

INTRODUCTION

OBJECT OF ADMINISTRATION

The Voluntary Administration process is regulated by Part 5.3A of the Corporations Act 2001 (Cth) ("the Act"). Section 435A of the Act states that the object of Part 5.3A is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

1. maximises the chances of the company continuing in existence; or
2. results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

THE BENEFITS OF ADMINISTRATION

The benefits of a company entering into Administration include the following:

1. Allows immediate action to be taken and sets a fixed time frame for dealing with the issues;
2. Control of the company is given to an independent person;
3. Prevents unsecured creditors, owners and lessors of property from taking action which may adversely affect the value of a company's business and assets;
4. Allows a company and its creditors to consider the merits of a compromise arrangement which may maximise the return to creditors; and
5. Enables directors in certain circumstances to avoid personal liability for company debts except for debts that have been personally guaranteed.

WHAT DIRECTORS SHOULD DO

Directors of companies that are insolvent or are likely to become insolvent should seek immediate professional advice in relation to their specific circumstances. The procedure normally requires consultation and certain investigative work before implementation, particularly when the intention is to carry on the business of the company or where a secured creditor is in existence.

THE PROCESS

WHO MAY APPOINT AN ADMINISTRATOR?

Pursuant to section 436A of the Act, an Administrator, who must be a registered Liquidator, can be appointed by:

1. the majority of the company's directors; or
2. a Liquidator of the company; or
3. a person holding a charge over the whole or substantially the whole of a company's property.

MAKING THE APPOINTMENT

Pursuant to subsection 436A(1) of the Act, the company's directors can appoint an Administrator by passing resolutions to the effect that the company is insolvent or is likely to become insolvent at some future time and that an Administrator be appointed.

A Liquidator, pursuant to subsection 436B(1) of the Act, may by writing appoint an Administrator to the company if he or she thinks that the company is insolvent or will become insolvent. In compliance with subsection 436B(2)(f) of the Act, the Liquidator can appoint himself or herself Administrator if:

1. at a meeting the creditors pass a resolution approving the appointment; or
2. the appointment is made with leave of the Court.

Pursuant to subsection 436C(1) of the Act, a person holding a charge over the whole or substantially the whole of a company's property may by writing appoint an Administrator to the company, if the charge has become and is still enforceable. In accordance with section 449A of the Act, the appointment of a person as Administrator of a company cannot be revoked.

Subsection 450E(1) of the act provides that a company under administration, must set out in every public document and in every negotiable instrument, after the company's name where it first appears, the expression "Administrator Appointed".

THE FIRST MEETING OF CREDITORS

Pursuant to subsection 436E(1) of the Act, the Administrator must convene the first meeting of creditors, to be held within eight (8) business days after the administration begins. The purpose of the meeting is to consider:

1. whether or not to appoint a Committee of Creditors; and/or
2. to replace the Administrator.

The functions of a Committee of Creditors as per subsection 436F(1) of the Act, are to consult with the Administrator and to receive and consider reports from the Administrator. The Committee cannot give directions to the Administrator (subsection 436F(2) of the Act) except to require the Administrator to report to the Committee (subsection 436F(3) of the Act). Furthermore, a Committee of Creditors can approve the remuneration of the Administrator (subsection 449E(1) of the Act).

THE SECTION 439A REPORT

The Administrator is required to prepare a comprehensive report to creditors that details the results of his or her investigation into the business, property, affairs and financial circumstances of the company (subsection 439A(4)(a) of the Act), and sets out the Administrator's opinions and the reasons for those opinions on each of the alternative courses of action as set out in the Act (subsection 439A(4)(b)). These alternative courses of action as set out in the subsection are as follows:

1. That the company executes a Deed of Company Arrangement ("DOCA"); or
2. That the Administration should end; or
3. That the company be wound up.

If a DOCA is being propounded, then the report must include a statement setting out the details of the proposed DOCA (subsection 439A(4)(c) of the Act).

THE SECOND MEETING OF CREDITORS

In accordance with subsection 439A(1) of the Act, the Administrator must convene a second meeting of creditors, such meeting to be held within five (5) business days before or within five (5) business days after, the end of the convening period, which is normally twenty (20) business days beginning on the day after the Administration began. Attached to the notice of meeting will be a copy of the Administrator's Section 439A report. The purpose of the meeting is to:

1. decide upon the future of the company by passing a resolution for the company to adopt one of the alternative courses of action set out above; and to
2. determine the remuneration of the Administrator, if it has not already been dealt with by a Committee of Creditors.

Alternatively and pursuant to subsection 439B(2) of the Act, creditors can resolve to adjourn the meeting from time to time for a period not to exceed forty-five (45) business days from the date of the second meeting.

VOTING AT THE MEETINGS

Pursuant to Corporations Regulation 5.6.19, a resolution put to the vote at a meeting must be decided by majority on the voices (or on a show of hands) unless a poll is demanded. Subregulation 5.6.21(2) states that a resolution is carried under a poll if a majority in number and value of creditors present vote in favour of the resolution. Conversely, subregulation 5.6.21(3) states that a resolution is not carried under a poll, if a majority in number of creditors present vote against the resolution. In the event of a stalemate, subregulation 6.6.21(4) gives the Chairperson the power to exercise a casting vote.

POWERS OF THE COURT

Pursuant to section 447A of the Act, the Court has general powers to make such orders as it thinks appropriate. The subsections that follow deal with specific powers, namely the protection of creditors (section 447B), the validity of the Administrator's appointment (section 447C), the ability of the Administrator to seek directions (section 447D) and the supervision by the Court of Administrators (section 447E).

THE ADMINISTRATOR

WHO MAY ACT

The appointment of an Administrator cannot be made unless the proposed Administrator has consented in writing to the appointment (section 448A of the Act). A person cannot consent to be appointed Administrator unless the person is a Registered Liquidator (section 448B of the Act).

THE ADMINISTRATOR'S INDEPENDENCE

In accordance with section 436DA of the Act and the Code of Professional Practice issued by the Insolvency Practitioners Association ("IPA") a person appointed Administrator must as soon as practicable after being appointed make out a Declaration of Independence, Relevant Relationships and Indemnities ("DIRRI"). The purpose of the DIRRI is to establish the independence of the appointee. In accordance with subsection 436DA(3) of the Act, the Administrator must circulate a copy of the DIRRI to creditors when he gives notice of the first meeting of creditors.

THE ROLE AND POWERS OF THE ADMINISTRATOR

In accordance with section 437A of the Act, while a company is under administration, the Administrator:

1. has control of the company's business, property and affairs; and
2. may carry on the company's business and manage its property & affairs; and
3. may terminate or dispose of all or part of the company's business or property; and

4. may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company was not in administration.

Section 437B of the Act states that when performing a function or exercising a power, an Administrator is taken to be acting as the agent of the company.

Pursuant to section 438A of the Act, an Administrator must investigate the company's business, property, affairs and financial circumstances and form an opinion about whether it is in the interests of the company's creditors for either the company to execute a DOCA, or for the administration to end, or for the company to be wound up.

Section 442A of the Act, sets out the additional powers of an Administrator, which comprise:

- a. removing from office a director of the company;
- b. appointing a person as a director;
- c. executing a document, bringing or defending proceedings, or doing anything else in the company's name or on its behalf;
- d. whatever else is necessary for the purposes of Part 5.3A of the Act.

THE ADMINISTRATOR'S REMUNERATION

The remuneration of an Administrator is normally calculated on a time basis using hourly rates set by his or her firm. The actual costs will depend upon the circumstances and complexity of the administration and can only be drawn down once approved. Pursuant to section 449E of the Act, the Administrator's remuneration can be determined;

1. by agreement between the Administrator and the Committee of Creditors (if any); or
2. by resolution of creditors; or
3. if there is no agreement or resolution, then by order of the Court.

As noted earlier herein, the remuneration of the Administrator would normally be determined at the second meeting of creditors or at any adjournment of that meeting, unless the remuneration has already been dealt with by a Committee of Creditors, assuming of course one is in existence.

THE EFFECT OF THE APPOINTMENT

THE EFFECT ON DIRECTORS & MEMBERS

Pursuant to section 437C of the Act, while a company is under administration, company officers cannot perform or exercise a function or power unless the Administrator has provided written approval for the person to so act.

Following the commencement of the administration, each director must deliver to the Administrator all of the company's books and records (subsection 438B(1) of the Act) and attend upon the Administrator providing such information about the affairs of the company as the Administrator reasonably requires (subsection 438B(3) of the Act).

Furthermore, in compliance with subsection 438B(2) of the Act, the directors must, within five (5) business days after the administration began or such longer period as the Administrator allows, give to the Administrator a statement about the business, property, affairs and financial circumstances of the company.

In so far as members are concerned, pursuant to section 437F of the Act, a transfer of shares made after the administration began, is void unless either the Administrator gives written consent and any conditions attaching thereto are satisfied, or the Court makes an order authorising the transfer.

THE EFFECT ON PERSONAL GUARANTEES

Pursuant to section 440J of the Act, during the administration of a company, a guarantee of a liability of a company cannot be enforced as against a director of a company or a relative or spouse of a director, except with leave of the Court and in accordance with such terms (if any) as the Court imposes.

THE EFFECT ON CREDITORS

Section 440D of the Act provides that during the period of the administration, there is a general stay of proceedings against the company or in relation to any of its property. Proceedings cannot be commenced or proceeded with except, with either the written consent of the Administrator or with leave of the Court.

If a creditor holds a charge over the whole or substantially the whole of the company's property, then pursuant to section 441A of the Act, the creditor is able to enforce the charge either before or during the "decision period", which is defined in the Act as the period of thirteen (13) days after receipt of notice of the Administrator's appointment.

Furthermore, pursuant to section 440C of the Act, the owner or lessor of property that is used or occupied by, or is in possession of the company, cannot take possession of the property or otherwise recover it except with the Administrator's written consent or with the leave of the Court.

THE EFFECT IF A WINDING UP APPLICATION HAS BEEN FILED

If a winding up application has been filed, then an Administrator can still be appointed. In compliance with subsection 440A(2) of the Act, the Court is to adjourn the hearing of an application to wind up a company already in administration, if the Court is satisfied that the continuation of the administration is in the interest of creditors. In our experience, there will

need to be evidence put before the Court that will lead the Court to conclude there is a real likelihood that a DOCA will be propounded and that the return under the proposed DOCA will be greater than if the company was wound up. If that cannot be done, then it is likely that the Court will order the winding up of the company in which case the administration ends.

THE CONTINUATION OF TRADING

As stated above, an Administrator has the power to carry on the business of a company. However the Administrator will only do so if he or she can be satisfied that the continuation of trading is in the interests of creditors. The reasons that support the continuation of trading include the following:

1. The ability of the company to generate a positive cash flow;
2. To maximize the realisable value of assets such as stock;
3. To facilitate the sale of the company's business;
4. To enable a DOCA to be propounded in the expectation that the return under the DOCA will be greater than if the company was wound up;
5. The availability of fixed assets to cover trade on debts and expenses.

Pursuant to section 443A of the Act, an Administrator is personally liable for debts he or she incurs in the performance or exercise of his or her functions and powers. Section 443D of the Act gives the Administrator an entitlement to be indemnified out of the company's property for debts, liabilities, damages or losses sustained for which he or she becomes liable. The indemnity extends to the remuneration of the Administrator.

THE OUTCOME

WHAT HAPPENS IF CREDITORS RESOLVE TO WIND UP THE COMPANY?

In the event creditors resolve to wind up the company, then pursuant to subsections 446A(1) and 446A(2) of the Act, the company is taken to have passed a resolution under section 491 of the Act that the company has been wound up voluntarily.

In the event that creditors resolve to wind up the company, then pursuant to subsection 499(2A)(a) of the Act, creditors can seek to appoint a person to be Liquidator for the purpose of winding up the company. If no such appointment is made, then pursuant to subsection 499(2A)(b) of the Act, the Administrator will automatically become Liquidator of the company.

WHAT HAPPENS IF CREDITORS RESOLVE THAT THE COMPANY EXECUTES A DOCA?

In the event creditors resolve that the company executes a DOCA, then pursuant to subsection 444B(2) of the Act, the DOCA must be executed within fifteen (15) business days after the end of the meeting of creditors, or such further period as the Court allows on an application made within those fifteen business days.

Further information in relation to DOCA's can be found at <http://www.obp.com.au/Deeds-of-Company-Arrangement>.

WHAT HAPPENS IF CREDITORS RESOLVE TO BRING THE ADMINISTRATION TO AN END?

In the event creditors resolve to bring the administration to an end, then control of the company simply reverts to the directors.

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