



**ASIC**  
Australian Securities &  
Investments Commission

## REGULATORY GUIDE 82

# External administration: Deeds of company arrangement involving a creditors' trust

December 2018

### About this guide

This guide is for registered liquidators appointed under Pt 5.3A of the Corporations Act as a voluntary administrator or deed administrator (administrator).

It explains:

- our interpretation of administrators' obligations under the Corporations Act and the general law where they are considering a proposed deed of company arrangement (DOCA) or a proposed variation of a DOCA (collectively, a DOCA proposal) involving a creditors' trust; and
- in particular, the information that we consider is material to creditors and should therefore be disclosed when a DOCA proposal involves a creditors' trust.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This guide was issued in December 2018 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Guide 220, issued May 2005, rebadged as Regulatory Guide 82 on 5 July 2007

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

A creditors' trust in a deed of company arrangement (DOCA) is a mechanism that is used to accelerate a company's exit from external administration.

It is important that voluntary administrators and deed administrators (administrators) are aware of their obligations and properly consider all the relevant issues raised by the use of a creditors' trust.

This guide indicates how we think administrators will adequately and properly perform all their duties and functions when a DOCA proposal involves a creditors' trust.

### DOCAs and creditors' trusts

- RG 82.1 A creditors' trust in a DOCA is a mechanism used to accelerate a company's exit from external administration: see RG 82.6–RG 82.11.
- RG 82.2 We have issued this guide to outline our views on the use of creditors' trusts and indicate our interpretation of adequate and proper performance by administrators of their duties and functions in this situation.

### Administrators' obligations about using creditors' trusts

- RG 82.3 Administrators should be aware of and properly consider all the relevant issues raised by the use of a creditors' trust, to avoid:
- (a) submitting a DOCA proposal to creditors that involves a creditors' trust without properly considering whether such an arrangement is appropriate in the company's circumstances;
  - (b) failing to disclose all the material information about the creditors' trust and its implications; and/or
  - (c) making an inappropriate recommendation about the DOCA proposal.

#### Is a creditors' trust appropriate in this situation?

- RG 82.4 We consider that DOCA proposals should not involve creditors' trusts unless administrators have:
- (a) adequately considered the appropriateness of using a creditors' trust in the particular case; and

- (b) disclosed all material information about the creditors' trust and its implications to enable creditors to consider the advantages and disadvantages for the company, the creditors and the administrator.

RG 82.5      DOCAs involving a creditors' trust create special risks for creditors. Once the creditors' trust has been constituted and the DOCA terminates, the arrangement is no longer governed by Pt 5.3A of the *Corporations Act 2001* (Corporations Act) and the protective mechanisms of that part—including the supervisory and remedial jurisdiction of the courts—cease to apply. Administrators recommending a creditors' trust bear a heavy burden of explaining to creditors the implications of adopting such a proposal.

## B DOCA and creditors' trusts

### Key points

A creditors' trust in a DOCA is a mechanism used to accelerate a company's exit from external administration.

The company and/or third parties promise to make payment (or transfer other property) to the trustee to satisfy the creditors' claims, and to extinguish their rights, against the company.

We consider that there are different and additional risks for creditors where a DOCA proposal involves a creditors' trust.

We are aware that creditors (particularly of large companies) have been asked to approve a 'holding' DOCA.

### What is a creditors' trust?

- RG 82.6 A creditors' trust in a DOCA is a mechanism used to accelerate a company's exit from external administration. It has been used most commonly (but not exclusively) in connection with the rehabilitation of public companies listed on ASX. In some cases, this leads to a 'backdoor' listing.
- RG 82.7 Typically, under the terms of the DOCA and one or more interconnected deeds, a trust entity is created and the company's obligations to some or all of the creditors bound by the DOCA are compromised and transferred to the trust. Those creditors become beneficiaries of the trust. Occasionally, there may be separate creditors' trusts for employee and non-employee creditors, or for secured and unsecured creditors.
- RG 82.8 The company and/or third parties promise to make one or more payments (or transfer other property) to the trustee to satisfy the creditors' claims against the company. In return, the creditors' rights against the company are extinguished.
- RG 82.9 The trustee of the new trust becomes solely responsible to the former creditors (now beneficiaries) for:
- (a) ensuring that the company and/or other third parties perform their payment and other obligations to the trustee;
  - (b) determining how much each of the former creditors is entitled to receive from the trust; and
  - (c) in due course, making any distribution to those former creditors.

- RG 82.10 Usually, the DOCA is 'effectuated' (and terminates) after the creditors' claims against the company have been removed in this way. In most cases, the DOCA terminates immediately on creation of the trust, which usually occurs when or shortly after the DOCA is executed.
- RG 82.11 When the DOCA terminates, the company ceases to be externally administered, the directors regain full control of the company and the company is no longer required to use the notification 'subject to deed of company arrangement' on its public documents (as otherwise would be required by s450E(2) of the Corporations Act).

## What are the special risks for creditors?

- RG 82.12 We consider that there are different and additional risks for creditors where a DOCA proposal involves a creditors' trust. The significance of the risks in a particular case will depend on the quality of the information the administrator provides to creditors and the actual terms of the DOCA, trust deed and any other related documentation.
- RG 82.13 The key additional risks are that:
- (a) under the DOCA proposal, the DOCA may be effectuated and creditors' rights against the company extinguished before:
    - (i) the amount available for distribution to creditors of the company/beneficiaries of the trust has been ascertained;
    - (ii) the trust fund has been received in full by the trustee; or
    - (iii) creditors of the company/beneficiaries of the trust have received any payment from either the deed administrator or the trustee;
  - (b) creditors may have fewer (or, in some circumstances, no) legal rights if the DOCA proposal is not fully complied with by all relevant parties; and
  - (c) creditors may agree to the DOCA proposal without being aware (or fully appreciating the implications) of these matters.
- RG 82.14 The following factors increase the severity of these risks:
- (a) creditors' lack of knowledge and inexperience;

Note: The use of a creditors' trust in a DOCA will be beyond the reasonable knowledge or experience of most creditors bound by the DOCA. Creditors (particularly unsecured creditors) of an insolvent company usually have limited knowledge of (or previous experience with) corporate insolvency laws and processes. Any previous experience is likely to be with the Corporations Act and ASIC as the relevant regulator, and they will generally expect their claims against the company and their dealings with the external administrator to be governed by the Corporations Act. Many creditors will have no or limited knowledge of trust law.

- (b) inadequate disclosure by administrators of material information about the DOCA proposal;
- (c) the additional complexity of the legal and documentary arrangements needed to support the use of a creditors' trust under a DOCA;
- (d) the trustee's identity, skills, remuneration and insurance arrangements;
- (e) non-uniformity of the state and territory Trustee Acts governing trusts and trustees;
- (f) differences in the ways trustees and registered liquidators are regulated and supervised, particularly by ASIC and the courts;
- (g) potential difficulties for ASIC and creditors (as beneficiaries of the trust) in monitoring and enforcing proper conduct by the trustee; and
- (h) legal uncertainties and other issues for ASIC, creditors bound by the DOCA or other persons in challenging a DOCA that has already terminated.

## 'Holding' DOCAs

RG 82.15 Creditors are sometimes asked to approve a 'holding' DOCA. A holding DOCA may be proposed when it is not in the interests of creditors that the administration end, nor that the company be wound up. Holding DOCAs give a voluntary administrator more time to develop proposals for restructuring or otherwise resuscitating the company. Where this is the case, the voluntary administrator does not need to seek an extension from the court of the convening period for the second creditors' meeting under s439A.

Note: See *Mighty River International Limited v Hughes* [2018] HCA 38.

RG 82.16 Generally, we think a holding DOCA should not propose the subsequent creation of a creditor's trust unless all the information specified in this guide is provided to creditors voting on the holding DOCA. We think it is unlikely that information will be available to a voluntary administrator at the time of proposing a holding DOCA, given the nature and purpose of a 'holding' DOCA. In our view, the appropriate course is to obtain express creditor approval of the creditors' trust by means of a formal variation of the DOCA when that information is available.

RG 82.17 Where a holding DOCA is proposed, we consider that its terms should:

- (a) exclude an open-ended or very lengthy period to formulate a concrete proposal for continuing the company or its business; and
- (b) include a program for interim reporting to creditors on steps taken and results obtained by the deed administrator, so that creditors can monitor the deed administrator's efforts.

## C Administrators' obligations about creditors' trusts

### Key points

Administrators have an overriding obligation to perform their duties and functions adequately and properly. Where a DOCA proposal is concerned, we consider that an administrator who is fulfilling this obligation will:

- evaluate the proposal before submitting it to creditors (see RG 82.20–RG 82.23);
- disclose all material information about the proposal to creditors (see RG 82.24–RG 82.27), and
- express an opinion about the proposal that adequately protects the interests of creditors (see RG 82.28–RG 82.30).

Administrators may be subject to disciplinary or other action if they do not fulfil their obligations when a DOCA proposal involving a creditors' trust is put to creditors.

### What are the obligations of administrators?

- RG 82.18 Administrators have an overriding obligation to perform their duties and functions adequately and properly. This includes ensuring that the interests of creditors are adequately protected. Where a DOCA proposal is concerned, we consider that an administrator who is fulfilling this obligation will:
- (a) evaluate the proposal before submitting it to creditors (see RG 82.20–RG 82.23);
  - (b) disclose all material information about the proposal to creditors (see RG 82.24–RG 82.26); and
  - (c) express an opinion about the proposal that adequately protects the interests of creditors (see RG 82.28).
- RG 000.19 Administrators may be subject to disciplinary or other action if they do not fulfil their obligations when a DOCA proposal involving a creditors' trust is put to creditors.

### Evaluating the proposal

- RG 82.20 Before submitting any DOCA proposal to creditors, administrators should consider whether the proposal is suitable to submit. For example, it will rarely be appropriate for an administrator to submit a DOCA proposal to creditors where the administrator does not have sufficient concrete details to comply with all of their disclosure obligations: see RG 82.24–RG 82.26.

RG 82.21 Where the DOCA proposal involves a creditors' trust, administrators should specifically consider whether such a mechanism is appropriate in the company's circumstances. We think this includes considering whether the DOCA proposal (if accepted) may be an abuse of Pt 5.3A or otherwise contrary to the public interest. If so, it may be appropriate for the administrator to seek directions from the court before submitting the DOCA proposal to creditors.

RG 82.22 Section 435A sets out the policy objective of Pt 5.3A:

... for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence, results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

RG 82.23 We consider that any mechanism for a creditors' trust should only be included in a DOCA:

- (a) when there is a sound commercial reason that persuades the administrators that in all the circumstances it is in the best interests of creditors to adopt a DOCA with a creditors' trust—to obtain a better return than from an immediate winding-up;
- (b) if it is consistent with the policy objective of Pt 5.3A, as outlined in s435A; and
- (c) if it is consistent with the public interest.

Note 1: We consider, for example, that it is likely to be an abuse of Pt 5.3A, or otherwise contrary to the public interest, for a DOCA to involve a creditors' trust where the DOCA proposal contemplates that the company would or could (after the DOCA has been effectuated in accordance with its terms) continue in existence in an insolvent financial condition. See Australian Law Reform Commission, [Report No. 45, General Insolvency Inquiry](#), 13 December 1988 (the Harmer Report), vol. 1, pp. 62–63.

Note 2: See *Re Beville Pty Ltd (in voluntary administration)* [2011] NSWSC 417. Regarding the importance of the statutory regime under Pt 5.3A and the protections or advantages provided to creditors see also *Sydney Land Corp P/L v Kalon P/L* (1998) 26 ACSR 427 at 430, *Young v Sherman* (2002) 170 FLR 86, *Bovis Lend Lease P/L v Wily* (2003) 45 ACSR 612 and *Blacktown City Council v Macarthur Telecommunications P/L* (2004) 47 ACSR 391.

## Disclosing material information

RG 82.24 Section 75–225 of the Insolvency Practice Rules (Corporations) 2016 (Insolvency Practice Rules) sets out matters that a voluntary administrator must include in their report and statement that accompany the notice of the second meeting of creditors convened under s439A of the Corporations Act.

The report must contain all information that is material to the creditors' decision, including material details of what a proposed DOCA will contain.

Note: See *M&S Butler Investments Pty Ltd v Granny May's Franchising Pty Ltd* (1997) 24 ACSR 695 and *Commissioner of Taxation v Comcorp Australia Ltd* (1996) 70 FCR 356; 21 ACSR 590 which were decided under the predecessor to s75–225 of the Insolvency Practice Rules and s439A(4) of the Corporations Act.

- RG 82.25 Section 445D of the Corporations Act reinforces the disclosure obligations of administrators by providing that the court may terminate a DOCA if (among other things) information that is material to the creditors' decision to approve the proposed DOCA was omitted or was false or misleading.
- RG 82.26 When submitting a DOCA proposal to creditors that involves a creditors' trust, administrators should disclose all the information that is material to the creditors' decision about whether to accept the particular risks associated with the proposal. In Section D, we set out the information we think is material to that decision.

#### **Disclosure before variation of DOCA**

- RG 82.27 We consider that deed administrators have an implied obligation to include similar matters in the documents that accompany a notice of meeting when a DOCA variation is proposed.

#### **Expressing an opinion that protects creditors' interests**

- RG 82.28 Administrators have an obligation to provide creditors with a statement setting out (among other things) the administrator's opinion about whether it would be in the creditors' interests for the company to execute a proposed DOCA or DOCA variation and the reasons for that opinion: see s75–225(3)(b) of the Insolvency Practice Rules and RG 82.27.
- RG 82.29 Where a DOCA proposal involves a creditors' trust, we consider that administrators fulfilling this obligation will discuss the advantages and disadvantages for creditors of the proposed creditors' trust when making their recommendation.
- RG 82.30 We also consider that the obligation to ensure the interests of creditors are adequately protected means that there are some circumstances when an administrator should not recommend that creditors approve a DOCA proposal involving a creditors' trust: see Table 1.

**Table 1: Examples of circumstances when an administrator should not recommend a proposal involving a creditors' trust**

Circumstance	Details
The proposed value of the creditors' trust fund cannot be reasonably estimated	<p>When the proposed value of the creditors' trust fund cannot be reasonably estimated at the time the proposal will be voted on by the creditors. This is because the amount that may become available to the creditors (as beneficiaries of the trust) will be so speculative that it will never be in the creditors' interests for the company to execute a DOCA that terminates, almost immediately, their status and rights as creditors.</p> <p>Note: DOCAs that do not involve a creditors' trust may, in some cases, propose a return to creditors that could be described as speculative. However, in those cases, the interests of creditors are different because the creditors' status as creditors (and their rights against the company under Pt 5.3A) will not be prematurely extinguished as may occur when a creditors' trust is used.</p>
There is concern about whether the trustee will receive all of the trust fund	<p>When the administrator has reason for concern about whether the trustee will receive all of the trust fund, or at least adequate and enforceable security for the trust fund, before the DOCA terminates and the creditors' rights (as creditors) against the company are extinguished. This is because it will rarely be in the creditors' interests to place on them (and the trustee) all the risks of failure of the trust if there is future non-performance of obligations undertaken under the DOCA by the company or a third party.</p> <p>Note: See also <i>Kalon v Sydney Land Corp P/L</i> (1998) 26 ACSR 593 upholding <i>Sydney Land Corp P/L v Kalon P/L</i> (1998) 26 ACSR 427.</p>
The DOCA or trust deed provisions will permit the trustee (or any replacement trustee) of the creditors' trust to be a person who does not have the necessary skills and experience	<p>When the DOCA or trust deed provisions will permit the trustee (or any replacement trustee) of the creditors' trust to be a person who does not have the necessary skills and experience or is otherwise unsuitable to be the trustee. The risk to creditors from an unsuitable trustee is severe. In our view, the interests of creditors are likely to be adequately protected if the trustee of the creditors' trust is a registered liquidator, but will never be adequately protected if the trustee will or could be the company the subject of the proposed DOCA.</p> <p>Note: This does not imply that the trustee should always be the same person as the deed administrator; the trustee could be another registered liquidator.</p>
Concern about adequate civil liability insurance for the trustee	<p>When there is reason for concern about whether the proposed trustee will have adequate civil liability insurance for their conduct as trustee of the creditors' trust.</p>
DOCA/trust will not provide rights at least as favourable as rights of creditors under the Corporations Act	<p>When the DOCA and/or the trust deed will not provide processes and rights that are at least as favourable to the beneficiaries as the processes for and rights of creditors under the Corporations Act.</p>
Concrete details about the proposed structure and terms of the DOCA and trust deed cannot be provided	<p>When concrete details about the proposed structure and terms of the DOCA and trust deed cannot be provided. Because of the additional complexity of creditors' trust arrangements, we do not consider that a broad outline of the proposed DOCA and proposed creditors' trust deed is sufficient. In practical terms, we think it is unlikely that administrators will be able to satisfy their disclosure obligations to creditors unless a draft DOCA and a draft trust deed have been prepared.</p> <p>Note: See also <i>Kirwan v Cresvale Far East Ltd (in liq)</i> [2002] NSWCA 395 at [382] per Young CJ; (2003) 44 ACSR 21 and <i>Commissioner of Taxation v Comcorp Australia Ltd</i> (1996) 70 FCR 356 at 389; 21 ACSR 590 at 624.</p>

## D Disclosing material information

### Key points

Administrators have an obligation to give creditors material information that will enable them to understand a DOCA proposal for a creditors' trust and make an informed decision whether to approve it.

Table 2 lists some of the types of information we consider an administrator must disclose to creditors and/or express an opinion about.

### What is material information?

RG 82.31 Administrators have an obligation to give creditors material information that will enable them to:

- (a) understand a DOCA proposal; and
- (b) appreciate the legal and practical implications for them of authorising the company to execute the proposed DOCA (or DOCA variation).

RG 82.32 In this section, we set out what we think is material information when a DOCA proposal involves a creditors' trust. Depending on the particular case, administrators may also need to disclose other material information.

Note: Parts of this section may also be relevant to DOCAs that do not involve a creditors' trust.

RG 82.33 The information should be set out in the report and statement made under s75–225 of the Insolvency Practice Rules (or explanation that accompanies the notice of meeting where a DOCA variation is proposed) as simply, clearly and succinctly as possible in the circumstances.

RG 82.34 When the DOCA proposal involves a creditors' trust, we consider this obligation means that information should be provided that enables creditors to understand the actual and potential implications and specific risks for them of the proposed creditors' trust arrangements. Creditors should be able to make a realistic and informed assessment of the proposal and whether they should approve it (including, but not limited to, whether they are likely to receive a better return under the particular DOCA proposal, under a DOCA that does not involve a creditors' trust, or under a winding-up). In *Parkview Constructions Pty Ltd v Tayeh and Others* [2009] NSWSC 186 at [76], Justice Barrett said that:

Administrators recommending to creditors the adoption of a deed of company arrangement that will give birth immediately to a creditors' trust and then itself promptly die bear a heavy burden of explaining to creditors

the implications of the shift from a regime incorporating a court administered scheme of creditor protection to one in which creditors become passive trust beneficiaries.

- RG 82.35 Much of the information that we think should be provided to creditors will describe the administrator's understanding of the law. Therefore, we consider that administrators should base such information on legal advice received by them that is applicable to the particular DOCA proposal.
- RG 82.36 Because of the additional complexity involved in a DOCA proposal involving a creditors' trust, we consider that creditors should be given adequate opportunity to obtain (if they wish) professional advice about the proposal, its implications and risks before they vote on the proposal. This may affect the appropriate period of notice of a meeting, the need for an extension of the convening period, or the need for an adjournment of the meeting.
- RG 82.37 ASIC, creditors and the public can only properly understand the DOCA by also understanding the associated arrangements. Where a DOCA (or DOCA variation) involving a creditors' trust is approved and executed, we expect administrators to lodge the DOCA (or DOCA variation) with ASIC, as well as lodging:
- (a) a copy of the creditors' trust deed; and
  - (b) any other associated document (such as an 'implementation deed') that is referred to in the DOCA or is otherwise necessary to support the creditors' trust arrangements.

**Table 2: Material information to disclose to creditors**

Information	Description	Reference
Reasons	The reasons why the DOCA proposal involves a creditors' trust	RG 82.38–RG 82.40
Key events	The anticipated sequence of key events if the DOCA proposal is approved, and the implications for creditors	RG 82.41–RG 82.42
Return	The anticipated return to creditors/beneficiaries	RG 82.43
Trustee particulars	The identity, skills, experience and insurance of the proposed trustee	RG 82.44
Remuneration	The proposed remuneration and expenses of the deed administrator and trustee	RG 82.46–RG 82.47
Indemnities	Details of any indemnities for fees or liabilities	RG 82.48
Powers	The differences between the powers of a deed administrator under the Corporations Act and the trustee under the DOCA proposal	RG 82.49–RG 82.50

Information	Description	Reference
Claims	How creditors' claims will be dealt with under the DOCA proposal and in what priority	RG 82.51–RG 82.52
Other creditor/beneficiary differences	A comparison of the protections and rights of creditors under the Corporations Act and of beneficiaries under the DOCA proposal	RG 82.53–RG 82.56
Fair Entitlements Guarantee scheme (FEG)	Any effect on employee entitlements under FEG	RG 82.57
Compliance opinion	An opinion on the capability of the company (and relevant third parties) to comply with obligations to the trustee	RG 82.58
Solvency statement	The basis for an opinion that the company will be solvent at the date of effectuation of the DOCA	RG 82.59
Tax issues for company/trust	Details of the taxation and stamp duty implications for the company and the trust	RG 82.61
Tax issues for individual creditor/beneficiary	Potential differences in taxation implications for creditors and beneficiaries	RG 82.62
Other	Any other material aspects or implications	RG 82.63–RG 82.64

## Reasons

- RG 82.38 Administrators should provide an explanation of the reasons why the DOCA proposal involves a creditors' trust, instead of a DOCA where creditors' claims and rights would be dealt with directly under the DOCA and the Corporations Act.
- RG 82.39 We expect this explanation to include identification of any legal or commercial reasons, and a discussion of why it is considered to be in the interests of creditors as a whole to use the proposed creditors' trust.
- RG 82.40 If one of the stated reasons is to enable listing of the company or re-quotations of the company's financial products on a financial market such as ASX, the administrator should also provide details of:
- (a) the market operator's requirements for listing or re-quotations and how it is proposed that the company would meet those requirements; and
  - (b) how and why listing or re-quotations would be in the interests of the creditors (as opposed to the directors, shareholders or some other party).

## Key events

RG 82.41 Administrators should explain the anticipated sequence and relative timing for each of the following key events if the DOCA proposal is approved, and the implications of each event for creditors:

- (a) execution of the DOCA;
- (b) creation of the creditors' trust;
- (c) termination of the DOCA;
- (d) receipt of the creditors' trust fund by the trustee; and
- (e) distribution to creditors/beneficiaries.

RG 82.42 The explanation of implications should include the nature of the legal relationship of the creditors to the company after each event (and specifically, when they would cease to be creditors), and what will happen if any of these events, or their timing, does not occur as anticipated.

## Return to creditors

RG 82.43 Administrators should provide information about the anticipated return to creditors/beneficiaries under the DOCA proposal, including:

- (a) the anticipated date(s) when the trust fund will be received by the trustee and from which sources;
- (b) the anticipated value of the total trust fund and of the portion that would be available for distribution to beneficiaries, with an explanation of any difference in those values;

Note: See also Table 1.

- (c) the anticipated date(s) for distribution by the trustee to the beneficiaries;
- (d) the anticipated rate(s) of distribution by the trustee;
- (e) risks to creditors/beneficiaries associated with any delay in receipt of the trust fund by the trustee, or in distribution by the trustee to the beneficiaries; and
- (f) the potential return to creditors if the DOCA proposal did not involve a creditors' trust.

Note: We consider that the information in this paragraph should be linked to other information provided (e.g. information about remuneration, expenses and taxation) so that creditors are able to identify and weigh up the additional overall costs involved because of the creditors' trust and any potential increase in the distribution to them, against the likelihood of, and any delay in, receiving that distribution.

## Trustee particulars

- RG 82.44 Administrators should provide information about the proposed trustee, including:
- (a) why that trustee is proposed and is considered appropriate, with details of their qualifications, skills and relevant experience to perform the duties and functions they will have as trustee of the creditors' trust;
 

Note: See also Table 1.
  - (b) whether the DOCA proposal requires the trustee (and any replacement trustee) of the creditors' trust to be the deed administrator or other person registered by ASIC under s20–30 of Sch 2 to the Corporations Act as a liquidator;
  - (c) whether ASIC or any other government regulator will have supervisory powers over conduct by the proposed trustee in that capacity, and if so, the nature of those powers;
 

Note: Administrators should note our view that ASIC has certain supervisory powers under Div 40 of Sch 2 to the Corporations Act over conduct by the trustee where the DOCA and trust deed provide that the trustee is a registered liquidator.
  - (d) whether the proposed trustee would have any potential conflict of interests when acting as trustee, and, if so, the nature of the conflict and how it would be managed; and
  - (e) whether the proposed trustee has civil liability insurance (including professional indemnity and fidelity) that will cover conduct by them in their capacity as trustee of the proposed trust, and the nature and aggregate value of any such insurance.
 

Note: See also Table 1 and RG 82.45.
- RG 82.45 If the proposed trustee is a registered liquidator, administrators should confirm whether that insurance policy covers conduct by the registered liquidator in the capacity of trustee. If not, additional insurance would be needed.

## Remuneration and expenses

- RG 82.46 Administrators should provide details of the remuneration and anticipated expenses of the deed administrator and proposed trustee, and a comparison of the remuneration process for the deed administrator and the trustee.
- RG 82.47 The information should cover:
- (a) how and when the deed administrator and trustee would be paid and at what rates;

- (b) the effect of the fees and expenses of each of the deed administrator and trustee on the anticipated distribution to beneficiaries of the trust (see also RG 82.43). This includes identifying any additional fees and expenses involved because of the use of a creditors' trust (such as through duplication of activity); and
- (c) the rights that beneficiaries would have to approve and/or challenge fees charged by the trustee (including what law and courts would decide those rights), compared with the rights they would have as creditors of a company subject to a DOCA.

Note: See also Table 1.

## Indemnities

- RG 82.48 Administrators should provide the details and implications for creditors/beneficiaries of any indemnity for fees or liabilities that has been (or will be) provided to the deed administrator or trustee, including the relationship between the indemnifier, the company, the deed administrator and the trustee. This includes any indemnity or lien in favour of the deed administrator or trustee over the assets of the company or over the trust fund under the proposed terms of the DOCA or trust deed.

## Powers

- RG 82.49 Administrators should explain the differences between the powers of a deed administrator under the Corporations Act and the powers the trustee would have under the proposed trust deed and the relevant state or territory Trustee Act.
- RG 82.50 This includes identification of any likely deficiencies in the powers of the trustee to perform the functions envisaged under the proposed trust deed, and which may lead to applications to court (and associated costs) by the trustee that would not be necessary for a deed administrator.

## Claims

- RG 82.51 Administrators should explain how creditors' claims against the company will be dealt with under the DOCA proposal and in what priority. This includes whether the value of those claims will be determined by the deed administrator or by the trustee. If by the trustee, there should be an explanation of what the process of determination will be and confirmation that the trustee will have unrestricted and free access to all the books and records of the company necessary to determine claims.

RG 82.52 If unsecured creditors' priorities (as beneficiaries of the trust) will not follow the priorities set out in s556 of the Corporations Act, the nature of and reasons for the divergence from s556 should be explained. If the claims adjudication processes by the trustee and the associated rights of beneficiaries would differ from the processes and rights under the Corporations Act for creditors' claims, the differences and their implications for beneficiaries should also be explained.

Note: See also Table 1.

## Other creditor/beneficiary differences

RG 82.53 The difference between Pt 5.3 of the Corporations Act, a creditors' trust and general trust law must be drawn to the attention of creditors. The use of a creditors' trust results in the loss of court supervision under the Corporations Act. Although courts can still provide relief under the general law of trusts, the safeguards available to creditors under Pt 5.3A are no longer available.

RG 82.54 Administrators should provide a comparison of the protections and rights that creditors would have under the Corporations Act as creditors of a company subject to a DOCA, and the protections and rights they would have as beneficiaries of the proposed creditors' trust.

RG 82.55 In relation to creditors, we expect this comparison to include explanation of the ability of a creditor to:

- (a) challenge decisions, actions or omissions by a deed administrator, including decisions about the value of their claim against the company;
- (b) be informed (including through reports to creditors, meetings of creditors, and lodgement of statements of receipts and payments with ASIC, where these are required) about the progress of the external administration;
- (c) require a deed administrator to call a meeting of creditors to put a resolution to vary or terminate a DOCA;
- (d) apply to the court for the DOCA to be varied, terminated or avoided; and
- (e) complain to ASIC about conduct by the deed administrator.

RG 82.56 In relation to beneficiaries of the proposed trust, we expect this comparison to include explanation of:

- (a) the law that would govern interpretation of the trust deed and the trustee's powers and duties;
- (b) how beneficiaries, individually and collectively, would be able to monitor and enforce compliance by the trustee, the company and any relevant third parties with the terms of the DOCA, the trust deed and any 'implementation deed' or other document setting out obligations

- connected with the creditors' trust. This includes the rights that beneficiaries would have (and against whom) if any part of the trust fund is not paid to the trustee in accordance with the proposed DOCA, trust deed or other aspect of the arrangements;
- (c) the rights that a beneficiary would have to challenge decisions, actions or omissions by the trustee, including decisions about the value of their entitlement to a distribution out of the trust fund;
  - (d) how, when and by whom the terms of the trust deed could be varied, including the rights that a beneficiary would have to call, or require the trustee to call, a meeting of beneficiaries to vary or terminate the trust deed; and
  - (e) how, and to which supervisory body, a beneficiary could complain about decisions or other conduct by the trustee.

## Fair Entitlements Guarantee scheme

- RG 82.57 Administrators should disclose the effect (if any) for employee creditors of becoming a beneficiary of a creditors' trust on their rights under the FEG, or on the Australian Government's rights of subrogation under FEG.

## Compliance opinion

- RG 82.58 Administrators should state:
- (a) the inquiries they have made about the capability (including financial capability) of the company and any relevant third party to comply with their obligations under the DOCA proposal;
  - (b) the information they have received in response to those inquiries; and
  - (c) based on this information, their opinion on whether the company (and any relevant third party) is capable of complying and is likely to comply with its obligations to the trustee, if the DOCA proposal is approved by creditors.

Note: See also Table 1.

## Solvency statement

- RG 82.59 Administrators should state the reasons why they have formed the opinion that the company will be solvent at the date of effectuation of the DOCA, if the DOCA is wholly effectuated on the terms proposed.
- RG 82.60 An administrator who has not formed or cannot form this opinion should re-evaluate the proposal: see RG 82.23.

## Taxation issues for company and trust

RG 82.61 Administrators should provide details of the taxation (including capital gains tax), stamp duty and other financial implications for the company and for the trust of:

- (a) establishing the trust;

Note: Trusts are entities that are subject to Australian Business Number (ABN) registration requirements and to Australian income tax legislation.

- (b) transferring to the trust the company's liabilities to its creditors and, where applicable, other property of the company;
- (c) where applicable, realising trust assets; and
- (d) distributing trust assets to the beneficiaries.

RG 82.62 This should include explanation of how these costs will impact on the anticipated return to creditors/beneficiaries: see also RG 82.45.

## Taxation issues for individual creditor/beneficiary

RG 82.63 Administrators should provide a statement in general terms about the potential taxation implications for a creditor of receiving distributions (in their capacity as beneficiary) from a trust, rather than payment from the company in their capacity as creditors, with a statement advising creditors to seek professional advice about their individual taxation circumstances.

## Other issues

RG 82.64 Administrators should provide information about any other material aspects or implications of the particular DOCA proposal, such as:

- (a) whether an Australian financial services (AFS) licence or authorisation would be needed by the trustee and, if so, the financial and other implications for creditors/beneficiaries;

Note: Administrators should note that the automatic AFS licensing exemptions available to external administrators under s911A(2)(f) of the Corporations Act may not apply to registered liquidators acting as trustee of a creditors' trust.

- (b) if the DOCA proposal involves preservation of the corporate shell, any independent opinion about the estimated value of the corporate shell; and
- (c) if the DOCA proposal involves a proposed equity raising and reorganisation of the company's share capital, information about what this would involve (including costs and the implications of those costs for the return to creditors/beneficiaries), and the implications of relevant fundraising or takeover laws.

## Key terms

Term	Meaning in this document
ABN	Australian Business Number
administrator	Has the meaning given in s9 of the Corporations Act Note: It therefore includes both deed administrators and voluntary administrators.
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
deed administrator	A person appointed to administer a deed of company arrangement under Pt 5.3A of the Corporations Act
DOCA	A deed of company arrangement
DOCA proposal	A proposed DOCA or proposed variation of a DOCA
FEG	Fair Entitlements Guarantee scheme
Insolvency Practice Rules	Insolvency Practice Rules (Corporations) 2016
Pt 5.3A (for example)	A part of the Corporations Act (in this example numbered 5.3A), unless otherwise specified
registered liquidator	A person registered by ASIC under s20–30 of Sch 2 to the Corporations Act
s439A (for example)	A section of the Corporations Act (in this example numbered 439A), unless otherwise specified
voluntary administrator	An administrator of a company but not of a deed of company arrangement

## Related information

### Headnotes

creditors' trust, deed of company arrangement, DOCA, material information, registered liquidator

### Regulatory guides

[RG 33](#) *Security deposits*

### Legislation

Corporations Act, Pt 5.3A; s435A, 439A, 445D, 450E(2), 556, 911A; Sch 2, Div 40, s20–30

Insolvency Practice Rules, s75–225

### Cases

*Blacktown City Council v Macarthur Telecommunications P/L* (2004) 47 ACSR 391

*Bovis Lend Lease P/L v Wily* (2003) 45 ACSR 612

*Commissioner of Taxation v Comcorp Australia Ltd* (1996) 70 FCR 356; 21 ACSR 590

*Kalon v Sydney Land Corp P/L* (1998) 26 ACSR 593

*Kirwan v Cresvale Far East Ltd (in liq)* [2002] NSWCA 395; (2003) 44 ACSR 21

*M&S Butler Investments Pty Ltd v Granny May's Franchising Pty Ltd* (1997) 24 ACSR 695

*Mighty River International Limited v Hughes* [2018] HCA 38

*Parkview Constructions Pty Ltd v Tayeh and Others* [2009] NSWSC 186

*Re Bevillesta Pty Ltd (in voluntary administration)* [2011] NSWSC 417

*Sydney Land Corp P/L v Kalon P/L* (1998) 26 ACSR 427

*Young v Sherman* (2002) 170 FLR 86