

BANKRUPTCY AND ALTERNATIVES

INTRODUCTION

YOUR OPTIONS

There are generally four options available to restructure an insolvent individual:

- Informal workout
- Debt agreement
- Personal insolvency agreement
- Bankruptcy

EXPERTISE AND EXPERIENCE

As experts in bankruptcy and personal insolvency, we specialise in turnaround and restructuring services. Our staff have worked on more than 1000 bankrupt estates.

Bankruptcy Solutions has a highly talented team of in-house professionals, including:

- Official liquidators
- Bankruptcy trustees
- Lawyers
- ARITA members
- CPA's
- Chartered Accountants

Our clients over the past 10 years have included all the major banks, second-tier financiers and hundreds of lawyers and accountants. However, our main specialisation has always been small business solutions.

If you are in financial difficulty, we can help you.

PRICE GUARANTEE

As part of our service, we offer this simple guarantee: If we consent to act as trustee of a bankrupt estate, we will undercut any written quote from any trustee in bankruptcy by 10 per cent. Our fees to act as trustee of a bankrupt estate start from \$11,000.

The Federal Government's Senate Inquiry into insolvency found that our average hourly charge-out rates are about 33 per cent lower than those of large insolvency firms.

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1. INFORMAL WORKOUTS

Informal workouts allow someone in financial distress, who might be referred to as a “debtor” in the bankruptcy scenario, to renegotiate the terms of trade with their creditors. They are an excellent way to avoid bankruptcy. Sometimes called a moratorium, a standstill arrangement or a deed of forbearance, an informal workout is a privately negotiated agreement between an insolvent person and a select group of its creditors.

The success of an informal workout will always rely on the attitude and conduct of its creditors. The problem is that when an individual is in financial distress, they generally lose the trust and confidence of their creditors. The inherent weakness of any informal workout is that it is impossible to compel a creditor to accept or honour the deal.

By using an independent expert to negotiate an informal workout, you can take the emotion and lack of trust out of the equation and quickly develop a good working relationship.

Creditors are reluctant to talk to insolvent debtors who have previously failed to honour their obligations and undertakings. But a creditor will generally talk to an experienced and competent Court officer with decades of insolvency experience.

Bankruptcy Solutions offers this service and can discuss viable informal workout options. Our reputation and integrity is one of the keys to our success at negotiating informal workouts.

Creditors want to minimise their economic loss arising from the insolvent person’s circumstances. Approximately 8 per cent of bankrupt estates pay a dividend, which averages only about 8 cents in the dollar. Hearing first-hand from a trustee in bankruptcy how little a creditor can expect to be paid from a bankrupt estate generally motivates all but the most aggrieved creditors to return to the negotiating table.

INFORMAL WORKOUT OPTIONS

Informal workouts may include the following options:

- Moratorium on creditor payments, pending completion of work, debt or capital injection or the sale of business or assets
- More time to pay creditors, to pay 10-20 cents in the dollar of creditor claims
- Repayment of old debts, including reduction or waiver
- Payment of old debts in instalments
- Debts are compromised
- Debt for equity swaps
- A change to the terms of bank funding to ensure that a business continues to trade

INFORMAL WORKOUT COST ADVANTAGE

Informal workouts are less expensive and quicker to implement than formal restructuring alternatives such as Personal Insolvency Agreements (PIAs).

INFORMAL WORKOUT PROBLEMS

Organising an informal workout can be as difficult as herding cats when creditors change their minds, abandon the agreed deals or attempt to bankrupt an individual. In these circumstances, all the costs incurred shall be wasted.

One of the important factors that stops a creditor walking away from a deal is the knowledge that if the insolvent person (or debtor) goes bankrupt after an informal workout, payments received by creditors under the informal workout may be clawed back or recovered as a preference payment.

2. DEBT AGREEMENT

A debt agreement is a legally binding agreement between a debtor and a creditor.

In 2014, more than 10,700 people entered into debt agreements to avoid bankruptcy. The same year, 6111 existing debt agreements were finalised. More than \$120 million was paid to satisfy creditor claims of \$202 million, which represented an actual return of about 58 cents in the dollar of creditors' claims.

Compare this to the average return over all bankrupt estates of just 1 cent in the dollar of creditors' claims and you will understand the appeal of debt agreements.

When entering a debt agreement, a debtor is expected to propose an achievable and sustainable offer to his creditors. The debtor's offer is based on an analysis of expected income from all sources, household expenses and personal circumstances. A proposal is accepted if a majority of creditors (in value) agree to the debtor's proposal.

Creditors are generally repaid 60 cents in the dollar over three to five years.

The *Bankruptcy Act 1966* contains a statutory framework that sanctions any agreement between an insolvent debtor and his creditors. This is contained in Part 9 of the *Bankruptcy Act 1966* and its recommendations are often called Part 9 Agreements or Debt Agreements.

To be eligible to enter into a debt agreement a person must have:

- Assets and creditors of less than the amount prescribed by the Act, which is about \$105,086
- An after tax income of less than the amount prescribed by the Act, which is about \$78,815
- Not entered into bankruptcy (or formal alternatives) during the previous 10 years.

Debt agreements are binding agreements between a debtor and his creditors that provide new terms for the repayment of existing debts. The new terms may include:

- Full release from current debts
- An undertaking to repay a new, mutually agreed smaller debt to creditors. For example, an insolvent debtor offers creditors 20-80 cents in the dollar in full and final repayment of existing debt
- A moratorium on payments. For example, creditors agree to a six-month period without repayments
- Repayment of a new, mutually agreed smaller debt by periodic payments to a trustee. For example, the insolvent debtor makes monthly repayments into a fund held by a trustee who repays creditors when the new agreed-on reduced debt is paid
- Creditors being offered assets not available in bankruptcy
- A combination of the above.

Debt agreements are governed by the *Bankruptcy Act 1966* and are a streamlined version of Personal Insolvency Agreements (PIAs). They are legally binding once creditors agree to the terms.

A debt agreement is initiated by making a proposal to a debtor's creditors. The proposal must identify the debtor's assets, how they will be dealt with and who will coordinate the debtor's proposal.

A debt agreement ends when all the obligations created under the proposal have been discharged.

ACCEPTANCE OF PERSONAL INSOLVENCY AND DEBT AGREEMENTS

The decision to accept or reject a debtor's proposal will be made solely by a debtor's creditors. Creditors may vote on a

debtor's proposal at a meeting of that debtor's creditors or by a postal vote. A proposal will be accepted when:

- More than 50 per cent of the creditors (in number) vote in favour and
- More than 75 of the creditors (in value) vote in favour.

To find out more about debt agreements please call Bankruptcy Solutions.

3. PERSONAL INSOLVENCY AGREEMENTS (PIA)

INTRODUCTION

Part X of the *Bankruptcy Act 1966* provides a statutory framework to sanction an agreement between an insolvent debtor and creditors known as a Personal Insolvency Agreement (PIA).

Formerly known as "a Part X", it is a procedure that requires an insolvent individual (a debtor) to make a proposal to creditors in the form of a deed that, if accepted by those creditors, will avoid bankruptcy. A registered trustee then administers the agreement and all creditors' claims that are provable will be bound by the terms of the agreement.

In 2014, only 211 people in Australia used a PIA to avoid bankruptcy and the average rate of return to unsecured creditors in PIAs that paid a dividend was about 2.35 cents in the dollar.

A PIA is a binding agreement between an individual and his creditors that provides new terms for the repayment of existing debts. The new terms may include:

- Full release from current debts
- An undertaking to repay a new, mutually agreed smaller debt to creditors. For example, an insolvent debtor offers creditors 20-80 cents in the dollar in full and final repayment of existing debt
- A moratorium on payments. For example, creditors agree to a six-month period without repayments
- Repayment of a new, mutually agreed smaller debt by periodic payments to a trustee. For example, an insolvent debtor makes monthly repayments into a fund held by a trustee who pays creditors when the new agreed reduced debt is paid
- Creditors are offered assets not available in bankruptcy
- A combination of the above.

A trustee administers the PIA and when it is implemented, all creditors are bound by its terms. There are no income, asset or debt limits for the PIA.

ENTERING INTO A PIA

To initiate a PIA an insolvent debtor will normally engage a registered trustee to act as a controlling trustee who will:

- Take control of the debtor's affairs and assets
- Undertake an independent investigation of the debtor's affairs
- Assess the merits of the debtor's proposal with regard to the likely return to creditors in bankruptcy
- Convene the meeting of creditors to determine if creditors wish to accept the debtor's proposal.

COSTS

Our rate for creating a proposal, investigating the debtor's affairs, reporting the findings, convening and attending the meeting of creditors as well as statutory duties as the controlling trustee is generally between \$10,000 and \$15,000.

If the insolvent person's proposal is accepted by creditors (i.e. 20 cents in the dollar), it will generally cost another \$10,000-15,000 to implement, pay and finalise the PIA.

4. INTRODUCTION TO BANKRUPTCY

In 2014, about 18,500 people were declared bankrupt in Australia. The Australian Financial Security Authority, a Federal Government department, administered about 80 per cent of these matters, typically for mums and dads who lost control of their credit cards and incurred retail shopping debt.

The value of the creditors affected by bankruptcy is about \$5.6 billion a year.

About 92 per cent of bankrupt estates do not pay any dividend.

The average dividend, paid from the 8 per cent of estates that do pay creditors, is only 8 cents in the dollar. The \$64 million paid in dividends across all bankrupt estates represents an average return of about 1 cent in the dollar.

About 150 Australians buy their way out of bankruptcy each year by doing a deal with their creditors and annulling their bankruptcy pursuant to section 73 of the *Bankruptcy Act 1966*.

About 300 people each year pay their creditors in full to secure an annulment of their bankruptcy.

OBJECTIVES OF BANKRUPTCY

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

Under this Act, the objectives of bankruptcy include:

- The distribution of the bankrupt's property to creditors
- Relieving the bankrupt of the burden of repaying creditors' and providing an opportunity for a fresh start
- Ensuring that an independent investigation is undertaken into the bankrupt's dealings, transactions, property and affairs to identify the causes of bankruptcy and any improper conduct
- To act in the public interest by preventing a reckless bankrupt from continuing to trade.

5. 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 an inability to pay debts as and when they fall due, 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:
- Entering into a transaction that would constitute a preference or undervalued transaction or if the main purpose of the transaction was to defeat creditors' claims
- Conduct intended to defeat or delay creditors, for example keeping property, departing Australia or being absent from a usual residence or place of business
- When a sheriff acting under process of Court seizes or sells personal assets or household items, or returns from the execution of a levy or order unsatisfied
- Failure by the debtor to execute a personal insolvency agreement, as agreed, or to attend a meeting of creditors pursuant to a personal insolvency agreement
- Breach of a Part IX debt agreement
- 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 specified time (normally 21 days) or apply to the Court to set aside the bankruptcy notice. A bankruptcy notice will only be issued if the creditor obtained a final judgment or court order against the debtor less than six years earlier and for an amount exceeding \$5000.

Failure to comply with a bankruptcy notice constitutes an act of bankruptcy and empowers a creditor to petition the Court for a sequestration order.

COMMENCEMENT DATE

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

CREDITOR'S PETITION COMMENCEMENT DATE

When a bankruptcy has been initiated by a creditor's petition, the commencement date is the earliest act of bankruptcy by a debtor within a six-month period before the 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
- When at least one creditor's petition is pending against the debtor, the commencement date is the date of the earliest act of bankruptcy on which any creditor's petition relied
- If no creditor's petitions are pending, but the debtor has committed an act of bankruptcy in the six months before being presenting a debtor's petition, the commencement date is the date of the earliest act of bankruptcy within the six months before the petition
- When there is no creditor's petition pending and no act of bankruptcy within the past six months, the commencement date is the date when the debtor's petition was presented.

DATE OF BANKRUPTCY

The date of bankruptcy is commonly perceived 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 the official receiver, if a bankruptcy is commenced voluntarily.

DEBTOR

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

INSOLVENT

Section 5 of the *Bankruptcy Act* provides that an individual is solvent if, and only if, he is able to pay all his debts as and when they become due and payable. An Act of Bankruptcy (see above) is evidence that the debtor is insolvent.

Judicial interpretations of insolvency can vary. Conclusions regarding insolvency must be distinguished from the mere temporary lack of liquidity and be proven at the time of the relevant transaction. It is generally necessary to analyse the nature of the insolvent person's business, cash flow, profit and loss statements and balance sheets, and the ability to procure funding by the realisation or mortgage of existing assets.

AUSTRALIAN FINANCIAL SECURITY AUTHORITY (AFSA)

AFSA is the government department responsible for bankruptcy administration in Australia.

INSPECTOR-GENERAL IN BANKRUPTCY

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

OFFICIAL RECEIVER

The official receiver is a government official employed by the Inspector-General in Bankruptcy. AFSA staff assist the official receiver to exercise his/her powers and functions.

OFFICIAL TRUSTEE IN BANKRUPTCY

In exercising powers or performing functions, the official receiver 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

This is the period between the date of bankruptcy and the commencement date (see above).

Transactions affected during the relation back period by an insolvent debtor (soon to be bankrupt) can be set aside by a trustee. The assets may then be available for realisation and distribution to the creditors of the bankrupt estate.

STATEMENT OF AFFAIRS

A bankrupt is required to file particulars of his assets and liabilities, known as a Statement of Affairs, with the official receiver. This document must be filed within 14 days of the date a bankrupt is notified of his bankruptcy.

6. INITIATING A BANKRUPTCY

VOLUNTARY BANKRUPTCY

An insolvent person may initiate his own bankruptcy by lodging a debtor's petition with an official receiver at any AFSA office.

An official receiver will reject a petition if the required documents are not completed, the insolvent person is party to a debt agreement or 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 his bankrupt estate, he must secure the consent of the prospective trustee and lodge the trustee's consent in the required form when 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. The official receiver acting on behalf of the official trustee shall administer that bankrupt estate with the assistance of staff at AFSA.

INVOLUNTARY BANKRUPTCY

A person may be involuntarily declared bankrupt by a court order called a sequestration order. To obtain a sequestration order, the Court requires evidence of an act of bankruptcy. The most common act of bankruptcy that creditors use as evidence of insolvency is the failure of a debtor 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 required form before the court hearing. The consent is typically filed and served on the bankrupt at the time of lodging the petition/application for bankruptcy.

7. APPOINTMENT OF A TRUSTEE

A trustee of a bankrupt estate may be either:

- A registered trustee, typically a specialist chartered accountant or certified practicing accountant (CPA) or
- The official trustee as the representative of AFSA.

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

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

The vast majority of bankrupt estates in Australia are administered by official trustees.

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 the trustee's duty to investigate the conduct of the bankrupt and their dealings, transactions, property and affairs.

Any conduct by the bankrupt or others that prevent the trustee from undertaking this process may be punishable by fine, contempt of Court or incarceration.

EFFECT OF BANKRUPTCY

When bankruptcy has been declared, a trustee will be nominated to take control of the bankrupt's property and affairs. All divisible property rests with the trustee, who shall realise and distribute the property for the benefit of creditors.

DIVISIBLE PROPERTY

Divisible property includes:

- All property that belongs to the bankrupt at the date of commencement of bankruptcy
- All property (excluding income) that the bankrupt acquires during the period of bankruptcy (such as inheritance or lottery winnings)
- 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. These payments are called income contributions.

The prescribed threshold amounts are indexed and updated every six months.



If a bankrupt's income exceeds the threshold, the bankrupt is required to pay 50 per cent of the excess to their bankrupt estate for the benefit of creditors. Adjustments can be made for variables such as the 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 used as a primary means of transport to a value not exceeding the prescribed amount of about \$7600
- Tools of trade to a value not exceeding the prescribed amount of about \$3,700
- Selective superannuation policies
- Rights to any proceeds from compensation of a personal nature
- Assets disposed of via a bona fide maintenance agreement.

LENGTH OF BANKRUPTCY

Bankruptcy is typically for three years. This three-year period starts when the statement of affairs is filed with AFSA. This means that if the statement of affairs is not filed immediately, the period of bankruptcy may be much longer.

CONSEQUENCES OF BANKRUPTCY

- The effects of bankruptcy for a bankrupt include:
 - Loss of all property (subject to exemptions)
 - Requirement to make income contributions
 - Social stigma
 - Bankrupt is prohibited from:
 1. Obtaining credit of more than the prescribed threshold of about \$5447 without disclosing status as a bankrupt
 2. Carrying on business without disclosing status as a bankrupt
 3. Acting as a director of a company
 - Obligation to help the trustee as much as possible to perform his duties
 - Surrender passport to trustee
 - Surrender to the trustee all documents that relate to property, dealings, transactions and other affairs
 - Notify trustee of change of address
 - Termination of partnerships, unless otherwise exempt
 - Suspension of all legal actions 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:

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

9. ASSETS AVAILABLE AND VOIDABLE TRANSACTIONS

Almost all property of the bankrupt at the commencement date will rest with the trustee of the bankrupt estate. The assets available to a trustee include:

- Property of bankrupt at the date of commencement
- After-acquired property
- Relation back doctrine assets
- After-acquired income

- Proceeds of execution and court proceedings
- Undervalued transactions
- Transfers to defeat creditors
- Preferences
- Controlled entity payments.

VOID TRANSACTIONS

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

Void transactions are payments and transfers that may be set aside by a trustee. When a trustee sets aside a transaction, the creditor must repay the value of the void transaction to the bankrupt estate. The creditor making this repayment will also be eligible to participate in any dividend from the bankrupt estate.

PROCEEDS OF EXECUTION OF COURT PROCEEDINGS

The money received by a creditor from the proceeds of execution of 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 judgment against the debtor. The taxed costs of obtaining the relevant judgment 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.

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 the debtor's property of the debtor or any action on behalf of a creditor and
- Deliver to the trustee any property the bankrupt held and any proceeds of the bankrupt's property.

UNDERVALUED TRANSACTIONS

A transfer of property by definition includes the payment of money and 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
- That the transfer occurred within five years of the date of commencement of bankruptcy and
- That the transferee gave no consideration to the bankrupt or gave 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 can show that the bankrupt was solvent at the time of transfer.

TRANSFER TO DEFEAT CREDITORS

A trustee is permitted to set aside a disposal of property made before bankruptcy where it was made with the intent to

defraud creditors. Such transfers of property were formerly 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 would 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 among the bankrupt estate creditors or to hinder or delay the process of making the property available for division among the bankrupt estate creditors.

DEFENCES

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

- 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 was about to, become insolvent.

PREFERENCES

- To establish a voidable preference a trustee must prove that:
- A transfer of property by the bankrupt was made 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 an advantage over other creditors generally and
- The transfer occurred during the relevant time period (see below).

THE RELEVANT PERIOD

To constitute an unfair preference, the transfer of property must be within a prescribed time period. This is the relevant period and it varies with circumstances, as follows:

- When the bankruptcy is initiated by a creditor's petition, the relevant period is the six months before the petition was presented
- When a debtor's petition is presented while a creditor's petition was pending, the relevant period begins on the commencement date of bankruptcy
- When a debtor's petition is presented under any other circumstances, the relevant period is the six months before the petition was presented.

DEFENCES

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

- They acted in good faith
- They gave consideration at or higher than 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. To do this, the trustee must establish all of 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:

- The transactions 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 transactions were in good faith and in the ordinary course of business.
- This general protection or defence is subject to sections 118 to 122 of the *Bankruptcy 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 of receiving the statement of affairs.

If a statement of affairs is not provided by the bankrupt, the trustee must endeavour to provide the above information to all known creditors within 60 days of bankruptcy.

The Trustee's report to creditors will normally disclose the following information:

- What assets can be realised
- The likelihood of a dividend
- Proposed meetings of creditors, if required
- The results of investigations to date
- Proposed future conduct.

Meetings of creditors may be convened by the trustee at any time. These meetings are not mandatory, but creditors can 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 and advertised on AFSA's website.

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 exceptions, all debts and liabilities present, future, certain or contingent that existed 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 or
- A liability to pay income contributions to the bankrupt estate.

NON-PROVABLE DEBT

Claims that are not provable include:

- Unliquidated damages (unless they arise as a consequence of a breach of contract, promise or breach of trust, in which case they are provable)
- Penalties or fines imposed by the Court for an offence
- Interest during a period beginning on the date of bankruptcy
- Liabilities of value that are incapable of being fairly estimated.

DIVIDENDS

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

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

Unsecured creditor claims are typically paid in the following order:

- Realisations and interest charges payable to the government
- Expenses reasonably incurred on behalf of the trustee while protecting the bankrupt's assets or carrying on a business of the bankrupt
- Other expenses incurred by the trustee in administering the estate
- The taxed costs of the petitioning creditor
- The trustee's remuneration
- Employee wages as determined by the Act
- Workers' compensation claims
- Employee long service leave, annual leave and sick leave.

10. ANNULMENT (EARLY TERMINATION) OF BANKRUPTCY

A bankruptcy will be annulled (or terminated) if:

- The trustee is satisfied that all the bankrupt's debts have been paid in full or
- The Court is satisfied the sequestration order should not 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
- Another scheme of arrangement.

DO YOU NEED HELP?

We invite you to give us a call, all initial discussions are free of cost or obligation. Talk to our in-house liquidators, bankruptcy trustees, lawyers or accountants about your circumstances and options.

We have offices in Sydney, Melbourne and Byron Bay together with affiliated offices in each capital city. Our nationwide network lets us service our clients' needs throughout Australia.