VOLUNTARY ADMINISTRATION

PURPOSE

Voluntary administration is a **process** whereby a **company** who may be **insolvent** is **managed** in a way that (**s 435A**):

(a) **Maximises** the **chances of the company continuing** in **existence**; **or**

(b) If this is not possible, provide a **better return for the company's creditors** and **members than** in the **case of immediate winding up**.

COMMENCEMENT

Administration of **company commences** (**s 435C(1)**) when **administrator accepts** an **appointment** from one of the following:

- the **company** (appointment by directors): **s 436A**
- the **liquidator**; **s 436B** or
- **secured party** with an **enforceable security over the whole**, or substantially the whole, of the company's property but not if a person holds an appointment as liquidator of company: **s 436C**.

APPOINTMENTS

How appointment made

(1) the company (directors)

The **directors** may **pass a resolution** that the **company is** or is likely to **become insolvent**, and that an **administrator should be appointed**: **s 436A**.

> **SECT 436A**
>
> **Company may appoint administrator if board thinks it is or will become insolvent**
>
> **(1)** A **company** may, by **writing**, **appoint** an **administrator** of the company if the **board** has **resolved** to the effect that:
>
> **(a)** in the **opinion** of the **directors** **voting** for the **resolution**, the **company** is **insolvent**, or is **likely** to **become insolvent** at some **future time**; **and**
>
> an **administrator** of the **company should** be **appointed**.

Although **directors** are **not required** to **examine** the **entirety** of the **company's financial position** or **obtain expert opinion regarding company's solvency**, they must actually **form** a **concluded opinion** about the **company's solvency**: ***Wagner v International Health Promotions*** **(1994)**.

- **Opinion** must be **genuine** and **not** used for **collateral purpose**: ***Kazur v Duus*** **(1998)**.

A **failure to resolve** that the **company is insolvent**, or likely to become insolvent, the **court** can **set aside** the **appointment**: ***Wagner v International Health Promotions***.

The **validity of appointment** by **board of directors** is **based** on **consideration** under law of meetings. There is a requirement that:

- **proper notice** (in terms of consent and timing) of the meeting be given to all directors;
- **directors** are **aware that the discussion** is a **formal meeting** of **board** and not an informal discussion; and
- **directors** with a **conflict of interest declare** their **interest** (**s 191**) and, unless exempted, refrain from voting.

Although directors may be **liable to the company** for **damages** if they **resolve to appoint administrators** in **circumstances** where the **section does not apply**, the **question** is '**whether** the **directors genuinely believed** that the **company was insolvent** or likely to become so, and whether that **belief was reasonable** in circumstances'.

- It will **depend** upon **whether** they **took adequate steps** to **satisfy themselves** that the **statutory requirements** were **met** before resolving to appoint administrator: ***Downey v Crawford*** **[2004]**.

A **VA** that is **initiated** by **directors** for a **collateral purpose** may be held to be **invalid** by the **court**.

The **court reserves** the **discretion** to **set aside appointments** where it **appears** although there is an **abuse of process**: ***Aloridge Pty Ltd v Christianos***.

(2) *By liquidator*

The **liquidator** or provisional liquidator may **appoint** an **administrator** by **writing** if they **think** that the **company is insolvent**, or is **likely to become insolvent** at some future time: **s 436B(1)**.

> **SECT 436B Corp Act**
>
> **Liquidator may appoint administrator**
>
> **(1)** A **liquidator or provisional liquidator** of a company **may appoint an administrator** of the company **if** he or she **thinks** that the **company is insolvent**, or is li**kely to become insolvent** at some future time.

The **liquidator may not appoint themselves** (or any partner if in partnership or officer if officer of corporation, etc) without a resolution of creditors or the leave of the court: **s 436B(2)**.

- Although a strict view was followed in ***Re Depsun Pty Ltd***, the **better view** appears to be that the ***court will be willing to grant leave*** as the decisions are left to the creditors: ***Commissioner of Taxation v Foodcorp Pty Ltd*****; Cf** ***Re Depsun Pty Ltd***.
    - Not good law – held too close an association.

(3) *Secured party with an enforceable security over the whole, or substantially the whole, of the company's property*

A **person** who is **entitled** to **enforce a charge** over the **whole or substantially the whole** of the **company's property** may **appoint** an **administrator by writing**: **s 436C**.

SECT 436C – Secured party may appoint administrator

(1) A **person** who is **entitled** to **enforce** a **security interest** in the whole, or substantially the whole, of a company's **property** may by writing **appoint an administrator** of the company…

The **interest** held by the **creditor** must be in the **nature of a security**: ***Re Smarter Way (Aust)* [2000] VSC**.

- **Security interest** must be **perfected**: **s 436C(1A) Corp Act**.

A **charge** is likely to be considered to be **over the whole**, or **substantially the whole** of the **assets** if it has a **charge** of **all the assets necessary to carry on the business of the company**.

- A **charge** includes a **mortgage**: **s 9**.

Note: There is **no requirement** of **insolvency**.

Here, <chargee> has charges over _____.

Chargee usually **appoints a receiver** as a **receiver** will **act in their interests**, whereas an **administrator** will act in the **interests of creditors as a whole**.

- Thus, usually only used where a shortfall would be expected, as the chargee does not need to pay the costs of the administrator.

Note: The **chargee cannot appoint** an **administrator** where the **company is in liquidation**: **s 436D**.

Overlapping of appointments

Overlap with liquidation

The **board cannot** make such an **appointment** if the **company is already in liquidation**: **s 436D**.

- However, such a resolution may be made prior to the order for winding up, but after an application: ***FAI Workers Compensation (NSW) Ltd v Philko Builders***.

Overlap with receivership

The **company** may **still appoint** an **administrator after a receiver** and **manager** has been **appointed**: ***Re Genasys II* (1996)**.

REQUIREMENTS TO BE AN ADMINISTRATOR

An **administrator** must be a ***registered liquidator*** (**s 448B**) and **satisfy independence requirements** (**s 448C**).

Disqualification of administrator

A person is ***disqualified*** from **acting** as an **administrator of a company** if (**s 448C(1)**):

- a **creditor** of, or has an **interest**, in the company, of **over $5,000**: **s 448C(1)(a)-(b)**;
- a **director**, **secretary**, senior manager or **employee** of **company**: **s 448C(1)(c)**;

- a **director**, secretary, senior manager of employee of company that is a **mortgagee** of **company's property**: **s 448C(1)(d)**;
- an **auditor** (**s 448C(1)(e)**) or **partner** or **employee** of an **auditor** (**s 448C(1)(f)**) of company;
- a **partner**, **employer** or **employee** of a **director**, secretary, senior manager or **employee** of the company: **s 448C(1)(g)**;
- an **insolvent** under **administration**: **s 448D**.
- The person is a partner or employee of an employee of an officer of the company: **s 448C (1)(h)**; or
- The **person** is an **insolvent** under administration: **s 448D**.

If **administrator accepts appointment** while **disqualified**, they **may** be **removed** but that **does not invalidate** their **appointment** or **render invalid** any **decisions made**: ***Viscariello v Macks*** **[2014]**.