

## **PROPOSED CHANGES TO THE OFFENCES PROVISIONS IN THE *BANKRUPTCY ACT 1966***

### *Infringement Notice Regime*

It is proposed to introduce an infringement notice regime for those offences of strict liability contained in the Act which place obligations on (primarily) trustees in bankruptcy and creditors. A common justification for a number of these offences is that they penalise (in particular) the trustee's failure to provide the Official Receiver with notification of the occurrence of particular events. This is important. A number of those events affect records of individuals' bankruptcy which is displayed on the National Personal Insolvency Index (NPII). Inaccurate information on the NPII can have a serious effect on a debtor and on other creditors.

Such a regime would provide an efficient means of penalising behaviour which, while relatively minor in criminality, can significantly affect the integrity of the personal insolvency system. The issuing of a notice would not replace the current penalties but would serve as an alternative to prosecution.

There are other events which the Act and *Bankruptcy Regulations 1996* require a party to give notice to the Official Receiver, and which may affect the publicly available record of an individual's insolvency, which are not subject to an offence. Trustees and debt agreement administrators are also required to provide a report or answer an inquiry on the operation of or an administration under the Act when requested by the Inspector-General. These provisions are also not subject to an offence but failure to comply can impede the efficient administration of the Act by the Inspector-General, particularly in relation to ensuring compliance with payment obligations imposed by the Act. On this basis, it is proposed to formalise these requirements and subject the obligations to strict liability offences, with associated penalties. These limited new offences will relate only to obligations currently imposed on trustees and creditors under the Act.

### *Bankrupt's passport*

Subparagraph 77(1)(a)(ii) imposes a duty on the bankrupt to hand over his or her passport (if any) to the trustee. It is not currently an offence for a bankrupt to fail to fulfil this duty. However, this failure can have significant implications for the administration of the bankrupt estate. A bankrupt who fails to hand over his or her passport has a means to leave the country and avoid their obligations under the Act. The proper administration of the bankrupt estate is significantly impeded where the trustee is unable to seek information from the bankrupt about, for example, property, income, transactions and dependants. The net result could be that the trustee is unable to realise property, and creditors will not receive a dividend that they may have, had the bankrupt not left the country, been able to receive.

On this basis, it is proposed that the bankrupt's failure to comply with the trustee's request to hand over his or her passport would be a ground for objecting to the bankrupt's discharge. This proposed change would be consistent with the current grounds for objection to discharge, which include failure by the bankrupt to comply with the trustee's request for information about property and income (paragraph 149D(1)(d)); failure to return to Australia when requested by the trustee (paragraph 149D(1)(h)); and leaving Australia before, on or after the date of bankruptcy and failing to return (paragraph 149D(1)(a)).

### *Failure to file the Statement of Affairs*

Section 54 of the Act provides that, where a sequestration order is made, the debtor shall make out and file with the Official Receiver a statement of his or her affairs (the Statement of Affairs) within 14 days. It is an offence of strict liability for failing to comply with this provision, with a current penalty of 5 penalty units. The review indicated that stakeholders are firmly of the view that this penalty is inadequate, and does not promote compliance with the obligation. The statement of affairs is the most important primary document needed by trustees to administer bankrupt estates effectively. As a means of compelling the filing of this document, it is proposed to introduce a provision that would allow the Official Receiver to issue a notice requiring the bankrupt to file the Statement of Affairs.

This provision would be similar to section 77C of the Act. The maximum penalty for failing to file the document would be the same as the section 77C offence, which is 12 months imprisonment (section 267B).

### *Inconsistency with penalties for other, similar offences: offences involving fraud or 'an intent to defraud'*

During the course of the review it became apparent that some of the penalties in the Act are inconsistent with penalties for similar offences in other Commonwealth and state and territory legislation. A number of offences contained in the Act are analogous to such offences, however, the penalties imposed for these similar offences are often harsher than those imposed under the Act.

Of particular relevance are the significant number of offences in the Act which require the prosecution to prove that the offence involved fraud, or that the defendant had an intention to defraud. These offences all carry a maximum penalty of 3 years imprisonment. However, similar offences in state and territory crimes legislation generally contain higher penalties. Examples include the offence of obtaining money, a valuable thing, or financial advantage by deception, contained in section 178BA of the *Crimes Act 1900 (NSW)*, the maximum penalty for which is 5 years imprisonment; and the offence of fraud contained in section 408C of the *Criminal Code (Qld)*, which carries a maximum penalty of either imprisonment for 5 years, or imprisonment for 10 years in certain circumstances. It is considered that, given the fraudulent intent of the offender and the impact of fraud on the victim, these penalties are commensurate with the gravity of the offence. On this basis, it is proposed to increase the penalties for the bankruptcy offences from 3 to 5 years imprisonment, to bring them into line with penalties for these other, similar, offences.

### *Inspector-General's powers under the Act*

Investigations into suspected offences under the Act are carried out by ITSA's Bankruptcy Fraud Investigation Unit and undertaken pursuant to delegation of the Inspector-General's powers under section 12 of the Act. This provision authorises the Inspector-General to make such inquiries and investigations as he 'thinks fit' in relation to *inter alia* the administration and conduct of a trustee and the conduct and examinable affairs of a bankrupt.

ITSA and the Attorney-General's Department undertook the opportunity, as part of the review, to consider whether these powers are sufficiently certain and effective to enable thorough and proper investigation of offences under the Act. It became apparent that there is

a need to clarify these powers by inserting an amendment into the Act which *expressly authorises* the Inspector-General to investigate alleged bankruptcy offences.

As a related amendment, it is also proposed to strengthen the Inspector-General's information-gathering powers for the purpose of investigating offences. It is proposed to introduce a provision, similar to paragraph 77C(1)(a) of the Act, which would allow the Inspector-General to issue a notice requiring a person, whether bankrupt or not, to give the Inspector-General information which is required for the purposes of investigating offences under the Act. It is proposed that the penalty for failure to comply with such a notice would be 12 months imprisonment. This would align the penalty with the current penalty for failure to comply with a paragraph 77C(1)(a) notice (contained in subsection 267B(1)).

Current paragraph 77C(1)(a) is primarily aimed at empowering the Official Receivers to assist trustees to obtain information for the purposes of administering bankrupt estates. As there is no analogous power bestowed upon the Inspector-General for the purpose of investigating offences, this means that, currently, trustees are far better placed under the Act to gain information from relevant parties. This proposal would address this incongruity by ensuring that the Inspector-General has appropriate information-gathering powers for the purpose of offence investigations.

#### *Debt agreements*

An agreement pursuant to Part IX of the Act, more commonly known as a 'debt agreement' provides a process by which a legally binding arrangement can be put in place between a debtor and their creditors as an alternative to bankruptcy. Debt agreements are administered by debt agreement administrators, who are in most cases required to be registered under the Act. There are currently a limited number of strict liability offences in the Act that relate to the conduct of debt agreement administrators. As noted above, these will be subject to the proposed infringement notice regime. However, as part of this review, all of the offence provisions have been examined to ensure that they apply to debt agreements as appropriate.

Only a limited number of offences were considered relevant in this context. Accordingly, it is proposed to introduce debt agreement offences that are equivalent to sections 263C and 269 of the Act. Section 263C currently makes it an offence for a creditor to give to the trustee a voting document knowing or reckless that the document is false or misleading. The penalty for the offence is imprisonment for 6 months. It is considered that a creditor involved in a debt agreement should face similar sanctions if it knowingly makes false claims about its entitlement to vote. Further, an additional offence is proposed relating to a creditor who gives false information to a debt agreement administrator in relation to the amount of the debt. This would be the equivalent of the offence for false proofs of debt (paragraph 263(1)(d)) (as there is no requirement for a proof of debt in a debt agreement).

Section 269 of the Act makes it an offence for an undischarged bankrupt to obtain credit of \$3 000 or more without disclosing to the credit provider that he or she is an undischarged bankrupt. The penalty for this offence is 3 years imprisonment. It is proposed to create a similar offence for debtors who are party to a debt agreement. A debtor who is party to a debt agreement has compromised debts and is using a formal process to deal with insolvency. The debtor is not released from those debts until the debt agreement is completed. It is considered that credit providers should be made aware that a person seeking further credit is party to such an agreement.

*Technical amendments*

It is also proposed to make technical amendments to the Act largely intended to harmonise the offences in the Act with the general principles of criminal responsibility set out in Chapter 2 of the Criminal Code.