Liquidation: A guide for creditors

Information sheet – 45

This is **Information Sheet 45 (INFO 45)**. It provides information for unsecured creditors of companies in liquidation.

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Who is a creditor?

You are a creditor if the company owes you money. You may be owed money because you:

- supplied goods or services to the company
- made loans to the company
- paid for goods or services that you have not received
- are an employee owed money for unpaid wages and other entitlements.

A 'contingent creditor' is owed money by the company if a certain event occurs (e.g. if they succeed in a legal claim against the company).

Creditors might be secured or unsecured:

- A **secured creditor** holds a security interest, such as a mortgage, in some or all the company's assets, to secure a debt owed by the company. Lenders might require a security interest in company assets when they provide a loan. If the creditor wants to ensure their security interest over personal property other than land is enforceable and given priority in an insolvency, they should register the security on the Personal Property Securities Register (PPSR). You can search the PPSR to find out if anyone holds a security interest (other than a mortgage over land) in the company's assets.
- An **unsecured creditor** does not hold a security interest in the company's assets.

Employees are a special category or class of unsecured creditor. In a liquidation, outstanding employee entitlements are paid before the claims

of other unsecured creditors. For more information, see Information Sheet 46 *Liquidation: A guide for employees* (INFO 46).

All references in this information sheet to 'creditors' are to unsecured creditors unless otherwise stated.

The purpose of liquidation

The liquidation of an insolvent company allows an independent registered liquidator (the liquidator) to take control of the company so its affairs can be wound up in an orderly and fair way to benefit creditors.

There are two types of insolvent liquidation:

- creditors' voluntary liquidation
- court liquidation.

The most common type is a creditors' voluntary liquidation, which begins when:

- an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator, or
- creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement.

In a court liquidation, a liquidator is appointed by the court to wind up a company following an application (usually by a creditor). Directors, shareholders and ASIC can also make a winding-up application to the court.

After a company goes into liquidation, unsecured creditors cannot commence or continue legal action against the company, unless the court permits.

It is possible for a company in liquidation to also be in receivership. For more information, see Information Sheet 54 *Receivership: A guide for creditors* (INFO 54).

Simplified liquidation process

A simplified liquidation process is a streamlined creditors' voluntary winding up for companies that meet the relevant criteria, including having liabilities less than $1 million.

It applies only to a creditors' voluntary winding up of a company where the event that triggers the start of the winding up occurs on or after 1 January 2021.

For additional information about the simplified liquidation process, refer to the simplified liquidation FAQs.

The liquidator's role

Liquidators have a duty to all company creditors.

Role in a creditors' voluntary liquidation and a court liquidation

The role of a liquidator in a creditors' voluntary liquidation (that has not adopted the simplified liquidation process) and a court liquidation is to:

- protect, collect and sell the company's assets
- investigate and report to creditors about the company's affairs, including:
  - unfair preferences (payments made to certain creditors over others) that may be recoverable
  - uncommercial transactions that may be set aside
  - possible claims against the company's officers (including insolvent trading)
  - creditor-defeating dispositions that may be recovered, including in relation to phoenix activity
- inquire into the failure of the company – and possible offences by people involved with the company – and report to ASIC
- distribute money from the collection and sale of assets after payment of the costs of the liquidation, including the liquidator's fees (subject to the rights of any secured creditor) – first to priority creditors, including employees, and then to unsecured creditors.

If a liquidator suspects that people involved with the company may have committed offences, and the liquidation has no or insufficient assets for the liquidator to be paid for their work to further investigate, the liquidator can apply to ASIC for funding to carry out a further investigation into the allegations and report to ASIC.

Role in a simplified liquidation process

The role of a liquidator who has adopted the simplified liquidation process is to:

- protect, collect and sell the company's assets

- provide an initial report to creditors
- investigate the company's affairs, including whether there are:
  - unfair preferences (payments made to certain creditors over others) that may be recoverable
  - uncommercial transactions that may be set aside
  - possible claims against the company's officers (including insolvent trading)
  - creditor-defeating dispositions that may be recovered, including in relation to phoenix activity
- inquire into the failure of the company and, where there are reasonable grounds to believe a person connected to the company may have engaged in conduct that would constitute an offence that has had, or is likely to have, a material adverse effect on the interests of creditors, report the matter to ASIC
- distribute money from the collection and sale of assets after payment of the costs of the liquidation, including the liquidator's fees (subject to the rights of any secured creditor) – first to priority creditors, including employees, and then to unsecured creditors (noting there can only be one dividend paid to unsecured creditors).

Role in all liquidations

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to incur an expense for the winding up unless there are enough assets to pay their costs.

If the company does not have enough assets, one or more creditors may agree to reimburse a liquidator's costs and expenses to undertake investigations and act to recover further assets. If the liquidator recovers additional assets, the liquidator or a creditor can apply to the court to compensate the creditor from funds recovered for funding the liquidator's recovery action. Compensation is usually paid before other creditors are paid.

Reporting to creditors

The liquidator will send the following to creditors:

- initial information about creditors' rights in the liquidation
- a statutory report within three months after their appointment (the content of this report differs depending on whether the simplified liquidation process is adopted)
- other reports as the liquidator decides or that creditors reasonably request.

Initial information

Within 10 business days after their appointment as liquidator in a creditors' voluntary liquidation (or 20 business days in a court liquidation), the liquidator must give creditors notice of their appointment and information advising creditors about their right to:

- request information, reports and documents
- direct that a meeting of creditors be held
- give directions to the liquidator
- appoint a reviewing liquidator
- remove and replace the liquidator.

In a creditors' voluntary liquidation, the liquidator also gives a summary of the company's affairs and a list of the names, addresses and estimated amounts owed to the company's creditors (identifying any creditors of the company).

The liquidator must also send an initial remuneration notice if they propose to seek fee approval during the liquidation: see Information Sheet 85 *Approving fees: A guide for creditors* (INFO 85).

Statutory report

The liquidator must send a report to creditors within three months after their appointment containing information about:

- the company's estimated assets and liabilities
- inquiries undertaken and further inquiries that the liquidator may need to undertake
- what happened to the company's business
- the likelihood of creditors receiving a dividend (part repayment of their debt)
- possible recovery actions as outlined above.

The report may give additional information relevant to the liquidation or notify creditors about whether the liquidator will convene a meeting of creditors. The liquidator might also attach details of a proposal for creditors to consider and vote on without the need to hold a meeting.

When a liquidator adopts the simplified liquidation process, the liquidator's report is different to the report described above. When a liquidator adopts the simplified liquidation process, the liquidator's report need only contain information about:

- anything relating to the winding up that the liquidator has done to date

- the date that the winding up is likely to end
- the likelihood of creditors receiving a dividend.

The liquidator must lodge a copy of the report with ASIC. You can obtain a copy by searching ASIC Connect for a fee.

Other reports

While there is no legal requirement to provide further reports to creditors, liquidators may provide further reports to update creditors about the liquidation.

Creditors can ask the liquidator to provide a further report. If the request is reasonable, the liquidator must comply with the request. See other creditor rights below.

Recoveries from creditors – 'unfair preferences'

A liquidator can recover, for the benefit of all creditors, certain payments the company made to individual creditors before the start of the liquidation (known as 'unfair preferences').

In general terms, a payment to a creditor may be an unfair preference payment if, during the six months before the liquidation is taken to have begun until the date the liquidator was appointed:

- the company was insolvent at the time it made the payment to the creditor (or became insolvent because of making the payment), and
- the creditor received more in respect of the unsecured debt owed to them than they would have received by way of dividend from the liquidation if the payment was set aside and the creditor had to prove their debt in the liquidation.

Note: Depending on the circumstances surrounding the appointment of the liquidator, the date the liquidation is taken to have begun may be a date before the date on which the liquidator is appointed.

There is no limit on the value of unfair preference payments that a liquidator can recover.

Limitations where simplified liquidation process adopted

When a liquidator adopts the simplified liquidation process, a liquidator's ability to recover payments from unrelated creditors that receive payments from the company is different. In a simplified liquidation, a payment or

series of payments made to an unrelated creditor are not recoverable as an unfair preference unless:

- the payment(s) is/are made at any time from three months before the liquidation is taken to have begun until the date the liquidator is appointed, and
- the total of the payment(s) received from the company during this period is more than $30,000.

Note: Depending on the circumstances surrounding the appointment of the liquidator, the date the liquidation is taken to have begun may be a date before the date on which the liquidator is appointed.

Defences available to creditors

Not all payments made within the relevant three- or six-month period before the liquidator is appointed are unfair preference payments.

There are various 'defences' provided in the Corporations Act. In particular, a creditor has a defence to a claim they have received an unfair preference if they can prove that, at the time the payment was made:

- they became a party to the transaction in good faith
- they had no reasonable grounds for suspecting the company was insolvent (or became insolvent because of the payment)
- a reasonable person in their circumstances would have had no reasonable grounds for suspecting the company was insolvent (or became insolvent because of the payment), and
- they gave valuable consideration for the payment.

If a liquidator seeks to recover a payment that has been made to you, you should ask the liquidator to provide you with:

- details of the payments they claim result in the creditor receiving an unfair preference
- reasons why they think the payment is an unfair preference payment (including the basis on which the liquidator claims the creditor cannot establish a defence), and
- supporting evidence to support their claim.

If the matter remains unresolved, you should seek independent legal advice on the merits of the registered liquidator's claim before repaying the money.

Creditors' meetings

Other than where the simplified liquidation process is adopted, a liquidator may call a creditors' meeting from time to time to inform creditors about the liquidator's progress, to find out creditors' wishes on a matter or to approve the liquidator's fees.

You can use a creditors' meeting to ask questions about the liquidation and tell the liquidator what you know about the company.

ASIC is also entitled to attend and participate in a meeting of creditors should there be a reason to do so.

A liquidator cannot call a meeting of creditors when the liquidator has adopted the simplified liquidation process.

Meetings during a court liquidation

In a court liquidation, the liquidator does not have to call a creditors' meeting unless creditors need to approve a matter.

The liquidator can call a creditors' meeting at any time – and must also call a meeting if:

- a committee of inspection directs it (where there is a committee of inspection)
- creditors pass a resolution requiring the liquidator call a meeting
- at least 25% in value of creditors ask the liquidator in writing to call a meeting
- less than 25% but more than 10% in value of creditors ask the liquidator in writing to call a meeting and they pay the costs of calling and holding the meeting.

If a direction to call a meeting by creditors or the committee of inspection is not reasonable, the liquidator does not have to comply. A direction is not reasonable if the liquidator, acting in good faith, thinks that:

- holding the meeting would cause substantial prejudice to the interests of creditors or a third party and the prejudice outweighs the benefits of complying with the direction
- there is insufficient money available to hold the meeting.

If the direction is not reasonable, the liquidator must notify the person or body that gave the direction and set out reasons why it is not reasonable.

If the liquidator decides not to convene a meeting because it is not reasonable, but the person or body who gave the direction agrees to pay the costs of calling and holding the meeting, and security for those costs is

provided if the liquidator requires that, the liquidator must convene the meeting: see section 75-250 of the *Insolvency Practice Rules (Corporations) 2016*.

Meetings during a creditors' voluntary liquidation

In a creditors' voluntary liquidation, the liquidator does not have to call a creditors' meeting unless creditors need to approve a matter.

The liquidator can call a creditors' meeting at any time and if directed to do so.

Also, the liquidator in a creditors' voluntary liquidation must call a meeting if:

- less than 25% but more than 5% in value of creditors ask the liquidator in writing to do so
- none of the creditors who request the meeting are a related entity of the company
- the request is given no more than 20 business days after the resolution for the voluntary winding up of the company is passed.

Creditors might request a meeting be held to:

- ask questions about the liquidation
- tell the liquidator what they know about the company
- consider replacing the liquidator if they have concerns about the liquidator's independence or conduct.

If a request to call a meeting by creditors or the committee of inspection is not reasonable, the liquidator does not have to comply. However, they must notify the person or body that made the request and set out reasons why it is not reasonable.

If the liquidator decides not to convene a meeting because it is not reasonable, but the person or body who gave the direction agrees to pay the costs of calling and holding the meeting and security for those costs is provided if the liquidator requires that, the liquidator must convene the meeting: see section 75-250 of the *Insolvency Practice Rules (Corporations) 2016*.

Meetings when the simplified liquidation process adopted

A liquidator who has adopted the simplified liquidation process is not required or permitted to hold a creditors' meeting. Matters that need to be determined by creditors are decided without a meeting via the 'proposal without a meeting process'.

Minutes of meetings

The chairperson of a creditors' meeting (usually the liquidator or one of their senior staff) must prepare minutes of the meeting and a record of those present at the meeting. The minutes must be lodged with ASIC within one month. You can search ASIC Connect and obtain a copy of the minutes of the meeting for a fee.

Voting at a creditors' meeting

To vote at a creditors' meeting you must lodge details of your debt or claim with the liquidator. The liquidator will provide you with a 'proof of debt' form to complete and return before the meeting.

The chairperson of the meeting decides whether to accept the debt or claim for voting purposes. The chairperson may decide a creditor does not have a valid claim and not allow the creditor to vote.

If the chairperson is not sure whether to accept the debt or claim, they must mark the vote as 'objected to' and allow the creditor to vote subject to the vote being declared invalid if the objection is sustained. This decision is only for voting purposes. It is not relevant to whether a creditor will receive payment of their claim.

You can appeal to the court within 10 business days after the chairperson decides to accept or reject a proof of debt or claim for voting purposes.

Voting by proxy

You can appoint an individual as proxy to attend and vote at a meeting on your behalf. Creditors who are companies will have to nominate a person as proxy. You do this by completing a proxy form that is sent out with the notice of meeting. You must provide the completed proxy form to the liquidator before the meeting. An electronic proxy form may be used if the liquidator allows electronic lodgement.

A 'special proxy' is used when you specify on the proxy form how the proxy holder is to vote on specified resolutions (the actual resolution wording is on the form). The proxy holder must vote in accordance with that instruction and cannot change the voting at the meeting. Further, the resolution specified in the form is the one you are voting on.

If a resolution that is specified in the special proxy is modified, then your special proxy should not be counted because you have not indicated how you will vote on that modified resolution. Subject to directions given in the

special proxy, the proxy has the same right to speak and vote on other matters that may arise at the meeting as the creditor who appointed them. A 'general proxy' is used when you leave it to the proxy holder to decide how to vote on each resolution.

You can appoint the chairperson to represent you through either a special or general proxy. If the liquidator, their partner or their employee is appointed as a general proxy, the proxy holder cannot vote in favour of a resolution approving payment of liquidator's fees.

Manner of voting

To vote on any resolution put to a creditors' meeting, creditors state aloud their agreement or disagreement, or a 'poll' is taken.

If voting is on the voices, the resolution is passed if a majority of those present indicate agreement. It is up to the chairperson to decide if a majority is reached.

After the vote, the chairperson must tell those present whether the resolution passed or failed. If the chairperson cannot determine the outcome of a resolution on the voices, they may conduct a poll.

A person participating and entitled to vote can also demand a poll. If a poll is demanded, it must be taken immediately, and the chairperson determines how to take this poll. If the meeting is held using virtual meeting technology, each vote must be taken on a poll.

If you intend to demand a poll, you must do so before, or as soon as, the chairperson has declared the result of a vote taken on the voices.

When a poll is taken, a resolution is passed if *both*:

- more than half the number of creditors who are voting (in person or by proxy) vote in favour of the resolution
- those creditors owed more than half of the total debt owed to creditors at the meeting vote in favour of the resolution.

This is referred to as a 'majority in number and value'. If a majority in both number and value is not reached under a poll (deadlock), the chairperson has a casting vote.

Chairperson's casting vote

When there is a deadlock, the chairperson may use their casting vote (except for resolutions to approve their remuneration) either in favour of or

against the resolution. If the resolution relates to the liquidator's removal, the chairperson may only exercise the casting vote in favour of their removal. The chairperson may also decide not to use their casting vote, and then the deadlocked resolution is not passed.

The chairperson must inform the meeting (and include in the written minutes of meeting that are lodged with ASIC) the reasons why they did or did not use their casting vote.

If you are dissatisfied with how the chairperson exercised their casting vote or failed to use their casting vote, you may, in specified circumstances, apply to the court for a review of the chairperson's decision. The court may vary or set aside the resolution or order the resolution is taken to have been passed.

Votes of related creditors

If directors and shareholders, their spouses, relatives and other entities controlled by them are creditors of the company, they are entitled to attend and vote at creditors' meetings.

If a resolution is passed or defeated based on related creditor votes and you are dissatisfied with the outcome, you may, in specified circumstances, apply to the court for the resolution to be set aside and/or for a fresh resolution to be voted on without related creditor votes. Certain criteria must be met before the court will make such an order (e.g. the original result of the vote is against the interests of all or a class of creditors).

Proposals to creditors without a meeting

Instead of convening a creditors' meeting, the liquidator can put proposals to creditors by giving notice in writing. A liquidator who has adopted the simplified liquidation process will use this process to seek resolutions from creditors, including for approval of remuneration.

This notice must be given to each creditor entitled to receive notice of a meeting and:

- include a statement of the reasons for the proposal and the likely impact the proposal will have on creditors
- invite the creditor to either:
  - vote 'yes' or 'no' for the proposal
  - object to the proposal without a meeting
- specify a reasonable time for the liquidator to receive creditor replies.

To vote on the proposal, you must lodge details of your debt or claim with the liquidator and complete the provided voting documents.

You can vote 'yes' or 'no' on the proposal and/or object to the proposal without a creditors' meeting. You should return your response to the liquidator within the time specified in the notice, which must be at least 15 business days after notice is given to creditors.

A resolution is passed if the majority of creditors in number and value who responded to the notice voted 'yes' and if 25% or less in value of the creditors who responded objected to the proposal being resolved without a creditors' meeting.

The liquidator should provide enough information to allow creditors to make an informed decision about the proposal. Contact the liquidator if you need further information to help you decide.

The liquidator must lodge with ASIC a statement about the outcome of the proposal. You can search ASIC Connect and obtain a copy of the outcome of the proposal for a fee.

Committee of inspection

A committee of inspection may be formed to assist and advise the liquidator in both a court liquidation and creditors' voluntary liquidation. No committee of inspection can be formed where the liquidator has adopted the simplified liquidation process.

The committee of inspection also:

- monitors the conduct of the liquidator
- may approve certain steps in the liquidation
- may give directions to the liquidator.

The liquidator must have regard to, but is not always required to comply with, such directions.

The committee may be formed by resolution passed at any meeting of creditors called for that purpose. All creditors are entitled to stand for committee membership. Members appointed to the committee of inspection represent the interests of all creditors.

If a creditor is a company, the creditor can nominate, in writing, an individual to represent it on the committee.

A person can be appointed as a member of the committee of inspection by:

- resolution of creditors
- a creditor, or group of creditors, owed at least 10% of the value of creditors' claims
- an employee, or group of employees, owed at least 50% in value of outstanding employee entitlements.

A member of the committee of inspection must not directly or indirectly derive any profit or advantage from the liquidation of the company unless creditors resolve to allow it, or a court grants leave to derive the profit or advantage. Deriving a profit or advantage can arise during ongoing trading with the company after the liquidator is appointed.

A committee of inspection has various powers and functions, including to:

- approve the liquidator's remuneration
- direct the liquidator to convene a creditors' meeting
- request the liquidator to give information, provide a report or produce a document
- obtain specialist advice or assistance (with prior approval of the liquidator or court) that the committee considers desirable about the conduct of the liquidation.

If the request to convene a meeting or provide information is not reasonable, the liquidator does not have to comply with the request. The same rules about when a request is not reasonable apply to directions given to a liquidator by a committee of inspection.

A committee of inspection can determine its own procedures and exercise its powers through resolutions passed at meetings of the committee. A resolution is passed by a majority in number of members present at a meeting. The committee of inspection can only act if a majority of its members attend.

Minutes of meetings of the committee of inspection must be prepared and lodged with ASIC within one month. You can search ASIC Connect and obtain a copy of the minutes of committee of inspection meetings for a fee.

ASIC is also entitled to attend a meeting of the committee of inspection.

Approval of liquidator's fees

A liquidator is entitled to be paid for the necessary work they properly perform. Their fees will usually be paid from available assets before any payments are made to creditors. If there are no – or only limited assets –

the liquidator is sometimes not paid (or only partially paid) for the work they do. The liquidator may arrange for a third party to contribute to their fees.

A liquidator is also entitled to ask for approval to pay their estimated future fees (for work yet to be done). Usually this is requested to allow the liquidator to continue doing work up to a certain point in time (e.g. to achieve a particular outcome) or to the completion of the liquidation.

The fees cannot be paid until the amount has been approved by creditors, a committee of inspection or the court. The liquidator can also put a proposal to creditors to approve their fees without holding a meeting (required where the liquidator has adopted the simplified liquidation process).

If fees are not approved by the relevant decision-making body, the liquidator is entitled to receive reasonable fees up to a specified maximum (indexed annually).

If you are asked to approve fees at a general meeting of creditors, at a meeting of a committee of inspection, or by a proposal put to creditors without a meeting, the liquidator must give you a report with sufficient information to help you assess whether the requested fees are reasonable. This should be given to you at the same time as the notice of the meeting or with the proposal. This report should be in simple language and set out:

- a summary of the major tasks performed or likely to be performed
- the costs of completing those tasks and how those costs were calculated
- the periods when funds will be drawn to pay the fees
- the estimated total fees, or range of fees
- an explanation of the likely impact the fees will have on any payments to creditors
- other information that will assist you to determine whether the fees claimed are reasonable.

If you are in any doubt about how the fees were calculated, ask the liquidator for more information.

If you do not think the fees are reasonable, raise your concerns with the liquidator.

If fees are approved and you wish to challenge the decision, you can apply to the court for a review of the fees. You may wish to seek your own legal advice about this.

Apart from fees, the liquidator is entitled to reimbursement for out-of-pocket expenses. This reimbursement may require creditor, committee of

inspection or court approval. For more information, see INFO 85.

Distribution of money

If there are funds left over after paying the liquidators' costs and priority creditors, including employees, the liquidator will pay unsecured creditors a dividend. Where the liquidator has adopted the simplified liquidation process, there can only be one dividend paid to unsecured creditors. Generally, funds are distributed in the following order:

- costs and expenses of the liquidation, including liquidators' fees
- outstanding employee wages and superannuation
- outstanding employee leave of absence (including annual leave and long service leave)
- employee retrenchment pay
- unsecured creditors.

Each category must be paid in full before the next category is paid. If there are insufficient funds to pay a category in full, the available funds are paid on a pro-rata basis (and the next category or categories will be paid nothing).

Proving your debt

Before any dividend is paid to you for your debt or claim, you will need to give the liquidator information to prove your debt.

The liquidator will notify you if funds might be available for payment and will call for formal proof of debt forms to be lodged. The liquidator must give you at least 14 days' notice of the deadline for lodging the proof of debt.

This notice must be given to each person claiming to be a creditor whose debt or claim has not already been accepted by the liquidator. It must also be published on ASIC's Published notices website. A copy of the formal proof of debt form will be sent to you with the notice.

You should attach copies of all relevant invoices or other supporting documents to the proof of debt form, because your debt or claim may be rejected if there is insufficient evidence to support it.

If a creditor is a company, the proof of debt form must be signed by a person authorised by the company.

The completed proof of debt form must be delivered or posted to the liquidator. When you submit your claim, ask the liquidator to acknowledge

receipt of your claim and if they require any further information.

If the liquidator decides to reject your claim, they must notify you within seven days after making that decision and provide reasons for doing so. If you are dissatisfied with the decision, follow the steps outlined in the notice of rejection and/or seek competent legal advice on your options to appeal the decision to reject your claim. You will have a limited time after you receive the notice, to appeal the liquidator's decision. If you do not appeal within this time, the liquidator's decision on your claim is final.

Contact the liquidator if you have questions about the calculation of your claim, or the timing of the payment.

Other creditor rights

As well as the various rights involving meetings and participation in dividends, creditors also have a right to:

- inform the liquidator about what they know that is relevant to the company's liquidation
- request the liquidator give information, provide a report or produce a document
- inspect certain books of the liquidator
- appoint a reviewing liquidator (not available when the liquidator adopts the simplified liquidation process)
- remove and replace the liquidator by resolution passed at a creditors' meeting (not available when the liquidator adopts the simplified liquidation process)
- complain to ASIC or the court about the liquidator's conduct in connection with their duties.

Request for information

Creditors can, by resolution or individually, request the liquidator to give information, provide a report or produce a document. The liquidator must comply with this request unless:

- the information, report or document is not relevant to the liquidation
- the liquidator would breach their duties if they complied with the request
- it is not reasonable to comply with the request.

There are rules governing when a direction is not reasonable, including if the liquidator, acting in good faith, thinks that:

- complying with the request would substantially prejudice the interests of one or more creditors or a third party and that the prejudice outweighs the benefits of complying with the request
- the information would be privileged from production in legal proceedings
- there is not enough money to cover the costs incurred to comply with the request.

The law requires the liquidator to provide the information within 20 business days of the request being made.

If the direction is not reasonable, the liquidator must notify the requesting party and set out reasons why the request is not reasonable.

If the requesting party agrees to pay the costs of providing the information and security for those costs is provided (if the liquidator requires that), the liquidator must comply with the request.

Liquidator's books

Liquidators must keep sufficient books to give a complete and correct record of their administration of the company's affairs. These include minutes of meetings and details of all the receipts and payments for the liquidation.

These books must be available at the liquidator's office for inspection by creditors and shareholders.

Copies of minutes of meetings and detailed lists of receipts and payments, as well as several other documents, must also be lodged with ASIC. You can search ASIC Connect and obtain copies of these documents for a fee.

Informing the liquidator

If the liquidator suspects anyone connected to the company may have committed an offence, the liquidator must report this to ASIC. Let the liquidator know if you have any information that might help the liquidator to prepare such a report.

These reports are not available for inspection. ASIC reviews these reports and decides whether to take further action, such as banning a person from acting as a company director for a period or charging the person with a criminal offence. ASIC considers a range of factors when deciding what action, if any, to take. For more information, see Information Sheet 151 *ASIC's approach to enforcement* (INFO 151).

Appoint a reviewing liquidator

Other than where a liquidator has adopted the simplified liquidation process, creditors can resolve to appoint a reviewing liquidator to carry out a review into fees and/or costs incurred by the liquidator. With the liquidator's agreement, one or more creditors may also appoint a reviewing liquidator.

A creditor can also apply for ASIC to appoint a reviewing liquidator: see Form 5605 *Application for ASIC to appoint a reviewing liquidator*.

Where creditors resolve to appoint a reviewing liquidator, the review is limited to:

- remuneration approved within the six months before the reviewing liquidator is appointed
- costs or expenses incurred during the 12-month period before the reviewing liquidator is appointed (unless the liquidator agrees to a longer period).

The reviewing liquidator must be a registered liquidator. A creditor who wishes to appoint a reviewing liquidator must get written consent from the registered liquidator confirming they would be prepared to act as reviewing liquidator. The person must also make a written declaration about any relationships they or their firm have that might affect their independence to act as reviewing liquidator.

The liquidator, and their staff, must cooperate with the reviewing liquidator.

If creditors pass a resolution to appoint a reviewing liquidator, the reviewing liquidator's costs form part of the expenses of the liquidation. If one or more creditors appoint the reviewing liquidator with the consent of the liquidator without passing a resolution, the reviewing liquidator's costs are borne by the creditor(s) who appoint the reviewing liquidator.

Remove and replace the liquidator

Other than where a liquidator has adopted the simplified liquidation process, creditors may remove and replace the liquidator at any time by resolution of creditors passed at a creditors' meeting for which at least five business days' notice is given.

A creditor who wishes to appoint a replacement liquidator must request the current liquidator to convene a meeting. The liquidator is not required to comply if the request is not reasonable. The liquidator must comply with the

request if the creditor agrees to pay the cost of calling the meeting, and security for those costs is provided at the liquidator's request.

A creditor who wishes to remove the current liquidator and appoint a replacement liquidator must approach a registered liquidator to get a written consent confirming they would be prepared to act as liquidator of the company. The person must also make a written declaration about any relationships they or their firm may have that might affect their independence to act as liquidator.

The notice of meeting must include details of the proposed resolution and attach:

- consent to act
- declaration of relevant relationships of the proposed replacement liquidator.

If the resolution to remove the current liquidator is passed at the meeting, the removal takes effect from when a resolution to appoint the replacement liquidator is passed.

Applications to the court

The court has the power to make orders as it thinks fit in relation to an external administration. Creditors and other persons with a financial interest in the external administration can apply to the court for these orders, including:

- an order determining any question arising in the external administration
- an order that a person cease to be appointed as the liquidator and that another registered liquidator be appointed
- orders in relation to remuneration.

Making an application to court can be costly. You can consider going to court if you cannot resolve any problems with the liquidator directly.

Liquidators, ASIC and other people can also make applications to the court. For example, a liquidator might apply to have questions decided about how to exercise certain powers in a liquidation.

Secured creditors' rights

If a company fails to meet its obligations under a security interest (e.g. a charge or a mortgage), a secured creditor can:

- appoint an independent and suitably qualified person (a receiver) to take control of and realise some or all the secured assets in order to repay the secured creditor's debt. This right continues after the company goes into liquidation (see INFO 54)
- ask the liquidator to deal with the secured assets for them and account to them for the proceeds and costs of collecting and selling those assets.

A secured creditor is entitled to vote at creditors' meetings for the amount the company owes them less the amount they are likely to receive from realisation of the secured assets (i.e. their shortfall). The secured creditor can participate in any dividend to unsecured creditors for their shortfall.

Directors and liquidation

Directors cannot use their powers after a liquidator has been appointed. They have an obligation to assist the liquidator by:

- advising the liquidator of the location of company property and delivering the property in their possession to the liquidator
- providing the company's books and records
- advising the liquidator of the location of other company records
- providing a written report about the company's business, property, affairs and financial circumstances within:
  - 10 business days of the appointment of the liquidator by the court, or
  - five business days of the appointment of a liquidator in a creditors' voluntary liquidation
- meeting with, or reporting to, the liquidator to help them with their inquiries, as reasonably required
- if required by the liquidator, attending a creditors' meeting to provide information about the company and its business, property, affairs and financial circumstances.

A liquidator has the power to apply to the court to conduct a public examination, under oath, of a director (or other person with information about the company).

If the company has traded while insolvent, ASIC, a liquidator or, in certain circumstances, a creditor can commence proceedings against directors personally for amounts lost by creditors.

Specific requirements under the simplified liquidation process

Where the directors believe that the company is eligible for the simplified liquidation process, the directors must, within five business days after liquidation commences, give to the liquidator:

- a report on the company's business affairs
- a declaration that they believe, on reasonable grounds, the company meets the eligibility criteria for the simplified liquidation process.

Ceasing simplified liquidation process

The liquidator must cease to follow the simplified liquidation process if:

- the eligibility criteria for the simplified liquidation process are no longer met
- the liquidator believes on reasonable grounds that the company, or a director of the company, has engaged in conduct involving fraud or dishonesty that has had, or is likely to have, a material adverse effect on the interests of the creditors or a class of creditors as a whole.

Conclusion of liquidation

A liquidation comes to an end when the liquidator has realised and distributed all the company's available property and reported to ASIC.

The liquidator must lodge a final account of their receipts and payments, called an 'end of administration return' and lodge it with ASIC. You can search ASIC Connect and obtain a copy of the return for a fee.

Alternatively, in a court liquidation, after the liquidator decides the company's affairs are fully wound up, they can:

- seek an order for release from the court
- seek an order for release and deregistration of the company by ASIC.

ASIC will deregister the company three months after the end of administration return is lodged.

Questions and complaints

Contact the liquidator to raise any questions or complaints. If this fails to resolve your concerns, including any concerns about the liquidator's conduct, you can lodge a report of misconduct with ASIC. Reports of misconduct against companies and their officers can also be made to ASIC.

ASIC does not usually become involved in matters of commercial judgement by a liquidator.

More information

- Information Sheet 39 *Insolvency information for directors, employees, creditors and shareholders* (INFO 39)
- Australian Restructuring Insolvency & Turnaround Association (ARITA) website
- ARITA Code of Professional Practice for Insolvency Practitioners

Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. We encourage you to seek your own professional advice to find out how the applicable laws apply to you, as it is your responsibility to determine your obligations.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases, your particular circumstances must be taken into account when determining how the law applies to you.

Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

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