

What is a Liquidation?

Liquidation is a form of external administration whereby the assets of the company are realized and the proceeds distributed in accordance with the Corporations Act, 2001 ("the Act") and company's constitution. Ultimately the company is deregistered, bringing its existence to an end.

There are a number of different forms of liquidations, including:

- Members' Voluntary Liquidation ("MVL") – a winding up of a solvent company;
- Creditors' Voluntary Liquidation ("CVL") – a winding up of an insolvent company; and
- Court Liquidation ("CL") – a winding up of an insolvent company by Order of the Court.

Who can be the Liquidator?

The liquidator of a CL or CVL must be a person registered with the Australian Securities & Investments Commission ("ASIC") as a liquidator. The Act provides for a number of further disqualifications including where a person is a creditor or officer of the company.

There are no such restrictions as to who may be a liquidator of a proprietary company in a members' voluntary winding up.

How is the Liquidator appointed?

MVL – by a resolution of members following a declaration by the majority of the company's directors that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.

CVL- by a resolution of members. A CVL may also follow a voluntary administration if creditors resolve to wind up the company. A CVL may also commence if the company is subject to a deed of company arrangement ("DCA") and creditors resolve to terminate the DCA and wind up the company.

CL – by Order of the Court following an application (generally by a creditor) to wind up the company.

What happens after the Liquidation commences?

In general terms:

- the liquidator assumes control of the company's assets;
- the powers of an officer of the company are suspended but they are required to assist the liquidator;
- only the liquidator can deal with company property;
- the liquidator will investigate the company's affairs (not in an MVL);
- the liquidator must report to ASIC if it appears that an offence has been committed by a past or present officer, or the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;
- a freeze is placed on all unsecured creditor claims. A proceeding in a court cannot be begun or proceeded with.

Any attachment, sequestration, distress or execution put in force against the property after the passing of the resolution of the winding up or court order is void;

- the liquidator is required to report to creditors within 3 months of appointment including the prospects of a dividend.
- the liquidator will realize the assets of the company and distribute the proceeds of sale in accordance with the order of priority set out in the Act and the company's constitution (if distributing to members);
- the liquidator has a duty to investigate and if warranted recover transactions entered into by the company that may be voidable. Voidable transactions include unfair preferences, uncommercial transactions, unfair loans and unreasonable director related transactions (N/A in MVL);
- the liquidator has a duty to investigate and if warranted pursue the director for insolvent trading. Creditors or ASIC may also pursue the director for insolvent trading; and
- compensation may be sought from the director for breaches of fiduciary duties.

When does a Liquidation end?

The liquidation ends following:

- the realisation of assets and distribution of the proceeds thereof;
- correspondence from ASIC indicating that they have no objection to the finalization of the winding up;
- the company is automatically deregistered by ASIC 3 months after the lodgement of the End of Administration Return by the liquidator; or
- in a CL, an application for deregistration to the court.

CREDITORS RIGHTS IN CVL AND CL

- The liquidator must provide creditors with his/her initial notification of appointment (within 10 business days for a CVL and within 20 business days for a CL).
- The initial report must also include a Declaration of Independence, Relevant Relationships and Indemnities ("DIRRI"), an Initial Remuneration Notice and identify related parties in the list of creditors.
- Within 3 months of appointment the liquidator must report to creditors, advising among other things, of the likelihood of a dividend.
- Creditors may require the liquidator to hold a meeting of creditors or request information BUT only if it is a reasonable request.
- Creditors may provide directions to a liquidator (although it is not mandatory for the liquidator to follow such directions); arrange for a review or oversight of the liquidator's conduct and/or remove and replace the liquidator.
- Creditors may elect a Committee of Inspection to assist the liquidator.