



**ASIC**

Australian Securities & Investments Commission

## INFORMATION SHEET 41

# Insolvency: a glossary of terms

This is a brief explanation of some of the terms you may come across in company insolvency proceedings. Please note that this glossary is for general guidance only. Many of the terms have a specific technical meaning in certain contexts that may not be covered here.

### **Asset**

Any property of value owned by a person. Can include tangible and intangible assets.

### **Bankruptcy**

An insolvency procedure that applies to a natural person, not to a company.

### **CALDB**

The Company Auditors and Liquidators Disciplinary Board—the body that disciplines external administrators.

### **Charge**

A form of security for a debt taken by a creditor over company assets. A mortgage is a type of charge.

### **Committee of creditors**

A small group of creditors, or their representatives, often appointed by the creditors of a company at the first meeting in a voluntary administration. The committee's role is to consult with the voluntary administrator and to receive and consider reports by the voluntary administrator. The voluntary administrator must report to the committee when it reasonably requires.

### **Committee of inspection**

A small group of creditors and shareholders, or their representatives, often appointed by the creditors and shareholders of a company in liquidation to assist the liquidator. The committee is often called on to approve the liquidator's fees and sometimes to approve the compromise of debts or the entry into contracts extending beyond 3 months by the liquidator.

### **Compromise**

Agree to accept a lesser sum in full payment of a debt.

Important note: The information sheets contain a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. These documents may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

**Contingent asset**

An asset that might arise if a certain event occurs (e.g. a current legal action being taken by a company might result in an asset if the company wins the case).

**Contingent liability**

A liability that might arise if a certain event occurs (e.g. a current legal action against a company might result in a liability if the company loses the case).

**Contributory**

A shareholder who may be liable to contribute towards a company's debts in a liquidation if their shares are not fully paid.

**Controller**

A person appointed by a secured creditor to deal with assets subject to a charge. Includes a receiver, and receiver and manager.

**Court liquidation**

A liquidation that starts as a result of a court order, made after an application to the court, usually by a creditor of the company.

**Creditor**

A person who is owed money.

**Creditors' trust**

A separate legal arrangement set up to deal with creditor claims. Creditor claims can be transferred to a creditors' trust as part of a deed of company arrangement.

**Creditors' voluntary liquidation**

A liquidation for insolvent companies, initiated by the company. Creditors may replace the liquidator appointed by the company in this type of liquidation.

**Debenture**

A document acknowledging that a company undertakes to repay a sum of money lent to the company by the holder of the document.

**Debt**

An amount owed.

**Debtor**

A person who owes a debt.

**Declaration of indemnities**

A declaration that must be provided to creditors by a voluntary administrator informing them about any indemnities given to the voluntary administrator to cover fees or other debts incurred in acting as voluntary administrator of the company. The declaration provides information to enable creditors to make an informed decision about whether they wish to replace the administrator over concerns about independence.

**Declaration of relevant relationships**

A declaration that must be provided by a voluntary administrator or a liquidator in a creditors' voluntary liquidation informing creditors about certain relationships. The declaration provides

information to enable creditors to make an informed decision about whether they wish to replace the administrator over concerns about independence.

**Deed administrator**

The external administrator appointed to oversee a deed of company arrangement.

**Deed of company arrangement**

A binding arrangement between a company and its creditors governing how the company's affairs will be dealt with, which may be agreed to as a result of the company entering voluntary administration. Aims to maximise the chances of the company, or as much as possible of its business, continuing, or to provide a better return for creditors than an immediate winding up of the company, or both.

**Director**

A natural person appointed as a director of a company who is then responsible for directing and managing the affairs of a company. Also includes a shadow director.

**Dividend**

A share of the profit of a solvent company paid to shareholders. Also used to describe a sum paid to creditors out of the assets of an insolvent company.

**Eligible employee creditor**

A creditor (including the Australian Taxation Office in respect of the superannuation guarantee charge) who, in a winding up of a company, would normally be paid their employment-related entitlements in priority to other unsecured debts. These creditors are given a special right to vote on a deed of company arrangement proposal that seeks to modify their priority.

**Eligible unsecured creditor**

A creditor who is entitled to have a say in a pooling determination made by a liquidator. The term generally covers the external unsecured creditors of the group, but excludes debts owing between companies in the pooled group. A pooling determination relates to a decision to treat the affairs of a group of companies as if it were a single external administration.

**Excluded employee**

An employee who has also been a director of the company, or a relative of a director, at any time in the 12 months before the appointment of an external administrator. Excluded employees are entitled to only limited priority for repayment of their outstanding entitlements.

**External administrator**

A general term for an external person formally appointed to a company or its property. Includes provisional liquidator, liquidator, voluntary administrator, deed administrator, controller, receiver, and receiver and manager. Other than a liquidator for a members' voluntary liquidation and a controller who is not a receiver or receiver and manager, an external administrator is required to be registered by ASIC. An external administrator is sometimes also referred to as an insolvency practitioner.

**Fixed charge**

A charge taken by a lender over particular assets of a company. The company may not dispose of these assets without the consent of the lender.

**Floating charge**

A charge taken by a lender over general assets of a company. The company is usually able to use and dispose of these assets (e.g. stock, debtors) in the ordinary course of business without the secured creditor's consent. A floating charge converts to a fixed charge over those assets if certain events listed in the charge document occur. These usually include the appointment of a liquidator or other external administrator.

**GEERS**

The General Employee Entitlements and Redundancy Scheme—a basic payment scheme to assist employees who have lost their jobs as a result of their employer's liquidation or bankruptcy, and are owed certain employee entitlements.

**Indemnity**

An agreement between the external administrator and a third party to cover the fees and other debts incurred by the external administrator.

**Insolvent**

Unable to pay all debts when they fall due for payment.

**Intangible asset**

An asset with no identifiable physical form (e.g. a contractual right, copyrights, patents and goodwill).

**IPA**

The Insolvency Practitioners Association—the leading professional organisation in Australia for external administrators/insolvency practitioners.

**Liability**

A legal obligation to pay a person.

**Liquidation**

The orderly winding up of a company's affairs. It involves realising the company's assets, cessation or sale of its operations, distributing the proceeds of realisation among its creditors and distributing any surplus among its shareholders. The three types of liquidation are: court, creditors' voluntary and members' voluntary.

**Liquidator**

A natural person appointed to administer the liquidation of a company.

**Member (of a company)**

A shareholder.

**Members' voluntary liquidation**

A liquidation for solvent companies, initiated by the company.

**Officer (of a company)**

A director, secretary or external administrator (in most cases) of the company.

**Person**

A natural person or a company.

**Poll (of creditors)**

A voting procedure where both the number of creditors voting a particular way and the value of their debts is considered in deciding if a resolution is approved or not.

**Pooling**

The practice of treating the affairs of a group of companies as if it were a single external administration.

**Prescribed provisions**

Provisions that the *Corporations Act 2001* takes to be included in a deed of company arrangement, unless the deed specifically excludes them.

**Priorities**

The order set down by the *Corporations Act 2001* for the payment of unsecured creditors of an insolvent company by an external administrator.

**Priority creditor**

An unsecured creditor entitled to be paid ahead of other creditors (e.g. employees).

**Proof of debt**

A prescribed form to be completed by creditors at the liquidator's request, setting out details of their claim against the company, including how the debt arose and the amount claimed.

**Provisional liquidator**

A liquidator appointed by the court to preserve a company's assets until a winding-up application is decided.

**Proxy**

A person appointed by another person to represent them at a meeting. A proxy is usually entitled to attend and vote on behalf of the person who appointed them. In an external administration, the appointer is usually a creditor or shareholder.

**Proxy form**

A prescribed form that must be completed by creditors or shareholders to appoint a proxy for a creditors' or shareholders' meeting.

**Public examination**

A liquidator, voluntary administrator, deed administrator, ASIC or a person authorised by ASIC to do so can apply to the court to question an externally administered company's directors or any other person who may be able to give information about the affairs of the company.

**Realise**

Convert assets into cash, often by selling them.

**Receiver**

An external administrator appointed by a secured creditor to realise enough of the assets subject to the charge to repay the secured debt. Less commonly, a receiver may also be appointed by a court to protect the company's assets or to carry out specific tasks.

**Receiver and manager**

A receiver who has, under the terms of their appointment, the power to manage the company's affairs.

**Receivership**

An insolvency procedure where a receiver, or receiver and manager, is appointed over some or all of the company's assets.

**Report as to affairs**

A prescribed form required to be completed by the directors and secretary of a company in liquidation or receivership, giving details of the company's assets and liabilities, and the identities of the creditors and debtors.

**Secured creditor**

A creditor who has a security (e.g. charge or mortgage) over some or all of a company's property.

**Shadow director**

A natural person not on the public register as a director of a company but who directs and manages the company's affairs and is taken by the *Corporations Act 2001* to be a director.

**Tangible asset**

An asset with a physical form (e.g. stock or real estate).

**Uncommercial transaction**

A transaction that was unreasonable for a company to have entered into. It may be able to be set aside by the company's liquidator provided it occurred within 2 years prior to the winding up, and when the company was insolvent or if the company became insolvent by entering into the transaction.

**Unfair preference**

A payment made or other benefit given to a creditor by an insolvent company which causes that creditor to be in a more favourable position than other unsecured creditors in a liquidation. The company's liquidator can seek to recover an unfair preference provided it occurred within 6 months prior to the liquidation, and when the company was insolvent or if the company became insolvent by making the payment or giving the benefit.

**Unsecured creditor**

A creditor who does not hold a security over a company's property.

**Voluntary administration**

An insolvency procedure where the directors of a financially troubled company or a secured creditor with a charge over most of the company's assets appoint an external administrator called a 'voluntary administrator'. The role of the voluntary administrator is to investigate the company's affairs, to report to creditors and to recommend to creditors whether the company should enter into a deed of company arrangement, go into liquidation or be returned to the directors.

**Voluntary administrator**

An external administrator appointed to carry out the voluntary administration of a company.

**Winding-up order**

A court order for the winding up of a company. The first step in a court liquidation. Usually made after an application by a creditor.