

1. What type of liquidation is it?

Types of liquidation

- (1) Compulsory liquidation/winding up by the Court [more common]
 - in insolvency (Part 5.4)
 - on other grounds
- (2) Voluntary liquidation/winding up
 - members' voluntary winding up
 - creditors' voluntary winding up

2. If insolvency court order, do they have standing to apply to court?

Standing – s 459P

Any one or more of the following may apply to the court for a company to be wound up in insolvency (**note below**):

- (a) the company;
- (b) a creditor (even if the creditor is a secured creditor or is only a contingent or prospective creditor); **[common]**
- (c) a contributory – meaning a current or past members of the company where unpaid amounts on shares as well as any holder of fully paid shares in the company ([s 9](#))
 - a group of people, who are members that may have money owing to them
- (d) a director;
- (e) a liquidator or provisional liquidator (person put in place temporarily) of the company; **[registered liquidators are common]**
- (f) ASIC **[common but usually with other breaches eg director duties]**
- (g) A prescribed agency

[Corps Act s 459P\(1\)x](#)

3. Is the company INSOLVENT?

-Can either prove it or presume it

Proving it:

A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable

[Corps Act s 95A\(1\)](#)

Sandell v Porter

A person who is not solvent is insolvent

[Corps Act s 95A\(2\)](#)

- 'Cash-flow' test rather than 'balance sheet' test of insolvency: *Duncan v Commissioner of Taxation; Re Trader Systems International Pty Ltd (in liq)* (2006) 58 ACSR 555.
 - just because company's assets > liabilities does not mean it is solvent.
 - just because company's liabilities > assets does not mean it is insolvent.

Q decided on the balance of probabilities (when they become due and payable)

Coates Hire Operations v D-Link Homes

Temporary lack of liquidity does not necessarily mean the company is unable to pay its debts: *Sandell v Porter*

Whether a company is insolvent or not is a question of fact to be ascertained from a consideration of the company's financial position taken as a whole – considerations:

- have regard to commercial realities – what resources are available to the company to meet its liabilities as they fall due (this will involve questioning the directors' views and whether they are overly optimistic)
- whether resources other than cash are realisable by sale or borrowing upon security;
- whether such realisations are achievable

Sandell v Porter

See generally *ASIC v Plymin* [2003] VSC 123 at [386] > Factors relevant if company insolvent [in addition to the cash flow test]

- Continuing losses
- Liquidity ratios below 1
- Overdue taxes
- Poor relationships with financiers
- Suppliers are restricting supplies to the company or imposing special payment requirements
- Creditors being paid outside timeframes eg usually paid within 30 days vs now 90 days
- Demands made on the company
- [exceeding overdraft]

If cant prove insolvency... presume it

Upon application under ss 459P or 464, 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 within the relevant period (s 459F) to comply with a statutory demand** [focus]
[Corps Act s 459C\(2\)](#)x

STATUTORY DEMAND

1. A person may **serve** on a company a demand relating to a debt or debts that the company owes to the person, that is due and payable and whose amount is at least the statutory minimum (\$2,000: s 9); [Corps Act s 459E\(1\)](#)

- Due and payable > cant be contingent debts or a debt that may become due and payable at some future time

2. Demand requirements:

The demand must:

- specify the debt and its amount – but can be part of the debt

Commonwealth Bank of Australia v Garuda Aviation Pty Ltd

- Eg what was owed and undisputed was \$6 mill, but SD was only for \$2 mill > held this was ok
- require the company to pay the amount of the debt within 21 days after the demand is served on the company; and
- be in writing; and
- be in the prescribed form [form 509H]; and
- be signed by or on behalf of the creditor [doesn't have to be secured, can be unsecured]

[Corps Act s 459E\(2\)](#)

3. If demand based on court judgement > attach court judgement. Otherwise need affidavit to verify debt is due: [Corps Act s 459E\(3\)](#)

- A failure to attach an affidavit when there is no judgement does not invalidate the demand itself but is likely grounds for having it set aside