

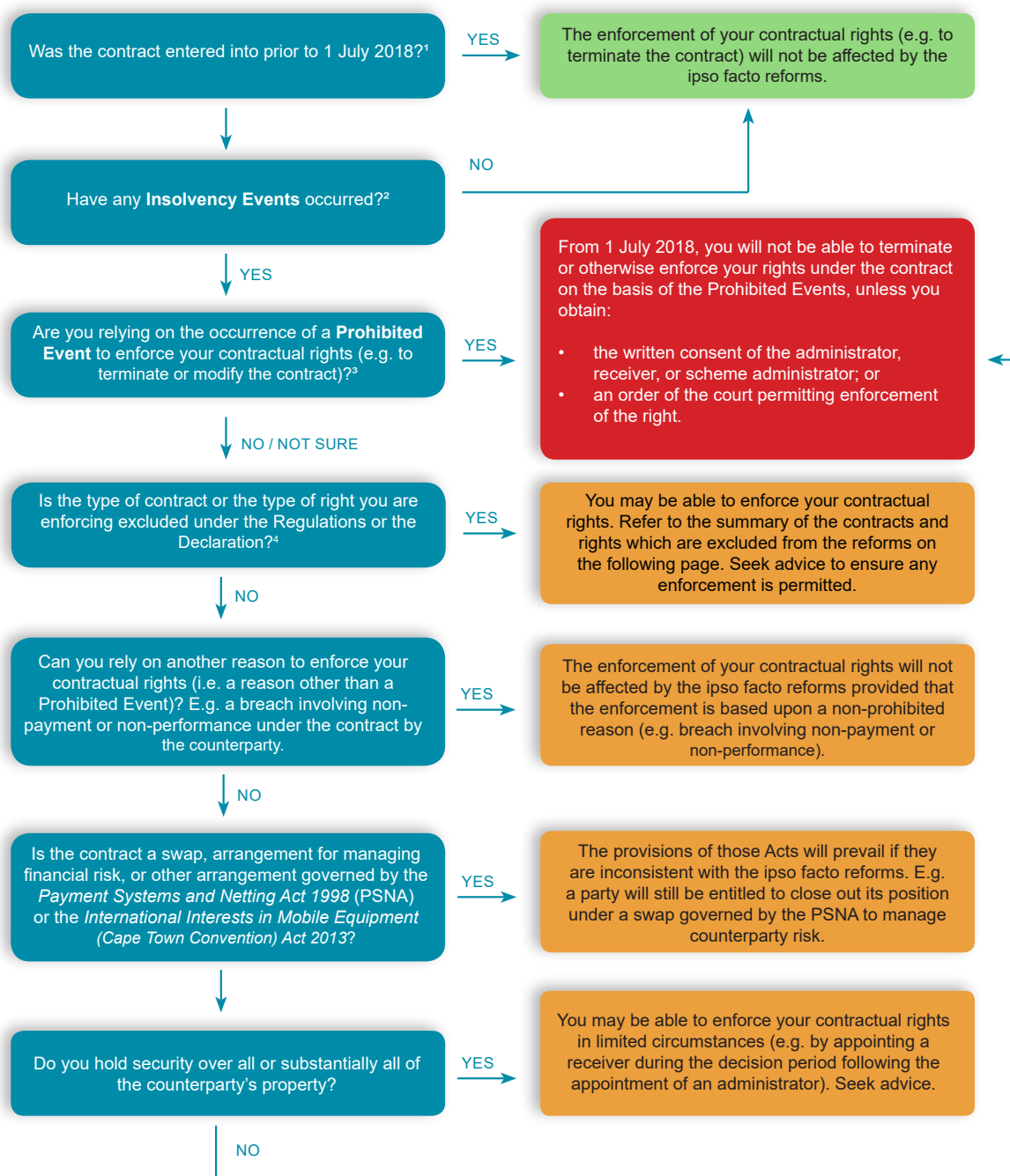
IpsO facto reforms

Can I enforce my contractual rights?

IpsO facto clauses are contractual provisions that allow a party to terminate or modify the operation of a contract on the occurrence of a specified event.

The Federal Government has introduced reforms which limit the rights of a party to enforce ipso facto clauses in certain insolvency scenarios. The reforms came into effect on 1 July 2018. The reforms are intended to assist in preserving the value of Australian businesses by limiting the ability of counterparties to exercise their ipso facto rights purely on the basis that a company has suffered an insolvency event.

This flowchart is designed to assist you to determine whether these reforms will impact upon the exercise of your contractual rights.



¹ If the original contract was entered into before 1 July 2018, but it has been amended, varied, novated or assigned after 1 July 2018 and before 1 July 2023, the answer to this question is 'yes'.

² **Insolvency Events** occur when a company:

- has an administrator appointed to it;
- has a controller (e.g. a receiver and manager) appointed over all of its assets; or
- becomes subject to a scheme of arrangement to avoid being wound up in insolvency (or becomes the subject of an application for such a scheme, or it announces it will make such an application).

³ **Prohibited Events** cannot be relied on to enforce your contractual rights against a counterparty. They include:

- the occurrence of an Insolvency Event;
- the financial position of a counterparty which experiences an Insolvency Event; or
- a reason which is, in substance (even if not in form), one of the above.

⁴ The *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* and the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* set out the types of contracts and types of rights which are **excluded** from the automatic stay on enforcement.

Exclusions to the stay

Excluded contracts and excluded rights

The Regulations and the Declaration set out 42 types of contract and 11 types of rights which have been excluded from the operation of the automatic stay on enforcement of ipso facto clauses.

We set out below some of the key types of contracts and types of rights which have been excluded under the Regulations and the Declaration.

Regulations | Excluded contracts

- contracts novated, assigned or varied on or after 1 July 2018 (but before 1 July 2023) which were entered into prior to 1 July 2018
- contracts providing for the enforcement rights of creditors holding security over all or substantially all of a company's assets
- arrangements relating to laws and international obligations, such as government licences or permits
- contracts for the acquisition of shares in, or the business of, a company
- arrangements relating to securities and financial products, including derivatives, margin lending facilities, arrangements relating to the issue of covered bonds, promissory notes, or syndicated loans and related underwriting arrangements
- contracts to supply goods and services to, or by or on behalf of a public hospital or public health service, relating to public hospitals and health services
- contracts for the supply of essential IT or communications products or services
- complex arrangements between sophisticated parties, including arrangements involving a special purpose vehicle (SPV) which provide for a public-private partnership, securitisation or a project finance arrangement
- construction contracts entered into between 1 July 2018 and 1 July 2023, where total payments under all contracts for the project exceed \$1 billion
- arrangements relating to debt and the ranking of creditors, including subordination, flawed asset and factoring arrangements
- arrangements relating to financial markets, and clearing and settlement facilities, such as operating rules of a clearing and settlement facility
- contracts governed by the International Interests in *Mobile Equipment (Cape Town Convention) Act 2013* (Cth)
- certain close-out and netting arrangements

Declaration | Excluded rights

- the right to appoint a receiver to an asset, where another receiver or controller has been appointed
- rights to change the priority in which amounts are paid or distributed
- rights to charge default interest or change the basis on which amounts are calculated under finance agreements, guarantees, indemnities or securities related to finance
- rights to indemnities for costs, expenses, losses or liabilities arising from the preservation or enforcement of rights
- termination rights in a standstill or forbearance arrangement
- certain step-in rights
- certain rights of set-off, netting, and combination of accounts
- rights of assignment and novation

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