

THE SIMPLIFIED LIQUIDATION

INTRODUCTION

A simplified liquidation is a streamlined creditors voluntary liquidation for companies with less than \$1M in debt. If a company qualifies for a simplified liquidation, it is the most cost effective way to wind up or liquidate an insolvent company. As experts in bankruptcy and corporate insolvencies, we specialise in turnaround, restructuring and insolvency services.

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

- Official liquidators
- Bankruptcy trustees
- Lawyers
- ARITA members
- CPAs
- Chartered Accountants

Our clients over the past 18 years have included all the major banks, second tier financiers and hundreds of lawyers and accountants, but our specialty is, and has always been, small business solutions.

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

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1. HOW MUCH DOES A LIQUIDATION COST?

The simplified liquidation is a new law designed specifically for small businesses as a low cost liquidation option. The cost of a simplified liquidation is designed to be cheaper than the standard creditor's voluntary liquidation and the cost will vary depending on a number of factors, including who acts as the 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 as liquidator.

"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 SIMPLIFIED LIQUIDATION

We estimate the average cost for a simplified liquidation with assets to be about \$8,000.

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% 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 simplified liquidation with no tangible assets or money up front, if there is a chance of a recovery from a voidable transaction.

Our team have liquidated thousands of small businesses, and our streamlined process is cost effective and efficient.

2. WHAT IS A SIMPLIFIED LIQUIDATION?

The Simplified Liquidation framework designed specifically for small business was introduced into the *Corporations Act 2001* on 1 January 2021 and provides a statutory framework (a set of rules) that enables a director to wind up or terminate the existence of an insolvent company.

THE OBJECTIVE OF A SIMPLIFIED LIQUIDATION

The purpose of a simplified liquidation is to:

- Wind up the affairs of an insolvent company with debts of less than \$1M; and
- Provide a fair and equitable distribution of the company's remaining property among the creditors in the order prescribed by the law.

3. WHAT ARE THE ELIGIBILITY CRITERIA FOR A SIMPLIFIED LIQUIDATION OF AN INSOLVENT COMPANY?

To be eligible for the simplified liquidation process:

- liabilities of the company on the day a liquidator is first appointed in the creditors' voluntary winding up must not exceed \$1 million;
- the company must be insolvent;
- the directors must within 5 business days after the day of the meeting where a resolution for voluntary winding up was passed 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,
 - no person who is, or has been a director of the company within the 12 months preceding the date a liquidator was first appointed, has been a director of another company that has undergone restructuring or been the subject of a simplified liquidation process in the preceding 7 years,
 - the company has not undergone restructuring or been the subject of a simplified liquidation process in the preceding 7 years, and
 - the company has lodged its tax returns and other tax lodgements due.

4. WHO CAN ACT AS A LIQUIDATOR?

Only a registered liquidator can act as a simplified 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.

Couch Amirbeaggi has qualified bankruptcy and insolvency practitioners on staff, as well as an in-house lawyer, CPAs and Chartered Accountants to help our clients.

If a company is already being wound up under a creditor's voluntary liquidation, the liquidator in the creditors' voluntary winding up may adopt the simplified liquidation process if:

- they believe on reasonable grounds the eligibility criteria are met;
- not more than 20 business days have passed since a liquidator was first appointed in the creditors' voluntary winding up; and
- the liquidator has given each member and creditor, at least 10 business days before adopting the simplified liquidation process, written notice of the following:
 - a statement that the liquidator believes on reasonable grounds the eligibility criteria for the simplified liquidation process will be met;
 - an outline of the simplified liquidation process;
 - a statement they will not adopt the simplified liquidation process if at least 25% in value of creditors direct the liquidator in writing not to adopt the simplified liquidation process.

5. WHAT IS THE ROLE OF THE LIQUIDATOR?

The tasks a liquidator undertakes during the simplified liquidation are as follows:

- 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 within 3 months of appointment
- Report to ASIC only if in the opinion of the liquidator, there are reasonable grounds to believe conduct constituting an offence may have occurred; and, that conduct has, or is likely to have, a material adverse effect on the interests of creditors as a whole or a class of creditors as a whole.
- any offences committed by company officers (ASIC investigates about 3% of liquidator complaints)
- Distribute any surplus company assets to creditors under a simplified dividend process
- Deregister the company via ASIC.

6. THE EFFECTS OF SIMPLIFIED LIQUIDATION

A company entering into simplified 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% of any successful settlement or judgement.

TRADING A BUSINESS DURING A SIMPLIFIED LIQUIDATION?

The liquidator is empowered to continue to trade a company in a simplified liquidation for a limited time in order to maximise the sale price of the business and/or assets of the company.

MEETING & REPORTING IN A SIMPLIFIED LIQUIDATION

Meetings of creditors are not held in a simplified liquidation process. Matters determined by creditors are decided without a meeting via the 'proposal without a meeting process'. Also, there is no committee of inspection.

A liquidator in a streamlined liquidation must report to creditors within three months of the liquidator's appointment, about:

- work performed to date by the liquidator;
- the liquidator's opinion on when the liquidation may be finalised; and
- the likelihood of a dividend being paid to creditors.

There are no other mandatory reports to creditors.

Creditors in a simplified liquidation process can make reasonable requests for information from the liquidator.

If funds will be available to pay a dividend to creditors, the liquidator is only able to make one dividend payment. This is likely to be near the end of the administration and there is no ability to make an interim dividend distribution.

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 income 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.

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

7. VOIDABLE TRANSACTIONS

Voidable transaction recoveries are still permitted under a simplified liquidation as in a creditor's voluntary liquidation, but under reduced circumstances. For example, a liquidator cannot seek to clawback an unfair preference payment from a creditor that is not related to the company.

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.