

WHAT'S IN A DEED OF COMPANY ARRANGEMENT?

A Deed of Company Arrangement is one executed by an insolvent company (already “under administration”) and its administrator, binding them and (most) creditors to arrangements intended to keep the company out of liquidation. The creditors will have approved the making of the deed at a meeting called for that purpose.

The *Corporations Act* governs the making, execution, performance, variation and termination of that deed. That said, the Act leaves it to the parties as to what their deed contains and they are mostly free to draft a deed to suit their particular circumstances. This paper looks at the kind of provisions you may expect to find.

Persons bound: Apart from the company, there must be a person to act as administrator of the deed. That person is often the person who acted as administrator, during the earlier phase of the company being “under administration”. The deed also binds persons who were creditors at the time the company became “under administration”, though secured creditors, lessors and owners of property in the company’s possession may be a special case. The officers and shareholders of the company are also bound by the deed.

Conditions precedent: It may be stated that the deed is not effective unless and until some event occurs. That could be:

- the sale of a particular asset (such as land) or a business or a division of a business
- a contribution to the company of fresh working capital (as debt or share capital)
- the obtaining of a tax opinion on the company’s position
- further investigations of the company’s past or prospects
- anything else.

Executive power: The administrator assumes sole executive powers (to the exclusion of the directors) on the company being “under administration”. The administrator of the deed will most likely also hold the executive power, at least until the arrangements are completed. If the deed allows the directors to run the company, expect ancillary provisions:

- giving the administrator continuing free access to books, records and minutes
- forbidding certain corporate behaviour or entitling the administrator to be consulted about material transactions
- requiring periodic reports to the administrator
- committing the company to an agreed recovery plan.

Claims by creditors: The creditors’ claims as existed when the company began being “under administration” may be:

- frozen for a time, before reactivation
- released in whole or in part
- satisfied by payment of some cents in the dollar (the usual choice) in which case expect to find:
 - o creditors must “prove” their claims under the same rules as would apply in a liquidation
 - o the deed to identify the company assets to be available to satisfy the claims
 - o if claims proved exceed the available assets, they rank for payment as they would in a liquidation.

Activities of creditors: Once the creditors approve the making of a deed, their role should be reduced to:

- filing a proof of debt with the administrator and doing whatever they need to prove their claims
- receiving a dividend in satisfaction of their claims
- (for some of them) serving on any committee of creditors constituted by the deed whose function is to be consulted by the administrator
- (in a later creditors’ meeting) if desired, resolving to vary or terminate the deed at any time.

The Administrator: Expect to see the deed deal these rights and duties of the administrator:

- a right to remuneration as approved by the creditors
- a right to indemnity from company assets for obligations incurred as administrator
- a right to a lien over company assets as security for payment to the administrator of the remuneration and indemnity
- broad powers to carry out the arrangements
- an obligation to consult with any committee of creditors constituted by the deed
- an obligation to file 6 monthly accounts at ASIC.

Early termination: The deed, once effective, may be terminated early:

- by operation of the deed's own terms, that might include the loss of key personnel in the company or the failure to progress a recovery plan
- by resolution of the creditors at any time.

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