Bankruptcy Amendment (Exceptional Circumstances Exit Package) Bill 2011

Paula Pyburne
Law and Bills Digest Section

Contents

Purpose ................................................................................................................. 2
Background ........................................................................................................... 2
   Farm Exit Support Program ........................................................................... 3
Committee consideration ..................................................................................... 3
Rationale for the Bill ............................................................................................ 3
Government’s position .......................................................................................... 4
   Reasons for the change in policy ................................................................. 5
Main issues .......................................................................................................... 5
   Whether a Bill for an enactment can amend a regulation ............................... 5
   Bankruptcy and the Exit Package .................................................................. 6
   Final order in bankruptcy .............................................................................. 7
Concluding comments .......................................................................................... 7
Bankruptcy Amendment (Exceptional Circumstances Exit Package) Bill 2011

Date introduced: 5 July 2011

House: The Senate

Portfolio: Private Senator's Bill: Senator Xenophon

Commencement: On the day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Bankruptcy Amendment (Exceptional Circumstances Exit Package) Bill 2011 (the Bill) is to amend the Bankruptcy Regulations 1996 (Bankruptcy Regulations) to ensure that monies received under the Exceptional Circumstances Exit Package are not divisible among creditors in the event that the recipient is declared bankrupt.

Background

The Exceptional Circumstances Exit Package (Exit Package) was introduced in 2007. It was initially intended that the Exit Package would be available until September 2008. Under the 2011-12 Budget it is set to end on 30 June 2012.

The Exit Package is a one-off taxable payment available to farmers whose farm enterprise is, or was, located within an Exceptional Circumstances declared area on or after 25 September 2007, who sold their farm enterprise and lodged an Exceptional Circumstances Exit Grant application between 25 September 2007 and 30 June 2011.


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
The Exit Package consists of the following components:

- Exceptional Circumstances Exit Grant of up to $150,000 and an increase in the assets test limit to access this grant to $575,000
- Exceptional Circumstances Advice and Re-training Grant of $10,000
- Exceptional Circumstances Relocation Grant of $10,000.

**Farm Exit Support Program**

The payments available under the Exit Package are similar to those which can be paid under the Farm Exit Support Program. That program is being tested under the pilot of drought reform measures in Western Australia in 2010-12. It aims to provide an opportunity for farmers in significant financial difficulty to leave farming before their assets are depleted, while enabling, where appropriate, viable farmland to be available to be farmed on a commercial basis. The grants are designed to facilitate adjustment for long term farm families, who have continuously worked the same farm for more than five years and who depend on it for their livelihood, but have considered the difficult decision to sell it.4

Despite the similarities, the Bill does not make reference to the Farm Exit Support Program.

**Committee consideration**

On 6 July 2011, the Bill was referred to the Senate Economics Committee (Economics Committee) for inquiry and report by 21 September 2011.5 At the time of writing this Bills Digest, the Economics Committee had not yet published its report.

**Rationale for the Bill**

On the date of a person’s bankruptcy, his or her property vests in the trustee who is administering the bankruptcy. All of the person’s property that is divisible among his or her creditors is specified in subsection 116(1) of the *Bankruptcy Act 1966* (Bankruptcy Act). Property acquired by the person after the date of bankruptcy, but before the date of discharge, is also available to the trustee. Subsection 116(2) of the Bankruptcy Act operates so that certain types of property are not available to the trustee. This Bill seeks to ensure that payments made under the Exit Package are not available to the trustee.

---


*Warning*: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
According to the second reading speech by Senator Xenophon:

... there have been reports that farmers who have received the [Exceptional Circumstances] Exit Package have been threatened by creditors that they will have them declared bankrupt, seeking to capitalise on the funds they have received under the Package.

Under the provisions of this Bill, the [Exceptional Circumstances] Exit Package will be exempt from bankruptcy proceedings, so long as the final orders have not been made.

This is to ensure that the intention of the scheme is upheld: to assist farmers to leave their properties, to relocate and to retrain in new employment so they can continue to support themselves and their families.

Ultimately, the significant purpose of the [Exceptional Circumstances] Exit Package is to enable farmers who wish to leave the land with dignity to use the funds received under the Package to start afresh. This amendment will ensure that this can occur.6

Government’s position

Currently, Division 2A of Part 6 of the Bankruptcy Regulations lists a number of rural support schemes, amounts paid under which are not divisible among creditors in the event that the recipient is declared bankrupt.7 Notably, all of those rural support schemes are now closed.8

The submission to the Economics Committee by the Department of Agriculture, Fisheries and Forestry (DAFF) provides the rationale for the omission of the Exit Package from the list in Part 6. According to that submission, the re-establishment and/or exit grants that are listed in Part 6 of the Bankruptcy Regulations were intended to provide a head start to help farmers in financial difficulty to successfully establish a life after farming. The exemption of payments under those schemes from bankruptcy proceedings was intended to guarantee some financial security for the farm family after exiting.9

7. For example, 1985 Rural Adjustment Grant Scheme, 1988 Rural Adjustment Grant, Rural Adjustment Grant Scheme, Rural Adjustment Scheme, Rural Reconstruction Grant Scheme, Sugar Industry Reform Program and Tobacco Grower Assistance Package.
9. Ibid., p. 3.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Reasons for the change in policy

However, the Exit Package was designed to assist farmers suffering significant financial difficulty to make the hard decisions about their future in farming before they reach a point, financially, from which it would be very hard to recover. Some farmers remain, hoping for a good season to repay their debts, but this is very risky if they are already burdened by debt. The Exit Package guidelines encourage farmers to consider their position before it is too late by requiring that, to receive a grant, an applicant must be ‘effectively in control’ of the farm enterprise immediately before the sale of the farm.\(^\text{10}\) For the purposes of the Exit Package ‘effectively in control’, means the person has a legal title or interest in the farm enterprise and an ability to transfer it to another and so cannot:

- be involved in bankruptcy proceedings
- have been issued an eviction order
- have been threatened with foreclosure, or
- have in any other way lost management control of the farm.

The Exit Package was not made exempt from any future bankruptcy action so as to avoid deterring farmers from taking early action. Rather, it is intended to provide an opportunity for farmers in financial difficulty to leave farming before their assets are depleted, while enabling, where appropriate, viable farmland to be available to be farmed on a commercial basis.\(^\text{11}\)

Main issues

Whether a Bill for an enactment can amend a regulation

Parliament frequently enacts legislation containing provisions which empower the executive government to make regulations which, provided that they are properly made, have the effect of law. This form of law is referred to as ‘delegated legislation’.\(^\text{12}\)

Delegated law ‘is law made by the executive government, by ministers and other executive office-holders, without parliamentary enactment’.\(^\text{13}\) In this case, subsection 116(2) lists certain property which is exempt from the operation of the Bankruptcy Act. Specifically, paragraphs 116(2)(k) and 116(2)(l) allow for ‘amounts paid to a bankrupt under a rural support scheme to be prescribed’. The power to make regulations is created by section 315 of the Bankruptcy Act which provides that the Governor-General may make regulations prescribing matters which are required or

---

11. Ibid., p. 2.
13. Ibid.

*Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.*
permitted by the Bankruptcy Act to be prescribed. Part 6 of the Bankruptcy Regulation has been created in accordance with those powers.

The question then arises whether it is possible for a Bill for an enactment to amend a regulation. It can.

The term ‘parliamentary sovereignty’ denotes the lack of any legal limitations on the legislative authority of the Parliament. The sovereignty of Parliament is presented in three features. First, there are no legal restrictions on the legislative capability of Parliament. Second, the courts are under a responsibility to implement the laws created by Parliament. Third, no Parliament can restrict its successors or be restricted by its predecessors.

That being the case, while the process of using principal legislation to amend subordinate legislation is unusual, it would seem to be valid based on the principle of parliamentary sovereignty. According to the Office of Parliamentary Counsel:

Acts should not amend regulations except for compelling reasons (for example, a need to amend a regulation retrospectively in a way that adversely affects a person’s rights or imposes new liabilities contrary to the Acts Interpretation Act 1901 or the Legislative Instruments Act 2003).\(^\text{14}\)

No explanation for using this form of legislation to amend the Bankruptcy Regulations is contained in the second reading speech or Explanatory Memorandum.\(^\text{15}\)

However, if the Bill is enacted, then it is open to the Government, using the power in section 315 of the Bankruptcy Act, to further amend the Bankruptcy Regulations or to repeal the amendment to the Bankruptcy Regulations.

Bankruptcy and the Exit Package

The requirement that an applicant for monies under the Exit Package is ‘effectively in control’ of the farm enterprise immediately before the sale of the farm, acts to filter out potential grant recipients who might later become bankrupt. However, if an undischarged bankrupt did receive such a payment, then the Bill would operate so that the person would be able to retain the payment.

According to the submission by the Department of Attorney-General, where a person receives monies under the Exit Package prior to the date of bankruptcy (and, under the Bill, the payment is exempt property) and:


\[\text{15}\]. N Xenophon, ‘Second reading speech: Bankruptcy Amendment (Exceptional Circumstances Exit Package) Bill 2011, Senate, Hansard, 5 July 2011, p. 4051, viewed 14 September 2011, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%A%22chamber%2Fhansards%2F1e9c200e4362-461a-b69f-0149a53d40f8%2F0084%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%A%22chamber%2Fhansards%2F1e9c200e4362-461a-b69f-0149a53d40f8%2F0084%22)

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
• none of the monies have been spent and the grant money is readily identifiable—the bankrupt would retain the payment
• some of the monies have been spent and/or the money has been commingled with other money—the bankrupt would have to provide evidence to the trustee regarding the source of the money
• the money has been spent on some form of property—the bankrupt may be entitled to retain the property. (The effect of paragraph 116(2)(n) and subsection 116(3) is that if the ‘whole, or substantially the whole’ of the money used for the purpose of a particular property is ‘protected money’ the bankrupt will be entitled to retain that property. The definition of ‘protected money’ includes amounts covered by paragraph 116(2)(k) and paragraph 116(2)(l).)\(^\text{16}\)

**Final order in bankruptcy**

**Item 4 of Schedule 1** to the Bill is an application provision. It refers to persons who have received a grant of monies under the Exit Package on, or after, 1 July 2010 where ‘a final order in bankruptcy’ has not been made before the date of commencement of the amending *Bankruptcy Amendment (Exceptional Circumstances Exit Package) Act 2011* (as enacted).

The submission to the Economics Committee by the Attorney-General’s Department highlights some confusion which may arise from this wording:

> A person can become bankrupt either by the Court making a sequestration order against them (involuntary bankruptcy) or through the submission of a debtor’s petition to the Insolvency and Trustee Service Australia (voluntary bankruptcy). While the reference to a ‘final order in bankruptcy’ may cover those cases where a Court makes a sequestration order it probably would not cover those cases where a debtor becomes voluntarily bankrupt through the submission of a debtor’s petition. The reference to ‘final orders’ could also lead to confusion as the term ‘final order’ is used in a different context in the [Bankruptcy] Act (see s 40(1)(g)).\(^\text{17}\)

**Concluding comments**

The submissions from both the Attorney-General’s Department and DAFF comment on the policy aspects of the Exit Package and the Bill.

The Attorney-General’s Department acknowledged that it is undesirable for government grant money to be paid to a person only to have the grant money become part of their bankrupt estate. However, from a Bankruptcy Policy perspective there are sound reasons for not making certain property exempt—especially that it complicates the bankruptcy process and increases uncertainty

---


17. Ibid.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
among creditors. In addition, there are other types of government payments to individuals—such as those made to persons who are victims of a natural disaster—for which there is no exemption.  

According to DAFF whilst on the face of it, allowing exit grant funds to be available to creditors appears to defeat the purpose of the grant, it can be argued on equity grounds that former farmers should face the same treatment as other sectors of the business community in any commercial dealings they enter into after farming.

That being the case, it appears that the Bill may need to be considered within a broader policy framework.

---

18. Ibid., p. 5.
19. Department of Agriculture, Fisheries and Forestry, op. cit., p. 4.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2434.