

**Guidelines for Applicants Winding up Insolvent Companies in the
Supreme Court of Queensland (Corporations Court) –
Section 459P Corporations Act 2001 (Cth)**

The following procedure is provided as a guide only and does not constitute legal advice.

The fact that a matter satisfies all procedural requirements does not restrict the discretion of a Registrar or Judge.

1. Application for Winding Up (For Non-Payment of Statutory Demand)

If an application to wind up a company is based on insolvency due to non payment of a Statutory Demand for a debt (owed by a corporation) of at least \$2,000, being the *statutory minimum* – (ss 9, 459C, 459E, 459F, 459Q *Corporations Act 2001* (Cth) ('CA')), the Application must:

- (a) Be in accordance with Form 2 – r 2.2(3) sch 1A *Uniform Civil Procedure Rules 1999* (Qld) ('UCPR'). Form 2 can be found at the Queensland Courts' website under Forms '*Corporations Act 2001*'.

<http://www.courts.qld.gov.au/forms>

- (b) Exhibit a copy of the Statutory Demand and:
- (i) Where the statutory demand relates to a judgment debt, a copy of the judgment debt; OR
 - (ii) Where the statutory demand does not relate to a judgment debt, be supported by an Affidavit verifying that the debt or a stated component of the debt is still due and payable by the respondent company – s 459Q CA;
- (c) Set out the particulars of service of the Statutory Demand and the failure to comply with the Statutory Demand – s 459Q CA;
- (d) Be filed after 21 days from the date of service of the Statutory Demand (s 459F(2)(b) CA); or where an application to set aside the statutory demand has been made under s 459G CA, be filed after the conclusion of the period for compliance prescribed by s 459F(2)(a) CA;
- (e) Be filed within 3 months after the 21 day period for satisfying the Statutory Demand – s 459C(2)(a) CA;
- (f) Be determined within 6 months of the application being lodged – s 459R(1) CA. An application for an extension of time can be made, as long as that application is made within the 6 months and can demonstrate special circumstances justifying the extension – s 459R(2) CA.

Pursuant to s 459E(2)(e) CA a Statutory Demand must be in the prescribed form. The prescribed form for a Statutory Demand can be found in sch 2 of the *Corporation Regulations 2001* (Cth)('CR').

Unless there is a Judgment Debt, a Statutory Demand must be accompanied by an Affidavit of Debt – s 459E(3) CA. This Affidavit of Debt must be in accordance with Form 7 – r 5.2 sch 1A UCPR. Form 7 can be found on the Queensland Courts' website under Forms '*Corporations Act 2001*'.

<http://www.courts.qld.gov.au/forms>

2. Affidavit in Support of Application for Winding Up

An application to wind up an insolvent company should be supported by an Affidavit stating the facts in support of the application – r 2.4 sch 1A UCPR;

Pursuant to r 5.4 sch 1A UCPR the supporting Affidavit must:

- (a) verify service of the statutory demand on the company;
- (b) verify the failure of the company to comply with the statutory demand;
- (c) verify to what extent the debt to which the statutory demand relates is still due and owing;
- (d) be sworn/affirmed within the 7 days before the application was filed;

Also a supporting Affidavit must exhibit an ASIC search of the respondent company carried out no earlier than 7 days before the application is filed – r 2.4(2) sch 1A UCPR. (NB: 'no earlier than 7 days' means the search must not be older than 7 days when Application is filed)

Form 7A is an example of a supporting Affidavit. Form 7A can be found at the Queensland Courts' website under Forms '*Corporations Act 2001*'.

<http://www.courts.qld.gov.au/forms>

3. Affidavit of Service of the Statutory Demand

Where the person deposing the supporting Affidavit did not themselves serve the subject company with the Statutory Demand; a separate Affidavit of Service of the Statutory Demand, exhibiting the Statutory Demand and accompanying Affidavit of Debt or copy of the Judgment Debt, will need to be filed with the application.

4. Affidavit of Service of the Application

The application must be served as soon as practicable –at least 5 days before the hearing date – r 2.7 sch 1A UCPR.

A corporation may be served by posting a copy or leaving a copy of the Application and any supporting Affidavit at the company's registered address – s109X CA.

An Affidavit of Service must be filed confirming service of the Application.

For a corporation with its registered address outside Queensland, s 9 *Service and Execution of Process Act 1992 (Cth)* ('SEPA') provides that service can be by post or leaving the documents at the company's registered address. A Form 1 notice under s 16 SEPA must be served with the documents. Form 1 can be found in Schedule 1 of *Service and Execution of Process Regulations 2018 (Cth)*.

Section 17 SEPA provides that a corporation has 21 days to enter an appearance, although this period may be shortened on application to the Court.

5. Notification to ASIC

The applicant must notify ASIC of the winding up application no later than 10:30am on the next business day after filing the application – s 470(1)(a) CA.

An Affidavit to this effect must be filed in the proceedings, exhibiting a copy of the notification to ASIC (ASIC Form 519).

Section 470(1)(b) CA requires the applicant to notify ASIC within 2 business days of the winding up order being made (and provide details of the liquidator), or advise ASIC of any withdrawal or dismissal of the application.

Section 470(2) CA requires the applicant to lodge/serve a copy of any winding up order on ASIC, the subject company and any liquidators appointed, within 7 days of the winding up order being made. The liquidators are to be provided with a statement of service of the order upon the subject company.

6. Publication of Application

The application must be advertised/published – s 465A(c) CA.

Publication can be undertaken on ASIC's website - Insolvency Notice pursuant to s 1367A CA and reg 5.6.75 CR

There is no requirement that a notice of an application under ss 459P, 462 or 464 be published in a daily newspaper of the State where the respondent company has its principal place of business – r 5.6(1) sch 1A UCPR; reg 5.6.75 CR

Pursuant to r 5.6 sch 1A UCPR the publication of notices must be in accordance with Form 9 and must be undertaken –

- (a) at least 3 days after service of the application upon the respondent; and
- (b) at least 7 days before the hearing date.

Form 9 can be found on the Queensland Courts' website under Forms for the '*Corporations Act 2001*'.

<http://www.courts.qld.gov.au/forms>

An affidavit verifying publication must be filed in the proceedings – r 2.12 sch 1A UCPR.

7. Consent of the Liquidators

Written consent of liquidators must be obtained prior to them being appointed in a winding up order – s 532(9) CA.

The written consent of the liquidators must be in Form 8 – r 5.5(2) sch 1A UCPR. Form 8 can be found on the Queensland Courts' website under Forms 'Corporations Act 2001'.

<http://www.courts.qld.gov.au/forms>

The written consent of the liquidators must be filed before the hearing of the application and must be served upon the respondent company at least 1 day prior to the hearing – r 5.5(3) sch 1A UCPR.

8. Outline of Submissions and Draft Orders

An Outline of Submissions and three (3) copies of the Order sought should be handed up at the hearing. Submissions should address any specific issues that have arisen and would reasonably impact on the Registrar granting the relief sought. It is always prudent for practitioners to prepare submissions they would feel comfortable providing to a Judge, as the Registrar may exercise their discretion to refer the matter onto the Applications Judge for determination. Should amended draft orders need to be provided, they can be emailed to Corporations.Clerk@justice.qld.gov.au

Where possible documents (3-7) should be filed prior to the hearing date, rather than seeking the court's leave to file these documents at the hearing of the application