



Special administration, insolvency and winding up

Changes to the special administration, insolvency and winding up provisions of the CATSI Act are being considered. The aim is to give more help to CATSI corporations, particularly those facing financial difficulty.

Special administration

Special administration allows the Registrar to provide early assistance when a CATSI corporation faces financial or governance difficulties. This special help is not available under the *Corporations Act 2001* (Corporations Act). In most cases at the conclusion of special administration, the corporation is returned to the control of its members in better health.

Since 2007, 110 corporations have been put into special administration. Of the 102 cases where special administration has been completed, over 90 per cent were returned to the control of their members to continue delivering services and supporting communities.

Changing the name

Special administration is a positive intervention. However, people often view it negatively, assuming it is similar to administration under the Corporations Act. Funding bodies have even moved to stop funding corporations under special administration.

It has been suggested that if special administration had a different name, people might not make such negative assumptions.

- What do you think would be a more appropriate name?

Appointing special administrators

The CATSI Act says the Registrar must notify the corporation if the Registrar is considering special administration, giving the corporation an opportunity to respond. This is called a 'show cause' notice. Corporations are given a reasonable time, generally two weeks, to respond to the show cause notice.

When appointing a special administrator, the Registrar must give public notice in the *Australian Government Gazette* and newspapers. This can be time consuming and costly.

- Should this be changed so that the Registrar only has to publish these notices electronically, such as on ORIC's website?



'Show cause' notice

One of the grounds for placing a corporation under special administration is where a majority of directors request the Registrar do so. However, even if all the directors have unanimously agreed to ask the Registrar to appoint a special administrator, the Registrar still has to issue a show cause notice.

We think the Registrar should not have to issue a show case notice if either all or the majority of directors ask for a special administrator to be appointed.

- Should the show cause process be removed if the majority of a corporation's directors request the appointment of a special administrator, or should it only be where all directors have unanimously asked the Registrar?
- Is there any other way the show cause process could be streamlined or shortened?

Grounds for appointment

Currently one of the grounds for appointing a special administrator is if the Registrar thinks that the CATSI corporation has traded at a loss for at least six of the last 12 months. This can be hard to work out where corporations operate on a seasonal basis or if record keeping is poor. Also, some financially strong corporations receive grant funding either annually, twice a year, or four times a year—and because of these fluctuations in their finances, this ground could apply.

- Do you agree with changing this ground to one that applies if the Registrar or an authorised officer identifies irregularities in a corporation's financial affairs.

Keeping contracts going during special administration

The Corporations Act was changed in 2018 so that contracts of insolvent companies could not be stopped just because the company went into receivership or voluntary administration. Stopping contracts, including funding agreements, during special administration is more likely to harm than help a corporation.

- We propose changing the CATSI Act to include a similar provision. Do you agree?

Examinable affairs and financial matters

Currently the Registrar can authorise someone to examine the books of a CATSI corporation and report back on its affairs, including any irregularities in the operations or examinable affairs of the corporation. We propose changing the CATSI Act to explicitly allow the Registrar to authorise an officer to examine how a corporation's financial affairs are managed, and report back to the Registrar on any financial irregularities.

This would provide an express basis for examining facts that may support a determination that a corporation be placed under special administration on the grounds proposed above.

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- Do you think authorised officers should be able to examine and report on a corporation's financial irregularities?

Insolvency and winding up

A CATSI corporation may be insolvent if it cannot pay its debts when they must be paid. Running an insolvent corporation can put directors at risk of being found personally liable for certain debts of the corporation and/or having to pay penalties under the CATSI Act.

The CATSI Act provides a means for winding up a corporation. Winding up involves taking control of the corporation from its directors, finalising the corporation's affairs, selling its assets (if any) and dissolving the corporation (so it ceases to exist).

But an insolvent corporation does not necessarily have to be wound up. With the help of special administration, a corporation with financial or governance difficulties may get back on track and continue operating.

Rebuttable presumptions of insolvency

If a corporation is insolvent and nothing is done to improve it, the court can wind it up—but this can be a long and difficult process.

One way to make it easier for a court to wind up a corporation is to introduce practical tests for insolvency, based on evidence and advice from a specialist. If a CATSI corporation meets these tests, the court would then be able to assume that the corporation is insolvent. This is called a 'presumption of insolvency'.

A corporation would still have the chance to show a court that it can pay its debts even if a presumption of insolvency exists. A court would then decide whether the corporation should or should not be wound up based on all the evidence before it.

Some responses to the Technical Review of the CATSI Act expressed concern that adopting these presumptions would make it too easy to wind up a CATSI corporation. They also felt it could be deemed discriminatory and heavy handed.

In answer to these concerns, we emphasise that a CATSI corporation can still seek to prove to the court it is not insolvent. Also, only the Registrar could make an application to the court on these grounds.

Would you agree that a CATSI corporation should be presumed to be insolvent if an authorised officer or a special administrator has reported to the Registrar that:

- the corporation has failed to keep adequate written financial records (with no time period specified),
or
- the corporation has failed to keep adequate financial records for a period of seven years?



Do you also think a presumption of insolvency should be introduced when a corporation hasn't kept adequate financial records? Do you think a set time period should be specified?

Seeking leave of the court

Before the Registrar can pursue insolvency in the court, the Registrar must first seek the court's permission to make the application. This is a procedural step that adds to the cost of winding up a corporation.

- Should the process be simplified so that the Registrar doesn't need to seek leave of the court to wind up a corporation?

The Registrar would still need to prove to the court that there are valid grounds for winding up the corporation because it is insolvent.

Voluntary deregistration

Under the CATSI Act, all members need to agree to voluntarily deregister a corporation. This can be difficult when members may have lost interest and contact.

- Do you agree that the CATSI Act should be amended to allow a special resolution agreeing to the winding up or providing the Registrar with the power to exempt corporation from meeting some of the requirements set out under the CATSI Act?

Insolvent trustee corporations

The CATSI Act and the Corporations Act insolvency provisions are not particularly suited to trustee corporations. Recently, the courts have made some decisions that help explain how insolvency laws can apply to insolvent trustee corporations.

We are not considering any changes to the CATSI Act about this at the moment, but we welcome your feedback about dealing with insolvent trustee corporations.

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