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BUSINESS ADVISORS & INSOLVENCY SERVICES

VOLUNTARY ADMINISTRATION (VA)

INTRODUCTION

The voluntary administration framework is a world-class statutory framework that allows a company to restructure and avoid insolvency by implementing a rescue plan, known as a deed of company arrangement, which may include the following:

- Deferral of trade creditor debts (average period is 12 months)
- Compromise trade creditor debts (average payment is 10 to 20 cents in the dollar)
- Moratorium on creditor payments, pending completion of work, debt or capital injection or sale of business or assets.

As experts in corporate and personal insolvency, we specialise in turnaround and restructuring services. Our partners have worked on more than 500 voluntary administrations.

Our clients over the past 18 years have included all the major banks, various second-tier financiers, hundreds of lawyers and accountants, but our specialty is, and has always been, helping small business owners in financial distress.

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1. VOLUNTARY ADMINISTRATION COSTS

The cost of a voluntary administration will vary depending on its size, complexity and which liquidator consents to act as administrator. Our fees for acting as voluntary administrator start from $25,000.

In 2013, ARITA reported that:

- The average cost of a voluntary administration was $54,670
- The average cost of a deed of company arrangement was $28,772
- Total average voluntary administration fee was $83,442
- The average dividend paid to creditors in a small company was 14 cents in the dollar over a 12-month period

There are about 680 qualified liquidators (250 of whom are employed by the 13 largest liquidation firms) and about 270 insolvency firms in Australia. Average hourly fees are as follows:

Average hourly fees			
Company size	Small	Medium	Large
Registered liquidator	$460	$550	$690

In 2010 The Federal Government's Senate Inquiry into insolvency found the hourly charge-our rates of the large insolvency firms are about 33 per cent higher than those of smaller insolvency firms such as Bankruptcy Solutions.

Our work on the $100m Heritage Fine Wines matter proves that our services are highly cost-effective. The average charge-out rate on this large scale, highly complex matter, which was closely monitored by the Courts, was successfully finalised with an average charge-out rate of about $200 per hour.

BEWARE FIXED PRICE QUOTES

Fixed price quotes are just a marketing gimmick. Those found online rarely limit the amount the administrator can charge. Instead they typically reflect the initial payment the administrator will require to act or the pre-insolvency advisor wants as a fee to introduce a client to an administrator.

More than 75 per cent of all voluntary administrations end in liquidation, according to ASIC figures, but "fixed quotes" will generally exclude any amount the administrator will be paid if appointed as liquidator or deed administrator.

SMALL BUSINESS CANNOT AFFORD TO USE VA

According to the ASIC Report 645 Insolvency Statistics to June 2019:

- 85% had assets of less than $100,000, 58% had less than $10,000, and almost 37% were reported as assetless
- Almost 76% had liabilities of less than $1M; 38% had less than $250,000

Various ASIC annual reports show 93% of liquidations do not pay any dividend.

The 2015 Productivity Commission report also suggested that 80 per cent of the 10,000 companies that enter into a formal insolvency appointment (including liquidations, receivership and voluntary administration) have less than $50,000 in assets at the date an insolvency practitioner was appointed.

So only about 20 per cent of the 10,000 insolvent companies that enter into a formal insolvency administration each year have the capacity to pay for the costs associated with a voluntary administration (remember the average fee is more than $83,000).

Without $83,000 in cash or assets to pay an administrator their fees and trade-on costs, an insolvent business will normally be shut down and will not survive the voluntary administration process.

A new option for small businesses operating through a company structure has come into effect from 1 January 2021. This new small business restructuring process gives small businesses an opportunity to develop a restructuring plan to restructure the company's unsecured creditor debts. Importantly, while the plan is being developed, the control of the company remains with you; the director.

Click here to take a look at our '**Small Business Restructuring Plan**' resource to see if your company qualifies for this new structure.

2. WHAT IS A VOLUNTARY ADMINISTRATION?

A company can avoid liquidation by entering into voluntary administration.

The statutory process provides a means of appointing an independent person, called an administrator or voluntary administrator, to take control of management of a company in financial distress.

The directors' powers cease and control of the company passes to the administrator.

During the administration period, creditors are restrained from enforcing their rights, Court proceedings are suspended, and landlords, asset owners and lease companies are generally unable to enter into possession of their property. The restrictions on creditor rights are designed to create an environment where the administrator can, if appropriate, trade on the business and facilitate a restructure in the best interest of all the creditors.

The *Corporations Act 2001* states that the rescue plan or restructure of a company that can be implemented by a formal agreement and that is binding on all unsecured creditors, is known as a deed of company arrangement.
The contents of a deed of company arrangement may include any of the following:

- A moratorium of payments to creditors for a defined period (normally 12 months)
- Compromise, release or reduction from a company's unpaid trade creditors' debts (10 to 20 cents in the dollar is usually paid to creditors)
- Merger, sale or closure of existing operations
- Injection of new management, accountant capital or other expertise
- Reorganisation of loans and shareholdings
- Debt forgiveness by stakeholders
- Related parties excluded from the dividend paid to creditors in 90 per cent of deed of company arrangements

Directors and other interested parties who want to save the business, not the administrator, are responsible for formulating a deed of company arrangement for creditors to consider. An administrator will, however, generally help directors to formulate any proposal, if requested.

It is vital that directors are proactive if they want to propose a deed of company arrangement. Directors must not leave the work to the administrators but must liaise with major creditors during the voluntary administration period to ensure creditors understand the rescue plan and gauge the level of support of their proposal. If there is a problem, it is far cheaper to amend a rescue proposal well in advance of the administrator's report to creditors, which is issued about 18 business days after appointment.

Control of the company will revert to the directors when the deed of company arrangement is signed. The administration period is typically only 25 business days.

TIMELINE OF VOLUNTARY ADMINISTRATION

1st Business Day: Appointment of administrator

- The administrator takes control of company
- Directors' powers cease and liability for insolvent trading ends
- Moratorium on creditors' claims imposed

8th Business Day: First meeting of creditors

- Creditors confirm appointment of incumbent administrator or replace the incumbent administrator with another

18th Business Day: Report by administrator issued

- Report details company's business and financial circumstances
- Report discloses the administrators investigations and viability of rescue plan, if proposed

25th Business Day: Second meeting of creditors

- Creditors determine company's future by voting for either deed of company arrangement or liquidation

3. INITIATING A VOLUNTARY ADMINISTRATION

A voluntary administration is easy to initiate. It takes less than an hour to appoint an administrator and is usually done by the directors of a company via a conference call.

If all the directors agree, a valid meeting of the directors can be convened at any time and the directors resolve to make the formal appointment by passing a resolution of the board of directors that states:

- The company is insolvent or is likely to become insolvent and
- An administrator of the company should be appointed

If there is a dispute between the directors, the *Corporations Act 2001* and the company's constitution must be reviewed to ensure that reasonable notice of the directors meeting is given to all directors and that the meeting has met all formal meeting requirements.

The appointment is effective when the directors of the insolvent company have executed a written appointment document. Court orders are not required to appoint a voluntary administrator.

A voluntary administration may also be initiated by a secured creditor or liquidator.

4. WHO CAN ACT AS ADMINISTRATOR?

Only a registered liquidator can act as a voluntary administrator. Lawyers are not qualified to act as voluntary administrators.

5. CONSEQUENCES OF APPOINTMENT

ADMINISTRATOR ROLE

The voluntary administrator will:

1. Assume sole responsibility for the company's operations
2. Trade on the business or sell the assets/business
3. Investigate the company's affairs
4. Liaise with employees, creditors, the ATO, banks, lease companies, landlords and statutory bodies
5. Assist and evaluate any deed of company arrangement proposal
6. Prepare reports to creditors and ASIC
7. Hold meetings of creditors
8. Draft deed of company arrangement, if required

INVESTIGATIONS BY ADMINISTRATOR

The administrator is required to include and report to creditors if there are any voidable transactions that may be recoverable by a liquidation. This includes:

1. Preference payments
2. Uncommercial transactions
3. Insolvency trading
4. Breach of directors' duties

Click here for more information on voidable transactions

MORATORIUM ON CREDITOR CLAIMS

A company's assets are protected by a moratorium on creditors' recovery actions.

During the administration period:

- Court proceedings against a company, including winding-up applications, cannot proceed unless the administrator consents or the Court grants leave
- The owner or lessor of property that is being used by the company cannot be taken unless the administrator or court consents
- A sheriff or court officer cannot take action to sell the company's property
- A provisional liquidator cannot be appointed

SECURED CREDITOR AND LANDLORD

A secured creditor (i.e. a bank) who has a general security agreement (a mortgage or a fixed floating charge) over the whole or substantially the whole of the property of a company may appoint a receiver to take control of their asset. The receiver's power supersedes the administrator's powers.

The secured creditor has 13 business days to determine if they want to enforce their security interest and take possession of their assets. If a secured creditor does not appoint a receiver to sell their assets during the 13-day "decision period", they will be bound by the general creditor moratorium on creditors, enabling the administrator to continue to use the assets.

The vast majority of secured creditors will not have a security interest or charge over the whole (or substantially whole of the business). These financers, owners, landlords and lessors are precluded from taking possession of the assets (i.e. cars, trucks, plant and equipment subject to specific leases) during the voluntary administration period.

PERSONAL GUARANTEES

During the administration period, a guarantee of company debts cannot be enforced against a director, or a spouse, de-facto or relative of a director.

At the end of the administration period (normally 25 business days) a guarantor will be permitted to pursue any personal guarantees. A personal guarantee will not be released or varied by operation of a deed of company arrangement. If a creditor holding a guarantee votes for a deed of company arrangement that specifically alters the guarantor's rights, however, the guarantor will be obligated to comply with that variation.

LITIGATION AGAINST DIRECTORS BY LIQUIDATOR

If a deed of company arrangement is executed, the company will avoid liquidation and without a liquidator the following recovery actions cannot be pursued for the benefit of the creditors:

- Insolvent trading against directors and holding companies
- Uncommercial transaction
- Unfair preference
- The personal liability of directors to indemnify the Australian Taxation Office for the repayment of an unfair preference will also be avoided

6. MEETINGS OF CREDITORS

THE PROPOSAL OR SECOND MEETING OF CREDITORS

The second meeting of creditors will usually be held 25 business days after the administrator's appointment. All creditors present will vote to determine the company's future. Adjournments are permitted for a period of up to 45 business days without Court consent.

There are three options for the company's future:

- Enter into a rescue plan or reconstruction known as a deed of company arrangement
- Liquidation or
- Return control of the company to the directors and end the administration

The administrator, as chairperson, will adjudicate on the eligibility of creditors' claims for voting purposes.

Unlike bankruptcy and liquidation scenarios, a secured creditor is entitled to vote in respect of the full value of their debt without surrendering or deducting the value of their security.

Where a poll is called, a resolution will be carried if creditors representing more than 50 per cent in number and 50 per cent in value vote in favour of that resolution.

TAXATION DEBTS

From 1st July 1993 the priority repayment of taxation liabilities ahead of trade creditors was revoked. Subject to rare exceptions, outstanding tax debts are now treated like any other unsecured trade creditor.

Since 2012 and the introduction of the 'lockdown DPN', however, directors are automatically personally liable for unpaid company taxes if their company does not report and pay its ATO obligations on time. From a personal liability perspective, it's now more important to report than pay ATO obligations.

It is vital that a director liaise with the ATO to determine exactly what their personal liabilities are, before considering implementing a voluntary administration.

If a deed of company arrangement is accepted by the prescribed 50 per cent majority of creditors, the ATO must accept the terms prescribed by the deed (i.e. the ATO must accept 10 to 20 cents in the dollar in full and final settlement of all outstanding taxation obligations). The personal liability for unpaid and unreported ATO debts will survive a deed of company arrangement, however.

VARIATION OF DEED OF COMPANY ARRANGEMENT

When a company defaults on its obligations agreed in a deed of company arrangement, it may be varied at a meeting of creditors. Generally variations give more time to pay agreed obligations.

7. VOLUNTARY ADMINISTRATION STATISTICS

According to ASIC statistics from the past decade, about 5 per cent of the 10,000 companies that enter into a formal corporate insolvency administration each year will use the voluntary administration framework to successfully restructure. Invariably these are large companies with enough money to pay the administrator's fees and trade-on costs. For most companies, however, the use of voluntary administration is in decline.

In 2002, voluntary administration represented about 40 per cent of all insolvency appointments (i.e. liquidations, receivership and voluntary administration). By 2014, this figure had dropped to 12 per cent. Between 2000 and 2010, there were about 2700 voluntary administration appointments a year. Over the past two years, this figure has dropped significantly.

About 75 per cent of companies in voluntary administration will go into liquidation. About 25 per cent of companies in voluntary administration will offer to pay creditors via a deed of company arrangement. About 64 per cent of these deeds of company arrangement will be successful.

The decline in the number of voluntary administrations is probably due to the costs of implementing the framework and the increased use of buying the assets of an insolvent company pre or post liquidation without incurring the costs of an administration.
ASIC statistics suggest that about 85 per cent of all voluntary administrations result in the administrator being paid less than $100,000 in professional fees.

At the other end of the scale there are about 40 large-scale administrations a year that generate more than $250,000 in administrator fees. Some of these matters are the massive jobs that realise millions in professional fees for the administrators.

DO YOU NEED HELP?

We invite you to give us a call, all initial discussions are free of cost or obligation. Talk to our in-house liquidators, bankruptcy trustees, lawyers or accountants about your circumstances and options.

We have offices in Sydney, Melbourne and Byron Bay together with affiliated offices in each capital city. Our nationwide network lets us service our clients' needs throughout Australia.