



COURT APPOINTED LIQUIDATION

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COURT APPOINTED LIQUIDATION

Liquidation is the process used to wind up a Company's affairs and bring its existence to an end.

Appointment of a Court Appointed Liquidator

As the name suggests, the appointment of the Liquidator in Court Appointed Liquidations is made by the Court. The appointment is the outcome of proving to the Court there are valid reasons why a Liquidator should be appointed to wind up the Company.

Various parties including Creditors, Shareholders and Directors of a Company may initiate the Court process. The most common petitioner is a Creditor who is owed money and the Company has failed to pay.

A Creditor's Statutory Demand requiring payment of an undisputed debt within 21 days usually initiates the process. During the 21 day period, the Company has the right to make an Application to the Court to set aside the Creditor's Statutory Demand.

If there are no grounds for the Company to contest the Creditor's Statutory Demand and payment within the timeframe has not been made, the Creditor can apply to the Court to wind up the Company on a presumption that it is insolvent (i.e. not able to pay debts as and when they fall due).

The Court sets a date to hear the Application and a notice of Winding Up Application is served on the Company. Unless the money is paid prior to the hearing, the Winding Up application is usually successful and the Court appoints a Liquidator.

In most instances, the Creditor who has applied for the Company to be wound up will nominate a Liquidator whom the Court will agree to appoint.

The key stakeholders

Key stakeholders in a Court Appointed Liquidation are the:

- Liquidator;
- Company Directors; and
- Creditors.

Each has a role to play and must understand their responsibilities, obligations, and the timing of required actions.

Commencement of Liquidation

The Liquidation commences on the date the Court makes the Order to wind up the Company and appoint a Liquidator.

The following will need to occur prior to or upon the day of appointment:

- Signing Consent to Act by Liquidator; and
- Provision of information as per our checklists.

What happens upon Appointment?

Effect on Creditors

Once a Company is placed in Liquidation, unsecured Creditors cannot continue recovery action against the Company unless they obtain leave of the Court.

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.

Liquidation does not, however, limit the rights of Creditors to pursue Guarantors of the Company's debts or interfere with any rights Secured Creditors have against the Company.

Effect on Directors and Officers

Once a Company is placed in Liquidation, the Directors and the Officers lose all of their rights of management to the Liquidator. They are also required to provide information regarding the Company's financial position and to give reasonable assistance to the Liquidator in undertaking his/her duties as outlined in the following key deliverables section.

It is important to reiterate that once a Company is placed in Liquidation, Directors' personal guarantees remain enforceable.

Effect on Company

Liquidation brings to an end the normal operations of the Company. It can only continue to trade so far as it is necessary for the beneficial disposal or winding up of the business and its assets.

The aim of Liquidation is to effectively convert the Company's assets into a pool of funds from which Creditor's claims can be met.

Key deliverables in Court Appointed Liquidation

1. Secure and insure

The Liquidator is to quickly and effectively secure control of all assets and ensure adequate protective insurance is in place. This is important to ensure all available assets can be realised to create a pool of funds for distribution to appropriate Creditors.

2. Committee of Inspection

In large Liquidations, it is often the practice to form a Committee of Inspection. Whilst not required by law, the committee can be helpful through their advice and assistance to the Liquidator throughout the winding up process.

The Committee could be involved in the approval of the Liquidator's remuneration, authorisation for the Liquidator to enter into long term arrangements over three months, or the compromising of debts due to the Company greater than \$100,000.

The Committee could generally be elected at the first meeting of Creditors and whilst there is no limit on the number of committee members, it would generally include between three to five members.

3. Reports as to Affairs

The Directors are required to lodge a Report as to Affairs with ASIC within 14 days of the Liquidator's Appointment. A Report as to Affairs details things such as share capital, and the assets and liabilities of the Company at the date of the Liquidator's Appointment.

4. Realisation of physical assets (e.g. plant, equipment, land)

The realisation of the physical assets is instrumental in creating a potential pool of funds from which appropriate Creditors are paid. The methodology of realisation utilised will depend upon the nature of the assets and the appropriate way in which to promote their sale. Readily available and generally used items may be auctioned, whilst specific industry assets may be realised via a tender process. In all instances a Liquidator will formulate a strategy that will maximise the return to Creditors. If a Committee

of Inspection has been appointed, the Liquidator may forward a proposal for review by the Committee.

5. Realisation of liquid assets

The very nature of liquid assets (i.e. debtors, stock, trade marks, etc.) means that the approach for realisation will potentially vary from those employed for selling physical assets. However, the objective remains the same: to maximise the value for distribution to Creditors.

6. Investigation and report to ASIC

The Corporations Act requires Liquidators to investigate and report on any instances of the following:

- Insolvent Trading. If proven, Directors can be personally pursued for financial compensation to Creditors for debts incurred during the time of the insolvent trading.
- Preferential payments. Payments made to Creditors at a time when the Company was insolvent will be reviewed. As a consequence, the Company may have provided a Creditor with a preference over other Creditors of the company. That payment may be “clawed back” from the Creditor by the Liquidator.
- Uncommercial transactions. Transactions that a reasonable person would not have entered into because the transaction was either detrimental to the Company or provided the other party with a benefit that would not normally be realised.
- Related party transactions. Transactions that are to the detriment of the Company and entered into by persons or entities related to the Officers or Shareholders of the Company.

The Liquidator is obliged to prepare and lodge a report pursuant to section 533 of the Corporations Act if unsecured Creditors of the Company will receive a dividend of less than 50 cents in the dollar, or if there have been breaches of the Corporations Act by the Company's Officers and/or related parties, including the transactions noted above.

The Liquidator may lodge further reports specifying any other matters that he/she thinks appropriate to the Commission. The Liquidator's statements are protected by a limited privilege in proceedings for defamation.

7. Receipts and Payments Statement

Where a Liquidation takes longer than six months, the Liquidator is required at six monthly intervals to provide a Receipts and Payments Statement to ASIC. This report/statement provides a snapshot of the Liquidation and covers areas such as an update of asset realisation, outstanding fees, etc.

8. Proofs of Debt

A Proof of Debt is a document completed by the Creditors to formalise their claims made to the Liquidator who will then assess them. The Liquidator may call for additional evidence in making an assessment to accept or reject the claim. Aggrieved Creditors whose claims have been rejected by the Liquidator can make an application to the Court for a review of the assessment.

An accepted claim joins the pool of Creditor claims to which pro-rata payments are made from the assets of the Company.

9. Dividend payments

Whilst the basic tenet of Liquidation is that all Creditors share equally in the assets of the Company via pro-rata payments, the Corporations Act sets out groups who are given a priority. These include the fees and disbursements of the Liquidator and/or any prior costs of a Voluntary Administration, costs of protecting and preserving the assets of the Company, Employees Entitlements including wages, compulsory superannuation contributions, annual leave, long service leave and petitioning creditors costs.

After priority costs have been met, the balance of funds are distributed to Creditors via dividends.

Meetings

Meetings are an important part of the Liquidation process. The Liquidator is required to hold a meeting where the Creditors requesting the meeting represent not less than 10% in value of all Creditors or at any time the Liquidator deems fit. Meetings are conducted in accordance with the regulations of the Corporations Act, which detail the steps and processes to be undertaken.

The Liquidator is likely to call a meeting to:

- Report on matters of substance;
- Seek Creditors' agreement to a course that the Liquidator proposes to undertake;
- Obtain funding or approval of remuneration (if there is no committee);
- Seek information;
- Obtain authority to enter into long term agreements; and
- Compromise a debt due to the Company exceeding \$100,000.

Ending a Liquidation

Once the Liquidator has recovered and realised all assets, completed his investigations and disbursed all available funds to the Creditors, the Liquidation can be finalised. This can be done by:

- Applying to ASIC for de-registration of the Company, or
- Applying to the Court for a release from the Liquidation and dissolution of the Company.

Timeline for records of the Company to be made available

As mentioned, the Court appointed Liquidation process is defined by the Corporations Act.

In order for a Liquidator to meet obligations, certain tasks must be completed by certain dates.

The following tables outline what information is required from the Company Directors to ensure these obligations are met.

These tables are best used in conjunction with the available "Checklist for Books and Records" that lists in detail all items required.

UPON APPOINTMENT DATE (I.E. DAY 1)		
Type of Record	Item code In Checklist	Purpose
Bank Account Info Account numbers and contact details of branch where account is held	1.1, 1.2 & 1.3	As set down by the Corporations Act, only the Liquidator is able to deal with the Company's property. In this regard the Liquidator will freeze the Company's bank account(s) to ensure that no debits are processed from the account.
Eftpos Eftpos facility details and direct debit details	1.8 & 1.9	If there is no reason for the business to continue to trade, Eftpos facilities will need to be redirected and the Liquidator will need to stop direct debits.
Secured Creditors (details of securities and guarantee(s))	5.1	To be able to notify all secured Creditors the Company is to be wound up (i.e. Liquidated).
Assets Copies of lease/hire purchase agreements List of all assets including land and buildings, motor vehicles, stock, WIP, etc.	14.1 & 14.2 10.1, 10.3, 10.4, 11.1, 11.2, 13.2, 17.1 & 17.4	To contact Lessors and obtain details. The Liquidator can disclaim onerous lease agreements, if necessary. To secure the assets of the Company and arrange for insurance cover.
Retention of title Details of any retention of title on stock	17.3, 17.4 & 17.5	Suppliers of stock with retention of title claims will need to provide details of their claims. Stock may be returned to Suppliers depending on the review of the retention clauses and stock available to meet the claims.

WITHIN 14 DAYS OF APPOINTMENT DATE		
Type of Record	Item code In Checklist	Purpose
Financial Statements	3.1 to 3.5	The Liquidator must investigate the financial position of the Company and prepare a detailed report as set down by the Corporations Act.
All books and records	As per Checklist	The Liquidator must investigate the financial position of the Company and prepare a detailed report as set down by the Corporations Act.
Reports as to Affairs (As required by the Corporations Act)		The Director(s) must complete and provide to the Liquidator a Report as to Affairs detailing the Director(s)' knowledge of the financial position of the Company as at the Date of Appointment of the Liquidator.
Other Creditor Details	2.1 & 2.2	A list of Creditors, including names and amounts outstanding, as required.

Disclaimer: *The information presented in this brochure is a broad outline of the Court Appointed Liquidation provisions of the Corporations Act. As is the case with all such matters any interested parties should rely upon the formal advice of their Solicitor.*



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