

## **Simplified liquidation Revised legislation – ARITA proposal**

### **Summary of significant changes**

Remove ability to litigate in an SCL (excluding in relation to proof of debt)

#### *Simplify the commencement process*

- Liquidator assesses eligibility and makes a determination as to whether simplified process may be suitable based on information in the ROCAP.
- Creditor information already available in ROCAP – will need to add a question to ROCAP regarding tax lodgements and prior use of simplified or SBR process
- Liquidator adopts simplified liquidation within 20 business days of appointment
- Directors do not have to certify eligibility as information included in ROCAP
- Creditors will have 10 business days from when notice is given to contest the adoption of the simplified liquidation process – at least 25% in value of creditors (excluding related creditors) object to have liquidation revert to normal liquidation.
- ASIC be given the power require the termination of the simplified process – ASIC need to provide reasons for termination.
- Notice should not be provided to members as is currently required – members have no say in the liquidation process so there is no benefit with providing them notice of the simplified liquidation.
- Problems it solves:
  - Currently the process is complex with difficult to understand timeframes. The proposed changes will make timeframes easier to understand.
  - Directors currently have to certify eligibility when in reality it is the liquidator that would determine eligibility as the liquidator understands the eligibility requirements and the process

#### *Extend the simplified process to Court Liquidations*

- Currently the simplified process is only available for creditors' voluntary liquidations.
- Court liquidations should be able to use the simplified process.
- Adoption based on information in ROCAP.
- ROCAP is required to be provided to liquidator within 10 business days (s475) – liquidator to make assessment and adopt simplified liquidation within 20 business days
- Problem it solves: Both low debt creditors' voluntary and court liquidations should be able to be run as simplified liquidations to reduce the costs of the liquidation process. This is particularly important due to the high level of liquidations in which there are sufficient funds to meet the cost of the liquidation process. Encourages directors to comply with their requirement to lodge a ROCAP.

#### *Separate simplified liquidations from small business restructuring*

- Use of a simplified liquidation should not prevent a director from utilising SBRs in the future.

- The simplified liquidation and SBR processes serve very different purposes and the use of one should not limit the use of the other.
- Problem it solves: Will reduce restrictions on the use of simplified liquidations and SBRs.

#### *Increase maximum statutory remuneration*

- Currently the maximum statutory remuneration amount is \$5,000 indexed. This is the amount that can be drawn without having to seek approval of creditors or the court before drawing remuneration.
- The benefit is that the significant costs of preparing a remuneration report and requesting approval do not have to be incurred (noting that a remuneration report and approval is required before any remuneration can be drawn notwithstanding the source of funds).
- To minimise costs in a liquidation, we recommend this amount is increased to \$10,000 indexed which would mean that remuneration approval would not likely be needed on most simplified liquidations – significantly reducing the costs of the remuneration process and thus the liquidation process overall.
- This change would be beneficial, and potentially reduce costs, for all liquidations and not just SCVLs
- Problem it solves: Removes the cost of seeking approval of remuneration for many liquidations.

#### *Give creditors the right to end a simplified liquidation*

- Creditors should have the right to end a simplified liquidation process where they assess that they would be better off having the company subject to a full liquidation process. For example, if litigation is required to make recoverable transactions, creditors should be able to choose whether to end the simplified process to allow for litigation or not.
- Same percentages and who is entitled to vote apply as in objecting to adoption.
- Liquidator still required to end simplified process where company no longer meets eligibility requirements or fraud by directors.
- Problem solved: gives creditors the power to make decisions about how the liquidation is handled.

#### *Improve the dividend process*

- Allow multiple dividends to priority employee creditors only to allow for timely payment of entitlements
- Remove the need for a formal proof of debt process and allow rejection of claims without a formal proof
- Remove need for an ATO clearance (noting that tax affairs have to be up to date prior to adoption of simplified liquidation and ATO will be given the same opportunity as other creditors to submit its claim)
- Problem it solves – allows for employees to be paid promptly, reduces delays with obtaining ATO clearance (can be in excess of 6 mths), reduces the cost of the dividend process

*Clarify investigation, reporting and provision of information requirements*

- Remove the statutory obligation for creditors to have a right to request information
- Clarify the extent of investigations required by the liquidator
- Streamline reporting obligations
- Problems it solves:
  - while creditors should always have a right to discuss the liquidation with the liquidator and obtain information as a stakeholder in the process, removing the statutory obligation to respond would ensure that a small number of creditors do not add significant costs to the process with multiple and/or lengthy requests for information that offer no benefit to the general body of creditors
  - While liquidators do not have a requirement to comprehensively report on the company's business and affairs, it is unclear whether these matters must still be investigated to enable a liquidator to determine if reasonable grounds exist to lodge a misconduct report with ASIC. These investigations create significant costs and are arguably only for the benefit of ASIC. Therefore clarification of investigation and reporting requirements will reduce costs to the liquidation.

## Appendix A: Flowchart – How SLs should work

|                        | Proposed Process   | Additional comments  | Change   | Cost & time savings  |
|------------------------|--|--|--|--|
| Appointment & adoption | Court or Directors initiate the appointment or other triggering event occurs and liquidator appointed  | Every step from triggering event to adoption must occur within 20 business days otherwise simplified liquidation is not an option                      | Process continues to start as normal creditors voluntary liquidation but should be extended to be available in a Court liquidation | <p>In addition to providing significant cost savings, enabling the liquidator to commence a simplified liquidation process and giving creditors the right to opt out provides greater clarity and certainty for the liquidator and removes significant confusion about the current adoption process.</p> <p>The current adoption process is red tape intensive, simplifying the process will streamline the adoption process and remove the additional time added by the current requirements.</p> |
|                        | Directors provide liquidator with Report on Company Affairs and Property (ROCAP).  | Use of the simplified liquidation process will not prevent a director from being able to subsequently use small business restructuring and visa versa. | Include a question in ROCAP for status of tax lodgements and prior use of simplified liquidation process.                          |  |
|                        | Liquidator makes determination to adopt simplified liquidation process based on review of eligibility from information available in the ROCAP and notifies creditors of adoption within 20 business days of appointment. |  | No notification requirements to members  |  |
|                        | Creditors have 10 business days from when notice is given to contest adoption of simplified liquidation  |  | Creditors contest use of the simplified process once adopted, rather than objecting to the adoption                                |  |

|                           | Proposed Process   | Additional comments   | Change   | Cost & time savings   |
|---------------------------|--|---|--|---|
| Investigation & reporting | Liquidator proceeds to realise assets, recover voidable transactions and pursue insolvent trading if in the interests of creditors   |   | Remove ability to undertake litigation in simplified liquidation (except as part of proof of debt process). Liquidator may recommend to creditors and seek resolution by proposal to terminate simplified process and revert to full liquidation if litigation is to be pursued. | Litigation creates significant costs in liquidations, these costs are counterintuitive to a streamlined process and should be removed. Litigation can often add years to a liquidation process. Removing the ability to litigate from the streamlined liquidation process could enable simplified liquidations to be finalised years earlier.   |
|                           | Liquidator may issue proposals seeking approval of resolutions including remuneration (must supply remuneration report), compromise of debts and arrangements longer than 3 months | Objections to proposals being resolved without a meeting do not apply in simplified liquidation                 | Increase statutory maximum remuneration a liquidator may receive without need to obtain approval to \$10,000 (excluding GST) indexed, currently \$5,725 (excluding GST)  | An increase in the maximum statutory fee for streamlined liquidations would remove or limit the reporting and approval of remuneration from creditors. Fulfilling the reporting and approval process has a substantive cost and many liquidators may choose to take a reasonable statutory fee, rather than incurring the additional time and cost of reporting and seeking approval for a streamlined liquidation, particularly considering low asset levels in many liquidations.   |
|                           | Liquidator issues simplified Statutory Report by Liquidator within 3 months of appointment   | Offence report must be lodged with ASIC if liquidator has reasonable grounds to believe misconduct has occurred | Streamline reporting requirements and clarify the extent of investigations required by the liquidator. Remove statutory obligation for liquidator to respond to creditor requests for information, however give creditors right to seek to terminate simplified process.         | While liquidators do not have a requirement to comprehensively report on the company's business and affairs, it is unclear whether these matters must still be investigated to enable a liquidator to determine if reasonable grounds exist to lodge a misconduct report with ASIC. These investigations create significant costs and are arguably only for the benefit of ASIC.<br><br>Similarly, while creditors should always have a right to discuss the liquidation with the liquidator and obtain information as a stakeholder in the process, removing the statutory obligation to respond would ensure that a small number of creditors do not add significant costs to the process with multiple and/or lengthy requests for information that offer no benefit to the general body of creditors. |

|                         | Proposed Process  | Additional comments   | Change   | Cost & time savings   |
|-------------------------|---|---|--|---|
| Dividend & finalisation | If there are sufficient funds, liquidator advertises notice of intention to declare dividend and notify creditors (payment of interim dividends permissible to priority employee creditors and a single dividend for ordinary unsecured creditors). | All recovery actions MUST be finalised prior to dividend being declared as legislation only allows for a single dividend to be declared and distributed to all classes of creditors, including employees  | Remove the requirement to obtain tax clearance from the ATO (noting tax documentation must be up to date to be eligible for simplified process).<br>Remove current optional duplication of advertising for proofs of debt. | While enabling additional dividends to be paid to priority employee creditors will not have any direct time and cost savings, it is unreasonable for employees to have to wait for the conclusion of the liquidation to be paid (noting that not all priority employee amounts can be paid by the Fair Entitlement Guarantee).<br><br>Time and cost savings would be made by removing the requirement to get tax clearance from the ATO (it can still prove for the debt owing and historically it has taken 90-120 days for the ATO to provide clearance) and the need for small creditors to lodge a proof of debt. |
|                         | Liquidator receives and adjudicates on proofs of debt. Creditor may appeal to Court if liquidator rejects all or part of their claim.   | All Court proceedings MUST be finalised prior to dividend being declared as legislation only allows for a single dividend to be declared and distributed to all classes of creditors, including employees | Formal proofs not required - informal proofs/claims can be rejected without need for formal proof.   |   |
|                         | Once all recoveries and any proceedings regarding proof of debt are finalised, liquidator declares final dividend for all classes of creditors (must be first & final for ordinary unsecured creditors), issues notice of declaration and payments  | An ordinary unsecured creditor who does not prove prior to the dividend is not entitled to an equalising dividend   | Priority employee creditors entitled to more than one dividend.  |   |
|                         | Liquidator finalising liquidation and ASIC deregisters company after 3 months   |   |  |   |
| Cessation               | Must cease simplified process if:<br>- eligibility criteria no longer met<br>- company or director engaged in dishonesty which has material adverse effect on interests of creditors<br>- creditors resolve   |   | Extend to include right of creditors to terminate following a resolution by proposal issued at discretion of liquidator or request of creditors (subject to 25% threshold)   | While this would not offer any time or cost savings it would ensure integrity in the system and protect creditor rights.  |

## Appendix B: Structure of Legislation

### Key to change column

M = Move to Act  
L = Leave in Regulations  
D = Delete  
C = Change  
N = New

### Corporations Act

| Current provision  | Change | Edit   |
|--|--------|--|
| <b>Division 3 – Creditors’ voluntary winding up</b>  |        |  |
| <i>Subdivision B--Simplified liquidation process for creditors' voluntary winding up of an insolvent company</i> |        |  |
| 500AAA Meaning of triggering event   | C      | Include appointments by the Court  |
| 500A Liquidator may adopt the simplified liquidation process   | C      | Change the process so that the liquidator adopts simplified process within 20 business days and then creditors have 10 business days to object to the adoption.  |
| 500AA Eligibility criteria for the simplified liquidation process  | C      | Declaration of eligibility not required – liquidator makes determination of eligibility based on information in the ROCAP<br>Previous SBR not a restriction to using a simplified liquidation  |
| 500AB Creditors may request liquidator not to follow the simplified liquidation process                          | C      | Creditors have 10 business days from when notice of adoption of simplified liquidation is given to object  |
| 500AC Liquidator must cease to follow the simplified liquidation process   |        |  |
| 500AD Working out whether the 25% in value of creditors test met   |        |  |
| 500AE Simplified liquidation process   |        | Liquidator does not have to comply with requests for information – only need to send statutory notifications and reports.<br>Liquidator cannot undertake litigation – if litigation is required the simplified liquidation needs to end and convert to a normal liquidation. |

### Corporations Regulations

| Current provision   | Change | Edits   |
|---|--------|---|
| <b>Part 5.5 – Voluntary Winding up</b>  |        |   |
| <b>Division 2 – Simplified Liquidation Process</b>  |        |   |
| <i>Subdivision A - Preliminary</i>  |        |   |
| 5.5.02 Declaration about eligibility for simplified liquidation process and other matters | D      | Declaration of eligibility not required – liquidator makes determination of eligibility based on information in the ROCAP |
| 5.5.03 Eligibility criteria for simplified liquidation process                            | C      | Previous SBR not a restriction to using a simplified liquidation  |
| <i>Subdivision B – Simplified liquidation process</i>                                     |        |   |

| <b>Current provision</b>  | <b>Change</b> | <b>Edits</b>   |
|---|---------------|--|
| 5.5.04 Transactions that are not voidable                                 |               |  |
| 5.5.05 Reports by liquidator  | C             | Streamline reporting requirements and clarify the extent of investigations required by the liquidator. While liquidators do not currently have a requirement to comprehensively report on the company's business and affairs, it is unclear whether these matters must still be investigated to enable a liquidator to determine if reasonable grounds exist to lodge a misconduct report with ASIC. As investigations create significant costs – the liquidator's obligations need to be clarified. |
| 5.5.06 Notice of adoption of simplified liquidation process               | D             | Notice only required if simplified liquidation process is ceased (for whatever reason – ie. creditor objection, ceasing to be eligible, creditor vote to convert to normal liquidation etc). This obligation is covered by reg 5.5.08  |
| <i>Subdivision C – Ceasing of simplified liquidation process</i>          |               |  |
| 5.5.07 Liquidator must cease to follow the simplified liquidation process | C             | Liquidator must also cease simplified liquidation if at any time more than 25% of value of creditors (other than those excluded under 5.5.09) direct   |
| 5.5.08 Transition from simplified liquidation process                     |               |  |
| 5.5.09 Working out whether the 25% in value of creditors test met         |               |  |
| <b>Part 5.6 Winding up Generally</b>                                      |               |  |
| Proof of Debt and dividend process  | C             | <ul style="list-style-type: none"> <li>• Formal proof process to not apply</li> <li>• Informal claim can be rejected in a simplified liquidation</li> <li>• Only one advertisement/notice required for lodging claim and declaring dividend</li> <li>• More than one dividend can be paid for priority creditors</li> </ul>  |

## Insolvency Practice Schedule

| <b>Current provision</b>         | <b>Change</b> | <b>Edits</b>  |
|----------------------------------|---------------|---|
| IPS 60-15 Maximum default amount | C             | Increase the maximum default amount for simplified liquidations to \$10,000 indexed to reduce costs of remuneration approval process in low cost liquidations |

## Other legislation

| <b>Current provision</b>                | <b>Change</b> | <b>Edits</b>   |
|---|---------------|--|
| 260-45 Taxation Administration Act 1953 | C             | <ul style="list-style-type: none"> <li>• Amend to not require a tax clearance in a simplified liquidation</li> </ul> |