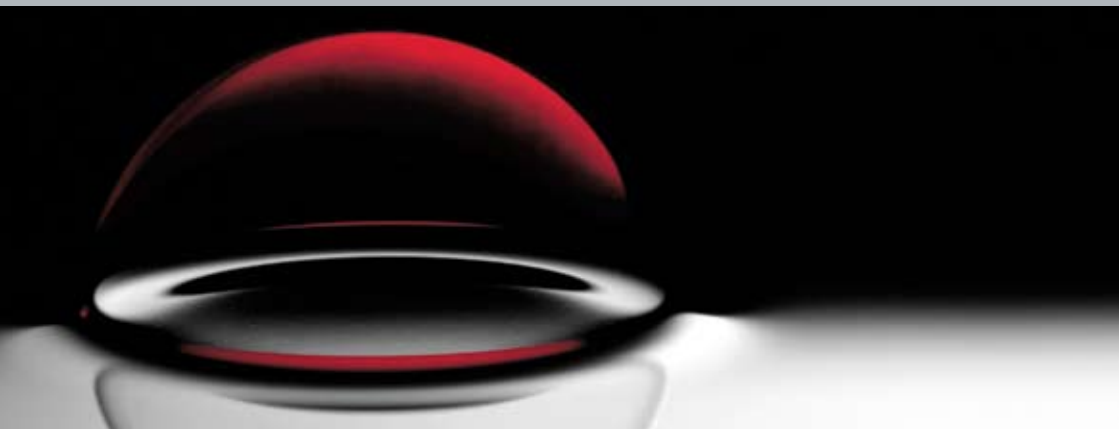


CLAYTON UTZ

Restructuring & Insolvency
Deed of company arrangement



What is it?

A Deed of Company Arrangement is a document which records the terms of a restructuring of a company and which completes the process instituted in the voluntary administration provisions of the Corporations Act 2001.

In essence, a Deed of Company Arrangement is a compromise or arrangement approved by a majority (in both number and value or either one of them with the approval of the voluntary administrator) of the creditors of a company voting at the second meeting of creditors convened by the administrator of the company.

The Deed facilitates a company's recovery to a position of solvency and allows that company the opportunity to continue its corporate existence. A Deed is selected when, at the second meeting of creditors (generally 15 to 25 business days after the appointment of the administrator), the company's creditors (by the requisite majority in number and/or value) prefer the proposed terms of the arrangement to the alternatives of the administration ceasing or the company proceeding to liquidation.

What are the advantages?

For unsecured creditors

A Deed of Company Arrangement is a mechanism which is designed to maximise the chances of the company or a large part of its business, continuing in existence or gives creditors the opportunity to receive a better return than they would if the company were immediately wound up.

A moratorium period, which may be included in the Deed, allows a company breathing space to reconstruct its affairs in a manner satisfactory to the company's creditors. A Deed avoids the appointment of a liquidator.

This means that payments made by the company prior to the appointment of the administrator cannot be recovered as a preference or an uncommercial transaction, which might happen if a liquidator were appointed, provided that the proposal contained in the Deed is fulfilled.

For secured creditors

The rights and remedies of secured creditors are not affected by the Deed, except to the extent that the secured creditor participates in the vote on the proposed terms of the Deed. The same preservation of rights applies to owners and lessors of property against the company.

For the company

The company is given an opportunity to start afresh. Depending upon the terms of the Deed, all or some of the pre-Deed debts may be extinguished (in whole or part) after the obligations in the Deed are met and the Deed is terminated. The successful completion of the terms of the Deed will usually operate as a bar to all claims against the company that arose prior to the appointment of the administrator.

For the company's directors

A Deed offers the company's directors protection from potential insolvent trading liability. Because the insolvent trading provisions can lead to personal liability attaching to directors there is a strong incentive for the directors to ensure that the company fulfils its obligations under the proposal which is embodied in the Deed.

How does it work?

The administrator, having investigated the affairs of the company and reported his recommendations as to whether it is in the interests of the creditors to accept the Deed of Company Arrangement, submits the proposal to the creditors at the second meeting. Commonly the proposal will contain some or all of the following elements:

- payment of a sum of money by the directors or third parties, with that sum to be distributed between creditors
- a period of time within which the company is to obtain an investor, sell certain assets or otherwise obtain capital or some other asset for the benefit of the creditors
- forgiveness or subordination of debt by a related party or sympathetic creditors.

As long as a Deed remains within the parameters of the Corporations Act 2001, the precise terms of a proposal contained in a Deed are virtually unlimited.

If the requisite majority of the creditors accepts the proposal, the Deed administrator must ensure that the Deed is executed no longer than 15 business days after that meeting, unless that period is extended by application to the court.

Impact

Once the Deed has been executed it binds the company, its officers and members, the administrator and all unsecured creditors as well as secured creditors who have voted for it.

Termination

If the proposal contained in the Deed is not fulfilled then the creditors can terminate the Deed and resolve that the company be wound up. The Deed of Company Arrangement may be terminated by court order, creditors' resolution or by occurrence of circumstances specified in the Deed, being of a defaulting nature or completing the process contemplated in the Deed.

Variation

The Deed may be varied by a resolution of the creditors.

Summary

A Deed of Company Arrangement is a flexible and versatile tool for returning an ailing or insolvent company to a state of financial health and providing benefits to creditors which they would not enjoy if the company were immediately wound up. Deeds of Company Arrangement may also present a commercial solution to liquidity problems experienced by companies and permit companies, with the indulgence of their creditors, to trade through periods of difficulty and emerge as a viable and ongoing concern.

Restructuring & Insolvency group publications

The Restructuring & Insolvency group of Clayton Utz has prepared a series of brochures that provide an outline of the operation of relevant areas of law.

The complete set of brochures in the series comprises:

- Deed of company arrangement
- Company receivers and managers
- Third party guarantees
- Retention of title clauses
- Voluntary administration
- Liquidation
- Provisional liquidation
- Enforcing security rights

Treatment of the topic addressed in each brochure though comprehensive is not exhaustive. Moreover, a proper understanding of any particular situation demands an integrated approach. Clayton Utz is available to give advice over the whole range of issues relating to corporate restructuring and insolvency, including the position of secured and unsecured creditors, and the practical issues relating to enforcement of securities and debt recovery, structuring and restructuring transactions and litigation.

Copies of this brochure and the others referred to can be obtained free of charge from the Restructuring & Insolvency group of Clayton Utz.

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