

weeks, achieving some measure of success. Within that period it was reported that of 130 cases dealt with 26 had been resolved and mediators had been successful in re-establishing credit facilities where the farm was viable. (*AFR* 28 July 87).

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developments in bankruptcy law

bankruptcy amendment bill, 1987. On 15 September, 1987 the Bankruptcy (Amendment) Bill 1987 was introduced into the Senate. The Bill subsequently passed through both Houses, although only some of its provisions have been proclaimed.

bill extensive. The Amendments cover a variety of aspects of Bankruptcy Law including technical matters of administration, the ongoing modernisation and simplification of language of the Act as well as some fundamental changes. This article identifies three areas of bankruptcy law and practice upon which the Bill has a significant impact.

new ambit of sequestration. One of the most far-reaching amendments is a whole new set of provisions designed to facilitate investigations and asset recovery from other commercial structures such as companies and trusts which the bankrupt might have used to conceal property or income. Until recently, property not owned by a bankrupt but used by the bankrupt as if it were his or her property was beyond the reach of a trustee and so the bankrupt's creditors. The words 'property that belonged to, or was vested in, a bankrupt' (s 116 Bankruptcy Act) have been strictly construed. As Senator John Button, representing the

Attorney-General said in the second reading speech:

such limits on the trustee's powers have opened the way for unscrupulous debtors to defeat the aims of the bankruptcy law. By using a plethora of family trusts and companies, debtors have been able to organise their affairs so that they are apparently without any assets, while they continue to enjoy the use of property and assets which have the guise of being owned by a company or trust.

To deal with this the Bill responds in two ways. First the trustee's powers of investigation are extended and secondly, provisions are introduced enabling the trustee to recover from such commercial structures and other persons, assets which have been acquired by the personal efforts of the bankrupt. This more extensive reach of the Bankruptcy Act will pivot around a number of critical definitions.

associated entities. The Bill introduces the concept of 'associated entities'. These may be companies, natural persons, partnerships or trusts which come within a specified relationship with the bankrupt. The degrees of relationship defined (and the definitions are exhausting if not exhaustive) all centre upon some connection where the bankrupt might be in a position to exert some influence or control over the 'associated entity.' The provisions, however, carefully attempt to exclude the situation where a person is a financial, legal or other business adviser to such entity.

investigations. The amendments will enable a trustee to investigate the financial affairs of an entity associated with a bankrupt in so far as those financial affairs are relevant to the bankrupt's financial affairs. These new powers will operate as extensions

to the trustee's existing right to require examination of the bankrupt and other persons to attend before the court for examination and production of property related to a bankrupt's financial affairs.

new investigation provision. The Bill also introduces a new power. A trustee will be empowered to obtain access to the books of an 'associated entity' for the purpose of conducting an investigation and question a person who has possession of the books or 'any other persons who were a party to the compilation of the books.' There is no requirement that such enquiry be conducted before a court or that the person being questioned have access to legal advice. A person who fails to comply or co-operate with these investigations may be liable to a \$1 000 fine and/or six months imprisonment. There is no time limit on when such investigations may take place, that is they are not limited by a person's discharge from bankruptcy.

warrant for seizure. Other provisions, such as the right to obtain a warrant for seizure of a bankrupt's property, have been redrafted in an attempt to ensure that the extensive incursions on a person's or entity's liberty and rights which those provisions might allow are not impinged without proper judicial scrutiny.

extended ambit of property provisions.

The extension of the powers of the trustee to investigate all the circumstances surrounding a bankruptcy is of itself not enough if at the end of the day no real benefit will flow through to the creditors. (Senator Button, Senate, 15 September 1987).

Another aspect of this broadening of the reach of the bankruptcy law is,

therefore, an extension of what might be deemed to be the property of the bankrupt. The Bill introduces provisions which will enable a trustee to apply to the court for an order transferring property of an associated entity to the trustee or that the entity pay a sum of money to the trustee.

To obtain such an order a trustee must prove that:

- the bankrupt supplied his or her services to the entity or on behalf of the entity during a specified period before the bankruptcy in accordance with the bankrupt's instructions or wishes
- the bankrupt received no remuneration for those services or the remuneration was substantially less than might reasonably be expected had the relationship between the bankrupt and the entity been at arm's length;

vesting order. Where the trustee also proves that:

- during the period of 2 years before the bankruptcy or up to 4 years before, if the debtor was at that time insolvent, the entity acquired property as a direct or indirect result of the supply of the bankrupt's services,
- the bankrupt used or derived a benefit from the property during that period and when the bankrupt controlled the entity, and
- the entity still retains the property,

the court may order that the whole or part of the property be transferred to the trustee. The court is given wide

powers to ensure that such orders are complied with. For example the court may order the execution of documents and the production of documents of title.

payment order. Where, in addition to the two criteria earlier described, it is shown that the entity's net worth, during that specified period, exceeded by a substantial amount what might reasonably have been expected had the bankrupt's services not been supplied, then the court may order that the entity pay a specified amount to the trustee. That amount must not exceed the amount by which the entity is enriched beyond which would have been expected had the bankrupt's services not been provided.

protecting third parties. Obviously such orders have the potential to prejudice the rights of third parties. The new provisions therefore require that, in considering whether or not to make an order transferring an entity's property to the trustee, the court take into account:

- the nature and extent of any other person's or entity's interest in the property and any hardship that the order might cause them; and
- the entity's current net worth and any hardship such order might cause to the entity's creditors.

Only the second consideration is to be taken into account by the court when considering the making of a payment order. Further, because the effect of these provisions is to vest in the trustee property which would otherwise not belong to the bankrupt, provision is made for the entity from which the property is transferred to claim as a debt from the bankrupt the value of the property or the amount paid just

like any other creditor of the bankrupt, except that whatever dividend may be payable to the entity is postponed until all claims of the other creditors have been paid.

encouraging debtors to obtain advice. A second area of innovation in the Bill is the introduction of a pre-bankruptcy moratorium. Senator Button said the purpose of the moratorium is to encourage people to explore the alternatives to bankruptcy which are available. Under the existing law a debtor may file a debtor's petition whereby he or she is immediately bankrupt. The Bill introduces a 'Declaration of Intention to File a Debtor's Petition.' When such declaration is filed by a debtor, the Registrar must ensure that the debtor has been made aware of:

- procedures available under the Bankruptcy Act outside of bankruptcy for dealing with the debtor's financial affairs — namely the possibility of a voluntary administration under Part X of the Act and
- the availability of sources of advice and guidance about how the debtor can deal with his or her financial difficulties.

stay of proceedings. The filing of such declaration can be used to prevent the debtor's creditors enforcing payment of a debt for up to 7 days. The stay does not affect secured creditors.

voluntary administration. The third significant aspect of the Bill relates to voluntary administration under Part X. The amendments are intended to address three problems with Part X.

First, creditors do not receive sufficient information about a debtor's affairs before they accept arrangements under

Part X. Secondly, there are no provisions in the Act which ensure that previous dealings between a debtor, a particular creditor or creditors and the trustee are disclosed. Thirdly there is no effective supervision of Part X arrangements'. (Senator Button, Senate, 15 September 1987).

information to creditors. A debtor who wishes to initiate a Part X administration will have to submit to the trustee or solicitor who the debtor has authorised to call a meeting of his or her creditors, a statement of financial affairs and how the debtor proposes his or her affairs be dealt with. At the moment a statement of affairs need only be provided at the first meeting of creditors. The trustee (but not a solicitor) must then prepare a report which summarises and comments on the debtor's financial affairs as disclosed in the debtor's statement and set out all other relevant information available to the trustee which is necessary to give a true and fair view of the debtor's affairs. The trustee must also state whether, in the trustee's opinion, it is in the best interests of the creditors to accept the debtor's proposal.

The notice informing the creditors of the meeting must be accompanied by:

- a copy of the debtor's statement of affairs and proposal,
- if a trustee has been appointed, the trustee's report,
- a statement prepared by the trustee or solicitor setting out the alternative special resolutions that may be passed by the meeting.

declaration by trustee. The second aim of the amendments to Part X is intended to be brought about by requiring the trustee nominated to act

in a Part X administration to declare previous dealings with the debtor or the creditor(s) proposing the resolution. Also, the ability of a chairman (quite often the trustee or solicitor) to influence voting at the meeting by the holding of proxies will also be reduced by limiting proxy votes in respect of the special business of the meeting to be exercised only in the manner specified in the proxy form.

increased supervision of Part X. There are also new provisions in the Bill heightening supervision of those who conduct Part X administrations.

ALRC report. As reported in the last issue of *Reform* the Australian Law Reform Commission last year published Discussion Paper 32 in its General Insolvency Inquiry. That Discussion Paper covers many of the aspects included in the Bankruptcy Amendment Bill, some of which thereby will receive early implementation. The Discussion Paper was followed by an intensive round of public hearings in all Australian capital cities in November and December last year. The Insolvency Inquiry is now engaged in considering evidence given to the Commission at the public hearings as well as the large number of written submissions received in response to the Discussion Paper. The Commission's Report is due to be published in mid-1988.

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class actions — continuing push

Don't clap too hard — it's a very old building.

John Osborne, *The Entertainer*

real estate institute. The last edition of *Reform*, ([1987] *Reform* 171),