

## INTRODUCTION

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When the directors of a company determine that the company is insolvent and cannot continue its operations or be rehabilitated, then they may wind up the company voluntarily. The relevant legislation regulating creditors' voluntary winding up is Parts 5.5 to 5.9 of the Corporations Act 2001 (Cth) ("the Act").

### WHEN A COMPANY CANNOT BE WOUND UP VOLUNTARILY

Except with the leave of the Court, a company cannot resolve that it be wound up voluntarily if an application for the company to be wound up in insolvency has been filed, or the Court has ordered that the company be wound up in insolvency, whether or not the order was made on such an application (section 490).

### WHEN A COMPANY CAN BE WOUND UP VOLUNTARILY

Subject to section 490, a company may be wound up voluntarily if the company so resolves by special resolution (subsection 491(1)). If circumstances change substantially, then a liquidator can appoint an Administrator (subsection 436B(1)) with a view to propounding a Deed of Company Arrangement.

## THE PROCESS

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### A MEETING OF DIRECTORS

To initiate a creditors' voluntary winding, the directors must convene a meeting and resolve that the company is insolvent and that it should be wound up. The directors may also resolve to convene a meeting of members for the purpose of winding up the company. Alternatively, they may decide to proceed by way of circular resolution avoiding the need to convene a meeting of members.

At the meeting of directors, a Summary of Affairs made out on the prescribed form (ASIC Form 509) must be tabled and signed. If a meeting of members is to be convened, then a director must sign the notice convening a general meeting of members. It should be noted that a general meeting of members can also be convened by members holding at least 5% of the votes that may be cast at a general meeting (subsection 249F(1)).

### RESOLUTIONS AT A MEETING OF MEMBERS

At least 21 days notice of the general meeting is required to be given (subsection 249H(1)). However, this period can be shortened if 95% of the members consent to short notice (subsection 249H(2)(b)). Subject to obtaining this consent, the meeting of members can be held immediately after the meeting of directors. To wind up a company, members are required to pass a special resolution which requires approval by at least 75% in number of members entitled to vote (section 9). Before doing so, a consent to act signed by the proposed liquidator (subsection 532(9)) must be tabled. Following the passing of the special resolution to wind up the company, members must resolve as an ordinary resolution to appoint a liquidator (subsection 495(1)). Within 7 days from the date of winding up, the directors of the company are required to provide the liquidator with a Report as to Affairs (ASIC Form 507) setting out the assets and liabilities of the company as at the date of winding up (subsection 497(5)).

### RESOLUTIONS WITHOUT A MEETING OF MEMBERS - CIRCULAR RESOLUTIONS

A company with more than one member may pass a resolution without a general meeting being held if all the members entitled to vote on the resolution sign a document containing a statement that they are in favour of the statement set out in the document (sub-section 249A(2)). Each member of a joint shareholding must sign. Separate copies of a document may be used if the wording of the resolution and statement is identical in each copy. The resolution is passed when the last member signs.

A company that has only one member may pass a resolution by the member recording it and signing the record (subsection 249B(1)).

## THE STATUTORY FIRST MEETING OF CREDITORS

Following the meeting of members, the liquidator must convene not later than 11 days after the date of winding up, a meeting of creditors (subsection 497(1)). He or she is required to give creditors at least 7 days notice of the creditors' meeting (subsection 497(2)(a)). The liquidator is required to attach to the notice of meeting the Summary of Affairs together with a listing of creditors (subsection 497(2)(b)). The notice and documents must be filed at ASIC at least 7 days before the creditors' meeting (subsection 497(2)(c)) whilst the notice must be published not less than 7 nor more than 14 days before the meeting in a daily newspaper in each state or territory that the company carries on business (subsection 497(2)(d)).

At the meeting of creditors, the creditors may, by resolution, remove the incumbent liquidator from office and appoint another person as liquidator instead (subsection 497(11)). In addition, creditors may also resolve to appoint a Committee of Inspection (subsections 497(10) and 548(1)(a) & (b)). The liquidator must convene the meeting of the company's creditors at a time, date and place convenient to the majority in value of the creditors (subsection 497(2)).

## **COMMENCEMENT OF THE WINDING UP**

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When members pass the special resolution to wind up the company, the winding up is taken to have begun or commenced on the day on which the resolution was passed (section 513B). However, if immediately before the resolution was passed, the company was under administration, then the winding up is taken to have begun or commenced on the day on which the administration began (subsection 513B(b) and section 513C).

## **EFFECT OF THE WINDING UP**

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Following the meeting of creditors of the company, the liquidator administers the winding up process in the same way as a liquidator in a compulsory liquidation.

### EFFECT ON THE COMPANY

The purpose of winding up the company is to effectively convert the company's assets into a pool of funds from which creditor claims can be met. The company can only continue to trade so far as is necessary for the purpose of maximising the realisation of its business and assets (section 493). Except in specific circumstances, a transfer of shares after the date of winding up is void (subsection 493A(1)).

### EFFECT ON DIRECTORS AND OFFICERS

On winding up, directors and officers lose all powers relating to the management and the affairs of the company (subsection 499(4)). However, directors are required to meet certain statutory obligations including the provision of information regarding the company's affairs and financial position and to provide assistance to the liquidator (section 530A).

### EFFECT ON SECURED CREDITORS

The rights of secured creditors are usually not affected by the winding up. It is not uncommon for secured creditors to allow the liquidator to sell the assets whilst he or she recognizes the rights of the secured creditor. However, in some circumstances, the security itself may not be enforceable against the liquidator.

The secured creditor may prove in the liquidation for any shortfall after taking into account either the value of its security (subsection 554E(5)) or the proceeds from the sale of the secured property (subsection 554E(4)).

### EFFECT ON UNSECURED CREDITORS

Once a company is wound up, unsecured creditors cannot continue recovery action against the company unless they obtain the consent of the court (subsection 500(2)). Their rights are restricted to proving their claim to the liquidator and receiving a pro-rata distribution of the company's realised assets in due course.

The winding up of a company does not limit the rights of creditors to pursue guarantors of the company's debts.

## **INVESTIGATIONS CARRIED OUT BY THE LIQUIDATOR**

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A liquidator will take possession of a company's books and records for the primary purpose of conducting an investigation into its affairs and the conduct of its directors. Specific areas of enquiry include the following:

1. Trading whilst insolvent and whether or not proceedings should be brought against the directors for damages;
2. Preferential payments and whether or not any monies can be recovered;
3. Void transactions and whether any can be overturned;
4. Transactions with related entities;
5. Breaches of the Act.

In order to facilitate the investigation process, a liquidator is able to:

- (i) conduct public examinations of the directors and others in accordance with Part 5.9 the Act,
- (ii) to make an application to the Court for a warrant to search for and seize property and books of a company (subsections 530C(1) and (2)) and to gain access to property (subsection 530C(4)).

Following completion of the investigation, the liquidator is required to report to ASIC on the outcome (section 533).

## **DISTRIBUTION OF MONIES**

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The liquidator must distribute the proceeds from the realisation of assets in the order of priorities set out in subsection 556(1). The order of priorities is summarised hereunder:

1. The costs and expenses of the liquidation;
2. The claims of employees for unpaid entitlements;
3. The claims of any secured creditors;
4. The claims of ordinary unsecured creditors.

The claims of directors, their spouses and their relatives for unpaid employee entitlements are limited to \$2,000 each for wages & superannuation (subsection 556(1A)) and \$1,500 each for other entitlements (subsection 556(1B)). The balance of such claims rank as unsecured.

## **MEETINGS OF CREDITORS**

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### GENERAL MEETING OF CREDITORS

Meetings are an important part of the winding up process. A liquidator can convene a meeting of creditors at any time. For these meetings and the statutory meetings described below, the meetings must be convened at a time and place convenient for the majority of creditors. The purpose of the meeting may be to:

1. report on matters of substance and seek information;
2. seek creditor agreement to a course of action;
3. obtain funding or approval of remuneration;
4. obtain authority to enter into long term agreements; and compromise a debt due to the company (subsections 477(2A), 477(2B) and 506(1A)).

### STATUTORY ANNUAL MEETING OF CREDITORS

In circumstances where the winding up of a company continues for more than one year, the liquidator must either convene a meeting of creditors (subsection 508(1)(b)(i)) and lay before the meeting an account of his acts and dealings and the conduct of the winding up (subsection 508(2)) or alternatively, prepare a report that complies with subsection 508(3) and lodge a copy of the report with ASIC (subsection 508(1)(b)(ii)). In the report, the Liquidator must also provide details of the tasks remaining to be carried out to complete the winding up and an estimate of when it is likely to be completed.

## STATUTORY FINAL MEETING OF MEMBERS AND CREDITORS

Once the affairs of the company are fully wound up, a liquidator must convene a meeting of members and creditors of the company for the purpose of laying before it an account showing how the winding up has been conducted and the property of the company has been disposed of (subsection 509(1)). A final return (ASIC Form 523) and a statement of receipts and payments is then lodged with ASIC triggering the deregistration of the company. Alternatively, and if the liquidator is without funds, he or she may dispense with the meeting and lodge a request with ASIC (ASIC Form 578) for deregistration (subsection 601AB(2)).

## LIQUIDATOR'S REMUNERATION

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A liquidator is entitled to remuneration as determined by a Committee of Inspection, creditors or the Court. Pursuant to subsections 499(6) and 499(7) of the Act and the Code of Professional Practice ("the Code") issued by the Insolvency Practitioners Association of Australia, the liquidator must prepare a report setting out:

1. such matters as will enable the committee, or the creditors, to make an informed assessment as to whether the proposed remuneration is reasonable;
2. a summary description of the major tasks performed; or likely to be performed, by the liquidator; and
3. the costs associated with each of those major tasks.

The same requirements apply to a compulsory winding up.

There is no fixed scale of remuneration. The Code sets out principles and guidance as to how remuneration is to be claimed. In most windings up, a fee based on time spent on tasks is appropriate, while other methods of calculation may be warranted in certain cases. The Code also contains requirements for disclosure of fee rates and estimates of total fees to be charged in a winding up.

In windings up where there is no remuneration approved for whatever reason and certain conditions have been complied with, the creditors are taken to have resolved that the liquidator may claim up to \$5,000 in remuneration (section 499(3A)).

## THE TIME PERIOD TO COMPLETE A VOLUNTARY LIQUIDATION

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There is no set time limit. The winding up lasts for as long as is necessary to complete all of the tasks, but the liquidator will usually try to finalize the administration as soon as possible. The winding up ends after a final meeting of members and creditors has been held or a request for deregistration is filed, after which ASIC deregisters the company at the expiration of three months.

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