

CORPORATIONS ACT RELEVANT CLAUSES

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Chapter 5 External administration

Part 5.3A Administration of a company’s affairs with a view to executing a deed of company arrangement

Division 11 Variation, termination and avoidance of deed

Section 445G

445G When Court may void or validate deed

(1) Where there is doubt, on a specific ground, whether a deed of company arrangement was entered into in accordance with this Part or complies with this Part, the administrator of the deed, a member or creditor of the company, or ASIC, may apply to the Court for an order under this section.

(2) On an application, the Court may make an order declaring the deed, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.

(3) On an application, the Court may declare the deed, or a provision of it, to be valid, despite a contravention of a provision of this Part, if the Court is satisfied that:

(a) the provision was substantially complied with; and

(b) no injustice will result for anyone bound by the deed if the contravention is disregarded.

(4) Where the Court declares a provision of a deed of company arrangement to be void, the Court may by order vary the deed, but only with the consent of the deed's administrator.

445D When Court may terminate deed

(1) The Court may make an order terminating a deed of company arrangement if satisfied that:

(a) information about the company's business, property, affairs or financial circumstances that:

(i) was false or misleading; and

(ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;

was given to the administrator of the company or to such creditors; or

(b) such information was contained in a document that accompanied a notice of the meeting at which the resolution was passed; or

(c) there was an omission from such a document and the omission can reasonably be expected to have been material to such creditors in so deciding; or

(d) there has been a material contravention of the deed by a person bound by the deed; or

(e) effect cannot be given to the deed without injustice or undue delay; or

(f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:

(i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or

(ii) contrary to the interests of the creditors of the company as a whole; or

(g) the deed should be terminated for some other reason.

(2) An order may be made on the application of:

(a) a creditor of the company; or

(b) the company; or

(ba) ASIC; or

- (c) any other interested person.

Chapter 5 External administration

Part 5.3 Administration of a company's affairs with a view to executing a deed of company arrangement

Division 8 Powers of administrator

Section 442A

Division 8—Powers of administrator

442A Additional powers of administrator

Without limiting section 437A, the administrator of a company under administration has power to do any of the following:

- (a) remove from office a director of the company;
- (b) appoint a person as such a director, whether to fill a vacancy or not;
- (c) execute a document, bring or defend proceedings, or do anything else, in the company's name and on its behalf;
- (d) whatever else is necessary for the purposes of this Part.

Division 11AA—Notification of contravention of deed

445HA Notification of contravention of deed of company arrangement

Administrator to notify company's creditors

- (2) If the administrator of a deed of company arrangement becomes aware that:
- (a) there has been a material contravention of the deed by a person bound by the deed (who may be the administrator); or
 - (b) there is likely to be a material contravention of the deed by a person bound by the deed (who may be the administrator);

the administrator must, as soon as practicable after becoming aware of the contravention or likely contravention, give notice of the contravention or likely contravention to as many of the company's creditors as reasonably practicable. The notice must be lodged with ASIC and must be in the prescribed form (if any).

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450B Execution of deed of company arrangement

As soon as practicable after a deed of company arrangement is executed, the deed's administrator must:

- (a) send to each creditor of the company a written notice of the execution of the deed; and
- (b) lodge notice in the prescribed form with ASIC of the execution of the deed.

Note: For electronic notification under paragraph (a), see section 600G.

450C Failure to execute deed of company arrangement

As soon as practicable after a company contravenes subsection 444B(2), the deed's administrator must:

- (a) lodge a notice that the company has failed to execute the instrument within the required period; and
- (b) send such a notice to each of the company's creditors.

Note: For electronic notification under paragraph (b), see section 600G.

450D Termination of deed of company arrangement

Where a deed of company arrangement terminates because of paragraph 445C(b), the deed's administrator must:

- (a) lodge a notice of the termination; and
- (b) send such a notice to each of the company's creditors.

Note: For electronic notification under paragraph (b), see section 600G.

450E Notice in public documents etc. of company

(1) A company under administration must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression ("administrator appointed").

(2) Except with the leave of the Court, until a deed of company arrangement terminates, the company must set out, in every public document, and in every negotiable instrument, of the company,

.....

(4) The Court may only grant leave under subsection (2) on the application of:

- (a) the administrator of the deed of company arrangement; or
- (b) any interested person.

(5) The Court may only grant leave under subsection (2) if it is satisfied that the granting of leave will not result in any significant risk to the interests of the company's creditors (including contingent or prospective creditors) as a whole.



Division 4—Application for order to wind up company in insolvency

459P Who may apply for order under section 459A

(1) Any one or more of the following may apply to the Court for a company to be wound up in insolvency:

- (a) the company;
- (b) a creditor (even if the creditor is a secured creditor or is only a contingent or prospective creditor);
- (c) a contributory;
- (d) a director;
- (e) a liquidator or provisional liquidator of the company;
- (f) ASIC;
- (g) a prescribed agency.

(2) An application by any of the following, or by persons including any of the following, may only be made with the leave of the Court:

- (a) a person who is a creditor only because of a contingent or prospective debt;

(b) a contributory;

(c) a director;

(d) ASIC.

(3) The Court may give leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise.



External administration **Chapter 5**

Administration of a company's affairs with a view to executing a deed of company arrangement **Part 5.3A**

Protection of company's property during administration **Division 6**

Section 440A

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Division 6—Protection of company's property during administration

440A Winding up company

(1) A company under administration cannot be wound up voluntarily, except as provided by section 446A or 446AA.

(2) The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.

(3) The Court is not to appoint a provisional liquidator of a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than have a provisional liquidator appointed.



Chapter 5 External administration

Part 5.3A Administration of a company's affairs with a view to executing a deed of company arrangement

Division 4 Administrator investigates company's affairs

Section 438D

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438D Reports by administrator

(1) If it appears to the administrator of a company under administration that:

(a) a past or present officer or employee, or a member, of the company may have been guilty of an offence in relation to the company; or

(b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:

(i) may have misapplied or retained, or may have become liable or accountable for, money or property (in Australia or elsewhere) of the company; or

(ii) may have been guilty of negligence, default, breach of duty or breach of trust in relation to the company;

the administrator must:

(c) lodge a report about the matter as soon as practicable; and

(d) give ASIC such information, and such access to and facilities for inspecting and taking copies of documents, as ASIC requires.

(2) The administrator may also lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to ASIC's notice.

(3) If it appears to the Court:

(a) that a past or present officer or employee, or a member, of a company under administration has been guilty of an offence in relation to the company; or

(b) that a person who has taken part in the formation, promotion, administration, management or winding up of a company under administration has engaged in conduct of a kind referred to in paragraph (1)(b) in relation to the company;

and that the administrator has not lodged a report about the matter, the Court may, on the application of an interested person, direct the administrator to lodge such a report.

CORPORATIONS ACT 2001 - SECT 232

Grounds for Court order

[The Court](#) may [make](#) an [order](#) under [section 233](#) if:

- (a) the conduct of a [company](#)'s [affairs](#); or
- (b) an actual or proposed act or omission by or [on behalf of](#) a [company](#); or
- (c) a [resolution](#), or a proposed [resolution](#), of [members](#) or a [class](#) of [members](#) of a [company](#);

is either:

- (d) contrary to the [interests](#) of the [members](#) as a whole; or
- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a [member](#) or [members](#) whether in that capacity or in any other capacity.

For the purposes of [this Part](#), a [person](#) to whom a share in the [company](#) has been transmitted by [will](#) or by operation of law is taken to be a [member](#) of the [company](#).

Note: For [affairs](#), see [section 53](#).

<https://www.kottgunn.com.au/updates/corporate-and-commercial/doca-lessons-for-administrators/>

Lessons for administrators

In order to avoid the possibility of executing a deed that does not comply with Part 5.3A, administrators should consider how they can ensure that their DOCA is indeed the DOCA “specified in the resolution”. Such steps might include:

- › circulating a fully drafted proposed DOCA to creditors attached to the notice of meeting;
- › taking detailed and accurate minutes of the creditors’ meeting, including any proposed changes to the DOCA that might be raised verbally; and
- › ensuring that any amendments raised at the meeting are drafted and inserted into the proposed DOCA, and that creditors are satisfied with those amendments, before they vote to approve it.

In the two cases discussed, it was ultimately possible for the Court to cure the non-compliant terms and allow the DOCAs to continue to operate. However, Supreme Court litigation was required in each matter, undoubtedly causing considerable inconvenience and expense for the companies, directors, creditors and administrators alike.

