

Overview of Members' Voluntary Liquidation and Deregistration of an Australian company

Introduction

The concept of winding up does not exclusively apply to insolvent companies. Solvent companies can also be wound up, on the initiation of the company's directors and shareholders (for example, as part of a corporate reconstruction or to close down non-operating or redundant entities).

An overview of the two key procedures to effect the dissolution of a solvent Australian company, being **Members' Voluntary Liquidation** and **Deregistration**, is set out below.

What is a Members' Voluntary Liquidation or MVL?

A Members' Voluntary Liquidation is the method by which a solvent company is wound up and its assets are distributed to its members (also known as shareholders). The winding up itself is usually conducted by a registered liquidator (typically a chartered accountant from an accounting firm).

The procedure for entering into a Members' Voluntary Liquidation is contained in Part 5.5 of the *Corporations Act 2001* (Cth) (**Corporations Act**). We describe the basic procedure below.

Initiating a Members' Voluntary Liquidation

A Members' Voluntary Liquidation is commenced by a special resolution of the shareholders of the company.

However, prior to the meeting of shareholders at which the resolution is made, the directors of the company must meet and a majority of the directors of the company must make a **declaration of solvency** and attach to that declaration, a current **statement of affairs of the company** (in the prescribed ASIC Form 520).

The directors must also resolve to convene a meeting of shareholders to consider a resolution to wind up the company.

Before the shareholders' meeting is held, the proposed liquidator must consent in writing to act as liquidator, if so appointed at the meeting.

The Corporations Act provides that the declaration of solvency is ineffectual unless:

- (a) it is made at the meeting of directors;
- (b) it is lodged with the Australian Securities and Investments Commission (**ASIC**) prior to the issue of notices calling the meeting of the shareholders to consider the proposal to wind up the company; and
- (c) the resolution to wind up the company is passed within five weeks of the making of the declaration.¹

It is therefore critical that no more than five weeks pass between the date of the meeting of directors and the date of the meeting of shareholders. The Corporations Act requires no less than 21 days' notice of a meeting (unless at least 95% of the shareholders agree beforehand).²

The shareholders' meeting must:

- (a) consider a special resolution to wind up the company; and
- (b) if passed, consider an ordinary resolution to appoint a liquidator and may at that meeting fix the amount of remuneration for the liquidator.

The Solvency Declaration

As stated above, at a meeting of directors, the majority of directors must make a declaration of solvency. The written declaration of solvency is to the effect that the directors have made an inquiry into the affairs of the company and at the meeting of directors, they have formed the opinion 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.³

In considering whether the company is solvent (i.e., able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up), it is necessary to consider the claims that are likely to be admitted to prove in the liquidation to receive a dividend out of the company's assets. These claims are defined in section 553(1) of the Corporations Act which provides:

Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

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It is therefore necessary to take into account not only liabilities which have fallen due and those which will fall due in the future, but also those claims which may fall due in the future if certain events (or contingencies) occur. The types of potential liabilities to be considered include any potential warranty claims or litigation and the possibility of being called on to make payments under any indemnities or guarantees given, the underlying basis of which occurred prior to the winding up.

¹ Section 494(3) of the Corporations Act.

² Section 249H of the Corporations Act.

³ Section 494(1) of the Corporations Act.

Directors can have regard to parent company support in considering whether the company is solvent.

The declaration of solvency is not to be made lightly. A director who makes a declaration of solvency without having reasonable grounds for his or her opinion that the company will be able to pay its debts in full within the period stated in the declaration is guilty of an offence. If the debts of the company are not paid or provided for in full within the period stated in the declaration, it is presumed (unless the contrary can be shown) that a director who made a declaration did not have reasonable grounds for his or her opinion.⁴

If a liquidator appointed under these provisions forms the view that the company will not be able to pay or provide for the payment of its debts within the period stated in the solvency declaration, he or she must take steps to turn the Members' Voluntary Liquidation into an insolvent liquidation (either a Court ordered liquidation or a creditors' voluntary liquidation) or appoint a voluntary administrator to the company.

Effect of Members' Voluntary Liquidation on Company

Once a liquidator is appointed to a company, the powers of the directors of the company cease. In addition, the company must cease carrying on its business, except so far as is in the opinion of the liquidator required for the beneficial disposal or winding up of that business.

Overview of Liquidation Process

The company will typically conduct due diligence prior to the winding up to identify any matters which should be addressed prior to placing the company into liquidation, such as taxation issues and organising corporate records and accounts.

Once any pre-liquidation issues have been resolved and the company has been placed into liquidation, the liquidator will:

- take steps to confirm the liabilities of the company;
- correspond with the tax authorities to lodged tax returns and obtain final tax clearance;
- distribute any remaining assets of the company to shareholders; and
- arrange for a final meeting of shareholders to be held to finalise the liquidation and lodge minutes of the final meeting with ASIC.

Once these tasks are complete, ASIC will deregister the company within around 3 months of the conclusion of the liquidation. On deregistration, the company ceases to exist.

In the case of standard and non-complex winding ups, the liquidation process usually takes around 6 to 12 months. This does not include the pre-liquidation due diligence process, which can take some time to undertake, depending on the particular complexities of the company.

Alternative to a Members' Voluntary Liquidation: Deregistration

For a solvent corporation, an alternative approach to the dissolution of the company is voluntary deregistration. Although it is a quicker and cheaper option (as it does not require the appointment of a liquidator), it is more difficult for a company to meet the threshold criteria to proceed straight to deregistration.

⁴ Section 494(5) of the Corporations Act.

In order to qualify for deregistration:

- (a) all shareholders of the company must agree to the deregistration;
- (b) the company must not be carrying on business;
- (c) the company's assets must be less than \$1,000;
- (d) the company must have paid all fees and penalties payable under the Corporations Act;
- (e) the company must not have any outstanding liabilities; and
- (f) the company must not be a party to any legal proceedings.⁵

Generally, only a company that has been dormant for some period of time will be able to satisfy the above criteria. Where a company has been recently trading, the Members' Voluntary Liquidation process will generally be more suitable, including to identify and deal with the residual liabilities of the company.

The company, a director or a member may apply to ASIC for the company to be deregistered provided the above criteria are met. The application for deregistration is made by lodging a completed ASIC Form 6010 with ASIC.

If ASIC is not aware of any failure to comply with the above criteria, ASIC will record the proposed deregistration on its database, publish notice and deregister the company 2 months later, at which time the company will cease to exist.

Implications of deregistration

On deregistration, any remaining assets of the company will vest in ASIC.

It is possible for:

- ASIC to reinstate the company if it is satisfied that the company should not have been deregistered; and
- the Court to reinstate a company if an application is made by an "aggrieved person" or a former liquidator of the company, and the Court is satisfied that it is just that the company be reinstated.

Reinstatement is often sought to access insurance policies held by the company.

⁵ Section 601AA(2) of the Corporations Act.

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