If your company cannot dock in a safe harbour, in a voluntary administration the administrators may consider a 'holding DOCA' to buy more time to develop proposals for restructuring or resuscitation of the company

What is voluntary administration?

If a company is insolvent or is likely to become insolvent, the directors of a company may appoint voluntary administrators to take control of the whole company with a view to resolving the company's future quickly. Voluntary administrators may also be appointed by a liquidator, provisional liquidator, or a secured creditor.

Once voluntary administrators have been appointed, they must hold a meeting of the company's creditors within 8 business days of being appointed, unless the Court grants an extension of time. The voluntary administrators must investigate the affairs of the company, including as to its property and financial affairs.

Unless the Court grants an extension of time, **within 25 days of being appointed**, the voluntary administrators must hold the **second meeting of creditors**.

There are generally **three options** available at the second meeting of creditors:

1. **Return** the company to the control of the directors, ending the voluntary administration
2. **Agree** a DOCA (deed of company arrangement) – see below
3. **Appoint** a liquidator to wind-up the company

What is the position of the company's creditors during the voluntary administration?

- **Unsecured creditors** cannot enforce their claims against the company without the consent of the administrator or the Court
- **Landlords** cannot recover their property
- **Secured creditors** cannot enforce their security, except in some limited circumstances
- **Personal guarantees** cannot be enforced without the Court's consent

Who are unsecured creditors?

An unsecured creditor is a person (individual or entity) who is owed money by a company, and that person does not have security – such as a charge over property in respect of the debt.

Unsecured creditors include:

- **Suppliers** of goods and services
- **Retail customers** who have paid for goods which have not yet been delivered
- **Employees**
- **Contingent creditors** – e.g. a person who has a claim against a company, such as for breach of contract, misleading or deceptive conduct or negligence, and the Court has not yet given judgment and neither has a settlement been reached

What is a DOCA?

A DOCA is an **agreement reached between the company and its creditors**. It is the predominant vehicle to restructure a company which has entered voluntary administration.

The **aim of a DOCA** is to:

- Facilitate the business, or part of the **business continuing**; and or
- To provide a **better outcome for the creditors** that would be available in an immediate winding-up of the company.

A DOCA is voted on at the second meeting of creditors. It is passed by creditors voting: 50% in number and 50% in value of debt. A DOCA is **binding on all creditors, whether or not they voted for it**. There are often **legal issues which arise around voting**, and some challenges which non-approving creditors or excluded creditors could advance.

Time limit for approving DOCA

The administrators are usually required to hold the **second meeting of creditors within 15 to 25 business days after their appointment**. It is at this second meeting the administrators will present their findings about the affairs of the company, and present their proposal for a way-forward – which may include a proposed DOCA.

But, **here's the problem**. Although the DOCA process was developed with the need for speed in dealing with a company in financial difficulties, and as an alternative to a scheme of arrangement, **25 days is often too short** for the administrators to properly understand the affairs of the company and develop the best possible proposal for the future of the company.

The *Corporation Act* 2001 provides a mechanism for the administrators to **ask the Court for an extension of time to convene the second meeting of creditors**. If an extension is granted, the administrators would have more time to investigate the affairs of the company and come up with proposals – this breathing space could prove vital in resuscitating the company. But, a **Court application can be costly and distracting** and there is no guarantee that a Court would grant the extension.

So, is there an **alternative** to approaching the Court for an extension of time to convene the second meeting of creditors? Yes, the *Mighty River* – **a 'holding DOCA'**.

What is a holding DOCA?

In *Mighty River International Ltd v Hughes* [2018] HCA 38, a majority decision, the High Court of Australia **approved the use of holding DOCAs** (albeit it did not approve use of the term itself). Although the *Corporations Act* does not use the term 'holding DOCA', this is the term widely used in the insolvency industry and amounts to a DOCA which effectively **places the company in a holding pattern**, and **buys the administrators more time** to investigate the affairs of the company and **develop further plans to restructure the company**.

A holding DOCA is **voted on at the second meeting of creditors**, and effectively agrees a holding pattern. As with a normal DOCA, creditors must pass a resolution agreeing to the holding DOCA. If there is a majority in number of creditors, and value of debt, the **holding DOCA can be passed notwithstanding some dissenting creditors**.

A holding DOCA, especially in these uncertain times, will give the **administrators more time to consider restructuring options for the company** and in the meantime will **stay any creditor claims**. A holding DOCA should:

1. contain a **stay of creditors' claims** for a set time period
2. provide for **regular reporting** to creditors
3. **identify any assets** available to pay creditors, even if the DOCA says that there are no assets available

Before executing a holding DOCA (or any DOCA), the administrators must ensure there is sufficient information to enable them to express an opinion about whether it is in the **interests of the company's creditors:**

1. for the company to **execute the holding DOCA**
2. for the **administration to end**
3. for the **company to be wound-up**

Comment

The use of a holding DOCA is clearly **different to the safe harbour regime**, because a company in safe harbour has not gone into a formal insolvency procedure, and in safe harbour the directors are shielded from personal liability while they, in effect, trade their way out of insolvency. Given directors are now shielded from personal liability arising from insolvent trading occurring the in next 6 months as a result of *Coronavirus Economic Response Package Omnibus Bill 2020*, there may be less uptake of the safe harbour regime. Nevertheless, **creditors may still be looking to enforce contracts and debts**, and therefore **companies should still give serious consideration to the voluntary administration regime**.

There are several benefits of a holding DOCA, including **keeping employees** on board, the **business continues trading** as far as possible with **creditors agreeing to or being forced to defer enforcement** of their debts.

A further obvious benefit of a holding DOCA is that, in effect, it **avoids the need for a distracting and sometimes costly Court application** to extend the time to convene the second meeting of creditors.

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