

INDUSTRY INSIGHTS

By Peter Krejci

Saving businesses using a deed of company arrangement



As the Australian Government considers insolvency law reforms as part of its Innovation and Science Agenda, it's worth reflecting on the existing law relating to corporate restructuring via voluntary administration (VA) and deeds of company arrangement (DOCA).

While the VA regime has existed since 1993, not all insolvency practitioners have embraced the legislation to achieve its primary objective – saving businesses.

Those practitioners who have adopted a commercial approach to their appointments as administrator of a going concern have had, at their disposal, a unique instrument in the form of DOCA to restructure distressed businesses and salvage value for stakeholders.

Indeed, such outcomes are insisted upon by the current market, which is jaded by the value destruction that occurred with bygone practices where some stakeholders would win at the expense of others.

This cultural shift in the market insists on salvaging value for all stakeholders of distressed companies, and ideally results in saving the distressed business.

A DOCA is the ideal instrument to achieve these outcomes.

How is a DOCA achieved?

A DOCA is one option that can follow a VA appointment.

The VA process normally takes 3-5 weeks, although the court can extend it to run for some months if investigations or the scale of the issues dictate.

During a VA, an independent administrator takes control of the business. This administrator can make any decision about the business and is personally liable for liabilities incurred. At the same time, a range of enforcement steps and creditors' rights are temporarily suspended.

If additional time is required, the administrator can use a 'holding DOCA'. This is a DOCA entered into for the purpose of holding the status quo, pending a final solution, although DOCAs can be amended by creditor approval.

The primary outcomes of a VA are an administrator's report (which provides recommendations about options) and a creditors' meeting.

The creditors' meeting considers three options:

Saving businesses using a deed of company arrangement

1. returning the company to the directors (i.e. 'leave as is'),
2. put the company into liquidation, or
3. accept a DOCA.

The outcome must command the support of majorities in terms of both value and number. If no majority is obtained, the administrator exercises a casting vote in the best interests of the creditors generally.

The pillars of a successful reconstruction

To use a DOCA to save a business, an administrator should keep in mind the principles, or 'pillars', of a successful reconstruction.

These four pillars are:

1. **The business must be potentially viable.** For example, there has to be identifiable opportunities to achieve operating surplus cash flows, a market must exist for the company's products or services, and the business mustn't be speculating with someone else's money.
2. **The business must have honest, competent managers.**
3. **The business must have the trust of key stakeholders** (so far as trust is necessary), including the trust of financiers, suppliers, customers and employees.
4. **All stakeholders, including the directors, must be open to a fundamental change in the way the business operates.** There has to be an acknowledgement from all parties that something needs to change.

Without these pillars in place, any attempt to restructure the business will invariably fail.

Using a DOCA as a reconstruction tool

A deed of company arrangement, as a mechanism for business reconstruction under the Corporations Act, can achieve many objectives and/or provide solutions to the challenges a corporation may face.

Applied in a variety of circumstances, a DOCA is a dynamic and flexible legal solution for commercial



problems. As such, its implementation must focus on inherently commercial outcomes.

Where an administrator tries to implement an inappropriate DOCA, misunderstands the commercial problems, or attempts to impose a legal solution where there is no commercial solution, the outcome will lead to failure for stakeholders.

Implementing a DOCA is not straightforward. There will be issues to be dealt with, including:

- ▲ creditors' claims
- ▲ retaining control
- ▲ selective termination of leases and other contracts, and their conversion into money
- ▲ salvaging contractual rights that may otherwise be forfeited, and avoid incurring interruption penalties.

I'll address these issues in future articles.

Used astutely, a DOCA can provide the best opportunity to maintain the enterprise value of a trading entity. Trading businesses recover the greatest value by trading, and not breaking up.

Selling off a company's assets separately will destroy enterprise value, result in less for stakeholders

Saving businesses using a deed of company arrangement

and may trigger additional claims (e.g. employee redundancy, loss of customer contracts, and loss of favourable supply terms).

A DOCA, therefore, can be an effective way to restructure the viable business of a troubled company under Australian law. It's a proven mechanism for saving companies when applied by skilled practitioners with a mix of relevant commercial and technical expertise.

If your business is experiencing financial difficulties, contact [BRI Ferrier](#) for a confidential and obligation-free discussion.

Important notice. The information contained in this bulletin is by way of general comment only and is not intended as a substitute for specific advice that addresses your particular circumstances. You should seek specific advice before acting. The information contained in this newsletter remains the exclusive intellectual property of BRI Ferrier and any reproduction, publication, communication or adaptation of this information, without the prior written consent of BRI Ferrier, will constitute an infringement of The Copyright Act 1968.

About BRI Ferrier

BRI Ferrier is a unique affiliation of expert business recovery, insolvency, forensic accounting and advisory firms. We provide practical, innovative services that help financially distressed businesses to recover or at least minimise the negative impacts of insolvency.

With over 160 staff and eleven practices in Australia, New Zealand, Hong Kong and the United Kingdom, we work with clients of all types – from individuals, sole traders and small businesses to public corporations and government entities.

We also work with financiers, solicitors, accountants and creditors to address the needs of all stakeholders when businesses face financial challenges.

How BRI Ferrier can help

BRI Ferrier can assess your current situation and advise on a path forward to minimise further risk.

Early intervention is often the key for a successful restructure of your business. If you or your client is experiencing financial challenges then don't delay, contact us today.

Author

Peter Krejci
Principal
BRI Ferrier, Sydney

T: +612 8263 2300
pkrejci@brifnsw.com.au



For positive solutions to financial difficulties please contact us.

The initial consultation to your client is free, strictly confidential and without obligation.

Sydney

T: 02 8263 2300
info@brifnsw.com.au

Melbourne

T: 03 9622 1800
info@brifvic.com.au

Adelaide

T: 08 8233 9900
info@brifsa.com.au

Perth

T: 08 6316 2600
info@brifwa.com.au

Brisbane

T: 07 3220 0994
info@brifsq.com.au

Cairns

T: 07 4037 7000
info@brifnq.com.au

Townsville

T: 07 4755 3300
info@brifnq.com.au

Mackay

T: 07 4953 7900
info@brifnq.com.au

www.briferrier.com.au