



MEMO

To: Board of Directors
From: Company Secretary
Subject: **WINDING-UP A SOLVENT COMPANY**

A solvent company (ie, one which can meet its debts as and when they are due and payable – see Section 95A of the Corporations Act) may be closed down through either:

- a) de-registration; or
- b) a **shareholders' voluntary winding-up**.

If shareholders have no further use for a company and it is not in financial difficulty or insolvent, they may wish to simply close it down; that is, voluntarily de-register it.

ASIC will de-register a company, on application, if it meets all the following requirements:

- all shareholders of the company agree to de-register
- it is not carrying on business
- its assets are worth less than \$1,000
- it has no outstanding liabilities
- it is not a party to any legal proceedings
- it has paid all fees and penalties payable under the Corporations Act.

Shareholders' Winding-up

The principal alternative is for a solvent company to be wound up through a shareholders' (or members') voluntary winding-up as per Sec. 491.

A formal winding-up involves, amongst other things, a clearance process with the taxation authorities and advertising for external creditors. This provides shareholders (and the directors) with the highest level of comfort that the company has met all its liabilities.

The procedure is as follows:

1. The directors (or shareholders) must decide who will handle the winding-up (the "liquidator"). For a proprietary company the winding-up can be managed by anyone (eg, the Company Secretary) – Sec. 532(4), although this is unusual. All other types of companies must appoint a registered company liquidator, but can generally 'supervise' his conduct to some extent. This appointment is later ratified at the shareholders' meeting (see item 5. below). Sec. 495 covers liquidators.



2. The liquidator's role will involve the orderly winding-up of the company's affairs through managing the process of realising the company's assets, ceasing and/or sale of its operations, payment of its debts (if any) and distribution of surplus assets (if any) among its shareholders.
3. The [majority of] directors must make a written declaration that they have made an inquiry into the affairs of the company and that at a meeting of directors they have formed the opinion that the company will be able to pay its debts in full within 12 months after the commencement of the winding-up ('solvency declaration') – pursuant to Sec. 494. The directors' meeting should also resolve to call a general meeting of shareholders/members to formally consider the voluntary winding up and the appointment of the nominated liquidator.
4. The [majority of] directors must then sign a Form 520 Declaration of Solvency, on the date (or within a few days) of passing the 'solvency declaration', and lodge it with ASIC before the date of [and the sending out of] the notice of shareholders' meeting. This Form also sets out details of any assets and liabilities of the company.
5. The shareholders/members of the company must – within 5 weeks of the dating of Form 520 – pass a special resolution to wind-up the company and appoint a liquidator. The liquidator's Consent to Act must be tabled at the meeting. All members must be given at least 21 days written notice of the special resolution and at the meeting at least 75% of the votes cast by members entitled to vote must be in favour of the resolution for it to be passed.
6. Form 205 Notification of Resolution is then lodged with ASIC within 7 days, detailing the special resolution – Sec. 491(2)(a) – which is then published in the Govt Gazette within 21 days (of the shareholders' meeting). The minutes of the general meeting should accompany this Form.
7. Within 14 days of the shareholders' meeting Form 505 Notification of Appointment of External Administrator must be lodged with ASIC by the liquidator.
8. And whilst these events are unfolding the liquidator is proceeding with all the matters necessary towards the successful winding-up of the company (eg, lodging final BAS/tax returns, closing bank account, advertising for claims, etc). In the meantime, as required by Sec. 493, the company must have ceased to carry on business other than to the extent necessary to assist the liquidator in disposing of assets and winding up the company's affairs. Generally, all powers of the directors cease on appointment of a liquidator – Sec. 495(2).
9. During the liquidation process no share transfers may be made without the consent of the liquidator (or the court) – Sec. 493A – and, generally, the directors and/or Company Secretary cannot be changed.



10. The property of a company must, on its winding-up, be applied first in satisfaction of any liabilities equally and, generally, then be distributed amongst the shareholders (either equally depending on their shareholding, or otherwise according to the rights of various shareholders as per the company's Constitution) – Sec. 501.

11. Whilst a company is being wound-up it must set out on every public document after the company name the words “in liquidation”.

12. Within 1 month after the first 6-month period from the date of appointment (and every 6 months thereafter) the liquidator must lodge with ASIC a Form 524 Presentation of Accounts & Statements.

13. If the winding-up continues for more than 12 months (and each succeeding year) the liquidator must – under Sec. 508 – call a shareholders' meeting, within 3 months, to report to shareholders on the progress of the liquidation.

14. As soon as the liquidation is finalized the liquidator must call a meeting of shareholders and give a full account of his actions – Sec. 509. The liquidator must lodge Form 523 Notification of Final Meeting Convened by Liquidator with ASIC within 7 days of the final meeting.

15. Form 505 Notification of Cessation of External Administrator must be lodged with ASIC by the liquidator within 14 days of the shareholders' winding-up being formally completed.

16. The company remains registered with ASIC even after it ceases to trade and is still subject to the legal requirements of a registered company, including payment of the annual review fee (to ASIC) each year, until the winding-up process is completed and the company has been de-registered by ASIC. Under Sec. 509(5) ASIC must deregister the company 3 months after the final return (Form 523) is lodged.

17. During the winding-up process the liquidator takes control of all books and relevant records of the company and then, 5 years after the date of deregistration, may destroy them – Sec. 542.

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.