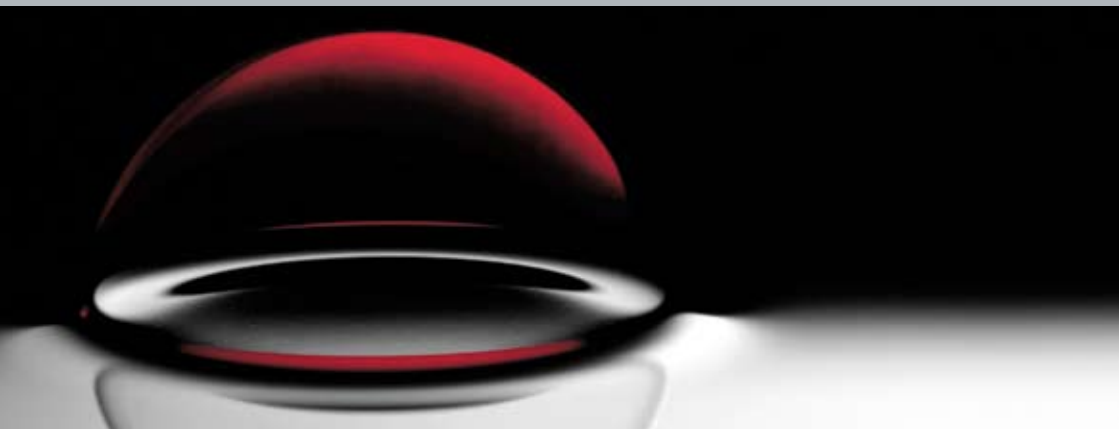


CLAYTON UTZ

Restructuring & Insolvency
Voluntary administration



What is it?

A positive procedure

The object of voluntary administration is to provide for a procedure for the reorganisation of companies that are insolvent or nearly insolvent. Unlike winding up procedures, voluntary administration looks to the possible survival of the company, rather than its ceasing to exist. The affairs of a company in voluntary administration are to be administered in a way that:

- maximises the chances of the company, or its business, continuing in existence; or
- if the company or its business cannot continue in existence, results in a better return to its creditors and shareholders than would result from an immediate winding up.

Who needs it?

Voluntary administration has particular attractions for small and medium-sized companies in financial difficulties. It is designed to be capable of quick implementation, and to be uncomplicated, inexpensive and flexible. In essence, it provides for a short period of external administration of the company, during which options for its continued survival can be explored. The possibility of a company taking the route of voluntary administration is of particular interest to its:

- directors
- secured creditors
- unsecured creditors
- shareholders
- owners of property (lessors, sellers which have the benefit of a retention of title clause) in the possession of the company.

Often the voluntary administration of a company is initiated by its directors, who may do so if they think that the company is insolvent or likely to become insolvent, and that an administrator should be appointed. An administrator may also be appointed by a creditor with security over the whole, or substantially the whole, of the company's property, or by a liquidator or provisional liquidator.

How does it work?

Voluntary administration is not so much an end in itself, as a breathing-space or moratorium on claims against the company. The administrator takes control of the company's business, property and affairs. This means that, even if the company continues to trade, the officers of the company cannot be liable for insolvent trading.

With important exceptions, while the administration lasts, the company cannot be wound up, and unsecured and secured creditors (including owners or lessors of property in the possession of the company) cannot start or continue legal proceedings against the company, without the consent of the administrator or the leave of the court.

Furthermore, subject to certain limited exceptions, no enforcement process against the property of the company can be initiated or continued without the leave of the court. In the meantime, the administrator explores options for rescuing the company or its business.

What are the options?

Investigating the options

An administrator's first task is to investigate the business, property, affairs and financial circumstances of the company, and form an opinion about whether it would be in the interests of the company's creditors, for the company to execute a deed of company arrangement; or for the administration to end; or for the company to be wound up. The administrator must also, within eight business days after appointment, convene a "first meeting of creditors", the purpose of which is to determine whether to appoint a committee of creditors. This first meeting can also resolve to replace the administrator with someone else.

Reporting the options

The administrator must convene a second meeting of the company's creditors within the "convening period", usually 20 business days after the administrator is appointed. The court may extend the time. The meeting itself must be held within five days before or after the end of the convening period. With the notice of meeting, each creditor must be given a copy of a report by the administrator of the result of the investigation, and a statement of the administrator's opinion on each of the options. The administrator

must give reasons for the opinions. If a deed of company arrangement is proposed, a statement of the details of the proposed deed must accompany the notice of meeting.

Choosing an option

The second meeting of creditors may be adjourned from time to time, but for not more than 45 business days in total. At the meeting, the creditors may decide upon one of the options. It is open to the creditors to decide for a deed of company arrangement that differs from the deed, details of which accompanied the notice. If the creditors decide either for a deed of company arrangement, or for the company to be wound up, provisions of the Corporations Act 2001 ensure a transition to the chosen option. Where the creditors decide for a deed of company arrangement, the company and the administrator must execute it. Unsecured creditors cannot act in a manner inconsistent with the deed but (with important exceptions) the deed does not prevent a secured creditor, or the owner or lessor of property in the possession of the company, from realising the security or otherwise asserting property rights.

Summary

Voluntary administration can be a valuable tool in company recovery. It can be activated quickly (resolution by the directors, appointment by liquidator or provisional liquidator, appointment by a creditor having security over the whole or substantially the whole of the company's property). It is of relatively short duration but, while it lasts, it preserves the company as a going concern. The future of the company is very much in the hands of the creditors.

The outcome of the "second meeting of creditors" can be a deed of company arrangement, leading to company recovery. If, however, the creditors so resolve, the company may move from voluntary administration to winding up.

Throughout the process the directors and other officers of the company, its creditors (secured and unsecured), owners of property (lessors, owners which have the benefit of a retention of title clause) in the possession of the company, and its shareholders, need to be aware of their respective positions, and of the possible futures that the company faces.

Restructuring & Insolvency group publications

The Restructuring & Insolvency group of Clayton Utz has prepared a series of brochures that provide an outline of the operation of relevant areas of law.

The complete set of brochures in the series comprises:

- Deed of company arrangement
- Company receivers and managers
- Third party guarantees
- Retention of title clauses
- Voluntary administration
- Liquidation
- Provisional liquidation
- Enforcing security rights

Treatment of the topic addressed in each brochure though comprehensive is not exhaustive. Moreover, a proper understanding of any particular situation demands an integrated approach. Clayton Utz is available to give advice over the whole range of issues relating to corporate restructuring and insolvency, including the position of secured and unsecured creditors, and the practical issues relating to enforcement of securities and debt recovery, structuring and restructuring transactions and litigation.

Copies of this brochure and the others referred to can be obtained free of charge from the Restructuring & Insolvency group of Clayton Utz.

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