Bankruptcy Amendment Bill 1987

Date Introduced: 15 September 1987
House: Senate
Presented by: Senator the Hon. John Button, Minister for Industry, Technology and Commerce

Digest of Bill

Purpose

To amend the Bankruptcy Act 1966 (the Principal Act) in a number of ways, and particularly to insert new provisions dealing with associated entities, examinations, the declaration of an intent to present a debtor's petition, and orders in relation to property controlled by a bankrupt or an associated entity.

Background

Paragraph 51 (xvii) of the Constitution gives the Commonwealth power to make laws with regard to bankruptcy and insolvency. While the extent of this power has yet to be finally settled, as things currently stand the Commonwealth has exclusive legislation dealing with the bankruptcy of individuals while the insolvency of corporations is contained in the uniform Companies Code which has been enacted by the States and the Commonwealth. Proposals for an exclusive Commonwealth Companies Code may result in the Commonwealth having exclusive control of both individual and corporate insolvency.

The only comprehensive review of Australian bankruptcy law was conducted between 1956 and 1962 by a Committee headed by Sir Thomas Clyne (the Clyne Committee). The Principal Act was the result of the work of the Clyne Committee and, while the existing principles of bankruptcy law were not substantially altered, a major reform was the introduction of agreements with creditors as an alternative to bankruptcy. (The provisions relating to agreements are contained in Part X of the Principal Act). More recently, in January 1985, the Australian Law Reform Commission published an Issues Paper discussing insolvency.¹ The paper noted the changed economic and social conditions that have taken place since the Clyne Committee, such as the great increase in the use of credit, continuing inflation and high interest rates. Regarding Part X, the paper noted certain problems that have restricted its use, such as the cost structure and the fact that it is not available prior to insolvency.²

Parts of the Principal Act were also reviewed by the Royal Commission on the activities of the Federated Ship Painters and Dockers Union (the Costigan Commission). It was found that arrangements were being made whereby bankrupts were associated with financially viable entities and so able to conceal assets. In this regard...
the Costigan Commission recommended that the Principal Act be amended to give
the Official Trustee specific power to investigate trusts, companies, businesses, part-
nerships and other entities suspected of being financially associated with a bankrupt
or a member of their family. It was also recommended that it be made an offence
to fail to disclose to the Registrar in Bankruptcy or the Official Trustee all bank, building
society, credit union, credit and other accounts in any name used by, on behalf of,
or for the benefit of the bankrupt.3

The causes of bankruptcies are investigated in the annual report on the operation
of the Bankruptcy Act. Of the 2572 non-business bankruptcies administered by Offi-
cial Receivers in 1984-85 (which accounted for 93.5% of non-business bankruptcies
in this period) the major causes of bankruptcy were excessive use of credit (34.5%),
unemployment (28.8%), ill health (7%), domestic discord (5.8%), adverse litigation
(2.9%) and gambling (2.7%).4

Main Provisions

Clause 5 will insert a number of new terms into the Principal Act. A person will be
taken to be associated with a company if they take part in the management of the
company; is able to control or materially influence the company’s activities or inter-
nal affairs; is a member of the company; can vote, or control a vote, at a general
meeting of the company; can dispose of, or control the disposal of, a share in the
company; is financially interested in the success or failure of the company; is owed
a debt by the company; is employed, or engaged on contract, by the company; acts
as an agent for the company; or gives professional advice to the company (proposed
section 5B).

A person will be taken to be associated with a natural person if the other person
is a close relative; is a trustee of a trust under which the person is capable of benefit-
ing; acts as an agent for the person; is employed, or engaged under a contract, by
the person; is an attorney of the natural person under a power of attorney or if the
natural person is an attorney of the other person; gives professional advice to the
person; or receives professional advice from the natural person (proposed section 5C).

A person will be taken to be associated with a partnership if they are a partner;
are able to control or materially influence the partnerships activities or internal af-
fairs; are financially interested in the success or failure of the partnership; are a cre-
ditor of the partnership; are employed, or engaged under a contract, by the
partnership; act as an agent for the partnership; or give it professional advice (pro-
posed section 5D).

A person will be taken as associated with a trust if the person is a settlor of the
trust; has power to appoint or remove a trustee or vary the terms of the trust; is a
trustee; is able to control or materially influence the activities of the trust; takes part
in the management of a company that is the trustee; can benefit under the trust;
is a creditor of the trust; is employed, or engaged under a contract, by the trust; acts
as agent for the trustee; or gives professional advice to the trust (proposed section 5E).

A person will be taken to be in control of an entity in relation to a matter if no act,
commission or decision inconsistent with the persons instructions or wishes was made,
or it may reasonably be expected that no such action or omission would be made,
in relation to that matter (proposed section 5F).
The financial affairs of a company will be taken to include the company’s promotion, formation, membership, control, operations, state of affairs, management and proceedings (proposed section 5G).

The financial affairs of a natural person will be taken to include the person’s operations and state of affairs and any thing done in relation to the person’s business or property while the person was an undischarged bankrupt or had entered an agreement under Part X of the Principal Act (proposed section 5H).

The financial affairs of a partnership will include the same matters as that of a company (proposed section 5J).

The financial affairs of a trust will include the creation of the trust; matters arising under the terms of the trust; the appointment or removal of trustees; the business, trading etc. of the trust; and the management of the trust (proposed section 5K).

Clause 11 will insert proposed section 19AA into the Principal Act. Under the proposed section, the trustee, or the Official Receiver where the trustee has indicated an intention not to investigate, may, at any time, investigate the bankrupts conduct and examinable affairs (the latter is defined in clause 4, to include the person’s dealings and the relevant dealings of associated entities) and the cause of the bankruptcy, and file a report on the investigation with the Registrar.

Except where the Principal Act provides otherwise, the standard of proof required will be the balance of probabilities (proposed section 34A which will be inserted by clause 15).

Section 40 of the principal Act, which deals with acts of bankruptcy, will be amended to insert a new paragraph so that a declaration under proposed section 54A will constitute an act of bankruptcy (clause 16).

A new Division 2A, titled Declaration of Intention to present Debtor’s Petition, will be inserted into Part IV of the Principal Act by clause 19.

Proposed section 54A provides for a debtor to present such a petition to the Registrar. However, a debtor will be disqualified from presenting such a declaration under a number of circumstances including where the debtor is not entitled to present a debtor’s petition under section 55 of the Principal Act without leave; where a creditor’s petition has been presented and has not been accepted or rejected or has not lapsed or been withdrawn or dismissed; or where the debtor’s property is subject to control under Part X (proposed section 54B). Where the debtor is entitled to present a declaration and it is in the correct form, the Registrar is to accept the declaration. In other cases, it is to be rejected (proposed section 54C). Where a declaration has been produced to a creditor, enforcement proceedings in respect of ‘frozen debts’ (i.e., a debt that would be provable in bankruptcy other than a maintenance debt) will be stayed during the ‘stay period’ (i.e., generally seven days) (proposed section 54E). Similarly, a person authorised to deduct money from a declared debtor in respect of a frozen debt is to refrain from such action during the stay period (proposed section 54H).

Clause 30 will amend section 69 of the Principal Act, which deals with the examination of bankrupts, to allow the examination of a person who has become bankrupt
(currently the person must still be bankrupt to be examined) and to allow a greater range of activities to be examined (i.e., the person's conduct and examinable affairs).

A new section 77A will be inserted into the Principal Act by clause 35 to allow an investigator to require the production of the books of an associated entity of the bankrupt.

Section 81 of the Principal Act will be amended to allow a creditor with a provable (rather than proven) debt to commence discovery action of a bankrupt's property and to allow the examination of an 'examinable person' as defined in clause 4 (the definition includes a person possessing the bankrupt's property, a debtor of the bankrupt or a person who is an associated entity who may be able to give information on the person's examinable affairs) (clause 38).

Section 116 of the Principal Act will be amended to include property vested in accordance with proposed sections 139D and 139E (see below) in the property divisible amongst creditors. In addition, the section will be amended to exclude personal transport to the value of $2500 from the property that is divisible (clause 43).

Clause 47 will substitute a new section 130 into the Principal Act. Under the proposed section, the power to seize the property of a bankrupt will be widened to allow a trustee of a bankrupt's estate to apply for a warrant in connection with the books of an associated entity and property connected with the bankrupt's examinable affairs, as well the property of the bankrupt.

A new Division 4A, titled Orders in relation to Property of Entity controlled by bankrupt, will be inserted into Part VI of the principal Act by clause 51. Proposed section 139A will allow the trustee of a bankrupt's estate to apply for an order under the proposed Division within six years of the date of bankruptcy. The entity concerned is to be notified (proposed section 139B) and will be able to appear at the hearing (proposed section 139C). If the Court is satisfied that (a) the bankrupt supplied personal services to the entity during the examinable period and before bankruptcy; (b) controlled the entity in relation to the supply of those services; (c) the bankrupt received either no renumeration or substantially less than reasonable renumeration; (d) during the examinable period the entity acquired an estate in property as a result, either direct or indirect, of the supply of those services; (e) the bankrupt used, or derived a benefit from the property during the examination period when the bankrupt controlled the entity in relation to the property; and (f) the entity still has an estate in the property, the Court may order that all or part of the interest vest in the trustee (proposed section 139D). Under similar circumstances, if the court is satisfied that the net worth of the entity is substantially higher as a result of the supply of such services, it may order that the entity pay the trustee an amount up to the difference in worth (proposed section 139E). In such actions the Court is to take account of the interests of others (proposed section 139F).

Section 150 of the Principal Act will be amended to allow a bankrupt to apply for a discharge at any time. Currently, such applications may only be made after a public examination has been completed, the bankrupt has been notified that no such examination is to take place or 12 months after the commencement of the bankruptcy (clause 53).
Section 176 of the Principal Act, which allows for a Court to order a trustee to make good losses caused by negligence, willful default or breach of trust, will be repealed and a new section substituted which will allow such orders to be made for any breach of duty (clause 57).

A new Division 4A will be inserted into Part VIII of the Principal Act to allow the Inspector-General to apply to the Registrar for an order to examine a person in relation to a trustee (proposed section 179A). A new Division 2A will be inserted into Part X of the Principal Act by clause 75 to perform the same function in relation to arrangements under Part X.

Proposed section 189A will require a report to be prepared and filed with the Registrar summarising a meeting called under section 188 of the Principal Act (i.e. a meeting of creditors under Part X) (clause 64).

References

2. Ibid., p. 12.

For further information, if required, contact the Law and Government Group.

7 October 1987

Bills Digest Service
Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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