

# Proposal for a Deed of Company Arrangement

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**National Express Group Australia (Bayside Trains) Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) (ACN 087 425 287)**

**National Express Group Australia (Swanston Trams) Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) (ACN 087 494 997)**

**National Express Group Australia (V/Line Passenger) Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) (ACN 087 425 269)**

**National Express (Bayside Train Maintenance) Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) (ACN 088 510 589)**  
*(Franchisees)*

## 1. Introduction

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A Deed of Company Arrangement (**DOCA**) is proposed for the Franchisees collectively under which the Director of Public Transport (**Director**) and National Express Group PLC (**PLC**) will make contributions totalling \$30 million to enable establishment of a fund to be shared by the unsecured creditors of the Franchisees (**Fund**). The claims and entitlements of employees are protected by other means (see section 2.5 below). As such, employees of the Franchisees will not share in the Fund.

## 2. The arrangement

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### 2.1 Deed Administrators

The current administrators of the Franchisees will be appointed as deed administrators to administer the DOCA and the Fund.

### 2.2 Date when Deed takes effect

The proposed DOCA will take effect when two conditions precedent are fulfilled. These conditions precedent are:

- (a) the execution of a share option deed between the Director and National Express Group (Australia) Pty Ltd (**NEGA**) giving the Director (or his nominee) the right at his option to acquire from NEGA the shares in the Franchisees (other than National Express (Bayside Train Maintenance) Pty Ltd); and
- (b) the execution by the Franchisees of releases of all claims of any nature whatever in favour of:
  - (i) the Director and other related governmental servants and agents; and
  - (ii) PLC, most of its related bodies corporate and their directors.

It is proposed that both the releases and the share option deed will be executed at the same time as the DOCA so that the DOCA will be effective immediately.

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### **2.3 Binding Effect of the DOCA**

- (a) The DOCA will bind all creditors, officers and shareholders of the Franchisees, although nothing in the DOCA will affect:
  - (i) the property rights of any owner or lessor of property in the use or possession of the Franchisees who does not vote in favour of the DOCA;
  - (ii) the rights of secured creditors.
- (b) The Director will be entitled to continue to enforce his security over the assets of the Franchisees and those assets will be applied in reduction of the Director's secured debt. As such, no assets of the Franchisees will be available for distribution to unsecured creditors. The receivers and managers appointed by the Director will be entitled to continue to exercise their powers in respect of the assets of the Franchisees and to continue to conduct the Franchisees' businesses.
- (c) The officers of the Franchisees will continue in office but must not exercise any function or power as an officer of the Franchisees unless authorised to do so by the receivers.
- (d) If the Director exercises his right to acquire the shares in any of the Franchisees from NEGA then the newly appointed officers of the Franchisees will resume all their powers when those shares are acquired.
- (e) The Deed Administrators will have power sufficient to enable them to administer the DOCA and the Fund but those powers will be subject to the functions and powers of the receivers.

### **2.4 Contribution of Fund and release of claims**

- (a) Within 14 days after the commencement of the DOCA, the Director and PLC must contribute the sums of \$20 million and \$10 million respectively to the Fund. Although the Director and PLC and some of its related bodies corporate are creditors of the Franchisees, they will not share in the Fund with other creditors unless:
  - (i) all other creditors have been paid in full; or
  - (ii) the debt or claim for which they prove was a debt or claim assigned to them after the administrators' appointment by a creditor (other than a creditor associated with PLC); or
  - (iii) NEGA has a right to be indemnified by some or all of the Franchisees in respect of a debt or claim by TXU Electricity Limited as at 23 December 2002 in respect of the supply of electricity services to the Franchisees, in which case, NEGA is permitted to prove against the Fund in respect of that right of indemnity alone.
- (b) The Fund will be held by the Administrators on trust for the creditors entitled to share in it, for so long as the DOCA remains operative.
- (c) At the same time as the Director and PLC make their contributions to the Fund, the Claims (as defined) of creditors (other than the Claims of the Director and the

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employees) will be released as claims against the Franchisees and will be converted into claims of equivalent value against the Fund. Claim will be defined in the DOCA as a debt payable by, or claim against, a Franchisee (based in contract, tort, statute or otherwise, present or future, certain or contingent, ascertained or sounding only in damages), being a debt or claim arising on or before 23 December 2002, but does not include a claim against a Franchisee for Employee Entitlements (as defined).

- (d) Employee Entitlements will be defined as any right or entitlement of any employee which that employee would be entitled to prove in priority as a debt or claim against a Franchisee pursuant to section 556 of the Act had that company been wound up pursuant to Part 5.6 of the Corporations Act.
- (e) The release of claims will not affect the ongoing obligations of creditors under contracts entered into with the Franchisees or agreements entered into with the Director relating to the supply of goods and services to the Franchisees.

## 2.5 Employees

- (a) The employees will not share in the Fund. Instead, the receivers will continue to procure the payment of the employees' entitlements whilst they are managing the businesses of the Franchisees. The Director will ensure that the receivers have sufficient funds to enable them to meet their obligations in this regard.
- (b) The Director will acknowledge the assurance given to the employees by the Minister for Transport on 16 December 2002 that:
  - (i) "For other than senior management, an assurance is given that all accrued entitlements (including annual leave, sick leave, long service leave and public holidays) and existing conditions (including superannuation) of the staff of each business will be protected, consistent with the franchise agreements. All existing Enterprise Agreements (*EBAs*), Awards and other agreements (including those agreements on safety levels) will be honoured."
  - (ii) "This assurance will also apply in the event of refranchising of the businesses. Current conditions will be protected in any transmission of business."
- (c) Nothing in the DOCA will affect the assurance given by the Minister.

## 2.6 Distribution of the Fund

- (a) Whilst the DOCA is operative, the Deed Administrators will distribute the Fund as follows:
  - (i) first, in payment of the Deed Administrator's fees, expenses, debts, costs and charges (for the period from 23 December 2002 until completion of the DOCA) (**Administrators' Entitlements**);
  - (ii) second, in payment of the Claims of unsecured creditors (other than the Director, PLC and its related bodies corporate other than where those

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Claims are for debts assigned to them as noted in paragraph 2.4(a)(ii) above or are in respect of claims as noted in paragraph 2.4(a)(iii) above);

(iii) third, if the creditors in (ii) are paid in full, and any part of the Fund remains for distribution, in payment of the Claims of the Director and PLC and its related bodies corporate.

(b) The Deed Administrators may make interim distributions as well as a final distribution.

## **2.7 Adjudication of proofs**

(a) Creditors sharing in the Fund will be required to lodge proofs of debt or claim with the Deed Administrators so as to establish their entitlement to a distribution out of the Fund.

(b) The Deed Administrators will adjudicate proofs of debt applying the rules in the Corporations Regulations (with such modifications as are necessary) that apply to the adjudication of proofs of debt in a liquidation (see below).

(c) The claims of creditors sharing in the Fund will be treated as if the Franchisees were one entity and they will be entitled to share in the Fund on a pro rata basis.

## **2.8 Termination of the DOCA**

(a) The DOCA will terminate:

(i) when the Deed Administrators have distributed the Fund;

(ii) if the Court so orders under section 445D of the Corporations Act;

(iii) if the creditors vote to terminate it at a meeting convened under section 445F of the Corporations Act;

(iv) if the Court declares a provision of the DOCA void under section 445G of the Corporations Act and either the Director or PLC notifies the Deed Administrators in writing that the DOCA is to terminate,

whichever occurs first.

(b) If the DOCA terminates in respect of one Franchisee in any of the circumstances envisaged under paragraphs (a)(ii) to (iv), then the DOCA will terminate in respect of all Franchisees and they will be placed into liquidation.

(c) If when the DOCA terminates, any part of the Fund remains, then the Deed Administrators will pay that remaining amount:

(i) first, to the Deed Administrators for any unpaid part of the Administrators' Entitlements relating to the period since the date of the DOCA;

(ii) second, to the Director up to the amount of \$20 million less two thirds of the amounts already paid out of the Fund in respect of the Claims of creditors and in respect of the Administrators' Entitlements relating to the period after the date of the DOCA;

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- (iii) third, to the Administrators for any unpaid part of the Administrators' Entitlements that relates to the period prior to the date of the DOCA;
  - (iv) as to the balance, to PLC.

### **3. Other provisions**

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#### **3.1 Committee of creditors**

- (a) The creditors may resolve to appoint committees of creditors to any or all of the Franchisees.
- (b) The committees of creditors will consult with the Deed Administrators and receive and consider reports by the Deed Administrators.
- (c) The committees of creditors will also have responsibility at monthly meetings for considering and, if appropriate, approving the remuneration of the Deed Administrators.

#### **3.2 No inconsistent act**

Between the date that the creditors vote in favour of the DOCA and its execution, creditors must not do anything that would be inconsistent with the proposed DOCA.

#### **3.3 No proceedings**

During the currency of the DOCA, no creditor bound by it may commence any court proceedings or enforcement action against a Franchisee, including proceedings to recover any part of its debt or claim or to wind up a Franchisee.

#### **3.4 Administrators**

- (a) The Deed Administrators will act as agents of the Franchisees and will not be personally liable for any debt or claim or any loss or damage arising as a result of the Deed Administrators exercising their functions under the DOCA.
- (b) Other than as provided in 2.8(c) above, the Deed Administrators will be entitled to their costs, charges and expenses and the debts that they incur in performing their functions under the DOCA. They will also be entitled to be indemnified out of the Fund for these amounts.

#### **3.5 Application of the *Corporations Act 2001 (Cth)* and the Corporations Regulations 2001 (Cth)**

- (a) Schedule 8A of the Corporations Regulations will not apply to the DOCA except as expressly included in the DOCA.
- (b) For the purpose of creditors proving their debts or claims so that they can share in the Fund, subdivisions A, B, C and E of Division 6 of Part 5.6 of the *Corporations Act* (other than sections 553(1A) and 554F) and Corporations Regulations 5.6.39 to 5.6.44 and 5.6.46 to 5.6.57 will apply with such modifications as are necessary to adapt them to claims against the Fund in administration as opposed to a liquidation context.

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- (c) Corporations Regulations 5.6.12 to 5.6.36A with such modifications as are necessary will apply to meetings of creditors held pursuant to the DOCA.

Dated June 2003

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Director of Public Transport

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For and on behalf of National Express Group PLC