

MANAGING THROUGH COVID-19

CPA AUSTRALIA UPDATE WEBINAR

16 April 2020

PRESENTERS

CPA Australia

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Deloitte Financial Advisory

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Robert Woods, Partner Restructuring Services

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AGENDA

CPA Australia Update

- Regulatory Relief - Early Access to Superannuation
- Community Campaign
- CPA Australia Policy and Advocacy, Resources

Deloitte Financial Advisory Serives

- Insolvency 101

Questions

REGULATORY RELIEF – EARLY ACCESS TO SUPER

REGULATORY RELIEF – EARLY ACCESS TO SUPER

- Over 600,000 people have registered their interest to access their super early
- This is an important decision and also has future consequences
- Under the *Corporations Act 2001*, this advice is financial product advice and could only be provided by an appropriately licensed financial adviser
- It would also require a statement of advice to be provided
- There is a need to ensure that people have access to affordable advice in order to make an informed decision
- Strong need for regulatory relief to enable this to occur

REGULATORY RELIEF – EARLY ACCESS TO SUPER

- ASIC has provided temporary relief

Registered Tax Agents (RTAs)

- Can provide advice to existing clients about early access to super, without the need to be authorised under an AFS licence
- Must ensure they have the competence to provide this advice (TASA code of Professional Conduct)

Financial Advisers

- Do not need to provide a statement of advice when providing advice about early access to super

REGULATORY RELIEF – EARLY ACCESS TO SUPER

Conditions for RTAs and Financial Advisers

- Must provide client record of advice (ROA)
- Fee capped at \$300 – key concern is affordable advice given people seeking advice on accessing super due to financial distress
- Must establish that the client is entitled to the early release of their superannuation
- The client must have approached the advice provider for the advice
- ASIC will monitor market developments, consult and provide 30 days notice before revoking relief

REGULATORY RELIEF – EARLY ACCESS TO SUPER

Record of Advice Requirements

Must include:

- brief particulars of the recommendation and basis on which the recommendation is made, including:
 - If the client satisfies an eligible ground for the early release of super
 - based on the client's circumstances, if they should apply for early release and why; and
- if recommend access early release of super, the name of the super fund or retirement savings account (RSA) to which the recommendation relates and the implications for the client in releasing their benefits early, e.g. impact on future balances, insurance considerations

REGULATORY RELIEF – EARLY ACCESS TO SUPER

Record of Advice Requirements

Also must provide the client:

- information about remuneration or benefits that the advice provider or an associated entity will receive which might reasonably be expected to be capable of influencing the advice, and
- information about any conflicts of interest which might reasonably be expected to be capable of influencing the advice
- CPA Australia is working to provide further guidance for members, which will be available soon
- Need for relief and challenges also strongly demonstrates the impact of regulatory burden on providing advisory services to clients

ADDITIONAL RELIEF

Financial Advisers

ASIC has provided temporary relief to allow the provision of an ROA to existing clients even though:

- the clients' personal circumstances have changed as a result of the COVID-19 pandemic, and
- the client sees a financial adviser from the same AFS licensee or practice, not their original adviser

POLL QUESTION

Q. If a client approaches you for advice whether they should seek early access to super, will you?

- A. As an RTA, provide advice under the conditional relief
- B. As a financial adviser, provide advice under the conditional relief
- C. As an RTA, refer my client to a licensed financial adviser
- D. As a financial adviser, provide advice under the normal SOA requirements
- E. Not provide advice and direct the client to ATO or other resources to make their own decision

COMMUNITY CAMPAIGN

COMMUNITY CAMPAIGN

- With the ongoing impact of COVID-19, there is a need to ensure that small and medium business seek professional advice
- This includes advice to understand the potential support that may be available to them from the various state and federal government stimulus packages
- Importantly, it is also to consider cash flow, liquidity needs and strategies to plan tailored to their business
- We know that public practitioners are extremely busy with current client demand
- However, wanted to ensure that we encouraged SMEs to seek advice from a professional accountant

COMMUNITY CAMPAIGN

- 15 and 30-second television commercials will run during the early evening news for four weeks from Friday 17 April (metro and regional):
 - Seven Network
 - Nine Network
 - Network 10, and
 - SBS
- Also we will run social media advertising, using short and shareable videos to convey our message
- We will continue to provide up-to-date and relevant resources

POLL QUESTION

Q. If CPA Australia developed resources you could brand and provide to your clients, which of the following would be most valuable?

(You can select more than one response)

- A. Checklist for client eligibility for stimulus packages
- B. Checklist guide for JobKeeper
- C. What can 'I' apply for (SME focus)
- D. How to calculate turnover
- E. I would not use these resources

CPA AUSTRALIA RESOURCES

ESSENTIAL ROLE OF ACCOUNTANTS

- CPA Australia is proactively advocating for members
- Accountants are playing an essential role supporting businesses and the community respond to the unprecedented economic impact of COVID-19
- [Read our submission](#) to the Coronavirus Business Liaison Unit and the Federal Treasurer detailing this essential role and requesting that accountants be permitted to continue operating as an essential service
- [Read our submission](#) Request for deferrals and penalty waivers - The joint bodies submitted a letter to the Commissioner of Taxation requesting lodgement deferrals and penalty waivers in response to the COVID-19 crisis
- View all submissions at <https://www.cpaaustralia.com.au/coronavirus-covid-19-impact-resources-support/covid-19-sources-of-government-advice>

BUSINESS ADVICE GRANTS / VOUCHERS

- We know that many members are experiencing challenges with clients unable to afford or pay for their advice and services – at a time when they need your advice the most
- We also know that you yourself are small business owners
- Some states are providing some financial assistance to support small business access advice
- CPA Australia and CA ANZ has written to the Coronavirus Business Liaison Unit seeking a uniform approach between the Commonwealth and the State governments to make appropriate financial support available to all small businesses
- Advocating for a voucher system that businesses can use to seek advice from their professional accountant
- View our [submission](#)

CPA AUSTRALIA SUPPORT

To keep up to date, visit CPA Australia's [COVID-19 WEBPAGE](#)

It includes:

- Up to date summaries of all stimulus measures announced by [FEDERAL GOVERNMENT](#) and the [STATE AND TERRITORY GOVERNMENTS](#)
- [FAQs ON THE JOBKEEPER PAYMENT AND CASH FLOW BOOST](#)
- [COMPARISON OF PAYROLL TAX CHANGES](#)
- [RESPONSES OF REGULATORS TO COVID-19](#)
- [CHECKLIST OF POSSIBLE ACTIONS TO HELP YOUR BUSINESS MANAGE THROUGH COVID-19](#)
- [SETTING UP YOUR VIRTUAL OFFICE](#)

CPA AUSTRALIA SUPPORT

UPCOMING SUPPORT FOR MEMBERS:

- More webinars
- More resources for business
- More information on what Government is doing
- More articles for In The Black
- More submissions to Government

DELIOTTE FINANCIAL ADVISORY SERVICES QUESTIONS

DELIOTTE FINANCIAL ADVISORY SERVICES

INSOLVENCY 101

OVERVIEW

- Insolvency trends
- Indicators of financial distress and insolvency
- Director duties
- Temporary Federal Govt Measures
- Corporate insolvency
- Safe harbour
- Illegal phoenixing laws
- Personal insolvency



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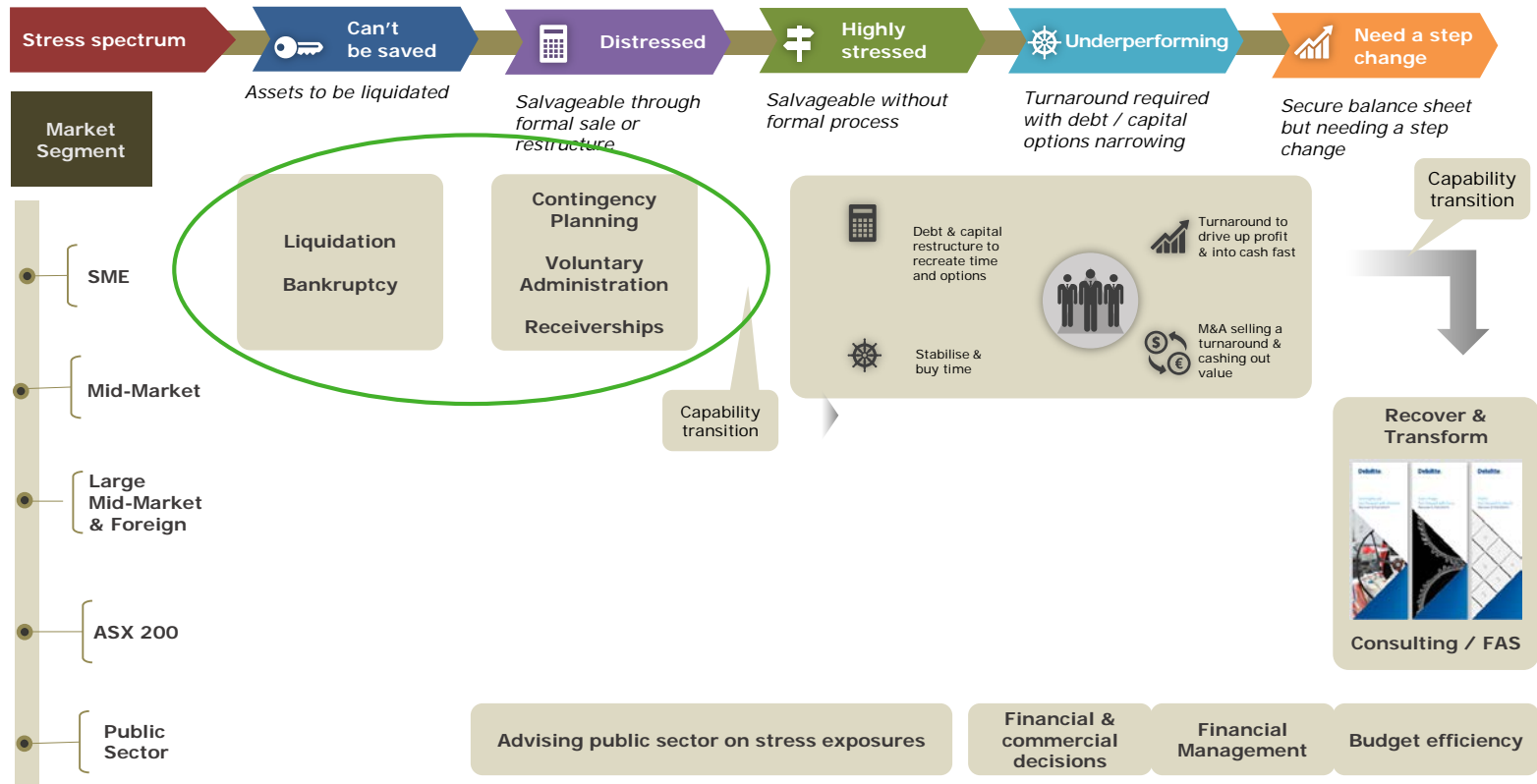
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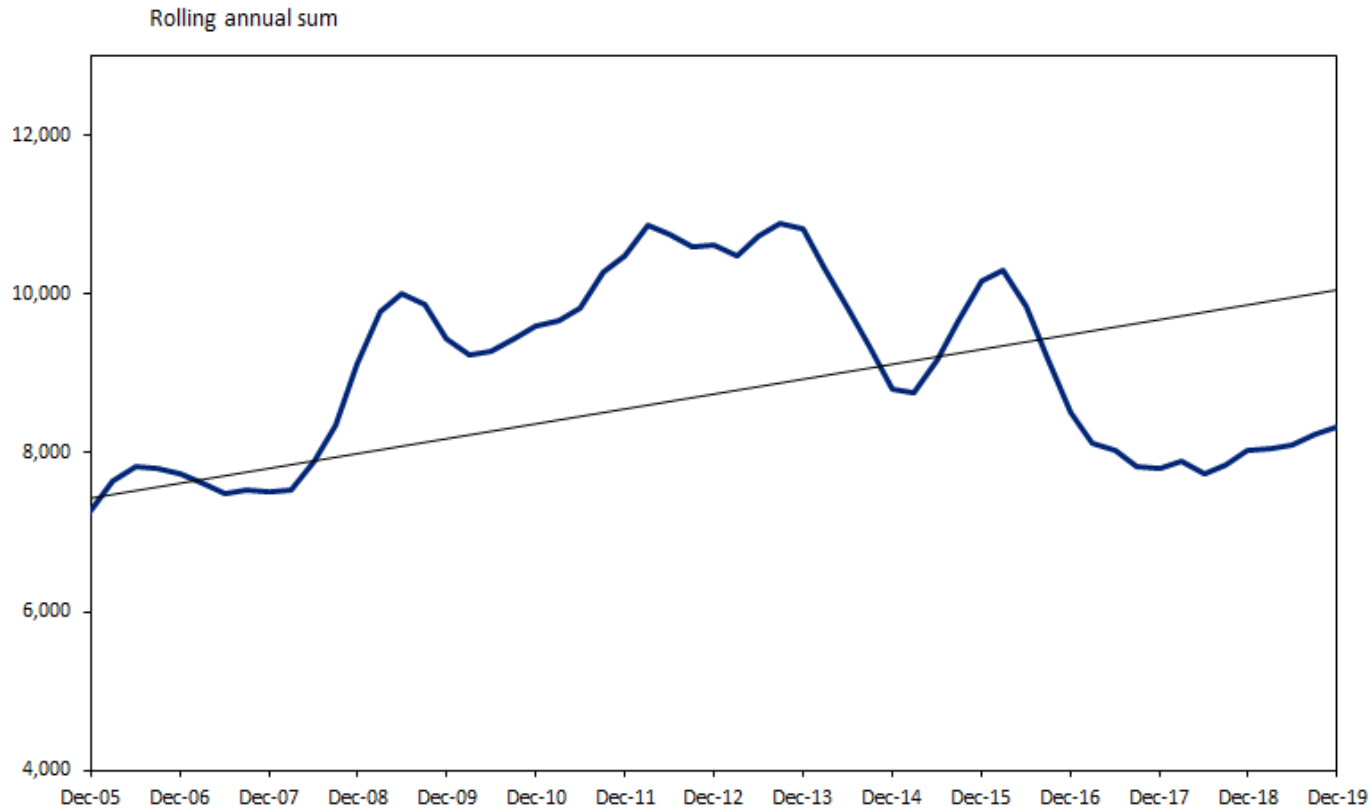
OUR EXPERTISE



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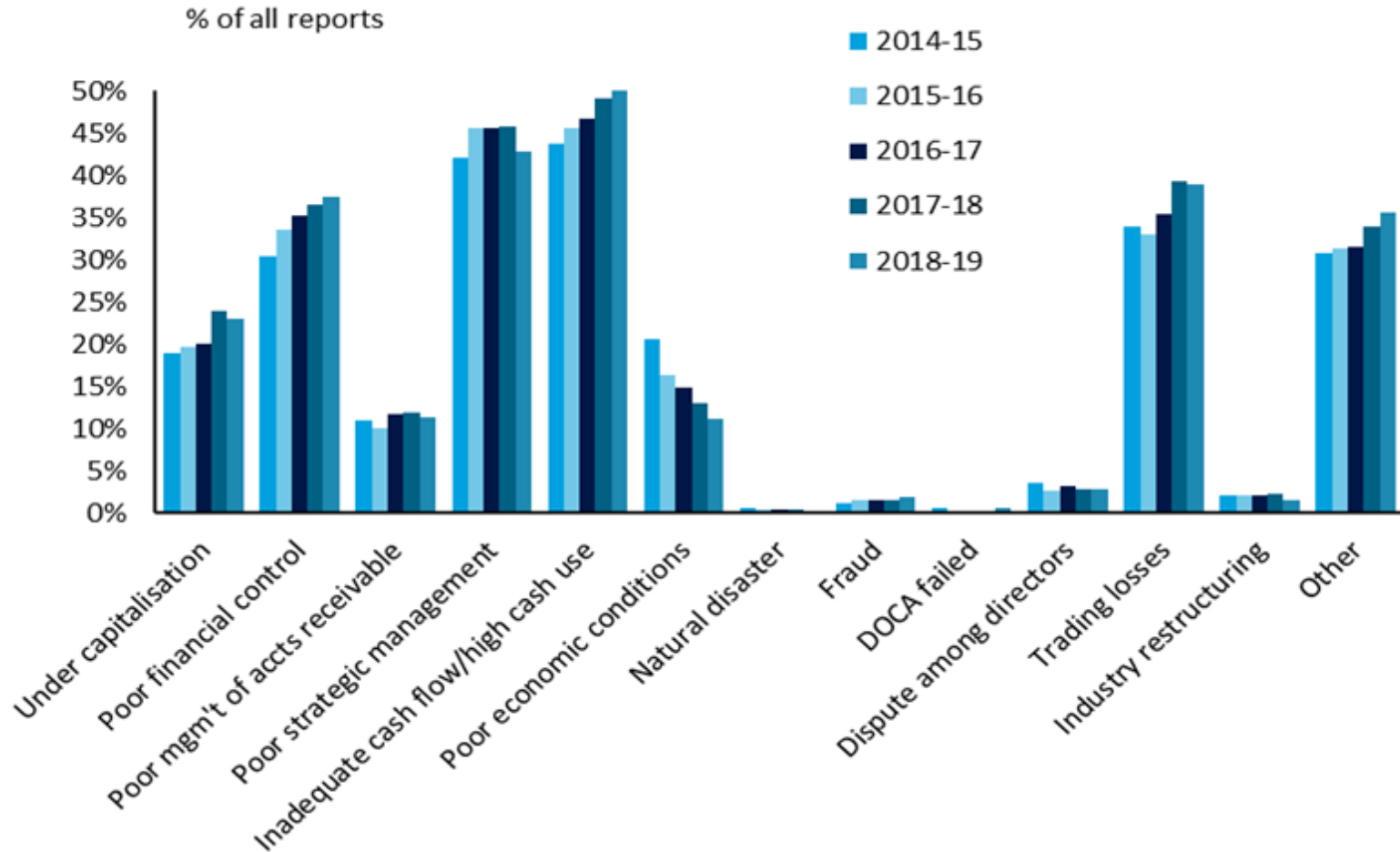
INSOLVENCY TRENDS

CORPORATE INSOLVENCY TRENDS – NUMBER OF APPOINTMENTS

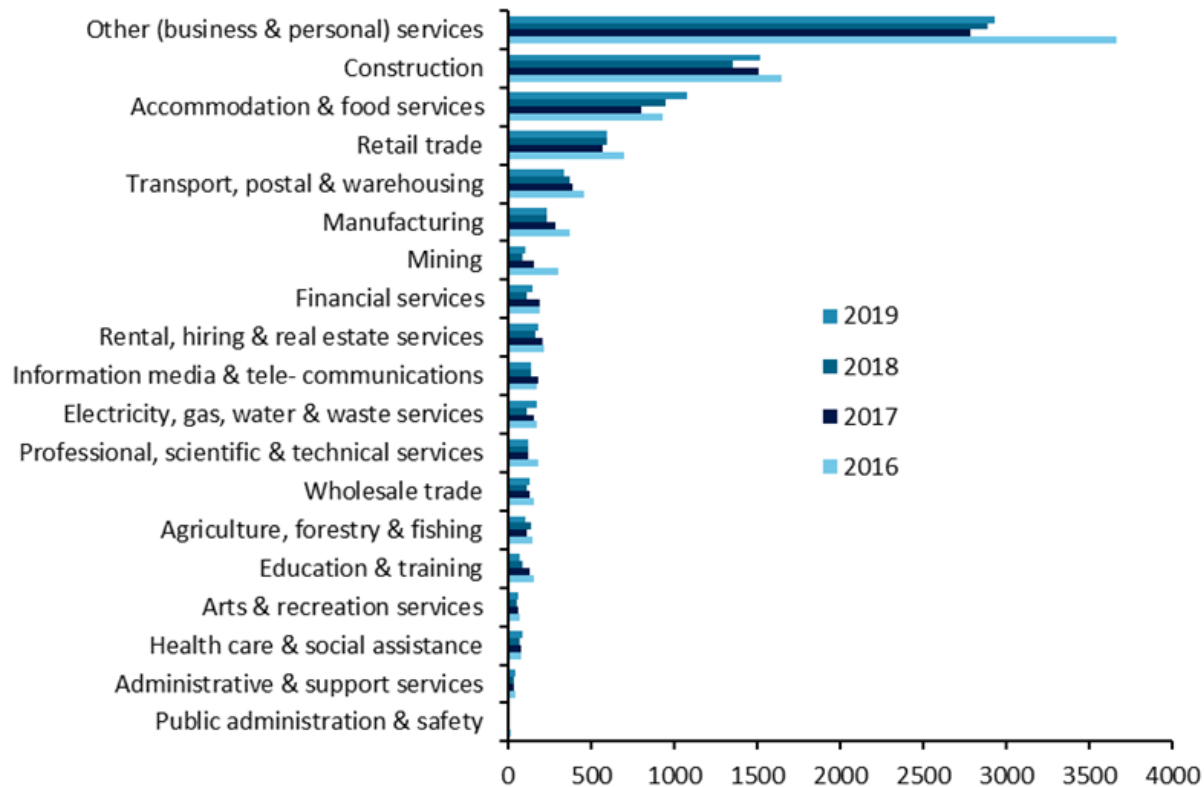


Source: ASIC Insolvency Statistics

NOMINATED CAUSES OF COMPANY FAILURE



NOMINATED CAUSES OF COMPANY FAILURE

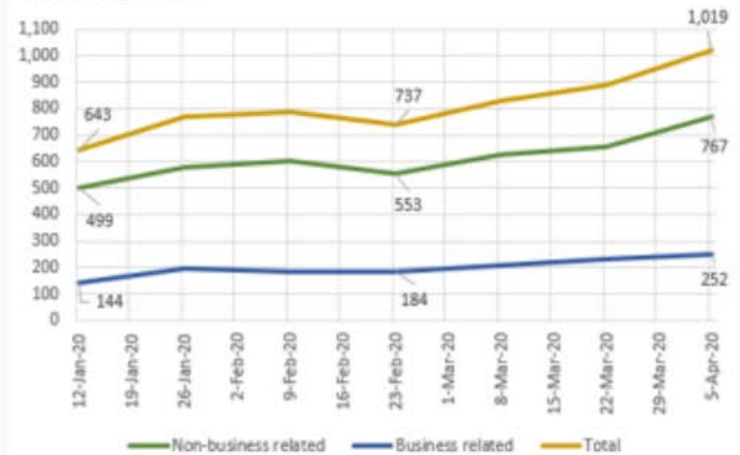


PERSONAL INSOLVENCY – STATISTICS (Oct - Dec 2019)

● 3,385 new bankruptcies
1,778 new debt agreements
35 new personal insolvency agreements



Fortnightly Trend from 1 January 2020



Data sourced from AFSA.



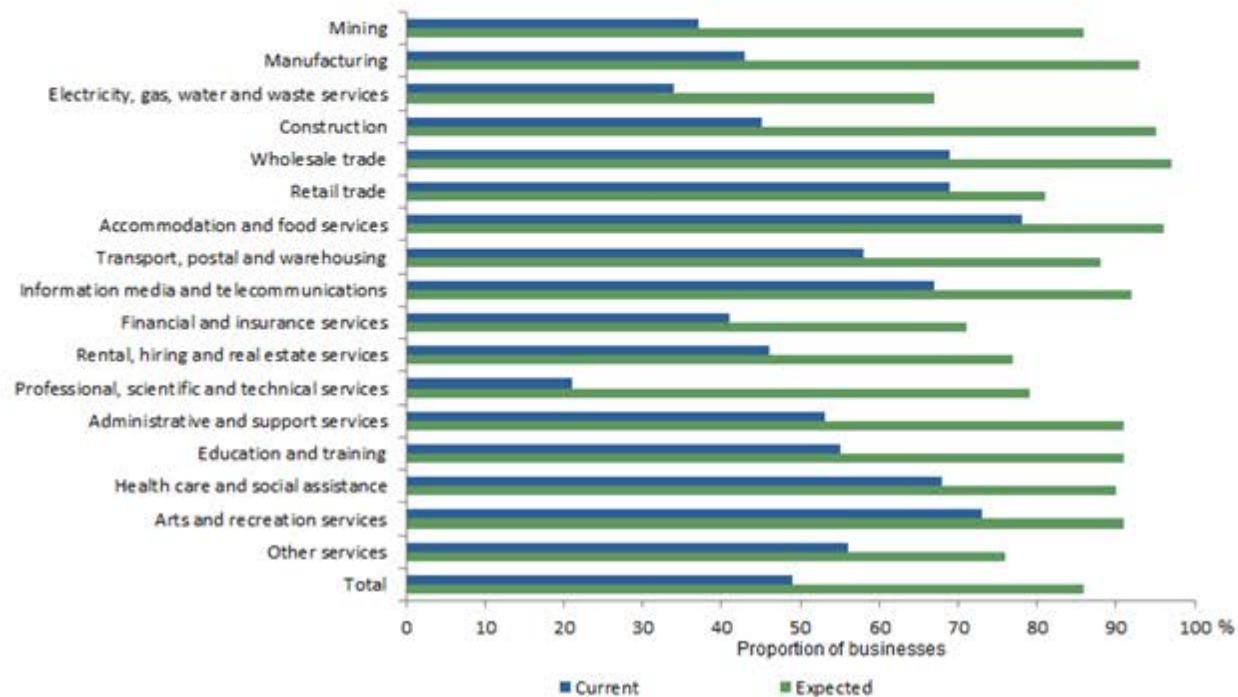
New bankruptcies fell across Australia by 10.6% compared to the December 2018 quarter and were at the lowest numbers since December 1994 quarter

Data sourced from AFSA.

Industries at risk – perceptions of adverse impact

ABS data shows most sectors expect a significant impact, though not feeling it yet

Businesses adversely impacted by Coronavirus (COVID-19), current and expected, by industry, March 2020



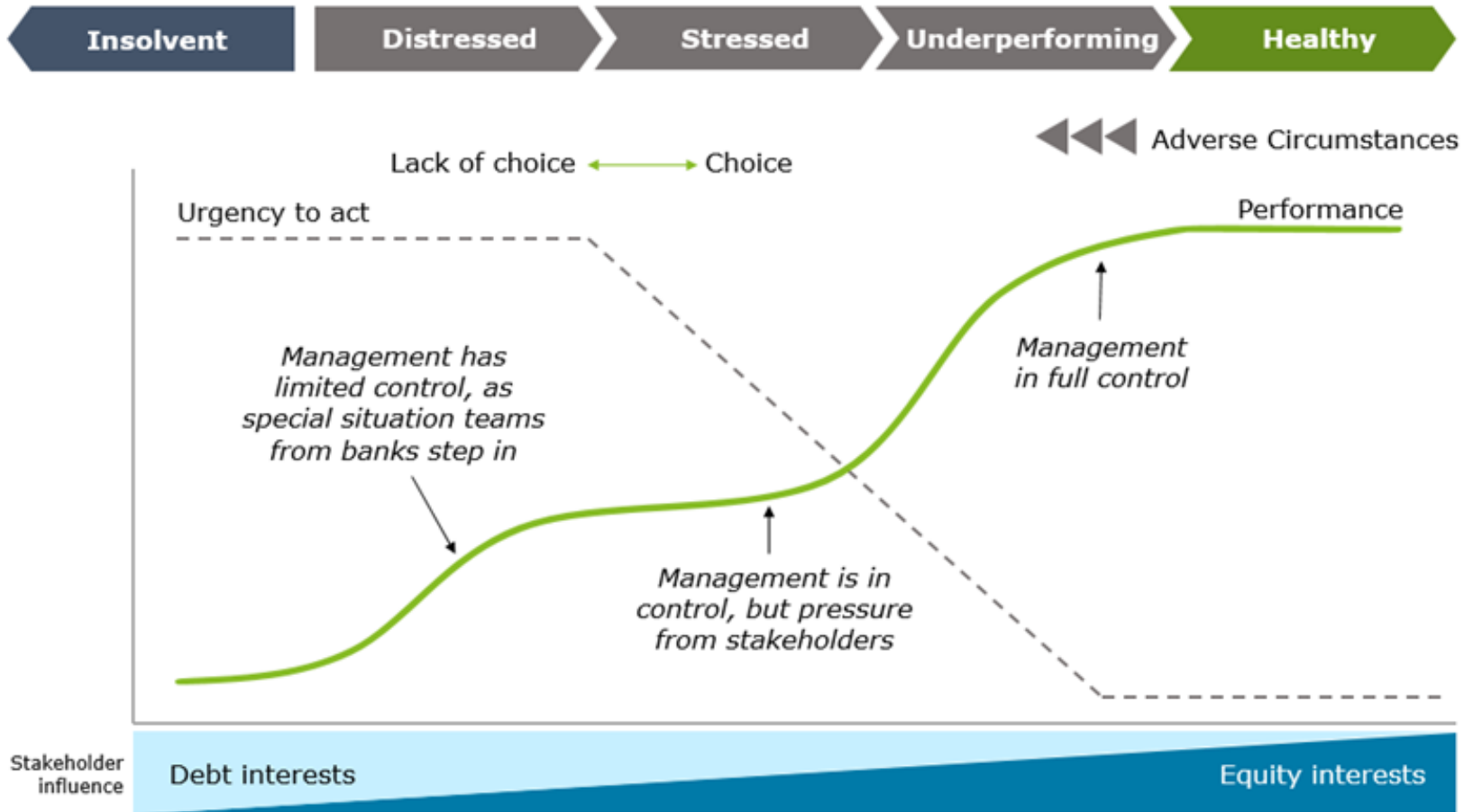
SIGNS OF FINANCIAL DISTRESS AND INSOLVENCY

WARNING SIGNS

- Continuing losses
- Liquidity ratios below 1
- Overdue taxes and other statutory charges
- Unpaid superannuation
- No access to alternative finance
- Poor Bank relationship, including inability to borrow further funds
- Inability to raise further equity capital
- Creditors paid outside trading terms
- Dishonoured cheques
- Special creditor arrangements
- Solicitor's letters & judgments etc
- Payments to creditors of rounded sums not reconcilable to specific debts
- Suppliers placing the company on COD, or otherwise demanding special payments before resuming supply
- Inability to produce timely and accurate financial information.
- Issuing of post-dated cheques

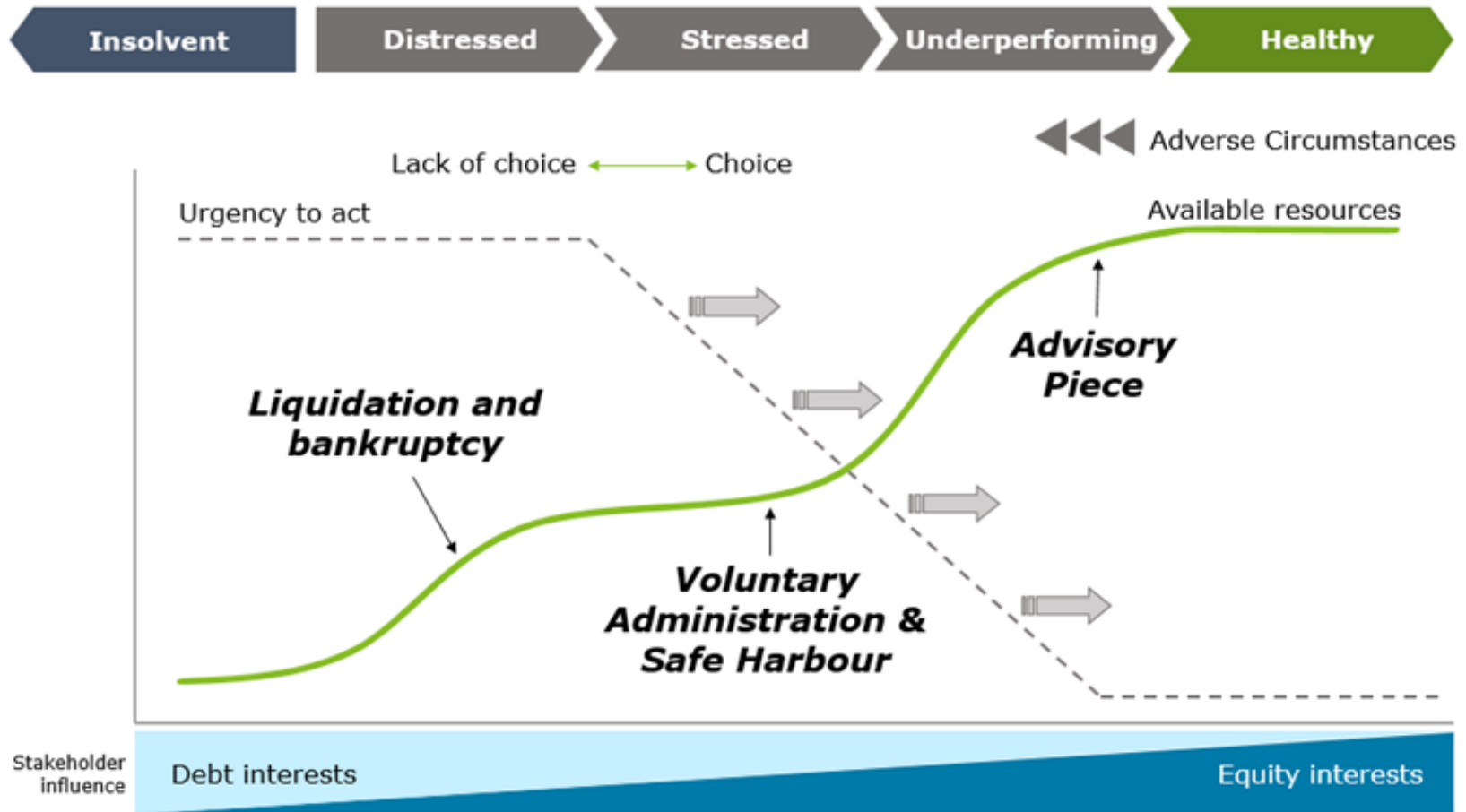
ADVOCATE CHANGE

Prevention is better than a cure



ADVOCATE CHANGE

Acting early increases the financial options



TEMPORARY FEDERAL GOVERNMENT MEASURES IN RESPONSE TO COVID-19

Before COVID-19

• Insolvent Trading (Director)

Directors personally liable for debts incurred when a company becomes insolvent

• Insolvent Trading (Holding Company – s588V of the Corporations Act 2001)

Holding Company could be held liable for the insolvent trading of the subsidiary

• Statutory Demand – (Corporate/Liquidation)

Response time – 21 days

Minimum debt – \$2,000

• Bankruptcy Notice – (Personal/Bankruptcy)

Response time – 21 days

Minimum debt – \$5,000

• Safe Harbour requirements

Lodgements up to date and ongoing compliance

• Commercial tenants and landlords

Landlord and tenant to honour existing lease and conditions

NOW

• Insolvent Trading (Director)

Directors will be temporarily relieved for 6 months from personal liability under the Corporations Act 2001 for insolvent trading

• Insolvent Trading (Holding Company – s588V of the Corporations Act 2001)

Holding companies will be temporary relieved for 6 months from insolvent trading

• Statutory Demand – (Corporate/Liquidation)

Response time – 6 months

Minimum debt – \$20,000

• Bankruptcy Notice – (Personal/Bankruptcy)

Response time – 6 months

Minimum debt – \$20,000

• Safe Harbour requirements

ARITA advocating for loosening of requirements

• Commercial tenants and landlords

Mandatory code 7 April 2020 – Landlords unable to terminate leases and tenants must honour leases. Landlords are required to reduce leases in proportion to the reduction in the tenants business. Turnover of \$50 million or less.

DIRECTOR DUTIES

Directors have specific duties and obligations in carrying out their role. In uncertain times, directors need to understand how their duties may change when faced with financial distress and who they can turn to for expert advice.



1) Who do directors owe duties to?

The obligation of company directors is to act in ‘the best interests of the company as a whole’.

During times of financial uncertainty, the scope of their duties broadens to include an obligation to interests of creditors. Court decisions indicate that the law requires directors to:

- give increased and proper consideration to creditors
- not favour one group of creditors over another, and
- not act in a way which prejudices the interests of creditors.

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DIRECTOR DUTIES

Directors have specific duties and obligations in carrying out their role. In uncertain times, directors need to understand how their duties may change when faced with financial distress and who they can turn to for expert advice.



2) Is the Company insolvent?

- Insolvency is characterised by an 'endemic shortage of working capital' which is distinct from temporary cash flow challenges
- The determination of insolvency at a point in time requires a careful and honest assessment of a company's financial position, taken as a whole.
- Insolvent trading is a criminal offence and may impact a directors personal financial position

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GENERAL DUTIES – DIRECTORS AND OFFICERS

The Corporations Act 2001 (Cth)

Section	Civil/Criminal obligation
180 Care and diligence	Civil
181 Good faith	Civil
182 Use of Position	Civil
183 Use of information	Civil
184 Good faith, use of position and use of information	Criminal
286 Obligation to keep financial records	Civil
429 Officers to report to controller about corporations affairs	Civil
438B Directors to help administrator	Civil
475 Report on Company Activities and property (ROCAP) to be submitted to liquidator	Criminal
530A Officers to help liquidator	Criminal
588G Director's duty to prevent insolvent trading by a company	Criminal

CHANGES TO INSOLVENT TRADING – TEMPORARY RELIEF

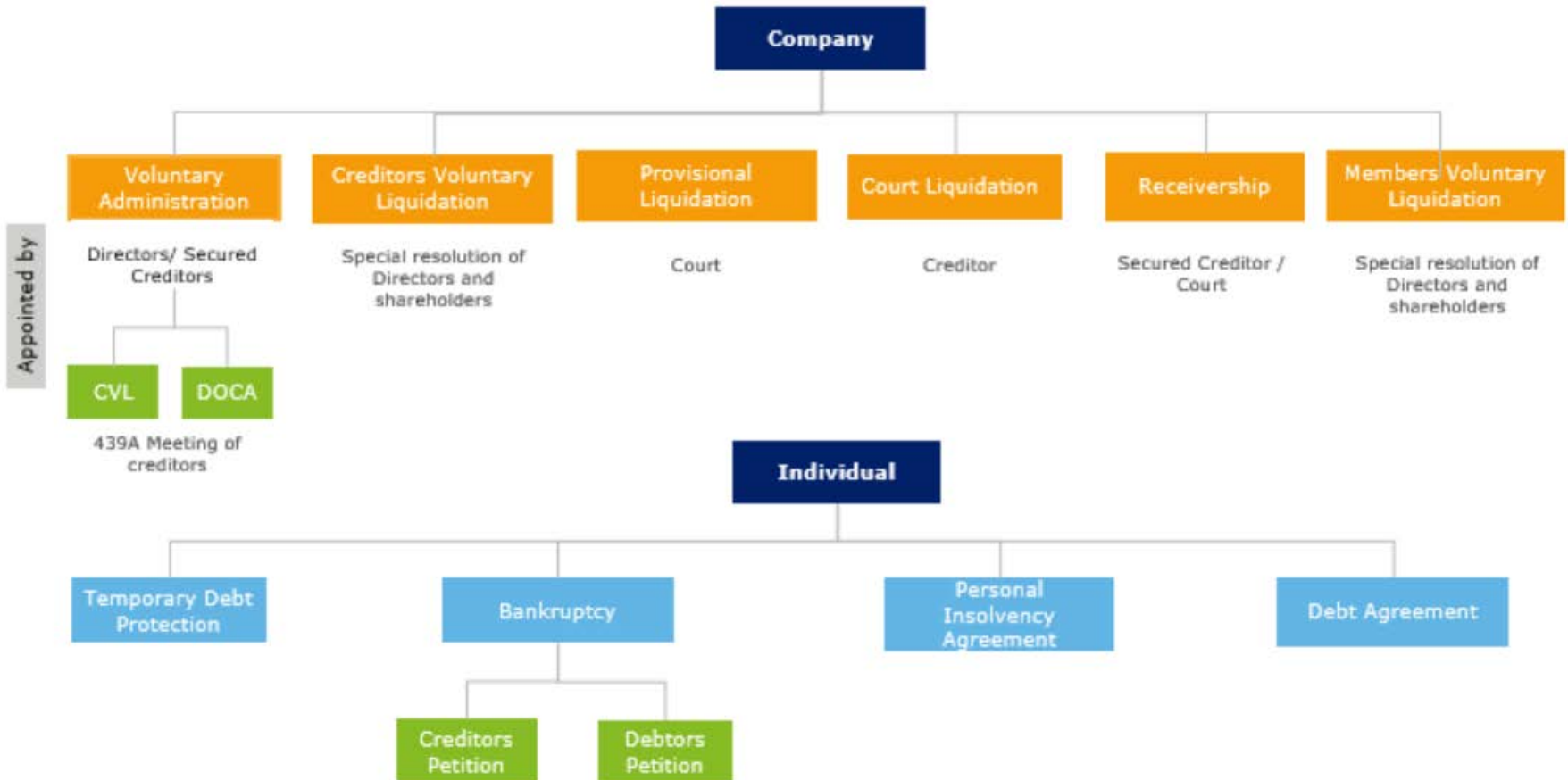
The Coronavirus Economic Response Package Omnibus Act 2020 (Cth)

- Directors are not required to prove nexus of insolvency to the COVID-19 pandemic
- The changes are limited to the **civil** penalty provisions, not the **criminal** offence (dishonest purpose)
- Currently 6 months relief from **25 March 2020**, but may be extended
- The relief only relates to debts incurred in the ordinary course of business i.e. debts that are necessary to the continuation of the business, with specific exclusions for dishonest and fraudulent activities.
- The Company's requirements to pay remain.
- Holding Companies can rely on the temporary safe harbour if reasonable steps are taken to ensure it applies to the subsidiary's directors
- **No changes to Director's other statutory/general duties**

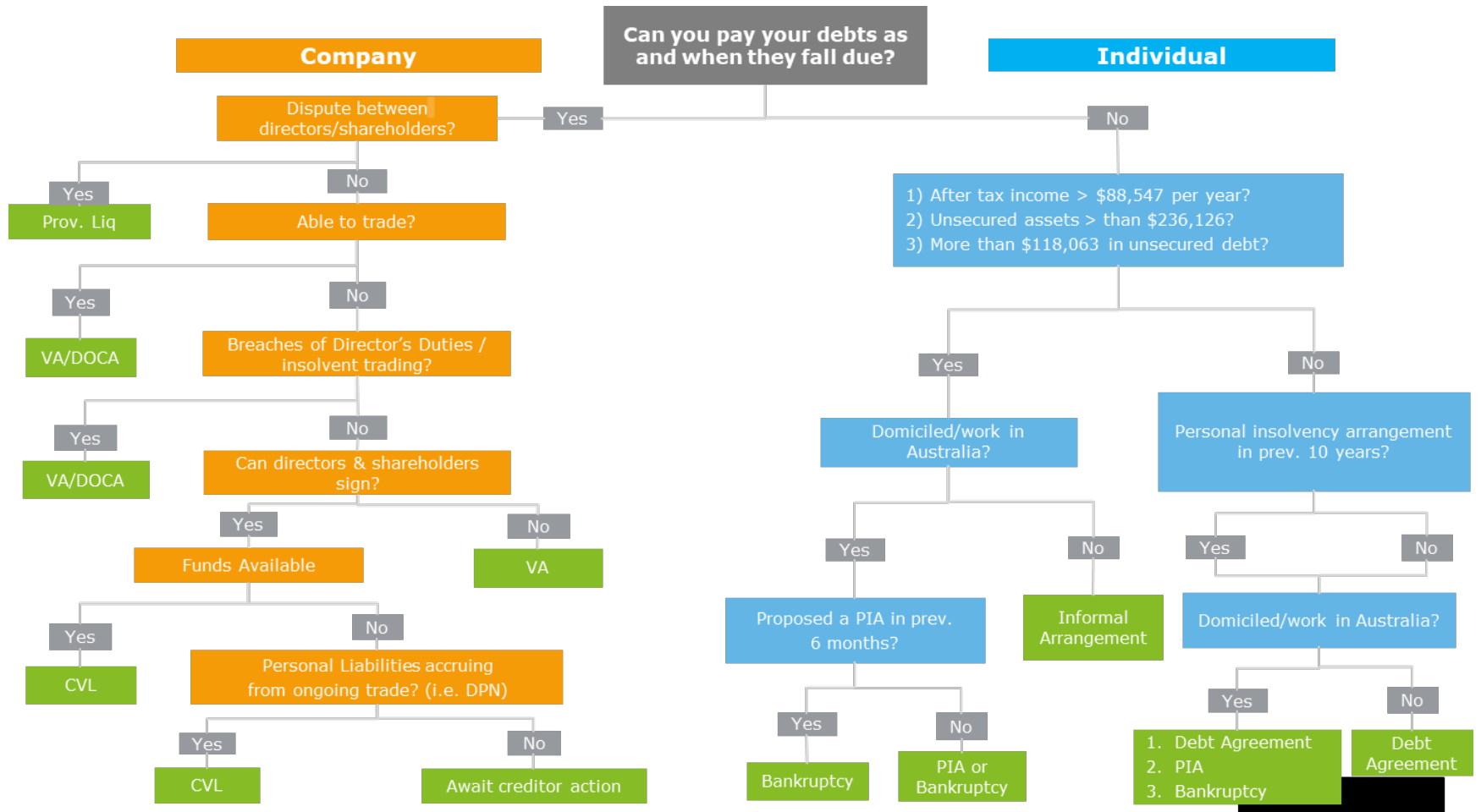


INSOLVENCY APPOINTMENTS

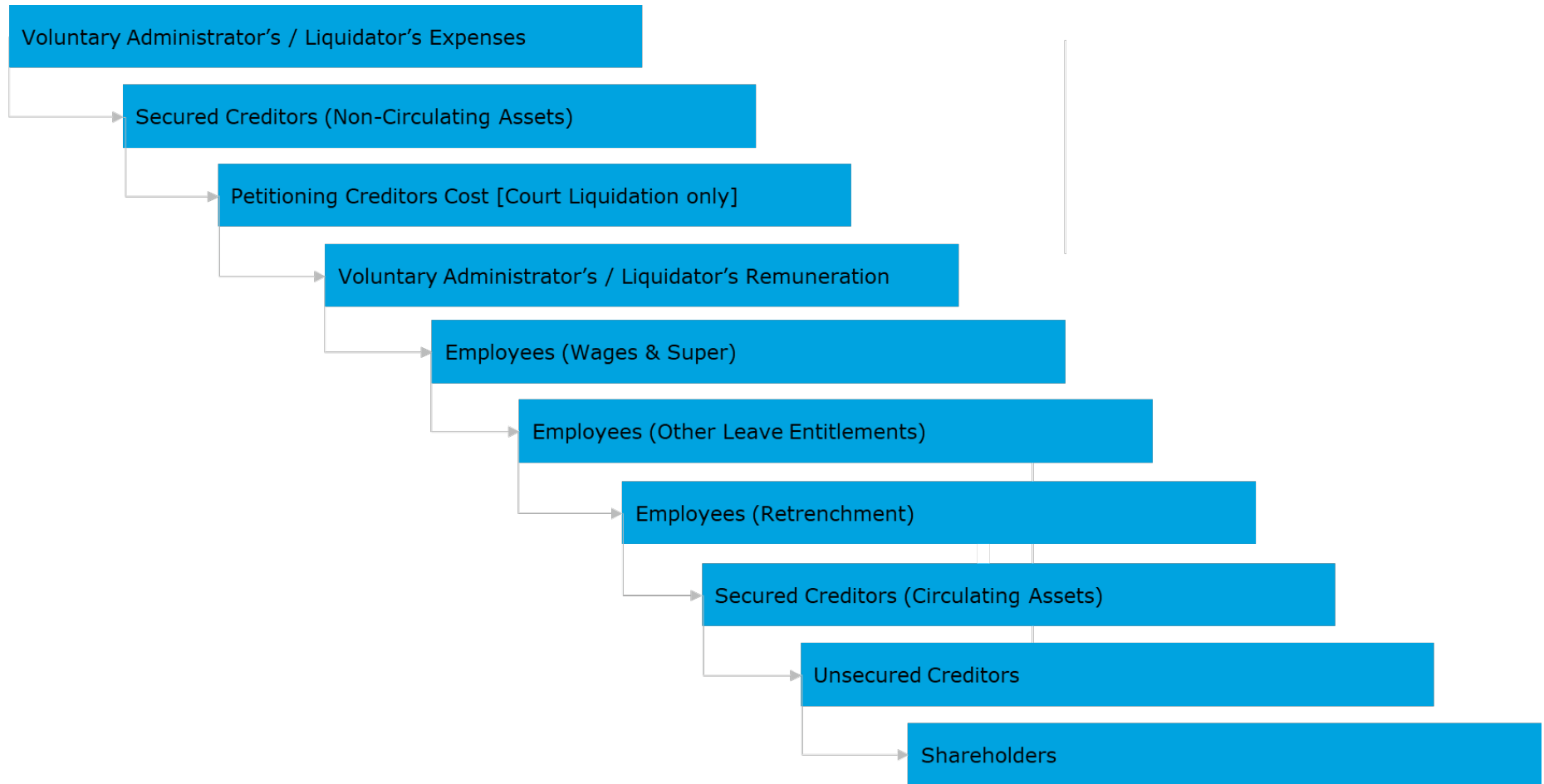
TYPES OF APPOINTMENTS



DECISION TREE - INSOLVENCY APPOINTMENTS



PRIORITY OF CREDITORS



CORPORATE INSOLVENCY

OVERVIEW OF CORPORATE INSOLVENCY PROCEDURES

The Australian system is flexible and allows for a combination of insolvency procedures to facilitate restructuring and protect creditor interests.

Main insolvency "rescue" procedures

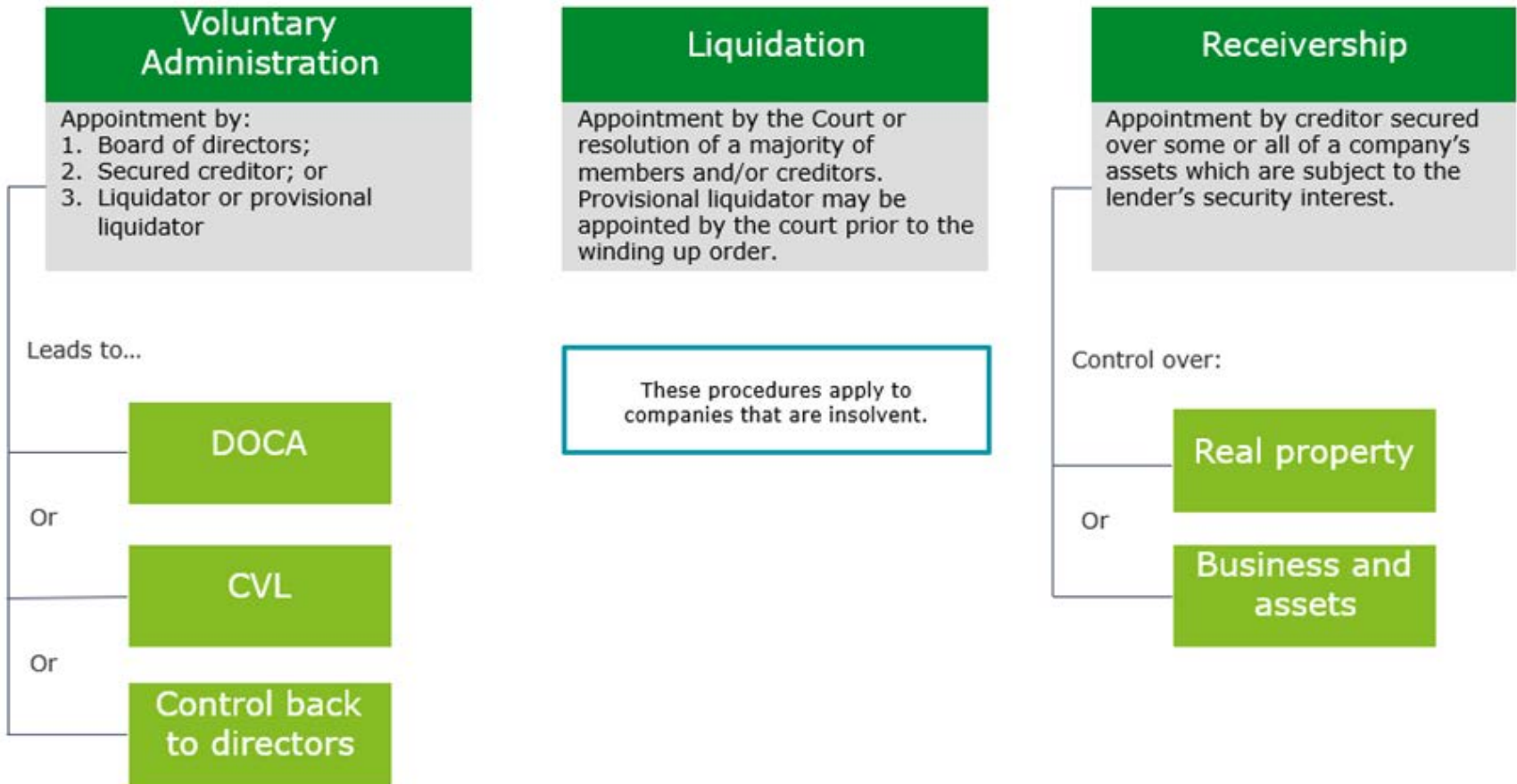
- A. Voluntary Administration followed by a Deed of Company Arrangement
- B. Receivership

Main insolvency "terminal" procedures

- C. Liquidation

Key Questions for Options A and B	
1. Is there a high level of creditor control?	Yes
2. Is there a high level of debtor control?	Some
3. Is the regime flexible?	Yes
4. Is rescue easily achievable?	Possible

CORPORATE INSOLVENCY PROCEDURE MAP

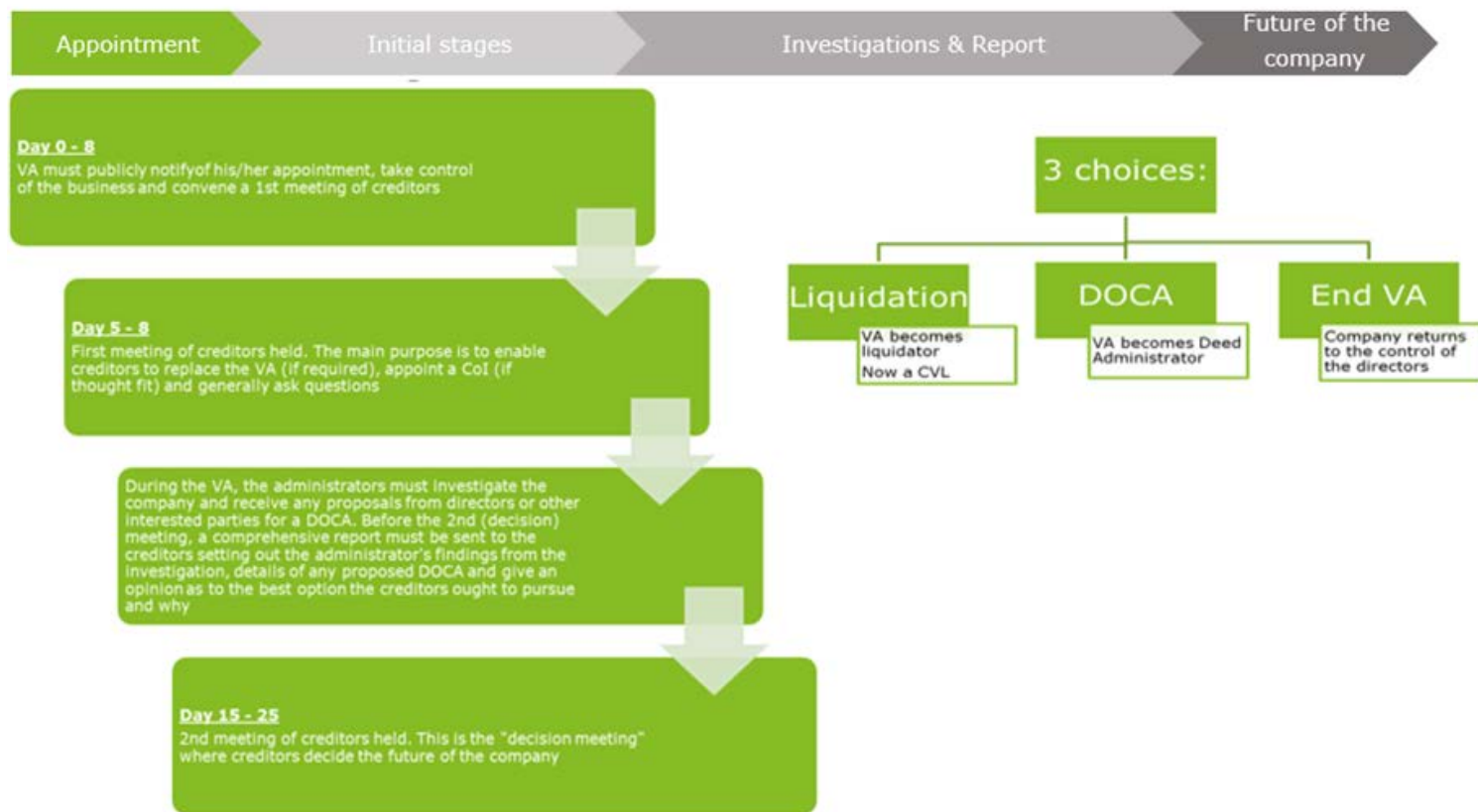


VOLUNTARY ADMINISTRATION

CORPORATE INSOLVENCY PROCEDURE – VOLUNTARY ADMINISTRATION

Voluntary Administration is an effective way for a company to have its financial position assessed by an independent IP within a short moratorium period .

Process and timeline



CORPORATE INSOLVENCY PROCEDURE – DEED OF COMPANY ARRANGEMENT

Under the Voluntary Administration/Deed of Company Arrangement scheme, control of a company can return to Directors within 2 months of the appointment of the Administrator

Practical and commercial considerations

- The Administrator will become the Deed Administrator, save any exception from creditors.
- The Deed Administrator is tasked with ensuring the company or any other parties subject to terms of the DOCA carry out their obligations under the DOCA.
- The company or another party will pay money into a deed fund over the course of the DOCA.
- Some DOCA proposals involve the creation of a creditors trust, under which a separate legal arrangement is used to accelerate a company's exit from the DOCA. Creditors claims are transferred into a creditors trust, with any returns received by the trustee and not the Deed Administrator. The DOCA terminates once the creditors claims are moved to the trust.
- The DOCA does not prevent a creditor holding a personal guarantee from taking action to have their debt repaid.

CORPORATE INSOLVENCY PROCEDURE – DEED OF COMPANY ARRANGEMENT

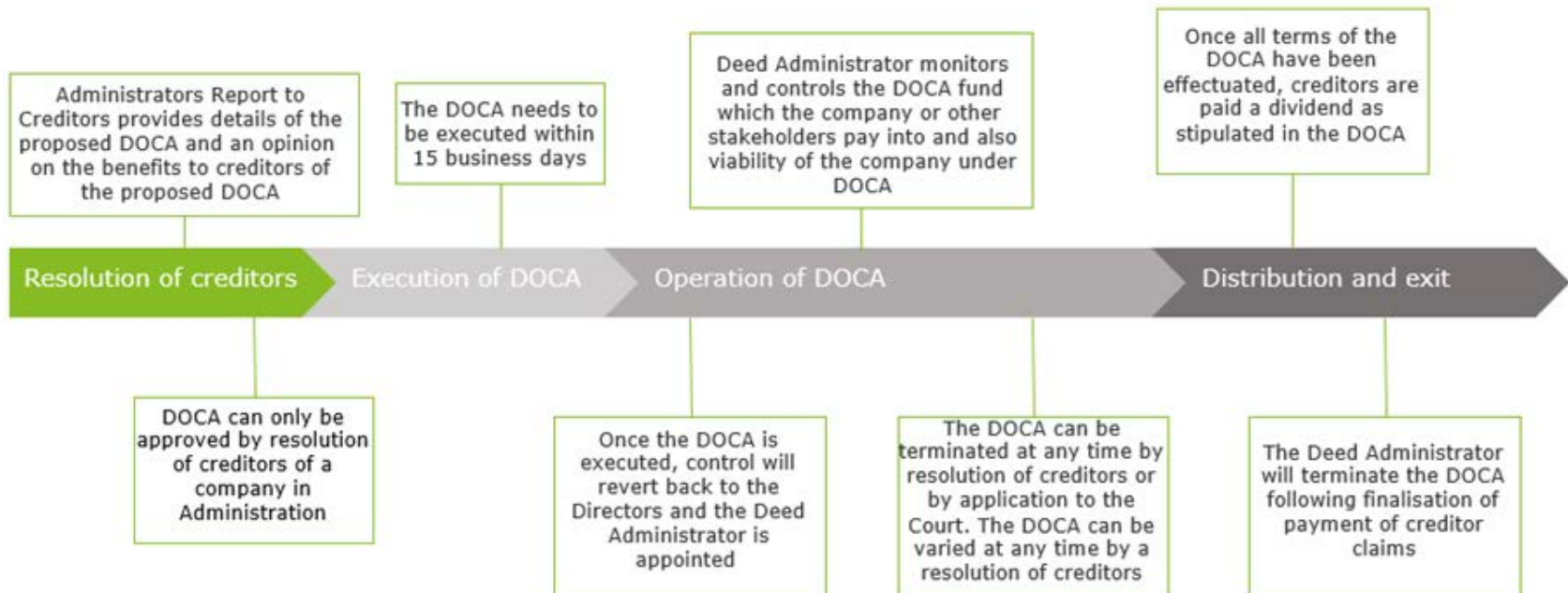
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CORPORATE INSOLVENCY PROCEDURE – DEED OF COMPANY ARRANGEMENT

The Deed of Company Arrangement returns control of the company back to directors under an arrangement to repay unsecured creditors

Process and timeline



“HOLDING” DEED OF COMPANY ARRANGEMENT

Characteristics:

- Extension of time for the Administrator extends the moratorium on creditor claims
- Company does not need to have assets available
- Holding pattern
- May allow for control to flow back to the Directors in circumstances where their actions were not the reason for the financial distress

Companies might use a “holding DOCA” in situations where they are:

- Cash poor
- Unable to pay creditors
- Have insufficient funds to continue
- Are being pursued by creditors
- Needing to restructure

LIQUIDATION

CORPORATE INSOLVENCY – PROVISIONAL LIQUIDATION

Maintaining the status quo:

- A provisional liquidator can be appointed by the court any time after the application for the winding up of a company is lodged.
- Purpose is to preserve the assets of the company until the court hears the winding up application and decides whether to appoint a liquidator or not.
- Used if it is felt that the assets of the company are in jeopardy or for commercial reasons (such as directors' potential exposure to insolvent trading).
- Can also occur as a result of director / shareholder disputes.
- On just and equitable grounds.

CORPORATE INSOLVENCY PROCEDURE – LIQUIDATION

Creditors Voluntary Liquidation and Court Liquidation are the most common insolvency procedures and are terminal in nature. When the liquidation is complete the company is deregistered and ceases to exist.

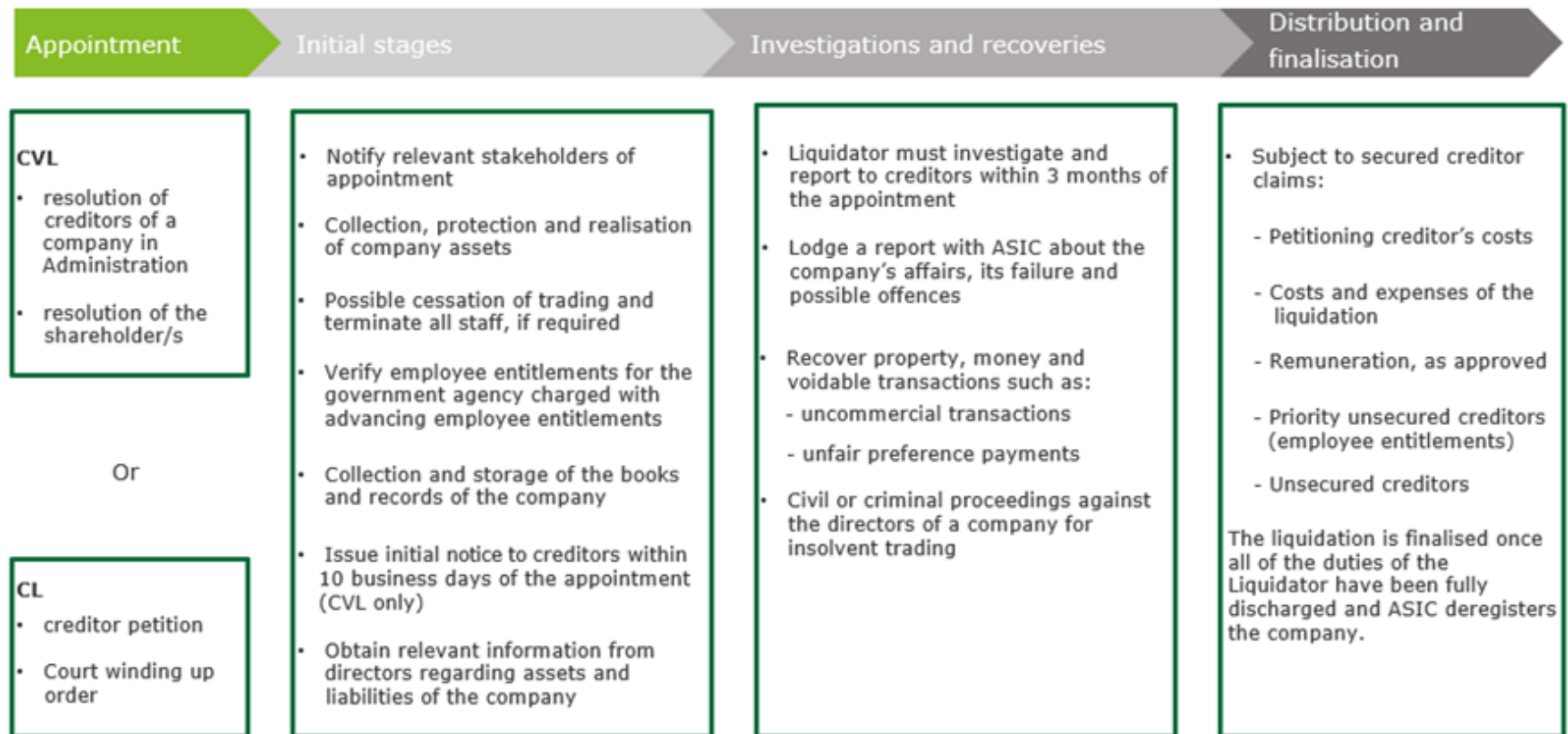
Practical and commercial considerations

- The Liquidator is responsible for the realisation of the company's assets.
- The Liquidator has a duty to investigate the failure of the company and provide a report to ASIC in respect of (amongst other things) the financial position of the company, the reasons for failure and the estimated likely dividend to unsecured creditors.
- The Liquidator has broad powers to void transactions entered into prior to the appointment. Types of transaction that can be void include unfair preference payments to creditors and assets disposals.
- The statute provides the Liquidator with recourse to begin civil and/or criminal proceedings against directors for trading a company whilst it is insolvent.
- Any distributions to creditors are made based on their ranking and security. Employee entitlements are given priority status over unsecured creditors.
- Except for lodgment of documents and reports with the regulatory body, a Liquidator is not required to do any work unless there are enough assets to pay their costs.

CORPORATE INSOLVENCY PROCEDURE – LIQUIDATION

Despite different appointment methods, CVL and CL appointments are very similar in process and outcome for creditors

Process and timeline



CORPORATE INSOLVENCY PROCEDURE – LIQUIDATION - Duties of a Liquidator

Fiduciary duties:

- **To act honestly - *ASIC v Edge (2007) 211 FLR 137***
- **To avoid a conflict of interest**
- **To act impartially – *CCA v Harvey [1980] VR 669***

General duties:

‘Generally speaking, liquidators seeking to discharge their duty to collect the assets of the company by recovery proceedings should do so with the costs and benefits clearly in view, the relevant benefits being primarily being benefits to creditors. The liquidators statutory powers...must be exercised bona fide for the purpose for which they were conferred: i.e. for the purpose of collecting the assets of the corporation for, relevantly, the benefit of creditors’

Hall v Poolman (2009) 5 NSWLR 99

CORPORATE INSOLVENCY PROCEDURE – LIQUIDATION

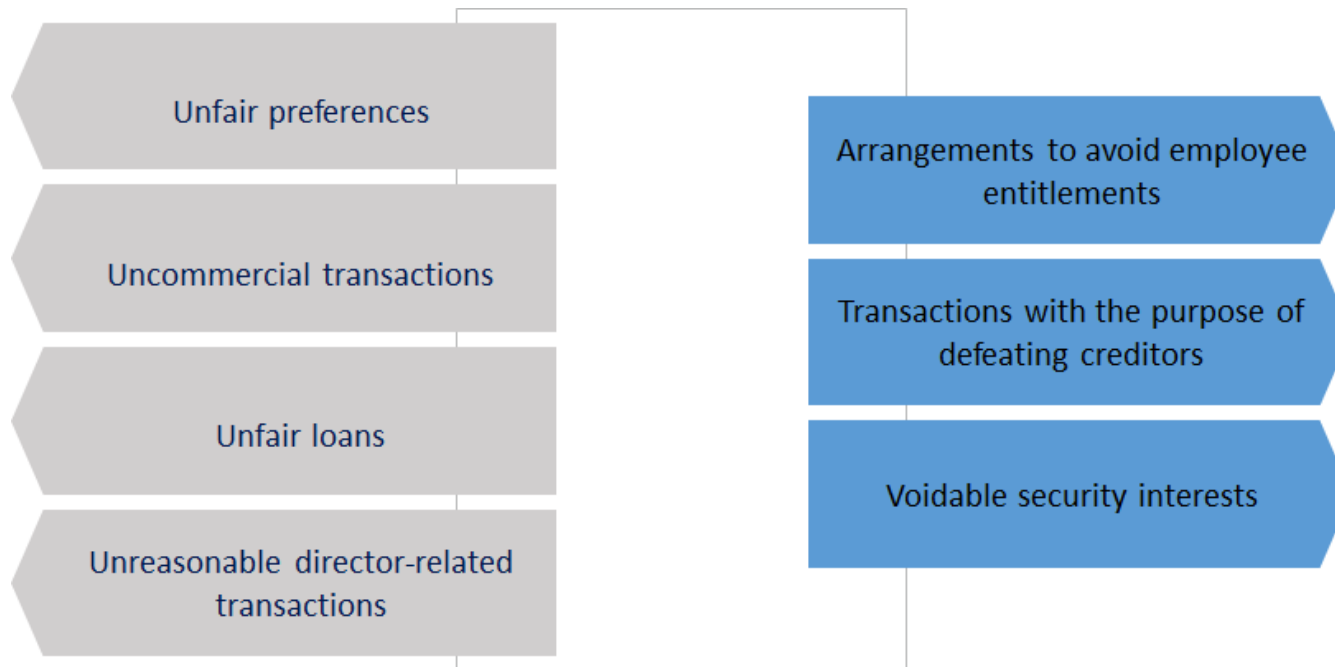
Purpose of investigations

WHY

- Determine whether there are **transactions where money, property or other benefits could be recoverable** for the benefit of creditors
- Provide an **explanation for the failure** of the business
- Determine whether there have been any **offences committed by a relevant person**
- Required to prepare and lodge a **report with ASIC** if it appears that any past or present officers or advisors may have been guilty of an offence in relation to the company.

CORPORATE INSOLVENCY PROCEDURE – LIQUIDATION

Liquidator recoveries under the Corporations Act



Consider commerciality:

Decisions to pursue transactions need to be made on a commercial basis taking into account the assets of the company and the costs of the claims. Where there are insufficient assets the Liquidator may request creditor or litigation funding to pursue transactions.

CORPORATE INSOLVENCY PROCEDURE – LIQUIDATION

Examinations

The court must summon a person for examination concerning the examinable affairs of the company if the liquidator applies for the summons and the prospective examinee was an officer of the company during the two years prior to the commencement of the winding up.

The court can order that persons who have taken part in the examinable affairs of the company or who maybe guilty of misconduct in relation to the company can be summoned to an examination. The court has a discretion as to whether or not to summon a person.

An “eligible applicant” may seek an examination. This includes the liquidator, ASIC, a provisional liquidator, a voluntary administrator or administrator of a deed of company arrangement.

CORPORATE INSOLVENCY PROCEDURE – LIQUIDATION

Benefits of examinations:

- obtaining information from uncooperative persons
- unravelling the complex history of a company or its transactions
- exposing breaches of legislation
- protecting interests of creditors
- enabling evidence to be obtained that may be used in proceedings against persons in connection with the examinable affairs

FAIR ENTITLEMENTS GUARANTEE (“FEG”)

- Federally funded safety net that guarantees employee entitlements when there are insufficient assets to pay
- Not available in voluntary administrations, DOCA or receiverships
- There are limitations to what can be claimed:

What can I claim?

You may be able to claim:

- your unpaid wages—up to 13 weeks
- your unpaid annual leave and long service leave
- payment in lieu of notice—up to five weeks
- redundancy pay—up to four weeks per full year of service.

Note: unpaid Superannuation Guarantee Contributions cannot be claimed. You should pursue these through the [Australian Taxation Office](#).



**Fair
Entitlements
Guarantee**

- After employees are paid, FEG are entitled to subrogate, and stand in the shoes of those priority employee creditors

RECEIVERSHIP

CORPORATE INSOLVENCY PROCEDURE – RECEIVERSHIP

Receivership allows a secured charge holder to enforce their security over an asset or group of assets and maximise their return.

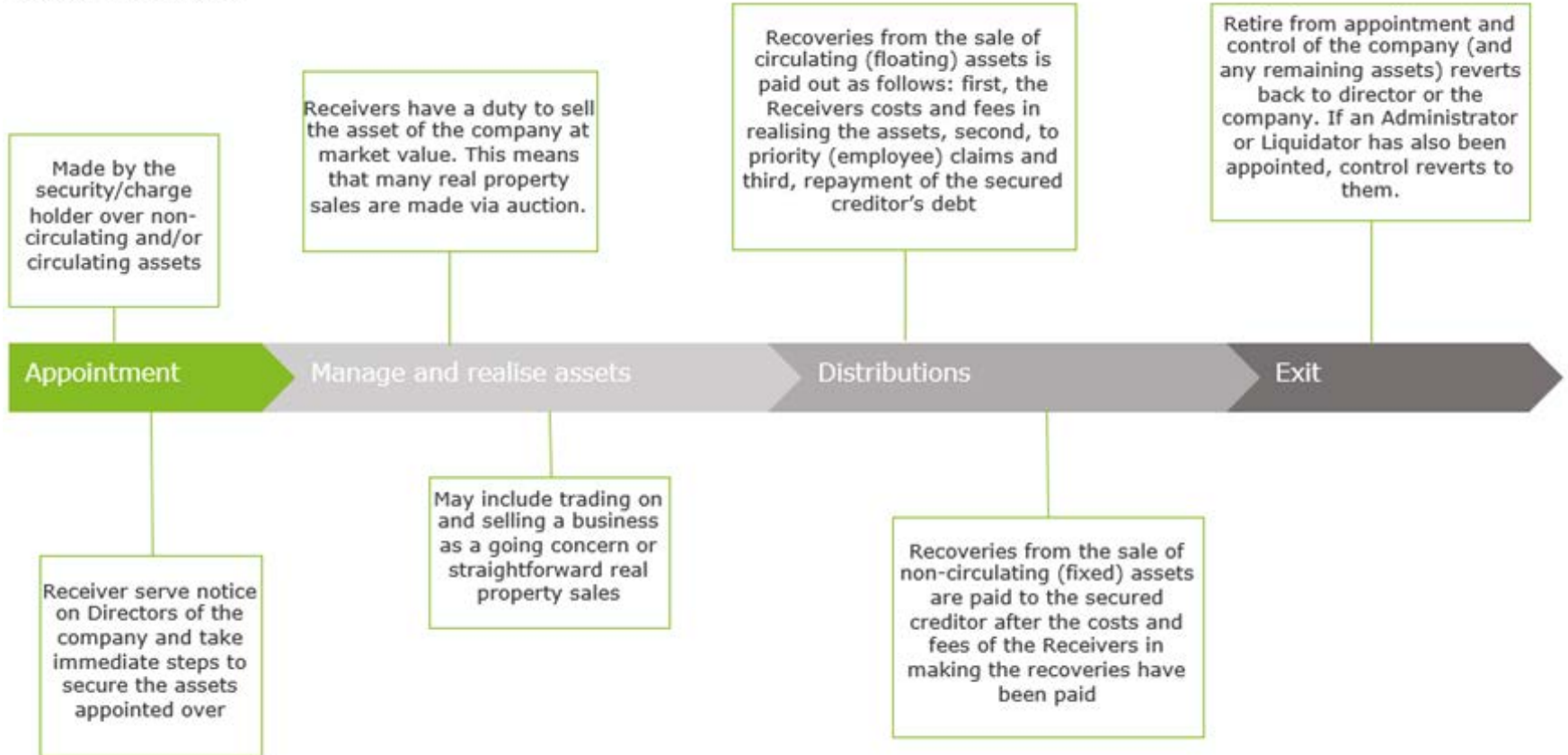
Practical and commercial considerations

- Receivers are personally liable for any debts they incur in the trading on of the business (usually funded by the secured creditor)
- Receivers have no obligation to report to unsecured creditors
- Primary duty is to collect and sell enough of the charged assets to repay the debt owed to the secured creditor
- Realisation of circulating assets (cash, debtors, inventory) must first apply the proceeds to pay any priority employee claims
- A company in Receivership can also be in provisional liquidation, liquidation, voluntary administration or subject to a DOCA.
- Receivers cannot sell real property through a caveat properly lodged over the property, and an appointment as Agent for the Mortgagee may be more practical after a consideration of circumstances.

CORPORATE INSOLVENCY PROCEDURE – RECEIVERSHIP

The operation of a Receivership differs greatly depending on the assets appointed over.

Process and timeline



INSOLVENCY LAW REFORM - CORPORATE

Powers of creditors

- Right to request information
- Give directions to the external administrator (through COI)
- Removal of an external administrator

ipso facto

- Effective 1 July 2018
- Clauses that terminate contracts upon insolvency
- Unenforceable against the counterparty in instances of administration, receivership or scheme of arrangement

SAFE HARBOUR FOR COMPANY DIRECTORS

A “Safe Harbour” plan can protect the company directors from insolvent trading... If completed properly



HELPING CLIENTS WITH COMPANIES IN FINANCIAL DISTRESS – RESPONSE



The options available to your clients will depend on their solvency status.

Longer-term options?

Distress level	Options
Doubts about solvency and whether there is a viable business	<ul style="list-style-type: none"> Restructuring with safe harbour protection (outside a formal insolvency appointment) Voluntary administration with a deed of company arrangement to compromise debts and give the company opportunity to restructure (a formal insolvency appointment)
Insolvent but there could be a viable business	<ul style="list-style-type: none"> Voluntary administration with a deed of company arrangement to compromise debts and give the company opportunity to restructure (a formal insolvency appointment) Liquidation (a formal insolvency appointment) involving a sale of the business
Insolvent and no viable business to save	<ul style="list-style-type: none"> Liquidation (a formal insolvency appointment)

Source: Australian Restructuring Insolvency & Turnaround Association (ARITA) 2020

ARITA - 8 Essential Steps if your business is in distress

1. Be honest with yourself
2. Do your accounts
3. Are you already broke?
4. Talk to your bank & lenders
5. Talk to the Tax Office
6. Talk to your suppliers
7. Get qualified help
8. Look after your mental health.

ILLEGAL PHOENIXING LAWS

What is illegal Phoenixing?

- Generally involves transactions that are intended to defeat creditors
- We have seen the rise of the “pre-insolvency” advisor

Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019

Things ASIC are hoping to have included in Corporations Act:

- New criminal and civil penalties to deter advisors and directors from doing the wrong thing such as creditor defeating dispositions
- Giving ASIC & Liquidators the power to apply to Court to void creditor defeating dispositions and recover property

PERSONAL INSOLVENCY

BANKRUPTCY TYPES

Voluntary bankruptcy

- A debtor declares them self bankrupt; and
- The debtor has the option of appointing a registered trustee of their choice.

Involuntary bankruptcy

- Involuntary bankruptcy occurs when the Court makes an order declaring a debtor bankrupt upon the petition of one or more creditors; and
- The petitioning creditor gets the option of appointing a registered trustee of their choice to administer the debtor's bankrupt estate.

BANKRUPTCY TYPES

Some ramifications

- A person is bankrupt for 3 years, this period can be extended to 5 or 8 years
- A person can be bankrupt indefinitely if no statement of affairs is filed
- Whilst bankrupt a person cannot be a director of a company
- The bankruptcy is recorded on the NPII forever
- The NPII is a public database maintained by the Federal Government
- The bankruptcy will be listed on commercial agency reports (i.e. Dun & Bradstreet or Veda) for 7 years
- Bankrupts are restricted to Credit limit of \$5,882 (as at 20 March 2020 – subject to indexation)
- Overseas travel may be restricted (flight risks & Pace Alerts)

Employment Restrictions

- Particular industry associations or licensing authorities may impose certain restrictions or conditions should a member or licensee become bankrupt or enter into an arrangement under the Bankruptcy Act.

OTHER DEBTOR ARRANGEMENTS

Debt Agreements – typically for consumer debtors

- Very popular method for a debtor to compromise debts, typically suited to consumer debtors ie those with credit card and store card debt, unsecured personal loans etc
- A Debt Agreement is a proposal for how a debtor intends to deal with debt ie a debtor may offer creditors 20 cents in the dollar in satisfaction of its all their debts
- To qualify certain limits apply – unsecured debts <\$118,063.40, unsecured assets <\$236,126.80 and income <\$88,547.55 (after

Personal Insolvency Agreement (PIA) – typically for sole trader debtors

- Is a legally binding agreement which is similar to a debt agreement however there are no restrictions on the value of unsecured debts, divisible property or after tax income; and
- The Controlling Trustee – registered trustee or solicitor
- The trustee has a duty to collect payments and/or to deal with property specified in the personal insolvency agreement and distribute same to creditors.
- The debtor is discharged from most of his/her debts once all obligations created under the debt arrangement of PIA have been completed.

OTHER DEBTOR ARRANGEMENTS

Deceased Estates

- Administration Order – Choose a registered trustee
- Statement of Affairs – legal representative
- Same powers to recover property
- No income provisions

OTHER DEBTOR ARRANGEMENTS

Temporary Debt Protection (TDP)

- Used to provide time to consider options if in financial difficulty (negotiate payment plans or formal insolvency)
- Unsecured creditors and sheriffs cannot take action to recover debts for a period of 6 months after execution of a TDP
 - ** Due to COVID-19, the period has increased from 21 days to 6 months**
- Person is not made bankrupt by submitting with AFSA a TDP form
- Not recorded on the register of personal bankruptcies (NPII)
- Secured creditors can still repossess goods
- It is an act of bankruptcy and creditors can use it to apply to the court to make the person bankrupt
- Does not protect the person from debts such as child support, HELP debts and fines imposed by a court

Not eligible for a TDP if:

If had a TDP in force in the previous 12 months

Currently under a Debt Agreement or Personal Insolvency Agreement

Have been served with a creditor's petition filed in court

BANKRUPTCY – OTHER NOTABLE FEATURES

Divisible Property

- Equity in Property
- A debtors interest in a deceased estate will be available to trustee
- Taxation Refunds in the years prior to bankruptcy
- After-acquired property

Exempt assets

- Vehicles to the amount of \$8,000 (as at 20 March 2020 – subject to indexation)
- Tools of trade \$3,800 (as at 20 March 2020 – subject to indexation)
- Certain household items; and
- Superannuation (provided that there are no abnormal contributions)

BANKRUPTCY – OTHER NOTABLE FEATURES

Income Contributions

- For a bankrupt with no dependants, 50% of after tax wages above \$59,031.70 per annum are to be contributed to their bankrupt estate; and
- The threshold increases for each dependant (to be a dependant, their income must be <\$3,708pa and residing with the bankrupt) there are no abnormal contributions)

Key Voidable Transactions

- Undervalued transactions
- Transfers to defeat creditors; and
- Preference payments

INITIATING BANKRUPTCY - CREDITORS

Steps to Bankruptcy

1. Get a court judgement or order
2. Apply for a bankruptcy notice
3. Serve the bankruptcy notice
4. File a creditor's petition with the court
5. Obtain the sequestration order from the court

Bankruptcy Notices

Debt **>\$20,000**, and no more than **6 years old**. Costs \$470 at time of application.

Debtor has **6 months** to comply from the date you serve the notice. If they don't, they are committing an act of bankruptcy.

INITIATING BANKRUPTCY - CREDITORS

**** Changes due to COVID-19, effective from 25 March 2020:**

- Minimum debt amount increased from \$5,000 to \$20,000
- Compliance time extended from 21 days to 6 months
- The minimum debt amount which a creditor can petition for a sequestration order is now \$20,000

These changes will remain in place for 6 months.

COMMON ACTS OF BANKRUPTCY – SEC 40

Importance of Acts of Bankruptcy

To apply to the court to make someone bankrupt, you need to prove that the person has committed an 'act of bankruptcy' within the 6 months prior to your application. The most common 'act of bankruptcy' is non compliance with a Bankruptcy Notice another can be signing an authority pursuant to Section 188 to appoint a controlling trustee to initiate a PIA.

Obtain Consent of Trustee to Act

When you present a creditor's petition to the court (Federal Court or the Federal Circuit Court), if you wish to appoint a particular trustee, you must provide a Trustee consent to act declaration at this stage.

Creditor's Petition - Sequestration Order

To obtain a priority in the Bankrupt estate for the petitioning creditor's costs you should request that the court either fix the costs in the sequestration order or order that the costs are to be taxed and paid as a priority claim out of the bankrupt estate.

BANKRUPTCY TRUSTEE'S DUTIES

- Informing creditors of the bankruptcy
- Identifying and protecting property that can be realised to pay a dividend to creditors
- Reporting to creditors within 3 months of the date of the bankruptcy on the likelihood of creditors receiving a dividend
- Giving information about the administration of the estate to a creditor who reasonably requests it
- Investigating transfers of property that is void against the trustee
- Recovering property
- Taking whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt's duties under this Act
- Determining whether the bankrupt has committed any offences against this Act
- Referring to the Inspector-General or to relevant law enforcement authorities any evidence of an offence by the bankrupt against this Act
- Administering the estate as efficiently as possible by avoiding unnecessary expense
- Exercising powers and performing functions in a commercially sound way

In performing duties, Trustees engage other professionals to assist administering estates

BANKRUPTCY - ACCESSING INFORMATION & RECORDS

- Notices - s77A Associated entities
- s77C
- s81 examinations
- Offshore Information Notices

Funding

Similar to ASIC's Assetless Administration funding, the Commonwealth may underwrite the future costs of:

- Making inquiries into examinable affairs
- initiating, continuing or defending proceedings where there are reasonable prospects of success
- locating Bankrupts where Trustee has tried and failed (\$500 local and \$800 Australia wide)

BANKRUPTCY - PRIORITY OF CLAIMS & DIVIDENDS

- **Section 109** outlines order in which funds in a bankrupt estate is to be distributed
- Estate Realisation and Interest Charges (a levy on the estate currently 7% of gross realisations less secured creditor payments and any trade-on costs)
- AFSA fees and costs if change of trustee
- Expenses of trustee protecting assets or carrying on a business
- Taxed costs of the petitioning creditor (or as fixed by the court in the sequestration order)
- Trustees remuneration as approved
- Employees wages to \$4,550 each
- Annual leave, LSL, etc
- Apprenticeship debts
- Unsecured creditors

BANKRUPTCY - PRIORITY OF CLAIMS & DIVIDENDS

Provable Debts

All debts and liabilities, present or future, certain or contingent as at the date of bankruptcy (some exclusions includes fines or penalties, unliquidated damages, HELP debts, student start up loans.

Dividends

Payment of claims in accordance with the Act on a pro rata basis.

ENDING A BANKRUPTCY

Discharge – 3 years and 1 day (statement of affairs)

Annulments

- By Composition or arrangement Pursuant to Section 73 of the Bankruptcy Act
- Debts paid in full together with the statutory amounts
- If the Court is satisfied that a Debtor's Petition ought not to have been accepted by the Official Receiver
- As a result of any annulment, the remainder of the vested property reverts to individual

Objections

Special grounds (5 years)

General grounds (2 years)

ENDING A BANKRUPTCY

Offences

Compliance - carry 12 month statutory limitation periods and punishment includes up to 6 months jail

- administrative-type bankruptcy offences
- failure by a person to provide the trustee or Official Receiver with specific information and/or documents

Complex – higher burden of proof criminal & civil

- those that involve fraud and/or financial loss
- need to establish that the bankrupt or debtor intentionally or recklessly failed to comply with their obligations

INSOLVENCY LAW REFORM - BANKRUPTCY

Creditors Rights

- Have the right to request to change the trustee (see also s181A)
- Make a reasonable request to the Trustee for a report, document or information (5 business days)
- Request a review of the Trustee's remuneration by the Inspector General (within 20 business days of RCN)
- By resolution, provide directions to Trustee (not required to comply with)

COVID-19 Reform

In 2015 the productivity commission put forward the concept of reducing the bankruptcy period from 3 years to 1 year. A Bill was put forward, however it never became legislation.

As a result of COVID-19 many individuals will become bankrupt through no fault of their own, therefore it may be time for the bill to be re-introduced and legislation enacted to reduce the period to 1 year.



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QUESTIONS