



# Update

Insolvency

April 2010

## Schemes, Yes - DOCAs, No Yes, or No?

On 30 March 2010 the High Court of Australia dismissed the Appeal in the *Lehman Brothers v City of Swan* matter. At that time, reasons were not given and were only published on 14 April 2010. Previously, the Full Court of the Federal Court had determined that the Lehman Brothers Deed of Company Arrangement (DOCA) was void because it had purported to bind creditors respecting their rights against persons other than the company. In contrast, previously, the Full Court of the Federal Court had upheld a Scheme of Company Arrangement between four companies in the Opes Prime Group and their creditors which did have the effect of binding creditors respecting their rights against third parties. The Full Court had concluded if there was an adequate nexus between the release and the relationship between creditor and company that should suffice.

### The Decision

The main judgment of the High Court focused on the strict interpretation of the words of section 444D(1), which says that "all creditors of the company" are bound by a DOCA and they are bound "so far as concerns claims" against the subject company. These words make it clear that DOCAs can bind creditors of that company to release their claims against that company only, not their claims against third parties. In a separate judgment, Heydon J also referred to the rule of construction in the *Mabo* case that "Clear and unambiguous words be used before there will be imputed to the legislature an attempt to expropriate or extinguish valuable rights relating to property without fair compensation." Given the absence of clear words in this statute, the words should be read as not having that effect.

### Implications

There has been significant speculation in the insolvency community as to whether in the Lehman Brothers case, the High Court would express a view on the earlier Opes Prime decision. Both the primary judges and Heydon J expressly avoided doing so. However the majority did note that unlike section 444D(1), section 411(4) does not qualify the extent to which creditors are bound.

However, the approach taken by the High Court could provide some sign posts as to its attitude should a subsequent Scheme of Company Arrangement come before that Court. On the one hand, the Court may look closely at the words in section 411(1), which refers to "a Part 5.1 body and its creditors". Are those words equivalent to section 444D(1) "all creditors of the

company" and if so, do the words "so far as concerns" act as a limitation in section 444D(1) which does not exist in section 411? On the other hand, the Court may apply the rule of construction that clear words are required before legislation should be read as intending to aid the expropriation or extinguishment of rights of property without fair compensation.

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