



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 82

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

**A guide for registered liquidators  
appointed under Part 5.3A**

May 2005

**Important note**

This guide is limited to certain conduct issues for registered liquidators appointed under Part 5.3A as a voluntary administrator or deed administrator (administrator), where a proposed deed of company arrangement (DCA) or proposed variation of a DCA (collectively, a DCA proposal) involves a creditors' trust. It is not intended to be comprehensive and does not describe ASIC's views about how administrators, or all registered liquidators, should perform all their relevant duties and functions.

This guide does not constitute legal advice. Registered liquidators should seek their own advice to confirm how the law applies to them. It is the responsibility of each registered liquidator to identify the precise nature of their obligations from time to time under the Corporations Act, the Corporations Regulations and the general law, and to determine what they must do to perform adequately and properly all their duties and functions.

# What this guide is about

- 1 This guide is for registered liquidators appointed under Part 5.3A of the *Corporations Act 2001* (Act) as a voluntary administrator or deed administrator (administrator).
- 2 It explains:
  - (a) our interpretation of administrators' obligations under s439A, 445F, 1292(2) and the general law where they are considering a proposed deed of company arrangement (DCA) or a proposed variation of a DCA (collectively, a DCA proposal) involving a creditors' trust; and
  - (b) in particular, the information that we consider is material to creditors and should therefore be disclosed when a DCA proposal involves a creditors' trust.

## Why has ASIC issued this guide?

- 3 The use of creditors' trusts in DCAs is a relatively recent practice that appears to be increasing. We have issued this guide to outline our current views on this practice and indicate our interpretation of adequate and proper performance by administrators of their duties and functions in this situation.
- 4 We are concerned that administrators appear not to be aware of or are not properly considering all the relevant issues raised by the use of a creditors' trust. As a result, they may:
  - (a) submit to creditors a DCA proposal that involves a creditors' trust without properly considering whether such an arrangement is appropriate in the company's circumstances; and/or
  - (b) fail to disclose all the material information about the creditors' trust and its implications to enable creditors to consider the advantages and disadvantages of this type of arrangement for them; and/or
  - (c) make an inappropriate recommendation about the DCA proposal.
- 5 We consider that DCA proposals should not involve creditors' trusts unless administrators have adequately considered the appropriateness of using a creditors' trust in the particular case, and the advantages and disadvantages for the company, the creditors and the administrator.
- 6 DCAs involving a creditors' trust create special risks for creditors. Further, using a creditors' trust in a DCA in some cases may be an abuse of the Part 5.3A process or be otherwise contrary to the public interest. As a result, our view is that while the use of a creditors' trust in a DCA may occasionally be justified by the circumstances of a particular company, indiscriminate use of creditors' trusts in DCAs is not appropriate.

## Why follow this guide?

**7** This guide indicates how we think administrators will perform their obligations where a DCA proposal involves a creditors' trust, if they are adequately and properly performing all their duties and functions.

**8** We will generally consider that an administrator has not complied with all their obligations under the Act and the general law if an administrator asks creditors to vote on a DCA proposal involving a creditors' trust and the administrator has not followed this guide in a material respect.

**9** In such cases, we may:

- (a) make an application to the court for the relevant DCA to be terminated or avoided; and/or
- (b) seek specific orders against the administrator under s445D, 445G, 447A, 447E(1) and/or 1321 as appropriate.

**10** In addition or alternatively, if we consider that the administrator has not adequately and properly performed their duties or functions as a registered liquidator (or is otherwise not fit and proper to remain a registered liquidator), we may make an application to the Companies Auditors and Liquidators Disciplinary Board (CALDB) under s1292(2) for cancellation or suspension of the administrator's status as a registered liquidator. The CALDB may also impose other sanctions under s1292(9).

**11** Where a s439A report or s445F notice referring to a DCA proposal involving a creditors' trust has already been sent to creditors but the relevant creditors' meeting has not been held before publication of this guide, administrators should give creditors as much additional information referred to this guide as it is reasonably practicable for the administrator to provide in the time between publication of this guide and the creditors' meeting.

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# Section 1: DCAs and creditors' trusts

## What is a creditors' trust?

**1.1** A creditors' trust in a DCA is a mechanism used to accelerate a company's exit from external administration. To date, it has been used most commonly (but not exclusively) in connection with the rehabilitation of public companies listed on Australian Stock Exchange Ltd (ASX). In some cases, this leads to a 'backdoor' listing.

**1.2** Typically, under the terms of the DCA 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 DCA 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.

**1.3** The company and/or third parties promise to make one or more payments (or transfer other property) to the trustee in satisfaction of the creditors' claims against the company. In return, the creditors' rights against the company are extinguished.

**1.4** 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.

**1.5** Usually, the DCA is 'effectuated' (and terminates) after the creditors' claims against the company have been removed in this way. In most cases, the DCA terminates immediately upon creation of the trust, which usually occurs when or shortly after the DCA is executed.

**1.6** When the DCA 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 Act.

## What are the special risks for creditors?

**1.7** We consider that there are different and additional risks for creditors where a DCA 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 DCA, trust deed and any other related documentation.

**1.8** The key additional risks are that:

- (a) under the DCA proposal, the DCA 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; or
  - (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 less (or no) legal rights if the DCA proposal is not fully complied with by all relevant parties; and
- (c) creditors may agree to the DCA proposal without being aware (or fully appreciating the implications) of these matters.

**1.9** 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 DCA will be beyond the reasonable contemplation or experience of most creditors bound by the DCA. 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 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 Act. Many creditors will have no or limited knowledge of trust law.

- (b) inadequate disclosure by administrators of material information about the DCA proposal;
- (c) the additional complexity of the legal and documentary arrangements needed to support the use of a creditors' trust under a DCA;
- (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 DCA or other persons in challenging a DCA that has already terminated.

## What are the obligations of administrators?

**1.10** Administrators have an overriding obligation to perform adequately and properly their duties and functions: s1292(2). This includes ensuring that the interests of creditors are adequately protected. Where a DCA proposal is concerned, we consider that an administrator who is fulfilling this obligation will:

- (a) evaluate the proposal before submitting it to creditors (see paragraphs 1.11–1.14);
- (b) disclose all material information about the proposal to creditors (see paragraphs 1.15–1.18); and
- (c) express an opinion about the proposal that adequately protects the interests of creditors (see paragraphs 1.19–1.22).

### Evaluating the proposal

**1.11** Before submitting any DCA proposal to creditors, administrators should consider whether there is a proposal suitable for submission. For example, it will rarely be appropriate for an administrator to submit to creditors a DCA proposal where the administrator does not have sufficient concrete details to comply with all their disclosure obligations: see paragraphs 1.15–1.18.

**1.12** Where the DCA 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 DCA proposal (if accepted) may be an abuse of Part 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 DCA proposal to creditors.

**1.13** It has been asserted to ASIC that s435A (particularly paragraph (a)) always justifies the use of creditors' trusts in DCAs.

Note: Section 435A states that the object of Part 5.3A is 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 that is not possible, results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

**1.14** In our view, s435A does not justify in a DCA every kind of mechanism that would produce one of the outcomes referred to in that

section. We consider that any mechanism intended to achieve one of those outcomes should only be included in a DCA if it is:

- (a) in the interests of creditors as a whole;
- (b) in accordance with the purpose and policy of Part 5.3A; and
- (c) consistent with the public interest.

Note 1: We consider, for example, that it is likely to be an abuse of Part 5.3A or otherwise contrary to the public interest for a DCA to involve a creditors' trust where:

- (a) there is no proper and compelling legal or commercial reason why the continued existence of the company or its business could not be achieved under a DCA that does not involve a creditors' trust. This includes cases where the underlying reason for using a creditors' trust is to circumvent the effect of s450E(2); or
- (b) the DCA proposal contemplates that the company would or could (after the DCA has been effectuated in accordance with its terms) continue in existence in an insolvent financial condition. See *Report No. 45, General Insolvency Inquiry*, Australia Law Reform Commission, 1988 (the Harmer Report), vol 1, page 62–3.

Note 2: 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; *Blacktown City Council v Macarthur Telecommunications P/L* (2004) 47 ACSR 391.

## Disclosing material information

**1.15** Section 439A(4) and reg 5.3A.02 set out matters that a voluntary administrator must include in the documents that accompany the notice of the second meeting of creditors. It has been held that a s439A report must contain all information that is material to the creditors' decision, including material details of what a proposed DCA will contain.

Note: See *M&S Butler Investments Pty Ltd v Granny May's Franchising Pty Ltd* (1997) 24 ACSR 695; *Commissioner of Taxation v Comcorp Australia Ltd* (1996) 70 FCR 356; 21 ACSR 590.

**1.16** We consider that deed administrators have an implied obligation to include similar matters in the documents that accompany a s445F notice where a DCA variation is proposed.

**1.17** Section 445D reinforces the disclosure obligations of administrators by providing that the court may terminate a DCA if (*inter alia*) information that is material to the creditors' decision to approve the proposed DCA was omitted or was false or misleading.

**1.18** When submitting to creditors a DCA proposal 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 such a proposal. In Section 2 of this guide, we set out the information we think is material to that decision.

## Expressing an opinion that protects creditors' interests

**1.19** Administrators have an obligation to provide creditors with a statement setting out (*inter alia*) the administrator's opinion about whether it would be in the creditors' interests for the company to execute a proposed DCA or DCA variation and the reasons for that opinion: see s439A(4)(b) and paragraph 1.16 of this guide.

**1.20** Where a DCA 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.

**1.21** We also consider that the obligation to ensure the interests of creditors are adequately protected means that there are some circumstances where an administrator should not recommend that creditors approve a DCA proposal involving a creditors' trust.

**1.22** Examples of such circumstances include where:

- (a) the proposed value of the creditors' trust fund cannot be reasonably estimated at the time the proposal will be voted on by the creditors. We consider that in such a case, 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 DCA which terminates almost immediately their status and rights as creditors;

Note: DCAs 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 Part 5.3A) will not be prematurely extinguished as may occur where a creditors' trust is used.

- (b) there is 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 DCA 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 DCA by the company or a third party;

Note: See also *Kalon v Sydney Land Corp P/L* (1998) 26 ACSR 593 upholding *Sydney Land Corp P/L v Kalon P/L* (1998) 26 ACSR 427.

- (c) the DCA 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 must be a registered liquidator, but will *never* be adequately protected if the trustee will or could be the company to which the administrator is appointed;

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.

- (d) 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;
- (e) the DCA 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 Act;
- (f) concrete details about the proposed structure and terms of the DCA 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 DCA 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 DCA and a draft trust deed have been prepared.

Note: See also *Kirwan v Cresvale Far East Ltd (in liq)* [2002] NSWCA 395 at [382] per Young CJ; (2003) 44 ACSR 21; *Commissioner of Taxation v Comcorp Australia Ltd* (1996) 70 FCR 356 at 389; 21 ACSR 590 at 624.

## **'Holding' DCAs and 'self-executing' creditors' trusts**

**1.23** We are aware that creditors (particularly of large companies) have been asked to approve so-called 'holding' DCAs. These holding DCAs are typically used as a means of providing more time for a voluntary administrator (or the directors or third parties) to develop proposals for restructuring or otherwise resuscitating the company, thereby avoiding the need for the voluntary administrator to seek an extension from the court of the convening period for the second creditors' meeting under s439A. Typically, holding DCAs do not contain any concrete provisions on the future of the company or any immediate benefits for creditors.

**1.24** In our view, administrators should not submit to creditors a proposal for a holding DCA where the terms of the holding DCA would permit subsequent creation of a creditors' trust and effectuation of the DCA without the need to first obtain express creditor approval of the creditors' trust by means of a formal variation of the DCA. We consider that before a creditors' trust is created, creditors should be given specific information as indicated in this guide.

**1.25** Where a holding DCA 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

Note: An open-ended or very lengthy period magnifies the potential remuneration of the deed administrator with little or no tangible benefit for creditors. It therefore raises significant conflict of interest issues, as well as issues about whether the holding DCA is in the interests of the creditors as a whole or infringes the purpose and policy of Part 5.3A.

- (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.

## Section 2: Disclosing material information

### What is material information?

**2.1** In this section of the guide, we set out what we think is material information where a DCA proposal involves a creditors' trust. In a particular case, there may also be other material information that should be disclosed.

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

**2.2** Administrators have an obligation to give creditors information that will enable them to:

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

The information should be set out in the s439A report (or explanation that accompanies the s445F notice of meeting) as simply, clearly and succinctly as possible in the circumstances.

**2.3** Where the DCA proposal involves a creditors' trust, we consider this obligation means that information should be provided which 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 DCA proposal, under a DCA that does not involve a creditors' trust, or under a winding up).

**2.4** 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 DCA proposal.

**2.5** Because of the additional complexity involved in a DCA 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.

**2.6** Where a DCA (or DCA variation) involving a creditors' trust is approved and executed, we expect administrators to lodge with ASIC, in addition to the DCA (or DCA variation):

- (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 DCA or is otherwise necessary to support the creditors' trust arrangements.

This is because ASIC, creditors and the public can only properly understand the DCA if they understand the associated arrangements.

**Table 1: Information for creditors**

<b>Reasons</b>	The reasons why the DCA proposal involves a creditors' trust (see paragraphs 2.7–2.9)
<b>Key events</b>	The anticipated sequence of key events if the DCA proposal is approved, and the implications for creditors (see paragraphs 2.10–2.11)
<b>Return</b>	The anticipated return to creditors/beneficiaries (see paragraph 2.12)
<b>Trustee particulars</b>	The identity, skills, experience and insurance of the proposed trustee (see paragraphs 2.13–2.14)
<b>Remuneration</b>	The proposed remuneration and expenses of the deed administrator and trustee (see paragraph 2.15–2.16)
<b>Indemnities</b>	Details of any indemnities for fees or liabilities (see paragraph 2.17)
<b>Powers</b>	The differences between the powers of a deed administrator under the Act and the trustee under the DCA proposal (see paragraph 2.18–2.19)
<b>Claims</b>	How creditors' claims will be dealt with under the DCA proposal and in what priority (see paragraphs 2.20–2.21)
<b>Other creditor/beneficiary differences</b>	A comparison of the protections and rights of creditors under the Act and of beneficiaries under the DCA proposal (see paragraphs 2.22–2.24)
<b>GEERS</b>	Any effect on employee entitlements under GEERS (see paragraph 2.25)
<b>Compliance opinion</b>	An opinion on the capability of the company (and relevant third parties) to comply with obligations to the trustee (see paragraph 2.26)
<b>Solvency statement</b>	The basis for an opinion that the company will be solvent at the date of effectuation of the DCA (see paragraph 2.27)
<b>Tax (company/trust)</b>	Details of the taxation and stamp duty implications for the company and the trust (see paragraph 2.28)
<b>Tax (creditor/beneficiary)</b>	Potential differences in taxation implications for creditors and beneficiaries (see paragraph 2.29)
<b>Other</b>	Any other material aspects or implications (see paragraph 2.30)

## Reasons

**2.7** Administrators should provide an explanation of the reasons why the DCA proposal involves a creditors' trust, instead of a DCA where creditors' claims and rights would be dealt with directly under the DCA and the Act.

**2.8** 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.

**2.9** If one of the stated reasons is to enable listing of the company or re-quotation of the company's financial products on a financial market such as ASX, details should also be provided of:

- (a) the market operator's requirements for listing or re-quotation and how it is proposed that the company would meet those requirements; and
- (b) how and why listing or re-quotation would be in the interests of the creditors (as opposed to the directors, shareholders or some other party).

## Key events

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

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

**2.11** 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 eventuate as anticipated.

## Return to creditors

**2.12** Administrators should provide information about the anticipated return to creditors/beneficiaries under the DCA 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 paragraph 1.22(a) of this guide.

- (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 DCA proposal did not involve a creditors' trust.

Note: We consider that the information in this paragraph should be linked to information provided about remuneration, expenses, taxation etc 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

**2.13** 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 paragraph 1.22(c) of this guide.

- (b) whether the DCA proposal requires the trustee (and any replacement trustee) of the creditors' trust to be the deed administrator or other person registered by ASIC under Part 9.2 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 and the CALDB have certain supervisory powers under Part 9.2 over conduct by the trustee where the DCA 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 paragraphs 1.22(d) and 2.14 of this guide.

**2.14** If the proposed trustee is a registered liquidator, administrators should note that:

- (a) where the registered liquidator has provided a performance bond as security for the purposes of s1284, that bond will not cover conduct by the registered liquidator in the capacity of trustee of a creditors' trust. The registered liquidator would need insurance covering conduct as a trustee; and
- (b) where the registered liquidator is relying on insurance to satisfy s1284 under Policy Statement 33 *Security deposits* [PS 33], it will be necessary to confirm whether that policy covers conduct by the registered liquidator in the capacity of trustee. If not, additional insurance would be needed.

## Remuneration and expenses

**2.15** 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.

**2.16** 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 paragraph 2.12 of this guide). 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 DCA.

Note: See also paragraph 1.22(e) of this guide.

## Indemnities

**2.17** 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 DCA or trust deed.

## Powers

**2.18** Administrators should explain the differences between the powers of a deed administrator under the Act and the powers the trustee would have under the proposed trust deed and the relevant State or Territory Trustee Act.

**2.19** 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

**2.20** Administrators should explain how creditors' claims against the company will be dealt with under the DCA 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.

**2.21** If unsecured creditors' priorities (as beneficiaries of the trust) will not follow the priorities set out in s556, 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 Act for creditors' claims, the differences and their implications for beneficiaries should also be explained.

Note: See also paragraph 1.22(e) of this guide.

## Other creditor/beneficiary differences

**2.22** Administrators should provide a comparison of the protections and rights that creditors would have under the Act as creditors of a company subject to a DCA, and the protections and rights they would have as beneficiaries of the proposed trust.

**2.23** 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 DCA;
- (d) apply to the court for the DCA to be varied, terminated or avoided; and
- (e) complain to ASIC about conduct by the deed administrator.

**2.24** 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 DCA, 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 DCA, 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.

## **GEERS**

**2.25** Administrators should disclose the effect (if any) for employee creditors of becoming a beneficiary of a creditors' trust on their rights under the General Employee Entitlements and Redundancy Scheme (GEERS), or on the Commonwealth Government's rights of subrogation under GEERS.

## **Compliance opinion**

**2.26** 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 DCA 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 DCA proposal is approved by creditors.

Note: See also paragraph 1.22(b) of this guide.

## Solvency statement

**2.27** Administrators should state the basis on which they have formed the opinion that the company will be solvent at the date of effectuation of the DCA, if the DCA is wholly effectuated on the terms proposed.

Note: An administrator who has not formed or cannot form this opinion should re-evaluate the proposal. See paragraph 1.14 of this guide.

## Taxation etc (company and trust)

**2.28** 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: Administrators are reminded that 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.

This should include explanation of how these costs will impact on the anticipated return to creditors/beneficiaries (see also paragraph 2.12 of this guide).

## Taxation (creditor/beneficiary)

**2.29** 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

**2.30** Administrators should provide information about any other material aspects or implications of the particular DCA 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) may not apply to registered liquidators acting as trustee of a creditors' trust.

- (b) if the DCA proposal involves preservation of the corporate shell, any independent opinion about the estimated value of the corporate shell;
- (c) if the DCA 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

In this guide, these terms have the following meanings:

**ABN** Has the same meaning as in s9

**Act** *Corporations Act 2001* (Cth), including regulations made for the purposes of the Act

**administrator** Has the same meaning as in s9

Note: It therefore includes deed administrators and voluntary administrators

**AFS licence** An Australian financial services licence under Part 7.6

**ASIC** Australian Securities and Investments Commission

**ASX** Australian Stock Exchange Ltd

**CALDB** Companies Auditors and Liquidators Disciplinary Board

**DCA** A deed of company arrangement

**DCA proposal** A proposed DCA or proposed variation of a DCA

**deed administrator** An administrator of a DCA

**GEERS** The General Employee Entitlements and Redundancy Scheme

**Part 9.2** (for example) A part of the Act (in this example, numbered 9.2)

**reg 9.2.01** (for example) A regulation in the *Corporations Regulations 2001* (in this example, numbered 9.2.01)

**registered liquidator** A person registered by ASIC under s1282(2)

**s1282** (for example) A section of the Act (in this example, numbered 1282)

**voluntary administrator** An administrator of a company but not of a DCA