FACT SHEET

Deed of Company Arrangement

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What is a Deed of Company Arrangement ("DCA")?

A DCA is a binding agreement between the company, creditors (generally excludes secured creditors), the deed administrator and the company's shareholders whereby debts are typically compromised or paid over an extended period. A DCA is flexible in so far that it may provide for:

(a) a moratorium on creditor claims; and

(b) a compromise of debts.

A DCA differs from other insolvency appointments as it does not necessarily bring the company's existence to an end.

A DCA may provide for control of the affairs of the company to revert to the directors and result in a better return to creditors than liquidation.

Why consider a DCA?

The advantage of a DCA for a company often is that it can continue to trade, generally with its usual customers, and survive its financial difficulties having dealt with creditor claims in an orderly fashion.

If a DCA is accepted by creditors:

- generally, control of the day to day affairs of the company reverts to the directors;
- the company may be able to trade with a moratorium placed on the claims of creditors that arose prior to the appointment of the administrator;
- employees may be retained; and
- suppliers may continue supplying the company.

How does a DCA come about?

A company that executes a DCA is a company that was in voluntary administration. At the "second meeting" or "proposal meeting" convened by the administrator, creditors consider, and if agree to the terms of the DCA, resolve that the company execute a DCA. The terms of the DCA are circulated by the administrator in a report forwarded to creditors prior to the "second meeting".

Generally, if creditors resolve to execute a DCA, the company must execute the DCA within 15 business days after the end of the meeting of creditors.

Contributions to the Deed Fund – what sources are available?

The Deed Fund is the pool of money that will be distributed in accordance with the terms of the DCA. The contributions to the Deed Fund may come from any source, including:

- sale of company assets;
- future trading;
- third parties; and
- equity in the family home.

What are the effects of a DCA?

Once the DCA is properly executed, the Voluntary Administration terminates. The terms of the DCA and relevant statutory provisions will now apply.

Upon execution of the DCA:

- the powers of an officer of the company are revived, subject to the terms of the DCA;
- a secured creditor may realise or otherwise deal with their property except so far as the DCA so provides to a secured creditor who voted in favour of the DCA;
- an owner or lessor of property is only bound by the terms of the DCA if they voted in favour of the DCA;
- a person bound by the DCA cannot make an application for an order to wind up the company;
- a person bound by the DCA cannot begin or proceed with a proceeding or enforcement process in relation to any of the company's property;
- a creditor may proceed to enforce a guarantee provided by a director; and
- the company is released from a debt only in so far that the DCA provides for the release and the creditor is bound by the DCA.

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Tax Losses

Tax losses may, to some limited extent, be available to a company that executes a DCA. There are, however, a number of restrictions on utilising these losses including “continuity of ownership” and “same business” tests. Furthermore, the extent of the tax loss that may be available to be used in the future will be limited to the quantum of the dividend to creditors and other terms of the DCA eg. related party claims.

You should consult a taxation adviser on the availability of utilising past tax losses in any proposed DCA.

Claims of Related Parties

Invariably, directors and their associates are creditors. To increase the return to the general body of unrelated creditors (eg. trade suppliers, Australian Taxation Office, etc), and thus increase the attractiveness of a proposed DCA, the claims of directors and their associates may be deferred until after other creditors have received a dividend in accordance with the terms of the DCA and the DCA has been “wholly effectuated” (ie. ended).

After the DCA has been wholly effectuated, the claims of related parties may then be dealt with by the company.

When does a DCA terminate?

A DCA terminates when:

- the Court makes an order terminating the DCA; or
- creditors pass a resolution terminating the DCA; or
- the DCA specifies circumstances in which the DCA is to terminate; or
- the Deed Administrator executes a “Notice of Termination of Deed”.

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