

Voluntary deregistration or winding up of companies limited by guarantee

Legal information for companies limited by guarantee

This fact sheet covers:

- ▶ voluntary deregistration, and
- ▶ voluntary winding up.

There are many reasons why you may want to end your company limited by guarantee voluntarily. This fact sheet seeks to outline the steps that you need to take when voluntarily deregistering or voluntarily winding up a company.

A company can only voluntarily deregister in limited circumstances, which are listed below, and if those circumstances do not apply then the company must be wound up. The steps for winding up are also outlined below.

We want to end our company limited by guarantee voluntarily. What should we do?

Usually, the members of the company limited by guarantee hold a meeting and decide to bring the company to an end.

How an organisation is ended voluntarily depends on the financial situation when the decision is made.

The *Corporations Act 2001* (Cth) (**Corporations Act**) allows certain companies to end their operations by deregistering without having to go through the formal steps of winding up. This is usually the quickest and cheapest method to end an organisation. However, this option is only open if the organisation is not operating, has virtually no assets and has no liabilities.

If the organisation does not meet the criteria for voluntary deregistration, the only way to end the organisation is to initiate a voluntary winding up. Once the winding up is completed, the organisation will then be deregistered by Australian Securities and Investments Commission (**ASIC**).

NOTE

Always check your organisation's constitution to see whether there are additional requirements to winding up as these are likely to affect how you must undertake this process.

Voluntary deregistration

We think we meet the criteria for voluntary deregistration. How do we do it?

A director, a member or the company itself (by a nominated person) can apply for voluntary deregistration by lodging a Form 6010 "Application for voluntary deregistration of a company" with ASIC if:

- all the members agree to the deregistration
- the company is no longer carrying out its activities
- the company's assets are worth less than \$1,000
- the company has paid all fees and penalties payable under the Corporations Act, and
- the company has no outstanding liabilities and is not party to any legal proceedings.

Once the Form 6010 is lodged and the fee paid, ASIC can request information about the current and former officers (directors and secretary) of the organisation. As long as ASIC is satisfied with the information provided, it will give notice of the proposed deregistration on its database and on the ASIC Insolvency notices website. When 2 months have passed after these notices are given, ASIC can then deregister the company and will give notice of the deregistration to the original applicant (i.e. the director, member or nominated person who originally made the application).



TIP

To download a copy of the application, (Form 6010) go to [ASIC's website](#)

Voluntary winding up

If the organisation does not meet the criteria listed above for voluntary deregistration, the only way to end the organisation is to initiate a voluntary winding up. Once the winding up is completed, the organisation will then be deregistered by ASIC.

When voluntary winding up is proposed, the board members (directors) of the organisation must examine the company's financial position.

If the board decides that the company:

- is expected to be able to pay its debts in the next 12 months, then the board makes a 'declaration of solvency'. In that case, the members get to choose who to appoint as liquidator and are responsible for approving the liquidator's remuneration and receiving reports from the liquidator. This is known as a 'members' voluntary winding up' (or liquidation – the terms 'winding up' and 'liquidation' are often used interchangeably and describe the same process).
- is not expected to be able to pay its debts in the next 12 months, then there is no declaration of solvency. In that case, the creditors can overrule the members' choice of liquidator and become the main point of contact for the liquidator for reporting and decision making during the liquidation. This is known as a 'creditors voluntary winding up' (or liquidation).

Apart from the differences in choosing the liquidator and reporting (and limited decision making powers), there is very little practical difference between the day to day conduct of a members' voluntary winding up and a creditors' voluntary winding up.

Regardless of the solvency of the organisation, a voluntary winding up begins with a special resolution of members that “the company be wound up voluntarily”. For this purpose a meeting of ‘members’ for a company limited by guarantee means a meeting of those people have given the ‘guarantee’.

If the resolution is passed, the day to day running of the organisation immediately passes to the control of a ‘liquidator’, who is normally appointed at the same meeting.

Except with special permission from a Court, a company cannot be wound up voluntarily if:

- an application to wind up the company in insolvency has been filed, or
- a Court has ordered that the company be wound up in insolvency.

Below is a summary of the steps involved in a voluntary winding up of a company limited by guarantee.

NOTE

Winding up is a highly technical process that requires a good understanding of the provisions of the *Corporations Act 2001* (Cth). It will be difficult for an organisation to be sure that it has completed all the necessary steps without first obtaining legal advice or assistance from an accountant with experience in voluntary winding up.

This information is intended to provide only a general summary of the options open to an organisation and what is involved in each of those options. It should not be relied on as a complete guide to undertaking a winding up or any of the other options discussed.



Step 1: Make a declaration of solvency (if you think your organisation can pay all its debts within 12 months)

These are the key steps in making a declaration of solvency:

- the directors must call and hold a meeting of directors
- at that meeting, a majority of all directors (not just those present at the meeting) must resolve that they have formed the opinion that the company will be able to pay its debts in full within a period of not more than 12 months after the meeting of members which will resolve to wind up the company. The directors must have reasonable grounds for forming this opinion, failing which, they may be guilty of an offence
- the directors who vote in favour of the resolution must then sign a written declaration which says 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 a period not exceeding 12 months after the meeting of members which will resolve to wind up the company
- there must be attached to the declaration a ‘statement of affairs’ of the company in the ‘prescribed form’ setting out details of the assets and liabilities of the organisation and the estimated cost of the winding up
- although it is not compulsory, the directors would normally also resolve at the same meeting to hold a meeting of members for the purpose of proposing and voting on a special resolution that the company be wound up, and
- the signed declaration and attached statement of affairs must be lodged with ASIC.

The timing of the declaration of solvency is very important:

- it must be made and lodged before sending out the notices of the meeting of members at which the winding up to be voted on; and
- the meeting of members must be held and the resolution for winding up passed within 5 weeks after the date the declaration is made (unless ASIC agrees to extend that time).

Step 2: Find a liquidator

Regardless of whether your organisation has made a declaration of solvency or not, you need to identify a person to be appointed as liquidator. The person to be appointed must be a “registered” liquidator. In most cases, this will be an accountant who specialises in liquidation work.

For a list of firms that offer liquidation services go to the website of the Australian Restructuring Insolvency & Turnaround Association at www.arita.com.au/in-practice/find-a-firm.

You can also check if the person you are considering is registered by searching the ASIC database.

It is common to appoint more than one person as liquidator, and usually they are appointed on the basis that either can act (that is, “jointly and severally”). This is done so that if one of the liquidators is ill or on leave, there is someone else who can step in without the need to appoint a new liquidator.

A liquidator cannot accept an appointment unless they have first provided the organisation with a written consent to act as liquidator. A person is not permitted to consent to act as liquidator (without permission from a Court) if the organisation owes them (or they or owe the organisation) more than \$5,000, or if they are:

- an officer, employee or auditor of the organisation (or a partner, employee or employer of a person who is an officer, employee or auditor of the organisation), or
- an officer or an employee of a body corporate that holds security over the organisation's property.

Step 3: Hold a meeting of members and pass a special resolution

Once you have identified a liquidator or liquidators and obtained their consent (and, in the case of a members’ voluntary winding up, arranged the declaration of solvency) the next step is to pass the necessary resolutions.

For either a members’ or creditors’ voluntary winding up, the organisation must convene a meeting of members for the passing of a special resolution that the company be wound up voluntarily. The following are the statutory requirements for a valid special resolution for companies limited by guarantee:

- a special resolution can only be passed at a general meeting of members. This can either be the annual general meeting or a special general meeting
- at least 21 days’ notice of the meeting must be given to all members
- the notice should state the text of the proposed special resolution
- the notice must specify the intention to propose the resolution as a special resolution, and

FURTHER READING

For more detail on convening and holding meetings go to Not-for-profit Law’s [Running the Organisation’s page](#)

- the special resolution will only be passed at the general meeting if at least 75% of those members, who vote on the resolution, vote in favour. This includes members who are not actually present themselves but who appoint a 'proxy' to cast votes on their behalf. It excludes those members who abstain from voting.

The liquidator will usually request that the members also be asked to pass a resolution at the same meeting fixing the liquidators' remuneration (or fees and expenses). However, the members are not permitted to fix the liquidators' remuneration until the liquidator has prepared and tabled at the meeting a report setting out the matters the members need to know before they can decide if the proposed remuneration is reasonable, including details of the major tasks to be completed in the liquidation and the costs associated with those tasks.

EXAMPLE

Unless your constitution provides for something different, the notice of meeting will say (as a minimum) something like this:

NOTICE OF MEETING TO WIND UP THE COMPANY

Notice is hereby given that a meeting of members will be held at [time] on [date] at [place] for the purposes of considering and if thought fit passing the following resolutions:

- as a special resolution, that the company be wound up voluntarily, and
- as an ordinary resolution, that [name of proposed liquidator(s)] of [name and address of firm of liquidator] having consented to act, is appointed as liquidator(s) for the purposes of conducting the liquidation.

Step 4: Notify ASIC and the public

The company must:

- within 7 days of the passing of the resolution, lodge a copy of the resolution with ASIC, and
- within 21 days of the passing of the resolution, publish notice of the resolution on the ASIC Insolvency notices website.

Step 5: The liquidator completes the winding up process

It is important to be aware that, once a company passes resolutions that a company be wound up and a liquidator appointed, it starts a process that is very difficult to stop and unwind. And this applies in both a members' and creditors' voluntary winding up. In particular, the moment the resolutions are passed:

- the powers of the directors cease, unless the liquidator agrees that some or all of those powers continue
- the liquidator takes absolute control of the organisation and begins the process of shutting down its activities (including terminating staff and terminating leases of property and equipment), collecting and selling or disposing of its assets and paying off creditors

- the organisation must stop carrying on its usual activities, unless the liquidator thinks that it is necessary for the activities to continue in the short term to maximise the benefits from the disposal of the organisations assets, and
- each officer of the organisation (directors and secretary) must deliver all the records of the company in their possession to the liquidator, meet with the liquidator and provide information about the organisation as the liquidator reasonably requires and cooperate with the liquidator.

Once the liquidator has got control of the organisation's cash and sold all its assets, the liquidator pays all outstanding debts and then pays any surplus funds in the manner provided for in the constitution.

When a company limited by guarantee is wound up without adequate funds to discharge its liabilities each person who is a member at the commencement of the winding up is liable to pay an amount that the member has undertaken to contribute if the company is wound up. This is usually a small amount. If it appears to a Court that members are unable to meet the company's liabilities, persons who have been members within a year before the commencement of winding up are liable to honour their guarantees. But those past members are liable to contribute only towards payment of the company's debts incurred before they ceased to be members: see Part 5.6 Division 2 of the Corporations Act.

Step 6: Notify the Australian Charities and Not-for-profits Commission (ACNC) where required

If the organisation is a registered charity, you will need to notify the ACNC that the charity is no longer in operation and apply to the ACNC to have the organisation's charity registration revoked. You will need to do this by completing and submitting a Form 5A: Application to revoke charity registration. This form can be found on the ACNC's website here: [Wind up my charity](#).

What if the organisation is not solvent?

If no declaration of solvency was made before the notices of meeting were sent out (which means that the liquidation is a 'creditors voluntary winding up'), the liquidator must within 11 days of the members' meeting (i.e., the meeting at which it was resolved to wind up the company) arrange a meeting of creditors who can vote to change the liquidator and set up a 'committee of inspection' to act as a sounding board for the liquidator and approve the liquidator's fees and charges.

If a declaration of solvency has been made, but the liquidator forms the view that the organisation will not be able to pay or provide for all liabilities within 12 months of the declaration, the liquidator must:

- apply to the court for an order that the organisation be wound up as insolvent; or
- appoint a 'voluntary administrator' (discussed further below), or
- call a meeting of creditors (which effectively turns the liquidation into a 'creditors voluntary liquidation').

In any case where the organisation does not have enough cash or assets to pay all its debts, certain debts (for example, the liquidator's fees and expenses and employee entitlements) are paid first, and if there is money left after these debts are paid, all remaining debts are paid in equal proportions until the money runs out.

How often must the liquidator report to the members or creditors?

In a members' voluntary winding up, if the winding up is still going on after 1 year, the liquidator must within 3 months of the end of the first year (and each succeeding year), convene a general meeting of members and provide to that meeting a report about the winding up. The report must include details of what the liquidator has been doing in the preceding year.

In a creditors' voluntary winding up, the liquidator can either convene a meeting of creditors and report in the same way as the report to members in a members' voluntary winding up, or just provide a report to creditors which must be lodged with ASIC. The report to creditors is required to contain additional information if no meeting of creditors is held. In any case, in a creditors' voluntary winding up, there is no requirement to hold meeting of members or report to members. However, a member can obtain a copy of any report to creditors from the ASIC database.

What else does the liquidator do?

In addition to collecting and selling the assets of the organisation etc., the liquidator is also required to investigate the way in which the activities of the organisation have been conducted in the period leading up to the winding up. If the liquidator becomes aware of any misconduct by officers or other wrongdoing in relation to the company (including where certain creditors have been given preference in repayment of debts just before winding up), a liquidator must report this to ASIC and has wide ranging powers to enquire into those matters (for example, by conducting compulsory examinations of people involved with the company). The liquidator can bring legal proceedings on behalf of the organisation in respect of the misconduct or report any concerns to ASIC (or both).

What happens when the winding up process is complete?

As soon as an organisation is fully wound up, the liquidator must prepare a final account and report of the winding up and convene a general meeting of members (in the case of a members' voluntary winding up) or of creditors and members (in the case of a creditors' voluntary winding up) for the purposes of providing the liquidator's account and report to the meeting.

The liquidator must within 7 days after the meeting, lodge with ASIC a return of the holding of the meeting and of its date with a copy of the liquidator's account attached. ASIC must deregister the company within 3 months after the liquidator has lodged the return.

Resources

Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub at www.nfplaw.org.au has further resources on the following related topics:

- Changing or ending your organisation – www.nfplaw.org.au/changingorending

This section of the Information Hub covers the legal issues that organisations should think about when things change, such as changes to an organisation's constitution or rules, changing legal structure or amalgamating or merging with another organisation.

- Running the organisation – www.nfplaw.org.au/runningtheorg

This section of the Information Hub features resources on governance, rules, holding meetings, documents and records, and Secretary's Satchel for running an incorporated association in Victoria.

Other Related Resources

- [Australian Securities and Investments Commission \(ASIC\)](#)
- [Australian Restructuring Insolvency & Turnaround Association](#)
- [Australian Charities and Not-for-profits Commission \(ACNC\)](#)

A Not-for-profit Law Information Hub resource. Access more resources at www.nfplaw.org.au

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