

MEMBERS' VOLUNTARY LIQUIDATION

A TAX EFFECTIVE WAY TO DISTRIBUTE FUNDS TO THE
SHAREHOLDERS OF A SOLVENT COMPANY.



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TOGETHER WE MAKE IT HAPPEN

Who are we?

We are a dedicated insolvency accounting practice with extensive corporate and personal insolvency experience. Our firm is an independent member of HLB International and the HLB Mann Judd National Association – a worldwide organisation of respected accounting firms and business advisors.

We appreciate that managing a struggling business and juggling debt is distracting and stressful. We derive satisfaction and motivation by helping people understand their options and by creating a clear plan to escape a cycle of uncertainty and worry.



Greg is a Partner at HLB Mann Judd Insolvency WA with over 13 years of corporate and personal insolvency experience. Greg is a Registered Liquidator and manages the corporate and personal insolvency appointments managed by the firm.



Kim is a Partner at HLB Mann Judd Insolvency WA. Kim is a Registered Liquidator and Trustee in Bankruptcy with over 35 years of experience specialising in insolvency and reconstruction involving all types of personal and corporate administrations.

WHAT IS A MEMBERS' VOLUNTARY LIQUIDATION?

A Members' Voluntary Liquidation ("MVL") is often a tax effective method of bringing the affairs of a solvent company to an end by settling the claims of creditors in full and distributing the surplus assets of the company to its members.

The main reason to commence an MVL process is to return the capital of the company to the members or to distribute any pre-1985 capital reserves in a tax effective way.

BENEFITS OF A MEMBERS' VOLUNTARY LIQUIDATION:

Taxation

If a company has derived a mixture of accumulated profits and capital reserves, the *Income Tax Assessment Act 1936* provides relief to members in certain circumstances where distributions are made by a Liquidator that would otherwise not be available.

The two main categories of exemptions afforded to members relate to:

- Capital profits generated by a company from pre-CGT assets (i.e. acquired prior to 20 September 1985); and
- Small business CGT concessions.

If a company declared a dividend and distribution of accumulated profits and capital reserves prior to the appointment of a Liquidator, these dividends and distributions would be fully taxable to the members of the company.

However, should a Liquidator be appointed by way of a MVL, the same dividend and distribution will, in most circumstances, result in the tax free status of the capital reserves flowing to the members own tax return (so long as the financial accounts of the company underpin the identification of the relevant capital reserves).



BENEFITS OF A MEMBERS' VOLUNTARY LIQUIDATION cont.

Clean Up / Finalise Affairs

An MVL can 'fast track' the deregistration of a company which has achieved its original purpose.

Ensuring the deregistration of a company at the end of its 'useful life' will save on annual fees and accounting costs, which would otherwise accumulate if the company was left registered, when it had no reason to be.

Family Conflicts

Conflicts can arise when dealing with family companies, especially in relation to the distribution of company assets at the end of its operational life.

An independent Liquidator, appointed by way of an MVL, is well equipped to act as an independent arbiter in these situations.

Risk Management

As long as a company is registered, there remains the prospect of a public liability claim or personal injury claim being made against it and therefore its members.

By undertaking a MVL, a company can be deregistered, removing the immediate risk of any such claims.

Furthermore, a company is far more difficult to reinstate following deregistration via MVL, compared to a company deregistered as a result of unpaid annual ASIC fees or a simple application for deregistration. This is because a company deregistered following a MVL requires an application to the Court to be reinstated, while a company deregistered as a result of the latter circumstances does not.

"A members' voluntary liquidation provides security of its members interests whilst the company winds up"

THE MEMBERS' VOLUNTARY LIQUIDATION PROCESS

The process to appoint a Liquidator is very important and we know it well - see below:

Step 1 - Meeting of Directors: At a meeting of directors, a resolution should be passed that a Declaration of Solvency (ASIC Form 520) be signed and that a general meeting of members be called to consider the resolutions that the company be wound up, that the assets be distributed and that a Liquidator be appointed.

Step 2 - Lodgement of Declaration of Solvency: The original of the Form 520 (Declaration of Solvency) must be lodged with ASIC before the date on which a notice of meeting of members is sent out.

Step 3 - Notice to Members of an Extraordinary General Meeting: Members must receive 21 days' notice of the proposed meeting, unless a Consent to Short Notice is obtained from not less than 95% of the members.

Step 4 - Meeting of Members: At the meeting of members, the following resolutions should be passed:

- that the company be wound up,
- that a Liquidator be appointed,
- the amount of the Liquidator's remuneration, and
- members' consent for the early destruction of the records of the company upon dissolution of the company.

The Liquidator does not always physically realise assets, as they may be transferred to the members in specie as part of the distribution process. We have handled the in specie distribution of loan accounts (Division 7A loans for example), land and shares and we have systems to streamline these processes.

Before the assets can be distributed, the Liquidator must obtain a tax clearance from the Australian Taxation Office ("ATO"). This usually means we work with the existing taxation accountant to complete any outstanding lodgement obligations before tax clearance is granted (i.e. a tax return up to date of liquidation and any other outstanding Business Activity Statements etc).

It can take upwards of six weeks (but often quicker) to obtain tax clearance from the ATO and the members should be advised of this time frame before the liquidation commences.

Upon distribution of the assets, the liquidation is finalised and the company is ultimately deregistered by ASIC three months after the Liquidator has completed the process.

At HLB Mann Judd Insolvency WA, we conduct more than our fair share of MVLs and we bring a great deal of knowledge to the process, especially when it comes to dealing with the ATO on the issue of tax clearance. Our experience tells us that time invested up front understanding the balance sheet will often make for a smoother MVL process, with less chances of delays as a result.

"A members' voluntary liquidation serves to return capital and other reserves to shareholders in a tax effective way"

- Greg Quin, Partner



CASE STUDY: IN-SPECIE DISTRIBUTION OF LAND TO MITIGATE TRANSFER DUTY

In-specie distributions of land in a Members' Voluntary Liquidation are common. They are an effective way to transfer land out of the name of a corporation and into the names of the shareholders and in most circumstances, in a way that minimises transfer duty levied by the Western Australian Office of State Revenue ("OSR").

Briefly, nominal duty is chargeable on a dutiable transaction that is a transfer of corporation property if the total value of the transaction to the shareholder, when the winding up begins, is equal to or less than the value of the shareholder's entitlement to the net assets of the corporation at that time.

In other words, nominal transfer duty is chargeable on a transfer of land if the shareholder receives an entitlement to land proportionate to, or less than, their shareholding proportion in the company.

For the assessment of nominal transfer duty as a consequence of a Members' Voluntary Liquidation to apply, the following will need to be provided to the OSR (key elements are provided – there are more!):

1. The transaction record (such as a transfer or agreement to transfer)
2. A Statutory Declaration by the Liquidator that includes:
 - a) Confirmation of the winding up details
 - b) Complete financial statements of the corporation:
 - i. As at the date of winding up
 - ii. Immediately following the date of winding up
 - iii. As at 30 June the previous financial year
 - c) Details of the share capital of the corporation and a listing of the shareholders and their respective holdings as at the date of winding up
 - d) Details of the rights of each class of share
 - e) Details of any amounts owed to a shareholder that the shareholder has released the corporation from paying during the period beginning 12 months before the winding up commenced and ending when the property is transferred
 - f) Details of any liabilities that a shareholder has assumed or discharged on behalf of the corporation during the period beginning 12 months before the winding up commenced and ending when the property is transferred
 - g) The date each shareholder acquired their individual shareholding
 - h) Confirmation that it is intended to distribute the assets of the corporation to the shareholders in accordance with their respective beneficial entitlements and details of how the distribution is to be made
 - i) Where the property was previously owned by a corporation related to the corporation being wound up, confirmation of whether or not any shareholder held shares in that related corporation
 - j) Dates of acquisition of the property by the corporation or a related corporation
 - k) Details of any dealings in shares of the corporation or a related corporation by a shareholder or a previous owner of the property

CASE STUDY: IN-SPECIE DISTRIBUTION OF LAND TO MITIGATE TRANSFER DUTY cont.

There are some other considerations that the OSR takes into account also, which can be obtained from their website. The point of all of this is so the OSR can make a clear assessment on what the right amount of transfer duty should be.

In a recent case we dealt with at HLB Mann Judd Insolvency WA, the director said there were two identical parcels of land to be distributed to the two, 50/50 shareholders. At face value, the nominal transfer duty concession would apply, right? Wrong. Upon further inspection of the records, there was a third shareholder in the company that transferred its shares equally to the remaining two shareholders for no consideration only a few months prior to the intended winding up. The reason for this was simply to make the whole process simpler – two parcels of land and two shareholders instead of three.

This creates a problem, in that the full rate of transfer duty would be assessable on the proportion of the land that the ‘third’ shareholder would have ordinarily received. It will still be an advantageous outcome, but not as good as it could have been.

Members’ Voluntary Liquidations are not only effective from the perspective of accessing pre-CGT gains and other tax concessions and discounts in tax effective ways, but also from a transfer duty angle also – but there are some traps if you do not know what to look out for.

If you have a client that is a candidate for a Members’ Voluntary Liquidation, then please feel free to get in touch with us for a cost and obligation free consultation regarding the ins and outs of the process.

As our example above points out, an early discussion could save a fair bit of money at the end of the day.

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