

Asset risk exposure checklist

Personal insolvency

CONSIDERATION	PROVISION / EXPOSURE	Y	N
Divisible assets of at-risk person vest in Trustee, including but not limited to: • Shares/Units owned in Companies/Trusts • Debit Loan Accounts/Unpaid Present Entitlements	ss58 & 116 – Bankruptcy Act		
Assets acquired after bankruptcy but before discharge vest in Trustee.	ss58 & 116 – Bankruptcy Act		
Is at risk person a beneficiary of a Will where the interest may crystallise before/during bankruptcy?	ss58 & 116 – Bankruptcy Act		
Income of person assessable for contributions to Bankrupt Estate (beware deeming provisions for benefits).	Div4B – Bankruptcy Act		
Has there been a transfer of assets by individual within 5 years of relevant date for undervalue?	s120 – Bankruptcy Act		
Has there been a transfer of assets by individual to defeat creditors (no time limit)?	s121 – Bankruptcy Act		
Have there been gifts or other settlements with entities/individuals?	ss120 & 121 – Bankruptcy Act		
Services/Financial Contributions provided by at risk person to Individual/Entity which was used to acquire / service assets of an entity of another individual.	ss139A to 139H – Bankruptcy Act		
Have there been transfers to superannuation funds before bankruptcy?	ss128B & 128C – Bankruptcy Act		
Have there been withdrawals from superannuation funds before bankruptcy?	ss58 & 116 – Bankruptcy Act		
Member of a SMSF must notify ATO within 28 days if insolvent under administration: • disqualified from acting as trustee personally • banned from acting as director of company	s120(1)(b) – Superannuation Industry (Supervision) Act s206B(3) – Corporations Act		

Asset risk exposure checklist *Corporate insolvency*

CONSIDERATION	PROVISION / EXPOSURE	Y	N
Is more than one spouse a director of the corporate trading entity?	Personal guarantees/ insolvent trading/breach of director duties etc.		
Have personal guarantees been given to suppliers? Do they have a charging clause? Has a register been maintained?			
Are there outstanding Debit Loan Accounts owing to the company that must be repaid?			
Has there been repayment of a related party credit loan account that may give rise to a claim by a Liquidator?	Pt 5.7B – Corporations Act (voidable transactions)		
Has there been a transaction with a related party which may be considered uncommercial or for less than market value that may give rise to a claim by a Liquidator?	Pt 5.7B – Corporations Act (voidable transactions)		
Beware director indemnity provisions relating to payments to the ATO (recovery of preferential payment by liquidator).	s588FGA – Corporations Act		
Has the Company traded whilst insolvent? Consideration of insolvent trading 'safe harbour provisions'? Consideration of statutory defences? Review ASIC Regulatory Guide 217 - Duty to Prevent Insolvent Trading.			
Does the at-risk trading entity have a holding company (risk that holding company liable for insolvent trading)?	s588V – Corporations Act		
Is there any conduct that may give rise to a potential claim for breach of fiduciary duties?	ss180 to 184 – Corporations Act		
Is there a risk of a Director Banning Order from ASIC?	s206F – Corporations Act		

Asset risk exposure checklist *Corporate insolvency*

Director Penalty Regime

CONSIDERATION	PROVISION / EXPOSURE	Y	N
Consideration for exposure for personal liability to the ATO for PAYG, “net” GST ¹ and Superannuation.	Division 269 of Schedule 1 - Taxation Administration Act 1953		
Residential address up to date with ASIC?			
Safeguards to ensure BAS/IAS are lodged by (or within 3 months of) due date.			
Safeguards to ensure SGC Statements are lodged by the due date.			
Consideration of exposure for personal liability of new directors appointed to existing companies.			
OTHER CONSIDERATIONS			
Are related party credit loan accounts documented in writing (including a charging clause) and registered on the PPSR?	Personal Property Securities Act		
Is the business being conducted in a separate entity to where the assets are being accumulated?			
Is there an unregistered PPS Lease between entities, which is at risk of vesting in an external administrator on an insolvency event?	ss267 & 55(3) – Personal Property Securities Act		
Has a PPSR registration been taken by the financier (i.e. bank or other financier) over the corporate entity?			
Consideration of taking a security interest and PPSR registration to secure exposure for contingent liabilities e.g. personal guarantees that may be paid in the future.	Personal Property Securities Act		
Is Discretionary Trust ‘alter-ego’ of at-risk person? Consider role of Trustee, Appointor and Directorships?			
Is insurance cover in place and adequate to mitigate risk (e.g. Professional Indemnity, Product Liability, Business Insurance, Trade Debtor Insurance, Director and Officer Insurance etc.)?			

i.e. GST, Wine Equalisation Tax and Luxury Car Tax

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