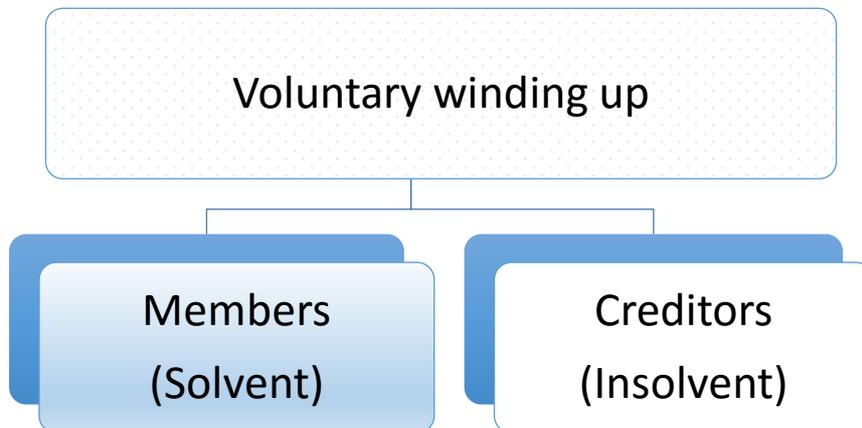


## Topic 2 - Voluntary and Compulsory winding up

### Voluntary winding up



#### What is voluntary administration?

- The voluntary administration process is designed to assist insolvent companies satisfy their debts, by ensuring that they can either:
  - Come to a formal arrangement with their creditors to pay those debts through a Deed of Company Arrangement (DOCA), or
  - Be placed into liquidation, quickly and inexpensively
- The VA process maximizes the chances of a company continuing to exist by giving it the opportunity to propose a DOCA to its creditors

### Members voluntary winding up

- Creditors have no involvement because they will be repaid in full
- The purpose of the winding up is invariably to distribute the assets to the members in accordance with the constitution, and close the company down to its ultimate deregistration
- Winding up is initiated by special resolution of the company: Corporations Act, ss 491, 9.
  - Special resolution requires the support of 75% of the members who attend and vote after 21 days' written notice has been given: s 249H(1)
  - Shorter period of notice is permitted provided that members with at least 95% of the votes that can be voted at the meeting agree to the shorter notice in advance: s 249H(2).
    - The requirement to agree to short notice in advance only requires that consent be given before the meeting begins: *Re Aprais Pty Ltd*
      - Case involved a shareholder meeting to consider a voluntary winding up where there was no evidence that the major shareholder had consented to the short notice, although its consent was subsequently given. The court granted relief from the consequences of this defect in process under s 1322.

*The declaration of solvency*

- Before the meeting which considers the proposal to wind up a company, a majority of the directors of the company are required to make a written declaration (ASIC Form 520) to the effect that they have made an inquiry into the affairs of the company and at a meeting of directors they have formed the opinion that the company will be able to pay its debts in full within 12 months of the commencement of the winding up: s 494(1).
- The statement must show the property of the company and the total amount expected to be realized from that property, the company's liabilities and the estimated expenses of the winding up: s 494(2).
- The statement must be made up to the latest practicable date before the making of the declaration (s 494(2)), and takes the form of the latest accounts prepared prior to the date of liquidation.
- The declaration of solvency is ineffectual unless (s 494(3)):
  - It is made at a directors' meeting
  - It is lodged with ASIC prior to the issue of notices calling the meeting of the company's members to consider the proposal to wind up; and
  - The resolution to wind up is passed within 5 weeks of the making of the declaration
- It is an offence for a director to make a declaration without having reasonable grounds for the opinion as to solvency: s 494(4)
  - Director has the burden of proving the reasonableness of that opinion
  - If the company's debts are not paid for or provided for within the period stated in the declaration, it is presumed that the director did not have reasonable grounds for the opinion: s 494(5)
- In proceeding to wind up the company, if the liquidator, at any time, forms the opinion that the company will not be able to pay its debts in full within the period stated in the declaration of solvency, the liquidator must do one of the following as soon as practicable (s 496(1)):
  - Apply to the court under s 459P for the company to be wound up in insolvency
  - Appoint an administrator of the company under Pt5.3A; or
  - Convene a meeting of the company's creditors.
- If the last action is taken then the voluntary liquidation provisions in Pt 5.5 apply and from the time of the creditors' meeting the winding up will be classified as a creditors' voluntary winding up.

#### *After the resolution*

- If a special resolution is passed at a members' meeting providing for the winding up of the company, a copy of the resolution must be lodged with ASIC within seven days (s 491(2)(a) and notice of the resolution must be published on the ASIC Public Notices website: s 491(2)(b): ASIC forms 205, 505.

#### *The liquidator*

- The liquidator need not be a registered liquidator, and they may in fact be an officer or employee of the company, or the company accountant or lawyer: s 532(4)
- Although this type of winding up requires expertise, it does not involve the wide range of powers and duties of a registered liquidator of an insolvent company.

## Creditors' voluntary winding up

- Company is insolvent
- Initiated by members and not creditors
- It is called 'Creditors' voluntary winding up' only because of the involvement of creditors in the process
- This form of winding up may only occur in one of two ways:
  - Directors determine that the company is insolvent and should be wound up
  - Members voluntary winding up is initiated but liquidator finds the company insolvent.

### *(a) No declaration of solvency*

If the directors are unable to complete a declaration of solvency, the company has no option but to proceed with a creditors' voluntary winding up.

Once the directors have determined that the company is unable to pay its debts, the directors should ensure that the company does not incur any further debts, because they could be in breach of the insolvent trading provisions of the Corporations Act.

The procedure for initiating a creditors' voluntary winding up is as follows.

### Convening the meetings of members and creditors

- The directors must convene a meeting of members of the company at which a resolution for voluntary winding up is passed. The company is thereupon in liquidation and a registered liquidator is appointed. Within 7 days after the members' meeting, the directors must give the liquidator a summary statement, in the prescribed form, about the company's business, property, affairs and financial circumstances. A breach of this is an offence.
- Liquidator must then convene a meeting of the company's creditors within 11 days after the members' meeting, that is, the day of the winding up.
  - Creditor must be given 7 day's notice of time and date.
  - Place must be convenient to majority of creditors
  - In effect within 11 days to convene the meeting, and at least 7 days notice required the meeting of creditors may be held at least 18 days after the date of the winding up resolution However, in most cases the liquidator will be anxious to have the meeting held as soon as possible.
- Notice sent to creditors (ASIC Form 529) must include a summary of affairs of the company (ASIC Form 509) and a list setting out the names of all creditors, the addresses of those creditors and the estimated amounts of their claims, as shown in the records of the company.
- Copy of the notice and accompanying documents – not less than 7 days of meeting
- Publish notice on the Public Notice website – not less than 7 days, nor more than 14 days.
- Unless the court makes an order, liquidator need not send the list of creditors to creditors whose debt does not exceed \$1000, but the notice to those creditors must specify a place at which copies of the list can be obtained.
- "Creditor" not defined in Corp Act

- Generally any person who has a debt payable by, or a claim against, a company which is admissible to proof in the winding up of the company under s 552 is a creditor of the company.
- Directors must not completely dismiss claims against the company because they are disputed, are unliquidated or are the subject of pending contested litigation in determining who are creditors. Such persons may well be creditors who should be notified: *National Australia Bank Ltd v Market Holdings Pty LTD*.

#### *The meeting of members*

- The major resolution which will be passed at the meeting of members is that the company be wound up.
- Must be a special resolution (s 491(1)); and if such a resolution is not passed the voluntary liquidation process does not proceed.
- The other resolution of note which will be voted on by the members is the appointment of a registered liquidator (s 499(1)) who has previously given written consent to such an appointment: s 532(9).
- There are general restrictions in s 532 as to who can be a liquidator, with authority given to some creditors in a voluntary winding up to dispense with these restrictions in some cases: s 532(5).
  - The person appointed must be a registered liquidator.
- The liquidation commences at the time of the passing of the special resolution to wind up and at the time of the appointment of the liquidator the powers of the directors' cease unless otherwise approved by a committee of the creditors (s 499(4)); and the company's business must cease unless the liquidator decides otherwise: s 493. The ILRB 2015 will replace s 499(4) with a new s 198G that will deal with the powers of directors during external administration.

#### *The meeting of creditors*

- Creditors may appoint one of their number or the liquidator to preside at the meeting: s 497(8)
- The chair must, at the meeting, determine whether the meeting has been held at a date, time and place convenient to the majority in value of the creditors and that decision is final: s 497(9).
- The creditors may decide to appoint a committee of inspection, including what number of persons will constitute the committee and those who are to be the members: s 497(10). The committee was discussed earlier.
- The creditors may, by resolution, remove the liquidator chosen by the directors and appoint another person as liquidator instead. This preserves the control of the creditors over who should conduct the liquidation (s 497(11))
- Under s 506A, there is a requirement for a "declaration of relevant relationships" (s 60) to be made by the liquidator which is to be provided to creditors along with the notice of meeting under s 497.
- Creditors are at liberty to ask questions of the director concerning the affairs of the company.
- Liquidator then begins the task of administering the company.

- A creditors' voluntary winding up terminates normally with the realisation of all available assets and their distribution to claimants in order of priority.

#### *Voting rights*

- A person must lodge with the chair particulars of the debt or claim which is said to be owed by the company: Corporations Regulations, reg 5.6.23(1)(b).
- The chair has discretion as to whether he or she will exclude the creditor: reg 5.6.26(1).
  - Creditor is entitled to appeal to the court against the decision within 14 days: reg 5.6.26(3).

#### *Defects in the process*

- Procedural irregularities may be overlooked but a deliberate failure to give notice to a person entitled to notice of a meeting may be considered to be more than a procedural irregularity: *Re PW Saddington & Sons Pty Ltd*
- The court in *Mamouney v Soliman* said
  - "the more significant the resolutions passed at the meeting, and the greater the procedural defects, the more ready the court will be to say that they have caused or may cause substantial injustice"
- A failure to advertise the meeting will only be fatal if it causes substantial injustice: *Re John Plunkett Consolidated Pty Ltd*.
- The court also has the power to set aside the resolution or to order that the meeting be reconvened with either separate classes or by disregarding particular votes where the result of the meeting was determined by related party creditors (such as parent company owed money through an intra-group loan): s 600A.
  - Section 600A would be repealed by the ILRB 2015 and replaced by a new regime for review by the courts of the results of creditor meetings: Div 75.

#### *Following the creditors' meeting*

- The chair of the creditors' meeting must prepare and sign minutes of the meeting: reg 5.6.27(1).
- Liquidator then begins the task of administering the company

#### Liquidator believes company is insolvent

- If the liquidator forms this opinion they must take one of the courses of action prescribed by s 496(1).
  - Convene a meeting of the creditors
    - Must provide statement of the assets and liabilities of the company if they do this.
    - Notice convening the meeting should advise the creditors that they are at liberty to appoint a new liquidator: s 496(4), (5).
- From the time of the creditors meeting, the liquidation is converted from a members; voluntary winding up to a creditors' voluntary winding up: s 496(8)
- If the original liquidator was not a registered liquidator, a registered liquidator must take over the winding up.

- Within 7 days after the meeting has been held, the liquidator must lodge with ASIC a Form 522 notice stating that the meeting has been held. This requirement falls on the liquidator if one is appointed by the meeting: s 496(7).

### **Compulsory winding up**

- Compulsory liquidation is a procedure enabling a person to apply to the court for an order that a company be wound up.
  - Note: Although referred to as compulsory, in many cases the company may consent to or not oppose the courts order that it be wound up.
- Section 459A: On application under s 459P, the court may order that an insolvent company be wound up in insolvency.
- Section 459P – persons who may apply for a company to be wound up

### Grounds upon which a court: s 451

- Insolvency (S. 459A)
- 'just and equitable' ground ( S. 461(1)(k))
  - Used where there is lack of confidence in the conduct of the company. Typically, this can be established where directors have caused the company to enter into highly irregular and potentially dishonest transactions; or where there is history of a failure to comply with legal obligations and commercial morality in the conduct of its business.
    - ***DCT v Casualife Furniture International Pty Ltd*** [2004] VSC 157 : Here, the court found that application could be made on the 'just and equitable' ground to wind up the company based on concerns about the company's poor tax history and the company's disdain for the obligation of tax.

### Creditor is the usual applicant

- Section 459P of the Corporations Act confers standing on creditors to apply to the court for a winding up order and this is the most frequent situation in which a company is wound up.
- The creditor must be owed a valid debt that is capable of legal enforcement even if the time for payment has not yet arisen. The debt must also be unpaid at the time of lodging the application for the winding up: *Re William Hockley Ltd*.

### Presumption of insolvency

- Section 459C provides that a company is presumed to be insolvent if, during or after the 3 months ending on the day on which an application was made for winding up of the company, any one of the following 6 situations occurs:
  - the company failed (as defined by [section 459F](#)) to comply with a statutory demand; **THIS IS THE MOST COMMON** or
  - execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or
  - a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a circulating security interest in such property; or