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## KALUS KENNY INTELEX

### Bankruptcy, Insolvency & Rehabilitation Proceedings in Australia

**ILN RESTRUCTURING & INSOLVENCY GROUP**

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## KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER AUSTRALIAN LAW

**Companies**

Corporate insolvency in Australia mostly involves a company being placed in liquidation or administration.

Companies can be placed in liquidation by:

1. The directors, or
2. A creditor applying to the court, or
3. An oppressed minority shareholder applying to the Court, or
4. The shareholders, or
5. After an administration process, if a scheme of arrangement is not entered into by the company with its creditors.

A liquidator is appointed to control the affairs of the company to recover funds for creditors.

The liquidator will be a private practitioner who will charge fees for his and his firm's work. Those fees are a priority payment before unsecured creditors are paid.

The liquidator needs to be independent. Liquidators that have had a prior association with the company or its directors can be removed.

The voluntary administration process requires the directors to appoint an Administrator to investigate if the company can be saved, most commonly by a sale of assets or a scheme of arrangement with creditors.

When a company is in administration, there is a moratorium that prevents, among other things, the winding-up of the company, secured parties enforcing security interests, landlords taking possession of leased property, and court action cannot commence or proceed.

A scheme of arrangement usually involves shareholders agreeing to provide funds to pay an amount to creditors to avoid the company being placed in liquidation. There is a limited time for a scheme of arrangement to be proposed.

For example, shareholders might advance funds equal to say 50% of amounts owing to creditors.

A scheme of arrangement requires 75% of the value of the creditors, and a majority in number, to agree. Creditors need to be satisfied that the Scheme of arrangement would create a better

return than if the company was placed in liquidation.

The Administrator would usually recommend the scheme of arrangement to creditors if that was the case.

Otherwise, the company will go into liquidation.

The Administrator then becomes the Liquidator.

Liquidators will then take such steps as they can to recover funds for creditors. Those steps often include:

- Asking creditors (including the taxation office) who were paid in the 6 months prior to the liquidation to repay the funds to the liquidator;
- Selling assets;
- Collecting debts, including debts owing by directors or shareholders;
- Recovering uncommercial transactions entered into to defeat the interests of the creditors.

**Traps for directors**

Liquidators can pursue bad corporate behaviour by directors.

Directors of a company that goes into liquidation can then have a poor credit rating. Banks may then be reluctant to lend to the director or to

any new company, and creditors may be reluctant to extend credit.

If a person is a director of 2 or more companies that have gone into liquidation, and if the return to creditors was less than 50%, the director can be banned from being a director of a company for 5 years.

If the company was trading and incurring debts when the directors ought to have known the company was insolvent, the directors can be held personally liable for any such debts.

**Individuals**

Personal insolvency is called bankruptcy in Australia.

A person who is unable to pay his or her debts, can declare themselves bankrupt, or a creditor can apply to the Court to bankrupt an individual, if they have a judgment against them for at least $5,000.

Bankruptcy releases a person from unsecured debts and allow them to make a fresh start.

Bankruptcy normally lasts for 3 years and 1 day. It can be extended for up to 8 years most commonly if a person's bankruptcy Trustee has reason to believe that the person has not been truthful about their affairs.

When a person becomes bankrupt a Trustee is appointed. A Trustee is a person who manages your bankruptcy.

A bankrupt person must provide details of their debts, income, and assets to their Trustee.

Your Trustee notifies creditors that you are bankrupt - this prevents unsecured creditors from pursuing the debt.

The trustee can sell certain assets to help pay debts.

A bankrupt may need to make compulsory payments if their income exceeds a set amount.

Bankruptcy is an option, but a person may also try to enter into a personal insolvency agreement, requiring 75% of creditors to agree.

Bankruptcy may have serious consequences and prejudice a person's ability to obtain credit, travel overseas or gain certain employment.

Certain types of professions may be in jeopardy such as a lawyer or a builder.