Ending a company limited by guarantee

A guide to ending a CLG

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Contents

Part 1

Introduction

Introduction

Disclaimer

This guide provides general information about ending a company limited by guarantee. This information is a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to the full disclaimer that applies to this guide.

Your company limited by guarantee (**CLG**) may want to end voluntarily for a variety of reasons or it may be required to end (ie. ending is compulsory).

This guide sets out the options available and the processes to end a CLG. The process you must follow to end your CLG depends on whether your CLG is solvent or insolvent.

This guide includes information about what it means to be insolvent and what to do if you have reasonable grounds to suspect that your CLG in financial difficulty, is nearing insolvency or is insolvent.

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Can you wind up parts of a CLG?

Winding up is generally only necessary if you want to bring the entire CLG to an end.

If you only want to bring parts of a CLG to an end, the process will depend on the CLG's constitution.

For example, if the parts you want to end are just a division or business unit, a service or project of the CLG, there are no special rules as to how you bring them to an end (subject to any provisions that may apply in the CLG's constitution). The CLG may need to re-deploy staff or make them redundant, sell assets, terminate leases etc.

While each of these steps will need to be carefully considered and each will involve legal issues, they don't affect the existence of the CLG.

Part 2

When is a company limited by guarantee insolvent?

When is a company limited by guarantee insolvent?

This part covers:

- tests for establishing insolvency under the Corporations Act
- warning signs of insolvency
- the duty to prevent a CLG from trading while insolvent, and
- the duty to prevent creditor-defeating dispositions

Under the *Corporations Act 2001* (Cth):

- a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable, and
- a person who is not solvent is insolvent

It's often difficult to determine whether a CLG is insolvent just by looking at its financial records and accounts. A CLG experiencing an irregular shortage of cash is not necessarily insolvent. Similarly, if a CLG's assets exceed its liabilities, it's not necessarily solvent. A range of factors are relevant, and insolvency is determined by looking at the financial position of the CLG as a whole.

For more information about insolvency, see our fact sheet 'Insolvency and your organisation', which covers what insolvency means and the duty to prevent insolvency.

The **cash flow test** is the first and primary test in establishing insolvency under the Corporations Act.

The cash flow test looks at whether the CLG has enough cash on hand to pay debts as and when they become due and payable. This requires realistically assessing whether the CLG's anticipated current and future cash flows will be sufficient to enable current and future liabilities to be paid as and when they fall due for payment.

However, the **balance sheet test** can be used as a secondary test to show that a temporary lack of liquidity may not be indicative of insolvency. A CLG is insolvent under the balance sheet test if the total liabilities are more than the total value of the assets of the company. When performing the balance sheet test, it may be relevant to look at the financial position of the company as a whole and consider other commercial factors when assessing solvency.

A court will first make an assessment using the cash flow test and then use the balance sheet test to determine whether the CLG is experiencing temporary illiquidity or is in fact insolvent.

Warning signs of insolvency

The warning signs of insolvency may include:

- ongoing losses
- poor cashflow
- absence of a business plan
- incomplete financial records or disorganised internal accounting procedures
- lack of cashflow forecasts and other budgets
- increasing debt (liabilities greater than assets)
- problems selling stock or collecting debts
- unrecoverable loans to associated parties
- creditors unpaid outside usual terms
- solicitors' letters, demands, summonses, judgements or warrants issued against your company
- suppliers placing your company on cash-on-delivery terms
- special arrangements with selected creditors
- payments to creditors of rounded sums that are not reconcilable to specific invoices
- overdraft limit reached or defaults on loan or interest payments
- problems obtaining finance
- change of bank, lender or increased monitoring or involvement by financier
- inability to raise funds from shareholders
- overdue taxes and superannuation liabilities
- board disputes and director resignations, or loss of management personnel
- increased level of complaints or queries raised with suppliers, and
- an expectation that the 'next' big job, sale or contract will save the CLG

This is not an exhaustive list. There are a range of factors which may ultimately point to a CLG's inability to pay their debts when they fall due.

Example

Justin, a director of a company, is concerned that the company may be insolvent but is not sure.

The company was impacted by COVID-19 and owes suppliers $40,000. To try to raise funds to cover its outstanding debt, the company developed a fundraising plan. The company also sought payment extensions on contracts with suppliers. However, the company has been unable to pay its suppliers and doesn't have any assets.

The company doesn't have enough cash on hand to pay debts as and when they become due and payable (cash flow test). And the company's total liabilities are more than the total value of the assets of the company (balance sheet test). It's therefore likely that the company is insolvent.

Duties of directors of companies

Directors of CLG's must comply with their duties set out in the Corporations Act. If a director breaches any of its duties, particularly where the CLG is insolvent, adverse consequences may include civil penalties, compensation proceedings and criminal charges.

For more information about directors' duties, see our duties guide, which covers the key duties of directors of companies and the duties that apply to directors of companies registered as charities with the Australian Charities and Not-for-profits Commission.

Note

The directors' duties discussed below are duties that are relevant to ending an insolvent CLG. This fact sheet does not cover all the duties that apply to directors of a CLG.

Duty to prevent the CLG from trading while insolvent

Directors and officers of a CLG have a duty to prevent the CLG from trading while insolvent, which means a duty not to incur a debt if the company is insolvent or that will cause the CLG to become insolvent. The duty to prevent insolvent trading applies to all the directors.

Before the CLG incurs a new debt, the directors must consider whether they have reasonable grounds to suspect the CLG is insolvent or will become insolvent as a result of incurring the debt.

To ensure directors don't breach this duty, directors must have a clear understanding of the CLG's current financial position so they can make informed decisions about whether the CLG can responsibly enter into new transactions, contracts or other debts. An understanding of the CLG's financial position when directors sign off on the yearly financial statements is not sufficient. Directors need to be constantly aware of the CLG's financial position.

Note

Ignorance is no excuse. A director must not turn a 'blind eye' to the CLG's financial status or leave understanding the CLG's finances to the other directors.

A CLG's director can defend a claim for insolvent trading if they can show that, after realising that the CLG may become insolvent, they started developing a course of action that was reasonably likely to lead to a better outcome for the CLG. A 'better outcome' for the CLG means an outcome that is better for the CLG than the immediate appointment of an administrator or liquidator.

Factors that determine whether a course of action is reasonably likely to lead to a better outcome for the CLG are set out in the Corporations Act. A key consideration in determining whether the course of action was reasonably likely to lead to a better outcome for the CLG is whether the director (or officer) sought the advice of a qualified person. For this reason, it is critical that a director (or officer) gets expert insolvency advice.

If a CLG fails to keep proper financial records, and an insolvent trading claim is made against a director, the court may presume (unless the director can prove otherwise) that the CLG was insolvent for the period of time that the CLG failed to keep proper financial records.

Penalties and adverse consequences for insolvent trading include civil penalties, compensation proceedings and criminal charges. Contravening the insolvent trading provisions of the Corporations Act can result in civil penalties against directors, including pecuniary penalties of up to $200,000.

A compensation order can be made in addition to civil penalties. Compensation proceedings for amounts lost by creditors can be initiated by ASIC, a liquidator or a creditor against a director personally.

Compensation payments are potentially unlimited and could lead to the personal bankruptcy of directors. The personal bankruptcy of a director disqualifies that director from continuing as a director or managing a company.

A director may also be subject to criminal charges for insolvent trading (which can lead to a fine of up to 2,000 penalty units or imprisonment for up to five years, or both). Being found guilty and convicted of the criminal offence of insolvent trading may also lead to a director's disqualification.

Furthermore, a director's obligations may continue even after the company has ceased trading and has been deregistered.

Example

Sue is a director of a CLG that provides support services to people impacted by bush fires.

When the board approved the annual financial statements in July last year, Sue had a clear understanding of the company's financial position. At that time, the treasurer gave a detailed briefing to the board about the company's finances. Sue understood that, although the company had 'sailed pretty close to the wind' all year, at the end of the financial year, the company managed a small surplus of $40,000.

At a board meeting eight months later, the company's service-manager asks the directors to approve the signing of a contract for renovations at a cost of $50,000 so the works can begin immediately. Sue is reluctant to ask any questions because she doesn't want to appear to hold up the process or frustrate the manager, who looks stressed.

Sue's legal duty to prevent the company from trading while insolvent, means she must consider whether she has reasonable grounds to suspect the company is insolvent or will become insolvent as a result of incurring the debt. She is required to have a clear understanding of the current financial position of the company. It's not sufficient to rely on her understanding of the financial position from eight months ago.

While the manager may be focussed on the day to day running of the company, it's the director's duty to look at the current financial position of the company. Directors should ask for financial information to confirm the company can afford the renovations and get professional advice if needed. It's a duty of all directors, not just the treasurer, to be satisfied that the company can pay its debts as and when they become due and payable.

Duty to prevent creditor-defeating dispositions

Directors and officers of a CLG have a duty to prevent the CLG from entering into a transaction that is a creditor-defeating disposition.

What is a creditor-defeating disposition?

A creditor-defeating disposition is a disposition of property (ie. assets):

- for less than the lesser of the market value of the property or the best price reasonably obtainable, and
- that prevents, hinders or significantly delays the property from becoming available to benefit creditors in a winding up

A director's duty to prevent a creditor-defeating disposition arises when a CLG is insolvent or becomes insolvent because of a disposition or several dispositions of company property or assets.

This duty extends to other people who may be involved in or encourage such a disposition to take place, including pre-insolvency advisers, lawyers or others who assist or advise the directors to undertake such a disposition.

If there is recklessness in making a creditor-defeating disposition, the breach of the creditor-defeating provisions is an offence under the Corporations Act and a court, subject to exceptions, can order compensation be paid to creditors equal to the loss or damage suffered.

In these circumstances, a CLG should urgently seek legal advice or advice from an accountant specialising in insolvency.

Note – director penalty notice

If you receive a section 222AOE penalty notice, also known as a 'director penalty notice', from the Commissioner of Taxation for your company's unpaid tax, you should immediately seek professional advice. Failure to take appropriate steps within 14 days may result in the Commissioner of Taxation taking recovery action against you personally for the unpaid tax.

Duty to keep books and records

A CLG must keep proper financial records to correctly record and explain the company's transactions, its financial position and performance. A director contravenes the Corporations Act if they fail to take all reasonable steps to do so.

If a CLG fails to keep proper financial records, and an insolvent trading claim is made against a director, the court may presume (unless the director can prove otherwise) that the CLG was insolvent for the period that the company failed to keep proper financial records.

Duties of charities

CLGs that are also registered as charities with the Australian Charities and Not-for-profits Commission (**ACNC**) must comply with the ACNC Governance Standards, which are a set of minimum requirements for the governance of a charity. A charity must meet the Governance Standards when it applies to be registered with the ACNC and must continue to meet them to maintain its registration.

Tip

You can check if your CLG is a registered charity on the ACNC's online charity register.

Governance Standard 5 sets out the duties that apply to Responsible People (directors) in a charity. These duties are similar to the duties of officeholders in CLGs. Duties that make up Governance Standard 5 include the duty not to allow the charity to operate while it's insolvent.

Under the ACNC Governance Standards, it is the responsibility of the charity, not the individual person, to take reasonable steps to ensure that the Responsible Person understands and fulfils their duties under Governance Standard 5.

However, Responsible People will generally still have legal duties placed on them directly under legislation and the common law.

When a charity hasn't taken 'reasonable steps' to ensure that the Responsible Person understands and fulfils their duties under Governance Standard 5, the ACNC can take action including:

- warnings or directions from the ACNC Commissioner compelling compliance

- additional ongoing oversight and regulation by the ACNC through an enforceable undertaking (which if not complied with may result in court orders to cover losses suffered by the charity or to pay back any benefits gained)
- suspension and prohibition of a relevant person from participating in governing the charity (which if breached could result in both civil and criminal penalties)
- administrative penalties, and
- deregistration of the charity

People responsible for managing charities may also face civil or other penalties for breach of those duties under legislation and the common law.

For more information about the duties of Responsible People, see our duties guide, which covers the key duties of directors of companies and the duties that apply to directors of companies registered as charities with the Australian Charities and Not-for-profits Commission.

Protect your CLG against insolvency

To help protect a CLG from insolvency, directors of CLGs and Responsible People of registered charities, should make sure they comply with their legal duties to:

- act honestly and diligently and in compliance with the CLG's constitution
- act in the best interests of the CLG
- not use their position for personal advantage (or for the benefit of a friend or associate), and
- always disclose conflicts of interests

This means they must be careful and diligent in managing the financial situation of the company.

In practice this means that directors and responsible persons should:

- keep up to date with the CLG's financial position at all times (ie. debts owed and cash flow)
- prevent the CLG from incurring debts when there are reasonable grounds to suspect it won't be able to repay them
- identify problems the CLG may have (including its expenses and liabilities, and income and cash flow) and put mechanisms in place to mitigate these problems, and
- seek advice from an expert accountant or financial advisor at the first sign of trouble

Tip

Taking steps to ensure your CLG remains financially sound will minimise the risk of an insolvent trading action against you and may also improve your CLG's performance.

Part 3

Ending a solvent company limited by guarantee

Ending a solvent company limited by guarantee

This part covers:

- voluntary deregistration of a solvent company limited by guarantee, and
- voluntary winding up of a solvent company limited by guarantee

This part of the guide sets out the steps to deregister or wind up a solvent company limited by guarantee (**CLG**).

A CLG can only voluntarily deregister in the limited circumstances set out below.

If a CLG doesn't qualify for voluntary deregistration, the only way to voluntarily end the CLG is to wind it up.

Voluntary deregistration of a solvent CLG

In certain circumstances, a CLG may end its operations without going through the formal steps of winding up by applying to cancel its incorporation. This process is called voluntary deregistration.

Note – you can't deregister a CLG if it owes money, or if it is insolvent

Voluntary deregistration is usually the simplest and most cost-effective way to end a CLG. If the CLG is not operating, has virtually no assets and has no liabilities, it may qualify for voluntary deregistration.

If the CLG doesn't qualify for voluntary deregistration, you may need to consider voluntary winding up.

Even if your CLG has stopped trading, while it's still registered with ASIC, you must meet the CLG's legal obligations, including paying the annual review fee to ASIC.

Once the CLG is deregistered, it's no longer a legal entity and officeholders (such as directors and secretaries) are removed from any obligations as officeholders.

Is your CLG eligible for voluntary deregistration?

To be eligible to voluntary deregistration, your CLG must satisfy the following requirements:

- all the members of the CLG agree to the deregistration
- the CLG is no longer conducting business or carrying out its activities
- the CLG's assets are worth less than $1,000
- the CLG has paid all fees and penalties payable to ASIC
- the CLG has no outstanding liabilities (for example, unpaid employee entitlements), and
- the company is not a party to or involved in any legal proceedings

It's also recommended that all the CLG's tax and superannuation obligations are up to date.

For more information, see ASIC's webpage 'Deregistering a company'.

The CLG's 'outstanding liabilities' include unpaid employee entitlements such as annual leave, long service leave, payment in lieu of notice, redundancy pay and wages.

Tip

You can check whether your CLG owes ASIC money through one of ASIC's online lodgement systems. Otherwise, check with your registered agent or contact ASIC on 1300 300 630.

Payment of any money owing must be submitted with the application to deregister the CLG.

If ASIC seeks further information in relation to the CLG's former or current officers, the CLG must provide this information.

Note

It's a good idea to deal with the CLG's assets (which will be less than $1,000) before you deregister the CLG.

This will avoid the inconvenience and costs of seeking assistance or approval from ASIC to deal with the deregistered company's outstanding assets. Any assets that remain in the CLG's name after deregistration will ordinarily vest in ASIC or the Commonwealth.

Example – CLG is eligible for voluntary deregistration

You are a director of a solvent company. The company wants to end its operations as it's no longer conducting business or carrying out its activities. The company is considering deregistration and voluntary winding up. The company members will agree to whichever process is in the company's best interests.

The company's assets are worth less than $1,000, the company has no outstanding liabilities, the company is not a party to or involved in any legal proceedings, the company has paid all fees and penalties payable to ASIC, and the company's tax and superannuation obligations are up to date.

The company is eligible for voluntary deregistration. The company decides to proceed with voluntary deregistration as it is simpler and cheaper than winding up.

Example – CLG is not eligible for voluntary deregistration

You are a director of a solvent company. The company wants to end its operations as it's no longer conducting business or carrying out its activities. The company is considering deregistration and voluntary winding up. The company members will agree to whichever process is in the company's best interests.

The company has no outstanding liabilities, is not a party to or involved in any legal proceedings, has paid all fees and penalties payable to ASIC, and its tax and superannuation obligations are up to date. However, the company's assets are worth more than $1,000.

Because the company's assets are worth more than $1,000, the company is not eligible for voluntary deregistration and must proceed with voluntary winding up to end the company.

The process to voluntarily deregister a solvent CLG

Before voluntarily deregistering your CLG, you should take the following action:

- close all bank accounts in the CLG's name, regardless of the balance and whether the company owned the account beneficially or as trustee
- cancel or transfer all registered business names held by the CLG
- transfer, sell or otherwise dispose of all CLG property (for example, vehicles, any interest in land, shares, trademarks, intellectual property, leases, permits) regardless of whether the company property is held beneficially or as trustee
- if the CLG was a trustee, appoint a new trustee and make sure no trust property remains registered in the company's name
- cancel or end any licenses held by the company, and
- conduct searches to make sure the CLG has dealt with all CLG property, including business names

Step 1 **Application**	The CLG or a director or member of the CLG can apply for voluntary deregistration by lodging an 'Application for voluntary deregistration of a company' (ASIC Form 6010) with ASIC. A fee of $47.00 (as at December 2023) must also be paid. If the CLG makes the application, a person must be nominated to receive the notice of deregistration. The full name and address of this nominee must be provided. The ASIC Form 6010 must be signed by the applicant for deregistration. A director or secretary can sign if the applicant is the CLG. If the CLG doesn't satisfy all the deregistration requirements (for example, there are unpaid company fees), ASIC will reject the application.
Step 2 **Notice of intended deregistration**	Once the CLG has lodged the ASIC Form 6010 and paid the applicable fee, ASIC will publish notice of the intended deregistration on its database and website. If the notice is published before the annual review fee is due, the CLG will not have to pay this fee. A CLG should therefore apply for voluntary deregistration at least two weeks before its annual review due date.
Step 3 **Deregistration**	Two months after ASIC's publication of the notice of the proposed deregistration, ASIC will deregister the company. ASIC will give notice of deregistration to the applicant (the director, member or nominated person).

The effects of deregistration

Once a CLG is deregistered:

- it no longer exists as a legal entity and can no longer do anything in its own right
- property owned by the CLG (other than trust property) vests in ASIC
- property held by the CLG on trust vests in the Commonwealth (represented by ASIC)
- the former officeholders no longer have the right to deal with property registered in the CLG's name
- any legal proceedings in which the CLG is a party can't be continued (in so far as they relate to the deregistered CLG), and
- legal proceedings can't be brought against the CLG

Deregistered company property vests in ASIC or the Commonwealth and ASIC is generally the only party legally able to deal with company property after deregistration. This is why it's preferable to deal with all company property before deregistration.

Members' voluntary winding up (liquidation) of a solvent CLG company

If a CLG does not meet the requirements for voluntary deregistration (for example, it has assets worth more than $1,000), the only way to voluntarily end a solvent company is by voluntary winding up (also called members' voluntary liquidation).

A CLG may want to end voluntarily for a variety of reasons, including because:

- it no longer wants to pursue its objectives
- it no longer has enough members, funding or committed people, or
- it has achieved its purpose

The process to voluntarily wind up a solvent CLG

Winding up is a process where a liquidator takes control of the CLG, sells the CLG's assets, distributes the proceeds of sale among creditors and shareholders, and the CLG is deregistered and no longer exists.

Step 1 **Declaration of solvency**	To begin winding up a solvent company, a majority of the directors must make a 'Declaration of Solvency' (ASIC Form 520) and lodge it with ASIC. A 'Declaration of Solvency' means that the directors believe the company will be able to pay all its existing debts in full within 12 months of the start of the voluntary winding up. The ASIC Form 520 must be lodged with ASIC before notices for the meeting of members (see Step 2 below) are sent to members to consider the resolution to wind up the company. It is an offence under the *Corporations Act 2001* (Cth) (**Corporations Act**) to make a false declaration of solvency. Penalties can apply. If you believe that your CLG is insolvent, see part 4 of this guide.
Step 2 **Special resolution**	After the ASIC Form 520 has been lodged, the members must pass a special resolution to wind up the CLG. **Special resolution** means, in relation to a CLG, a resolution: • of which notice as set out below has been given, and • that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution A **notice of a meeting** of a company's members must:

	• set out: – if there is only one location at which the members who are entitled to physically attend the meeting may do so, the date, time and place for the meeting – if there are two or more locations at which the members who are entitled to physically attend the meeting may do so, the date and time for the meeting at each location, and the main location for the meeting, and – if virtual meeting technology is to be used in holding the meeting, sufficient information to allow the members to participate in the meeting by means of the technology • state the general nature of the meeting's business • if a special resolution is to be proposed at the meeting, set out an intention to propose the special resolution and state the resolution, and • if a member is entitled to appoint a proxy, contain a statement setting out the following information: – that the member has a right to appoint a proxy – whether or not the proxy needs to be a member of the company – that a member who is entitled to cast two or more votes may appoint two proxies and may specify the proportion or number of votes each proxy is appointed to exercise **Note**: There may be other requirements for disclosure to members. The CLG must appoint a liquidator and the winding up begins from the date the special resolution is passed. See part 5 of this guide for information on choosing a liquidator. The CLG must lodge a copy of a special resolution with ASIC within 14 days after the resolution is passed. Notice of the resolution to wind up the company must be published on ASIC's published notices website by the end of the next business day after the liquidator is appointed. You will need to subscribe to the website and pay the applicable fee before you can publish a notice. For more information on how to publish a notice, see ASIC's published notices website.
Step 3 **Winding up**	Once the liquidator is appointed, the liquidator takes full control of the CLG. The liquidator then begins winding up the CLG. At any point, if the liquidator thinks the CLG will be unable to pay their debts in full within 12 months, they must: • convene a meeting of creditors • appoint a voluntary administrator, or • apply to the court for the CLG to be wound up in insolvency **Steps after the appointment of a liquidator** On the appointment of the liquidator, control of the CLG passes immediately to them. The liquidator will investigate and assess the CLG finances and affairs. The liquidator will publish notices of the liquidation and contact any creditors. Creditors are informed of their rights and given the opportunity to provide evidence of outstanding debts, as well as any information they may have about the CLG's affairs.

	The liquidator will collect and realise (sell) any assets and will collect and distribute the proceeds of sale. **While a CLG is wound up:** • there must be a notification in all public documents that the CLG is in liquidation by including the expression 'in liquidation' after the name of the CLG • the CLG's property can only be disposed of by the liquidator • legal proceedings against the CLG can't be started or continued without the court's permission, and • depending on the specific circumstances, certain transactions entered into by the CLG for a period before the winding-up could be voidable (not valid and therefore not enforceable)
Step 4 **Completion of winding up**	Once the investigations are completed, the assets have been realised and distributions have been made, the winding up process is complete. Once the winding up of a company is complete, the liquidator must lodge an 'End of Administration Return' (ASIC Form 5603) within a month of winding up and notify members if they have requested, in writing, to be notified of the lodgement of the final return. The company will be deregistered within three months after lodgement of the ASIC Form 5603. At this point the company no longer exists and most outstanding debts or claims are void. Creditors no longer have any claim against the CLG.

See part 6 of this guide for information on:
- the distribution of assets after winding up (liquidation), and
- the consequences of winding up (liquidation)

Part 4

Ending an insolvent company limited by guarantee

Ending an insolvent company limited by guarantee

This part covers:

- options if your CLG is insolvent
- small business restructuring
- voluntary administration
- creditor's voluntary winding up (liquidation)
- simplified winding up (liquidation)
- compulsory winding up by a court

This part of the guide sets out the options available to end an insolvent company limited by guarantee (**CLG**).

Options if your CLG is insolvent

Financial problems or insolvency are serious matters and acting on early warning signs is important. (See the warning signs of insolvency listed in part 2 of this guide).

Note

If you have reasonable grounds to suspect your CLG is in financial difficulty, is nearing insolvency or is insolvent, do not allow the CLG to incur further debt.

You should seek professional accounting or legal advice as early as possible. This increases the likelihood the CLG will survive.

Tip

A registered liquidator or other appropriately qualified specialist insolvency accountant can conduct a solvency review of your CLG and advise on available options.

ASIC maintains a list of registered liquidators, (also see ASIC's webpage 'Registered liquidators').

The Australian Restructuring Insolvency & Turnaround Association (**ARITA**) website also contains information about registered liquidators.

If your CLG is insolvent, you need to be aware of your options so you can make informed decisions about the CLG's future. Options may include refinancing, restructuring, changing your CLG's activities, obtaining equity funding to recapitalise the company or appointing an external administrator.

The options covered by this part of this guide are:

- small business restructuring
- voluntary administration
- creditor's voluntary winding up (liquidation), and
- simplified winding up (liquidation)

Each of these options involves the appointment of a restructuring practitioner, an administrator or a liquidator.

We deal with each option in more detail below.

Small business restructuring

Small business restructuring was introduced as new insolvency process for companies incorporated under the Corporations Act in 2021.

For more information, see the ASIC webpage 'Restructuring and the restructuring plan'

The small business restructuring process allows eligible companies to enter into a restructuring plan with creditors with the assistance of a Small Business Restructuring Practitioner (**SBRP**).

A SBRP is a new class of insolvency practitioner, charged with the role of administering the restructuring process of a small business. This person must be registered with ASIC as a 'registered liquidator'.

The restructuring process allows the directors of a CLG to retain control of the company's business, property and affairs and continue to trade while it develops a plan to restructure the company's affairs. Affected creditors decide whether a restructuring plan should be accepted.

The small business restructuring process is designed to be shorter and less regulated than voluntary administration. The directors remain in control of the company in the small business restructuring process, while the administrator takes control of the company in voluntary administration. The small business restructuring process is also intended to keep the costs lower.

When is a company eligible for small business restructuring?

To be eligible for small business restructuring:

- the company must be incorporated under the Corporations Act
- the liabilities of the company must not exceed $1 million on the day it enters the process
- the company is insolvent or likely to become insolvent at some future time
- the company must be up to date with its employee entitlements (exclusive of leave and other entitlements that are not currently due to be paid)
- the company must be up to date with its tax lodgements
- the company, or any director of the company (or people who have been directors in the previous 12 months), must not have engaged in the small business restructuring process or the simplified liquidation process within the past seven years

The small business restructuring eligibility test is administered strictly.

If a company is behind on its tax lodgements, it needs to get these up to date before entering the small business restructuring process.

What is the cost of small business restructuring?

The cost of the restructuring will vary depending on the company and the complexity of the restructure.

However, the SBRP must offer a flat fee to assist you to prepare the restructuring plan and to put the plan to creditors. You and the SBRP must agree on this cost before the restructuring starts.

Once a plan is agreed by the creditors, the SBRP is paid as a percentage of the disbursements to creditors under the plan. Creditors will be made aware of, and must consent to, this proposed remuneration when voting on a plan.

How does the small business restructuring process work?

There are three phases to the small business restructuring process.

Step 1 **Resolution and appointment phase**	If your company wants to appoint a SBRP and start the small business restructuring process, the directors must resolve that: • the company is insolvent or likely to become insolvent at some time in the future • the company should appoint a SBRP, and • a fixed amount of remuneration of the SBRP for the proposal period The company appoints a SBRP to guide its directors through the process. The SBRP will assess the company to confirm that it is eligible to proceed with SBRP and that it is a suitable solution for the company.
Step 2 **Restructuring phase**	Directors have 20 business days to come up with a restructuring plan while working with the SBRP. There is no set formula for what will be included in the plan. The plan may include a single contribution by the director into a fund and the SBRP will distribute those funds to creditors. The SBRP will send the plan to creditors. Creditors are asked to vote on the plan within 15 business days: either agreeing or disagreeing with the plan. If the majority (over 50% by value that vote) of the creditors agree to the plan, the plan can begin. If the majority of the creditors don't agree to the plan, the company can proceed with simplified liquidation, voluntary administration or creditors' voluntary liquidation. The company can continue to trade during the restructuring phase under the control of the directors.
Step 3 **Plan phase**	If the majority in value of the creditors accept the plan, the plan proceeds. Often that will be a one-off contribution by the director into a fund and the SBRP will distribute those funds to creditors. The period of the plan cannot exceed 3 years. The company can continue to trade during the plan phase under the control of the directors.

Forms of external administration for companies

The most common forms of external administration available to directors are:

- voluntary administration, which may lead to a deed of a company arrangement (DOCA) or liquidation
- creditors' voluntary liquidation, and
- simplified liquidation

Voluntary administration

If your CLG is insolvent, one of your options is to appoint a voluntary administrator before an application for compulsory winding up is made.

Voluntary administration allows insolvent companies to assess their options and pursue the best course of action for both the CLG and its creditors.

An administrator should be appointed as quickly as possible to maximise the chance the CLG will survive.

The major benefits of voluntary administration are that:

- it allows the CLG to gain breathing room from its creditors
- it allows an administrator to investigate the CLG's affairs
- it maximises the chances of the CLG continuing to trade or providing a better return to creditors than if the CLG had been immediately wound up, and
- it helps the directors to minimise the risk of trading while insolvent

During the administration period:

- creditors, including some secured creditors, are prohibited from taking any action against the CLG to recover debts, enforce security interests or have the company wound up
- owners or lessors of property that is being used by or is in the possession of the CLG (including leased premises and goods subject to retention of title or Purchase Money Security Interest (**PMSI**) terms) are prohibited from seizing or reclaiming property (even though they may have contractual rights to do so),and
- guarantees granted by directors of the CLG can't be enforced

The moratorium period allows the company to gain some breathing room from its creditors to proceed with the administration process.

How do you appoint a voluntary administrator?

Step 1

Special resolutions

To appoint a voluntary administrator, the directors must pass special resolutions that:

- in the opinion of the directors voting for the resolution, the CLG is insolvent or is likely to become insolvent at some future time
- the CLG should enter voluntary administration, and
- a voluntary administrator should be appointed

Special resolution means, in relation to a CLG, a resolution:

- of which notice as set out below has been given, and
- that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution

A **notice of a meeting** of a company's members must:

- set out:

	– if there is only one location at which the members who are entitled to physically attend the meeting may do so, the date, time and place for the meeting – if there are two or more locations at which the members who are entitled to physically attend the meeting may do so, the date and time for the meeting at each location, and the main location for the meeting, and – if virtual meeting technology is to be used in holding the meeting, sufficient information to allow the members to participate in the meeting by means of the technology • state the general nature of the meeting's business • if a special resolution is to be proposed at the meeting, set out an intention to propose the special resolution and state the resolution, and • if a member is entitled to appoint a proxy, contain a statement setting out the following information: – that the member has a right to appoint a proxy – whether or not the proxy needs to be a member of the company – that a member who is entitled to cast two or more votes may appoint two proxies and may specify the proportion or number of votes each proxy is appointed to exercise **Note**: There may be other requirements for disclosure to members. A CLG must lodge a copy of a special resolution with ASIC within 14 days after the resolution is passed. The directors must obtain a registered liquidator's written consent to act as a voluntary administrator before the appointment is effective. A voluntary administrator must be a registered liquidator or other appropriately qualified specialist insolvency accountant who is registered with ASIC as a liquidator. See part 5 of this guide for information on choosing an administrator. Once the voluntary administrator is appointed, the voluntary administrator takes full control of the CLG. Two meetings of creditors are required to be held in a voluntary administration.
Step 2 **First meeting of creditors**	The first meeting of creditors must be held within eight business days of the appointment of the administrator. The only official business at the first meeting of creditors is to: • consider the possible replacement of the administrator (which rarely happens), and • appoint a committee of inspection if the creditors determine that they wish to do this The real value of the first meeting is to meet the administrator, ask questions and obtain information about the administration.
Step 3 **Second meeting of creditors and voting**	The second meeting of creditors is more substantive in terms of outcomes. The second meeting must be held five business days before or five business days after the end of the convening period. The **convening period** operates for 20 business days from the date of the administrator's appointment. Therefore, the second meeting of creditors must be held between 15 and 25 business days from the date of the administrator's appointment. In calling the second meeting, the administrator must provide a report to the creditors which: • discusses the CLG's business, property, affairs and financial circumstances • sets out the details of any proposed Deeds of Company Arrangement (**DOCA**) to be put to creditors, and • provides the administrator's opinion on whether it's in the interests of the creditors for the CLG to execute any DOCA which has been proposed, for the administration to

end (and the CLG be returned to the control of its directors) or for the CLG to be wound up, and the reasons for that opinion

The creditors vote on whether:

- the CLG is to be returned to the control of the directors
- the CLG is to enter into a DOCA, or
- the CLG is to be wound up (by a creditors' voluntary liquidation)

A DOCA is a binding agreement between the CLG and its creditors about how the CLG's affairs are to be handled. A deed of company arrangement usually means the CLG will continue.

The administration usually ends when creditors resolve at the second meeting of creditors in favour of one of these options or, if the creditors resolve that the CLG enter into a DOCA, on its execution.

Comparison of small business restructuring and voluntary administration

Small business restructuring was only introduced in 2021. The other main restructuring tool available to CLGs remains voluntary administration.

If a CLG qualifies for small business restructuring, then it's likely to be better for the CLG to use small business restructuring rather than voluntary administration.

The key difference between small business restructuring and voluntary administration is the person taking control of the business. Under small business restructuring the CLG directors remain in control of the business, while under voluntary administration control of the CLG passes to the administrator.

The small business restructuring process is designed to be shorter and less regulated. As a result, it also costs significantly less than voluntary administration.

Key differences between small business restructuring and voluntary administration

	small business restructuring	voluntary administration
Fixed cost?	✓	✗
Directors retain control?	✓	✗
Designed for small business?	✓	✗
CLG returns to directors if deal fails?	✓	✗
Duration	35 business days	35 business days

Creditor's voluntary winding up (liquidation)

If your CLG is insolvent, the directors and shareholders of the CLG may voluntarily enter into liquidation before an application for compulsory winding up is made.

A creditors' voluntary liquidation is used to end the affairs of an insolvent CLG. It is the most common type of liquidation and used in circumstances where a CLG is deemed to be insolvent.

Circumstances that may lead to a CLG's shareholders considering creditors' voluntary liquidation include:

- the CLG is insolvent, or likely to become insolvent
- the voluntary administration has come to an end, or
- a Deed of Company Arrangement (**DOCA**) has been terminated

The major benefit of a creditors' voluntary liquidation is that it allows CLG shareholders to wind up the CLG without a Court order, which can simplify the liquidation process. It also helps the directors to minimise the risk of trading while insolvent.

How do you enter creditors' voluntary liquidation?

Step 1

Special resolutions

A creditors' voluntary liquidation is initiated by the directors and shareholders of the CLG.

The directors call a general meeting of the CLG at which the shareholders vote on entering liquidation.

The shareholders or members must pass special resolutions that:

- in the opinion of the shareholders voting for the resolution, the CLG is insolvent or is likely to become insolvent at some future time, and
- a liquidator should be appointed

Special resolution means, in relation to a CLG, a resolution:

- of which notice as set out below has been given, and
- that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution

A **notice of a meeting** of a company's members must:

- set out:
  - if there is only one location at which the members who are entitled to physically attend the meeting may do so, the date, time and place for the meeting
  - if there are two or more locations at which the members who are entitled to physically attend the meeting may do so, the date and time for the meeting at each location, and the main location for the meeting, and
  - if virtual meeting technology is to be used in holding the meeting, sufficient information to allow the members to participate in the meeting by means of the technology
- state the general nature of the meeting's business
- if a special resolution is to be proposed at the meeting, set out an intention to propose the special resolution and state the resolution, and
- if a member is entitled to appoint a proxy, contain a statement setting out the following information:
  - that the member has a right to appoint a proxy
  - whether or not the proxy needs to be a member of the company
  - that a member who is entitled to cast two or more votes may appoint two proxies and may specify the proportion or number of votes each proxy is appointed to exercise

Note: There may be other requirements for disclosure to members.

A CLG must lodge a copy of a special resolution with ASIC within 14 days after the resolution is passed.

The directors must obtain a registered liquidator's written consent to act as liquidator before the appointment is effective.

A liquidator must be a registered liquidator or other appropriately qualified specialist insolvency accountant who is registered with ASIC as a liquidator.

See part 5 of this guide for information on choosing a liquidator.

Step 2

Winding up

Once the liquidator is appointed, the liquidator takes full control of the CLG. The liquidator then begins winding up the CLG.

If the directors initiate the liquidation and certain eligibility criteria are met, the liquidator may consider whether to adopt a **simplified liquidation process**.

See the next section on simplified winding up (liquidation).

Simplified winding up (liquidation)

Simplified liquidation is one of two new formal insolvency processes introduced by the Federal Government.

Simplified liquidation is a type of creditors' voluntary liquidation. The process can be adopted once a CLG has been placed into a creditors' voluntary liquidation and the CLG meets certain eligibility criteria.

The simplified liquidation process reduces both the cost and time involved in completing a CLG's liquidation, and provides relief for business owners and creditors more rapidly than other liquidation processes.

When is a CLG eligible for simplified liquidation?

Simplified liquidation only applies to CLGs that are being wound up through a creditors' voluntary liquidation, where the winding-up occurs on or after 1 January 2021.

Eligibility for simplified liquidation is measured using a strict test that critically evaluates the CLG before it started liquidation.

To be eligible for simplified liquidation:

- the CLG must be in a creditors' voluntary winding up that started on or after 1 January 2021
- the CLG's liabilities, on the appointment of the liquidator, must not exceed $1 million
- the CLG will not be able to pay its debts in full within 12 months
- the directors must, within five business days of the liquidation starting, give the liquidator:
  - a report on the CLG's business affairs, and
  - a declaration that they believe, on reasonable grounds, that the CLG meets the eligibility criteria for the simplified liquidation process
- no person who is a director of the CLG (or person who has been a director of the CLG up to 12 months before the appointment of the liquidator) has been a director of another company that has used the restructuring process or simplified liquidation process within the preceding seven years
- the CLG has not undergone restructuring or simplified liquidation in the preceding seven years, and
- the CLG has given returns, notices, statements, applications and other documents required under the *Income Tax Assessment Act 1997* (Cth)

How is the simplified liquidation process different to a full creditors' voluntary winding up?

In a simplified liquidation process:

- meetings of creditors are not held in a simplified liquidation process (matters determined by creditors are decided without a meeting through the 'proposal without a meeting process')
- creditors can't form a committee of inspection
- the liquidator must report to creditors within three months of the liquidator's appointment, about:
  - any 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 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.

Compulsory winding up

When can your CLG be compulsorily wound up?

Compulsory winding up occurs when a person or organisation makes an application to the Court for a winding up order.

Compulsory winding up usually happens on one of two grounds:	
Insolvency	An application to wind up a company can be made to court on the grounds that the company is insolvent. This is the most common ground for compulsory winding up.
Other grounds	An application to wind up a company can be made to court if a company is solvent on other grounds set out below.

The Court may order the winding up of a CLG if:

- the CLG has resolved by special resolution that it be wound up by the Court
- the CLG does not start business within one year from its incorporation or suspends its business for a whole year
- the CLG has no members
- the directors have acted in affairs of the CLG in their own interests rather than in the interests of the members as a whole, or in any other manner that appears to be unfair or unjust to other members
- the CLG's affairs are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole
- an act or omission, or a proposed act or omission, by or on behalf of the CLG, or a resolution, or a proposed resolution, of a class of members of the CLG, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole
- ASIC has stated in a report prepared under the ASIC Act that, in its opinion:
  - the CLG cannot pay its debts and should be wound up
  - it is in the interests of the public, of the members, or of the creditors, that the CLG should be wound up
- the Court is of opinion that it is just and equitable that the CLG be wound up

Who can apply to the Supreme Court?

The CLG, a creditor (including a contingent or prospective creditor in certain circumstances) of the CLG, a contributory (a member) of the CLG, the liquidator of the CLG, ASIC (in connection with an investigation under the ASIC Act or in the circumstances set out below), or the Australian Prudential Regulation Authority (**APRA**) may apply to the Supreme Court for an order to wind up a CLG.

ASIC may apply for an order to wind up a CLG if:

- the CLG has no members, and
- ASIC has given the CLG at least one month's written notice of its intention to apply for the order

In most cases, a creditor of a CLG can make an application to the Court for orders winding up the CLG on the grounds of insolvency because the CLG has failed to comply with a statutory demand (information on the statutory demand procedure is below) and is presumed to be insolvent.

The statutory demand procedure

If a CLG owes a creditor a debt or debts that is due and payable and total at least $4,000, the creditor can send a document called a 'Statutory Demand' to the CLG requiring the CLG to pay the debt within 21 days.

Note

If your CLG receives a statutory demand you should urgently seek legal advice from a lawyer specialising in insolvency.

The consequences of doing nothing in response to receipt of a statutory demand can be extremely serious.

If the creditor is relying on a debt that is not a judgment debt (where the creditor doesn't have a court order or court judgment that the debt is due and payable by the CLG to the creditor), the statutory demand must be accompanied by an affidavit that verifies that the debt is due and payable by the CLG. If a creditor is relying on a debt that is a judgment debt, the statutory demand does not need to be accompanied by an affidavit.

If a CLG is served with (given) a statutory demand, it has 21 days after service of the demand to:

- comply with the statutory demand, or
- apply to the Court for an order that the statutory demand be set aside

Any application to set aside a statutory demand must be filed with the Court and served on the creditor within 21 days after service of the demand. The compliance period has been strictly applied by the courts and no extensions of time, or dispensation with these requirements, can be given.

The Court may set aside a statutory demand if:

- there is a genuine dispute as to the debt
- the CLG has an offsetting claim (the CLG has a genuine claim again the creditor that can be used to offset the creditor's claim against the CLG)
- there is a defect in the demand that will cause substantial injustice unless the demand is set aside, or
- for some other reason

If a CLG has applied to set aside a statutory demand, the time for compliance with the demand will automatically be extended until the application has been decided.

If the Court sets the statutory demand aside, the statutory demand will be of no force or effect and no presumption of insolvency will arise as a result of non-compliance.

If the application to set aside is dismissed, the time for the CLG to comply with the statutory demand will be extended until seven days after the date of the dismissal, unless the Court specifies another period.

If a CLG fails to comply with a statutory demand within 21 days, the CLG is presumed insolvent. This means that the Court must presume, subject to evidence to the contrary, that the CLG is insolvent and should be wound up.

Note

If your CLG receives a statutory demand or if creditors (including the ATO) threaten or start legal proceedings, don't ignore them! The court may make an order placing your CLG into liquidation and appointing a liquidator in your absence.

If you are aware of legal proceedings taken against your CLG, seek urgent legal advice.

Example – don't ignore a statutory demand

Kim, a director of a CLG, received a statutory demand addressed to the CLG.

Kim didn't know the importance of the document, so they put the demand in a pile of documents to be dealt with in the future. The statutory demand was left in a pile of document for several months. By this time, the Court had already ordered that the CLG be wound up in insolvency and the appointment of a liquidator.

Example – action in response to a statutory demand

Ron, a director of a CLG, received a statutory demand addressed to the CLG.

Ron immediately contacted the creditor's solicitor (the solicitor's details were on the statutory demand). The director and the creditor's solicitor were able to negotiate payment of the debt by instalments and the solicitor agreed not to pursue winding up the CLG.

The procedure for applying for a winding up order

The creditor who served the statutory demand may rely on the CLG's failure to comply with the statutory demand and the presumption of insolvency as the basis for making an application to a state court or the Federal Court for an order winding up the CLG.

Step 1 **Originating process**	The creditor can start proceedings by preparing and filing with the Court a court application (called an 'Originating Process') which attaches a copy of the statutory demand and any accompanying affidavits in support. The Court will allocate a hearing date for the matter. The creditor must also: • obtain the consent of a registered liquidator to act as liquidator if a winding up order is made (the Court will not make a winding up order until the plaintiff has obtained a registered liquidator's consent to be appointed as the liquidator) • comply with ASIC requirements, and • serve sealed copies of the originating process and supporting affidavits on the CLG within 14 days of filing the application with the Court and not less than five days before the hearing date
Step 2 **Court hearing**	At the hearing, the CLG may appear to request an adjournment (ie. that the matter be heard on another date) or oppose the making of winding up orders. If the CLG intends to do this, it will usually need to file and serve a notice of appearance and a notice stating its grounds of opposition, preferably supported by an affidavit. If the winding up application is not opposed, the Court will usually make a winding up order if it is satisfied that the formal requirements have been met. Even if the formal requirements have been met, the Court may adjourn (ie. decide to hear the matter on another date) or dismiss the originating process, or make any other orders that it thinks fit. If the Court is satisfied that the formal requirements for winding up have been met, the Court may order that: • the CLG be wound up, and • a liquidator (or liquidators) be appointed to the CLG

	Usually, the creditor will have obtained a signed consent to act from a suitable liquidator before the hearing, and the Court will appoint that person as the liquidator. The creditor will: • contact the liquidator and inform them of the order, and • notify ASIC of the order The creditor should also serve a copy of the order on the CLG.
Step 3 **Winding up**	**Steps after the appointment of a liquidator** On the appointment of the liquidator, control of the CLG passes immediately to them. The liquidator will investigate and assess the CLG's finances and affairs. The liquidator will publish notices of the liquidation and contact any creditors. Creditors are informed of their rights and given the opportunity to provide evidence of outstanding debts, as well as any information they may have about the CLG's affairs. The liquidator will collect and realise (sell) any assets, and will collect and distribute the proceeds of sale. **Once a CLG is wound up:** • there must be a notification in all public documents that the CLG is in liquidation by including the expression 'in liquidation' after the name of the CLG • the CLG's property can only be disposed of by the liquidator • legal proceedings against the CLG can't be started or continued without the court's permission, and • depending on the specific circumstances, certain transactions entered into by the CLG for a period before the winding-up could be voidable (not valid and therefore not enforceable)

See part 6 of this guide for information on:
- the distribution of assets after winding up (liquidation), and
- the consequences of winding up (liquidation)

Part 5

Choosing a liquidator or administrator

Choosing a liquidator or administrator

This part covers:

- key factors to consider when choosing a liquidator
- the costs of liquidation or administration

A CLG should choose a liquidator that is a specialist, with significant liquidation experience and a track record of successfully completed liquidations.

Key factors to consider when choosing a liquidator

Cost

As liquidation work is highly regulated, most liquidators adhere to 'High Court Approved' hourly rates. This means that selecting a more experienced liquidator is unlikely to increase the cost of liquidation. Ultimately, the costs of liquidation are discharged from the realised assets of the CLG and are subject to the approval of the creditors. The liquidator will need to demonstrate to the creditors that the fee represents fair value for the work completed.

Experience

Liquidating a CLG can be unnecessarily problematic if you engage a liquidator who lacks significant experience. Liquidation is a highly regulated activity and engaging an inexperienced liquidator brings an unnecessary risk that your liquidator will not complete the work with the necessary professionalism.

Reputation

Treat selecting a liquidator as you would selecting any supplier or company you work with as part of your business. A good way to get good service can be by personal recommendation. Use contacts you have made in your operations and investigate any suggestions. Even if you don't have personal recommendations, reputation is a valuable guide.

Also see ASIC's list of registered liquidators and the Australian Restructuring Insolvency & Turnaround Association (**ARITA**) website.

The costs of liquidation or administration

The costs of the liquidation or administration of a company is an important factor for a director in deciding what to do. This includes whether a director will have to personally contribute any funds to pay for the costs of the liquidation.

The costs of the liquidation will depend on the complexity of the liquidation, which is based on factors such as the company's size, the number of creditors and shareholders and the value of its assets.

The costs of the liquidation will cover a wide range of duties the liquidator performs during that time. The liquidator's duties include:

- advising directors of their duties
- settling legal disputes or any outstanding contracts
- making employees redundant and processing claims for monies they are owed
- collecting debts owed to the business
- investigating transactions that took place before liquidation
- keeping creditors up to date with the progress of the liquidation
- valuing and realising the company's assets
- distributing the proceeds to the company's creditors, and
- lodging the relevant forms with ASIC.

The costs of the liquidation are usually paid from the proceeds of the sale of the company's assets. The payment of a liquidator's costs is generally subject to approval by creditors. If the company has sufficient assets which can be sold to pay the costs of the liquidation, then a director will not have to personally contribute any funds to pay for the costs of the liquidation.

There may be other means where a liquidator may be able to recover funds to pay their costs, such as through pursuing legal claims or recovery actions.

If the company does not have sufficient assets, one or more creditors may agree to pay the liquidator's costs to undertake investigations and to recover additional 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.

If the company does not have sufficient assets and there are no other means of paying the liquidator's costs, the liquidator may ask a director to personally contribute funds to pay for the cost of the liquidation.

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.

Part 6

Consequences of ending a company limited by guarantee

Consequences of ending a company limited by guarantee

This part covers:

- distribution of assets after winding up (liquidation)
- consequences of winding up (liquidation)

How are assets distributed in a winding up (liquidation)?

Funding agreements

Funding agreements may include specific winding up clauses relating to the disposal of assets purchased with funding agreement money.

Irrespective, any surplus property that was supplied by a government agency must be returned to that agency or a body nominated by the agency. If a government agency has provided assets, such as grant funding, the CLG must return the remaining portion to that department or authority or to a body nominated by that department or authority.

Unused grant monies must be returned once outstanding debts, liabilities and (depending on the contract) winding up costs relevant to the funding are paid. Commercial contracts can have clauses which outline exit processes to follow when prematurely ending a contract. These often include exit fees.

Note

If a clause in a funding agreement relevant to winding up the CLG or closing a service is unclear, seek legal advice.

Dividends

In the process of liquidation, the liquidator will obtain control of the CLG, realise (sell) its assets, pay any outstanding debts and distribute surplus money.

The money collected from the sale of company assets is held by the liquidator and distributed as a 'dividend' to outstanding creditors.

Under the *Corporations Act* 2001 (Cth), the rights of employees are given priority over other unsecured creditor claims, and dividends are allocated in the following order:

1. the Liquidator's fees and expenses

2. employee wages and superannuation
3. employee leave entitlements
4. employee retrenchment pay, and
5. unsecured creditors

Each of the above categories must be paid in full before the next category can receive a distribution. If there are insufficient assets to pay a category in full, the affected creditors are paid a pro rata dividend.

Liquidation does not affect a secured creditor's right to enforce their security. However, it's common for secured creditors to allow secured assets to be sold during a liquidation, provided their rights are protected by the Liquidator.

Deductible gift recipient status

If CLG has deductible gift recipient (**DGR**) status, the process to end the CLG remains the same.

All CLGs that have been endorsed by the Australian Taxation Office (**ATO**) as having DGR status are required to have a clause in their constitution dealing with winding up the CLG and the distribution of surplus assets.

This winding up clause will require the CLG to distribute all surplus assets to another DGR fund, authority or institution that has a similar primary purpose to the CLG. The winding up clause will ensure that profits are directed toward achieving the CLG's purpose.

The winding up clause will generally prohibit distributions of profits to members, both while operating and when winding up.

If your CLG has DGR status, check your CLG's constitution and make sure you are complying with it.

Example – distribution to another not-for-profit company that has similar purposes

You are a director of a company endorsed with DGR status which was wound up. The company's constitution included a winding up clause that stated – *if the company is wound up, the company's surplus assets must be distributed to another not-for-profit company that has similar purposes*.

The company's legal purpose as set out in the constitution was 'to prevent food waste at the farm level and to ensure that surplus crops reach people who are experiencing food insecurity'.

There are no other not-for-profit companies with the same purpose. Therefore, your company could distribute surplus assets to a not-for-profit company with a similar purpose such as 'to prevent food waste'.

The consequences of winding up

The consequences of winding up (liquidation) can vary for each party involved in the liquidated CLG.

These consequences apply to:

- a liquidated CLG which was voluntarily wound up while solvent under a members' voluntary liquidation, and
- a liquidated CLG which was wound up while insolvent under a creditors' voluntary liquidation, simplified liquidation or a compulsory winding up by a court

The consequences of winding up for directors

When the CLG enters liquidation, the directors lose control of the CLG and the directors' powers are removed. They can't make business decisions or access the CLG's finances.

The director's role in liquidation becomes one of assisting the liquidator where necessary. This typically involves helping to locate and sell assets.

The CLG is no longer trading, so directors will usually not receive any further pay or benefits from the company. However, they may be able to claim some expenses incurred during the liquidation process.

Under certain circumstances, directors may be liable for debts incurred by the CLG when the CLG is unable to pay those debts. This means that directors may be required to pay debts owed to creditors out of their own pockets.

Credit reporting agencies keep track of insolvent companies who have entered liquidation, alongside the names of the directors of such companies. It is important to note that this is only on your file for seven years.

A director of a liquidated company can usually become a director of another company in the future. However, if a director has been involved with two or more companies that have gone into liquidation within the last seven years and paid their creditors less than 50 cents in the dollar, ASIC may disqualify them from managing corporations for up to five years. This effectively bans a person from acting as a director.

ASIC may also disqualify directors from managing corporations for up to five years where a person is, or has been, an officer of two or more companies within seven years that have relied on the Fair Entitlements Guarantee (**FEG**) scheme to pay employee entitlements. This can happen where the Commonwealth has paid employee entitlements under the FEG scheme and has received minimal or no return and is unlikely to receive more than a minimal repayment of funds paid under the FEG scheme.

For more information, see the Department of Employment and Workplace Relations' webpage Fair Entitlements Guarantee.

ASIC can also apply for orders disqualifying a person from managing corporations for up to 20 years if they have been an officer of two or more companies that have failed within the last seven years, and the way in which the companies were managed contributed to the failures.

ASIC maintains a banned and disqualified persons register.

Once the liquidation is complete, the directors' role with the CLG will end.

Directors of companies in liquidation should seek legal advice to ensure they understand their rights and obligations during the liquidation process.

The consequences of winding up for shareholders

Being a shareholder of a company that enters liquidation has no serious effects, other than the loss of the value of the shares.

The consequences of winding up for creditors

A creditor is a person or entity that is owed money by the CLG in liquidation.

Creditors receive several reports on the process of liquidation, which set out the likelihood of them receiving any distribution or dividend by the liquidator.

The consequences of winding up for employees

All the CLG's employees will lose their employment when the CLG enters liquidation.

Depending on the CLG's situation, if employees are unable to be paid their entitlements, the government can provide assistance to eligible employees under the Fair Entitlements Guarantee scheme (**FEG**).

The FEG is a government legislative safety net scheme of last resort with assistance available for eligible employees. The scheme provides financial assistance to eligible employees who have lost their employment due to the liquidation of their employer and who are owed employee entitlements which are not able to be paid by their employer or from another source.

FEG assistance is only available where there is no other source of funds to pay employment entitlements to eligible employees who lose their employment due to the liquidation of their employer.

The Department of Employment and Workplace Relations can pay what is owed to employees under their terms and conditions of employment for the following entitlements:

- wages – up to 13 weeks
- annual leave
- long service leave
- payment in lieu of notice – up to 5 weeks, and
- redundancy pay – up to 4 weeks per full year of service, noting some governing instruments that provide for redundancy entitlements specify an upper limit.

Some entitlements are subject to maximum thresholds.

The FEG does not cover unpaid Superannuation Guarantee Contributions owed by the employer. If an employee has unpaid employer superannuation guarantee contributions, the employee should:

- contact the insolvency practitioner managing your former employer's affairs to discuss your rights as an employee creditor, and
- visit the ATO website

Other things to consider after winding up

ABN	If your company has an Australian Business Number (**ABN**), you should also consider cancelling this with the Australian Business Register (**ABR**). This will also cancel your registration for goods and services tax (**GST**) and other tax registrations.
Charities	If your company is a charity registered with the Australian Charities and Not-for-profits Commission (**ACNC**), you also need to revoke the charity's registration with ACNC. To revoke the charity's registration with ACNC, you need to: • submit outstanding Annual Information Statements (and annual financial reports, if applicable) for each reporting period that your charity was registered or explain why it is not necessary, and • complete and submit a form to revoke your registration as a charity with the ACNC through the ACNC Charity Portal. The ACNC will decide whether to approve your charity's application to revoke its registration based on its Commissioner's Policy Statement: Voluntary revocation. In some cases, the ACNC has the power to revoke a charity's registration without you applying for this. One example might be if your charity has a liquidator, or a person appointed or authorised under an Australian law to manage the charity because it is insolvent.
Treatment of records	For information about the treatment of records (for example, financial documents, employee information, tax records, financial documents, minutes of meetings, fundraising documents), see our fact sheet on record keeping for charities.

If your organisation is wound up, can you start up again later?

Until the Court has made a winding-up order, the application for winding up can be withdrawn by the person (or organisation) who lodged the application or by the consent of the Court.

After a CLG has been wound up and deregistered, it has two options:

- a director, secretary or member of the CLG can apply to ASIC for reinstatement (if it meets the criteria), or
- a person aggrieved by the deregistration, or a former liquidator can apply to the court for an order that ASIC reinstate the CLG

Application to ASIC for reinstatement (Administrative Reinstatement)

ASIC may reinstate the registration of a CLG if it is satisfied that the CLG should not have been deregistered.

ASIC may also reinstate the registration of a CLG is if the CLG was deregistered for non-payment of the levy imposed by the *ASIC Supervisory Cost Recovery Levy Act 2017* (Cth) and AISC has received an application for reinstatement and payment of the CLG's outstanding levy and related penalties.

To apply to ASIC for reinstatement of a CLG, you:

- must have been a director, secretary or member of the CLG at the time of deregistration
- must be able to confirm that upon reinstatement the CLG will be able to pay its debts as and when they fall due
- cannot be disqualified from managing corporations, and
- must provide supporting documentation as to why the CLG should not have been deregistered (where required)

Application to the Court for an order that ASIC reinstate the CLG (Court Reinstatement)

A person who is aggrieved by the deregistration of the CLG or a former liquidator of the CLG may make an application for reinstatement to the court.

The Court may make an order that ASIC reinstate the registration of a CLG if:

- an application for reinstatement is made to the Court by:
  - a person aggrieved by the deregistration, or
  - a former liquidator of the company, and
- the Court is satisfied that it is just that the CLG's registration be reinstated

Generally, ASIC will not object to an application if the requirements for court reinstatement are satisfied.

If a court makes an order to reinstate a CLG, a copy of the order must be served on ASIC to ensure the reinstatement takes place.

Caution

Seek independent legal advice before making an application to the Court for reinstatement.

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