

Compulsory winding up of a CLG

Legal information for companies limited by guarantee

This fact sheet covers:

- ▶ when your organisation can be compulsorily wound up
- ▶ winding up in insolvency
- ▶ winding up on other 'non-insolvency' grounds, and
- ▶ what happens if a court makes a winding up order.

Compulsory winding up occurs when there is a court order that an organisation be wound up

The process of 'winding up' requires an organisation to take all steps to cease its affairs and eventually 'dissolve', including finalising outstanding matters and selling off assets.

The winding up process can happen as a result of:

- the court making a 'winding up order', referred to as 'compulsory winding up', or
- when the members (or creditors) of an organisation decide they want to wind up voluntarily.

This fact sheet outlines the two circumstances in which a compulsory winding occurs and explains what happens if a court makes a winding up order.

RELATED RESOURCES

This fact sheet does not discuss 'voluntary winding up', which can occur only where an organisation is solvent. For more information, see the Ending the organisation page of the Not-for-profit Law Information Hub at www.nfplaw.org.au/windingup.



When can your organisation be compulsorily wound up?

Compulsory winding up occurs when a person or company makes an application to the court to make a winding up order. Although this is described as 'compulsory' winding up, in many cases the organisation may consent to the court's order to be wound up. Compulsory winding up usually happens in one of two circumstances:

- 1. Insolvency:** An organisation is insolvent when it is unable to pay all its debts when they become due and payable. An application can be made to the court that an organisation be wound up because it is insolvent.
- 2. Other grounds:** An application might also be made for an organisation to be wound up where there is a special resolution by the company to do so, there is a breakdown or failure in management of the organisation, or where the organisation has become defunct, or never started operating. This is known as 'winding up on other grounds'.

Not just anyone can make an application for a winding up order, and who is eligible to do so will depend on the grounds relied on in seeking the winding up order (see discussion below).

Winding up in insolvency

The organisation itself can apply to be wound up in insolvency. In addition, a creditor, member (ie. a shareholder), director, liquidator or the Australian Securities and Investments Commission (**ASIC**) may make an application (but generally require the court's permission to do so).

In most cases, the application will be made by a creditor. Whomever applies is required to prove to the court that the organisation is insolvent. Usually, the process involves:

- a creditor who is owed money by the organisation provides the organisation with a document called a 'statutory demand'
- the organisation doesn't pay the demand, or doesn't commence a court proceeding to have the demand set aside within 21 days after the demand is received, and
- the creditor then commences court proceedings, seeking an order that the organisation be wound up.

The organisation must prove it is solvent as there is a presumption of insolvency (non payment of the demand).

RELATED RESOURCES

For more information on insolvency, read Not-for-profit Law's 'Insolvency and your organisation' fact sheet on the Governance page of the Information Hub at www.nfplaw.org.au/governance.

NOTE

There are many other ways a company can be wound up in insolvency, but all of them begin with a statutory demand or legal proceedings (or both). There are very specific rules that relate to the form of the demand and the time limits which apply to this process. If you are served with a demand, you should seek legal advice immediately.



What should we do if we receive a statutory demand or we are struggling to pay our debts?

If your organisation receives a statutory demand or you are concerned that your organisation may not be able to pay its debts when they become due, the consequences of doing nothing can be extremely serious. Your organisation should urgently seek legal advice or advice from an accountant specialising

in insolvency. One of the things your organisation might be advised to do is to appoint a 'voluntary administrator'. This is explained briefly below.

What is 'voluntary administration'?

One option for an organisation facing insolvency is for its board of directors to resolve that:

- in the opinion of the directors voting for the resolution, the organisation is insolvent or is likely to become insolvent at some future time, and
- an administrator of the company should be appointed (called a 'voluntary administrator').

A voluntary administrator must be a specialist accountant or lawyer who is registered with ASIC as a liquidator. You can find a list of firms that offer insolvency services on the Australian Restructuring Insolvency & Turnaround Association [website](#). You can also check if the person you are considering is registered by searching the ASIC database available [online](#).

The voluntary administrator takes full control of the organisation to investigate its affairs. They prepare a report to the creditors on the organisation's options, and a meeting of the creditors is then held to decide on the future of the organisation. The options that are considered by the creditors are whether:

- the organisation be returned to the control of the directors
- a 'deed of company arrangement' is to be entered into by the organisation (which is a binding agreement between the organisation and its creditors about how the organisation's affairs are to be handled), or
- the organisation be wound up (which will be a creditor's voluntary liquidation).

The main advantages of a voluntary administration for an organisation are that:

- if the directors act quickly enough, a decision to appoint a voluntary administrator will protect them from getting into trouble for allowing the organisation to incur new debts when it is insolvent, and
- it provides a chance for an organisation that is struggling financially to restructure and reduce its debts.

NOTE

A decision to appoint a voluntary administrator has very serious consequences and should not be taken before your organisation has obtained legal or other professional advice.

Winding up on other 'non-insolvency' grounds

Other than on the grounds of insolvency, an organisation can also be compulsorily wound up by a court when:

- the organisation has resolved by special resolution to be wound up by the court
- the organisation has not commenced any activities for a year after incorporation or has suspended its activities for a whole year
- the organisation has no members

- in conducting the affairs of the organisation, the directors have acted in their own interests rather than in the interests of the members as a whole, or in any other manner which appears unfair or unjust to members
- the affairs of the organisation are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member
- a group of members does something (or fails to do something) which is or would be oppressive, unfairly prejudicial or unfairly discriminatory against a member or members, or the interests of the members as a whole
- ASIC has prepared a report stating that, in its opinion, the organisation cannot pay its debts or it is in the interests of the public that the company be wound up, or
- the court believes it is 'just and equitable' that the company be wound up.

Who can apply?

An application to a court on any of these grounds can be brought by:

- the organisation itself
- a creditor
- a member
- a liquidator, or
- various government bodies (e.g. ASIC).

What are the steps for applying to a court for winding up on non-insolvency grounds?

An application to a court for winding up on grounds other than insolvency requires a court application to be prepared in the approved form, which sets out the reasons relied on to seek winding up orders. That application must also be supported by a sworn statement or statements (called affidavits) which verify the grounds for making those orders.

In a simple uncontested case (for example, where the organisation has resolved by special resolution to be wound up by the court), the application will be reasonably straightforward and the supporting affidavit will simply confirm that the resolution was validly passed.

However, in cases where the application is made in the context of some alleged mismanagement or a dispute, the application will be much more complex and be similar in scale to contentious litigation.

In either case, the application and affidavits must be:

- lodged with a court (either the relevant state's Supreme Court or the Federal Court), and
- provided to various interested parties (in particular, the organisation if it is not the one making the application).

In more complex applications, the court registry will usually allocate the application to a judge, and a court listing will be set a few weeks from the lodgement of the application so that the judge can hear from the interested parties and make directions for any further steps that need to be taken before a final hearing. It would be unusual for more complex applications to be finally heard and determined in less than a few months, and in some cases, they can take much longer. Simpler uncontested applications should be determined within a few weeks.

What happens if a court makes a winding up order?

If the court agrees with the application for winding up (whether it be on grounds of insolvency or otherwise), the court will order that:

- the organisation be wound up, and
- a liquidator or liquidators be appointed to the organisation.

Usually, the party making the application will have arranged to obtain consent to act from a suitable liquidator before the court makes its final decision.

There are consequences for the organisation once liquidators are appointed – it is not ‘business-as-usual’. Upon appointment of the liquidator, control of the organisation passes immediately to them. They then proceed to collect and sell the organisation’s assets, pay off creditors, investigate the organisation, provide annual reports and so on, with a view to ceasing the organisation’s affairs.

Some consequences of a compulsory winding up include, for example:

- there must be a notification in all public documents and negotiable instruments (eg. cheque or bill of exchange) that the company is in liquidation
- the organisation’s property can only be disposed of by the liquidator in a certain way
- shares can’t be transferred unless authorisation is provided by the liquidator or court
- legal proceedings against the company can’t be commenced or continued without the court’s permission, and
- depending on the specific circumstances, certain transactions entered into by the organisation for a period prior to the winding-up or administration could be voidable (not valid and therefore not enforceable).

RELATED RESOURCES

To answer your frequently asked questions on ending an organisation, see our FAQs resource on the Not-for-profit Law Information Hub at www.nfplaw.org.au/windingup.

Resources

Related Not-for-profit Law Resources

- Changing or ending your organisation – www.nfplaw.org.au/changingorending

This Not-for-profit Law page on the Information Hub provides information on changes to an organisation's constitution, changes to an organisation's structure, the ending of an organisation and voluntary cancellation or deregistration.

- Governance – www.nfplaw.org.au/governance

This page features resources on the legal duties of boards, committees and office holders, and insolvency.

Other Related Resources

- [Australian Securities and Investments Commission \(ASIC\)](http://www.asic.gov.au)

This ASIC webpage provides information on closing down your company.

- [ASIC Professional Register](http://www.asic.gov.au/professional-register)

This ASIC webpage allows you to search in its Professional Registers.

- [Australian Restructuring Insolvency & Turnaround Association \(ARITA\)](http://www.arita.org.au)

ARITA is the professional body for insolvency practitioners.

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