

## Article Information

Authors: Joanne Hardwick, Michael Lhuede, Stephen Kyrou

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## Hold on tight! How a 'holding' DOCA can see you through turbulent times

**The COVID-19 outbreak that has resulted in restrictions placed on our borders, community gatherings and the way we socialise is having a direct and immediate impact on virtually every industry and business that employs people, relies on consumer sentiment and confidence, or on a supply chain to conduct its business. Directors and stakeholders need to know that there are options available in these distressed times.**

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Do not discount the benefits of voluntary administration and the use of a 'holding' deed of company arrangement (**DOCA**) which can give everyone time to breathe, keep staff employed and earning a salary and the business trading 'as usual' with creditors agreeing to wait or defer their claims until this pandemic passes. The use of a 'holding' DOCA was approved by the majority of the High Court in the decision of *Mighty River International Ltd v Hughes* [1] and, it would seem, that the use of such instruments and the voluntary administration process generally may be an appropriate course to adopt for certain businesses at this time.

What are the features of a 'holding DOCA'?

- a holding DOCA may be proposed when it is not in the interests of creditors that the administration end, nor that the company be wound up;
- they contemplate a creditor moratorium while the company explores recapitalisation and restructure to enable the business to survive into the future;
- holding DOCAs give a voluntary administrator more time than to develop proposals for a restructure or otherwise to resuscitate a company. Where this is the case, the voluntary administrator does not need to seek an order to extend the convening period for the second creditors' meeting under s439A of the *Corporations Act 2001* (Cth) (**Act**);
- once the business and business environment stabilises management can then, within the time frames of the DOCA, seek to have the deed administrator convene a further meeting of creditors to amend the holding DOCA to effectuate a substantive resolution of creditor claims.

What are the minimum requirements for a holding DOCA?

- its terms should contain a moratorium on creditor claims for a defined period; management will ordinarily be handed back to the directors with reporting covenants to ensure it can continue to trade whilst solvent;
- it should include a program for interim reporting to creditors on steps taken and results obtained by the deed administrator, so that creditors can monitor the company's and deed administrator's efforts;
- it should disclose the amount of any assets available for distribution to creditors, but such amount does not need to be available for immediate distribution; and
- there must be sufficient information for an administrator to express an opinion required by s 438A(b) that the company enter the DOCA as opposed to immediate winding up.

### Points to take away

The High Court in *Mighty River* (by majority) held that a DOCA that **contemplated the voluntary administrators undertaking further investigations without an immediate distribution of assets to creditors, and provided a moratorium on claims while that investigation was undertaken**, was consistent with objects of Pt 5.3A of the Act.

Although an extension of time under s 439A(6) can only be obtained by a court order, an otherwise compliant instrument that becomes a deed of company arrangement can **incidentally extend time for an administrator's investigations pending a subsequent variation to it**. The Deed had that incidental effect. The operation of the Deed aimed to fulfil the object of the Part 5.3A of the Act by maximising the chance of the Company's survival or otherwise providing a better return to creditors than would result from its immediate winding up.

The High Court also held that s 444A of the Act **requires disclosure of the amount of any assets available for distribution to creditors under a deed of company arrangement, rather than imposing a substantive requirement that such an amount be available for distribution**, and that such a deed was not inconsistent with the provision for the court to approve an extension of time for the second meeting under s 439A(6).

The High Court did not, however, exhaustively identify under what circumstances a holding DOCA would or would not satisfy the requirements of Part 5.3A. It should be noted that ASIC Regulatory Guide 82 offers some useful guidance, although it does not have legislative force. RG 82.17 provides:

*Where a holding DOCA is proposed, we consider that its terms should:*

- *exclude an open-ended or very lengthy period to formulate a concrete proposal for continuing the company or its business; and*
- *include a program for interim reporting to creditors on steps taken and results obtained by the deed administrator, so that creditors can monitor the deed administrator's efforts.*

Piper Alderman is assisting clients on the spectrum of legal issue arising from the pandemic. Please see our [COVID-19 Resource Hub](#) for more information on areas including **employment, industrial relations, construction law, government & defence, insolvency and property**.



[\[1\]](#) (2018) 359 ALR 181 ('Mighty River').