



THE COMPLETE INSOLVENCY GUIDE

Any business thinking about
closing the doors should be
armed with this guide

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THE COMPLETE INSOLVENCY GUIDE

This guide explains TPH Advisory's Philosophy, Approaches and Practices to Formal Voluntary Insolvency Appointments

Thank you for taking the time to find out more about **tph** Advisory. We hope this guide gives you an introductory perspective of our unique philosophy and how we go about our business.

As you are no doubt aware, when a company finds itself in the unfortunate position of requiring an insolvency practitioner, a referral from the company's accountant, lawyer or trusted adviser continues to have significant influence over the choice of Liquidator.

However, appointing a voluntary administrator or liquidator is fundamentally the domain of a director. Once the situation arises where it is necessary to consider appointing a liquidator, only a small percentage of advisors and directors have appropriate knowledge on how to make the decision as to their choice of Liquidator.

The decision to choose a registered liquidator is a significant one in the life of a director, and with this in mind **tph** has put together this guide clearly describing how **tph** will deal with the plethora of common legal and commercial issues.

tph believes it is important that accountants, lawyers, advisors and directors have the opportunity to understand how **tph** as a proposed Liquidator will deal with these types of matters before any appointment is made.

Following the appointment of an insolvency practitioner the influence that these parties can have on the direction and life of the company from that point on is negligible. The choice of liquidator is fundamentally the last significant decision to influence the activities of the company.

It seems obvious to **tph** that a director and their advisors should know how the nominated liquidator will respond to various issues given those issues will have significant impact on the director, the shareholders, creditors and employees.

tph recognises there is very little published material on how registered liquidators treat common issues in different ways and with different approaches. Although every company is dealing with the same laws it does not mean the Liquidators will react the same way with each issue.

By providing this guide, **tph** hopes it is clear what you are getting when appointing **tph**, and also what you should be asking of other liquidators before a decision is made.

It's about choice, and if you do not get clear, understandable answers from a potential liquidator then you have an opportunity to interview others for the role.

We hope you get some assistance from this guide. We are always happy to answer any other questions you may have that are not covered by the guide.

Please contact one of our liquidators or senior staff who will be only too happy to assist.



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WHO WE ARE



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Tim has been helping financially distressed businesses and individuals for 30 years. Not only is Tim a Senior Insolvency Practitioner but he is a Leading Restructuring and Turnaround Professional.

As a recognised Senior Registered Liquidator, his advice and guidance is constantly being sought by those willing to work on saving, turnaround and reconstruction strategies.

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Amanda Lott

**Senior Strategy Expert
Restructure, Turnaround, and Insolvency**

With 18 to 20 years' experience in this specialist field, Amanda is a Chartered Accountant and Registered Liquidator with a wealth of knowledge.

Amanda is passionate about creating the best possible solutions for her clients. Her attributes make her the 'go to' choice for re- construction and insolvency expertise.

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Mark Everingham CPA

**Strategy Implementation Manager
Restructure, Turnaround and Insolvency**

Mark has over 12 years of industry experience in both corporate and personal insolvency, as well as advisory matters. Mark has a degree in Financial Administration (Accounting), is a professional member of CPA Australia and a full member of Australian Restructuring Insolvency Turnaround Association, in addition Mark is Registered Liquidator.

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OVERALL GENERAL APPROACH/PHILOSOPHY

The tph Approach

tph Advisory's overarching philosophy is to first explore with directors the options to save the business, or if that's not possible to maximise the value of its assets.

This may include liquidating the company but saving the business at the same time. For example, selling the business to related or unrelated parties.

We are also focused on asking the directors... 'what do they want to achieve with respect to the business'? Do they want to save it or let it fall over?

We canvas the applicability of 'Safe harbour' and restructuring options as an alternative. If not a formal safe harbour then the principles enshrined in 'Safe Harbour'. We also ask, 'do they want to avoid Liquidation or Voluntary Administration' and would they be prepared to attempt to turn the business around without going into Liquidation or Voluntary Administration? It is all about exploring logical options.

Liquidation and Voluntary Administration are not always the right answer. That said, if we form the view that it would be either extraordinarily difficult to save the business, or impossible to look like the action taken is considering creditors and employees and other stakeholder interests then we will always inform the directors of what is expected of them as directors with respect to their fiduciary duties.

Common alternative approaches adopted by Insolvency Firms

The interpretation and delivery of insolvency work varies widely across the Australian Corporate landscape. The variation occurs due to a multitude of factors.

Factors such as:

- does the liquidation arise because a creditor has taken action and the courts have appointed a Liquidator. This usually occurs against the wishes of the directors.
- Were the director's conscious of the business' dire position and thus sought professional advice as to options for the company/business, in which case the directors can choose which insolvency practitioner to use.
- Does the company have sufficient realisable assets from which to meet the remuneration requirements of the Liquidator/VA?
- Has the company been in existence for a long or short time.?
- Have the directors previously been through a liquidation or the like?

The tph Smart Solution

All these factors feed into the approach adopted by the appointed Liquidator. It would be unusual for any two Liquidators to treat each factor the same way. Of course, there are legal requirements, ASIC guidelines and there is a professional body (ARITA) to help guide Liquidators, but ultimately the way a liquidation unfolds is a case-by-case situation. Many decisions, whether it's a good thing or not are influenced by the availability of funds to do whatever has to be done.

tph tries to balance responsibility with commercial reality and we have significant regard for what is in stakeholders' best interests..

ADVISORY ROLE VS FORMAL INSOLVENCY WHICH ONE IS BEST FOR ME

The tph Difference

When a director requires either feedback or specific services of an insolvency practice it is not uncommon for that director to have had limited experience in engaging insolvency expertise. **tph** ensures that every potential client is offered either our advisory services where we act for the director or our formal insolvency services where we act for creditors and all parties.

We have developed these options because a formal insolvency solution (eg Liquidation or Voluntary Administration) is not always the best approach. Where we see an opportunity of leading a company away from a formal insolvency solution for a chance of a better result, we will always promote that approach.

It does mean however that we are ineligible for the Liquidation or Voluntary Administration if **tph** is the advisor. We have no difficulty in accepting the advisory role as that will generally provide a superior outcome. Advisory roles allow the insolvency advisor to act for the directors (whilst aiming for better outcomes for all stakeholders/creditors).

Common Alternative Approaches adopted by Insolvency Firms

Not all insolvency firms are motivated to offer advisory services and much prefer to push for an official appointment such as liquidator or voluntary administrator (VA). That is their prerogative, and some would say that avoids any of the difficult questions concerning conflict of interest.

In **tph's** view it also limits the options available to a company and its directors as the 'choices' provided by the insolvency expert will often be directed at a VA/Liquidation and not an advisory turnaround reconstruction type scenario. The other reason advisory is not offered by many insolvency firms is that it is actually more challenging than doing VA/ Liquidations which are very prescriptive and offer a certain amount of protection to the insolvency practitioner.



The tph Smart Solution

At **tph**, we find this very limiting and that is why we will consider either role for the most effective outcome. Recent legislation has created a legal category called 'small business restructuring'. **tph** supports and offers this service.

Appointing an insolvency firm, whether it is in a formal capacity or in an advisory role, the approach should be to arm you with the information so that the best outcomes can be achieved. All too often a quick decision is made to appoint an insolvency firm without first understanding the philosophy and approach of a firm. **tph** will provide options and opportunities which is a clear difference when comparing against other firms.



QUESTIONS DIRECTORS SHOULD ASK BEFORE CHOOSING AN INSOLVENCY PRACTITIONER

The tph Difference

If Liquidation or Voluntary Administration is decided as the best option, a director really should ask questions as to how the proposed Liquidator will deal with a number of common issues that arise in most formal appointments. Unfortunately, directors don't usually ask as many questions as they should and therefore there are many surprises after a Liquidator takes control. Directors often say, "I wish I'd known that before I appointed 'so and so' as I might have made different decisions". For example, I may have tried to save the business and found more finance to keep it going... But often it is too late.

What we present here is a very transparent view of how **tph** approaches the issues. Some simple common questions might be:

- 1 When would you start insolvent trading action against a director?
- 2 What action will you take if there is a director debit loan account?
- 3 How will you treat any loan I've made to the Company?
- 4 What do you expect me to do to assist you as Liquidator?

Common Alternative Approaches adopted by Insolvency Firms

We have not seen any other insolvency firm outline their approach in a public manner such as we have at **tph**.

It seems logical and timely for us to do so when the corporate environment is calling for transparent actions.

Insolvency should not continue to be opaque, and it needs insolvency practitioners to illuminate and outline their approaches adopted.



The tph Smart Solution

tph works hard to provide open and transparent solutions, clients are well informed with the facts and what the outcomes will be. We encourage you to ask questions, this will help you select the best liquidator for your company knowing that any issues which arise will be dealt with in a way which achieves the best outcome for all parties. Directors armed with the facts can appoint the best firm so they can make better decisions.

RESTRUCTURE VS CLOSE DOWN LIQUIDATION

The tph Difference

At **tph** we have been in the insolvency industry for a very long time, and we have evolved our overall philosophy to support any program that should provide better outcomes for stakeholders (creditors/employees/shareholders). This usually means developing rescue plans that will involve turnaround strategies and perhaps restructuring options.

We will only look at a formal appointment as a first option if the directors want that as their only option. If however a director wants **tph** to work with the company to provide the best solution for all the stakeholders then everything is on the table. This is so, even after the introduction of the Small Business Restructuring Legislation.

We consider the possible scenarios that could work, such as negotiating different terms with pressing creditors, or looking at altering overhead issues, or cutting unprofitable lines of business etc.

We do the heavy lifting in getting on the front line with the suppliers/bankers or whoever it is that needs to be part of the solution. **tph** has significant experience in dealing with the banks, ATO, State Revenue etc.

Although we are very good at Liquidations, we are very effective at saving businesses by looking at all the options.

Common Alternative Approaches adopted by Insolvency Firms

The insolvency industry has a reputation in certain quarters that it shuts down businesses before it considers rescue plans.

There are many reasons for this, with the primary one being the insolvency practitioner who is likely to be personally liable if a trade-on position is adopted and it is unsuccessful.

There are genuine situations where a close down alternative is the logical choice, however the insolvency industry has a reputation for closing down too fast.



The tph Smart Solution

tph takes the time to truly evaluate what is the best course of action for all parties concerned, if there is a pathway that can save the business **tph** will recommend strategies to achieve that. The common approach is not always the best solution, **tph** will take a deep dive to unpack all the facts. The **tph** approach provides balance so that the best outcomes can be achieved.



INSOLVENT TRADING AND DIRECTORS

The tph Difference

tph takes a commercially pragmatic approach to insolvent trading. In essence, if the creditors are not prepared to indemnify us to take the action or they do not want us to use the funds in the 'kitty' and there is no litigation funding group willing to indemnify **tph**, then we are reluctant to take on the risk of litigation. Its slightly more complex than that, however that is our underpinning approach. In more detail however we look at:

- the size of the claim;
- whether the directors may have assets sufficient to pursue a claim;
- what funds a Liquidator has in the 'kitty' to undertake the legal action;
- If we have funds in the Liquidation, we determine whether it would be better to use the 'kitty' to repay creditors or take the legal action and risk their return. In fact, we ask creditors for their views on this issue;
- If we are unfunded we ask creditors to fund us;
- Under certain circumstances we may look to litigation funders, but claims usually have to be greater than \$300k;
- We are also obliged to consider any party who may wish to buy the right the Liquidator has to take the insolvent trading action, however it is a very complex and difficult outcome to achieve;
- Also, should the shareholders also be substantial creditors, we weigh up if it is worthwhile to commence the action against directors (who maybe the

shareholders) as they would end up recovering a significant dividend from the recoveries and it would not make sense to go through the exercise.

- When we meet directors, we will be transparent on this issue and all issues arising in the liquidation as it should assist in them making an informed decision.

Common Alternative Approaches adopted by Insolvency Firms

It is difficult to summarise how the rest of the industry addresses insolvent trading, but based on the number of cases that find their ways to the courts one could suspect there are few who make it all the way through the litigation process.

This may in fact be the case, but there are many liquidators who prepare and serve demands on directors without many of the **tph** criteria being met and some argue that it is simply a bargaining tactic to secure funds from directors even though there was never any intention to pursue the action.



The tph Smart Solution

tph does not adopt that approach and we would like to see the whole industry adopt the **tph** approach, however we feel that is a long way away. Firms that jump in and serve demands on directors without first applying the **tph** criteria can create an environment that lacks transparency and therefore making it challenging for the directors to exercise informed decisions.

DIRECTOR FIDUCIARY DUTIES

The tph Difference

It is possible for a Liquidator to make a claim(s) against directors for the damage inflicted on the company due to their management malfeasance and or poor observance of their fiduciary duties under the Corporations Act.

We take a pragmatic view, that unless it is an obvious wrong, we would report the matter to ASIC (as required by law) and let the Regulator decide what to do.

If there is a significant issue, we take a similar view as that adopted in Insolvent Trading cases. i.e. what are the creditors views/position. Are the directors sufficiently asset rich? Do we have sufficient available funds etc.

Common Alternative Approaches adopted by Insolvency Firms

It is very difficult to summarise how the rest of the industry address directors duties but based on the number of cases that find their ways through the courts one could suspect there are few commenced.

Nevertheless, we as an industry report to ASIC our findings as to directors' duties and most firms look to ASIC to fund supplementary reports which provide further information and evidence to ASIC as to the directors' actions.

tph also adopts this approach and assist ASIC as far as we are expected to do in accordance with the law.



FIDUCIARY
DUTY

The tph Smart Solution

tph upholds high standards, our approach is to maintain good governance, assess the criteria and work in accordance with the law. This ensures the correct procedures are followed whilst adopting a pragmatic view without the overhanging threat to commence proceedings to force action from directors.



UNCOMMERCIAL TRANSACTIONS SUCH AS PREFERENCES OR DISPOSITIONS CONCERNING DIRECTORS

The tph Difference

Directors sometimes enter into transactions in a time period before a company is placed into Liquidation. These transactions need to be reviewed by a Liquidator under the law to see if they should be reversed, or a claim made to compensate the company as the transaction may provide an unfair outcome to the directors over creditors.

tph reviews all transactions and identifies any that may fit that category. But again, the **tph** approach is commercially and legally pragmatic so unless stakeholders (usually creditors) want the Liquidator to spend money on recovering these types of transactions, or the transaction would be something a litigation funder would support, **tph** will report them to creditors but only commence the action if sufficient funds/coverage is available for cost orders in the event of losing, or if third party creditors are fully behind the action.

That sends a message to **tph** and how we deal with the claims. It's not absolutely conclusive that the action won't be taken, however it weighs heavily on our decision. We don't take legal actions simply for the sake of securing our remuneration (as an example).

Where a claim may exist against the directors, we are obliged at the very least to report it to ASIC and we will look to see if an action is feasible and that it is in the best interests of creditors. However, an action is not commenced unless it is commercially justifiable to do so.

Common Alternative Approaches adopted by Insolvency Firms

This area of insolvency and its treatment is widely interpreted by variety of practitioners. The pragmatic view of **tph** is sometimes adopted, however many practitioners will look at pursuing potential claims based more on a speculative basis than on a pragmatic basis.

There is certain criticism levelled at insolvency practitioners on the basis that it would appear claims that may be difficult to substantiate are made in any event in the hope that some funds may be recovered without litigation actually taking place and even if litigation is commenced then there might be some view that the litigation can be won by the Liquidator and recoveries would follow.

When this approach is adopted, in many instances it gives rise to a criticism which is levelled at insolvency practitioners whereby the recovery action does not benefit creditors but in many instances simply meets the costs of the liquidator. Clearly, sometimes it will look like that is the primary motivation, however unless you are in the shoes of the particular practitioner it is difficult to follow through on the accusation as there are other factors that need to be taken into account.



The tph Smart Solution

tph upholds high standards, our approach is to review all transactions, and evaluate their commercial criteria and work in accordance with the law. This ensures the correct procedures are followed whilst adopting a pragmatic view, unless the stakeholders (usually creditors) want the liquidator to recover these types of transactions by using the available options.



PHOENIXING COMPANIES

The tph Difference

The phoenixing of companies is an ongoing problem and challenge after an impacted company is placed into liquidation. If directors of companies engage in blatant asset transfer strategies for their own benefit (or they are assisted to do so by their advisors) we will take the approach that is expected under the corporations law, in particular the recent laws directed at phoenixing behavior.

If however, there have been steps taken that ultimately enhance creditors outcomes and preserve the legitimate business, **tph** will always look at those transactions in a logical fashion and avoid upsetting them. There are legitimate approaches that can be adopted prior to a liquidator being engaged. In many instances' creditors do not like the fact that a director has set up again with similar assets etc, however that does not automatically mean they have done it in a legally indefensible way (sometimes, there is a public interest argument, however they are rare).

Many business owners recognise that to maintain value in an asset, something must happen to it prior to liquidators getting involved as the Liquidation process can severely dampen the value of many business assets. **tph** look very pragmatically at these situations. For example, if a phoenix transaction has taken place but there are no funds to support a liquidator taking action to recover, then creditors will be canvassed for indemnification or litigation funders will be approached if the size of the potential claim is sufficient.

It is rare that **tph** would start an action without either creditor support/litigation funding or sufficient realised funds to support a claim. Regardless, the issue must be reported to the regulator who may take their own action under the new legislation.

Common Alternative Approaches adopted by Insolvency Firms

Recent amendments to the legislation have widened and strengthened the ability for Liquidators to seriously challenge genuine phoenix activity. ASIC now has a more involved role, and it is expected the insolvency industry will utilise the strengthening of the insolvency laws.

Liquidators will not attempt to upset pre-appointment asset transfers unless it is commercially sensible to do. **tph** adopts this approach as do many practitioners. That said, some liquidators will interpret an asset transfer situation quite narrowly and attempt to upset the transaction.

It is however a case-by-case situation and should a director have been party to a transfer of assets prior to a liquidation/VA then it should be disclosed to the prospective practitioner to understand the hypothetical approach that practitioner will adopt in his/her review of said transaction.

This disclosure and subsequent discussion will assist the director in making his/her decision as to whether to appoint **tph**.



The tph Smart Solution

Creating a clear picture, understanding the facts and how that will ultimately impact the outcomes for directors and the creditors is a critical factor when a decision is made to appoint an insolvency firm. It is commonplace for directors to appoint firms without conducting the due diligence to ensure that all parties will achieve the best outcomes. There is a clear difference in how insolvency firms apply solutions, the solutions should be pragmatic, fair and impartial, that is the **tph** difference.

PREFERENCES CREDITORS/SUPPLIERS/ATO

The tph Difference

Where **tph** is appointed Liquidator, we review all transactions that could be caught under the legislation commonly referred to as preference recoveries. A preference payment is where the company has paid a creditor just prior to liquidation and it has given that creditor an advantage over other creditors who were not paid. There are complexities attached to this area as Liquidators are generally asked to do their work in favour of creditors however the law asks Liquidators to recover funds from creditors who may have received an unfair advantage over other creditors prior to the Liquidation.

It is an awkward arena and **tph** is again pragmatic. If there has been an abuse that clearly favours the creditor and in many cases the directors too, we look to see all the commercial issues attached. To run a preference action is expensive and Liquidators are personally liable for costs orders that go against them. That is, if the liquidator commences the action and does not win, they (and not the assets in the company) must meet the costs order.

In 2021, unless the preference is over \$100,000 it is difficult to mount a commercial case to commence proceedings. Lawyers and Liquidators fees would take more than half of \$100,000 and it is an accusation levelled at Liquidators that they mostly only take preference recovery actions to meet their own fees. For this reason we do not commence proceedings unless the commercial rationale supports the action.

In respect to the ATO we will generally commence a demand against ATO where there are the appropriate grounds to do so. We will always let Directors be made aware that if we commence a preference action against the ATO, then the ATO may seek to join the director to recover whatever they had to repay to the Liquidator. Historically the ATO do not commonly take actions against directors for moderate amounts of money (say less than \$100,000).

Common Alternative Approaches adopted by Insolvency Firms

Preference recovery approaches vary considerably from Liquidator to Liquidator. Most of the time it revolves around a practitioner's appetite for taking on litigation risk. Some insolvency practices appear to treat preference recovery strategies as a primary limb of insolvency responsibilities. Many practices will commence speculative actions and gain the support of some aligned legal firms irrespective as to whether there are sound commercial reasons to do so.

Although the preference law is in place for the objectives previously noted, it can be used inappropriately without achieving either a return to creditors or penalising creditors who took advantage of their situation prior to the liquidation. Unless there is reform in the area perverse outcomes will continue.

There is ongoing debate as to whether the preference regime should be overhauled as it can be adopted by certain practitioners with its primary purpose to meet the costs of the liquidator. The underlying objectives are to recover monies from a creditor that received repayment of debt with knowledge of the company's financial circumstances over and above what other creditors were paid and secondly to recover those funds so that they can be more evenly distributed amongst the body of creditors.

Unless there is a significant transaction in comparison to the body of creditors, it is rare that the recovery of a preference goes towards making a fairer distribution of the company's funds to all creditors as the monies can often be simply fees for the liquidator. Many firms will simply issue demands to see if any parties will disgorge funds without a fight. If there is a defence then it varies from liquidator to liquidator how they make the decision to continue or not.



The tph Smart Solution

The primary objective is to reach the best outcome for all parties, using litigation as means to force preference recovery requires a strong case and a sizeable funds due to the high costs involved. **tph** applies a careful and measured approach to ensure the best outcomes are achieved for all parties, this comes from years of experience and knowledge working to provide smart solutions tailored to each client.



EMPLOYEE CLAIMS

The tph Difference

Employee claims are dealt with usually in conjunction with the FEG (Fair entitlements guarantee scheme) where the government essentially pays the employees. They get paid first before other creditors when a liquidator distributes money.

FEG has demonstrated they want Liquidators to act in a certain way with the funds Liquidators collect where the FEG scheme has paid employees.

They also tend to review any legal recovery actions Liquidators may have, which if successful could repay FEG the monies paid to employees. Every situation is different; however all stakeholders should be aware as to FEGS involvement and influence on Liquidations (and Voluntary Administrations and Receiverships).

Common Alternative Approaches adopted by Insolvency Firms

All practitioners should have regard for FEG's influence as a primary stakeholder/priority creditor in many liquidations and receiverships.

Because FEG is the government and have the most to gain from any actions liquidators may have for recovery they are the first to be considered when 'funding' maybe required to pursue legal actions that need funding to be commenced.

It is fair to say most practitioners do not ignore FEGs influence in the industry or over its practices.



The tph Smart Solution

tph respects and appreciates when a company goes into liquidation other than the directors of the business employees are heavily impacted, this requires empathy and appreciation for the employees ensuring that they remain a primary stakeholder throughout the process.



SALE OF ASSETS... AUCTION OR AN ALTERNATIVE

The tph Difference

When appointed as a Liquidator or Voluntary Administrator we are often responsible for selling the company's assets. At **tph** we like to think outside the proverbial square and our first step is to see if there is any other sensible approach other than sending assets to the auction block.

In a situation where there is a going concern business, we explore all possibilities of preserving the goodwill of the business. If the appointment is through a voluntary administration that gives scope to considering a deed of company arrangements rather than a sale of asset outcome. That type of scenario usually results in far better outcomes for creditors at the same time as preserving the business.

If there are no Deed of Company Arrangement options, other sale methods are considered such as a sale back to the related parties at a more attractive figure, a sale on-line, a going concern sale, can we sell to a competitor etc. If after an exhaustive program of looking at alternatives, there is no other option, we turn to the auction block.

Common Alternative Approaches adopted by Insolvency Firms

The approaches adopted by insolvency practitioners varies on how assets are realised.

All insolvency practitioners are governed by the same laws however, how they are applied does vary. We find many practitioners take the easy route and send assets to auction when they are well aware the return will be discounted just to avoid any scrutiny of their sale process.



The tph Smart Solution

Taking the easy route is not always going to get the best outcome, creating solutions that achieve the best results for all parties is built on the back of experience and knowledge. **tph** will always follow smart solutions to achieve the best outcomes.

ATO AS A MAJOR CREDITOR

The tph Difference

Where the ATO is a major creditor, and in some instances the only creditor, **tph** treat it as the primary beneficiary of any financial outcome that occurs whilst we are Liquidators. We provide the appropriate information to the ATO and if we think there is a legal action that, if funded, could result in a payment back to ATO, then we advise the ATO and ask if they wish to fund the action.

The ATO has a formal procedure to complete and a formal process they adopt when a request for funds is lodged. We note it can be a very costly exercise for a Liquidator to complete the request for funding process so **tph** rarely do so for unfunded matters.

We always invite the ATO to consider funding any legal actions, however they will not do so unless their expensive application procedure is followed. Thus we have found it problematic to get ATO to fund actions.

Common Alternative Approaches adopted by Insolvency Firms

The ATO rarely funds Liquidator recovery actions unless it is of adequate size, is a legally sound action and they are to be the significant beneficiary.

For that reason, most practitioners do not have many examples that would meet the criteria.

The ATO is also subject to political influence (such as COVID-19 crisis) and their approach can change depending on what they are told should be in the public interest.



The tph Smart Solution

Navigating a liquidation when the ATO is a major creditor and the primary beneficiary is bound by formal procedures. Although directors may view this process as weighted against them, it is important to understand that liquidators operate under the guidelines, **tph** presents a clear, open, and transparent pathway so that directors are informed working to achieve the best outcomes for all parties.



DEAL WITH DIRECTOR DEBIT LOAN ACCOUNTS

The tph Difference

Director debit loan accounts are usually the result of how payments to directors are treated when the payment is not included in the wages of shown by the company. If a director pays themselves but does not declare the payments as wages then when a Liquidator is appointed it will be recorded in the company's balance sheet as a loan the director should repay to the company.

It is up to a Liquidator to decide whether a claim for repayment is made against the director. Again, this usually revolves around the evidence backing up the loan account, the director's known financial circumstances, the cost to run the action and whether creditors want the Liquidator to use the 'kitty' to pursue the director.

tph applies its usual standard rules and does not commence actions unless all the criteria are met.

tph does not run actions against parties simply to meet its outstanding fees.

Common Alternative Approaches adopted by Insolvency Firms

Many Liquidators will try and run an action to secure a commercial result and this usually goes towards the lawyers and the Liquidators fees.

This approach varies between practitioners, however the more litigious a Liquidator, the more likely it is that an action will be commenced or demands made for the recovery of the figure represented in the balance sheet.

tph requires substantial evidence with things like loan agreements appropriately executed before considering pursuing a claim. Once relevant evidence is apparent the usual guidelines, such as creditors support, litigation funding and a positive view of the director's personal wealth are considered before embarking on a claim.

Directors should specifically ask potential Liquidators how they will treat the debit loan account. If the answer is unclear the director should consider an alternative Liquidator.



The tph Smart Solution

Any business that is considering appointing an Insolvency firm to liquidate a company should ask how director loan accounts will be treated and get a clear strategy. **tph** will collect the facts and always remain transparent so that there are no surprises once appointed.



BANK/SECURED LENDER AS A MAJOR CREDITOR

The tph Difference

If a company is placed into Liquidation or Voluntary Administration and it has borrowings where a party (usually a bank) has a legally binding circulating and noncirculating registered security interest, then **tph** will treat the bank with the highest level of respect and communicate regularly with it and attempt to be as transparent as possible.

tph will always recognise the security holders' rights and attempt to undertake a Liquidation program that takes the bank's interest/secured lenders position into account whilst also recognising other stakeholders' interest.

It can be tricky and sometimes the banks want their own program to be implemented. If that happens **tph** is as helpful as possible to allow the bank to act on its security.

Common Alternative Approaches adopted by Insolvency Firms

It is difficult to say what approach various insolvency practitioners adopt with secured lenders. If an insolvency practitioner is either considering appointment as a Liquidator or is appointed and there is a bona fide security interest (all or specific) then most Liquidators will recognise the position and work with the lenders wishes.

However, there are definitely examples where liquidators challenge security interests or do not assist the secured party.

In those situations, outcomes for all stakeholders have a greater uncertainty and in most instances do not end up being in the interests of the unsecured creditors or guarantors to the loans.



The tph Smart Solution

Much like a boxing match **tph** will act as the referee to ensure all parties are treated fairly whilst remaining transparent. Each situation is unique and requires a tailored approach, we understand there are difficult problems that require creative solutions. That's the **tph** difference, experienced practitioners with more than 30 years of knowledge in the industry. That's how you know you are getting the best advice to transition you and your business



DIRECTOR HAS EXPOSURE THROUGH PERSONAL GUARANTEES

The tph Difference

It is important to know which creditors have personal guarantees so that decisions that are made concerning creditors during a Liquidation or Voluntary Administration are made with knowledge of what other motivating factors may be at play from both the directors perspective and the creditors.

Directors also need to be advised that paying personal guarantee creditors in preference to other creditors can trigger the preference provisions.

Common Alternative Approaches adopted by Insolvency Firms

Because of the uncertainties of outcomes with respect to guarantees given, it is difficult to gauge actions by other firms.

It is correct to say however that the guarantee position of creditors in a liquidation should be well understood by the practitioner so that there are no surprises as the liquidator makes decisions during the course of the appointment.



The tph Smart Solution

There are many moving parts during a liquidation, directors can often feel overwhelmed during the process, **tph** adopts a clear and transparent pathway so that all parties remain informed.



INVESTIGATION REPORTS COMPULSORILY LODGED WITH ASIC BY LIQUIDATORS

The tph Difference

tph has developed an investigation program to comply with the requirements of the statutory reports to ASIC. The primary report is a tick-a-box format and asks questions about the size of operations and the likely creditor profile in the Liquidation/ Voluntary Administration. It also asks whether there are any aspects of the directors' conduct that should be reported for ASIC's consideration.

This is a document tph comply with and we perform our statutory investigation prior to completing the document. Occasionally ASIC will suggest that a supplementary report be lodged, and they fund approximately \$11,000 to the Liquidator to do additional investigatory work to assist with the report.

If ASIC has requested a supplementary report it usually means it is reviewing the directors conduct to decide as to whether a banning application against the director should be commenced. This aspect of Liquidations cannot be avoided and tph complies with the requirement.

Common Alternative Approaches adopted by Insolvency Firms

It is a statutory requirement that all Liquidators comply with.

Not to do so will jeopardise the registered liquidator's compliance and ASIC could take disciplinary action in such instances.



The tph Smart Solution

Investigation reports compulsorily lodged with ASIC by Liquidators highlight that there are strict rules around liquidating a company. Organisations trying to cut corners or not follow and apply the rules demonstrate that selecting a firm with experience and a wealth of knowledge is critical to get the best results.



LEGAL CLAIMS THAT COULD LEAD TO RECOVERIES INTO THE LIQUIDATION

The tph Difference

Quite often a Liquidator must decide whether to commence a legal action to recover funds for creditors in the Liquidation. The variety of legal claims is wide, and directors can alert the prospective Liquidator to the issues even before the Liquidation commences. At **tph** each legal claim is independently considered before a decision to continue any legal action is made.

Considerations include:

- 1 What is the legal merit of the case (ie is there a legal claim and is the evidence sufficient to run the claim?)
- 2 Are there sufficient funds to obtain a legal advice?
- 3 Are there sufficient funds in the 'kitty' available for such an action and do creditors want the Liquidator to utilise those funds?
- 4 Does the target party have the means to pay any judgement amount?
- 5 Can litigation funding be sourced?
- 6 Can the claim be sold/assigned for a fee?
- 7 Will creditors indemnify the Liquidator if there are insufficient available funds to commence the action?
- 8 Will an indemnifying party indemnify the liquidator against an adverse costs order?

Once the matrix of issues has been answered, a decision is made.

At **tph** we do not attempt litigation lightly. It is expensive and always takes longer than anticipated and the prospects of success are never guaranteed. If however there is enough support (i.e. several criteria are met) then **tph** will undertake litigation where necessary or where all other logical approaches have or would fail to recover funds.

Common Alternative Approaches adopted by Insolvency Firms

Because the role of a Liquidator is to recover funds and distribute to competing interested parties, Liquidators commonly confront legal issues that may only be completely solved by litigating. The approaches by insolvency practitioners vary considerably, however many of the criteria used by **tph** would be upper most in the minds of practitioners.

That said, many practitioners see commencing litigation (even if there is no desire to run the entire case) as a way to secure/ compromise offers which are capable of acceptance. The 'risk' appetite for litigation varies from practitioner to practitioner and before engaging or appointing a practitioner a due diligence enquiry should be directed at the policy of the practitioner towards litigation.

That is, ask the practitioner the process he/she adopts before commencing litigation. If the answer is hard to follow or seems like it is a case by case proposition, then that would not provide satisfactory guidance as to how that liquidator will approach any legal matters that may arise.

With voluntary liquidations and voluntary administrations, the only real influence a director has is in the choice of insolvency practitioner. Therefore, the director should avail him/herself to the manner in which the prospective registered liquidator will approach the role.

Questions as to the approach to litigation should be raised prior to appointing a liquidator.

The tph Smart Solution

Appointing an insolvency firm to perform a voluntary administration or liquidation by a director is one of the last points of influence in the process. Therefore, this is a big decision and should not be taken lightly. **tph** is open and transparent, removing unforeseen surprises working to achieve the best outcomes for all parties. Insolvency firms offering their services should answer specific questions from directors about how they will run a Voluntary Administration or Liquidation concisely. Legal claims that could lead to litigation are among the many questions a director must ask to understand how an insolvency firm will respond. **tph** applies the eight steps to ensure the considerations are satisfied before moving forward with litigation.





FEES AND REMUNERATION

The tph Difference

Remuneration is heavily regulated. **tph** has standard hourly rates which we use for most formal appointments such as Liquidations and Voluntary Administration's. For non-formal consulting/ advisory work we charge a 33% discount on those rates. So, the hourly rate for a director of **tph** on advisory work is \$400 per hour. For advisory work we agree on likely costs and for any variation we work with the client to ensure all parties are comfortable before commencement of any extra work.

Where companies look like there are insufficient assets to be sold to meet the estimated costs, we ask for funds before commencement. Fees vary from case to case however we can undertake Liquidations for as low as \$5,000 in certain circumstances, whilst the average cost for a Liquidation that has few creditors, and few assets is approximately \$10,000. If a Voluntary Administration is requested the **tph** fee for non-trading Voluntary Administration is approximately \$20,000 and the following Creditors Voluntary Liquidation is between \$5,000 and \$10,000.

If the Liquidation/Voluntary Administration is for companies with more activities (for example, they have a trading position, suppliers outstanding, employees, various operating sites, plant and equipment, work in progress, stock etc) then the costs do go up. These costs are usually met by the assets that are sold and we try to provide a likely range of costs before commencement.

There are also other costs for alternative appointments such as entering a Deed of Company Arrangement after a Voluntary Administration. **tph** attempts to be as transparent as possible when meeting with directors and their advisors before being asked to undertake a role.

It is however never a perfect science in projecting costs in a Liquidation/ Voluntary Administration. It is like a builder going onto a site without the benefit of the historical engineering reports or a motor mechanic being asked to quote on

fixing a car without being able to look under the hood first. It is difficult to be right every time. Usually, a range will be provided based on our best judgement.

Common Alternative Approaches adopted by Insolvency Firms

The insolvency industry is regularly criticised for the costs of delivering the programs for formal insolvency appointments such as liquidations, voluntary administrations, DOCA's or receiverships. Costs vary enormously from firm to firm however it is always difficult to determine if another firm had been appointed to the company would they have provided a better result for the money or even less money.

It is advisable to seek a practitioner to agree to a fixed fee where possible. If that is not feasible due to the nature of the prospective appointment, then it is always recommended that the practitioner is asked to justify any proposed costs with examples of previous similar sized appointments.

This should not be too much to ask and as a director is responsible for choosing the voluntary Liquidator so as the best outcome is achieved for the creditors it seems logical to appoint someone who is transparent and open to be reviewed for their fee structures and projections.



The tph Smart Solution

When appointing an insolvency firm to conduct services, be sure to understand the fees; it is crucial that this is disclosed upfront. **tph** will always detail pricing and expected costs to ensure all parties agree to the schedule of work. If there is extra unexpected work due, then **tph** will detail the extra costs involved.



INDEMNITIES FOR FEES

The tph Difference

Sometimes there are insufficient assets to cover the cost of the Liquidators/ Voluntary Administration's fees. In those cases, we look to the directors/shareholders or any impacted stakeholder to meet the expected shortfall in costs.

We do not offer any special treatment for the indemnity as that would go against all our professional and legal obligations and requirements and if we did, we could be deregistered.

We do however conduct the program as outlined above and so any party indemnifying **tph** has a clear idea as to how we will conduct the program.

Common Alternative Approaches adopted by Insolvency Firms

The industry requires indemnities in many instances, and they should be calculated based on the objectives of the director.

No indemnity should be given expecting a practitioner to act in a certain way, however indemnities should be given that allow the appointment to be commenced and completed without the liquidator having to be out of pocket.



The tph Smart Solution

It is important to highlight that the work conducted to complete a Liquidation or Voluntary Administration will have a cost, **tph** will provide the knowledge and experience to achieve the best outcomes adhering to our legal obligations



BOOKS AND RECORDS

The tph Difference

Books and Records are to be made available to the Liquidator and/or Voluntary Administrator upon request. The Liquidator cannot perform their job completely without the books and records. **tph** takes a pragmatic approach and wants the records to remain as relevant and accessible as possible so we work out what accounting programs are helpful and in use and attempt to keep them alive.

We generally require assistance from the directors to get go access to the books and records. We are also required to request records from the company's accountants and their lawyers. Sometimes nothing is forthcoming and if directors do not give records, we must notify ASIC and seek their assistance to persuade relevant parties to provide what information is being sought and is available to them.

Whether the records are up to date or not is something out of the control of the Liquidator and unless there is a compelling reason to do so, the accounting records are generally not brought up to date after a Liquidator is appointed. Sometimes in a Voluntary Administration it is beneficial to bring the records up to date however it is always a cost benefit analysis.

Common Alternative Approaches adopted by Insolvency Firms

The requirement is for directors to maintain adequate books and records.

All liquidators demand they be supplied shortly after appointment as is their duty.

Some liquidators will seek the assistance of ASIC should the books and records not be supplied, if directors and others are being uncooperative in this regard.



The tph Smart Solution

During a liquidation or voluntary administration **tph** cooperatively works with all parties, put simply we want the best outcome for all stakeholders. Having an open and transparent approach will allow for quicker resolutions, these form part of the building blocks in delivering smart solutions where the business can continue in its restructured form or transition to a fresh start for the directors.



ASSISTING THE LIQUIDATOR WITH ENQUIRIES

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TRYING TO OBTAIN INFORMATION CONCERNING PERSONAL ASSETS OF DIRECTORS

The tph Difference

Although a Liquidation or Voluntary Administration is over a company the interaction with a director and the personal financial position of the Director is always a relevant area of enquiry for a Liquidator.

Most creditors believe the directors personal wealth should be disclosed to the Liquidator so decisions can be made as to whether any actions are commercially worthwhile taking against the directors.

There is, however, no legislation compelling directors to divulge such information. However, in certain circumstances directors may see it in their interests to disclose the information.

Given the various information channels available these days it is sometimes difficult for directors to hide their financial position. **tph** again takes a pragmatic approach and depending on the outcome we wish to achieve we will highlight to a director if it is important for us/(and him or her) why the information is helpful. But at the end of the day there is little a Liquidator can do if the information is not voluntarily provided.

Common Alternative Approaches adopted by Insolvency Firms

All practitioners believe an understanding of the director's personal financial circumstances to be helpful information.

Many practitioners apply as much pressure as possible to secure such information.

This informs them as to the prospect of there being sufficient assets available should the Liquidator commence an action against the director.

Although liquidators are to be assisted by the directors in the course of a liquidation there is no legal obligation to supply personal financial information.



The tph Smart Solution

tph will assess the situation, look for solutions and work with directors to achieve the best outcomes. It is important for directors to be informed understand their legal obligations. Once a plan is in place, **tph** will outline the process and the steps to achieve a resolution; this is at the heart of remaining impartial and transparent, it is what separates us from other insolvency firms.

PUBLIC EXAMINATIONS OF DIRECTORS/ SHAREHOLDERS

The tph Difference

Liquidators and Voluntary Administrators have the right to conduct a court examination of directors if they think it will help in their investigations and ultimately recoveries.

It is usually an expensive process and one that some suggest is closer to a fishing expedition than an appropriately convened examination of fact. It usually means Liquidators do not have enough information about aspects or affairs of the company and the court will compel witnesses to divulge under oath questions the Liquidator wants answered.

At **tph** we can do examinations, however the circumstances are few and far between and its unlikely examinations occur without strong reason to do so.

We would also need the financial support of creditors or an impacted stakeholder, and when Liquidators ask for funding from creditors it is rare that those parties are willing to put their hands in their pockets, particularly for court examinations. In fact, the ATO, as a usual candidate to seek funding rarely funds examinations.

FEG may do so, but only in an effort to advance the recovery actions of the liquidator so they can be repaid the funds provided to employees subject to its mandate.

Common Alternative Approaches adopted by Insolvency Firms

There are not a lot of examinations conducted in comparison to the number of liquidations that occur annually.

That said the courts that are set aside for examinations are constantly used and to obtain a convenient time can be challenging due to the constant demand for the court time by the industry.

Practitioners vary as to their desire to examine persons of interest and most will only go down that path when there is compelling reason to do so.

Extremely complex matters can lend themselves to court examinations and again it is usually practitioners who adopt litigious type programs that look to use the examination path.



The tph Smart Solution

tph does not adopt a litigious approach with public examinations unless there is a strong reason. Insolvency firms that adopt litigious actions to force outcomes from Directors often represent the style in how they approach Liquidations and Voluntary Administrations. **tph** seeks smart solutions so that all parties can receive the best outcomes and allow for a fresh start for the directors.

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