

## What is a Liquidation?

Liquidation is a form of external administration whereby the assets of the company are realised 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 liquidation, including:

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

## Who can be the Liquidator?

The liquidator in a CVL must be a person registered with the Australian Securities & Investments Commission ("ASIC") as a liquidator. The liquidator of a company that is in OL, must be not only a registered liquidator, but also registered with ASIC as an official liquidator. The Act provides for a number of further disqualifications including where the 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 meeting of creditors is then held (up to 18 days after the liquidators appointment) to consider the affairs of the company and to allow creditors the opportunity to replace the liquidator with one of their choosing. 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.

OL – 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 affairs;
- 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 (in a CVL and OL);
- 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 creditor claims (excluding the claims of secured creditors). A proceeding in a court cannot be begun or proceeded with. Any attachment, sequestration, distress of execution put in force against the property after the passing of the resolution of the winding up is void;
- the liquidator will realise 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 in a CVL and OL 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;
- the liquidator in a CVL and OL 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 the Liquidation end?

The liquidation ends following:

- the realisation of assets and distribution of proceeds thereof;
- correspondence from ASIC indicating that they have no objection to the finalisation of the winding up (in a CVL and OL);
- in a CVL and MVL the liquidator convenes a final meeting and the company is deregistered approximately three months thereafter; or
- in an OL, an application for deregistration to either ASIC or the Court).