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MEMBERS' VOLUNTARY LIQUIDATION

What is a Members' Voluntary Liquidation (MVL)?

A Members' Voluntary Liquidation is a process by which the assets of a company are able to be distributed to its creditors and members under the control of a liquidator who is subject to the legislative requirements of the Corporations Act 2001 (Act).

An MVL may also be used in the winding up of solvent associations and co-operatives, as the procedures set out in the Act are generally adopted by the various State Acts under which Associations and Co-Operatives are governed.

When can an MVL be used?

An MVL can only be used when a company is solvent, i.e. able to pay its debts (including related entity debts such as shareholders' loans) in full within 12 months of the commencement of the winding up.

Why would an MVL be used?

- Simplification of a group structure wherein the more subsidiary companies the greater the compliance costs.
- The reason for the company's existence is no longer relevant, or the company has achieved its purpose (such as in the construction industry)
- A family company has outlived the first- and perhaps even second-generation founders and the present shareholders no longer wish to be in business together or want access to any shareholders' entitlements they may have.
- It provides a measure of security, as a Liquidator is appointed if the company is revived (for example, to answer historical insurance claims).

What is the proposal for distribution to shareholders?

- Is there a clear understanding of who is intended to get what, and do all of the shareholders agree? If not, the liquidator may well end up in court.
- If the proposal is for a distribution of assets in specie, does the Constitution (or equivalent) allow such a distribution? If not, a special resolution will be required to amend the relevant clause prior to placing the company into liquidation. Additionally, where the distribution may include an in specie component, consideration of the value of any assets to be distributed in specie is important.

Share Structure

Matters to be considered when reviewing the share structure include:

- Are there any classes of shares with special conditions attached? Family companies frequently have a number of classes of shares which may have special conditions attached (such as founders' shares), which have different entitlements to participate in the distribution of surplus assets in a winding up.
- Are all the shares fully paid and if not, do partly paid shares have different voting rights to fully paid shares?
- Do any partly paid shares need to be paid up prior to the distribution to shareholders?
- Is the Authorised Capital as disclosed in the company's records within the limitations set by the Constitution?

Taxation Matters

Consideration needs to be given to the taxation position of both the company and the individual shareholders and in more complex instances, tax advice may be required from a competent tax lawyer. In particular:

- Capital Gains Tax implications for shareholders. Have there been any movements in share capital, including the issuance of new shares, which may diminish the capital gains tax free distribution of capital reserves (in particular Division 149 ITAA 1997)?
- Is the franking account up to date to maximise the franking credits available to shareholders?
- Are there timing considerations for the shareholders?

Trading Position

Has the company ceased to trade and, if so, have:

- suppliers and other creditors (including loans and other statutory commitments such as superannuation and workers compensation) been paid?
- contracts involving the company been completed?
- all required taxation lodgements (BAS, ITR) been made and any resulting liabilities or refunds been paid/received? This may also include cancellation of the company's ABN where appropriate.
- company reserves identified as either pre- or post-CGT assets?

Ideal Balance Sheet

An "ideal" balance sheet would disclose only assets and equity, with all liabilities having been paid.

As a result of changes to the Act in September 2017, the existence of liabilities at the time of appointment triggers onerous reporting obligations on the liquidator (notwithstanding that the company is solvent or may pay all liabilities during the course of the liquidation). This can increase the cost of the liquidation significantly, and should be avoided if possible.

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The MVL Process

Upon appointment, the liquidator will:

- notify the ATO and other statutory bodies of the appointment of the liquidator, and advertise for any claims against the company.
- identify and take control of all of the company's assets.
- instruct the company's tax accountant to prepare the final accounts and tax lodgements up to the date of liquidation and ensure the final tax payment is made.
- seek clearance from the ATO to distribute the company's assets in accordance with Section 260-45 of the Tax Administration Act 1953.
- lodge an account of the liquidation with ASIC. The company is deregistered 3 months after the lodgement of this account.

To find out more, including an indication of the cost, please contact us on 1800 246 801.

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