

## Voluntary Administration Report: Summary

**The Australian Securities Commission recently conducted research into the effectiveness of the voluntary administration provisions of the Corporations Law.**

The detailed findings of this research are contained in the report *A Study of Voluntary Administration in New South Wales*.

The Commission looked at Part 5.3A of the Corporations Law ("the legislation") which allows a voluntary administrator to be appointed to a company in certain circumstances. The Commission looked at Part 5.3A of the Corporations Law ("the legislation") which allows a voluntary administrator to be appointed to a company in certain circumstances. The legislation commenced in 1993 after an Australian Law Reform Commission Inquiry. The inquiry considered that the interests of creditors, shareholders and employees are paramount when a company faces insolvency. It therefore recommended that it is better if a company is given a chance to restructure its affairs with a view to saving its business rather than going into liquidation.

The voluntary administration system provides companies facing insolvency with a mechanism over a short period to try to preserve their property and business. This gives an insolvency practitioner time to examine the position and make an informed recommendation to creditors about the best course of action. If the company or its business can't be saved, the legislation aims to give creditors improved returns over what they would receive if the company was immediately wound up.

Since the legislation commenced there has been much discussion about whether the voluntary administration provisions succeed in saving companies and their businesses from liquidation and whether creditors have really benefited. Voluntary administrations conducted under the legislation have also been a source of complaints to the ASC.

### MAIN FINDINGS OF THE ASC STUDY

In response to these discussion and

complaints, the ASC has conducted research which shows that the voluntary administration process is worthwhile. The research reveals that the legislation does help insolvent companies which have in whole or in part sound underlying businesses. It succeeds because the procedures are quicker and more flexible than an immediate wind up. The research does not suggest that the legislation needs major changes or should be abandoned.

However, the research did reveal that voluntary administrations were often commenced when there was little chance of improving the returns to all creditors. The research also revealed that sometimes the information and recommendations provided by insolvency practitioners to creditors were not adequate and in the best interests of creditors. In some cases the provisions of the legislation were not complied with.

### USE OF THE LEGISLATION

The ASC commissioned its study of 55 administrations in the Sydney area. The research shows that the legislation is used for:

- achieving a restructuring of a company or related business;
- avoiding the liability that directors face for group tax when the Australian Taxation Office issues a s222AOE notice.

However, of concern to the ASC is that in a number of cases, the legislation was used for purposes contrary to the spirit of the legislation including:

- initiating a liquidation. (In some cases there is no business to be saved and no possibility that creditors would benefit from a voluntary administration. The only effect of the voluntary administration is to increase the costs of the liquidation.)
- frustrating outstanding winding up applications. (This frustrates creditors' attempts to appoint an independent liquidator when a voluntary administration is not the most effective process.)
- avoiding the consequences of a liquidation, such as prosecutions for offences and section 600 action by

the ASC to ban directors from managing corporations.

### AREAS OF CONCERN FOR THE ASC

Creditors must be properly informed about their options when a company goes into voluntary administration. The ASC research found that administrators' reports and statements to creditors do not always contain all the information on the company's property, affairs and financial circumstances that might be needed when making a decision. Administrators do not always give an opinion on the options available to creditors. Some administrators do not report to the ASC when they are of the opinion that offences may have been committed by company officers.

- The research also revealed that some:
- deed instruments do not reflect the arrangements discussed and agreed with creditors;
  - deeds of company arrangement were varied without giving creditors information about the change;
  - company documentation did not disclose that an administrator or a deed was in operation. (This disadvantages potential creditors.)

The research also found that practitioners did not always comply with the deeds of company arrangement in such critical areas as:

- receiving the money payable under the deed on time;
- monitoring and reporting;
- taking timely action if there was a default.

In addition the research showed that voting on major issues, such as removing the administrator, approving a deed or approving remunerations is often controlled by the voting of related parties and the use of proxies. There is evidence that by canvassing for proxies the administrator can effectively control voting through the use of the casting vote.

Other findings revealed that:

- Some administrators recommend deeds of company arrangement

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## Out of Africa

*This month's contribution from CLANT comes from Michael Jones of NAALAS*

It was an unusual job interview.

The African men were asking me questions which I could barely understand. Their accent was a thick mixture of something oily and foreign and strangely click clack. I was having a lot of trouble understanding them. Besides, the air-conditioner was making a lot of noise.

Boldly, I asked, "Does it matter that I have a drink-driving conviction a few years ago?"

The African DPP replied, "No - I read that in your application. No, it doesn't matter."

A few months later, an hour or so out of Harare, the African immigration form leered up at me. "Have you ever been convicted of any criminal offence? It shrieked out.

Was drink-driving a criminal offence? Yes? No? Yes? No? What do I say?

"Always tell the truth", my mother used to say. I ticked the "yes" box.

The Zimbabwean immigration offi-

cial looked at me across his counter. He said, "You have been convicted of a criminal offence, isn't it?"

"Yes."

The immigration official looked pleased. He said, "You cannot enter this country. You must leave."

I looked enquiringly at the African DPP who had gone to some trouble to come out to the airport at a late hour. Happily, he intervened and explained that I was a very important Australian lawyer who was there at the request of the Zimbabwe government to prosecute people.

Unhappily, the immigration official was unmoved by the attorney's somewhat embellished demands. The immigration official turned to me and said, "You must go."

I was escorted back to the Qantas plane which was about to do the turnaround and fly back to Perth. By a stroke of utter luck, I happened to be seated in 43A where I found my 8th beer can of the

trip to Africa still basically intact and nestled in the rear pocket of the seat in front of me. I looked out the window and thought how much I had enjoyed my trip to Zimbabwe.

After some fairly hard-nosed representations by the mandarins in the Australian Foreign Affairs Department, and an apology by an African leader of some repute, a fortnight later I found myself about to conduct my first murder trial in Africa. I was in Harare sitting in the chambers of Wilson Sandura, Judge President of the High Court of Zimbabwe. We were having tea.

The judge looked at me across his desk and asked, "Whatever became of that poor fool from Australia who was deported the other day?"

I said, "You're looking at him."

Sandura gazed at me for a minute and paused before he spoke.

"You really are a poor fool!"

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which had little prospect of success and which were unlikely to mean that creditors would receive any return;

- When the deed of company arrangement was completed some companies were still insolvent and continued to trade and incur debts;
- Companies change their names before entering a voluntary administration. This minimises the damaging effect from the previous name which is associated with failure. (However it also means that creditors do not realise they are still dealing with the same company.)

### OTHER FINDINGS OF THE STUDY Companies Surviving Voluntary Administration

The ASC has also conducted an extensive statistical survey which looked at the number and outcomes of volun-

tary administrations. This survey was based on ASC records as well as research undertaken by companies and professional associations in Australia and overseas.

The ASC reviewed its database of the 5,760 companies in Australia that entered voluntary administrations between 1 July 1993 and 30 June 1997. It appears that at least 60% of companies entering into voluntary administration will subsequently become deregistered.

When allowing for the outcome of deeds of company arrangement, it appears that the number of companies resuming normal trading after entering administration is around 20%-25% which compares favourably with the United Kingdom (19%) and the United States of America (6%).

### Returns to Creditors

An Australian Society of Certified Practising Accountants survey found

that the estimated average return to unsecured creditors of companies from Part 5.3A administrations was 21.5 cents in the dollar. That study found that this compares to an estimated average return of 7.3 cents if the same companies had proceeded directly into liquidation.

The ASC research did not aim to quantify and compare returns to creditors. However, it did observe some evidence to suggest that 10 cents was becoming a benchmark that unsecured creditors were being offered to accept a proposed deed of company arrangement. Directors sometimes offer these ex gratia payments to induce creditors to agree to a proposed deed and thus avoid the consequences of liquidation.

**Submissions are invited on the issues and observations in the report. These may be sent to: ASC, Voluntary Administration Study, GPO Box 9827, Sydney NSW 2001 by 30 June.**