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## Corporate Insolvency

Corporate insolvency in Australia is regulated by the Corporations Act 2001 (including the Insolvency Practice Schedule (Corporations) which is Schedule 2 to the Act), the Corporations Regulations 2001 and the Insolvency Practice Rules (Corporations) 2016.

The different types of insolvency administrations available to corporate debtors under the Corporations Act are:

- Court Winding-up (or liquidation);
- Provisional Liquidation;
- Voluntary Winding-up (or liquidation);
- Voluntary Administration;
- Deed of Company Arrangement;
- Controllership, which includes where a receiver or receiver and manager is appointed; and
- Scheme of Arrangement.

A *Court Liquidation* occurs when and if the Court exercises its discretion to order the winding up of the company, following consideration of an application filed with it. The applicant is usually a creditor, although others including the company can apply. A Court Liquidation provides for the winding up of a company's affairs under the control of an independent liquidator and the orderly distribution of available monies amongst creditors. The Liquidator will also carry out investigations into the company's demise.

A *Provisional Liquidator* can be appointed any time after the application for the winding up of a company is lodged. The purpose of appointing a provisional liquidator is to preserve the assets of the company until the Court hears the winding up application and decides whether to appoint a liquidator or not. The appointment of a Provisional Liquidator may be requested if it is felt that the assets of the company are in jeopardy or for commercial reasons (such as directors' potential exposure to insolvent trading).

*Voluntary Liquidation* is a process formally initiated by the debtor company to wind-up its affairs and cease business, so that assets may be controlled and realised and the proceeds distributed in accordance with the Corporations Act. The company is placed into Voluntary Liquidation by a

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resolution of its members. There are Members' Voluntary Liquidations and Creditors' Voluntary Liquidations.

For a company to enter into a *Members' Voluntary Liquidation*, the company must actually be solvent.

If the company is insolvent, it will be placed into *Creditors' Voluntary Liquidation* upon the passing of the resolution by members. A company can also be placed into Creditors' Voluntary Liquidation by creditors so resolving at a meeting of creditors held during a Voluntary Administration or Deed of Company Arrangement.

*Voluntary Administration* is a formal moratorium type administration. A proposal for the company's future will be put to creditors, who may decide to accept a Deed of Company Arrangement or to liquidate the company. In the meantime, a unique stay on creditor action extends, with limited exceptions, to even secured creditors, landlords and other owners of property used by the company.

A *Deed of Company Arrangement* is a procedure permitting a company to make a compromise or arrangement binding on all its creditors. It is one of the possible outcomes following a voluntary administration. It will usually compromise creditor' rights, but with the aim of producing a situation ultimately beneficial to creditors when compared with liquidation. The Corporations Act provides the procedures for effecting such a compromise, and enables the arrangement to be made binding on all creditors if assented to by a simple majority at a meeting of creditors. If the company's undertakings under the deed are not carried out, the deed will fail and the company will usually be wound up by means of a creditors' voluntary winding up.

Court Liquidation, Creditors' Voluntary Liquidation, Members' Voluntary Liquidation, Provisional Liquidation, Voluntary Administration and Deeds of Company Arrangement are collectively referred to as *External Administrations*.

A controller of property of a corporation is a *receiver* or *receiver and manager* or anyone else in possession or control of corporate property for the purpose of enforcing a security interest. The appointment is usually made by a secured creditor, or in some cases by the Court. The controller has the power to realise company assets for the benefit of the appointor (the secured creditor). While ordinary creditors are not prevented from pursuing normal remedies (eg. forcing the company into liquidation), unless the controller has been improperly appointed, the assets which he or she is entitled to realise will not be generally available to ordinary creditors until the appointor is repaid.

A *Scheme of Arrangement* has similar objectives to a Deed of Company Arrangement, but it is more complex and may be used by both solvent and insolvent companies. It is only occasionally used by insolvent companies now, having been largely replaced by Deeds of Company Arrangement.

Corporate administrations are not necessarily exclusive, eg. a receivership and a liquidation may co-exist; or a receivership and a voluntary administration.

The tables on the following pages summarises the purpose and power of each administration.

*The tables on the following pages were originally sourced from Australian Insolvency Management Practice (loose leaf service) written by Taylor, T., Ferrier, I. and Hodgson, T. and published by CCH Australia Limited.*

Administration type	Intrinsic purpose of appointment	Person(s) appointing the administrator		
		Who	Initiated by	Rights stem from
Administration	A moratorium until creditors decide company's future	The company, a substantial secured creditor, or a liquidator / provisional liquidator	Board or relevant creditor or liquidator	Sections 436A, 436B and 436C Corporations Act
Deed of Company Arrangement	To administer a deed governing arrangements reached by the company with its creditors	Meeting of creditors	Proposal of administrator	Section 439C Corporations Act
Court approved scheme of arrangement	To administer a compromise or arrangement reached by the company with its creditors	Meetings of classes of creditors plus court approval	Proposal of company, creditor, member or liquidator to the court	Section 411 Corporations Act
Receivership	To realise and collect assets for the prime benefit of a chargeholder, or those parties who the court determines should be protected	Mortgagee, chargeholder or trustee  ..... Court	Exercise of contractual powers  ..... Order, on application	Debenture or charge document  ..... Equitable jurisdiction
Provisional Liquidation	Caretaker to safeguard the company assets pending hearing of liquidation petition	Court, on application	Order, following presentation of winding up application	Section 472 Corporations Act
Compulsory (court-ordered) Liquidation	To realise and collect assets, distributing the proceeds to creditors, and to examine the company's affairs	Court, on application	Order, following presentation of winding up application	Section 460-1 and 472 Corporations Act
Members' Voluntary Winding up *	To realise and collect assets, distributing the proceeds to members	Meeting of shareholders	Board convening	Section 491 Corporations Act
Creditors' Voluntary Winding up	Same as Compulsory Liquidation	Meeting of shareholders or meeting of creditors	Board convening or administrator / deed administrator	Sections 491 and 497, or 446A Corporations Act

\* Included for convenience – company *not* insolvent

Administration type	Person appointed as administrator		Powers	
	Title	Qualifications	Powers stem from	Carry on business
Administration	Administrator	Registered liquidator	Corporations Act Part 5.3A	Yes, but may also dispose of business
Deed of Company Arrangement	Deed administrator	Registered liquidator	Deed	Possible (depends on deed)
Court approved scheme of arrangement	Scheme trustee; scheme manager etc	Registered liquidator	Scheme document	Possible (dependent on terms of scheme)
Receivership	Receiver or receiver and manager	Registered liquidator	Charge document ..... Charge document (if any); Corporations Act and Court order	Usual, especially if floating charge
Provisional Liquidation	Provisional liquidator	Registered liquidator	Corporations Act and Court order	Usual
Compulsory Liquidation	Liquidator	Registered liquidator	Corporations Act (especially s 477)	Only for beneficial winding up
Members' Voluntary Winding up *	Liquidator	Need not be registered liquidator (see s 532)	Corporations Act (especially s 506)	Only for beneficial winding up
Creditors' Voluntary Winding up	Liquidator	Registered liquidator (see s 532 for disqualifying matters)	Corporations Act (especially s 506, applies s 477)	Only for beneficial winding up

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Administration type	Powers		Rights to formally examine and investigate past transactions	Normal termination
	Realise assets	Distribute proceeds		
Administration	Yes, even in some cases assets of third party	No	Private examination possible; report to ASIC on offences required (ss 438D, 597)	By resolution of creditors (s 439C)
Deed of Company Arrangement	Possible (depends on deed)	Usually	Unlikely	In accordance with deed, or upon its failure by Corporations Act
Court approved scheme of arrangement	Common (unless agreement is merely a moratorium)	Usually	None	In accordance with scheme document – usually upon satisfaction or breach of its terms
Receivership	Yes  ..... Usually	To chargeholders and priority creditors  ..... To such persons as Court directs	Some (s 422); report to ASIC on offences required (s 422)	On full repayment of chargeholder or exhaustion of assets  ..... By court application
Provisional Liquidation	Unusual, except in ordinary course of business	No	Right of examination (s 597)	On appointment of liquidator or withdrawal of petition
Compulsory Liquidation	Yes	Yes	Full rights	By application to Court or ASIC on completion of winding up (ss 480, 601AB) or on stay of winding up (s 482)
Members' Voluntary Winding up *	Yes	Yes	Full rights	On completion of winding up 3 months after lodging end of administration return (s 509); or by stay (s 482)
Creditors' Voluntary Winding up	Yes	Yes	Full rights	On completion of winding up 3 months after lodging end of administration return (s 509); or by stay (s 482)

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