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Voluntary Administrations

What is voluntary administration?

This is a process designed to assist insolvent companies satisfy their debts, by ensuring that they can either:

- (a) come to a formal arrangement with their creditors to pay those debts, or
- (b) are quickly and inexpensively placed into liquidation.

The process is designed to maximise the chances of a company continuing to exist by giving it the opportunity to propose a Deed of Company Arrangement to its creditors.

Why choose voluntary administration?

A voluntary administration offers a co-operative approach to satisfying the company's debts. It restrains creditors from enforcing their claims, and can assist a company to trade out of short-term difficulties caused by either short-term cash flow restrictions or one-off financial problems. If appropriate, it can also provide a way to restructure the business or the company itself to revive it to a healthier financial position.

How does a voluntary administration begin?

A voluntary administration begins when an appointment document is executed by either:

- (i) the directors - after they have resolved that the company is or is about to become insolvent,
- (ii) a liquidator - if they believe that a proposed deed of company arrangement will provide a better return than the continued liquidation, or
- (iii) a secured creditor - if the terms of their finance agreement have been breached.

What is the basic voluntary administration process?

A voluntary administrator is appointed to control a company's affairs. The administrator convenes two meetings of creditors. The first meeting is held within eight business days of the appointment. The second meeting is held about four to six weeks after the appointment. At that meeting creditors will choose the option which they believe will best serve their interests. The two most common outcomes of a voluntary administration are the execution of a Deed of Company Arrangement or the liquidation of the company.

What is the effect on secured creditors?

Secured creditors have 13 business days from the day of appointment to exercise their security. If they do not do so within that time, they are bound by a moratorium for the duration of the voluntary administration period. This decision period gives the secured creditor time to decide whether to exercise their charge, and the administrator some certainty during the rest of the administration period.

What is the effect on unsecured creditors?

A moratorium is imposed on actions which can be initiated by unsecured creditors. They cannot enforce their claims, or proceed with applications to wind up the company. Nor can a provisional liquidator be appointed to the company without the leave of the Court, and all proceedings or enforcement action against the company's property is placed on hold.

How should the company be described?

While in voluntary administration a company must advertise its status. For example, ABC Pty Ltd should be described as ABC Pty Ltd (Administrator Appointed) on all public documents.

What are the administrators power's?

The administrator assumes control of all of the company's business, property and financial affairs. The administrator assumes sole responsibility to perform all functions and exercise any and all powers that the directors of the company had or could exercise if the company was not under administration, including continuing to trade on the business and/or disposal of all or any part of the business or property as deemed appropriate. The directors and other officers lose all of these powers.

What does the administrator do?

During the voluntary administration, the administrator will:

- 1) take control of the company's assets;
- 2) investigate the company's affairs;
- 3) report any offences to ASIC;
- 4) assist the directors to form a proposal for a Deed of Company Arrangement;
- 5) report to creditors on which course of action provides for the best outcome; and
- 6) Call the required meetings of creditors to decide the future of the company.

Does the administrator look at preferences etc.?

Look at? Yes, in a preliminary manner.

Take recovery action? No.

The administrator is required to investigate potential voidable transactions, but only to carry out sufficient investigations to justify any recommendations that they may give in the report to creditors. The administrator has no power to commence any recovery proceedings. These are solely the powers of a liquidator.

PPSA & Voluntary Administrators

Section 440B of the Corporations Act imposes restrictions upon and of the following in the event of the appointment of a voluntary administrator to the company under Part 5.3A:-

- 1) An owner of property used by the company from taking possession of, or recovering, the property;
- 2) A lessor from levying distress rent, taking possession, or otherwise recovering the property;
- 3) A secured party with possessory security from selling the property or otherwise enforcing the security interest.

The voluntary administrator may still sell or dispose of assets:-

- 1) With the consent of the secured party;
- 2) With the consent of the Court;
- 3) In the ordinary course of business.

Any such disposal by the voluntary administrator requires the voluntary administrator to distribute the sale proceeds from the secured property to those holding relevant security interests.

How does the voluntary administration affect a landlord?

A landlord is also bound by the same moratorium affecting all creditors - providing they had not commenced proceedings prior to the appointment. The administrator can occupy the company's leased premises for up to seven days without paying rent, but has to pay rent for the remainder of the voluntary administration period.

The administrator's liability ends at the conclusion of the voluntary administration or when the premises are vacated - whichever comes first. If the administrator does not have possession of the property, they will not be liable for rent. This provision does not stop the company's continuing liability for the rent.

How does a voluntary administration affect guarantees?

Creditors holding third party guarantees from directors are bound by the moratorium during the period of the administration. Guarantees can be enforced by the holder of them after the voluntary administration ends.

Can a voluntary administrator pay dividends?

No. A voluntary administrator does not have the authority to pay dividends.

What happens at the first meeting of creditors?

The first meeting is held within eight business days after the appointment. There are only two matters that the Corporations Act requires to be considered at the meeting: (a) whether the creditors wish to replace the administrator with another administrator; and (b) whether the creditors wish to elect a number of representatives to form a committee which will advise and assist the administrator.

What happens at the second meeting of creditors?

A second meeting of creditors is normally held between 20 to 30 business days after the appointment. Creditors will decide the future of the company at this meeting. Prior to this meeting the administrator will issue a report detailing the results of the investigations, offences (if applicable), the viability and suitability of each of the options available to creditors. All information provided must be sufficient for creditors to make an informed decision, and a recommendation to creditors.

What options are available to creditors?

The creditors can pass a resolution for one of the following courses of action:

1. Accepting a proposal for a Deed of Company Arrangement (if one is proposed),
2. Ending the voluntary administration and passing control of the company back to the directors, or
3. Liquidating the company.

How complete must a draft deed of company arrangement be?

It is not uncommon for the draft deed to be submitted to the administrator in summary form. This is usually not an acceptable format to be considered by creditors. It is preferable for a full draft deed to be tabled at the meeting of creditors, as the final deed will include many more technical provisions than the original proposal.

Creditors should insist on the full draft, or at least as close to the final draft as practicable, before deciding upon it so that they are fully aware of all of the terms. The meeting can be adjourned to allow time for the production of a more satisfactory draft.

Voting at meetings?

A vote can be determined on the voices if there is a clear majority in number of those present at a meeting. In this case, each person (whether a creditor or a proxy) only has one vote.

If this is inconclusive, or if requested by creditors, the vote can be put to a poll. A poll is a vote which is determined on a majority in both numbers and value. In the event of a stalemate (e.g. majority of numbers voting one way and the majority of value voting another), the administrator will generally exercise a casting vote and make the final decision. Otherwise the resolution will fail.

Do creditors need to decide there and then?

No. The second meeting may be adjourned for up to 45 business days for further investigations to be carried out, or for a proposed Deed of Company Arrangement to be amended.

What does a voluntary administration cost?

There is no definite answer. Each administration is different and will therefore have a different cost dependent on the work required. There are two types of work on insolvency files, statutory and non-statutory but still necessary.

Statutory work has to be performed on every file regardless of size, complexity or other unique factors.

Statutory work includes:

- 1) Notifying ASIC
- 2) Issuing notices to creditors;
- 3) Issuing notices to utilities and statutory authorities (ATO etc.);
- 4) Conducting the first meeting of creditors;
- 5) Dealing with creditors' inquiries;
- 6) Conducting preliminary investigations into preferential payments, insolvent trading and other voidable transactions;
- 7) Preparing and issuing a detailed report to creditors;
- 8) Conducting the second meeting of creditors;
- 9) Notifying creditors and ASIC of the results of the second meeting of creditors.

Non-statutory but still necessary work may include the following tasks:

- 1) Trading the business during the period of the administration;
- 2) Dealing with secured creditors;
- 3) Dealing with finance companies;
- 4) Collecting and selling some or all of the assets of the company or the business of the company;
- 5) More detailed investigations into potential recoveries, the ownership of assets and the viability of any proposal for a Deed of Company Arrangement.

When does a voluntary administration end?

The voluntary administration ends when:

- 1) A Deed of Company Arrangement is fully executed;
- 2) The creditors resolve to wind up the company;
- 3) The creditors resolve that the voluntary administration should end;
- 4) The Court Orders that the administration is to end;
- 5) The approved Deed of Company Arrangement is not signed within 15 days of the second meeting;
- 6) The period for calling the second meeting ends without the meeting having been called; or
- 7) The Court appoints a liquidator to the company.

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