Australian Government – The Treasury

Helping Companies Restructure by Improving Schemes of Arrangement – Submission from DHC Capital Pte Ltd

9 September 2021

Cover letter

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Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir/Madam

HELPING COMPANIES RESTRUCTURE BY IMPROVING SCHEMES OF ARRANGEMENT
REQUEST FOR FEEDBACK AND COMMENTS

Thank you for the opportunity to submit feedback and comments on the Discussion Paper dated 2 August 2021 in relation to Helping Companies Restructure by Improving Schemes of Arrangement ("**Discussion Paper**").

We would be pleased to discuss the contents of this submission response with you and to provide you with such further information as you may require.

Should you have any further queries, please do not hesitate to call me on +65 6671 8021 or via email at david.chew@dhccapital.com.

Yours sincerely

David Chew
Partner
DHC Capital Pte Ltd

Contents

Background information on submission provider

Profile of DHC Capital Pte Ltd

Key information	▶ DHC Capital Pte Ltd ▶ 80 Raffles Place, #43-01 UOB Plaza 1, Singapore 048624 ▶ Year established: 2017 ▶ Website: www.dhccapital.com
Business overview	▶ We are an investment banking and financial advisory firm specialising in solving critical business challenges due to liquidity pressures or financial stress and distress ▶ We provide independent and conflict-free advice on financial and operational restructuring to corporates, creditors, investors and other stakeholders, both in and out of Court. We advise clients on structuring and executing bespoke capital raising and accelerated M&A transactions to meet short term liquidity requirements, raise capital to unlock shareholder value or meet growth objectives. We further provide directors or executives into corporates involved in a restructuring process or on behalf of creditors and investors to monitor and protect their investments ▶ We are incorporated in Singapore and have lodged with the Monetary Authority of Singapore (MAS) as an exempt person providing corporate finance advisory services ▶ We are based in Singapore and focus on the Asia Pacific region

Profile of Submitter

Name	▶ David Chew
Title	▶ Partner
Experience	▶ 25 years experience in restructuring, turnaround and special situations having worked as an advisor with DHC Capital (Singapore), Ernst & Young (Singapore and HK) and Arthur Andersen (Sydney), investment banker with Morgan Stanley (HK), in senior management as a CRO, CFO and interim CFO and Board member to distressed companies
Professional memberships and qualifications	▶ Member – Institute of Singapore Chartered Accountants ▶ Member – Hong Kong Institute of Certified Public Accountants ▶ Member – Chartered Accountants Australia and New Zealand ▶ Vice Chair – Chartered Accountants Australia and New Zealand Singapore Overseas Regional Council ▶ Awarded Hong Kong Institute of Certified Public Accountants Specialist Designation in Insolvency ▶ Licensed Insolvency Practitioner – Singapore ▶ Ministry of Law Singapore – Panel of Restructuring Advisors to support Simplified Debt Restructuring Programme under the Simplified Insolvency Programme

Response to issues raised in the Discussion Paper

No.	Question	Comments

1.	**Should an automatic moratorium apply from the time that a Company proposes a scheme of arrangement? Should the automatic moratorium apply to debt incurred by the Company in the automatic moratorium period?**	**Response:**
		▶ We provide our responses based on our experience in Singapore following the introduction of major reforms to the debt restructuring regime in the Companies (Amendment) Act 2017 ("**CAA**"), which came into effect on 23 May 2017 and was incorporated into the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**"), which came into effect on 30 July 2020. The automatic moratorium was introduced together with other features (including, amongst others, super priority rescue financing, cross class cram down and pre-pack schemes) to support debtor-in-possession "lite" led restructurings through a "turbo charged" scheme of arrangement regime
		▶ IRDA provides that upon application for a moratorium and where a debtor company proposes, or intends to propose, a scheme of arrangement the Court, there is an automatic moratorium period starting on the date on which the application is made and ending on the earlier of a date that is 30 days after the application date or the date on which the application is decided by the Court
		▶ IRDA does not provide for the moratorium to apply to debt incurred by the debtor company in the automatic moratorium period
		
		Key observations:
		▶ **Breathing room:** The automatic moratorium augmented the limited moratorium provisions contained in Section 210(10) of the Companies Act and has proven to be a game changing tool for restructuring in Singapore[1]. A debtor led process overseen by the Court under a scheme of arrangement process is now seen as the primary path taken by companies in Singapore to restructure, except in cases where there is fraud or mismanagement. The benefits of the automatic moratorium include:
		  ▶ Stabilises the situation and avoids "a race to the Court" situation where individual creditors rush to enforce debt or seek to "get ahead" of other creditors
		  ▶ Provides essential breathing room to companies when there is a burning platform with looming debt maturities / interest payments and overdue trade payables to formulate a plan, engage with new capital providers and key creditors and garner support
		▶ **Intention to propose:** Under IRDA, the debtor company does not have to propose a scheme at the time of the application to trigger the automatic moratorium period. It is enough for the debtor company to intend to propose a scheme to trigger the start of the automatic moratorium period of 30 days (subject to the information requirements below)

Notes:

1. *The Section 210(10) moratorium provision meant that a debtor company had to prepare a scheme proposal, make an application for leave to convene a creditors meeting and concurrently apply for a moratorium. In practise, there often is not the time window available given the liquidity situation to line up these tasks and the moratorium is needed precisely for this reason to give the company breathing room to put forward a proposal to its creditors and garner support*

Response to issues raised in the Discussion Paper

No.	Question	Comments

1.	**Should an automatic moratorium apply from the time that a Company proposes a scheme of arrangement? Should the automatic moratorium apply to debt incurred by the Company in the automatic moratorium period?**
	
	(Continued)
		▶ **Enhanced moratorium:** Under IRDA, the moratorium order may (i) be granted by the Court with respect to a holding or subsidiary company of the debtor company and (ii) at the Court's discretion, the moratorium order may be expressed to apply outside of Singapore (similar in concept to the "world-wide" stay provided for under Chapter 11). These enhanced concepts may also wish to be considered as they have utility in stabilising "groups of companies" and in cross-border situations where there are significant assets in other jurisdictions
		▶ **Extension of moratorium:** Upon the initial application being heard, the Court has the power to grant a longer moratorium as may be appropriate in the circumstances, which would give the debtor company time to properly formulate the scheme and garner support from creditors
		▶ **Risk of abuse:** The Court has a significant role to play to oversee that a debtor company does not abuse the moratorium and stall for time. The provision of information is an important step in this direction (though creditors typically will feel that more information should be provided) Under IRDA, the debtor company must provide specific information to the Court in support of the application:
		  ▶ Evidence of support from the debtor company's creditors
		  ▶ Explanation of how such support would be important for the success of the proposed scheme
		  ▶ Where the debtor company has not proposed the scheme, a brief description of the intended scheme, containing sufficient particulars to enable the Court to assess whether the intended scheme is feasible and merits consideration
		  ▶ List of every secured creditor
		  ▶ List of all unsecured creditors who are not related to the debtor company (or top 20 if more than 20 unsecured creditors)
		▶ The debtor company is also required to submit to the Court information on:
		  ▶ Valuation report of key assets
		  ▶ Disclosure on disposals of assets
		  ▶ Periodic financial reports
		  ▶ Forecasts on profitability and cash flow
		▶ There have also been instances where a monitoring accountant or Chief Restructuring Officer (or similar) have been appointed to oversee the restructuring process, asset sales and use of cash for debtor companies that are operating under the moratorium to provide additional support to the debtor company and safeguards to creditors[1]

Notes:

1. *By way of example, DHC Capital has been engaged to act in an interim management role for a Singapore listed company that had received Court approval for the moratorium*

Response to issues raised in the Discussion Paper

No.	Question	Comments
1.	**Should an automatic moratorium apply from the time that a Company proposes a scheme of arrangement? Should the automatic moratorium apply to debt incurred by the Company in the automatic moratorium period?** **(Continued)**	▶ **Debtor in possession "lite" model:** IRDA enhances the tools available for debtor companies, whilst retaining the flexibility and speed that has made schemes popular in many jurisdictions. Many Asian businesses are family owned and the key family members are integral to the business operations holding relationships with customers, suppliers and industry players. A debtor in possession "lite" model provides an incentive to seek the assistance of a restructuring process, whilst continuing in a management role to formulate the plan and running the business operations. In Singapore, creditor led processes such as Judicial Management (like Voluntary Administration in Australia), where an independent professional takes control typically leads to a managed wind down/closure or liquidation and rarely a balance sheet restructure and/or survival of the company and saving of jobs and is often seen as value destructive and costly in terms of fees to professionals ▶ **Failed schemes:** In Singapore, where a scheme has not even reached the voting stage and creditors have indicated that they do not support the intention of a scheme and the moratorium has lapsed or is about to lapse, the situation would result in the debtor company being placed into Judicial Management or liquidation. This can be initiated by the debtor company voluntarily or upon a petition by creditors. In certain situations, debtor companies have sought the Court's approval to repropose an amended scheme of arrangement when the initial vote did not reach the required thresholds
2.	**Would the moratorium applied during voluntary administration be a suitable model on which to base an automatic moratorium applied during a scheme of arrangement? Are any adjustments to this regime required to account for the scheme context? Should the Court be granted the power to modify or vary the automatic stay?**	**Response:** ▶ We are not familiar in relation to the Voluntary Administration regime

Response to issues raised in the Discussion Paper

No.	Question	Comments
3.	**When should the automatic moratorium commence and terminate? Are complementary measures (for example, further requirements to notify creditors) necessary to support its commencement?**	**Response:** ▶ IRDA provides that upon application for a moratorium and where a debtor company proposes, or intends to propose, a scheme of arrangement the Court, there is an automatic moratorium period starting on the date on which the application is made and ending on the earlier of a date that is 30 days after the application date or the date on which the application is decided by the Court ▶ IRDA provides that where an application for a moratorium is made, the debtor company must publish notice of the application in the Government Gazette and in at least one English language local daily newspaper, send a copy of the notice to the Registrar of Companies and send a notice of the application to each creditor meant to be bound by the intended scheme and who is known to the company ▶ IRDA also provides that certain information be provided to the Court (refer to Question 1) **Key observations:** ▶ In the cases we have been involved in, we have seen schemes completed in 4 months to 2 years from the date of application for the moratorium ▶ Extensions to the moratorium require creditor support ▶ Extensions can be supported where there are statutory requirements to be completed (e.g. stock exchange procedures for approval and listing of new shares, IFA opinion, whitewash waiver, shareholder approvals at EGM and issuance of shares to creditors)

Response to issues raised in the Discussion Paper

No.	Question	Comments
4.	**How long should the automatic moratorium last? Should its continued application be reviewed by the Court at each hearing?**	**Response:** ▶ IRDA provides for an automatic moratorium of approximately 30 days ▶ Moratorium extensions are approved by the Court. Affidavits are filed ahead of a Court hearing to provide an update on latest developments for the Court to make an informed judgement on the feasibility of a scheme and level of creditor support. Opposing creditors are able to attend and submit affidavits **Key observations:** ▶ In the event the Court approves an extension after the automatic moratorium period, the typical period of extension by the Court is 6 months. Recent cases have been for 3 to 6 months. Where the moratorium has extended for a lengthy period of time, 1 to 2 months extension is not uncommon ▶ The Court also has a significant role to play to oversee the amount of time for any further extension of the moratorium as previous cases have shown that continual extensions with no firm proposal erodes value and incurs significant professional costs
5.	**Are additional protections against liability for insolvent trading required to support any automatic moratorium?**	**Response:** ▶ IRDA does not provide any additional legislation on this **Key observations:** ▶ Directors should be afforded protection if debtor companies trade on throughout the moratorium period and any extensions

Response to issues raised in the Discussion Paper

No.	Question	Comments
6.	**What, if any, additional safeguards should be introduced to protect creditors who extend credit to the Company during the automatic moratorium period?**	**Response:** ▶ The introduction of Debtor-in-Possession financing to financiers who extend credit during the moratorium and restructuring period should be considered to promote a rescue culture, maximise value for creditors and to save jobs ▶ Refer to Question 9 for further information
7.	**Should the insolvency practitioners assisting the Company with the scheme of arrangement be permitted to act as the Voluntary Administrators of the Company on scheme failure?**	**Response:** ▶ We take no position as we are not licensed in Australia

Response to issues raised in the Discussion Paper

No.	Question	Comments
8.	**Is the current threshold for creditor approval of a scheme appropriate? If not, what would be an appropriate threshold?**	**Response:** ▶ Under IRDA, the voting thresholds require a majority in number and at least 75 per cent by value of creditors (or creditors of each class) present and voting (in person or proxy). This is consistent with schemes in Australia and the United Kingdom ▶ We would suggest to consider a lower voting threshold requiring a majority in number and at least two-thirds per cent by value of creditors (or creditors of each class) present and voting (in person or proxy). The lower threshold promotes a rescue culture and saving companies as going concerns as this maximises value for all stakeholders and saves jobs for employees **Key observations:** ▶ The lower approval threshold aligns with the approval thresholds required for schemes of arrangement passed under the Simplified Debt Restructuring Programme under the Simplified Insolvency Programme in Singapore[1]
9.	**Should rescue, or 'debtor-in-possession', finance be considered in the Australian creditors' scheme context?**	**Response:** ▶ Access to liquidity to fund operations, salaries and suppliers is vital to a company to continue as a going concern. Legislation that provides additional tools for financially distressed companies to access new working capital in order to continue business operations during a moratorium period and provide essential breathing room to engage with creditors on a restructuring proposal is a key element in promoting a rescue culture and saving jobs **Key observations:** ▶ The concept of super priority was adapted from the US Bankruptcy Court and introduced in the CAA and incorporated into the IRDA ▶ IRDA provides four levels of super priority ranging from being treated as part of the costs and expenses of the winding up (lowest level of priority) to secured by a security interest on property subject to an existing security interest, of the same priority as or higher priority than that existing security interest, known as "priming" (highest level of priority)

Notes:

1. *DHC Capital has been selected by the Ministry of Law Singapore to be on the Panel of Restructuring Advisors to support companies undergoing debt restructuring under the Simplified Insolvency Programme. Please refer to the following link for further information on the Simplified Debt Restructuring Programme: https://www.dhccapital.com/media-page/2021/2/3/dhc-capital-selected-by-the-ministry-of-law-to-be-on-the-panel-of-restructuring-advisors-to-support-companies-undergoing-debt-restructuring-under-the-simplified-insolvency-programme*

Response to issues raised in the Discussion Paper

No.	Question	Comments
9.	**Should rescue, or 'debtor-in-possession', finance be considered in the Australian creditors' scheme context?** **(Continued)**	**Key observations:** ▶ Super priority rescue financing in Singapore is still in its infancy. The legal regime is largely in place and successfully proven in local cases (albeit in smaller deals). Please refer to Appendix 1 for further information on super priority rescue financing cases in Singapore. Detailed information on super priority cases can be found in our thought leadership publication "Guide to super priority rescue financing in Singapore (second edition)" [1] ▶ Super priority involving "priming" existing security has not been tested to date. IRDA incorporates safeguards for existing security holders in priming situations. The concept of adequate protection incorporated from the US Bankruptcy Court is one such safeguard ▶ Court taking a commercial and practical approach. Court shown a willingness to take guidance from precedent cases from the US Chapter 11 regime
10.	**What other issues should be considered to improve creditors' schemes?**	**PRE-PACK SCHEMES** **Response:** ▶ IRDA includes the concept of a "pre-packaged" scheme of arrangement, in which the Court upon application by the debtor company, may make an order approving a scheme of arrangement without a meeting of creditors (or class of creditors) being held. Pre-pack schemes are subject to specific notice and information requirements to be sent to creditors intended to be bound by the scheme as set out in the IRDA. The Court can only approve the scheme if it is satisfied that had a meeting of creditors been summoned, creditors comprising a majority in number, representing at least 75% of the value (present and voting) would have approved the scheme **Key observations:** ▶ Promotes the "fast-tracking" of schemes as it removes the need for a Court hearing for leave to convene a meeting of creditors and the creditors meeting itself. This saves both time and costs ▶ Ballot forms have been used to demonstrate to the Court that had a meeting of creditors been summoned, the scheme would have been approved ▶ Increasing use of pre-pack schemes for local Singapore companies and in cross border situations

Notes:

1. *https://www.dhccapital.com/media-page/2020/11/9/insights-guide-to-super-priority-rescue-financing-in-singapore-second-edition*

Response to issues raised in the Discussion Paper

No.	Question	Comments
10.	**What other issues should be considered to improve creditors' schemes?** **(Continued)**	**PRE-PACK SCHEMES (CONTINUED)** **Key observations:** ▶ Cases involving pre-pack schemes include: ▶ First case: iflix Pte Ltd – Involved distressed M&A transaction for sale of business (where the parent entity was incorporated in Australia and a newly formed Board continued to trade under the special COVID-19 rules) and parallel corporate voluntary arrangement in Malaysia to distribute the sale proceeds to creditors[1] ▶ Second case: PT MNC Investama Tbk – Involved moratorium application by Indonesian company (based on substantial connection test relying on, amongst other factors, that the Notes were traded on the Singapore Stock Exchange) and is the first prepack scheme for foreign company ▶ Third case: Viking Offshore and Marine Ltd (SGX: 557) – Moratorium application and pre-pack scheme as part of a comprehensive restructuring and recapitalisation plan including senior lender debt settlement and capital injection from new equity investors[2] ▶ Fourth case: PT Modernland Realty Tbk – Indonesia company prepack for restructure of New York governed notes ▶ Fifth case: Capital World Ltd (SGX: 1D5) – Moratorium application and pre-pack scheme[3]

Notes:

1. *DHC Capital advised iflix Pte Ltd on the pre-pack scheme and acted as Scheme Manager. Please refer to the following link for further information: https://www.dhccapital.com/media-page/2021/1/21/dhc-capital-advises-iflix-pte-ltd-on-the-first-pre-pack-scheme-of-arrangement-under-irda*
2. *DHC Capital advised Viking Offshore and Marine Ltd on the pre-pack scheme and acted as Scheme Manager. Please refer to the following link for further information: https://www.dhccapital.com/media-page/2021/6/2/viking-offshore-and-marine-sgx-557-pre-pack-scheme-of-arrangement-sanctioned-by-court-dhc-capital-advised-on-scheme-and-appointed-as-scheme-manager*
3. *DHC Capital advised Captial World Ltd on the pre-pack scheme. Please refer to the following link for further information: https://www.dhccapital.com/media-page/2021/7/28/capital-world-ltd-sgx-1d5-pre-pack-scheme-of-arrangement-sanctioned-by-court-dhc-capital-advised-on-scheme-and-appointed-as-scheme-manager*

Response to issues raised in the Discussion Paper

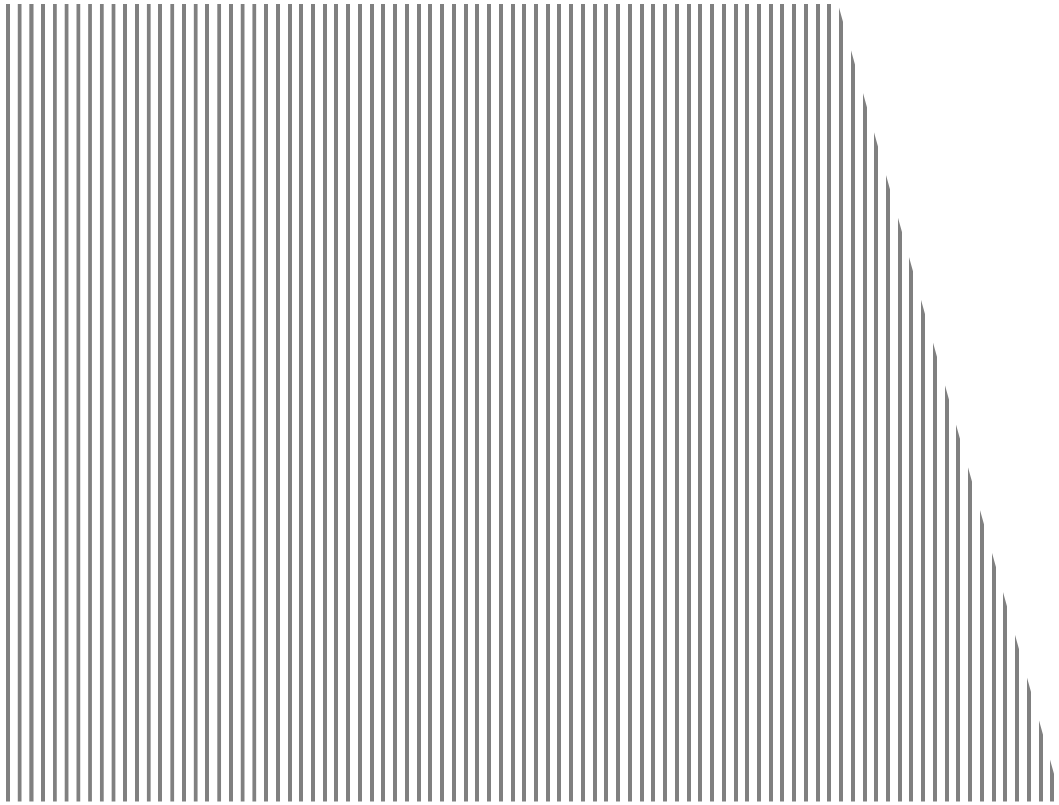
No.	Question	Comments
10.	**What other issues should be considered to improve creditors' schemes?** **(Continued)**	**OTHER** **Response:** ▶ **Cross class creditor cram down:** IRDA includes a mechanism to force or cram down one or more non-consenting classes of creditors to be bound by the scheme if certain tests are met. This is a complex topic and we do not intend to cover this in detail in this submission ▶ ***Ipso facto* clauses:** IRDA includes provisions limiting the exercise of *ipso facto* clauses which are triggered by the insolvency or restructuring of a debtor company. This prevents counterparties from terminating or amending contracts and is intended to support the rescue efforts of distressed companies. There are also exemptions listed in the IRDA. This is a complex topic and we do not intend to cover this in detail in this submission ▶ **Proof of debt regime:** IRDA sets out a detailed proof of debt submission, adjudication and dispute resolution mechanism[1]
11.	**Are there any other potential impacts that should be considered, for example on particular parties or programs? If so, are additional safeguards required in response to those impacts?**	**Response:** ▶ We are not aware of any relevant matters

Notes:

1. *https://sso.agc.gov.sg/SL/IRDA2018-S604-2020?DocDate=20200727*

Appendix 1

Evolution of super priority rescue financing in Singapore



Evolution of super priority rescue financing in Singapore

December 2017	April 2019	February 2020	May 2020	November 2020 / February 2021	August 2021
ATTILAN	Asiatravel.com	SWEE HONG	DSG	Asiatravel.com	Undisclosed Company
Attilan Group Ltd (SGX: 5ET) ▪ Court declined to grant super priority under s.211E CA (now s.67 IRDA)	**Asiatravel.com Holdings Ltd (SGX: 5AM)** ▪ Court granted priority over preferential debts pursuant to s.211E(1)(b) CA (now s.67(1)(b) IRDA) ▪ First successful application under s.211E CA ▪ DHC Capital acted as financial advisor to Asiatravel.com	**Swee Hong Ltd (SGX: QF6)** ▪ Court granted priority over unencumbered assets pursuant to s.211E(1)(c) CA (now s.67(1)(c) IRDA) and preferential debts pursuant to s.211E(1)(b) CA ▪ First successful application under s.211E(1)(c) CA ▪ DHC Capital acted as financial advisor to Swee Hong	**Design Studio Group Ltd (SGX: D11)** ▪ Court granted priority over preferential debts pursuant to s.211E(1)(b) CA ▪ First successful application involving a "roll-up" of an existing lender's pre-filing debt ▪ DHC Capital appointed to the Board of Design Studio Group	**Asiatravel.com Holdings Ltd (SGX: 5AM)** ▪ November 2020: Court declined to grant super priority pursuant to s.211E(1)(c) CA ▪ February 2021: Court granted priority over unencumbered assets pursuant to s.211E(1)(c) CA ▪ First successful application for second round of rescue financing	**Undisclosed Company** ▪ Court ordered that a third party litigation funder's financing of an undisclosed private international arbitration be given "super priority" status ▪ First successful application by a third party litigation funder for "super priority" order

Notes:

1. *CA – Companies Act*

DHC Capital | Restructuring | Capital Raising | Accelerated M&A | Expert Testimony | Board & Executive

About DHC Capital

DHC Capital is an investment banking and financial advisory firm specialising in solving critical business challenges due to liquidity pressures or financial stress and distress.

DHC Capital provides independent and conflict-free advice on financial and operational restructuring to corporates, creditors, investors and other stakeholders, both in and out of Court. DHC Capital also advises clients on structuring and executing bespoke capital raising and accelerated M&A transactions to meet short term liquidity requirements, raise capital to unlock shareholder value or meet growth objectives. DHC Capital will further provide directors or executives into corporates involved in a restructuring process or on behalf of creditors and investors to monitor and protect their investments.

For further information, please visit www.dhccapital.com.

DHC Capital Pte Ltd

DHC Capital Pte Ltd is a company incorporated in Singapore and has lodged with the Monetary Authority of Singapore (MAS) that it is an exempt person providing corporate finance advisory services.