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Personal & Corporate Insolvency Update

Major Insolvency Administrations

Companies

- Liquidations
- Administrations / DOCA's
- Receivership

Individual

- Bankruptcy
- Personal Insolvency Agreements

Corporate Insolvency Administration'S

- Liquidator
- Administrator / DOCA
- Receivership

Liquidation

- Members Voluntary Liquidation (Solvent Entity)
- Creditors Voluntary Liquidation (Insolvent Entity)
- Court Winding Up (Insolvent Entity)

Members Voluntary Liquidation (MVL)

- As stated the Winding Up of a solvent company.
- Quite often used to Wind Up farming operations traded through a Company to assist with inter generational transfers to siblings etc.
- Tax effect of all administrations subject to specific circumstances and in each instance it is recommended parties obtain their own independent tax advice.

Creditors Voluntary Winding Up (CVL)

- A CVL is the voluntary winding up or liquidation of a company by its members at a meeting convened by the Directors with the recommendation that as a company is unable to pay its debts as and when they fall due it should be wound up.
- Once this resolution is passed at the meeting, the company is wound up and a liquidator appointed for the purpose of realising the company's assets and undertaking the appropriate investigations into the Company's affairs on behalf of the creditors

Court Winding Up

- This is very similar to a CVL except it is the winding up of a company initiated by a creditor, who makes an application to the Court after satisfying various procedural requirements.
- Enables creditors to appoint preferred liquidator but otherwise provides no additional advantage except in some instances to stop the clock ticking in the event there may be preferences of void transfers etc.

Personal Exposure of Director of Company that is Placed into Liquidation

- MVL None
- CVL Personal Guarantees provided and breaches of Insolvent Trading Provisions ie: Sect 588G of the Corporations Act
- Court Winding Up As with CVL

Insolvent Trading – Sect 588G

- **Director's duty to prevent insolvent trading by company**

(1) This section applies if:

- (a) a person is a director of a company at the time when the company incurs a debt; and
- (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
- (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
- (d) that time is at or after the commencement of this Act.

Common Indications of Insolvency

- A history of dishonored cheques.
- Suppliers insisting on COD terms.
- The issue of post dated or round sum cheques.
- Special arrangements with creditors.
- Inability to conduct timely, audited accounts.
- Unpaid group tax, workers compensation premiums or superannuation contributions.
- Demand from bankers to reduce overdraft and other evidence of deteriorating relations with bankers.
- Receipt of letter of demand, statutory demands and court processes for debts.

Identifiable Offences

- Failure by officer to exercise a reasonable degree of care & diligence in the exercise of his powers and the discharge of his duties.
- Failure to act in good faith.
- Making improper use of position as an officer or employee, to gain directly or indirectly an advantage.
- Reckless or intentional dishonesty in failing to exercise duties in good faith for proper purpose. Use of position or information dishonestly to gain advantage or cause detriment.

Recovery Options

- Preferential payments
- Uncommercial Transactions
- Unfair Loans
- Arrangement to avoid employee entitlements
- Unreasonable payments to directors
- Voidable charges
- Insolvent Trading

Farm Debt Mediation Act of 1994 No 91

- The Farm Debt Mediation Act does not apply to a farmer being a Corporation that is an externally administered Corporation within the meaning of the Corporations Act 2001.
 - A company that is being Wound Up
 - In respect to property a receiver has been appointed
 - A Company that is under administration
 - That has executed a DOCA

Voluntary Administrations

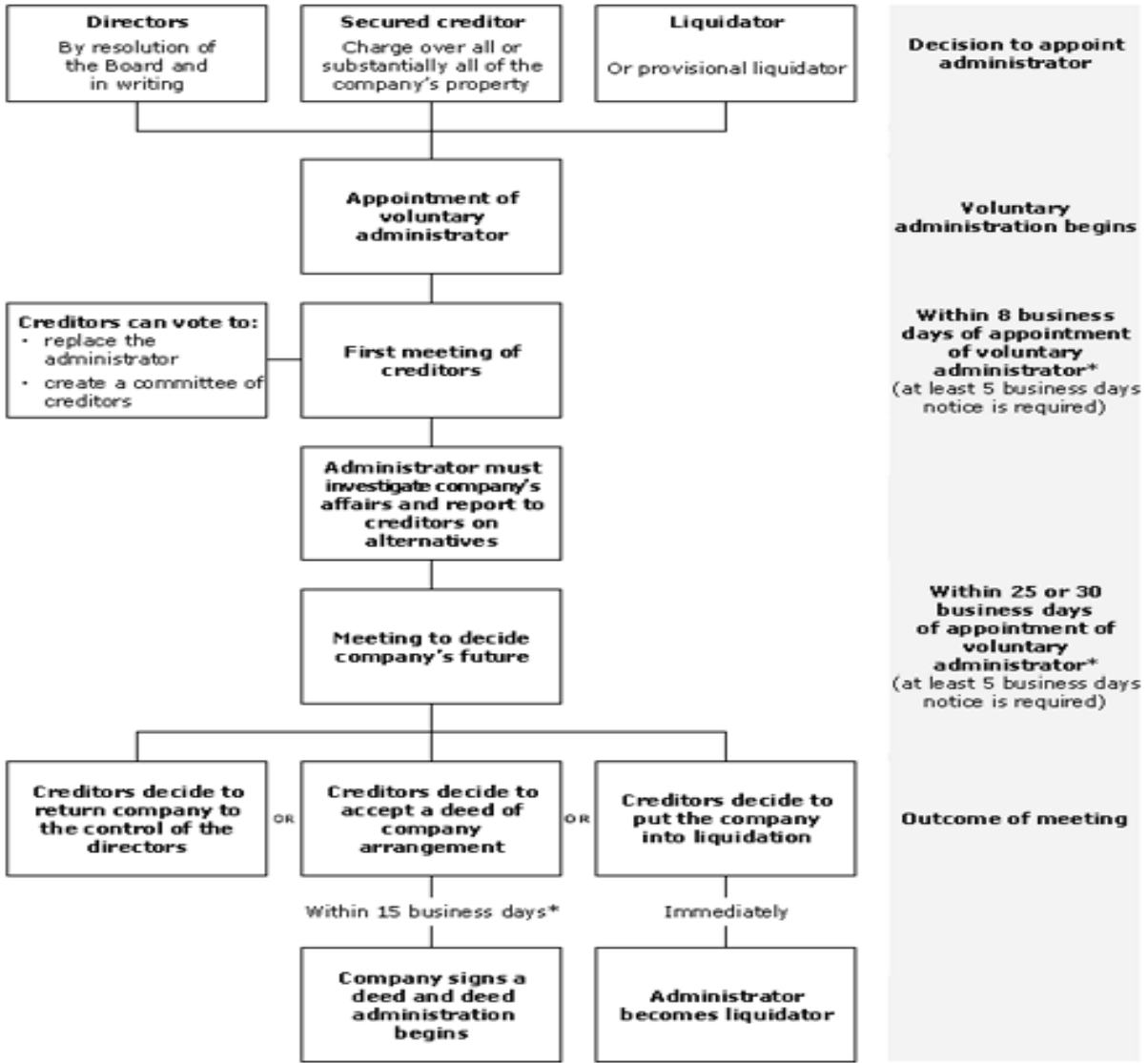
Methods of Appointment of Voluntary Administrations (VA)

- By Directors resolving that the Company is either insolvent or may be insolvent at some future stage.
- By a secured creditor who has a security over a majority of the Company's assets.
- By a liquidator of the Company.

Purpose of Voluntary Administrations

- Designed to enable the appointment of an independent person (ie: qualified liquidator) to a company's affairs to determine within a relatively short period (approx 35 days) whether the company has some capability to trade on via a proposed Deed of Company Arrangement (DOCA) or it be in creditors best interest it be wound up.
(Has a duty to all creditors ie: secured & unsecured)

The Voluntary Administration Process



Receiverships

- Appointment made by secured creditor in respect to its charge position, however those farm debt mediation provisions apply prior to a secured creditor making such an appointment (Not normally if through an administrator)
- Has responsibility only to secured creditor and does not address unsecured creditors position, nor halt any course of action by unsecured creditors.

Bankruptcy

What is Bankruptcy?

Bankruptcy is a procedure by which an individual or partnership can effectively obtain a release of all their provable debts if they are in a position where they are unable to service them.

Advantages of Bankruptcy

- You can make a fresh start
- Most debts are wiped in bankruptcy
- Ordinary household goods are protected
- Tools of trade up to \$3,350 are protected
- Low income earners are not required to make contributions
- Legal action & harassment stops
- Unsold seized goods are returned
- You can maintain bank accounts
- Superannuation is generally protected

Advantages of Bankruptcy (Cont'd)

- You may keep a car up to \$6,700 in value
- Personal injury money is protected
- Property purchased with your personal injury money is generally protected
- Property and money held in trust is protected
- Equity in home if current Defence Service Home loan finance is in place
- Travel within Australia is unrestricted
- Property of non-bankrupt spouse is protected
- Basic jewellery is protected
- Generally able to keep your passport

Disadvantages of Bankruptcy

- Some assets, such as shares, investments, real estate, cars, etc may be sold
- You cannot travel overseas without permission
- Your passport may be taken if considered a flight risk
- High income earners may be required to make contributions
- Your guarantors and co-borrowers will still be responsible for the debts
- Lottery & other prizes, inheritances, gifts and gifts of money or other assets may be taken by the Trustee during your bankruptcy

Disadvantages of Bankruptcy (Cont'd)

- Lose tax refunds earned prior to bankruptcy
- The Trustee may take substantial savings
- Finance may be difficult to obtain during and after bankruptcy
- Have to resign as Director of companies
- You are in bankruptcy for three years
- Bankruptcy is noted on your credit file for three years and a further four years as a discharged bankrupt
- Your bankruptcy is listed forever on the National Personal Insolvency Index
- If you do not cooperate with your Trustee the bankruptcy can be extended to 5 or 8 years

Disadvantages of Bankruptcy (Cont'd)

- You cannot operate a business without the permission of your Trustee
- Lose equity on Defence Service Mortgage if paid out during bankruptcy period
- You cannot write cheques above \$4,739 in value
- You cannot borrow over \$4,739 without disclosing your bankruptcy status
- There are employment restrictions

Possible Employment Restrictions

- Director of a company
- Significant managerial position
- Lawyer
- Accountant
- Sheriff
- Police
- Real estate agent
- Armed forces
- Some public servant positions
- Politician
- Licenced employees, eg tradesmen
- Check with your union or association to see if bankruptcy will affect your position

Provable & Non Provable Debts

Provable

- Personal debts eg, loans, credit cards
- Joint debts
- Secured debts
- Guaranteed debts
- Private debts to family, friends, etc
- Rental and lease debts
- Tax debts
- Electricity, gas, phone and water debts
- Car accident debts once established
- Forgotten debts
- Statute barred debts
- Non Fraudulent Centrelink debts

Provable & Non Provable Debts (Cont'd)

Non Provable

- Court fines
- Unliquidated damages
- Personal injury claim debts
- Student assistance loans
- Child Support Debt
- Fraudulent debts where a person lied on a loan application form
- Centrelink overpayments where fraud or deliberate misinformation is involved
- Department of Veteran Affairs
- Council Rates (secured by property)

What Income Can I Earn in Bankruptcy?

Base Income Threshold Amount

<i>No. of Dependents:</i>	0	\$42,242.20
	1	\$49,845.80
	2	\$53,647.59
	3	\$55,759.70
	4	\$56,604.55
	<i>Over 4</i>	\$57,449.39

Other Relevant Information

- Interests in Deceased Estates can be lost
- Exceptional circumstances grant may be affected
- Experiencing some difficulty in renting property
- Property transfers are subject to scrutiny
ie: Undervalue 2 years (4 years related party and extends to 5 years if insolvent) or if with intent to defeat creditors – Infinite

Exceptional Circumstances Exit Grant

(ie: \$150,000 to eligible farmers who applied between 25/09/07 and 30/06/09)

- Research would suggest DAFF approached the AGD back in 2007 to seek support to have the bankruptcy regulations amended to protect the Exceptional Circumstances Exit Grant.
- However, in a letter from DAFF's minister at the time, he disagreed with this application as he wished the Exit Grant to "be an incentive for farmers to consider early action to establish their lives off the farm. To protect an exit grant from any future bankruptcy action may act as a deterrent to farmers taking early action". The AG subsequently agreed.

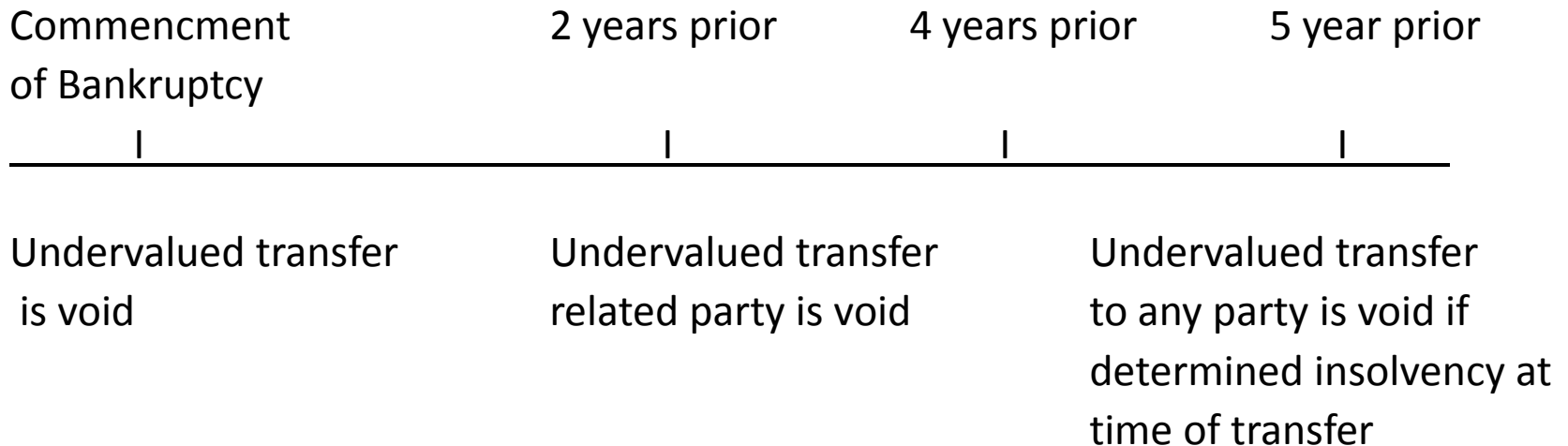
Position in Bankruptcy

Appreciating the Exceptional Circumstances Exit Grant is not therefore afforded any protection on its face the fact that it is a payment subject to taxation and the ATO classes it as income and if cash at bank would be by definition be accumulated income and would not vest in the Trustee in Bankruptcy regardless of whether it was received pre or post bankruptcy but may be subject to those income contribution obligations as previously outlined.

Undervalued Transfers

- Section 120 (3) a) i) & ii) extends the (2) two year period to (4) four years if the undervalued transfer is to a related party regardless of state of solvency with the (5) five year rule to remain.

ie:



Bankruptcy Statistics

<u>Year</u>	<u>Bankruptcy</u>	<u>Part X/PIA</u>
• 97/98	24,408	507
• 98/99	26,376	495
• 99/00	23,306	390
• 00/01	23,907	380
• 01/02	24,109	439
• 02/03	22,637	251
• 03/04	20,496	261
• 04/05	20,507	206
• 05/06	22,300	173
• 06/07	25,243	197
• 07/08	25,981	309
• 08/09	27,503	409

Personal Insolvency Agreements (P.I.A.)

- A P.I.A. is any proposal a debtor wishes to put to his creditors that they by majority in number and 75% in value of those in attendance at a meeting duly convened agree.
- Normally involves the introduction of third party monies that would not be available in bankruptcy and can provide also those void disposition provisions apply, so if there has been any prior breach creditors are not disadvantaged.
- The period a P.I.A. can run for is totally flexible, however not normally in excess of (3) three years.