

IN FOCUS

APRIL 2020

HOLDING 'DOCA'

ARE “HOLDING” DEEDS A MAGIC BULLET?

Given the uncertainties associated with the economic implications of the coronavirus outbreak, the mechanism of a “holding” deed of company arrangement (“DOCA”) may be an appropriate vehicle for certain companies which are insolvent or likely to become insolvent and have entered voluntary administration.

A majority of the High Court endorsed the use of “holding” deed of company arrangement in the decision *Mighty River International v Hughes* [2018] 359 ALR 181 (“Mighty River”).

2

Facts

- Mighty River concerned a deed of company arrangement for Mesa Minerals Limited (“Mesa”) whose terms contemplated;
- In exchange for a moratorium on claims by creditors.
- The administrators would conduct further investigations into the company property and affairs and explore the possibility of a restructure or recapitalisation of the company to determine the likely outcome to creditors and form an opinion as to whether a deed of company arrangement or liquidation, is in the best interest of creditors of the company.
- Crucially the deed itself did not provide for the distribution of any property to creditors- it effectively contemplated that any distributions of property would take place by way of variation to the deed following completion of the deed administrators investigations.

Such variations can only take place by way of further creditors approval at a subsequently convened meeting of creditors.

Decision

- A majority of the High Court found that this constituted a deed of company arrangement for the purposes of Part 5.3A of the Corporations Act “(the Act)”.

Elements of Holding Deed

- As an evolving area there is not a definitive list of terms of a valid holding deed. However, as a minimum the following points should be addressed:

ASIC Regulatory Guide 82 provides a holding deed should:

- Exclude an open ended or very lengthy period to formulate a concrete proposal for continuing the company or its business;
- Include a program for interim reporting to creditors on steps taken and results obtained by the deed administrators , so that creditors can monitor the deed administrators efforts;

In addition, a holding DOCA:

- Should contain a moratorium on creditors claims for a defined period, not an open ended or overly extended period;
- Should disclose the amount of assets available for distribution to creditors, but such amount does not have to be available for immediate distribution; and
- Must be based on the administrators opinion in accordance with Section 438A(b) of the Act that it is in creditors interests that the company enter the holding DOCA as opposed to resolving to end the administration or moving to an immediate winding up.

General Comments

- The High Court made clear that the term “holding” deed is actually unhelpful and rather than constituting some sub class of Deed , it is actually an effective DOCA in accordance with the terms of the Act.
- It might be anticipated that a holding deed might be a useful strategy for directors and creditors to adopt where there is some uncertainty in the timing and quantum of a deed fund brought about by the uncertainties of the economic implications of the Coronavirus and the associated health measures

Some words of caution should be expressed before declaring holding deeds as some sort of

magic bullet to the challenges brought about by the coronavirus crisis.

The law in this area is evolving and not without controversy- the fact that Mighty River made its way to the High Court is in itself testament to that.

- An administrator must express an opinion that entry into the holding deed is in the interest of creditors as opposed to immediate liquidation.

In the Mighty River case, as Mesa was an ASX listed company, there was demonstrable evidence before the Court that a valuable asset being the company shell would be destroyed, were the company to be placed immediately into liquidation

Circumstances can be envisaged where the evidence before an administrator may be much more opaque.

- Given a “holding” deed envisages additional reporting and meetings of creditors than the standard administration, it will necessarily involve additional professional fees including administration costs and legal fees than a standard administration;

Accordingly, the strategy, may well be beyond the resources of many companies particularly in the current climate.

Notwithstanding, the above a holding DOCA may in appropriate circumstances be a suitable response to the unique challenges presented by the effects of Coronavirus on Australian businesses.

For more information, please contact your local Hall Chadwick office:

NEW SOUTH WALES

Level 40, 2 Park Street

Sydney NSW 2000

Tel: +61 2 9263 2600

sydney@hallchadwick.com.au

SOUTH AUSTRALIA

Level 21, 25 Grenfell Street

Adelaide SA 5000

Tel: +61 8 8545 8422

adelaide@hallchadwick.com.au

VICTORIA

Level 14, 440 Collins Street

Melbourne VIC 3000

Tel: +61 3 9820 6400

hcm@hallchadwickmelb.com.au

QUEENSLAND

Level 4, 240 Queen Street

Brisbane QLD 4000

Tel: +61 7 3211 1250

brisbane@hallchadwick.com.au

WESTERN AUSTRALIA

Level 11 Allendale Square,

77 St Georges Terrace Perth WA 6000

Tel: +61 8 6557 6200

perth@hallchadwick.com.au

NORTHERN TERRITORY

Paspalis Business Centre

Level 1, 48-50 Smith St Darwin NT 0800

Tel: +61 8 8943 0645

darwin@hallchadwick.com.au

A Member of PrimeGlobal

**An Association of
Independent
Accounting Firms**



Disclaimer

This is not advice. Clients should not act solely on the basis of the material contained in this Newsletter. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. The Newsletter is issued as a helpful guide to clients and for their private information.