BANKRUPTCY AMENDMENT BILL 1984

Date Introduced: 30 May 1984
House: Senate
Presented by: Senator the Hon. G.J. Evans, Q.C., Attorney-General

Short Digest of Bill

Purpose

To terminate measures encouraging administration of a bankrupt's estate by a private trustee rather than the Official Trustee appointed under the Bankruptcy Act 1966; to amend the order of priority for payment of debts in the bankruptcy to achieve greater uniformity with similar provisions in the Companies Act 1981; to enhance the special protection accorded to maintenance creditors; and to make a number of administrative changes.

Background

The law relating to bankruptcy and insolvency is a Federal matter regulated by the Bankruptcy Act 1966. The Australian Law Reform Commission Report, called Insolvency: the Regular Payment of Debts (1977), reviewed the Bankruptcy Act in its application to small and consumer debts,[1] and recommended institution of an alternative to bankruptcy: a Regular Payment of Debts Program. Initiatives to implement this proposal have been recently announced.[2] The present Bill makes several other amendments. It is possible that further amendments will follow completion of a review of insolvency law referred to the Australian Law Reform Commission in 1983.[3] That review covers insolvency law relating to both individuals and companies. Some amendments of the present Bill are intended to achieve greater uniformity with the existing provisions of the Companies Act 1981 relating to the qualifications of company liquidators and the priority order.

The priority order for payment of claims outstanding against a company in liquidation is set out in s.441 Companies Act 1981. A number of changes in clause 24 will ensure some degree of uniformity between s.441 and the priority order in a bankruptcy including: provision for costs of an audit of a trustee's accounts; certain other liabilities to be treated as costs, charges and expenses of
the bankruptcy; and provisions relating to worker's compensation and employees' leave entitlements, other than long service leave, up to the existing limit of $1500.

In addition, s.443, a subsidiary section, provides that employees of the company may be employed by the liquidator when liquidation has commenced, with additional provision for payment of long service leave or extended leave entitlements arising during the period. In most cases, the bulk of leave entitlements so arising will rank in priority with other wages due. Clause 25 adds a new section 109A of the Bankruptcy Act 1966 to provide for similar treatment in the case of employees of a bankrupt whose employment is continued by the trustee after commencement of the bankruptcy.

The Bill amends requirements for registration of trustees in bankruptcy to be similar to those for registration of liquidators under the Companies Act. In addition, trustees in bankruptcy are required to file a statement, every 3 years, containing certain information relating to their practice, again similar to information required of liquidators and auditors registered under the Companies Act.

The contracting out of bankruptcy work to the private sector was announced following the Review of Commonwealth Functions.[4] Amendments to the Bankruptcy Act 1966 by Part V of the Commonwealth Functions (Statutes Review) Act 1981 enabled a private trustee registered under the Act to be appointed trustee at the commencement of a bankruptcy by debtor's or creditor's petition rather than by resolution at a meeting of creditors. The present Bill would restore this function in all cases of commencement of bankruptcy to the Official Trustee. Duties ascribed to a registered trustee following the 1981 amendment are reverted to the Official Trustee, on whose behalf the Official Receiver is empowered to act.

The enforcement of maintenance orders in Australia is a considerable problem. One measure recommended by the Joint Select Committee on the Family Law Act was the addition of a further sub-paragraph in s.40(3) of the Bankruptcy Act to deem a maintenance order to be a final order for purposes of initiating bankruptcy proceedings.[5] The Bill implements this measure and further provides that an order for payment of arrears of maintenance constitutes a debt provable in the bankruptcy.

Section 125 of the Bankruptcy Act requires bankers aware that an undischarged bankrupt is operating an account to notify the trustee. Amendments in clause 26 of the Bill
would extend this provision to building and co-operative societies, credit unions and other types of financial organisations as prescribed.

An amended subsection 20H(4) introduces a requirement for six-monthly review by the Investment Board of the Equalization Account for the purposes of payment of the excess to the Consolidated Revenue Fund.

The Bill increases the "threshold debt" for presentation of a creditor's petition from $1000 to $1500. Amended personnel arrangements permit the Inspector-General, Registrar, Deputy Registrars and Official Receiver to be appointed by the Permanent Head of the administering Department rather than the Executive Council, and permit more flexible adjustments of changing workload levels in bankruptcy proceedings through variation in the number of Deputy Registrar positions by the Attorney-General rather than the Governor-General.

Main Provisions

Clause 2 provides for commencement of the whole Bill on a date to be proclaimed. Transitional provisions in clause 42 relate principally to the performance of functions by the Official Trustee instead of a registered private trustee. Registered trustees appointed prior to commencement may be removed by the court on an application under s.156A(4) establishing grounds specified in that subsection, and the Official Trustee be appointed in that place.

A priority order for payment of debts and entitlements owed to employees similar to that applying to liquidations under the Companies Act is introduced by amendments to s.109 and the addition of a new s.109A (clauses 24, 25). Registered trustees are to be treated similarly to registered liquidators under the Companies Act following amendments to s.155 (registration requirements) (clause 30), and a new section 161A (triennial statements of trustee's affairs) is added (clause 35). Costs of audit are to be treated as a cost of the bankruptcy in the priority order (clause 24).

The 1981 amendments facilitating a greater role in bankruptcy proceedings for registered private trustees is reversed by removal of subsections which allowed the Official Trustee to act only where the distributable property was less than $10,000 or the consent of registered trustees to act as trustee was unobtainable (clauses 14, 16-18). The provision for the giving of consent by a registered trustee, s.156A, is repealed (clause 32, but see clause 42 transitional provisions). A replacement s.160
provides for the Official Trustee to act in default of a registered trustee being appointed (clauses 32, 34). Certain functions are returned to the Official Receiver or Official Trustee by reversal of the earlier ascription to a registered trustee in respect of matters including duties generally (clause 8), vesting of property following bankruptcy (clause 9), taking control of property prior to sequestration (clause 13), acquisition of a bankrupt's statement of affairs following sequestration (clause 15), conduct of a creditor's first meeting and public examination (clauses 20, 21); and preparation of a report for a Court considering discharge of the bankrupt by either the Official Trustee or the Official Receiver (clause 29).

The deeming of a Family Court maintenance order as a final order for bankruptcy commencement purposes is accomplished by amendment to s.40 (clause 11). Arrears of maintenance beyond the existing 1 year limit are a provable debt by virtue of a new subsection 82(1B) (clause 23). Debt limits for presentation of a creditor's petition are increased from $1000 to $1500 (clauses 12, 36 & 40).

Clause 22 provides for use of evidence given by a bankrupt at examination in proceedings where the bankrupt is a party though not necessarily the defendant.

For further information, if required, contact:

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Law & Government Group
LEGISLATIVE RESEARCH SERVICE

References


