Advanced Building & Construction Limited (Administrators Appointed)

Voluntary administration: a guide for creditors

If a company is in financial difficulty, it can be put into voluntary administration.

This information sheet provides general information for unsecured creditors of companies in voluntary administration.

Who is a creditor?

You are a creditor of a company if the company owes you money. Usually, a creditor is owed money because they have provided goods or services or made loans to the company. An employee who is owed money for unpaid wages and other entitlements is also a creditor.

A person who may be owed money by the company if a certain event occurs (e.g. if they succeed in a legal claim against the company) is also a creditor, and is sometimes referred to as a ‘contingent’ creditor.

There are generally two categories of creditor: secured and unsecured.

A secured creditor is someone who has a ‘charge’, such as a mortgage, over some or all of the company’s assets, to secure a debt owed by the company. Lenders usually require a charge over company assets when they provide a loan. An unsecured creditor is a creditor who does not have a charge over the company’s assets.

Employees are a special class of unsecured creditors. In some circumstances, their outstanding entitlements are paid in priority to the claims of other unsecured creditors. If you are an employee, see our related information sheet ‘Voluntary administration: a guide for employees’.

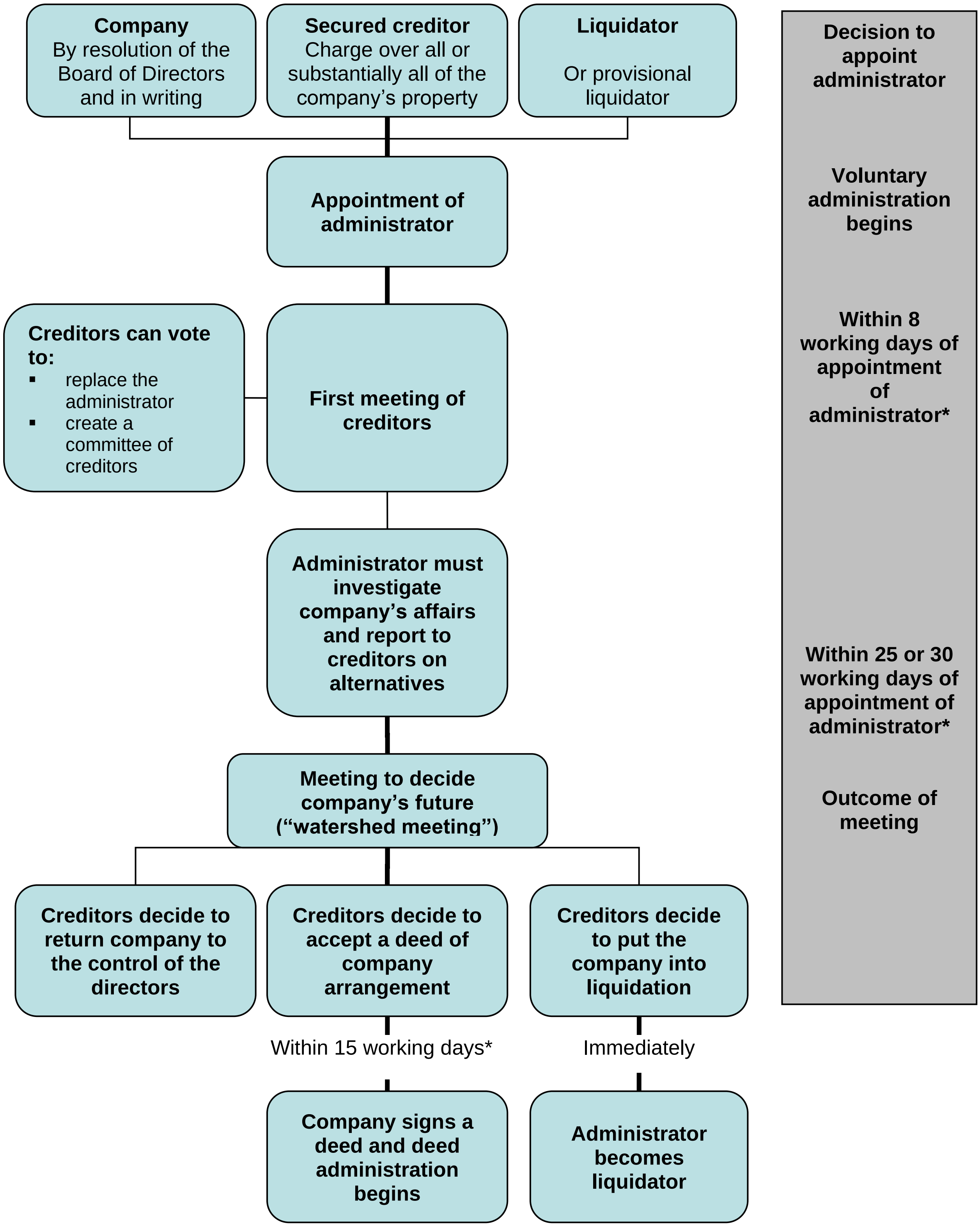
The purpose of voluntary Administration

Voluntary administration is designed to resolve a company’s future direction quickly (Figure 1 summarises the process). In a voluntary administration an independent and suitably qualified person (the administrator) takes full control of the company to try to work out a way to save either the company or its business.

If it isn’t possible to save the company or its business, the aim is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had instead been placed straight into liquidation. A mechanism for achieving these aims is a deed of company arrangement.

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

Figure 1: The voluntary administration process



* Unless the court allows an extension of time.

An administrator is usually appointed by a company's directors, after they decide that the company is insolvent or likely to become insolvent.

Less commonly, an administrator may be appointed by a liquidator, provisional liquidator, or a secured creditor.

A company in voluntary administration may also be in receivership.

The administrator's role

After taking control of the company, the administrator investigates and reports to creditors on the company's business, property, affairs and financial circumstances, and on the three options available to creditors. These are:

- end the voluntary administration and return the company to the directors' control
- approve a deed of company arrangement through which the company will pay all or part of its debts and then be free of those debts, or
- wind up the company and appoint a liquidator.

The administrator must give an opinion on each option and recommend which option is in the best interests of creditors.

In doing so, the administrator tries to work out the best solution to the company's problems, assesses any proposals put forward by others for the company's future, and compares the possible outcomes of the proposals with the likely outcome in a liquidation.

A creditors' meeting is usually held around 4 weeks after the company goes into voluntary administration to decide on the best option. In complex administrations this meeting may be held later if the court consents.

The administrator has all the powers of the company and its directors.

This includes the power to sell or close down the company's business or sell individual assets in the lead up to the creditors' decision on the company's future.

Another responsibility of the administrator is to report to the Registrar of Companies on possible offences by people involved with the company.

Although the administrator may be appointed by the directors, the administrator must act fairly and impartially.

Effect of appointment

The effect of the appointment of an administrator is to provide the company with breathing space while the company's future is resolved. While the company is in voluntary administration:

- unsecured creditors can't begin, continue or enforce their claims against the company without the administrator's consent or the court's permission
- owners of property (other than perishable property) used or occupied by the company, or people who leased such property to the company, can't recover their property
- except in limited circumstances, secured creditors can't enforce their charge over company property, and
- a court application to put the company in liquidation can't be commenced without the administrator's consent or the permission of the court.

Administrator's liability

Any debts that arise from the administrator purchasing goods or services, or hiring, leasing, using or occupying property, are paid from the available assets as costs of the voluntary administration. If there are insufficient funds available from asset realisations to pay these costs, the administrator is personally liable for the shortfall (unless the court orders otherwise). To have the benefit of this protection, you should ensure you receive a purchase order authorised in the manner advised by the administrator.

The administrator must also decide whether to continue to use or occupy property owned by another party that is held or occupied by the company at the time of their appointment. If the administrator decides to continue to do so, they will be personally liable for any rent or amounts payable arising after 7 days from the commencement of the administration (unless the court orders otherwise).

Amounts that become due to employees after the date of the appointment of the administrator have a priority claim against the company's assets as a cost of the administration. However, the administrator will become personally liable for such amounts arising 14 days after the commencement of the administration (unless the court orders otherwise).

Creditors' meetings

Two meetings of creditors must be held during the voluntary administration.

First creditors' meeting

The administrator must call the first creditors' meeting within 8 working days after the voluntary administration begins.

The purpose of the first meeting is for creditors to decide two questions:

- whether they want to form a committee of creditors, and if so who will be on the committee, and
- whether they want the existing administrator to be replaced by an administrator of their choice.

The role of a committee of creditors is to consult with the administrator about matters relevant to the voluntary administration and receive and consider reports from the administrator. The committee can also require the administrator to report to them about the voluntary administration.

A creditor who wishes to nominate an alternative administrator must obtain before the meeting written consent from the alternative person which complies with the Companies Act 1993. The administrator will only be replaced if the resolution to replace them is passed by the creditors at the meeting.

To be eligible to vote at this meeting, you must lodge details of your debt or claim with the administrator (discussed further below).

This meeting can be chaired by either the administrator or someone nominated by the administrator.

Second creditors' meeting (to decide the company's future) - "watershed meeting"

After investigating the affairs of the company and forming an opinion on each of the three options available to creditors (outlined above), including an opinion as to which option is in the best interests of creditors, the administrator must call a second creditors' meeting, known as the "watershed meeting".

At this meeting, creditors are given the opportunity to decide the company's future.

This meeting is usually held around 4 weeks after the company goes into voluntary administration.

However, in complex voluntary administrations, often more time is needed for the administrator to be in a position to report to creditors. In these circumstances, the court can approve an extension of time to hold the meeting.

In preparation for the watershed meeting, the administrator must send creditors the following documents at least 5 working days before the meeting:

- a notice of meeting
- the administrator's report, and
- a statement about any proposals for a deed of company arrangement.

These will be accompanied by:

- a claim form, and
- a proxy voting form.

The meeting must also be advertised.

Administrator's report

You should read the administrator's report before you attend the watershed meeting or decide whether you want to appoint someone else to vote on your behalf at that meeting. This report should give sufficient information to explain the company's business, property and affairs, and the reasons for the current financial situation, to enable you to make an informed decision about the company's future.

The report should also provide an analysis of any proposals for the future of the company, including the possible outcomes, as well as a comparable estimate of what would be available for creditors in a liquidation.

Finally, the report should include the administrator's opinion on each of the options available to creditors, as well as an opinion on which is in the best interests of creditors. As noted above, the options are:

- end the voluntary administration and return the company to the directors' control
- approve a deed of company arrangement (if one is proposed), or
- put the company into liquidation.

Administrator's statement about deed

If there are proposals for a deed of company arrangement, the administrator must provide creditors with a statement giving enough details of each proposal to enable creditors to make an informed decision. The types of proposals allowed in a deed of company arrangement are very flexible.

Typically, a proposal will provide for the company to pay all or part of its debts, possibly over time, and then be free of those debts. It will often provide for the company to continue trading. How these things will happen varies from case to case, as the terms allowed in a deed of company arrangement are also very flexible. The contents of a deed of company arrangement are discussed below.

Voting at a creditors' meeting

To vote at any creditors' meeting you must lodge details of your debt or claim with the administrator. Usually, the administrator will provide you with a claim form to be completed and returned before the meeting.

The chairperson of the meeting decides whether or not to accept the debt or claim for voting purposes. The chairperson may decide that a creditor does not have a valid claim or the amount of the debt cannot be determined with any certainty at the date of the meeting. In this case, they may not allow the creditor to vote at all, or only to vote for a debt of $1. This decision is only for voting purposes. It is not relevant to whether a creditor will receive a distribution.

An appeal against a decision by the chairperson to accept or reject a proof of debt or claim for voting purposes may be made to the court.

A secured creditor is entitled to vote for the full amount of their debt without having to deduct the value of their security.

Voting by proxy

You may appoint a proxy to attend and vote at a meeting on your behalf.

The completed proxy form must be provided to the administrator before the meeting.

You can specify on the proxy form how the proxy is to vote on a particular resolution and the proxy must vote in accordance with that instruction. This is called a 'special proxy'.

Alternatively, you can leave it to the proxy to decide how to vote on each of the resolutions put before the meeting. This is called a 'general proxy'.

You can appoint the chairperson to represent you either through a special or general proxy.

Manner of voting

A vote on any resolution put to a creditors' meeting may be taken by creditors stating aloud their agreement or disagreement, or by a show of hands. Sometimes a more formal voting procedure called a 'poll' is taken. The chairperson will determine how this poll is taken.

A resolution is passed if:

- more than half the number of creditors who are voting (in person, by postal, or by proxy) vote in favour of the resolution, and

- those creditors who are owed 75% or more of the total debt owed to creditors at the meeting vote in favour of the resolution.

Chairperson's casting vote

When a vote is taken and there is a deadlock in the number of creditors voting on the resolution, the chairperson may use their casting vote either in favour of or against the resolution. The chairperson may also decide not to use their casting vote.

Votes of related creditors

Related party creditors' votes at creditor meetings will be automatically disregarded unless they notify the practitioner of their intention to vote ahead of the creditor meeting and, within 10 working days of the meeting, apply to Court to have their vote included.

Deciding how to vote at the watershed meeting

How you vote at the meeting on the three possible options, including any competing proposals for a deed of company arrangement, is a commercial decision based on your assessment of the company and its future prospects, and your personal circumstances. The information provided by the administrator, including opinions expressed, will assist you. However, you are not obliged to accept the administrator's recommendation.

If you do not consider that you have been given enough information to decide how to vote, and particularly whether to vote for any deed proposal, you can ask for a resolution to be put to creditors that the meeting be adjourned (up to a maximum of 30 working days) and for the administrator to provide more information. You must make this request before a vote on the company's future. This resolution must be passed for the adjournment to take place.

Creditors also have the right when a deed of company arrangement is proposed and considered at the meeting to negotiate specific requirements into the terms of the deed, including, for example, how the deed administrator is to report to them on the progress of the deed.

Any request to vary the deed proposal to include such requirements should be made before the deed proposal is voted on.

Minutes of meeting

The chairperson must prepare minutes of each meeting and a record of those who were present at each meeting.

Company returned to directors

If the company is returned to the directors, they will be responsible for ensuring that the company pays its outstanding debts as they fall due.

Liquidation

If creditors resolve that the company go into liquidation, the administrator is the default liquidator unless creditors pass a resolution appointing a different liquidator. The liquidation proceeds as a creditors' voluntary liquidation with any payments of dividends to creditors made in the order set out in the Companies Act 1993

Deed of company arrangement

If creditors vote for a proposal that the company enter a deed of company arrangement, the company must sign the deed within 15 working days of the creditors' meeting, unless the court allows a longer time. If this doesn't happen, the company will automatically go into liquidation, with the administrator becoming the liquidator.

The deed of company arrangement binds all unsecured creditors, even if they voted against the proposal. It also binds owners of property, those who lease property to the company and secured creditors, if they voted in favour of the deed. In certain circumstances, the court can also order that these people are bound by the deed even if they didn't vote for it.

Contents of the deed

Whatever the nature of the deed of company arrangement, it must contain certain information, including:

- the name of the deed administrator
- the property that will be used to pay creditors
- the debts covered by the deed and extent to which those debts are released
- the order in which the available funds will be paid to creditors
- the nature and duration of any suspension of rights against the company
- the conditions (if any) for the deed to come into operation
- the conditions (if any) for the deed to continue in operation, and
- the circumstances in which the deed terminates.

Monitoring the deed

It is the role of the deed administrator to ensure the company (or others who have made commitments under the deed) carries through these commitments. The extent of the deed administrator's ongoing role will be set out in the deed.

Creditors can also play a role in monitoring the deed. If you are concerned that the obligations of the company (or others) under the deed are not being met, you should take this up promptly with the deed administrator. Matters that may give rise for concern include deadlines for payments or other actions promised under the deed being missed.

Creditors also have the right when a deed of company arrangement is proposed and considered at the watershed meeting to negotiate consequences of failure to meet such deadlines into the terms of the deed. Any request to vary the deed proposal to include such consequences should be made before the deed proposal is voted on.

Varying the deed

The deed administrator can call a creditors' meeting at any time to consider a proposed variation to the deed or a resolution to terminate the deed. The proposed resolutions must be set out in the notice of meeting sent to creditors.

Creditors owed at least 10% in value of all creditor claims can, by written request, also require the deed administrator to call such a meeting. However, it is unusual for this to happen, as those who make the request must pay the costs of calling and holding the meeting.

Payment of distributions under a deed

The order in which creditor claims are paid depends on the terms of the deed. Sometimes the deed proposal is for creditor claims to be paid in the same priority as in a liquidation. Other times, a different priority is proposed.

Before you decide how to vote at the creditors' meeting, make sure you understand how the deed will affect the priority of payment of your debt or claim.

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You may wish to seek independent legal advice if the deed proposes a different priority to that in a liquidation, or if creditors approve such a deed.

Establishing your claim under a deed

How debts or claims are dealt with under a deed of company arrangement depends on the deed's terms. Sometimes the deed incorporates the Companies Act provisions for dealing with debts or claims in a liquidation.

Before any dividend is paid to you for your debt or claim, you will need to give the deed administrator sufficient information to prove your debt. You may be required to complete a claim form.

You should attach copies of any relevant invoices or other supporting documents to the claim form, as your debt or claim may be rejected if there is insufficient evidence to support it.

If a creditor is a company, the claim form should be signed by a person authorised by the company to do so.

When submitting a claim, you may ask the deed administrator to acknowledge receipt of your claim and advise if any further information is needed.

If the deed administrator rejects your claim after you have taken the above steps, first contact the deed administrator. You may also wish to seek your own legal advice. This should be done promptly. Depending on the terms of the deed, you may have a limited time in which to take legal action to challenge the decision.

If you have a query about the timing of the payment, discuss this with the deed administrator.

How a deed comes to an end

The deed may set out certain conditions where the deed will automatically terminate.

Another way for the deed to end is if the deed administrator calls a meeting of creditors, and creditors vote to end the deed. This may occur because it appears unlikely that the terms of the deed can be fulfilled.

The deed may be also be terminated if a creditor, the company or any other interested person applies to the court and the court is satisfied that:

- creditors were provided false and misleading information on which the decision to accept the deed proposal was made
- the administrator's report left out information that was material to the decision on accepting the deed proposal
- the deed cannot proceed without undue delay or injustice, or
- the deed is unfair or discriminatory to the interests of one or more creditors or against the interests of creditors as a whole.

If the court terminates the deed as a result of such an application, the company automatically goes into liquidation.

Creditors' committee

A creditor's committee may be formed, following a vote of creditors, to consult with the administrator or deed administrator and receive reports on the conduct of their administration. A creditors' committee can also approve the administrator's fees if the court gives them this responsibility.

In a voluntary administration this committee is called a 'committee of creditors' and may be formed at the first creditors' meeting. While the company is under a deed of company arrangement, it is called a 'committee of inspection'.

All creditors, including a representative of the company's employees, are entitled to stand for committee membership to represent the interests of all creditors. However, to operate efficiently, the committee should not be too large.

If a creditor is a company, the creditor can nominate a director or employee to represent it on the committee.

Directors and voluntary administration

Directors cannot use their powers while the company is in voluntary administration. They must help the administrator, including providing the company's books and records, and a report about the company's business, property, affairs and financial circumstances, as well as any further information about these that the administrator reasonably requires.

If the company goes from voluntary administration into a deed of company arrangement, the directors' powers depend on the deed's terms. When the deed is completed, the directors regain full control, unless the deed provides for the company to go into liquidation on completion.

If the company goes from voluntary administration or a deed of company arrangement into liquidation, the directors cannot use their powers. If creditors resolve that the voluntary administration should end, control of the company goes back to the directors.

Complaints against companies and their officers can be made to the Companies office.