

This article discusses the process of liquidation of an Australian company, compared with deregistering a company. A company can be voluntarily deregistered by its members if it ceases trading. In order to do so, the company must have no assets or debts. Alternatively, members can choose to undergo voluntary liquidation if the company still has assets to distribute. If the company has unpaid debts, a creditor may also apply for a winding up order from the court to liquidate the company's assets.



## **A. LIQUIDATION**

Liquidation of a company is conducted pursuant to the *Corporations Act 2001* (Cth) and involves the process of winding up (closing or finalising) a company. Generally, this is due to the company being unable to pay its debts or being under significant financial stress, thereby becoming insolvent. Insolvency is defined as being unable to pay all your debts as when they become due and payable.<sup>1</sup>

In some cases, the directors and shareholders of a company choose to liquidate it voluntarily, which may provide tax benefits and protect its director/s from personal liability.

Otherwise, a court may order liquidation upon application by a creditor.

### **A.1. VOLUNTARY LIQUIDATION**

If a company is financially troubled and unable to pay its debts, it can choose to undergo voluntary liquidation. The company's shareholders may pass a resolution to liquidate the company,<sup>2</sup> or the creditors may vote for liquidation after the company enters voluntary administration (where a company appoints an administrator to organise its assets and liabilities).

### **A.2. INVOLUNTARY LIQUIDATION**

Creditors may lodge a winding up application against a company for court-ordered liquidation. Company officeholders or shareholders and the Australian Securities and Investments Commission (ASIC) can also make a winding-up application to the court. Once granted, a liquidator is appointed by the court to wind up the company and pay back creditors' debts (where possible).

### **A.3. LIQUIDATORS**

Once a liquidator is appointed, the powers of the directors of the company cease.<sup>3</sup>

The liquidator has a duty to all of the company's creditors and is responsible for:

- Collecting and selling the company's assets;

<sup>1</sup> *Corporations Act 2001* (Cth) s 95A.

<sup>2</sup> *Ibid* s 513B.

<sup>3</sup> *Ibid* s 499.



- Investigating into the company's affairs and reporting to creditors on any possible claims against the company's officers, any unfair payments made to certain creditors over others, or any other relevant issues;
- Investigating the reason for the company's failure; and
- Distributing money from the sale of the company's assets, prioritising the different types of creditors (after paying the liquidator's fees first).

## **B. DEREGISTRATION**

If a company is no longer active in business, the company officeholder/s may apply for voluntary deregistration with ASIC.

ASIC can also deregister a company if the company has outstanding fees and penalties not paid to ASIC, or if it appears to be no longer trading.

### **B.1. VOLUNTARY DEREGISTRATION**

The following criteria must be met for a company to undergo voluntarily deregistration:

1. All members of the company have agreed to deregister;
2. The company is not currently conducting business;
3. The company's assets are under \$1,000.00;
4. The company has no outstanding liabilities;
5. The company is not currently involved in legal proceedings; and
6. The company has paid out all of their fees or penalties payable to ASIC.

Before applying, all bank accounts under the company's name should be closed, all company property should be dealt with, any licences held by the company should be cancelled, and all of the

company's registered business names should be cancelled or transferred.

After applying, ASIC will publish a notice of the proposed deregistration in the Commonwealth of Australia ASIC Gazette. The ASIC Gazette is published on Tuesdays and Fridays (except the first and last week of every year). The notice is also published online: <https://publishednotices.asic.gov.au/>.

Two months after the notice is published, the company would be deregistered. The company will still be shown on ASIC registers, but with a status of 'deregistered'.

The application fee for voluntary deregistration is \$42.00. The company's annual review fee can be avoided if the notice of proposed deregistration is published before the fee is due.

Once a company is officially deregistered, it will no longer exist as a separate legal entity. Any property owned in the company's name will vest in the Commonwealth (represented by ASIC).

### **B.2. ASIC-INITIATED DEREGISTRATION**

Reasons for ASIC to deregister a company include:

- The company has not paid the annual review fee within one year of the due date;
- The company does not appear to be trading;
- The company has not responded to a company compliance notice or lodged any documents in 18 months; or
- The company is being wound up without a liquidator.

This can be prevented if the company pays out the fees owed to ASIC, lodges any required documents



or advises ASIC that the company is still in business.

### B.3. REINSTATING A COMPANY

To reinstate a company, an application can be made to ASIC by a director, secretary or member of that company who must confirm that the company can pay all its debts upon reinstatement and show why the company should not have been deregistered (eg the company had outstanding liabilities or was carrying on a business). Alternatively, a court order may be obtained for ASIC to reinstate a company.

### C. CONCLUSION

Since a company is a separate legal entity from its members, debts and liabilities can be accumulated in the company's name. If the company is unable to pay its debts or is otherwise in difficult financial circumstances, voluntary liquidation may be appropriate. ASIC may wind it up or the company's creditors may apply to wind it up.

Alternatively, if a company ceases trading and does not have any assets or debts, it can choose to close down through voluntary deregistration.

For more information on related matters, you may wish to read the following articles:

1. **Bankruptcy**: This article discusses bankruptcy generally, and how creditors can recover debts owed by taking bankruptcy proceedings against a debtor. It also provides information on how person becomes a bankrupt and the consequences that follow.

2. **Directors' Duty to Prevent Insolvent Trading**: This may be of interest if you are a Director of a Company.
3. **Financial Reporting Requirements**: This article discusses the financial reporting requirements of large proprietary companies and some small proprietary companies under the *Corporations Act 2001* (Cth).

Comasters can advise you on the process of liquidation or deregistration, and which option suits your circumstances the best.

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### CONTACT US

Jeffrey T Lee Principal Lawyer  
Gina Bae Associate Lawyer  
Alice Huang Senior Paralegal  
Alizeh Ahmad Paralegal

Comasters Law Firm and Notary Public  
Suite 101, Level 1, Capitol Terrace  
743-755 George Street  
Sydney NSW 2000, Australia

T +612 9288 0300  
F +612 9288 0399  
E [comasters@comasters.com.au](mailto:comasters@comasters.com.au)  
[www.comasters.com.au](http://www.comasters.com.au)