

# LIQUIDATION

## TYPES OF LIQUIDATION

### (1) Compulsory - by an order of the Court

- Liquidator appointed by the Court and acts as officer of the Court
- Any of the following may apply to have a company wound up for reasons of insolvency:
  - (i) the company
  - (ii) creditor; including secured creditor or *contingent* or prospective creditor
  - (iii) a contributory
  - (iv) a director
  - (v) ASIC

'*Contingent creditor*': "a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date". The importance of these words for present purposes lies in their insistence that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen".

*Community Development Pty Ltd v Engwirda Construction Co (1969) 120 CLR 455*

- Court hearing occurs where the Court will order winding up. Applicant must prove insolvency of the company: see presumptions under s 459C:

(2) *The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made:*

- (a) *the company failed (as defined by section 459F) to comply with a statutory demand; or*
- (b) *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*
- (c) *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*
- (d) *an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a security interest; or*
- (e) *a person entered into possession, or assumed control, of such property for such a purpose*
- (f) *a person was appointed so to enter into possession or assume control (whether as agent for the secured party or for the company).*

### (2) Voluntary - by special resolution of members: s 491(1) CA.

- Liquidator appointed by the Company and acts as Company officer

Can either be:

#### (i) Members Voluntary Winding up (Solvent companies)

- Company must be solvent: declaration of solvency must be lodged with ASIC in the appropriate form: s 494(1); 494(3) CA. Must attach a statement of affairs in the prescribed form and disclose certain information: s 494(2) CA.
- Company must be 'solvent': must be able to pay all of its debts in full within a period of no more than 12 months after the winding up resolution is passed: s 494(1) CA.

#### (ii) Creditor's Voluntary Winding up (Insolvent companies)

- Could automatically transfer from voluntary administrator under s 446A:
  - (i) final creditors meeting resolved to wind up company: s 446B;
  - (ii) failure to execute DOCA within statutory time limit: s 439C
  - (iii) creditors resolve to terminate the deed and wind up company: s 444B(2).

or