Form 27D **Respondent's submissions**
(rule 44.03.3)

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P7 of 2018

BETWEEN:

MIGHTY RIVER INTERNATIONAL LIMITED
BVI 1482079
Appellant

and

10 BRYAN HUGHES AND DANIEL BREDENKAMP AS DEED ADMINISTRATORS OF MESA MINERALS LIMITED (SUBJECT TO DEED COMPANY ARRANGEMENT)
ACN 009 113 160
First Respondent

MESA MINERALS LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT)
ACN 009 113 160
Second Respondent

RESPONDENTS' SUBMISSIONS

Part I: The Respondents certify that this submission is in a form suitable for publication on the internet.

20 **Part II**: The Respondents agree with the statement of issues at AS[2].

Part III: The Respondents do not consider that notice is required or should be given under s.78B of the *Judiciary Act* 1903.

Part IV: Narrative statement of the relevant facts

1. The Respondents agree with the statement of facts in the Appellant's submissions, although the facts at AS[9] to [11] are not relevant to this appeal.

2. There is a concurrent finding that Mesa's ASX listing had some value, albeit undetermined, but potentially significant. That value would be lost if Mesa lost the benefit

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of the deed of company arrangement considered by the Court (**DOCA**) and is put into liquidation: J[85], [111] AB36-37, 44; FC [227(e)], [235], [390] AB129, 132-133, 179.

30 The potential loss of the listed shell was one of the reasons that the First Respondent did not favour liquidation: J[85]. Further, if liquidators were appointed, they would be likely to follow the same route to realising the assets of Mesa as the deed administrators, but the difference would be that the value of the listed shell would be destroyed: J[111].

3. In the Court of Appeal, Murphy JA also found that the DOCA was designed at least to provide the opportunity for a better return for creditors than would result from an immediate winding up. Further, as the Appellant accepted, in the meantime the assets of the company are safe: FC[235] AB132-133.

4. In relation to investigations into potential claims by the Second Respondent (**Mesa**) against various parties, the Court found that the First Respondent had pursued the alleged

40 claims with "some degree of vigour", and it was difficult to see how they could have been expected to do any more than they had done: J[80] AB35-36. The conduct of Mr Hughes was found to be "exemplary": J[96] AB40.

Part V: The Respondents' argument

5. The Court of Appeal was correct to reject the Appellant's assertion that a deed of company arrangement which does not specify some present or future property that is to be available to pay creditors' claims is not a valid deed under Pt 5.3A of the Act: FC[138], [219]-[221], [349] AB108, 126-127, 165.

6. The Appellant accepts, as it must, that it contends for an interpretation of the Act which would hold a deed valid if it specified property of an insignificant value as being available

50 to pay creditors' claims (and that even $1 would be sufficient), whereas a deed must be void if it frankly specifies that no property is available to pay creditors' claims. The Appellant's construction of s.444A(4)(b) has the result of promoting formalism above the text and purpose of s.444A(4)(b) and the objects of Pt 5.3A.

7. A deed will comply with s.444A(4)(b) if it specifies that there is no property available to pay creditors' claims. The text of s.444A(4)(b) provides for this conclusion. The absence of the words "*if any*" in s.444A(4)(b) makes it clear that the instrument must specify the

property that is to be available to pay creditors' claims, regardless of whether there is any property or not: cf AS[36]-[39].

8. In contrast, in relation to the conditions (if any) for the deed to come into operation or to continue in operation (in s.444A(4), (e) and (f)), the instrument need not mention conditions if there are none. Similarly, an instrument need not mention a moratorium period if none is provided for by the deed, as signified by the word "any" (s.444A(4)(c)). By avoiding the words "any" or "if any" in s.444A(4)(b), the drafters made clear that was not the intention with respect to property. Instead, regardless of whether there is to be property available, the instrument must address that matter. The use of the definite article in the phrase "*the* property" does not narrow its operation in the manner contended by the Appellant.[1]

9. As discussed further below, Pt 5.3A has a facilitative purpose, which provides creditors with flexibility. The purpose of s.444A(4) is to inform creditors about key aspects of the deed, and s.444A(4)(b) is included to ensure that the instrument informs creditors the extent to which the company's property is to be available for distribution (as the Court of Appeal found at FC[148]-[149] AB109 (Buss P), [220]-[221] AB127 (Murphy JA)). This purpose is met if the instrument stipulates that there is nothing to be distributed.

10. The primary difference between the constructions contended for by the Appellant and the Respondents is that the Respondents' construction promotes the informative purpose of s.444A(4)(b) in particular and the facilitative purpose of Pt 5.3A as a whole, whereas the Appellant's construction promotes meaningless formalism and potentially absurd results. The Respondents' construction should therefore be preferred.

Legislative purpose

11. The scheme of Pt 5.3A was summarised in *Lehman Brothers Holding v Swan CC* (2010) 240 CLR 509 (***Lehman Brothers***) at 518-522 [20]-[33]. The plurality (French CJ, Gummow, Hayne and Kiefel JJ) noted at [31] that the provisions establish that effect is to be given to the will of the requisite majority of creditors who vote at the relevant meeting. Judgment about what is to happen to the company, and in particular "*judgment*

[1] A similar argument, turning on the use of the definite article, was described by Lord Diplock as "bold and ingenious" in *Tolly v Morris* [1979] 1 WLR 592 at 602D.

about the commercial worth of any proposal for a deed of company arrangement", is committed to the body of all creditors. For the making of that decision, it is not necessary to divide creditors into separate classes. The only substantial qualifications to the generality of these propositions are provided by the conferral on the Court of powers under ss.445D and 600A: see *Lehman Brothers* at [31].

12. Hence, the cornerstone of Pt 5.3A is that it vests control of the company's future in creditors, and affords them a greater degree of flexibility than was previously afforded by liquidation of schemes of arrangement. Pt 5.3A was intended to provide for speed and ease of commencement of administration, minimisation of expensive and time-consuming court involvement and formal meeting procedures, flexibility of action and ease of transition to other insolvency solutions where an administration does not by itself offer all of the answers: see the explanatory memorandum accompanying the *Corporate Law Reform Bill 1992* (Cth) (**EM**) at [448],[2] which introduced Pt 5.3A. The EM provided at [447] that the Part was *"primarily designed to redress concerns that Australia's current corporate insolvency laws are inflexible and that they too easily and too often lead to the liquidation of companies, when some such companies could have been saved*".

13. Similarly, the Second Reading Speech provided (Hansard, House of Representatives, 3 November 1992, 2400 at 2404):

> "*It is often said of our insolvency laws that they are so inflexible and expensive to use that it is impossible for a company to seek to recover through an insolvency administration without facing the likelihood of liquidation. This is because most current forms of administration suffer from the fatal flaw that individual creditors can disrupt them to the point where they become unworkable.*
>
> *What is really needed, when a basically sound company faces solvency difficulties, is a capacity for that company to obtain a breather. The Bill offers that opportunity. Directors will be able to appoint an administrator, who will have the benefit of a moratorium on actions against the company while formulating a plan of action for consideration by the creditors. The emphasis is*

[2] The Court may have regard to the EM under s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth). Section 15AB applies specifically to the Corporations Act 2001 (Cth): s.5C of the Act.

on informality and flexibility. The emphasis is also on speed of action. The procedure does not allow the indefinite administrations which can occur, for example, under the United States chapter 11 approach. The emphasis is also on appropriate protection of creditors' interests, so that they will find that they are not unduly disadvantaged by the short moratorium proposed."

14. Prior to the introduction of Pt 5.3A, the only options available to companies were liquidation or a scheme of arrangement (under Part 5.1). In enacting Pt 5.3A, Parliament provided an alternative to the close scrutiny of the Court under schemes of arrangement and instead empowered the majority of creditors to make commercial decisions as to the future of the company.[3] The limited supervisory role of the Court in a voluntary administration was a deliberate recommendation of the *Harmer Report* (see [33], p.32 [56] and p.34 [62], RFM12, 13): see, eg, *Commissioner of Taxation (Cth) v Comcorp Australia Ltd* (1996) 70 FCR 356 at 363, 380. In *Lehman Brothers*, the Court also emphasised that the chief difference between Pt 5.3A and earlier provisions for statutory composition and arrangements in corporate insolvency is the role played by the Court: "*Earlier provisions required court approval before the scheme was effective; Pt 5.3A provides for disallowance by the Court after the deed has been made*" (at [32], emphasis in original).

15. The Appellant has emphasised that a voluntary administrator may apply for an extension of the convening period by approaching the Court: AS[27(e)], [44]-[50]. In practice, extensions are regularly granted: *Re Riviera* (2009) 72 ACSR 352 at [10]-[15]. However, regardless of whether any application is made, the statutory scheme provides separately for creditors, or other specified parties, to approach the Court in a broad range of circumstances specified in s.445D, including if the deed or a provision of it is oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more creditors, or the deed "should be terminated for some other reason": s.445D. The Court may also make declarations to avoid, validate, or vary a deed: s.445G. The powers of the administrators and creditors to enter into a deed, although broad and flexible, therefore remain subject to supervision in appropriate circumstances.

[3] Creditors (unlike a court) can be expected to take into account their own economic interests, and also to make a commercial assessment of the terms of the proposed transaction: *Hall v Poolman* (2009) 75 NSWLR 99 at 134.

16. The Appellant seeks to introduce a mandatory requirement into deeds of company arrangement that is not supported by a proper reading of the statutory text and in a manner that is contrary to *Lehman Brothers* at 521-523 [31], [32], [34]-[38]. The plurality said that, apart from ss.444A(4), 444A(5), 444DA and 444DB, the Act does not identify what provisions may or may not be contained in a deed of company arrangements, and the Act and the Regulations are silent about both the nature and content of the "arrangement" between the company and its creditors that may be made (at 523 [37]). Further, the relevant provisions of the Act (including the objects and structure of Pt 5.3A) provided "*no compelling reason to confine the terms upon which creditors might agree to the compromise of claims against the company by the making of a deed of arrangement*" (523 [38]). The interpretation advocated by the Appellant limits the flexibility of Pt 5.3A and seeks to confine the terms upon which the creditors might agree. It should be rejected.

Text

Section 444A(4)(b)

17. Contrary to AS[32], the "plain words" of s.444A(4)(b) do not require that the deed specify that there be property available for distribution. As set out at [7]-[8] above, the text provides that where there is no property available the deed must specify that to be the case. Other relevant textual considerations include the following.

18. Section 444A does not, in terms, require that the deed the subject of creditors' resolution should make property available for distribution to creditors. Creditors' power to pass a resolution to enter into a deed under s.444A(1) is broad, and there is no limit requiring that it provide for property to be made available for creditors' claims.

19. The requirements for what must be specified under s.444A(4) relate to the instrument which is prepared by the administrator. In addition to the terms of the deed which must be set out under s.444A(3), s.444A(4) requires that the instrument *also* specify certain matters, including "the property of the company… that is to be available to pay creditors' claims". Given that there is no statutory requirement that creditors resolve to execute a deed which makes available property for distribution, it cannot have been intended that the instrument prepared for execution must specify that there will be property available for distribution. This would introduce an implied limit on the flexibility afforded to

creditors under Pt 5.3A, and it is contrary to the broad power conferred on creditors by s.444A(1).

20. As the Court of Appeal held, the word "specify" means "to make a specific mention" (FC [220] AB127 (Murphy JA)) or "to expressly mention or identify it, or to spell it out" (FC [351] AB165-166 (Beech JA)). The informative purpose of s.444A(4) (see above at [9]) is fulfilled if the matters are expressly or specifically mentioned or identified. Under s.444A(4)(b), the instrument must therefore specify (specifically mention or identify) if there is to be property available or not, and if so what that property is. This DOCA satisfies the requirement; it specifies that no property of the company will be available to pay creditors' claims in cl.8.

21. The text of s.444A(4)(b) must also be construed in the context of Pt 5.3A as a whole, including the objects as set out in s.435A. There are many arrangements which may achieve the objects of Pt 5.3A without making property available to pay creditors' claims (see [37] to [40] below). Having regard to the scheme of Pt 5.3A outlined above, its objects under s.435A, and the text of s.444A, the Court should not unduly confine creditors' power to pursue those arrangements if they see fit: *Lehman Brothers* at 523 [38]. Further, some Court supervision is provided for by ss.445D and 445G. The legislature made a deliberate decision not to introduce greater court supervision, as the extrinsic materials above demonstrate: *Lehman Brothers* at 521 [32], see above at [12]-[14]. The Appellant's assertions at AS[32] should therefore be rejected.

22. Although "[o]ne cannot distribute 'no property'" (AS[34]), this argument gives undue weight to the definite article "the" (see [8] above) and insufficient weight to the remainder of s.444A(4)(b) and the reference to a subset of property "that is to be available". A deed might specify some particular property which is to be excluded or seek to include every possible form of property which might be available in the future: *Elliott v Water Wheel Holdings Pty Ltd (subject to deed of company arrangement)* [2004] FCAFC 253; (2004) 209 ALR 682 (***Elliott***) at [58]. Similarly, it is permissible under s.444A(4)(b) and may be consistent with s.435A to have a deed which does not specifically provide for a distribution of property to creditors.

23. The Appellant's emphasis on the absence of the words "any" or "if any" in s.444A(4)(b) is misplaced (AS[36]-[39]). This supports the Respondents' construction (see [7]-[8]

above). In any event, the mere fact of an inconsistent drafting technique (if there is one, as Buss P suggested at FC [165] AB112) does not mean that the Appellant's construction should be accepted. In interpreting s.444A(4)(b), the interpretation that would best achieve the purpose or object of the Act is to be preferred to each other interpretation: *Acts Interpretation Act 1901* (Cth), s.15AA. The object or purpose as set out in s.435A, as discerned by the extrinsic materials referred to above, is best achieved by the interpretation adopted by the Court of Appeal and advanced by the Respondents.

24. The contrary interpretation has the potential to introduce practical difficulties which would detract from the flexibility afforded by Pt 5.3A and the availability of deeds to creditors. On the Appellant's construction, creditors are precluded from entering into a deed if the administrator cannot identify some property of the company (which includes property not yet owned by the company and all future property under the definition of 'property' under s.9 of the Act), and further that it will be available to pay creditors' claims. It might not be possible to do so, either because the future property and property not yet owned by the company is uncertain, or because there is no property available. Further, it may be inevitable that some of the company's property will be divested and other property will be acquired (eg. when stock or debts are realised and replaced by cash), and the deed should not be invalid for failure to specify every conceivable form of property: *Elliott* at [56]. Alternatively, if future property, contingent property or property not yet owned is specified and later turns out to be unavailable to pay creditors' claims, on the Appellant's construction the deed could be rendered void. In the absence of any express requirement to this effect, it is unlikely that Parliament intended that creditors could not resolve to execute a deed in those circumstances.

Other textual considerations

25. There are other provisions which suggest that the distribution of property was not a precondition for creditors' entry into a deed. Section 444GA recognises that a deed of company arrangement may involve a transfer of shares in the company in sole or part satisfaction of creditors' claims (ie. a debt for equity swap: see [40] below). On the Appellant's construction, such a deed would be invalid if it did not also provide for property of the company to be distributed to creditors. This is unlikely to have been intended, having regard to ss.435A, 444A and 444GA.

26. Additionally, s.445FA(1)(c), read in conjunction with s.445FA(1)(a) and (b), contemplates the termination of a deed of company arrangement where the creditors' claims have been 'dealt with' in accordance with the deed, including other than by way of a realisation of the company's assets. There is no suggestion in the text of that section that property of the company is required to fulfil either condition. In some cases, it is possible that creditors may not wish to be paid from company property if it is necessary to extend payment terms to allow the company's business to survive, and the creditors take a longer term view of its working relationship with the company. If the creditors agree to the relationship, and as a whole are in a better position than if the company were to dissolve, there is no need for the Court to intrude on the arrangement.

Context and purpose: "holding" deeds and the convening period

27. The context and purpose are addressed above in relation to the legislative purpose, the statutory scheme and objects of Pt 5.3A and the extrinsic materials to which the Court may have regard. However, it is necessary to address the submissions at AS[44]-[50] to the effect that some there is unwritten requirement which would prevent creditors entering into a deed which may be categorised as a "holding" deed, because of the ability to apply for an extension of the convening period under s.439A(6).

28. A "holding" deed may be understood as referring to a deed which is used as a means of providing more time for a voluntary administrator 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 under s.439A: *ASIC Regulatory Guide No. 82,* "External Administration: Deeds of company arrangement involving a Creditors' Trust" at [1.23], RFM25. As Finkelstein J explained, it is called a "holding" deed because it is intended to be only a temporary measure, one that will maintain the status quo until the administrators can come up with a final suggestion for a restructure: *Sons Of Gwalia (Subject To Deed Of Company Arrangement) v Margaretic* (2006) 149 FCR 227 at 229 [3]; (2006) 56 ACSR 585; [2007] FCAFC 17.

29. Although there was evidence that "holding" deeds are regularly used by insolvency practitioners (J[5], AB10),[4] the term is not one which appears in the Act. As Gummow J

[4] Holding DOCAs have been the subject of judicial consideration without any criticism: see, eg, *Sons Of Gwalia (Subject To Deed Of Company Arrangement) v Margaretic* (2006) 149 FCR 227; (2006) 56 ACSR 585; [2007]

said in *Sons of Gwalia (Subject To Deed Of Company Arrangement) v Margaretic* (2007) 231 CLR 160 at 186 [35], it is important not to distract attention from the "supreme importance of statute law". There is nothing in the Act which says that a company cannot enter into a deed which is intended to maintain the status quo in this manner, if that is what creditors decide, and if the deed is not otherwise susceptible to termination under s.445D of the Act.

270 30. The Master found that the purpose of using the "Holding DOCA" was to avoid the need for a court application to extend the convening period for the second creditors' meeting: J[5], AB10. However, the Master also found that the potential loss of the ASX listing was one of the reasons that the First Respondent did not favour liquidation: J[85], AB36-37. Given that finding, there is no basis for the Appellant to submit that the purpose was "*to side-step or outflank the process by which the Court supervises the voluntary administrator and the mandated investigations*" (AS[44]).

31. The Appellant's submissions in relation to the relevance of the convening period are a distraction from the real issue, which is whether s.444A(4)(b) required that the DOCA specifically identify some property that was available to be distributed to creditors.
280 Further, those submissions should be rejected for the following reasons.

32. *First*, Pt 5.3A does not provide for a process by which the Court supervises voluntary administrators and their investigations: see above at [11]-[15]. The Court retains its power under ss.445D, 445G and 600A to make orders about the deed which is passed, but it was not given an ongoing role in supervising the voluntary administrator or his or her investigations. The Appellant's submissions about the "context and purpose" of court supervision are at odds with the legislative intention in this regard.

33. *Secondly,* on entry into the deed, the convening period ends. The deed effects a change in status of the company from a company under administration to a company subject to a

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FCAFC 17, and on appeal in this Court (2007) 231 CLR 160; *Darren Gordon Weaver, Andrew John Saker and Martin Jones In Their Capacity As Joint and Several Deed Administrators of Midwest Vanadium Pty Ltd v Noble Resources Ltd* (2010) 41 WAR 301 at 306 [25]; (2010) 79 ACSR 237; [2010] WASC 182 (Martin CJ); *Chief Commissioner of State Revenue v CCM Holdings Trust Pty Ltd* [2014] NSWCA 42 at [21] (Gleeson JA); see also *Green (as voluntary administrators of Bevillesta Pty Ltd)* [2011] NSWSC 417; (2011) 84 ALR 215 at [65]-[68] (involving a creditors' trust); *Mentha, in the matter of Arrium Limited (administrators appointed)* [2016] FCA 1300.

deed of company arrangement.[5] This applies for any deed, regardless of whether it may be described as a "holding" deed.

34. *Thirdly,* it may be accepted that the matters taken into account by the Court when granting an extension under s.439A(6) (see, eg, *Re Riviera Group Pty Ltd* (2009) 72 ACSR 352 at [13]-[14]) are different from the matters which creditors may take into account. The distinction between the matters taken into account by the administrators in recommending a deed and the Court in considering whether to extend the convening period is irrelevant (cf. AS[47], [48]). The administrators' role is to conduct investigations into the company's business, property, affairs and financial circumstances, and form an opinion under s.438A as to whether it is in creditors' interests to enter into a deed of company arrangement. The powers of the administrators and deed administrators are not at large: each has fiduciary duties, as an officer of the company under administration, which operate as a constraint in exercising those powers and performing his or her statutory function (*Macks v Viscariello* [2017] SASCFC 172 [213]). They are qualified and experienced business persons who possess minimum experience and qualification requirements and must be independent (ss.448B, 448C). Ultimately, however, it remains a matter for creditors as to whether to accept the administrators' recommendation. This reflects the purpose of Pt 5.3A.

35. *Fourthly,* the availability of a "holding" deed does not remove "important safeguards" provided for by Pt 5.3A (cf AS[45], [47]).

36. The entry into a holding deed does not remove a "*judicial safeguard*" in favour of creditors who are not in the majority (cf. AS[45], [47], [49]). Pt 5.3A was a deliberate move away from a system which allowed individual creditors to disrupt insolvency administration: see above at [12]-[14]. The grounds on which the Court may terminate a deed are broad (particularly having regard to s.445D(1)(g): "the deed should be terminated for some other reason"). The fact that an applicant would bear an onus in any application to set aside or terminate the deed under s.445D reflects the statutory starting point that effect is to be given to the will of the requisite majority (i.e. a majority of creditors voting and where those in favour hold more than half of the total debts held by those voting). The "*judicial protection*" provided for by Pt 5.3A is not rendered illusory

[5] *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636 at 649 [25].

by the adoption of a "holding" deed; rather, the Court retains the power to set any deed aside if satisfied that it should do so.

Hypothetical deeds

37. The example of deeds specifying a nominal amount of property to pay creditors claims is not a mere hypothetical. It demonstrates that the Appellant's construction unduly elevates formalism over the text and purpose of s.444A(4)(b) (see [6], [10] above).

38. The Appellant says that such a hypothetical deed would be liable to set aside under s.445D (AS[55]). The fact that the Court's power is sufficient to protect creditors under this hypothetical deed suggests that it is similarly effective to protect creditors who are dissatisfied with a deed of company arrangement which does not specify any property for distribution to creditors. In neither case is the Court's jurisdiction illusory.

39. There are other deeds which are used in insolvency practice, which do not necessarily involve use of the company's property to pay creditors' claims, but meet the specific objects of s.435A by improving an insolvent company's prospects of returning to solvency and producing a greater return to creditors. For example, creditors may exercise their judgment to enter into a deed which provides for other matters such as a moratorium on claims and, or alternatively, a "debt for equity" swap under s.444GA. Creditors' claims may be given up or compromised. A third party may pay creditors' claims from property which never enters the company's hands. There may be a better return to creditors in the longer term, despite there being no property of the company available for distribution. Hence, the objects of s.435A may be met regardless of whether property is available for distribution under the deed.

40. The example of a deed providing for a debt for equity swap is instructive (see FC [224] AB128). These are commonly used in insolvency practice[6] and do not necessarily involve the payment of creditors.[7] In certain circumstances where payment is contemplated, the deed fund is not necessarily property of the company.[8] Additionally, there may be tax

[6] See for example *Re Western Work Force Pty Ltd* [2017] FCA 342; *In re Mirabela Nickel (subject to deed of company arrangement)* [2014] NSWSC 836; *Re Nexus Energy Ltd (subject to deed of company arrangement)* [2014] NSWSC 1910; *Re Weaver v Noble Resources Ltd* (2010) 41 WAR 301.

[7] *Re Paladin Energy Ltd (subject to deed of company arrangement)* [2018] NSWSC 11.

[8] *Re Bluenergy Group Ltd (Subject to deed of company arrangement) (admin apptd)* [2015] NSWSC 977, (2015)

advantages of a share sale or recapitalisation as opposed to asset or business sales.[9] It appears that no Court has made a finding that a deed of company arrangement containing a debt for equity swap contravenes Pt 5.3A on the grounds that no property of the company is distributed to creditors.

Relevant aspects of the DOCA

41. Each deed of company arrangement must be considered against its particular circumstances as to whether the deed does lay the foundation for, or facilitate the prospect of, a better return to creditors.

42. This DOCA maximised the chances of Mesa, or as much as possible of its business, continuing, as follows:

(a) It provided that "[s]ubject to any variation" of the deed, there would be no property of Mesa available for distribution to creditors under the deed. On a proper reading of the DOCA, it was intended that if the realisation process was successful a variation of the DOCA could be pursued and the property of the company would be made available to pay creditors' claims. The Act permits variations of deeds of company arrangement and this is expressly contemplated by cl.17 of the DOCA. A deed of company arrangement which provides the foundation for, or facilitates (in a realistic way), the prospect of a better return to creditors than would result in an immediate winding up, albeit that any such returns may be dependent on a variation to the instrument, is consistent with the objective outlined in s.435A(b) (See Murphy JA FC[243] AB134-135);

(b) It provided that the Respondents continue investigation into claims that Mesa might have against third parties commenced in the voluntary administration period (DOCA, cl.9.1);

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107 ACSR 373 at 378 [16].

[9]Ryan J Turner, 'Debt for equity swaps and corporate restructuring under s.444GA of the Corporations Act' (2015) 26 JBFLP 269, 272. See also, in relation to advantages of share sale or recapitalisation, Explanatory Memorandum, *Corporations Amendment Insolvency Bill 2007* (Cth) at 100 [7.54] - [7.55].

(c) It provided that the Respondents continue a reconstruction or realisation process commenced in the voluntary administration period (DOCA, cl.9.2 to 9.4);

(d) It provided a mechanism for the Respondents to put proposals for the reconstruction of the company to creditors, including for the partial or full sale of the company's assets, to creditors, together with the terms of any further deed of company arrangement or other mechanism designed to give effect to the proposal (DOCA, cl.9.3, 15(b) and (c));

(e) It provided for a moratorium and deferral of debts, thereby preserving the assets that would be available to pay creditors' claims under a varied deed or in the event of a winding-up (DOCA cl.10); and

(f) It provided for regular bi-monthly reporting to creditors and the provision of a report prior to the Sunset Date in relation to items including the possible proposals for reconstruction of the company (DOCA cl.15).

43. Therefore, the DOCA put in place a mechanism for the orderly sale of Mesa's assets, and the process required creditor approval. It was anticipated that "when the sale process was complete or when plans for reorganisation had reached fruition there would be a meeting which would vary the DOCA to allow for the realisation of the assets in the most expeditious fashion and for distribution of the sale proceeds to creditors and perhaps shareholders": J[106] AB43.

44. Additionally, one of the purposes of was to seek proposals "to reconstruct the Company with a view to reaching a position where the Company's securities may be re-quoted for trading on the ASX, including Proposals for the partial or full sale of the Company's assets" (DOCA, cl.9.2). The ASX listing was an asset which would not have otherwise been able to be realised in a liquidation: J[85] AB36-37, [111] AB44. The DOCA therefore provided the potential for a better return to creditors than a winding up.

45. As Beech JA found, in voting for the DOCA the majority of creditors chose to accept a moratorium on their debts while the administrators took steps to investigate claims, seek proposals, and then report on the outcome of those steps to inform the creditors' decision as to what should occur. That reflects a commercial judgment that the taking of those steps was more likely to produce a better return for creditors than the immediate winding

up of the company: FC[389] AB178. It is not for the Court to make its own assessment of whether a particular deed of company arrangement presents a better prospect of returns for creditors than immediate winding up of the company.

46. This DOCA satisfies the requirements of s.444A(4)(b) and is consistent with the objects of Pt 5.3A. The appeal should therefore be dismissed.

Relief and section 445G

Operation of s.445G

47. The Court of Appeal declined to deal with the operation of s.445G, as it did not arise. In the event that the Court determines that the DOCA does not comply with s.444A(4)(b), the Court should remit the matter to the Court of Appeal or, alternatively, the Master or other judge of the Supreme Court to determine whether the DOCA should be declared void or not void, or validated under s.445G(2) or (3). Generally speaking, that would be done on the basis of the circumstances as they exist at the time of rehearing, and the parties should be given an opportunity to lead evidence as to those circumstances: *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 at 183 [31].

48. It is therefore unnecessary for this Court to address the proper construction of s.445G(2) and (3) of the Act and the Appellant's submissions in AS[67]-[102]. However, as the matter has been raised, the following brief points may be made in response.

49. In the event that this Court determines that the DOCA did not comply with s.444A(4)(b), the Respondents would contend that it should be validated under s.445G(3), or varied under s.445G(4) to reflect the circumstances as they now exist.

50. The Appellant relies on a formalistic construction of s.444A(4)(b) and a technical breach of Pt 5.3A, so that that all that would be required to comply is that some nominal property be specified as being available for creditors. If that construction is accepted, the s.445G powers should be construed broadly to prevent creditors' intentions being frustrated.

51. In relation to the structure of s.445G, the Respondents agree that, *first*, the jurisdiction to make an order under s.445G is conferred where an applicant can show that there is doubt as to whether a deed of company arrangement was entered into in accordance with Pt 5.3A or complies with Pt 5.3A.

52. *Secondly,* once the jurisdiction is conferred, the task for the Court is to apply the facts as found to determine whether the deed, or a provision of it, is void or not void within the meaning of s.445G(2).

53. *Thirdly,* the Court will consider whether to exercise its discretion under s.445G(2) or (3). The cases suggest that the powers of the Court under ss.445D and 445G are discretionary, and are to be exercised having regard to both the interests of the creditors as a whole, and in the public interest.[10] It may be accepted that if a deed was not entered into in accordance with Pt 5.3A or does not comply with Pt 5.3A, and if the Court is not otherwise minded to grant relief validating or varying the deed under s.445G(3), the Court would ordinarily exercise the discretion under s.445G(2) to make a declaration that the deed, or a provision of it, is void. However:

(a) The Court has a discretion as to whether to declare that the deed is void, or to limit the declaration so that it relates only to a provision of it. That discretion is unaffected by the s.445G(3) criteria; and

(b) There may be cases where the Court would decline to declare a deed void despite the criteria in s.445G(3) not being satisfied. For example, the Court declined to declare a deed void where there was no practical benefit to creditors and to do so might visit hardship on classes of creditors such as employees: as occurred in *Deputy Commissioner of Taxation v Pddam Pty Ltd* (1996) 19 ACSR 498 at 512; [1996] FCA 1386 at [54]. Similarly, the Court declined to declare a deed void in a case where there was unexplained delay and there were potential adverse consequences for third parties without discernible benefit to the applicant: *Joseph Khoury & Sons v Zambena Pty Ltd* (2009) 217 ALR 527 at 544 [87]; [1999] NSWCA 402 (Fitzgerald JA, Davies AJA agreeing).

54. *Fourthly,* in relation to s.445G(3), the Court may declare that the deed, or a provision of it, is valid despite a contravention of a provision of Pt 5.3A, if it is satisfied that the provision was substantially complied with and no injustice will result for anyone bound by the deed if the contravention is disregarded. The Respondents accept that the s.445G(3)

[10] *Emanuele v Australian Securities Commission* (1995) 63 FCR 54 at 69C; *Joseph Khoury & Sons v Zambena Pty Ltd* (1999) 217 ALR 527; [1999] NSWCA 402 at [63]-[67]; *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 156 FLR 453 at 477 [107].

discretion is only enlivened if the criteria in s.445G(3)(a) and (b) are met. However, if the issue arises, the Respondents will contend that they are met in this case.

55. A question of construction arises as to the construction of the "provision" of Pt 5.3A. The Appellant takes a narrow construction assumes that the relevant provision in the present
460 context is s.444A(4)(b), but it could equally be interpreted (in the present context) as referring to ss.444A, specifically 444A(4). If the "provision" is interpreted too narrowly the question of "substantial" compliance becomes otiose, as the only inquiry will be whether or not there was compliance. A broader interpretation, which takes account of the fact that a deed complies with all of the requirements of s.444A except for one, better gives effect to the Court's remedial power and the legislature's concern that a deed which "substantially" complies should be preserved where possible. However, even if a narrower interpretation is taken, the DOCA substantially complied in the present case: see [58] and [62] below.

56. It has been suggested that the question whether there is substantial compliance is a matter
470 of degree, and involves a comparison between the practical effect of what was done and the practical effect parliament sought to achieve: *Commissioner of Taxation (Cth) v Comcorp Australia Ltd* (1996) 70 FCR 356 at 395-396 (Carr J, Lockhart J agreeing; Sheppard J dissented at 367-368) (**Comcorp**); *MYT Engineering v Mulcon* (1997) 140 FLR 247 at 249 (Handley JA) (reversed on appeal, but no question arose as to the making of an order under s.445G(3): see (1999) 195 CLR 636 at [29]). One assesses what has been lost by each respective contravention compared to what would have been if there had been no contravention, and asks: "Is the difference between the two such that one cannot fairly say that the provision was 'substantially complied with?": *Comcorp* at 396B.

57. The Appellant suggests that the contravened requirement does not admit "degrees of
480 compliance" in that it cannot be "substantially" complied with: AS[93]. The Appellant draws an analogy with cases where a time-limit was missed (for example, so that where the deed was not executed within that time-limit, other consequences defined by Parliament automatically follow): *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1997) 140 FLR 247 at 249-250 (Handley JA) and 268 (Powell JA); *S T (2) Pty Ltd v Lockwood* (1998) 27 ACSR 667 at 670-673.

58. However, the analogy is false. The stipulations for what an instrument setting out the terms of the deed should specify is different from a strict time-limit, which is either met or missed. The deed may substantially comply with the requirements of s.444A(4) by setting out most of the matters required to be addressed, or by leaving certain matters to implication. This is so even if s.445G(3) is interpreted narrowly so that the only "provision" of Pt 5.3A to be considered is s.444A(4)(b). If (contrary to the submissions above) a deed must comply by formally specifying some nominal property, the Court should exercise its discretion to validate a deed which expressly informs creditors that there is no property available. There is no substantive difference between the two, and the informative purpose of s.444A(4)(b) is met. The approach set out in [56] above, applying *Comcorp*, is appropriate.

59. *Finally,* if a provision of the deed is declared to be void, the Court may vary the deed, but only with the consent of the deed administrator. The Court's discretion to do so will obviously give rise to different considerations from those set out in s.445G(3).

Application in the present case

60. The Respondents maintain that the matter should be remitted for determination of these questions.

61. Should this Court decide to determine the question of s.445G, the Respondents seek a declaration that the DOCA is not void. If the Court determines that s.444A(4) was not complied with, the Respondents seek that any declaration under s.445G(2) be limited to cl.8 of the DOCA. Further, or in the alternative, the Respondents seek an order under 445G(3) to validate the DOCA. In the event that a provision of the DOCA is declared void and not validated, the Respondents would wish to consider a variation to it.

62. In the event that this Court determines that it should exercise the discretion for itself, the following matters are relevant:

(a) The DOCA is substantially compliant with s.444A(4)(b) in circumstances where:

(i) although the DOCA stated there would be "no property of the company available for distribution" it was clear that creditors understood that property may become available for distribution to creditors after a sale proposal was received and the DOCA was varied;

(ii) the creditors were aware of the terms of the DOCA and agreed with the Respondents' recommendation that the DOCA was in the best interests of creditors, and results in a better return for company creditors than would result from an immediate winding up of the company; and

520 (iii) accordingly the practical effect of the DOCA substantially equates with the practical effect which the legislature sought to achieve; and

(b) the Appellant has not shown that they, or any other creditor, will suffer any injustice if the DOCA is declared to be valid.

63. The appeal should be dismissed as the DOCA complies with s.444A(4)(b) of the Act. Alternatively, this is an appropriate case for the Court to exercise its powers under s.445G to preserve its operation.

Part VI: Not applicable.

Part VII: The Respondents propose to liaise with the first Respondent in P8 of 2018 to ensure that the total time for all Respondents' submissions is concluded within 2 hours and
530 15 minutes.

Dated: 4 May 2018

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