



## Voluntary administration

### Who is a creditor?

You are a creditor if the company owes you money. You may be owed money because you:

- supplied goods or services to the company
- made loans to the company
- paid for goods or services that you have not received
- are an employee owed money for unpaid wages and other entitlements.

A 'contingent creditor' is owed money by the company if a certain event occurs (e.g. if they succeed in a legal claim against the company).

Creditors might be secured or unsecured:

- A secured creditor holds a security interest, such as a mortgage, in some or all the company's assets, to secure a debt owed by the company.
- An unsecured creditor does not hold a security interest in the company's assets.

Employees are a special category or class of unsecured creditors. Their outstanding entitlements are usually paid before the claims of other unsecured creditors.



## Who is an employee?

You are an employee if you are:

- engaged by a company under an award, enterprise agreement, agreement-based transitional instruments (i.e. agreements that were in force before the commencement of the Fair Work Act 2009) or a contract of employment
- paid a salary, wages or commission.

If you are an employee owed money for unpaid wages, superannuation, annual leave, sick leave, long service leave, retrenchment pay or other benefits, you are a creditor of the company. You may be entitled to some or all of what you are owed before other company creditors (this is known as 'priority').

If you are a contractor, you may be classified as an unsecured creditor, not an employee. You should seek your own legal advice or contact the Australian Taxation Office (ATO), the Fair Work Ombudsman or your union representative to determine if you are a contractor or an employee.

## The purpose of voluntary administration

Voluntary administration is designed to resolve a company's future with the voluntary administrator taking full control of the company. This allows the director or a third-party time to find a way, if possible, to save the company or its business.

If it is not possible for the director or a third-party to come up with a plan to salvage the company or its business, the voluntary

administrator aims to administer the company's affairs to obtain a better return to creditors than if the company had been liquidated and closed down. A mechanism for achieving these aims is a deed of company arrangement (DOCA).

A DOCA is a binding arrangement between a company and its creditors governing how the company's affairs will be dealt with. It is agreed to after the company enters voluntary administration.

The DOCA is may be proposed by the director of the company or any third-party, usually in consultation with the voluntary administrator, and is administered by a deed administrator (who was the voluntary administrator).

A voluntary administrator can be appointed by:

- the director(s) (by resolution of the board and in writing)
- a secured creditor (with a security interest in all or substantially all of the company's property)
- a liquidator (or provisional liquidator).

The voluntary administrator must act fairly and impartially.

## The voluntary administrator's role

After taking control of the company, the voluntary administrator investigates and reports to creditors about the company's business, property, affairs and financial circumstances. They also report on the following three options available to creditors (including employees):



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

The voluntary administrator must give an opinion on each option and:

- determine possible solutions to the company's problems
- assess any proposals put forward for the company's future
- compare the possible outcomes of any proposals with the likely outcome in a liquidation.

The voluntary administrator has all the powers of the company and its directors, including the power to sell or close the company's business, or sell individual assets, in the lead up to creditors deciding the company's future.

The voluntary administrator is also responsible for reporting to Australian Securities & Investments Commission (ASIC) possible offences by people involved with the company.

### **Effect of appointment**

The effect of the appointment of a voluntary 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 cannot 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 lease such property to the company, cannot recover their property;
- except in limited circumstances, secured creditors cannot enforce their security interest in the company's assets;
- creditors or other eligible parties cannot commence a court application to put the company in liquidation; and
- a creditor holding a personal guarantee from the company's director or other person cannot act under the personal guarantee without the court's consent.

### **Directors and voluntary administration**

Directors cannot use their powers while the company is in voluntary administration. They must help the voluntary administrator by providing the company's books and records, a Report on Company Activities and Property and providing any further information about these that the voluntary administrator reasonably requires.



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

If the company goes from voluntary administration or a DOCA 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.

### **Voluntary administrator's liability**

If the voluntary administrator incurs debts for the purchase of goods or services, hiring, leasing, using or occupying property during the administration, under the administrator's authority, they are paid from the available assets of the company as costs of the voluntary administration. The administrator is personally liable to pay these costs, or any shortfall if there are insufficient funds available from company asset sales.

The voluntary administrator must decide whether to continue to use or occupy property owned by another party held or occupied by the company at the time of their appointment.

Within five business days after their appointment, the voluntary administrator must notify the owner of property whether they intend to continue to occupy or use the property and, if they do not intend to continue to occupy or use the property,

the location of that property (if known). If the voluntary administrator decides to continue to occupy or use the property, they will be personally liable for any rent or amounts payable that arise after the end of the five business days.

### **Employee entitlements**

If the voluntary administrator continues to trade the business, they must pay ongoing employees for services provided after the date of their appointment out of the assets available to them. These payments are treated as an expense of the voluntary administration.

The appointment of a voluntary administrator does not automatically terminate the employment of the company's employees. However, employee entitlements that arose before voluntary administration are not usually paid during voluntary administration.

How and when these employee entitlements are paid depends on the option passed at the creditors' meeting (i.e. company returned to directors, a DOCA or liquidation).

### **Approval of administrator's fees**

Both a voluntary administrator and deed administrator are entitled to be paid for the necessary work they properly perform. Generally, their fees will be paid from available assets before any payments are made to creditors. If there are no, or only limited, assets the administrator is sometimes not paid (or only partially paid) for the work they do. They may arrange for a third party to contribute to their fees.



An administrator and/or deed administrator is also entitled to ask for approval to pay their estimated future fees. This is usually requested to allow them to continue doing work up to a certain point in time or to the completion of the administration and/or deed administration.

The fees cannot be drawn until the amount has been approved by creditors, a committee of inspection or the court.

Creditors, the voluntary administrator or deed administrator, or ASIC can ask the court to review the amount of fees approved. The voluntary administrator or deed administrator can also put a proposal to creditors to approve their fees without holding a meeting.

Apart from fees, the voluntary administrator and deed administrator are entitled to reimbursement for out-of-pocket expenses. This reimbursement may require creditor, committee of inspection or court approval.

The administrator should provide enough information to allow creditors to make an informed decision.

### **Committee of inspection**

A committee of inspection may be formed to assist and advise the voluntary administrator or deed administrator. The committee of inspection also:

- monitors the conduct of the voluntary administrator or deed administrator

- may approve certain steps in the voluntary administration or deed administration
- may give directions to the voluntary administrator or deed administrator.

The voluntary administrator or deed administrator must have regard to the directions but is not always required to comply with them.

In a voluntary administration, the committee may be formed at the first creditors' meeting.

All creditors are entitled to stand for committee membership. Members appointed to the committee of inspection represent the interests of all creditors.

Minutes of meetings of the committee of inspection must be prepared and lodged with ASIC.

ASIC is entitled to attend a meeting of the committee of inspection.

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