

Assignment of Claims: A Comparative Analysis of the United Kingdom and Australia



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United Kingdom

- Company claims, including claims available to the company prior to the date of liquidation and proceedings commenced prior to that date; and
- causes of action

conferred on the external administrator by the *Insolvency Act 1986*, including fraudulent trading (England, Wales and Scotland), wrongful trading (England, Wales and Scotland), transactions at undervalue (England and Wales), preferences (England and Wales), gratuitous alienations (Scotland), unfair preferences (Scotland) and extortionate credit transactions (England, Wales and Scotland).

Australia

- Company claims, including debt claims and contractual rights to claim damages; and
- causes of action conferred on the external administrator by the *Corporation Act 2001* (Cth), including unfair preferences, uncommercial transactions, insolvent transactions, unfair loans to a company, unreasonable director-related transactions and insolvent trading claims.

It must also be noted that certain claims cannot be assigned. For example, in both the UK and Australia, it is not possible to assign causes of action under a contract that expressly prohibits assignment. In the UK, it is not possible to assign rights to appeal against the imposition of a tax liability. In Australia, a company's un-assignable statutory cause of action (e.g. a misleading and deceptive conduct claim) cannot be assigned merely because that company is in external administration, and there is also conflicting authority on whether an external administrator is permitted to assign a claim for breach of directors' duties.

The United Kingdom and Australia have recently implemented legislative changes to permit external administrators to assign or sell causes of action available to them. The reforms were directed at bolstering the negotiating position of external administrators, enhancing director accountability and, importantly, allowing added 'value of [liquidators' rights of action] to be realised'.¹ With the benefit of almost five years of implementation in the UK and over three years in Australia, we explore key aspects of both regimes with a view to leveraging this collective experience to assist practitioners to effectively realise the value of their rights of action and maximise returns to creditors in both jurisdictions.

The assignment of claims

Put simply, the assignment of a claim involves the transfer of a cause of action from the company or its external administrator to a third party (commonly a litigation funder) for a purchase price. Following the assignment, the claim is pursued in the name of the purchaser with no requirement for further external administrator involvement (unless agreed), contribution or exposure.

What claims can be assigned?

External administrators in the UK and Australia have historically had power to dispose of a company's property (including a cause of action) by way of assignment. The recent legislative changes further supplement this power by allowing external administrators to also assign causes of action that are conferred on them personally. Following these changes, the claims that are capable of assignment can be summarised as follows.

¹ Secretary to the Treasurer and Attorney-General, Parliament of Australia, *Proposals Paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*, (2011) 39.

Why assign?

The post-implementation experience in both jurisdictions supports the proposition that, as intended, assignments do improve external administrators' ability to effectively 'realise the value of their rights of action' by providing them with an additional tool for the monetisation of claims. Notwithstanding the adoption of lawyers' damages-based and contingency fee agreements in the UK and solicitors' conditional costs agreements in Australia, there remains a significant proportion of legal claims which external administrators would ordinarily be unable to pursue due to funding and other constraints. However, with the benefit of assignment, external administrators:

- can monetise claims that were not otherwise able to be pursued and, therefore, had no value;
- by monetising claims, can distribute funds to creditors without achieving a successful outcome in the claim and without incurring the significant costs and delays associated with litigation; and
- are able to maximise returns to creditors and receive and distribute funds earlier, while mitigating risk and decreasing cost.

Consequently, the ability to assign claims leads to better outcomes for creditors, external administrators and other stakeholders.

Assignment structure

Although there are a number of ways to structure the purchase of a claim, we suggest that the following are the most commonly negotiated arrangements:

- One-off upfront payment. Such an arrangement can be reached very early in the claim's lifecycle and has the benefit of requiring no long-term involvement from the company or the administrator. The purchase price can be distributed to creditors without delay and the administration can be closed. All future investigations and litigation are undertaken by the purchaser.
- Funding of investigations and subsequent payment (whether as 'one-off' as above, or 'split' as below). Such an arrangement allows for the claim to be investigated utilising

the investigative powers of the external administrator (available in both the UK and Australia), with the benefit of funding from the purchaser. It allows the claim to be quantified and assessed prior to assignment.

- Split payment including a fixed up-front component and a contingent component payable as a share of the recovery. This arrangement allows for a sharing of risk and reward between the external administrator and the purchaser, and is particularly common in claims with an uncertain quantum.

In our experience, the 'split payment' structure is most commonly used in the UK, whereas in Australia the use of the above options is more evenly spread. Every claim and administration will have different characteristics which may invite a different assignment structure. Therefore, we advocate for a flexible approach to assignment negotiations. By way of illustration, an upfront payment provides certainty and eliminates risk, but at a discounted price; whereas a contingent structure shares the risk and delay but offers a potentially greater return. External administrators should consider their priorities, and that of the creditors, before settling on a preferred assignment structure.

Assignment pricing

In the absence of an active market for legal claims, an objective and transparent valuation of a claim is critical to an external administrator's assessment of its sale price. In our experience, this is best achieved through a discounted cashflow methodology,² using the anticipated cashflows from the cause of action (i.e. likely quantum of the claim or settlement), adjusted for outputs (i.e. legal costs, after-the-event insurance, security for costs, administrator's fees), risk (i.e. litigation risk, enforcement risk) and time.

With the benefit of clear and transparent modelling, an objective price for the claim can be assessed, negotiated and compared with other monetisation options (like using the administration's resources to fund the claim or obtaining litigation funding).

² Siba Diqer and Justin Ward, 'Assigning Claims, a practical update' (2020) 3201 *Australian Restructuring Insolvency & Turnaround Association Journal* 22, 22.

LCM case study

Company:	Entity within a large enterprise with complex intercompany structure.
Claim:	Potential insolvent trading claim, but insufficient information and documents to assess prospects. Added complexity due to structure of enterprise.
Risk assessment:	High risk, particularly without complete information and documents.
Estimated costs:	High budget, due to complexity of claim and early stage of investigations.
Quantum:	Uncertain and unable to be confirmed without public examinations.
Enforcement:	Good recoverability prospects.
Funding:	Limited funds in the administration. External administrator unable to fund involved investigations or protracted litigation. Due to high risk and uncertainty of quantum, the higher cost of litigation funding increased the probability of no return to creditors.
Solution:	Offer to purchase the claim with: <ul style="list-style-type: none"> ▪ Public examinations to be undertaken and funded by LCM in order to obtain necessary evidence and confirm quantum; and ▪ One-off payment at the conclusion of investigations, calculated as a percentage of the confirmed quantum.
Benefits:	Monetisation of a claim that was otherwise unlikely to provide a return to creditors. No risk for external administrator. Early and certain return to administration. Demonstrably better outcome for creditors.

The future of assignments

The assignment markets in the UK and Australia are growing and gaining momentum. The benefit of the collective experience in these jurisdictions offers further opportunities to continue to develop

the 'toolkit' available to external administrators. This toolkit better assists external administrators to 'realise the value of their rights of action', thereby maximising returns to creditors and improving outcomes for all stakeholders. 🌐



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