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IF WE WERE DOING IT AGAIN: REFLECTIONS ON IMPROVING CHAPTER 11 AND CONTRASTING INTERNATIONAL EXPERIENCES

Australia's Voluntary Administration Regime

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Australia's Voluntary Administration Regime

1. Overview and Background to Regime

- 1.1 Influence of Chapter 11
- 1.2 Response to Existing Regimes
 - Schemes for Arrangement
 - Official Management
- 1.3 Reflection of Existing Conditions
 - Established body of registered and regulated professionals
 - Ready access to specialised courts

2. Essential Design

2.1 *"The [voluntary administration] procedure proposed was designed with the aim that it would be:*

- *capable of swift implementation;*
- *as uncomplicated and inexpensive as possible; and*
- *flexible, providing alternative forms of dealing with the financial affairs of the company"*

- Harmer Report, para 54

"The object of [voluntary administration] is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

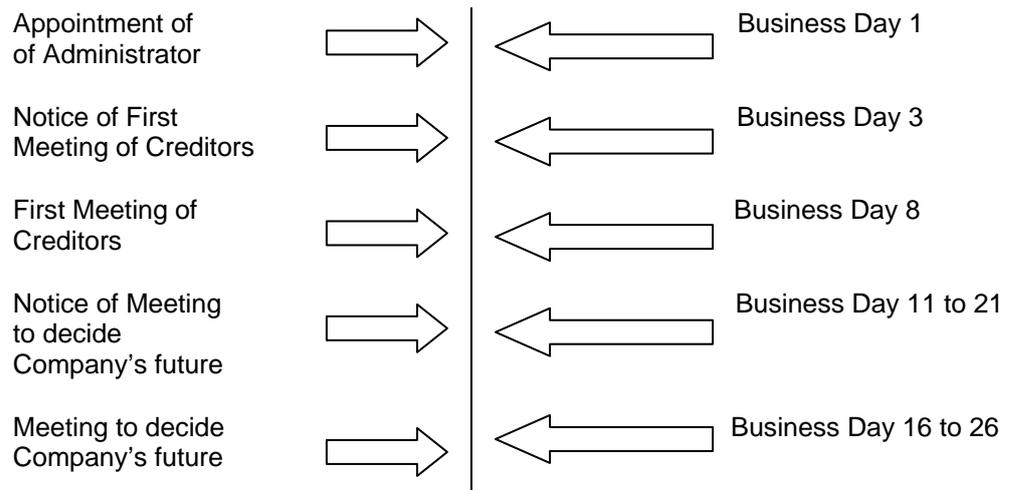
- (a) *maximises the chance of the company, or as much as possible of its business, continuing in existence; or*
- (b) *if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company"*

- Corporations Act, s435A

2.2 Interim nature of the regime

The voluntary administration regime is interim in nature in the sense that it provides for the business and affairs of the company to be placed under the control of an independent administrator who is able to make an objective assessment as to which of three options; reconstruction, liquidation or the return of the company to the control of its directors, is in the best interests of its creditors.

2.3 Duration of regime



2.4 Appointment of Voluntary Administrator

Appointment may be made by any one of:

- directors;
 - incentives:
 - avoid or limit insolvent trading claims;
 - avoid or limit claims on account of unremitted tax
- a chargeholder with an enforceable charge over “the whole, or substantially the whole, of the company’s property”
 - note the notion of “*pervasive securities*” is well established in English common law countries by reason of the regular use of so-called “*fixed and floating charges*” which attach to all of the assets of the company for the time being
- a liquidator of the company

2.5 Role of Voluntary Administrator

- assume responsibility for the management of the company’s affairs to the exclusion of its directors;
- plenary powers including a power to sell all or any of the businesses of the company;
 - There is no presupposition that the best results for a company’s creditors will be the restructuring of its affairs. Rather it is accepted that a sake of the company itself or its business may produce the best result.
- required to examine and report to the company’s creditors on which of the three available options for the company; reconstruction, liquidation or the return of the management of the company to the control of its directors, is in the best interests of its creditors and to report to creditors on the result of that review.
 - one of the matters upon which the voluntary administrator must report concerns the claims which might be pursued by a liquidator to augment the

assets of the company which are available to satisfy the claims of its creditors including claims for antecedent transactions such as preferences or claims against the company's directors for insolvent trading.

2.6 Role of Creditors

The voluntary administration of a company is, ultimately, under the control of its creditors in the sense that:

- (a) they can confirm the appointment of the voluntary administrator or appoint another administrator to assume control of the affairs of the company;
- (b) they can appoint a committee of creditors, albeit that that committee can only act in an advisory capacity; and
- (c) it is for the creditors in general meeting to determine which of the three options for the future of the company should be pursued.

2.7 Role of Court

- no necessary role
 - does not appoint voluntary administrator
 - does not approve reconstruction liquidation or return of company to the control of its directors
- various specific powers such as:
 - supervision of and advice to voluntary administrator;
 - approving exercise by, say, a secured creditor of its rights;
 - extending time limits; and
 - reviewing approval of a reconstruction of the company on the application of a "disaffected" creditor;
- supervisory power
 - *"The Court may make such order as it thinks appropriate about how [voluntary administration] is to operate in relation to a particular company"* Corporations Act, s447A.

2.8 Effect on Creditors

- Generally, there is a moratorium during the voluntary administration period on the claims of all creditors with the effective result that, subject to three relevant exceptions, no creditor may take action against the company during the moratorium period nor may its right to use or occupy any property be disturbed by either a secured creditor or an owner or lessor of that property seeking to take or retake possession of it.

The three significant exceptions to that general moratorium are that:

- A secured creditor with a charge over the whole or substantially the whole of the company's property may enforce that charge in respect of all of the property which is subject to it at any time within 14 business days after being given notice of the appointment of the voluntary administrator; and

- Either a secured creditor or the owner or lessor of property in the possession of the company which has commenced enforcement proceedings prior to the commencement of the company's voluntary administration may continue those enforcement proceedings unless the Court otherwise orders, which it may do, subject to being satisfied that the interests of the secured creditor or the owner or lessor of the property, as the case may require, are adequately protected.
- Suppliers of essential services (electricity, telephone and the like) must continue to supply these services.

3. Reconstruction

3.1 Deed of Company Arrangement

If the company's creditors elect to accept a reconstruction of the company's affairs, that reconstruction is effected by means of a Deed of Company Arrangement ("**DOCA**").

3.2 Terms of DOCA

The terms of the DOCA are regulated by the Corporations Act. However, it may provide for any compromise or arrangement between the company and the creditors to which the creditors by a simple majority in number and value have agreed.

3.3 Administration of DOCA

The DOCA is administered by an independent administrator, usually the person who has been the voluntary administrator.

The administrator of the DOCA will have the powers which it confers. Those powers may extend to a power to sell the shares in the company subject to obtaining either the leave of the court or the agreement of the shareholders.

The effect of the DOCA may be to divorce responsibility for its administration and the administration of the company which may be returned to the control of its directors.

3.4 Effect on Creditors

- Unsecured Creditors

The claims of some or all of the company's unsecured creditors may be bound by a DOCA which may treat them differentially subject only to the limitation that, if the company is insolvent, no creditor may be worse off than it would have been if the company was liquidated.

Claims of creditors will only be released to the extent to which express provision is made by the DOCA.

- Secured Creditors and Owners or Lessors of Property

These creditors will only be bound to the extent to which they expressly agree although the Court may restrain such a creditor from enforcing its rights provided that it is satisfied that adequate provision has been made for the protection of that creditor's interests.

3.5 Role of Court

As with voluntary administration, the Court has no particular role in relation to the promulgation or approval of a DOCA. It does, however, have a supervisory role both in relation to the operation of the DOCA and by way of a review of the decision of creditors that the company should undertake a DOCA on various grounds including that it is unfairly prejudicial to one or more of the company's creditors.

4. Cross-Border issues

- 4.1 Australia has adopted UNCITRAL Model Law. Both voluntary administration and a DOCA would be a foreign proceeding for the purposes of that Law.
- 4.2 Notwithstanding the adoption of the Model Law, the existing procedures for seeking recognition of an insolvency administration by way of Letter of Request continue to be available.

5. Possible Reforms

- 5.1 The operation of the regime has been reviewed on 2 or 3 occasions since its inception in 1993. Other than minor amendments, there have been no proposals for fundamental reform.
- 5.2 Proposed reform of “insolvent trading” laws to introduce a business judgment role:
 - Rationale: need to create an environment which promotes informal workouts
 - Other possible reforms include:
 - o “shadow” directorships
 - o continuous disclosure rule
 - o tax laws
- 5.3 Different pressures than in the US

6. Some Comments on Asia

- Capacity of existing infrastructure to support “court-based” regimes
- Development of AMC’s
- Development of informal processes through Asian Bankers’ Association