

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: of 2023

IN THE MATTER OF	PCA (QLD) Pty Ltd (subject to Deed of Company Arrangement) ACN 141 148 245
Applicants	Destination Brisbane Consortium Integrated Resort Operations Pty Ltd as trustee for The Destination Brisbane Consortium Integrated Resort Operating Trust and QWB Residential Precinct Operations Pty Ltd as trustee for the QWB Residential Precinct Operations Trust
	and
First Respondent	PCA (QLD) Pty Ltd (subject to Deed of Company Arrangement) ACN 141 148 245
	and
Second Respondent	Salvatore Algeri, Jason Tracy, David Orr and Matt Donnelly in their capacities as Deed Administrators of the Deed Companies

AMENDED ORIGINATING APPLICATION

A. DETAILS OF APPLICATION

This application is made under sections 445D, 450D, 445G, 447A, 447B and ~~444E~~44E of the *Corporations Act 2001* (Cth).

On the facts stated in the supporting affidavit, the applicant, applies for orders that:

1. Pursuant to:
 - (a) section 447A of the Act, Part 5.3A of the Act is to operate in relation to the Deed Companies, alternatively PCA, as if section 445G and section 445A of the Act provided that the DOCA may be varied by an order of the Court;

ORIGINATING APPLICATION
Filed on behalf of the Applicant
Form 2, Version 3, approved 8/10/2018
Uniform Civil Procedure Rules 1999
Rule 2.2
UCPR Schedule 1A

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- (b) section 445G or section 445A as so varied and applied to the Deed Companies, alternatively PCA, the DOCA be amended in the terms set out in Annexure A; and
 - (c) section 447A of the Act, Part 5.3A of the Act is to operate in relation to the Deed Companies, alternatively PCA, such that the DOCA containing the amendments set out in Annexure A, is valid.
- 2. In the alternative to paragraph 1, pursuant to s 447A(1) of the Act, Part 5.3A of the Act is to operate in relation to the Deed Companies, alternatively PCA, as if the DOCA given effect to pursuant to section 444A and executed pursuant to section 444B was always constituted by the DOCA as amended in accordance with Annexure A.
- 3. In the alternative to paragraphs 1 and 2, pursuant to sections 445G of the Act (on the section 445G grounds):
 - (a) clauses 1.1, 1.5, 14.11, 15.1(a), 15.3, 15.4 and 15.5 of the DOCA are declared void as against DBC; and
 - (b) thereafter, the Deed Administrators having consented, the DOCA is varied as set out in Annexure A.
- 4. In the alternative to paragraphs 1 to 3:
 - (a) pursuant to s 447A of the Act, Part 5.3A of the Act is to operate in relation to the Deed Companies, alternatively PCA, as if section 445G(4) of the Act did not require the Deed Administrators' consent;
 - (b) pursuant to sections 445G(4) as amended (on the section 445G grounds):
 - (i) clauses 1.1, 1.5, 14.11, 15.1(a), 15.3, 15.4 and 15.5 of the DOCA are declared void;
 - (ii) thereafter, the DOCA is varied by the reinstatement of clauses 1.1, 1.5, 14.11, 15.3 and 15.5 varied in the manner set out at Annexure A.
- 5. In the alternative to paragraphs 1 to 4 e, pursuant to section 447A(1) of the Act, Part 5.3A of the Act operates in relation to the Deed Companies, alternatively PCA, as follows:

- (a) Section 444D(1) of the Act is varied so that the DOCA does not bind DBC to the extent that the DOCA does not release, extinguish or otherwise discharge the DBC Claim other than in accordance with subparagraph (c) below;
- (b) for the avoidance of doubt, section 444D(1), is varied as set out in subparagraph (a) hereof notwithstanding the terms of the DOCA and how the DOCA would otherwise operate, and including by operation of clauses 1.5, 14.11, 15.1(a), 15.2, 15.3(a), (c) & (d), 15.4, 15.5 and the definition of “Claim” and “Creditor” in clause 1.1 thereof;
- (c) the DBC Claim will be released and extinguished upon the first to occur of the following:
 - (A) where any judgment (other than an interim or interlocutory judgment), Court Order, settlement, compromise or other agreement with PCA in respect of DBC’s Claim results in a net amount being payable by or on behalf of PCA to DBC:
 - (I) 28 days after all of the Insurance Proceeds, having been either received by PCA and paid to DBC or paid to DBC directly, provided that no appeal or review of a judgment has been filed within that 28 day period (and if any appeal or review is lodged within that 28 day period, then this clause shall apply to the outcome of that appeal or review); or
 - (II) 28 days after it has been determined by a judgment delivered by a court of competent jurisdiction (with all appeal rights either being exhausted by PCA or having lapsed on the part of the relevant Insurer) that even though the DBC Claim has resulted in an amount being payable by PCA to BC, each Insurer who PCA is, or may be entitled to be, indemnified under a contract of insurance in respect of the DBC Claim, is not liable to indemnify PCA; or
 - (B) where any judgment (other than an interim or interlocutory judgement) Court Order, settlement, compromise or other

agreement with PCA does not result in any net amount being payable by or on behalf of PCA to DBC:

- (I) in the case of a judgment, 28 days after that judgment is handed down, provided that no appeal or review of a judgment has been filed within that 28 day period (and if any appeal or review is lodged within that 28 day period, then this clause shall apply to the outcome of that appeal or review); or
 - (II) in the case of a settlement, compromise or other agreement, when that settlement compromise or other agreement takes effect.
- (d) Section 444H(1) of the Act is varied so that the DOCA releases PCA from the DBC Claim only so that satisfaction in respect of the DBC Claim is restricted to the Insurance Proceeds.
6. Within seven days of the making of any of the orders in paragraphs 1 to 5 above, the Second Respondent must:
- (a) cause notice of the making of the orders to be published in a national newspaper; and
 - (b) lodge a copy of the orders as made, including Annexure A, with ASIC.
7. Leave be granted pursuant section ~~444E(3) 444E(3)~~ of Act for DBC, to commence and proceed with proceedings against PCA, in respect of the claims and matters the subject of the draft claim and statement of claim exhibited to the affidavit of David Rodighiero to be sworn.
8. Such further or other order or direction as the Court considers appropriate.
9. The Second Respondent pay the applicants costs of the application.

Definitions:

Act means the *Corporations Act 2001* (Cth).

Annexure A means the document marked 'Annexure A' attached hereto.

DBC means the Applicants.

DBC Claim means any claim of the DBC Creditor (including but not limited to any claim for legal and other professional costs associated with pursuing or recovering any DBC Claim) against PCA and including (without limitation) any claim made by DBC against PCA in respect of or in connection with the alleged damage, destruction, interference, subsidence, movement or other impact to the REX during 2020.

DBC Creditor means the applicants.

Deed Administrators means Salvatore Algeri, Jason Tracy, David Orr and Matt Donnelly in their capacity as joint and several voluntary administrators of the Deed Companies.

Deed Companies means the companies listed in Schedule 1 of the DOCA.

DOCA means the Deed of Company Arrangement dated 21 July 2022 between the companies listed at schedule 1 thereto, Salvatore Algeri, Jason Tracy, David Orr and Matt Donnelly in their capacity as joint and several voluntary administrators of the Deed Companies and WBHO Constructions Pty Ltd, a company incorporated pursuant to the laws of South Africa with Registration Number 1983/011953/07.

Insurance Proceeds means any amount actually paid to or on behalf of and/or received by PCA after the 21 July 2022 by or from an Insurer (including but not limited to all indemnified amounts along with any legal and other adverse costs payable by PCA to any plaintiff).

Insurer means any insurers of PCA.

PCA means the First Respondent.

REX means the Riverside Expressway in Brisbane, Queensland.

Section 445G(1) grounds are the following specific grounds giving rise to doubt as to whether the DOCA was entered into in accordance with Part 5.3A of the Act or complies with Part 5.3A of the Act:

- (a) contrary to s 439A(1) of the Act, the Deed Administrators failed to properly convene the second meeting of creditors on 30 June 2022 by convening a meeting of creditors of PCA without giving notice of the meeting to DBC, a creditor of PCA;
- (b) contrary to rule 75-225 of the *Insolvency Practice Rules (Corporations)* 2016, the Deed Administrators failed to properly convene the second meeting of creditors on 30 June 2022 by giving notice of the meeting to as

many of the creditors of PCA as reasonably practicable because notice of the meeting was not given to DBC, a creditor of PCA;

- (c) contrary to s 438A(a) of the Act, the Deed Administrators failed to properly investigate PCA's business, property, affairs and financial circumstances, because they failed to make any or any adequate enquiries about the nature and quantum of DBC's claims against PCA and how those claims may impact the return to creditors under a deed of company arrangement or under liquidation;
- (d) contrary to s 439C of the Act, the resolution of creditors that PCA execute the DOCA did not occur at a properly convened meeting under s 439A for the reasons set out in paragraphs (a) and (b) above;
- (e) contrary to s 444A of the Act, the DOCA that was prepared was not as a result of a resolution of creditors at a properly convened meeting under s 439A for the reasons set out in paragraph (d) above; and
- (f) contrary to s 444B of the Act, the DOCA that was executed was not an instrument prepared under s 444A for the reasons set out in (e) above.

Signed

Description	Carter Newell Lawyers Solicitors for the Applicant
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Dated 31 March 2023

B. NOTICE TO RESPONDENTS(S)

TO: PCA (QLD) Pty Ltd (subject to Deed of Company Arrangement) 141 148 245

of: c/- Deloitte Financial Advisory
477 Collins Street
Melbourne VIC 3000

AND: Salvatore Algeri, Jason Tracy, David Orr and Matt Donnelly in their capacities as Deed Administrators of the Deed Companies

of: c/- Deloitte Financial Advisory
477 Collins Street
Melbourne VIC 3000

This application will be heard by the Court at QEII Courts of Law Complex, 415 George Street, Brisbane Qld 4000 on: _____ at _____.

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you. In addition you must before the day for hearing file a notice of appearance in this Registry. The notice should be in Form 4. You must serve a copy of it at the applicant's address for service shown in this application as soon as possible.

D. FILING

Date of filing: _____

Registrar

This originating application is filed by Carter Newell Lawyers for the applicant.

E. SERVICE

The applicant's address for service is:

Applicant's solicitors name:	David Rodighiero
and firm name:	Carter Newell Lawyers
Solicitor's business address:	Level 13, 215 Adelaide Street, Brisbane Qld 4000
Address for service:	Level 13, 215 Adelaide Street, Brisbane Qld 4000
Telephone:	07 3000 8376
Fax:	07 3000 8488
E-mail address (if any):	djr@carternewell.com

It is intended to serve a copy of this originating application on each respondent and on any person listed below:

1. PCA (Qld) Pty Ltd (subject to Deed of Company Arrangement) ACN 141 148 245
2. Salvatore Algeri, Jason Tracy, David Orr and Matt Donnelly in their capacities as Deed Administrators of the Deed Companies

Annexure A

1. The definition of “Claim” in clause 1.1 of the DOCA be varied to read:

Claim means any action, demand, suit, proceeding, debt, claim, loss, damage or other liability (whether present or future, certain or contingent, ascertained or sounding only in damages) whatsoever and however incurred, arising directly or indirectly from any act or omission by the Deed Companies (or any one of them) or by any agreement, circumstance or event, occurring on or before the Appointment Date, but does not include an Excluded Claim or the DBC Claim.

2. The following additional definitions be inserted in clause 1.1 of the DOCA:

DBC means Destination Brisbane Consortium Integrated Resort Operations Pty Ltd (ACN 608 538 638) as trustee for The Destination Brisbane Consortium Integrated Resort Operating Trust and QWB Residential Precinct Operations Pty Ltd (ACN 608 792 329) as trustee for the QWB Residential Precinct Operations Trust

DBC Creditor means DBC.

DBC Claim means any claim of the DBC Creditor (including but not limited to any claim for legal and other professional costs associated with pursuing or recovering any DBC Claim) against PCA and including (without limitation) any claim made by DBC against PCA in respect of or in connection with the alleged damage, destruction, interference, subsidence, movement or other impact to the REX during 2020.

Insurance Proceeds means any amount actually paid to or on behalf of and/or received by PCA after the Commencement Date by or from an Insurer (including but not limited to all indemnified amounts along with any legal and other adverse costs payable by PCA to any plaintiff).

Insurer means any insurers of PCA.

PCA means PCA (QLD) Pty Ltd (subject to Deed of Company Arrangement) ACN 141 148 245.

REX means the Riverside Expressway in Brisbane, Queensland.

3. Clause 1.5 of the DOCA be varied to read:

1.5 Bar to claims

(a) *Subject to section 444D of the Corporations Act, this Deed may be pleaded and tendered by:*

- (i) *the Deed Companies or the Deed Administrators against any person (other than the DBC Creditor) having or asserting a Claim released, discharged and extinguished by clause 15.3; and*
- (ii) *the recipient of any release or covenant contained in this Deed;*

as an absolute bar and defence to any legal proceeding brought or made at any time in respect of a claim, release or covenant as the case may be.

(b) *This Deed may only be pleaded and tendered by the Deed Companies or the Deed Administrators against the DBC Creditor following release and extinguishment of the DBC Claim in accordance with clause 15.3(f).*

4. Clause 14.11 be varied to read:

A Creditor (other than the DBC Creditor) will be deemed to have abandoned its Claim if, before the payment of a final dividend from the relevant Pool, the Creditor:

- (a) *fails to submit a formal proof of debt or claim in respect of its Claim; or*
- (b) *having submitted a formal proof of debt or claim in respect of its Claim which is rejected, that Creditor fails to appeal to the Court against the rejection, within the time allowed for such an appeal under the Regulations as if the proof were rejected in the liquidation of the Deed Companies.*

5. Clause 15.3(a) of the DOCA be varied to read:

(a) *Subject to clause 15.3(e), Creditors must accept their entitlements under the Deed Fund (if any) in full satisfaction*

and complete release and discharge of all Claims which they have, or claim to have, against the Deed Companies on or before the Appointment Date.

6. Clause 15.3(b) of the DOCA be varied to read:

- (b) Notwithstanding any other provision of this Deed, except clause 15.2, this Deed does not affect any:*
 - (i) rights of recourse Creditors may have in respect of bank guarantees, insurance bonds and other sureties and insurers; and*
 - (ii) Claim of a Creditor against a Deed Company, which Claim, if not released, extinguished or abandoned by the operation of this Deed, may be responded to by any policy of insurance held at the relevant time.*

7. Clause 15.3(c) of the DOCA be varied to read:

- (c) Subject to clause 15.3(e) each Creditor must, if required by the Deed Companies or the Deed Administrators, execute any document that the Deed Companies or a Deed Administrator may require from time to time to give effect to the releases in clause 15.3(d).*

8. Clause 15.3(d) of the DOCA be varied to read:

- (d) Subject to clause 15.3(e), immediately upon and with effect from the Final Distribution Date, the Claims of all Creditors will be fully released and extinguished.*

9. Clause 15.3 be varied by inserting the following additional subclauses at the end of clause 15.3:

- (e) Subject to clause 15.3(f), clauses 10.3, 15.3(a), 15.3(c) and 15.3(d) do not apply in relation to the DBC Creditor and the DBC Claim.*
- (f) The DBC Claim will be released and extinguished upon the first to occur of the following:*

- (i) *where any judgment (other than an interim or interlocutory judgment), Court Order, settlement, compromise or other agreement with PCA in respect of the DBC Claim results in a net amount being payable by or on behalf of PCA to DBC:*

(A) *28 days after all of the Insurance Proceeds, having been either received by PCA and paid to the DBC Creditor or paid to the DBC Creditor directly, provided that no appeal or review of a judgment has been filed within that 28 day period (and if any appeal or review is lodged within that 28 day period, then the provision of clause 15.3(f)(i) and 15.3(f)(ii) shall apply to the outcome of that appeal or review); or*

(B) *28 days after it has been determined by a judgment delivered by a court of competent jurisdiction (with all appeal rights either being exhausted by PCA or having lapsed on the part of the relevant Insurer) that even though the DBC Claim has resulted in an amount being payable by PCA to the DBC Creditor, each Insurer who PCA is, or may be entitled to be, indemnified under a contract of insurance in respect of the DBC Claim, is not liable to indemnify PCA; or*

- (ii) *where any judgment (other than an interim or interlocutory judgment) Court Order, settlement, compromise or other agreement with PCA does not result in any net amount being payable by or on behalf of PCA to DBC:*

(A) *in the case of a judgment, 28 days after that judgment is handed down, provided that no appeal or review of a judgment has been filed within that 28 day period (and if any appeal or review is lodged within that 28 day period, then the provisions of clause 15.3(f)(i) and 15.3(f)(ii) shall apply to the outcome of that appeal or review); or*

(B) in the case of a settlement, compromise or other agreement, when that settlement compromise or other agreement takes effect.

- (g) The DBC Creditor must accept its rights under clause 15.3(f)(i) and 15.3(f)(ii) of this Deed in full satisfaction and complete discharge of the DBC Claim which will otherwise be non-recourse against the Deed Companies. For the avoidance of doubt, the Deed Companies shall be under no obligation to make any payment to the DBC Creditor (including but not limited to any claim for adverse legal and other professional costs arising out of or any way connected to the DBC Claim) other than from any Insurance Proceeds received by it in respect of the DBC Claim.*