

CROUCH AMIRBEAGGI GUIDEBOOK

BANKRUPTCY AND ALTERNATIVES

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OBJECTIVES OF BANKRUPTCY

Bankruptcy is generally regulated by the Federal Government legislation known as the *Bankruptcy Act 1966* (the 'Act').

The prescribed objectives of bankruptcy include the following conduct:-

- The distribution of the bankrupt's property to creditors;
- Relief to the bankrupt from the burden of paying creditors' debts and providing an opportunity for a fresh start;
- To ensure an independent investigation is undertaken into the bankrupt's dealings, transaction, property and affairs. This investigation should identify the causes of bankruptcy and any improper conduct; and
- To act in the public interest by preventing a reckless bankrupt from continuing to trade.

BANKRUPTCY DEFINITIONS

Act of Bankruptcy

An act of bankruptcy is evidence that the debtor is insolvent. The prescribed acts of bankruptcy include the following conduct:-

- Evidence of inability to pay debts as and when they fall due and payable including failure to pay a bankruptcy notice (this is the most common act of bankruptcy);
- Dealings and transactions that would be void against a trustee if the debtor were bankrupt. Examples include:
 - i) Entering into a transaction that would constitute a preference, undervalued transaction, or the main purpose of the transaction was to defeat creditors' claims, or
 - ii) Conduct intended to defeat or delay creditors, for example keeping house, departing Australia or being absent from a usual residence or place of business;
- Sheriff acting under process of Court undertakes seizure or sale of personal assets or household items or returns from execution of a levy or order unsatisfied;
- Failure by the debtor to execute a personal insolvency agreement, as agreed, or attend a meeting of creditors pursuant to personal insolvency agreement;
- Breach of a Part IX debt agreement; and
- Termination of either a Part IX debt agreement or personal insolvency agreement.

Bankruptcy Notice

A bankruptcy notice is issued by an Official Receiver and requires a debtor to pay a debt within a prescribed time (normally 21 days) or alternatively apply to the Court to set aside the bankruptcy notice. A bankruptcy notice will only be issued if the creditor has obtained a final judgement or Court order against the debtor less than six years prior and for an amount exceeding \$2,000. Failure to comply with the bankruptcy notice constitutes an act of bankruptcy and thereby empowers a creditor to petition the Court for a sequestration order.

Commencement Date

The date when the bankrupt can be proven to be insolvent is known as the commencement date. A bankrupt has no authority to control, deal or dispose of their assets after this date. This date is most critical for recovery of assets.

Creditor's Petition Commencement Date

Where a bankruptcy was initiated by a creditor's petition, the date of commencement is the earliest act of bankruptcy by a debtor within the six months preceding the date on which a petition was presented.

Debtor's Petition Commencement Date

When a bankruptcy is initiated by a debtor's petition, the commencement date is determined as follows. Where:-

- The debtor's petition was accepted by the Official Receiver following Court directions, the commencement date is the date specified by the Court order;
- At least one creditor's petition was pending against the debtor, the commencement date is the date of the earliest act of bankruptcy on which any creditor's petition relied;
- No creditor's petitions were pending but the debtor had committed an act of bankruptcy in the six months preceding the date of presentation of debtor's petition, the commencement date is the date of the earliest act of bankruptcy during the six months preceding the debtor's petition; or
- No creditor's petition pending and no act of bankruptcy during the past six months, the commencement date is the date of the presentation of debtor's petition.

Date of Bankruptcy

The date of bankruptcy is what people would typically perceive as the start of bankruptcy. It is the date when the Court orders or declares a person bankrupt (via an order known as a sequestration order) or a debtor's petition is accepted by ITSA, if a bankruptcy is commenced voluntarily.

Debtor

Before a person becomes a bankrupt, they are generally described as a debtor or insolvent debtor.

Insolvency

Section 5 of the Act provides that a person is solvent if, and only if, the person is able to pay all the person's debts as and when they become due and payable. An Act of Bankruptcy (above) is evidence that the debtor is insolvent.

The judicial interpretation of insolvency is diverse. Conclusions regarding insolvency must be distinguished from the mere temporary lack of liquidity and be proven as at the date of the relevant transaction. Typically it is necessary to analyse the nature of the debtor's business; cash flow; profit and loss statements and balance sheets; and the ability to procure funding by realisation or mortgage of existing assets.

Insolvency and Trustee Service Australia (ITSA)

The government department responsible for bankruptcy administration in Australia is known as ITSA.

Inspector-General in Bankruptcy

The Inspector-General in Bankruptcy is the permanent departmental head of ITSA.

Official Receiver

The *Bankruptcy Act 1966* divides Australia into seven geographical bankruptcy districts. Each district is headed by an Official Receiver. The Official Receivers are government officials subject to the control of the Inspector-General in Bankruptcy. Staff of ITSA are employed to assist the Official Receivers to exercise their powers and functions.

Official Trustee in Bankruptcy

The Official Receivers of each bankruptcy district jointly constitute a government body corporate known as the Official Trustee in Bankruptcy. In exercising powers or performing functions, the Official Receivers must act in the name of, and on behalf of, the Official Trustee. The Inspector-General in Bankruptcy may also act as the Official Trustee.

Relation Back Period

The period between the date of bankruptcy and commencement date (see above) is known as the relation back period.

Subject to exceptions, every transaction affected during the relation back period by a insolvent debtor (soon to be bankrupt) can be set aside by a trustee. Thereby, the assets may be available for realisation and distribution to the creditors of the bankrupt estate.

Statement of Affairs

A bankrupt is required to file particulars of their assets and liabilities known as a statement of affairs with an Official Receiver. This prescribed document must be lodged within 14 days of the date a bankrupt is advised of their bankruptcy.

APPOINTMENT OF A TRUSTEE

A trustee of a bankrupt estate may be either:-

- a registered trustee, typically a specialist Chartered Accountant or Certified Practising Accountant ('CPA'); or
- the Official Trustee as the representative of the government institution known as Insolvency and Trustee Services, Australia (ITSA).

A registered trustee can be appointed trustee of a bankrupt estate if:

- the registered trustee consents prior to filing of a creditor's petition or debtor's petition;
- the creditors of the bankrupt estate resolve to replace the trustee at a meeting of creditors convened for that purpose.

The Official Trustee administers the vast majority of bankrupt estates in Australia.

ROLE OF THE TRUSTEE

Upon notification of appointment, the trustee will move to immediately secure all known assets, undertake their valuation, and determine the appropriate strategy for realisation.

Ultimately the assets will be realised for the benefit of the creditors of the bankrupt estate. In this regard the trustee will invite information from:

- The bankrupt;
- Creditors of the bankrupt;
- Associates of the bankrupt;
- Statutory authorities.

A trustee has wide ranging powers to compel associated parties to disclose information pertaining to a bankrupt's affairs.

It is incumbent upon a trustee to investigate the conduct of the bankrupt and their dealings transactions, property and affairs.

Various conducts by the bankrupt and others may be punishable by fine, contempt of court or committal to gaol.

EFFECT OF BANKRUPTCY

Upon bankruptcy, a trustee will be nominated to take control of the bankrupt's property and affairs. All divisible property vests in the trustee, who shall realise and distribute the property for the benefit of creditors.

Divisible Property

Divisible property is defined to include:-

- All property that belongs to the bankrupt as at the date of commencement of bankruptcy;
- All property (excluding income) that the bankrupt acquires during the period of bankruptcy (i.e. inheritance, lottery etc.); and
- Property that may be recoverable by the trustee.

Income of Bankrupt

A bankrupt is required to pay some of their income to the bankrupt estate if their income exceeds the prescribed threshold. The payments are known as income contributions. The indexed threshold commences at approximately \$42,000 (about \$59,000 before tax). Where a bankrupt's income exceeds the threshold, the bankrupt is required to pay 50% of the excess to their bankrupt estate for the benefit of creditors. Adjustments exist for the number of factors including number of dependents, child support payments and indexation.

Exempt Property

A bankrupt is permitted to keep the following exempt property:-

- Necessary household property;
- Motor vehicle to a value not exceeding \$6,500 (indexed);
- Tools of trade to a value not exceeding \$3,250 (indexed);
- Selective superannuation policies;
- Rights to proceeds from compensation of a personal nature; and
- Assets disposed via a bona fide maintenance agreement.

Length of Bankruptcy

Bankruptcy is typically a period of three years. The three year period does not start until the statement of affairs is filed with ITSA. Hence, if the statement of affairs is not filed immediately, the period of bankruptcy may be a lot longer.

CONSEQUENCES OF BANKRUPTCY**Consequences of Bankruptcy**

The effects of bankruptcy for a bankrupt include the following:-

- Loss of all property (subject to exemptions);
- Requirement to make income contributions;
- Social stigma;
- Prohibited from:
 - i) obtaining credit of more than \$4,669 (indexed) without disclosing status as a bankrupt;
 - ii) carrying on business without disclosing status as a bankrupt;
 - iii) acting as a director of a company.
- Obligation to attend the trustee and aid to the utmost of ability as a reasonably required;
- Surrender passport to trustee;
- Surrender all documents to the trustee that relate to property, dealings, transactions and affairs;
- Notify trustee of change of address;
- Unless otherwise provided, partnerships will terminate as a consequence of bankruptcy; and
- All legal actions are immediately suspended to enable the trustee to determine if any actions will continue.

Consequences of Bankruptcy for 3rd Parties

The impact of bankruptcy on third parties may include the following:-

- Any interest a bankrupt may have in a matrimonial home must be sold by the trustee; Typically this interest will be sold to the spouse at the current market valuation;
- Family and associates may be compelled to provide information to the trustee in the course of the trustee's investigations;
- Creditors are unable to enforce remedies against a bankrupt or their property; and
- Creditors are prohibited from commencing new actions against the bankrupt without the consent of the Court.

INITIATING A BANKRUPTCY

Voluntary Bankruptcy

An insolvent person may initiate their own bankruptcy by lodging a debtor's petition with an Official Receiver at any office of ITSA.

An Official Receiver will reject a petition if the prescribed documents are not duly completed, the insolvent person is party to a debt agreement or a personal insolvency agreement (leave of the Court will be required), the insolvent person is not a resident or does not have a registered interest in Australia or the insolvent person has the ability to pay all debts within a reasonable period.

If the insolvent person wants a registered trustee to administer their bankrupt estate, they must secure the consent of the prospective trustee and lodge the trustee's consent in the prescribed form at the time of petitioning for their own bankruptcy.

If the consent of a registered trustee has not been obtained, the Official Trustee will be appointed trustee of the bankrupt's estate. An Official Receiver acting on behalf of the Official Trustee shall administer that bankrupt estate with the assistance of the staff at ITSA.

Involuntary Bankruptcy

A person may be involuntarily declared bankrupt by a Court order known as a sequestration order. To obtain a sequestration order, the Court will require evidence of an act of bankruptcy.

The most common act of bankruptcy that creditors rely upon to evidence insolvency of a debtor is the failure to comply with a bankruptcy notice.

If the petitioning creditor wants a registered trustee to administer the bankrupt estate, they must secure the consent of the prospective trustee and lodge the trustee's consent in the prescribed form prior to the court hearing. Typically the consent is filed and served on the bankrupt at the time of lodging the petition/application for bankruptcy.

ASSETS AVAILABLE TO A TRUSTEE IN BANKRUPTCY

Almost all property of the bankrupt as at the commencement date will vest in the trustee of the bankrupt estate. The assets available to a trustee include the following:-

- Property of bankrupt as at the date of commencement;
- After acquired property;
- Relation back doctrine assets;
- After acquired income;
- Proceeds of execution and Court proceedings;
- Undervalued transactions;
- Transactions to defeat creditors;
- Preferences; and
- Controlled entity payments.

Voidable Transactions

A fundamental premise of modern bankruptcy law is that all creditors are treated equally. For this reason the Act permits a trustee to invalidate transfers of property (which include payments, charges and conveyances) that create a preferential effect for one creditor over the other creditors in general.

Payments and transfers that may be set aside by a trustee are known as voidable transactions. Where a trustee sets aside a transaction, the creditor must repay the value of the voidable transaction to the bankrupt estate. The creditor who makes this repayment will also be eligible to participate in any dividend from the bankrupt estate.

Proceeds of Execution and Court Proceedings

The money received by a creditor from the proceeds of execution and court proceedings within the six months before a bankruptcy petition (or after presentation of a bankruptcy petition) may be recovered by a trustee.

A trustee will review the benefit obtained by a creditor as a result of a Court ordered execution (including payment to avoid seizure or sale), or from a charging order in respect of a judgement against the debtor. The taxed costs of obtaining the relevant judgement are not payable to the trustee. It is irrelevant that the proceedings were taken and continued in good faith or without notice of a bankruptcy petition, or any act of bankruptcy.

A creditor who is paid money pursuant to section 118 of the Act may prove in the bankruptcy as an unsecured creditor.

Recovery of Property from Sheriffs and Courts

Upon written notice of bankruptcy, a sheriff or Court officer must:-

- Refrain from taking any action to sell property of the debtor or take any action on behalf of a creditor; and
- Deliver to the trustee any property of the bankrupt held and any proceeds of the bankrupt's property.

Undervalued Transactions

A transfer of property is defined to include the payment of money and is interpreted to include the granting of a charge or a conveyance of any kind. To establish an undervalued transaction the trustee must prove all of the following three elements:-

- A transfer of property by the bankrupt;
- During the period beginning five years before the date of commencement and ending on the date of bankruptcy; and
- The transferee gave no consideration to the bankrupt or consideration of less than market value.

Exemptions

Taxation obligations, maintenance payments, debt agreements and transfers that are of no value to creditors of the bankrupt estate are exempt.

Defences

A transfer will not be void against a trustee if:-

- the transfer took place more than two years before the commencement of bankruptcy; and
- the transferee proves the bankrupt was solvent at the time of transfer.

Transfer to Defeat Creditors

A trustee is permitted to set aside a disposition of property made prior to bankruptcy where it was made with the intent to defraud creditors. Such transfers of property were formally known as fraudulent dispositions.

To establish a transfer to defeat creditors the trustee must establish all of the following:-

- A transfer of property by the bankrupt to another person;
- The property would have become part of the bankrupt estate or probably have been available to creditors if it had not been transferred or made subject to the new interest; and
- The bankrupt's main purpose in making the transfer was either to prevent the property from becoming divisible property amongst the bankrupt estate creditors or hinder or delay the process of making the property available for division amongst the bankrupt estate creditors.

Presumption of fraud

If it can be inferred from circumstances, that at the time of the transfer the bankrupt was or about to become insolvent, the bankrupt's main purpose in making a transfer is presumed to constitute a transfer to defeat creditors.

Defences

A transfer of property is not void against the trustee if the transferee can establish:-

- the consideration given for the transfer was market value;
- the transferee did not know the bankrupt's main purpose in making the transfer; and
- the transferee could not reasonably have inferred that at the time of the transfer the bankrupt was or about to become insolvent.

Preferences

To establish a voidable preference a trustee must prove the following:

- A transfer of property by the bankrupt to another person;
- The bankrupt was insolvent when making the transfer;
- The transfer is in favour of a creditor of the bankrupt;
- The transfer gives the creditor a preference priority or advantage over other creditors generally; and
- The transfer occurs during the relevant time period (below).

The relevant period

To constitute an unfair preference, the transfer of property must be within the prescribed time period as follows. Where the:-

- The bankruptcy is initiated by a creditor's petition the relevant period is the six months before presentation of petition;
- A debtor's petition is presented when a creditor's petition was pending the relevant period is the commencement date of bankruptcy; or
- A debtor's petition presented in any other circumstances the relevant period is the six months before presentation of petition.

Defences

To defend an action by a trustee for an unfair preference, a person who received an unfair preference must establish all of the following:-

- They acted in good faith;
- They gave consideration at least as valuable as the market value; and
- The transaction was in the ordinary course of business.

Alternative defences include:-

- The transfer was made pursuant to a maintenance agreement;
- The transfer of property was made pursuant to a debt agreement; or

- A running account existed.

Controlled Entities

A trustee may obtain a Court order vesting an interest in property held by an entity controlled by the bankrupt. The trustee must establish the following:-

- The bankrupt supplied personal services to an entity, controlled the entity and received inadequate remuneration for those services;
- The entity acquired property directly or indirectly as a result of the bankrupt's supply of personal services; and
- The bankrupt used or derived benefit from the property during the relevant period.

General Defence to Recovery Actions by Trustee

Transactions with a bankrupt will be protected if:

- a transaction took place before the date of bankruptcy; and
- the transferee did not at the time of the transaction have notice of a presentation of a petition against the bankrupt; and
- the transaction was in good faith and in the ordinary course of business.

This general protection or defence is subject to sections 118 to 122 of the Act, discussed above.

REPORTING TO CREDITORS

The trustee must provide creditors with a notice of bankruptcy and a summary of the bankrupt's statement of affairs within 28 days after the date of receiving the statement of affairs.

If a statement of affairs is not provided by the bankrupt, the trustee must use their best endeavours to provide the above information to all known creditors within 60 days after the date of bankruptcy.

Within three months of appointment a trustee will normally provide a report to creditors disclosing the following:-

- All known assets;
- The likelihood of a dividend;
- Proposed meetings of creditors, if required;
- Possibility of early discharge from bankruptcy;
- The results of Investigations to date; and
- Proposed future conduct.

Meetings of creditors may be convened at any time by the trustee. Meetings of creditors are not mandatory, but it is possible for creditors to compel the trustee to convene a meeting of creditors in certain circumstances.

A written notice of a meeting of creditors must be given to all known creditors. Advertising is common but not mandatory.

PROOFS OF DEBT

The liabilities of a bankrupt are categorised into provable and non-provable debts. If a debt is provable, the bankrupt will be released from it upon discharge (subject to exceptions, see below).

Provable Debt

The Act provides that, subject to the exceptions, all debts and liabilities, present, future, certain or contingent that existed as at the date of bankruptcy are provable. A provable debt will be eligible to participate in any dividend paid by the trustee.

Exceptions to Release upon Discharge

A bankrupt will not be discharged or released from an obligation to pay the following:-

- Any debt that is not provable;
- A debt incurred by means of fraud or fraudulent breach of trust;
- An obligation arising from a maintenance agreement; and
- A liability to pay income contributions to the bankrupt estate.

Non-Provable Debt

Claims that are not provable include the following:-

- Unliquidated damages. However, unliquidated damages that arise as a consequence of a breach of contract, promise or breach of trust are provable;
- Penalties or fines imposed by the Court in respect of an offence;
- Interest in respect of a period commencing after the date of bankruptcy; and
- Liabilities of value that are incapable of fairly estimating.

DIVIDENDS

A trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proven their debts.

Secured creditors such as banks and other charge holders are almost always paid in priority or advance of unsecured creditors. Trade creditors are almost always categorised as unsecured creditors. The Act provides that some classes of unsecured creditors shall be paid in priority to other classes of unsecured creditor claims. If there is insufficient money to pay any class of creditor in full those creditors are paid pro rata.

The order of payment of unsecured creditor claims will typically be as follows:-

1. Realisation and interest charges payable to the government;
2. Expenses reasonably incurred on behalf of the trustee protecting the bankrupt's assets or carrying on a business of the bankrupt;
3. Other expenses paid by the trustee in administering the estate;
4. The taxed costs of the petitioning creditor;
5. The trustee's remuneration;
6. Employee wages to a maximum of \$3,100;
7. Workers compensation claims; and
8. Employee long service leave, annual leave and sick leave.

ANNULMENT (EARLY TERMINATION) OF BANKRUPTCY

A bankruptcy will be annulled (or terminated) if:-

- the trustee is satisfied that all of the bankrupt's debts have been paid in full; or
- the Court is satisfied the sequestration order ought not to have been made.

Composition by Bankrupt

Creditors may, by special resolution, accept a bankrupt's proposal to annul a bankruptcy by accepting one of the following:-

- A composition (partial payment) in full and final satisfaction of debts; or
- A scheme of arrangement that is some other arrangement.

OBJECTIONS TO DISCHARGE FROM BANKRUPTCY

The term of a bankruptcy may be extended for a period of up to 8 years after the date of receiving the summary of affairs if notice in writing is given by the trustee of an objection to the discharge of a bankrupt.

Section 149D of the Act lists all of the grounds of objection. The most common grounds of objection are as follows:-

- The bankrupt failed to submit a statement of affairs;
- The bankrupt left Australia after the date of bankruptcy;
- The bankrupt engaged in misleading conduct;
- The bankrupt failed to provide information about property, income or expected income requested by the trustee;
- The bankrupt provided false or intentionally misleading information to the trustee;
- The bankrupt refused to sign a document required by the trustee;
- The bankrupt failed to attend a meeting, interview or examination without having given a reasonable explanation to the trustee;
- The bankrupt failed, whether intentionally or not, to disclose to the trustee a liability that existed at the date of bankruptcy; or
- The bankrupt failed, whether intentionally or not, to disclose to the trustee a beneficial interest in any property.