

New Rules for Members' Voluntary Liquidations

Introduction

The Corporations Act 2001, which dictates the way in which liquidations must be conducted, recently changed and now comprises:

- ▲ Corporations Act 2001
- ▲ Insolvency Practice Schedule (Corporations) (Schedule 2 of the Corporations Act 2001)
- ▲ Corporations Regulations 2001
- ▲ Insolvency Practice Rules (Corporations) 2016 ("IPR")

In addition to the change in the structure, the legislation directly impacts the way in which the liquidation process is conducted for both insolvent and **solvent** companies with effect from 1 September 2017. Readers should note that the legislation applies to any person(s) appointed as Liquidator of a company, whether or not they are a Registered Liquidator. These changes are highlighted below.

The Process

To place the company into liquidation:

1. The directors must meet to resolve that the company is solvent and the company should be wound up. The directors also need to sign a declaration of solvency which must be lodged with ASIC;
2. Once the declaration of solvency has been lodged with ASIC, the directors need to give the company's shareholders formal notice of an extraordinary meeting of shareholders. In our view, IPR Rule 70-45(4) now requires that the proposed liquidator provide the shareholders with a formal remuneration report at the same time as the extraordinary meeting of shareholders is convened, containing the following:
 - ▲ a summary of the major tasks performed or likely to be performed by the liquidator;

- ▲ the costs associated with each of those major tasks and the method of calculation of the costs;
 - ▲ the periods at which the liquidator proposes to withdraw funds from the liquidation account in respect of the remuneration;
 - ▲ an estimated total amount of the remuneration;
 - ▲ an explanation of the likely impact of that remuneration on dividends.
3. The shareholders must meet to pass a special resolution to wind the company up.

Liquidators' Tasks

The statutory and other tasks undertaken by a liquidator include:

- ▲ Within 1 business day of appointment, advertising the appointment on the ASIC Published Notices website;
- ▲ Within 7 days of appointment, notifying ASIC of the special resolution passed by shareholders (Form 205);
- ▲ Within 14 days of appointment, notifying ASIC of the appointment (Form 505);
- ▲ Advertising for any claims against the company on the ASIC Published Notices website.
- ▲ Notifying the Australian Taxation Office (ATO) and other statutory bodies of the appointment of the liquidator.
- ▲ Taking possession of all of the company's assets. In practice, a new bank account for the liquidation should be opened and all physical assets of the company (if any) secured and insured.
- ▲ Facilitating the preparation of the final accounts up to the date of liquidation together with a final income tax return (usually by the company's external accountant).
- ▲ Seeking clearance from the Australian Taxation Office to distribute the assets to shareholders. Only when this clearance is received, can the

liquidator make any distribution of cash and assets in specie to the shareholders of the company.

- ▲ Prepare and lodge with ASIC an:
 - ▲ Annual Administration Return (where the liquidation continues for more than 1 year after appointment) within 3 months after the anniversary of the appointment; and
 - ▲ End of Administration Return in all cases within 1 month after the end of the liquidation.

Additional tasks are imposed upon a liquidator of a solvent company which has any unpaid liabilities at the time of the winding up. These are:

- ▲ Newly instigated IPR Rule 70-30 requires that the liquidator provide creditors with the following information within 10 business days of their appointment:
 - ▲ Confirmation of the appointment of the liquidator(s);
 - ▲ The right of creditors to:
 - ▲ request information, reports and documents from the liquidator(s);
 - ▲ give directions to the liquidator(s);
 - ▲ appoint a reviewing liquidator(s);
 - ▲ remove and replace the liquidator(s).
- ▲ Newly instigated IPR Rule 70-40 requires that the liquidator provide creditors with the following information within 3 months of their appointment and also lodge a copy of the report with ASIC:
 - ▲ the estimated amount of assets and liabilities of the company;
 - ▲ inquiries relating to the winding up of the company that have been undertaken to date;
 - ▲ further inquiries relating to the winding up of the company that may need to be undertaken;
 - ▲ what happened to the business of the company;
 - ▲ the likelihood of creditors receiving a dividend before the affairs of the company are wound up;
 - ▲ possible recovery actions.

These reports must be prepared and sent to creditors even if the liabilities will be paid in full in the course of the liquidation process.

Penalties

Penalties apply for documents which are lodged with ASIC after the due date. These are:

- ▲ \$78 for up to one month late;
- ▲ \$323 for over one month late.

Preparing for a Members' Voluntary Liquidation

Careful consideration of the manner in which the company is to be liquidated needs to be undertaken before the liquidation commences to avoid unnecessary costs. In addition, as highlighted above, ensuring that the company has no creditors at the date the shareholders resolve to wind up the company, will avoid the costs associated with the preparation of additional reports.

Find out more

BRI Ferrier offer a comprehensive range of business recovery and insolvency related services in the following areas:

- ▲ Corporate restructuring.
- ▲ Formal corporate and personal insolvency services.
- ▲ Business recovery and turnaround.

Our role is to ensure that the right approach is adopted and the best outcomes achieved for all stakeholders.

At BRI Ferrier, you will benefit from the involvement of our most experienced people and the attention they provide, while delivering the services required.

We are happy to provide a quote to conduct liquidations of solvent companies. If you are interested in obtaining a quote, please send the company's latest balance sheet and constitution to one of our Principals or alternatively please call us on (08) 8233 9900.

About BRI Ferrier

BRI Ferrier is a unique affiliation of expert business recovery, insolvency, forensic accounting and advisory firms. We provide practical, innovative services that help financially distressed businesses to recover or at least minimise the negative impacts of insolvency.

With over 160 staff and eleven practices in Australia, New Zealand, Hong Kong and the United Kingdom, we work with clients of all types – from individuals, sole traders and small businesses to public corporations and government entities.

We also work with financiers, solicitors, accountants and creditors to address the needs of all stakeholders when businesses face financial challenges.

BRI Ferrier's team has the expertise and resources to meet any client challenge. By combining our skills and enthusiasm, we achieve the best possible outcomes in all cases where a business experiences financial distress.

How BRI Ferrier can help

BRI Ferrier can assess your current situation and advise on a path forward to minimise further risk.

Early intervention is often the key for a successful restructure of your business. If you or your client is experiencing financial challenges then don't delay, contact us today.

Important notice. The information contained in this Inside Edge is by way of general comment only and is not intended as a substitute for specific advice that addresses your particular circumstances. You should seek specific advice before acting. The information contained in this Inside Edge remains the exclusive intellectual property of BRI Ferrier and any reproduction, publication, communication or adaptation of this information, without the prior written consent of BRI Ferrier, will constitute an infringement of The Copyright Act 1968.

Authors

Stuart Otway

Principal
BRI Ferrier, Adelaide

T: +61 8 8233 9900
E: sotway@brifsa.com.au



Alan Scott

Principal
BRI Ferrier, Adelaide

T: +61 8 8233 9900
E: ascott@brifsa.com.au



For positive solutions to financial difficulties please contact us.
The initial consultation to your client is free, strictly confidential and without obligation.

Sydney
T: 02 8263 2300
info@brifnsw.com.au

Melbourne
T: 03 9622 1800
info@brifvic.com.au

Adelaide
T: 08 8233 9900
info@brifsa.com.au

Perth
T: 08 6316 2600
info@brifwa.com.au

Brisbane
T: 07 3220 0994
info@brifsq.com.au

Cairns
T: 07 4037 7000
info@brifnq.com.au

Townsville
T: 07 4755 3300
info@brifnq.com.au

Mackay
T: 07 4953 7900
info@brifnq.com.au