

## 1.0 INTRODUCTION

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### 1.1 What is a Deed of Company Arrangement

A Deed of Company Arrangement (“**DOCA**”) is the mechanism by which a company enters into a compromise arrangement with its creditors under Part 5.3A of the Corporations Act 2001 (“**the Act**”). Its application arises only in circumstances where the creditors of a company have resolved at a meeting convened pursuant to section 439A of the Act that the company executes a DOCA (section 444A).

### 1.2 What form does the arrangement take?

The company's arrangement with creditors can take many forms and may include the following:

- a. The continuation of the company's business or part thereof with responsibility for trading normally resting with the directors.
- b. The injection of capital and/or the sale of certain assets;
- c. The payment to creditors of a fixed sum, or specified rate in the dollar or a percentage of profits payable in a lump sum or by way of instalments over a period of time.

## 2.0 EXECUTION AND CONTENT OF THE DEED

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### 2.1 Execution of the Deed

In accordance with subsection 444B(2) of the Act, the company must execute the deed within 15 business days after the end of the meeting of creditors or such further period as the court allows on an application made within those 15 business days. The proposed Deed Administrator must execute the deed before or as soon as practicable after the company executes it (subsection 444B(5)). The deed takes effect after it has been signed by the company and the proposed Deed Administrator (subsection 444B(6)).

### 2.2 Content of the Deed

Pursuant to subsection 444A(3) of the Act, the Administrator is to prepare an instrument setting out the terms of the deed. Subsection 444A(4) provides that the deed must specify the following:

- a. the name of the administrator of the deed;
- b. (the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims;
- c. the nature and duration of any moratorium period for which the deed provides;
- d. to what extent the company is to be released from its debts;
- e. the conditions (if any) for the deed to come into operation;
- f. the conditions (if any) for the deed to continue in operation;



- g. the circumstances in which the deed terminates;
- h. the order in which proceeds of realising the property referred to in point (ii) above are to be distributed among creditors bound by the deed;
- i. the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed.

### 2.3 Changing creditor priority status

In accordance with subsection 444DA(1) of the Act, the deed must also contain a provision to the effect that for the purposes of application of the company's property, any eligible employee creditors will be entitled to priority at least equal to what they would have been entitled to if the company had been wound up. Subsection 444DA(2) states that the rule in subsection (1) does not apply if:

- a. at a meeting of eligible employees held before the meeting under section 439A, the eligible employee creditors pass a resolution agreeing to the non-inclusion of such a provision; or
- b. the Court makes an order approving the non-inclusion of such a provision.

This is most relevant where employees agree to accept payment of their outstanding entitlements in the ordinary course of their employment rather than having them paid out in full under the DOCA.

### 2.4 Dealing with unpaid superannuation

Subsection 444DB(1) of the Act states that the deed must contain a provision to the effect that the Administrator of the deed must determine that the whole or part of a debt by way of a superannuation contribution is not admissible to proof if a debt by way of a superannuation guarantee charge includes that contribution and that charge has been paid or will be admissible to proof.

## 3.0 THE DEED ADMINISTRATOR

### 3.1 Who may be appointed Deed Administrator?

The deed will provide for the appointment of a Deed Administrator. Normally, the Administrator is appointed to administer the deed. However the appointment of a Deed Administrator cannot be made unless the proposed Deed Administrator has consented in writing to the appointment (section 448A of the Act). A person cannot consent to be appointed Deed Administrator unless the person is a Registered Liquidator (section 448B).

### 3.2 The Deed Administrator's remuneration

The remuneration of the Deed Administrator is normally calculated on a time basis using hourly rates set by his or her firm. The actual costs will depend upon the circumstances and complexity of the administration and can only be drawn down once approved. Pursuant to subsection 449E(1A) of the Act, the Deed Administrator's remuneration can be determined;

- a. by agreement between the Deed Administrator and the Committee of Inspection (if any); or
- b. by resolution of creditors; or
- c. if there is no agreement or resolution, then by order of the Court.

## 4.0 EFFECT OF ENTERING INTO A DEED

### 4.1 Effect on the company, officers & members

- a. Pursuant to section 444G of the Act, a DOCA binds the company, its officers and the Deed Administrator.
- b. Section 444GA provides for the transfer of shares. The Deed Administrator may transfer shares in a company if he or she has obtained the written consent of the owner of the shares or the leave of the Court. In this regard the Court may only give leave if it is satisfied that the transfer would not unfairly prejudice the interests of members of the company.
- c. Pursuant to section 444H, a DOCA releases the company from a debt only in so far as the deed provides for the release and the creditor concerned



is bound by the deed.

- d. Subsection 450E(2) provides that except with leave of the Court and until the DOCA terminates, a company, must set out in every public document and in every negotiable instrument, after the company's name where it first appears, the expression "Subject to Deed of Company Arrangement".

## 4.2 Effect on creditors

- a. Section 444C of the Act states that where creditors have resolved that the company executes a DOCA, until the deed is executed or the time period for execution has lapsed, creditors and others that will be bound by the deed must not do anything inconsistent with the terms of the deed except with leave of the court.
- b. In accordance with subsection 444D(1), a DOCA binds all creditors of a company so far as concerns claims arising on or before the day specified in the deed.
- c. Subsection 444D(2) states that the preceding subsection does not prevent a secured creditor from realising or otherwise dealing with the security, except so far as:
  - i. the deed so provides in relation to a secured creditor who voted in favour of the resolution that the company executes a DOCA; or
  - ii. the court orders.
- d. Subsections 444E(2) and (3) provide that until a DOCA terminates, a person cannot:
  - i. make an application for an order to wind up the company or proceed with an application to wind up a company if such an application was made before the deed became binding on that person.
  - ii. begin or proceed with a proceeding or enforcement process against the company in relation to its property, except with the leave of the court.
- e. Pursuant to subsection 444F(2), the Court may order a secured creditor not to realise or otherwise deal with its security, except as permitted by the

order. The court can also order the owner or lessor of property used by, occupied by or in possession of a company, not to take possession of the property or otherwise recover it (subsection 444F(4)). An order under these subsections can only be made on the application of an Administrator or Deed Administrator (subsection 444F(7)).

- f. In accordance with section 444J, a DOCA does not affect the rights of a creditor under guarantee or indemnity.

## 5.0 VARIATION, TERMINATION AND AVOIDANCE OF DEED

### 5.1 Variation of the Deed

Pursuant to section 445A of the Act, a DOCA can be varied by a resolution passed at a meeting of creditors convened for that purpose in accordance with section 445F, but only if the variation is not materially different from the proposed variation set out in the notice of meeting. Subsection 445B(1) states that a creditor may make an application to the court for an order cancelling the variation. The Court may in accordance with subsection 445B(2), make an order cancelling or confirming the variation either wholly or in part and make such other orders as it sees fit.

### 5.2 Termination of the Deed

Pursuant to section 445C of the Act, a DOCA terminates when:

- a. the Court makes under section 445D an order terminating the deed; or
- b. the company's creditors pass a resolution terminating the deed at a meeting that was convened under section 445F by a notice setting out the proposed resolution; or
- c. if the deed specifies circumstances in which it is to terminate and those circumstances exist; or
- d. the administrator of the deed executes notice of termination of the deed in accordance with section 445FA;

whichever happens first.



### 5.3 When creditor's may terminate Deed

Section 445CA of the Act states that creditors are not entitled to pass a resolution under section 445C(b) terminating a DOCA unless:

- a. there has been a breach of the deed; and
- b. the breach has not been rectified before the resolution is passed.

### 5.4 When the court may terminate Deed

Pursuant to subsection 445D(1) of the Act, the Court may make an order terminating a DOCA, if satisfied that:

- a. information about the company's business, property, affairs or financial circumstances that:
  - i. was false or misleading; and
  - ii. can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed; was given to the administrator of the company or to such creditors; or
- b. such information was contained in a report or statement under subsection 439A(4) that accompanied a notice of the meeting at which the resolution was passed; or
- c. there was an omission from such a report or statement and the omission can reasonably be expected to have been material to such creditors in so deciding; or
- d. there has been a material contravention of the deed by a person bound by the deed; or
- e. effect cannot be given to the deed without injustice or undue delay; or
- f. the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:
  - i. oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or

- ii. contrary to the interests of the creditors of the company as a whole; or
- g. the deed should be terminated for some other reason.

Subsection 445D(2) states that an order may be made on the application of a creditor of the company, or the company, or ASIC or any other interested person.

### 5.5 Creditors may terminate Deed and resolve that the company be wound up

Pursuant to section 445E of the Act, creditors may terminate a DOCA and resolve that a company be wound up where;

- a. at a meeting convened under section 445F, the company's creditors pass a resolution terminating the deed; and
- b. the notice of the meeting set out a proposed resolution that the company be wound up;

### 5.6 Meeting of creditors to consider proposed variation or termination of Deed

In accordance with subsection 445F(1) of the Act, the Administrator of a deed of company arrangement:

- a. may at any time convene a meeting of the company's creditors; and
- b. must convene such a meeting if so requested in writing by creditors the value of whose claims against the company is not less than 10% of the value of all the creditors' claims against the company.

Importantly, and pursuant to subsection 445F(3), the notice of meeting given to a creditor must:

- i. set out each resolution (if any) under sections 445A or 445C(b) that the Deed Administrator proposes that the meeting vote on; and
- ii. if the meeting is convened under subsection 445F(1)(b) of this section – set out each proposed



resolution under sections 445A or 445C(b) that is set out in the request.

## 5.7 When court may vary, void or validate Deed

Subsection 445G(1) of the Act allows the Deed Administrator, a creditor, a member or ASIC to apply to the court for appropriate orders if there is some doubt on a specific ground as to whether a DOCA was entered into in accordance with the Act. The court may;

- a. declare the deed or a provision of it to be void or not void as the case requires (subsection 445G(2)); or
- b. declare the deed or a provision of it to be valid (subsection 445G(3)); or
- c. when declaring a provision of a deed to be void, order that the deed be varied but only with the consent of the Deed Administrator (subsection 445G(4)).

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It should be noted that directors of companies that are insolvent or are likely to become insolvent should seek immediate professional advice in relation to their specific circumstances. The procedure normally requires consultation and certain investigative work before implementation, particularly when a secured creditor is in existence.

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**Without obligation or cost, we are available for an initial consultation. Please contact:**

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