



ATO GOES HARD

KJ Consulting [2005] FCA1827 is a great example where the ATO was not happy with the proposal for a Deed of Company Arrangement despite the outcome of the meeting of creditors and went on with its winding up application.

In this case, the ATO had issued a winding up application against the company prior to the appointment of Administrators.

The ATO and another creditor were owed the vast majority of the creditors' claims in value, the company was not trading and the proposal for a Deed of Company Arrangement centred around a cash injection from a related party and a moratorium on recovery actions against related parties.

The vote at the creditors meeting involved the majority in number in favour of the proposal and the majority in value voting against the Deed.

Readers will be aware that under regulation 5.6.21 of the Corporations Regulations the Chairperson of the meeting has a casting vote where there is a majority in number voting in one direction and a majority in value voting the other way. There is much debate as to which direction the vote should be cast, with many of the commentators coming down on the side of value, particularly where this involves the vast majority in value and they are all external creditors versus related parties.

Section 440A(2) provides for the Court to adjourn a hearing of a winding up petition where there has been the appointment of a Voluntary Administrator providing the Court is satisfied that it is in the interests of creditors

to do so. From our experience the ATO will wait to see the proposal, the Section 439A report of the Administrators and the outcome of the meeting before it pushes on with anything. In any event, Section 440D stays any action whilst there is an Administration, and a validly approved Deed of Company Arrangement stops future action being taken by creditors, if its terms are complied with by the company.

Throw into this mix Section 600A, which enables the Court to review a decision which has been carried on related party votes and Section 600D where the Court can review a resolution carried by the Administrator's casting vote.

Anyway, the ATO made the application to Court and were given the nod to go on with its winding up petition and the company went into liquidation.

What lessons can be learnt? Owners and directors can no longer afford to wait until a winding up petition has been served before seeking the appointment of an Administrator. In the event of an Administration, make sure your proposal is clearly a better alternative than liquidation, which it should be anyway, if you want the support of the Administrator in his recommendation.

For the Administrators, it is to look carefully at who and the value of the votes before casting the vote.

For creditors, it is to monitor closely the vote and that remedies exist if there has been a real misuse of the Administration process.

Be warned the remedies are expensive.



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