DOMINIC ROLFE
Business Journalist

feature

IN WORD AND DEEDS

An overview of the many different forms and uses of a deed of company arrangement.

A deed of company arrangement (DOCA) is the Swiss Army Knife in a restructuring professional's kitbag. DOCAs are comparatively cheap, effective and efficient, while maintaining the dynamism necessary to deal with all the ways that a company in distress can be reformed.

At the 2023 ARITA NSW/ACT Division Conference, the quirky, the bizarre and the unusual were up for debate. They included a DOCA that initially failed before being resurrected, a restructure that involved multiple DOCAs from multiple bidders, as well as a business that moved from liquidation into a DOCA arrangement.

As panelist Daniel Krochmalik, Barrister at 3 St James' Hall, noted of the discussion: "Each of the situations show how DOCAs can constitute a deeply flexible process that doesn't rely on overly prescribed rules."

MOVING FROM ONE PRIMARY BIDDER TO ANOTHER

No-one wants to see a DOCA fail and a company move into liquidation. But what if, despite an administrator's best efforts, a primary bidder can't close the deal? Is liquidation the natural next step? Not so, says Amanda Coneyworth, Partner in KPMG's Turnaround & Restructuring, Deal Advisory team.

Coneyworth referred to the role some of her fellow KPMG Partners recently held as administrators of the 140-year-old Australian wine producer, McWilliam's Wines. After many months, a preferred bidder for the McWilliam's business was identified and the administrators began moving towards settlement. However, it soon became clear that the bidder wasn't able to complete the terms of the settlement.

"It was a situation that would have spelled the end of the business and a complete destruction in value," Coneyworth says. "And we weren't only looking at a financial loss, but an emotional loss tied up with six generations of the McWilliam's family and their employees."

After the original bidder stalled on their settlement, the administrators pre-emptively engaged with other potential bidders. They effectively undertook another sale process to find other interested parties who might be in a position to step forward as the new purchaser. "Then the question became: if we find a new bidder, how do we transition a DOCA without having the company go into liquidation first?" Coneyworth says.

When the McWilliam's administrators understood that the principal proponent couldn't complete the transaction, they convened a meeting of creditors. Because the existing DOCA didn't practically allow for any option other than liquidation, the creditors and then the court needed to allow the administrators to adjourn the meeting beyond the time permitted by legislation to permit the second sale process. But the timing wasn't just impacting the administrators – McWilliam's was also in the middle of vintage.

"It meant that any agreement needed to be dovetailed with the reality of the business," Krochmalik says, "because maximising the value of the business was contingent on it remaining an ongoing concern."

This required asking the court to approve the novel legal move from one DOCA to another without having a liquidation in between: something that no Australian case law had contemplated to that point.

In this instance, the court saw no problem moving from one DOCA to another, as long as the creditors agreed. "We didn't take the decision out of the hands of the creditors," Krochmalik says. "The creditors resolved to implement an alternative DOCA without going into an interim liquidation, and the court agreed with us that it was consistent with s 435A and the whole purpose of Pt 5.3A of the Corporations Act.

"It's a good example of how a bit of flexibility on behalf of the courts, creditors and administrators can go a long way and how courts are willing to accept, on good faith, arrangements that allow that flexibility," he says.

MOVING FROM LIQUIDATION TO DOCA

Going from a DOCA to liquidation is perhaps the logical run of things. But what about going from liquidation to DOCA? It's a strange circumstance but after a tragic turn of events, Cathro & Partners Principal Andrew Blundell found himself dealing with just that.

Blundell and his team were appointed as firstly liquidators, then administrators and deed administrators of a family-run forklift company whose director and shareholders, a husband and wife, suddenly passed away. The business was left with significant debts to the ATO and a number of other unsecured creditors. The business had continued to trade post their passing and one of the sons had effectively stepped in as a quasi-director.

The executor of the deceased estates wasn't prepared to formally appoint a director to the company, and in fact there were no candidates prepared to take on a directors' appointment given the concerns surrounding the large ATO and unsecured creditor debts it owed. It was a situation that effectively left the business with no-one in control.

Given the circumstances, the son made an application to the court on just and equitable grounds to have liquidators appointed to the company. Blundell and his team knew that the son had an appetite to put forward either a proposal for a DOCA or to look to purchase the business, and they considered how that could happen given the company was in liquidation. "We approached the court," Blundell says, "and they were quite helpful."

First, the liquidators sought leave to commence proceedings against the company and then orders pursuant to ss 436B(2)(g) and 448C(1) of the Corporations Act to appoint themselves as administrators in that circumstance and/or deed administrators should creditors resolve to accept a DOCA at some future point.

> "DOCAs can constitute a deeply flexible process that doesn't rely on overly prescribed rules.

"Aside from some procedural matters in terms of doing away with requirements to hold first meetings and send initial notices, we also had to get a stay of the winding-up pursuant to s 482 of the Act," Blundell says. "We were able to obtain all those orders under one application, appointed ourselves as voluntary administrators, and work through the administration process."

One of the more difficult issues Blundell's team had to grapple with was how to deal with the deceased estate shares and how that affected ownership of the company. Under the terms of the deed proposal, the proponent was issued shares in the company while those current shareholdings remained in situate pending the outcome of the distribution of the deceased estates.

"This is a highly unusual case," Blundell says, "so some preemptive planning meant we could avoid having to make a court application under s 444GA to transfer the shares."

The DOCA was ultimately accepted by the creditors, with the administrators then going back to the court to ensure that the winding-up proceedings were dismissed. "The DOCA process and flexibility of the court were the right approach," Blundell says, "because the business could continue to operate: a result that was a great outcome for creditors, employees and the new owner."

DEALING WITH MULTIPLE DOCA PROPOSALS

"There's only one thing worse than scrambling around as an administrator trying to get an acceptable DOCA proposal and then seeing your DOCA proposal collapse pushing the company into a liquidation," Michael Brereton, Director, William Buck and former ARITA President says, "and that's trying to manage multiple competing DOCA proposals."

Despite the challenges for administrators, multiple DOCAs are a trend in Australian insolvency. One recent insolvency of a disability services provider elicited more than 20 separate DOCA proposals and the Virgin Airlines buyout saw multiple bidders, with certain underbidders engaging in a fierce contest with the administrators and the ultimately successful purchaser.

There is currently nothing in the Corporations Act that contemplates the scenario of what to do when there are multiple proposals, and it has been left to case law to fill in the gaps. Orla McCoy, partner with Clayton Utz's Restructuring and Insolvency practice, says there is usually some level of contention between the different proponents of the DOCA proposals.

As a matter of good practice, McCoy says that in their report to creditors, an administrator should identify the various proposals and outline why the administrator's recommendation is in favour of one proposal rather than another. "Sometimes it's easy for an administrator to form a view as to which proposal to recommend because of the disparity in what's on offer under different proposals," McCoy says, "but other times it's much more difficult if the proposals are similar in their terms."

Clarity in the report to creditors is critical when multiple DOCAs are involved. Administrators have a duty to at least provide preliminary investigations around transactions and other actions in a liquidation, says Coneyworth.

"It's just so important to have a balanced approach and make sure a lot of information about each proposal is disclosed up front, including the reasons behind the recommended proposal. And if the creditors still make an alternate decision, then so be it," she says.

Coneyworth notes, however, that in the case of multiple, competing DOCAs, an administrator merely needs to provide an opinion on the course of action, even if it doesn't extend to which DOCA is recommended. "You need to present to creditors the option of a DOCA or multiple DOCAs, liquidation or returning the company to the directors," she says. "If you've got multiple proposals, you can make a recommendation, but you're not necessarily obliged to."

In the case of McWilliam's Wines, the competing DOCAs were so similar that the administrators decided to put the two proposals to a preliminary vote, even though the administrators had the discretion to decide which proposal they would put forward. Krochmalik believes the vote had the likely effect of placating both of the deed proponents because they felt that each of them received a fair hearing from the creditors. But ultimately, he says, administrators (including as chairpersons of a second meeting of creditors) have significant latitude as to the order in which to present different DOCA proposals to creditors.

Courts have traditionally been reluctant to assist administrators when it comes to making commercial decisions. And as a commercial decision that administrators need to make, asking a court to help decide on whether to recommend a DOCA proposal or, in the event of competing proposals, which DOCA to recommend, strays significantly into that space.

In the context of competing DOCAs, administrators might be tempted to seek the protection of an order justifying the recommendation of a particular DOCA. However, Krochmalik believes that a level of judiciousness should be employed by administrators.

"There has to be a level of care before you rush off to court," he says. "Having multiple DOCAs can be a way of creating competitive tension when it comes to trying to maximise the value of the assets and business under administration. And because of that, often what's happening in the lead-up to the second meeting is quite a dynamic process."

There is also scope for administrators to approach a court for rulings on an administrator's decision in relation to a DOCA. Krochmalik says that administrators could ask a court to rule on a meagre offering, especially where there isn't a dynamic bidder environment. "A court could also be asked to rule on questions of commercial morality, in relation to poison pill or exhaustion of deed fund clauses and so on," he says.

Managing the shifting environment can see DOCAs change in the lead-up to the creditor's meeting, at the creditor's meeting and even after the meeting. Krochmalik says there's nothing in the act that requires the DOCA that has been proposed to be the same one that is voted on or even, to the precise letter, the DOCA that is ultimately entered into.

That said, administrators should be aware that any amendment of the DOCA proposal after the administrator's report has been issued may impact the ability to utilise special proxies in relation to the proposal at the meeting of creditors.

There is also an increasing trend towards DOCAs including more discriminatory treatment between groups of creditors, and courts have been called on to determine the legality of that treatment, especially when multiple DOCAs are involved.

One of the guiding principles is that not all creditors need to be treated equally. However, says Krochmalik, the creditor in the DOCA that receives the lowest return still has to be better off than what they would have received in a liquidation.

"If you make sure that the priority regime for creditors that exists in a liquidation is maintained in a DOCA," Krochmalik says, "then there's pretty broad scope to treat creditors differently in a DOCA."

If this occurs, there just has to be some cogent justification for the different treatment, McCoy says, citing the example of "critical content suppliers" (including the supplier of the TV program "I'm a celebrity … Get me out of here!") being given a higher return than ordinary unsecured creditors in the Network Ten DOCA.

DOCAs AND s 444GA

Section 444GA of the Corporations Act gives an administrator the power to transfer shares from a distressed entity to a new entity. This can be done through the consent of all parties or, if no agreement can be found, via the courts. Recently, some DOCAs have been drafted with a clause noting that either there's going to be consent to transfer or, in the case there isn't consent, then the shares will be transferred via a s 444GA order. McCoy says that court applications under this section are increasingly contentious.

"There is a current case going through the courts which has been described in the media where, in effect, a DOCA was contingent on a s 444GA order," she says. "But a delay in a government approvals process and a jump in the price of lithium has meant that some shareholders, whose interests have effectively gone from a zero valuation to a notional $1.5 billion, are asking the court to set aside the DOCA on the basis that they would suffer material prejudice if their shares are transferred for no value."

> "DOCAs are only limited by our brain power in coming up with the next novel idea.

The s 444GA provisions, and most particularly the potential for costs orders, are also being used to encourage recalcitrant shareholders to engage with the transfer. "There are some cases, for example, where people who haven't been particularly well advised are arguing that they shouldn't have to hand their shares over for nothing," Krochmalik says. "Often the answer is that the shares are worth nothing, but sometimes people can't get to grips with that concept."

Krochmalik says it can be expensive to go to court and get a s 444GA order, particularly if you're a public company, because of the Chapter 6 requirements. Even private companies will end up with quite an expensive application. Blundell agrees. "No matter what the structure, it isn't a straightforward application," he says. "There's a lot of detail that you have to show the court in terms of the detriment or not to a particular person or group of people."

While each of these scenarios may seem unique to their individual circumstances, together the nuances and aberrations help form the fabric from which all DOCAs can be fashioned.

When administrators are crafting a DOCA, having a view of what might or potentially might not happen will push the boundaries and understanding of other current and future proposals. As Brereton said during the ARITA conference panel discussion: "DOCAs are only limited by our brain power in coming up with the next novel idea."