



Court Liquidation

A Court Liquidation involves the appointment of a Registered Liquidator by the Federal or Supreme Court to wind up the affairs of a company. It is different to a Creditor's Voluntary Liquidation as the shareholders and members of the company are not responsible for appointing the liquidator.

Unlike a Creditor's Voluntary Liquidation where the members/shareholders resolve to appoint a Liquidator, Liquidator is appointed by either the Supreme Court or Federal Court to wind up the affairs of a company.

A Court Liquidation starts with a process whereby a creditor who is owed a debt by a company engages a solicitor to issue a Statutory Demand for payment. The Statutory Demand is then served on the debtor company and the company has 21 days in which to pay the amount outstanding or make an application to the Court to validly dispute and have the Statutory Demand set aside.

Should the 21-day period expire without either these scenarios occurring, the company is presumed to be insolvent in statute. The creditor then has a period of three months in which they can make an application to the Court to wind up the company. The creditor making the application to the Court is known as the petitioning creditor.

At a date set by the Court, the presiding Judge will hear from both parties and consider any material put before him/her before deciding whether to appoint a Registered Liquidator to the company in accordance with the provisions of the Corporations Act 2001 ("the Act"). The Registered Liquidator is usually nominated by the petitioning creditor.

The role of a Court Liquidator is the same as that of a Liquidator appointed to a Creditor's Voluntary Liquidation. The Court Liquidator will take steps to preserve and realise company assets for the benefit of creditors. Depending on the nature of the company, an appointed Liquidator may decide to continue to trade a company if it is deemed to be in the best interest of creditors. This may be beneficial if there is a possibility of selling the company's business.

A secured creditor's right to enforce their security is not affected by a company going into a Court Liquidation. A secured creditor will often allow a Liquidator to sell charged assets during the course of the liquidation, provided the rights of the secured creditor are maintained.

If the company is placed into liquidation, the employee entitlements (including wages, superannuation, leave and termination pays, etc.) are afforded a priority pursuant to the Act ahead of ordinary unsecured creditor claims, in the event of a distribution to creditors in a liquidation.

If there are insufficient realisable or recoverable assets in the liquidation, the Federal Government through the Department of Employment has implemented a scheme to protect employee entitlements. This is called the Fair Entitlements Guarantee (FEG) Scheme. This scheme provides funds employees of companies that are subject to liquidation in order to satisfy outstanding wages, leave entitlements and termination pays. This scheme does not cover unpaid superannuation.

The appointment of a Court Liquidator suspends an unsecured creditor's rights to pursue a company for unpaid debts. Unsecured creditors are able to lodge a claim in the liquidation for the amount of their debt and will rank equally with all other unsecured creditors in the event of any distribution.

However, an unsecured creditor that holds a personal guarantee in respect of company debts can proceed to enforce its rights against the guarantor under the guarantee once the liquidation commences.

Directors often provide personal guarantees to creditors for debts incurred by the company and as such, the Director(s) may become liable for some company debts once the liquidation commences.

Shareholdings generally have no value once an Court Liquidation is commenced as the company is insolvent and has insufficient assets to satisfy its liabilities. Accordingly, shareholders will most likely not receive a distribution in a Court Liquidation.

The powers of a director are suspended upon the appointment of a Court Liquidator and only the Court Liquidator is able to bind the company in any transaction. The director is however, required to assist the Court Liquidator in the conduct of the winding up including providing information and/or documents concerning the company's affairs. The director(s) has an obligation to comply with any requests made by the Court Liquidator pursuant to the Act.

In addition to the tasks mentioned above, a Registered Liquidator is required to:

- Conduct investigations into the affairs of the company and identify reasons for its failure;
- Provide reports to creditors;
- Identify any breaches of the Act or offences committed by directors or other officers of the company;
- Report the results of his/her investigations to the Australian Securities and Investments Commission (ASIC); and
- Distribute available surplus funds to creditors in order of priority.

A Court Liquidator makes an application to ASIC to deregister the company when the affairs of the company have been wound up and finalised.