

Tisher Liner FC Law Lunchtime Briefing

Commercial Matrimony: Marry / Battle / Kill



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Speakers

FELICITY SIMPSON:	SPECIAL COUNSEL
ROB OXLEY:	PRINCIPAL
SIMON ABRAHAM:	PRINCIPAL

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Commercial Matrimony: Marry

FELICITY SIMPSON SPECIAL COUNSEL

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Introduction



Whether you are Shareholders, Unit Holders or Partners similar issues arise.

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Financing



- Does each party have equal ability to contribute financially;
- Disproportionate contributions;
- Internal shareholder or director loans;
- Third parties;
- Guarantees.

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Decision Making



- Day to day (Managing Director)
 - Timely;
 - Efficient;
 - Fair;
 - Consistent with practice.
- Out of the Ordinary
 - New equity;
 - Finance;
 - Sale or purchase of assets.

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Disputes



- Deadlock – nothing happens.
- Personality - inability to continue to work effectively together.
- Different long term goals:
 - Change in personal circumstances (family, retirement);
 - increase dividends v growth.

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Impact of Disputes

- Staff discontentment/Loss of staff;
- Damage to business/goodwill/brand;
- Lost opportunities eg. projects, capital raise, IPO;
- Impact upon value of the business;
- Personal toll.

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Valuations

Business Valuations - Accountant or independent:

- Treatment of shareholder loans, unpaid dividends/distributions;
- Personal services business – value impacted by departure of equity holder.

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Mediation



- Excellent first step;
- Not always successful.

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Independent Sale



- Requires agreement – either in initial agreement or at the time;
- Price might be unknown;
- Will you realise the value of your interest;
- May not be a market.

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Forced Exits

- Is there 1 party (usually a majority) who should have the right to buy out others?
- A Defaulting Party – can they be brought out?
- Is there 1 party (usually a minority) who should have the right to be brought out?

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Have I missed the boat?



- An agreement can be done at any time – whilst parties are on the same page.
- Regular review of existing Agreements:
 - Does it adequately cover my needs – founder, majority or minority equity holder;
 - Have there been changes that might warrant an update – proportions, contributions, long term objectives, capital raise, new owners;
 - Does it protect the value of the business;
 - Is it suitable for our long term strategy?

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Commercial Matrimony: Battle

OPPRESSION CLAIMS CREDITOR'S STATUTORY DEMANDS

ROB OXLEY PRINCIPAL

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Oppression Proceedings

What constitutes oppressive conduct?

Section 232 of the Corporations Acts states that oppressive conduct includes conduct which is:

- *contrary to the interests of the shareholders as a whole; or*
- *oppressive to, unfairly prejudicial to, or unfairly discriminatory against a shareholder or shareholders.*

The conduct can:

- include an actual or proposed act or omission by or on behalf of a company;
- a resolution or proposed resolution of members; or
- conduct of the company's affairs.

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Oppression Proceedings

Examples of Oppressive Conduct

Classic examples of potentially oppressive behaviour include:

- improper diversion of a business to another entity;
- payment of excessive remuneration to a controller or associate;
- failure to prosecute an action;
- improper share issue;
- exclusion from participation in management;
- denial of access to information for example refusal to provide company books and records (including financial accounts);
- misuse of company funds; or
- oppressive conduct at board meetings.

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Oppression Proceedings

How the Supreme Court deals with oppression claims

Supreme Court recognised that many oppression claims are brought by shareholders in small businesses and/or family businesses.

Since 2014, the Court has operated the Oppression Proceeding Program.

The purpose of the program:

- *to facilitating the just, efficient, timely and cost effective resolution of the real issues in dispute in applications under s 233 of the Act; and*
- *is aimed at exploring resolution of the dispute at a very early stage of the proceeding before significant costs had been incurred.*

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Oppression Proceedings

Key Features of the Program

- Any application brought under s233 of the Act can only be supported by an affidavit of no more than three pages and only exhibiting a current ASIC search of the Company.
- At the first hearing, the parties will discuss with the Court whether the matter is ready for mediation or whether any preliminary steps are required first such as orders for:
 - the Defendant(s) to file a responding affidavit of no more than three pages;
 - a valuation of the company should be arranged;
 - an order for access and inspection of the books of the company should be made.
- If the matter does not resolve at mediation, the application may be referred to a judge for further directions and/or hearing.

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Oppression Proceedings

Remedies for Oppressive Conduct

The relief a court can grant is set out section 233 of the Act and can include:

- that the existing constitution be modified or repealed;
- regulating the future conduct of the company's affairs;
- a buy-out of shares;
- that the company institute or defend legal proceedings or authorise a shareholder to institute or defend legal proceedings in the name of the company;
- appointing a receiver and manager or a new receiver or manger;
- restraining a person from engaging in specified conduct or from doing a specified act;
- requiring a person to do a specified act.
- that the Company be wound up.

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Creditor's Statutory Demands

What is it?

- Legal debt notice issued pursuant to s459E of the *Corporations Act 2001 (Cth)*;
- Enables creditor to demand payment of a debt(s) for \$4,000 or above;
- A Company served with a statutory demand must, within 21 days from being served:
 - pay the debt;
 - reach an agreement with the creditor in relation to the debt (including for the withdrawal of the demand); or
 - commence a Court Proceeding seeking an order to set aside the demand.
- By failing to take any step the Company will be presumed to be insolvent.

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Creditor's Statutory Demands

Setting aside a statutory demand

- Proceeding must be commenced within the 21 day period;
- Demand can be set aside on one of the following grounds:
 - a genuine dispute;
 - an offsetting claim;
 - a defect in the demand; or
 - some other reason why the demand should be set aside.

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Creditor's Statutory Demands

Orders Court can made when determining application

Orders Court can make include:

- setting aside demand and ordering 'creditor' to pay the 'debtor's' legal costs of the proceeding;
- dismiss the application and extend period for payment of the demand; and
- amend the amount of the demand.

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Commercial Matrimony: Kill

Ways to Kill a Company

SIMON ABRAHAM

PRINCIPAL

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Overview of Bringing a Company to an End

1. Deregistration
 - a) Voluntary Deregistration
 - b) ASIC-initiated Deregistration
2. Winding Up
 - a) Solvent Companies
 - i. Members' Voluntary Winding Up
 - b) Insolvent Companies
 - i. Creditors' Voluntary Winding Up
 - ii. Voluntary Administration
 - iii. Winding Up by way of the Court
3. Liquidation Overview

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Deregistration - Introduction

- A company may be deregistered:
 - After it is closed down (e.g. voluntary deregistration);
 - Struck off the register of companies by ASIC (e.g. for outstanding annual review fees); or
 - Liquidated (by the members, court or creditors).
- General effect of company deregistration with ASIC:
 - Company is no longer a legal entity and can no longer do anything in its own right;
 - Property the company owned (other than trust property) vests in ASIC;
 - Property held by the company on trust vests in the Commonwealth (represented by ASIC);
 - The former officeholders no longer have the right to deal with property registered in the company's name;
 - Any legal proceedings in which the company is a party cannot be continued (in so far as they relate to the deregistered company); and
 - Legal proceedings cannot be commenced against the company.

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Deregistration - (Voluntary)

- Applying for voluntary deregistration ceases the company as a legal entity and removes the obligations of officeholders.
- Note that companies cannot be deregistered if they owe money, or if they are insolvent.
- Requirements before voluntarily deregistering a company:
 - All members of the company agree to deregister;
 - The company is not conducting business;
 - The company's assets are worth less than \$1000;
 - The company has no outstanding liabilities (e.g. debts);
 - The company is not involved in any legal proceedings; and
 - The company has paid all fees and penalties payable to ASIC.
- It is also recommended that all the company's tax and superannuation obligations are up to date.

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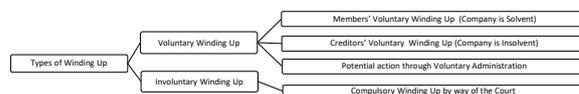
Deregistration - (ASIC-initiated)

- ASIC also has the power to deregister a company if they think it has ceased trading or it has overdue fees and penalties.
- Reasons for ASIC-initiated deregistration:
 - Company has not paid its annual review fee within 12 months of the due date;
 - Company has not responded to a company compliance notice, has not lodged any documents in 18 months, and ASIC thinks it's not in business; or
 - Company is being wound up and there is no liquidator.
- Remedies to potentially stop ASIC-initiated deregistration:
 - Paying the company's annual review fee and any other outstanding fees;
 - Lodging any required documents; or
 - Writing to ASIC and advising that the company is still trading.

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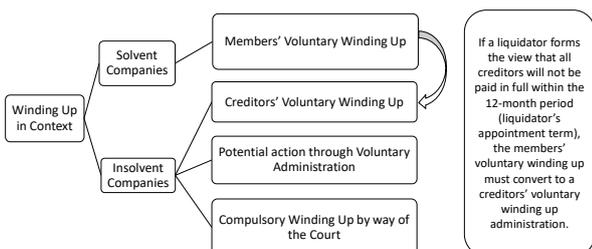
Winding Up - Introduction

- If companies don't satisfy the criteria to be closed under deregistration (e.g. has assets worth more than \$1000 or it's insolvent), closure by way of winding up should be considered.
- Winding up involves selling a company's assets and distributing the proceeds amongst creditors and shareholders accordingly.
- Winding up occurs because:
 - The company cannot pay all of its debts (i.e. is insolvent); or
 - Its members want to end the company's existence and have it struck off the ASIC register.



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Winding Up in Context



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Winding Up - Solvent Companies

- Members' Voluntary Winding Up
 - Avenue when members no longer wish to retain the company's structure as the company has reached the end of its useful life. All outstanding creditors are paid in full, and any surplus assets are distributed to its members.
 - Only process to fully wind up the affairs of a solvent company.
 - Process begins by the directors resolving to call a meeting of members to wind up the company. Directors must complete a 'declaration of solvency' that states the company is solvent and can pay all its debts within 12 months. This declaration is lodged to ASIC before the members' meeting.
 - Once all creditors' claims are satisfied, all other issues are resolved, and any surplus is distributed to the members, the process will end by the liquidator calling a final meeting of the company's members.
 - The company will be automatically deregistered by ASIC 3 months after this final meeting is held.
- Steps to wind-up a solvent company:
 1. Company directors must make a declaration of solvency
 2. Company members must pass a special resolution
 3. Notice of the special resolution must be published on the Published notices website
 4. Liquidator winds up company's affairs
 5. Liquidator finishes winding up company and lodges final documents

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Winding Up - insolvent Companies

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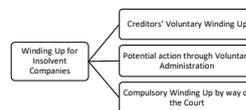
- If an insolvent company is not voluntarily wound up, a creditor of the company can apply to the court to wind up the company and appoint a liquidator.
- Voluntary
 - Creditors' Voluntary Winding Up:
 - Directors determine that the company is insolvent and resolve to place the company into liquidation.
 - Commonly used when a company is insolvent and a DOCA is not possible – the company simply needs to be liquidated.
 - If a wind-up application has been filed, or if the court has ordered the company be wound up, a creditors' voluntary winding up is not possible.
 - Voluntary Administration:
 - Directors resolve to appoint voluntary administrators to the company.
 - Process designed to assist insolvent companies to satisfy their debts, by ensuring that they can either:
 1. Come to a formal arrangement to pay debts through a DOCA; or
 2. Be placed into liquidation, quickly and inexpensively.
 - Creditors decide the company's future at the second meeting. Process may end with the creditors resolving to wind up a company.
 - Generally a more expensive process.

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Winding Up - insolvent Companies (Cont.)

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- Involuntary
 - Compulsory winding up by the court usually by one or more creditors making an application to the court.



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Liquidation Overview

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- Liquidation is the only way to fully wind up the affairs of a company and end the existence of the company.
- An independent party undertakes the process and protects the interests of creditors, directors, and members while the company structure is dismantled.
- Role of the Liquidator
 - The liquidator will:
 - Identify and protect the assets of a company;
 - Realise those assets;
 - Conduct investigations into the financial affairs of a company and any suspicious transactions;
 - Make appropriate recoveries;
 - Issue reports to ASIC and creditors;
 - Make a distribution to shareholders (if a surplus exists); and
 - Apply to ASIC to deregister a company.

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Liquidation Overview (Cont.)

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- Effect of Liquidation
 - When a company is liquidated, its structure survives the appointment of a liquidator, but not the liquidation.
 - Control of assets, conducting business, and other financial affairs are transferred to the liquidator. Directors cease to have any authority.
- How does Liquidation End?
 - Liquidation ends when:
 - The company is dissolved by a court order on the application of the liquidator; or
 - The company is struck off the register of companies by ASIC at the request of the liquidator; or
 - The winding up is set aside or stayed by the court.
 - At the end of liquidation, the liquidator applies to ASIC for the company to be deregistered. The company will then cease to exist.

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Any Questions?

FELICITY SIMPSON: FSIMPSON@TLFC.COM.AU

ROB OXLEY: ROXLEY@TLFC.COM.AU

SIMON ABRAHAM: SABRAHAM@TLFC.COM.AU

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