crouch amirbeaggi
BUSINESS ADVISORS & INSOLVENCY SERVICES

CREDITORS VOLUNTARY LIQUIDATION (CVL)

INTRODUCTION

A creditors voluntary liquidation is the most cost effective way to wind up or liquidate an insolvent company. It is initiated by the company and, generally, when there are no other viable options.

There are about 680 registered liquidators in Australia who can act as liquidator of a creditor's voluntary liquidation, making the market highly competitive.

EXPERIENCE AND EXPERTISE

A creditors voluntary liquidation is the most cost effective way to wind up or liquidate an insolvent company. As experts in bankruptcy and personal insolvency, we specialise in turnaround and restructuring services. Our partners and staff have worked on more than 1000 bankrupt estates insolvency administrations.

We have a highly talented team of in-house professionals which include

- Official liquidators
- Bankruptcy trustees
- Lawyers
- ARITA members
- CPA's
- Chartered Accountants

Our clients over the past 10 years have included all the major banks, second-tier financiers and hundreds of lawyers and accountants. However, our main specialisation has always been small business solutions.

If you are in financial difficulty, we can help you.

PRICE GUARANTEE

As part of our service, we offer this simple guarantee: If we consent to act as liquidator of your company, we will undercut any written quote from any liquidator by 10 per cent.

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1. HOW MUCH DOES A LIQUIDATION COST?

The cost of a creditor's voluntary liquidation will vary depending on its size and complexity and who acts as liquidator. There are about 680 registered liquidators in Australia who can act as liquidator of a creditor's voluntary liquidation, making the market highly competitive.

It's not uncommon for competing liquidators to allege that their peers are deliberately underquoting the true cost of their services to get control of a company and subsequently raise their fees after they are entrenched appointed as liquidator.

If you Google "creditor's voluntary liquidation", you will see "Fixed price quotes" like those shown below from a handful of insolvency firms and pre insolvency advisors:

Typical CVL fixed price costs	
Number of Creditors	**Cost**
1	$2,000
1- 6	$6,000
1- 10	$8,000
15 and above	$15,000

Five years ago, the lowest advertised "Up front fixed price" quote for a liquidation was about $8000. Perhaps Australian liquidators will eventually follow US liquidators by offering "No money up front" quotes. If it sounds to too good to be true, it generally is. Our experience suggests this type of approach is nothing more than a marketing gimmick.

"Fixed quotes" rarely limit the amount a liquidator can charge for a job in Australia. Instead, the "Fixed quotes" reflect the initial fee that a liquidator is seeking to act as liquidator. Or the fee the pre-insolvency advisor requests to introduce a client to a liquidator.

The fine print on every "Fixed quote" in Australia will normally exclude any amount the liquidator can recover and take as professional fees for undertaking their statutory duty to investigate and prosecute for the benefit of creditors.

THE AVERAGE COST OF A LIQUIDATION

ASIC has never published the average cost of a liquidation in Australia.

We estimate the average cost for a small liquidation with assets to be about $10,000.
When liquidators offer their services for less than the amount they will incur, they are acting with an expectation that their actual costs will be paid from the company's assets, from the available recovery actions or from other referral work that is actually profitable.

Unlike bankruptcy, where the government administers about 90 per cent of all bankrupt estates at no cost to the bankrupt, all liquidations in Australia are administered by private liquidators who expect to make a profit.

All liquidators will be eager to take on a creditor's voluntary liquidation with no tangible assets or money up front, if there is a big preference or an insolvent trading claim action against a director or third party who has the resources to pay the claim. That's the nature of liquidation work. Liquidators want to litigate because that is how we get paid.

For these reasons, it is vital that directors do not blindly accept the lowest "Up front fixed quote" to do a liquidation, and that they are aware of the available recovery actions and how the liquidator will be paid before making an appointment.

2. WHAT IS A CREDITOR'S VOLUNTARY LIQUIDATION?

The Corporations Act 2001 provides a statutory framework (a set of rules) that enables a director to wind up or terminate the existence of an insolvent company. This process is known as a creditor's voluntary liquidation (CVL) .

An insolvent company can also be wound up by an order of the Court, but this is generally a significantly more expensive option than a creditor's voluntary liquidation.

Solvent companies can sell their assets, pay their creditors then seek to terminate the company's existence via the deregistration process or via a members voluntary liquidation. Insolvent companies can not use either of these significantly cheaper options.

THE OBJECTIVE OF A CREDITOR'S VOLUNTARY LIQUIDATION

The purpose of a creditor's voluntary liquidation is to:

- Wind up the affairs of an insolvent company and
- Provide a fair and equitable distribution of the company's remaining property among the creditors in the order prescribed by the law.

The reason the creditor's voluntary liquidation process is said to be voluntary is that it starts with a voluntary resolution of a company's shareholders rather than being forced on it by a compulsory court order.

3. HOW TO WIND UP AN INSOLVENT COMPANY

If the directors of a company have determined that that company is insolvent and needs to cease trading and wind up its affairs, the cheapest way to put it into liquidation is via a creditor's voluntary liquidation.

This process requires the directors to convene a meeting of shareholders where they (the directors) ask the shareholders (who effectively own the company) to pass a special resolution that the company should be wound up and a liquidator appointed.

After this meeting, the liquidator appointed by the shareholders will notify the creditors of their appointment. The company's creditors will be given an opportunity to elect another liquidator at act on their behalf. As creditors will be paid before shareholders, it is appropriate that creditors dictate who acts as their liquidator.

A creditor's voluntary liquidation can also be initiated via a voluntary administration. In this case, it is the creditors who decide that the company should be wound up.

If an application has been filed with the Court for an order that the company be wound up due to its insolvency (s.490), a company can not enter into a creditor's voluntary liquidation without the consent of the Court.

4. WHO CAN ACT AS A LIQUIDATOR?

Choosing the right liquidator is important. Only a registered liquidator can act as a liquidator of an insolvent company Lawyers are not qualified to act as liquidators or as trustees in bankruptcy.

There are about 680 qualified liquidators in Australia, but only about 210 of these (31 per cent) are qualified to offer both bankruptcy and corporate insolvency services. Crouch Amirbeaggi has qualified bankruptcy trustees and qualified liquidators on staff, as well as an in-house lawyer, CPAs and chartered accountants to help our clients.

5. WHAT IS THE ROLE OF THE LIQUIDATOR?

The tasks a liquidator undertakes during the winding-up of a company include:

- Identify, locate and secure the company's assets (remember that staff and creditor relationships are often a business's most valuable assets)
- Identify the reasons for failure and opportunities for creditors to profit
- Sell the company's assets
- Investigate the company's financial affairs
- Identify voidable transactions such as preference payments and uncommercial transactions, and actions against directors for breach of directors' duties
- Report to creditors
- Hold meetings with creditors
- Report to ASIC any offences committed by company officers (ASIC investigates about 3 per cent of liquidator complaints)
- Distribute any surplus company assets to creditors (only 7 per cent of insolvent companies pay a dividend)
- Deregister the company via ASIC.

6. THE EFFECTS OF LIQUIDATION

There are six stakeholders affected by a company being placed into a creditor's voluntary liquidation: secured creditors, unsecured creditors, employees, shareholders, directors and the company itself. The impact upon each is discussed below.

A. SECURED CREDITORS

A creditor's voluntary liquidation generally does not affect a secured creditor's (i.e. a bank) right to enforce their security interest (i.e. their mortgage or fixed and floating charge).

Secured creditors typically allow the liquidator to sell and realise their secured assets. Any shortfall from the realisation of the assets can be listed in the liquidation as an unsecured claim.

B. EMPLOYEES

Employee entitlements such as wages, superannuation, annual leave, long service leave and redundancy pay are a high priority for repayment under the Corporations Act 2001. This means that employee entitlements will be paid before select secured creditor claims and all other unsecured claims such as those made by normal trade creditors.

When an insolvent company in liquidation has no assets, a Federal Government safety net called the Fair Entitlements Guarantee Scheme (FEG) pays its unpaid employee entitlements, with the exception of superannuation.

C. UNSECURED CREDITORS

Unsecured creditors are entitled to lodge claims to prove their debt in the creditor's voluntary liquidation. Admitted creditor claims will rank equally and claims will be paid pro-rata with all the other unsecured creditors in the event of a dividend distribution. About 7 per cent of all company liquidations pay a dividend.

D. SHAREHOLDERS

When a company enters into a creditor's voluntary liquidation, shareholdings typically no longer have any value. Shareholders' claims are deferred and paid after creditors' claims in terms of dividend payments, which means that shareholders almost never receive a dividend distribution from the realisation of the company assets.

After it is initiated, shareholders generally have limited input during a creditor's voluntary liquidation.

E. DIRECTORS

Once a company is placed into a creditor's voluntary liquidation, the directors no longer have any power. This means that only the liquidator can commit the company to any transaction.

Directors still have some responsibilities, however. They may be required to meet with the liquidator to discuss the company's affairs. The Corporations Act 2001 also requires the directors to help the liquidator where necessary during the winding up process.

Directors must ensure that they have completed the Report on Company Activities and Property (ROCAP), to avoid being fined by ASIC. (The ROCAP re-states the balance sheet on a statutory document that generally confuses almost everybody who will ever read it.)

Directors must also provide the liquidator with access to the company's books and records. If directors fail to provide this information, presumptions of insolvency will make actions against directors easier for a liquidator to litigate. Failure to supply information requested by the liquidator may also result in directors being prosecuted under the Corporations Act 2001.

F. THE COMPANY & LITIGATION

A company entering into liquidation continues to exist as a legal entity so that it can continue to engage in litigation. The legal entity ceases to exist when ASIC deregisters the company at the end of the liquidation.

There is an automatic stay on existing litigation when a company enters liquidation (s.500 & s.471B). In practice, the liquidator generally abandons litigation due to lack of funding.

If a liquidator chooses to continue or initiate litigation, she/he will often engage the services of a litigation funder who will pay legal costs and provide security for adverse costs if the liquidator loses, and take 25-75 per cent of any successful settlement or judgement.

Litigation funders generally focus on larger claims that exceed $500,000 and are an increasingly useful source of funds to enable litigation.

CAN A COMPANY TRADE DURING LIQUIDATION?

The liquidator is empowered to continue to trade a company in liquidation for a limited time. Liquidators will often continue to trade on a business to complete work in progress or seek to maximise the sale price of the business by offering the business for sale as a going concern.

There are legal restraints on a liquidator carrying on the business, however, which limit trading to the amount of time required to sell the business.

REPORTING AND MEETING REQUIREMENTS

A liquidator must prepare a statutory report to creditors within 3 months of her/his appointment. Creditors' meetings may be convened as required by the liquidator or at the request of creditors under certain circumstances.

WHAT CAN THE LIQUIDATOR RECOVER?

The assets available to a liquidator include:

- The property owned by the company at (or after) the time of liquidation; and
- All cash/debtors received by the company after the date of liquidation.

The Corporations Act 2001 empowers a liquidator to make an application to Court for orders that set aside pre-liquidation transactions. This permits the recovery of the company's property. Alternatively, where appropriate, the Court may order that compensation be paid to the company.

7. VOIDABLE TRANSACTIONS

Some of the voidable transactions a liquidator can set aside include:

- Transactions undertaken for the purpose of defeating creditors (s.588FE, 10-year limit)
- Transactions that provide a preference, priority or advantage to a creditor, also called an unfair preference (s.588FA, 6-month time limit)
- Uncommercial transactions (s.588FB, 2-year time limit)
- Unfair loans (s.588FB, no time limit)
- Insolvent trading claims (s.588G/V, no time limit)
- Related entities' guaranteed debts being paid (s.588FH)
- Creditor-defeating dispositions (s.588FGAA, 1-year time limit)
- Assets seized by the sheriff, charged or payments made pursuant to court orders (s.569 & s.570, 6-month time limit)
- Unreasonable director-related transactions (s.588FDA, 4-year time limit).

Note the Corporations Act 2001 extends the amount of time for recovery of unfair preferences or uncommercial transactions that involve a related party to four years.

Voidable transactions must be litigated by the liquidator within three to six years of the start of the liquidation.

STATUTORY MISFEASANCE

Misfeasance is a wilful and intentional act that results in a company suffering a loss.

A liquidator may pursue a person for misfeasance (s.598) if:

- A person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation a company; and
- The company has suffered, or is likely to suffer, loss or damage as a result of the fraud, negligence, default, breach of trust or breach of duty.

It's important to note that the liquidator is not required to prove solvency if a recovery is made through misfeasance.

DIRECTORS' DUTIES

A liquidator may pursue a director for breach of their director's duties (s.180-183), which are generally described as the duty to:

- Act in good faith in the best interests of the company, i.e. for proper corporate purposes, avoiding conflicts of interest and not using information improperly and
- Exercise care, diligence and skill

INVALID SECURITY INTERESTS

Liquidators are empowered to apply to Court to set aside security interests (formerly known as mortgages, general security agreements and Retention of Title claims) where:

- A circulating security interest was created within six months of the commencement of the liquidation (unless new consideration was given)
- The security interest was not registered in time
- A security interest in favour of an officer was enforced within six months of its creation.

RELATION BACK DATE & COMMENCEMENT DATE

In a creditor's voluntary liquidation, the date the company entered liquidation will normally define both the relation back day and date of commencement of winding up. These dates are unnecessarily complex legal terms that define the start of the available recovery periods of the voidable transactions detailed above.

INSOLVENT TRADING

Directors and holding companies have a positive duty to ensure that the company does not incur debts during the time it is insolvent. When this duty is breached, the liquidator may bring an action against the director or holding company and seek court orders that make the director or holding company liable to compensate the company for any debts incurred.

For more information on insolvent trading click here.

LIQUIDATOR ACCESS TO DIRECTORS' PERSONAL ASSETS

The liquidator of a creditor's voluntary liquidation has no immediate recourse to a director's personal assets. Instead, the liquidator must seek court orders for repayment of debts in the normal manner, but a liquidator's debt-collection processes can include bankruptcy proceedings against directors.

A DIRECTOR'S PERSONAL GUARANTEE

Personal guarantees executed by directors and other parties are not affected by a creditor's voluntary liquidation. Directors remain exposed to these debts.

HOW DOES A LIQUIDATOR GET PAID?

Liquidators are generally paid from the funds received by realising a company's assets. A liquidator cannot draw fees without the approval of creditors.

If creditors refuse to approve a liquidator's professional fees, the liquidator can ask the Court for assistance.

THE AVERAGE DIVIDEND PAID IN A LIQUIDATION

About 9000 companies enter into liquidation in Australia each year.

About 93 per cent of these do not pay any dividend to creditors.

Of the remaining 7 per cent, about 5 per cent pay a dividend of about 11 cents in the dollar; about 2.5 per cent will pay creditors a dividend of more than 11 cents; and, oddly, about 0.5 per cent of companies in liquidation pay a dividend of more than 50 cents, which usually means they should not have gone into liquidation in the first place.

DURATION OF A LIQUIDATION

There is no set time limit for the duration of a creditor's voluntary liquidation, but as a guideline, most CVLs are finalised within 12 months.

8. INSOLVENCY INDUSTRY STATISTICS

According to ASIC statistics, of the 9000 companies that go into liquidation each year, about 37% have no assets. In these cases the liquidator, who has usually consented to act in the hope of finding assets to pay for his services, will not get paid for his services and will write off his time and expenses. Insolvency is a speculative and risky profession.

On average 61 per cent of all liquidations result in the liquidator being paid less than $50,000 in professional fees.

At the other end of the scale, there are about 50 large-scale liquidations a year that produce more than $250,000 in liquidator fees. Some of these are massive jobs that can realise 10 million of dollars in professional fees for the liquidators and take years to complete.

For the past 25 years, the insolvency market number has been split between the large firms who chase big jobs like this, and small firms who specialise in small jobs (under $1 million in assets). There are about 270 insolvency firms in Australia today. About half of all liquidators work for large firms that have four or more liquidators; 13 large liquidation firms employ about 250 liquidators in total.

The Federal Government's Senate Inquiry into insolvency found that the average hourly charge-out rate of registered liquidators insolvency firms were: $460 for small firms, $550 for medium-sized firms and $690 for large firms.

The Inquiry also found that Crouch Amirbeaggi's hourly charge-out rates are about 33 per cent less than those of the large insolvency firms.

DO YOU NEED HELP?

We invite you to give us a call, all initial discussions are free of cost or obligation. Talk to our in-house liquidators, bankruptcy trustees, lawyers or accountants about your circumstances and options.

We have offices in Sydney, Melbourne and Byron Bay together with affiliated offices in each capital city. Our nationwide network lets us service our clients' needs throughout Australia.