

Episode 25: Summary

Episode name: Examine me please! How shareholders are utilising the Liquidation process to resolve disputes

Guest(s): Vince Pirina, Andrew McEvoy & Jason Porter

What area(s) of law does this episode consider?

Insolvency law, in particular the powers of a liquidator and the public examination process.

Why is this topic relevant?

The effect of COVID-19 on the health of businesses, despite government strategies to 'flatten the insolvency curve', will likely see many businesses enter formal insolvency processes, including liquidation, as a result of the pandemic.

A study of external administrators' reports lodged in 2017-2018 found that 4.9% of external administrators intended to hold public examinations to question a company's officer or another person about the financial affairs of the company.¹ 2020 and the coming years may see this statistic increase, due to the severe economic effects of COVID-19.

What legislation is considered in this episode?

Winding up and powers of the liquidator:

Section **461(1)(k)** *Corporations Act 2001* (Cth) – enables the Court to wind up a Company if it believes it is just and equitable to do so.

Section **467(4)** of the *Corporations Act 2001* (Cth) – the Court must make an order for winding up if it is of the opinion that the Applicant is entitled (to such an outcome) in the absence of any other remedy and the Applicant is not being unreasonable in pursuing the winding up.

Section **472** of the *Corporations Act 2001* (Cth) – On an order being made for the winding up of a company, the Court may appoint a registered liquidator.

Section **473** of the *Corporations Act 2001* (Cth) – A liquidator appointed by the Court may resign.

Section **474** of the *Corporations Act 2001* (Cth) – Where a company is being wound up in insolvency or a provisional liquidator of a company has been appointed, the liquidator or provisional liquidator must take into his or her custody or under his or her control, all the property which is, or appears to be, property of the company.

Section **475** of the *Corporations Act 2001* (Cth) – Directors and secretaries of a corporation that are the subject of a winding up in insolvency or by a Court must submit to the liquidators and verify a statement in writing, a report as to the affairs of the company as at the date concerned.

¹ Australian Securities and Investments Commission, 'Report 596 – Insolvency Statistics: External administrators' reports (July 2017 to June 2018) [110].

Section **477** of the *Corporations Act 2001* (Cth) – Liquidators have broad powers under the Act. For example, a liquidator of a company may carry on the business of the company (477(1)(a)), pay creditors in full (477(1)(b)), or to make compromises or arrangements with creditors (477(1)(c)). The powers also permit the sale of the company's assets, legal actions and to obtain credit, amongst other things.

Section **478** of the *Corporations Act 2001* (Cth) – as soon as practicable after the Court orders that a company be wound up, the liquidator must cause the company's property to be collected and applied in discharging the company's liabilities (478(1)(a)) and consider whether he or she is required to settle a list of contributories.

Public examinations:

Section **596A** of the *Corporations Act 2001* (Cth) – The Court has a mandatory power to summon a person for examination where an eligible applicant (such as ASIC, a liquidator, administrator, or ASIC authorised person, among others), applies for examination.

Section **596B** of the *Corporations Act 2001* (Cth) - permits discretionary examinations where the Court is satisfied that a person has taken part in or has been concerned in examinable affairs of the company and has been or may have been guilty of misconduct in relation to the corporation.

Section **596D** of the *Corporations Act 2001* (Cth) – A summons in accordance with section 596A or 596B may require the production of specified books that are in the person's possession and relate to the company's examinable affairs.

Section **596F** of the *Corporations Act 2001* (Cth) - gives the Court extensive powers to give directions concerning various matters that relate to the conduct of the examination

What are the main points?

The duties and obligations of a liquidator remain the same in a court-ordered winding up whether the company is solvent or insolvent and the process in a just and equitable winding up is no different to an ordinary winding up. However, liquidators in solvent windings up can consult their ultimate stakeholders – the shareholders – more readily than liquidators of insolvent companies and take into account their wishes.

While public examinations are one type of investigative tool, they are costly to conduct. Liquidators may try to limit costs, by:

- Obtaining evidence via affidavit;
- Narrowing the scope of the public examinations, for example by writing to parties involved asking them to put forward the main issues they wish to bring to light.

What are the practical takeaways?

Although liquidators are required to remain within the confines of the Corporations Act when exercising their duties, exercise of discretion is paramount, particularly depending on the type of liquidation or winding up. The choice to undertake a public examination, and the manner in which to do so, is one such exercise. In solvent windings up, considering the preferences of the shareholders, as the ultimate stakeholders, is a practical way to guide that discretion.