



Bankruptcy and Family Law Legislation Amendment Bill 2004

Morag Donaldson
Law and Bills Digest Section

Contents

Purpose.....	2
Background.....	2
Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002)	2
The Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004.....	4
Main Provisions	5
Schedule 1—Amendments relating to the interaction between family law and bankruptcy law.....	6
Summary of Schedule 1	6
Amendments to the Bankruptcy Act.....	6
Amendments to the Family Law Act.....	7
Schedule 2—Amendments relating to income contributions.....	11
Summary of Schedule 2	11
The ‘supervised account’ regime	11
Schedule 3—Amendment relating to maintenance agreements.....	12
Schedule 4—Amendments relating to financial agreements under the Family Law Act.....	12
Concluding Comments.....	12
Endnotes.....	13

Bankruptcy and Family Law Legislation Amendment Bill 2004

Date Introduced: 17 November 2004

House: Senate

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent; Schedule 1 commences on proclamation or six months after Royal Assent (whichever occurs first); Schedule 2 commences on Royal Assent; and Schedules 3 and 4 commence 28 days after Royal Assent.

Purpose

The Bill amends the *Family Law Act 1975* ('the Family Law Act') and the *Bankruptcy Act 1966* ('the Bankruptcy Act') to give effect to key recommendations contained in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002).¹

Particularly, **Schedule 1** to the Bill amends the Bankruptcy Act and the Family Law Act in relation to the interaction of family law and bankruptcy law. Among other things, **Schedule 2** to the Bill amends the Bankruptcy Act to create a 'supervised account' regime. **Schedule 3** to the Bill amends the definition of 'maintenance agreement' in the Bankruptcy Act, and **Schedule 4** amends section 40 of the Bankruptcy Act to provide that a person commits an act of bankruptcy if he or she becomes 'insolvent' (that is, having insufficient assets to meet debts and liabilities) as a result of one or more transfers of property pursuant to a financial agreement made under the Family Law Act.

Background

Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002)

The Joint Taskforce comprised officers from the Attorney-General's Department, Australian Taxation Office, Insolvency and Trustee Service Australia, and Treasury. It examined the use of bankruptcy and family law schemes to avoid payment of tax. Particularly, it was concerned about high-income, fee-for-service, professionals, such as barristers. As noted in the Executive Summary to the Taskforce's report:

A small but significant number of high-income tax debtors, typically high earning fee-for-service professionals, use bankruptcy to avoid paying the tax that they owe according to the law. These debtors have the ability to pay their debts, but instead fund a lifestyle made possible only through the non payment of tax and the build up of assets in the names of related parties. Typically the ATO is the sole or most significant creditor and the dividend distributed to creditors by the trustee in bankruptcy amounts to only a few cents in the

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

dollar. The inequity of this device is compounded as some offending debtors divert income and assets to other parties in a manner designed to thwart the capacity of the trustee in bankruptcy to realise their value for the benefit of the ATO or other creditors.²

The Bill reflects several recommendations made by the Joint Taskforce as follows:

Bill	Joint Taskforce recommendation	Summary of recommendation
Schedule 2	Recommendation 4	<p>That a ‘different and more rigorous [income] contribution collection regime’ be developed to supplement the existing scheme. Particularly:</p> <ul style="list-style-type: none"> • the whole of the debtor’s income must be deposited into a bank account • the debtor must not be paid ‘cash in hand’ or, except with the trustee’s written permission, by fringe or other benefits • the trustee could permit the bankrupt to draw on the account to an agreed sum per week/ fortnight/ month but the trustee would have no obligation to put the bankrupt’s preference for a particular standard of living ahead of the interests of creditors, and • if the debtor did not comply with the regime, he or she could be found guilty of a criminal offence and sentenced to imprisonment.
Schedule 3	Recommendation 5	<p>That the definition of ‘maintenance agreement’ in subsection 5(1) of the Bankruptcy Act be narrowed to exclude financial agreements entered into under Part VIIIA of the Family Law Act.</p>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

Bill	Joint Taskforce recommendation	Summary of recommendation
Schedule 4	Recommendation 9	That the Bankruptcy Act be amended to insert a new act of bankruptcy to apply where a person is rendered insolvent as a result of assets being transferred pursuant to a financial agreement under Part VIIIA of the Family Law Act. The act of bankruptcy would be deemed to occur on the date of the transfer of property pursuant to the agreement that made the person insolvent.

(Other recommendations made by the Joint Taskforce are already enshrined in legislation or were the subject of Bills which lapsed when the 40th Parliament was prorogued. See for example, the Family Law Amendment Bill 2004, which was introduced in the House of Representatives on 1 April 2004 but lapsed when Parliament was prorogued in August 2004.³)

The Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

The measures contained in the Bill initially appeared as part of the exposure draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004. The exposure draft was released by the Attorney-General on 14 May 2004, together with an explanatory memorandum. The exposure draft was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs for consideration as to whether the provisions of the Bill 'adequately address the problems identified in the Taskforce report'.⁴ In part, the reference gave effect to the Joint Taskforce's recommendation (Recommendation 11) that a committee:

... consider amendment of the Family Law Act and the Bankruptcy Act to provide that:

- where the marriage has broken down, all bankruptcy matters which involve the family law claim of a non-bankrupt spouse be transferred to a court exercising jurisdiction under the Family Law Act; and
- the trustee in bankruptcy will be made a party to the family law property proceedings, and be given the opportunity to make submissions to the Court on behalf of the creditors.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

The exposure draft contained five schedules. Essentially, Schedules 2 to 5 dealt with family law and, as mentioned earlier, now appear in largely unamended form as **Schedules 1 to 4** of the current Bill.

Schedule 1 of the exposure draft was of general application (that is, it was not restricted to family law matters) and drew much public criticism.⁵ It was designed to address the issue of high income earning professionals who use bankruptcy as a means of avoiding their liabilities while continuing to enjoy and use assets held in the name of a related third party (including spouses and service companies). However, the exposure draft did not refer specifically to such persons—consequently the provisions might have applied to other persons who legitimately structured their affairs to protect family assets (for example, by setting up a family trust) or those persons who legitimately transferred property to third parties at less than market value at any time within 10 years of their bankruptcy (for example, farmers who transferred all or part of their farms to family members instead of paying wages).

Essentially, Schedule 1 of the exposure draft sought to amend Division 4A of Part VI of the Bankruptcy Act, which deals with court orders in relation to property (assets) owned by an entity controlled by a bankrupt. It sought to permit trustees in bankruptcy to recover property ‘acquired by third parties using funds or property provided by the bankrupt where the bankrupt has used or derived a benefit from those assets’.⁶ It relied heavily on the new concepts of ‘tainted purpose’, ‘tainted property’ and ‘tainted money’, and also reversed the onus of proof by requiring the party that received the property to prove that the transfer was not made to defeat the interests of creditors.

The Committee recommended that the amendments contained in Schedule 1 of the exposure draft be abandoned, and that Insolvency and Trustee Service Australia and the Attorney-General’s Department ‘undertake fresh consultation with the Bankruptcy Reform Consultative Forum with a view to strengthening the current clawback provisions in the Act (sections 120 and 121 in particular)’.⁷

However, the Committee also recommended that the amendments contained in Schedules 2–5 of the exposure draft be implemented. It did not recommend any changes to those Schedules.

It should be noted in passing that the Committee comprised members of parliament from both the Liberal Party and the Australian Labor Party.

Main Provisions

It is probably unnecessary to discuss the individual provisions of the four schedules to the current Bill in great detail. This is because, apart from a few, insignificant details, the Bill is in exactly the same terms as the exposure draft.⁸ While some of the provisions of the four schedules were the subject of criticism by various individuals and organisations in submissions made to the Committee, the Committee did not recommend that the proposed

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

amendments be amended to take account of those criticisms. It should therefore suffice to explain the contents and effects of the four schedules in general terms, except where further explanation of particular provisions is warranted.

Schedule 1—Amendments relating to the interaction between family law and bankruptcy law

Summary of Schedule 1

Schedule 1 clarifies the relationship between family law and bankruptcy law in order to reduce hardship and uncertainty where family law proceedings and bankruptcy proceedings may be running concurrently but in different courts, particularly where those courts are exercising jurisdiction under different Acts that may give different emphasis to particular facts and may give different priority to the rights of certain persons. For example, a non-bankrupt spouse might have made contributions to property that are not reflected in the formal ownership of that property, and which, under the current law, may mean that in some situations, the bankrupt spouse's creditors are given preference over the non-bankrupt spouse (and the parties' children) in the division of the bankrupt's property, particularly where the contributions made by the non-bankrupt spouse are not readily quantifiable. The Bill recognises the competing claims of non-bankrupt spouses and bankruptcy trustees by expanding or restricting or clarifying the operation of various provisions of the Bankruptcy Act and the Family Law Act. Particularly, the Bill provides bankruptcy trustees with greater standing (or rights to appear and participate) in family law proceedings than is currently the case.

Amendments to the Bankruptcy Act

Items 1 and 2 amend the Bankruptcy Act to provide the Family Court of Australia with jurisdiction in bankruptcy where there are family law and bankruptcy proceedings running at the same time and involving the same parties. Particularly, the Family Court will have jurisdiction in bankruptcy where a party to the marriage is a bankrupt and the trustee of the bankrupt's estate is a party to property settlement or spousal maintenance proceedings or is an applicant under section 79A of the Family Law Act to set aside property settlement orders made under section 79 of the Family Law Act.

Item 3 inserts **proposed section 59A** into the Bankruptcy Act to provide that the general rule (as set out in section 58 of the Bankruptcy Act) that the property of a bankrupt vests in (or passes to) the Official Trustee is subject to any order made under Part VIII of the Family Law Act, which deals with property settlement and spousal maintenance.

Items 4–6 amend section 116 of the Bankruptcy Act to provide that property that a trustee is required to transfer to the bankrupt's spouse under an order made under Part VIII of the Family Law Act is not property that is available for division among the bankrupt's creditors.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

Item 7 amends section 140 of the Bankruptcy Act to provide that the trustee's powers to declare and distribute dividends among the creditors who have proved their debts are subject to any injunction made under section 114 of the Family Law Act.

Item 8 amends section 161 of the Bankruptcy Act to provide that the trustee may act in his or her prescribed official name (being 'The Trustee of the Property of (*name of bankrupt*), a Bankrupt') in proceedings under the Family Law Act. If a person ceases to be the trustee of the bankrupt's estate while proceedings are pending, and another trustee is appointed, the second trustee can be substituted for the first trustee as a party to the proceedings.

Amendments to the Family Law Act

Items 9 and 10 amend subsection 4(1) of the Family Law Act to insert definitions of the terms 'bankruptcy trustee' and 'debtor subject to a personal insolvency agreement'.

Item 11 amends the definition of 'matrimonial cause' in subsection 4(1) of the Act to provide that proceedings between a party to a marriage and the bankruptcy trustee of a bankrupt party to the marriage constitutes a 'matrimonial cause'. The amendment clarifies the jurisdiction of the Family Court (particularly in light of the amendments to the Bankruptcy Act contained in **items 1 and 2 of Schedule 1**) and the standing of the bankruptcy trustee. It also makes it clear that a 'matrimonial cause' is not confined to proceedings between parties to a marriage.

Item 12 also amends the definition of 'matrimonial cause' to include proceedings between a party to the marriage and the bankruptcy trustee of a bankrupt party to the marriage where the proceedings relate to 'any vested bankruptcy property in relation to the bankrupt party' and the proceedings arise out of the marital relationship or relate to divorce or nullity proceedings (whether concurrent, pending or completed). While the Explanatory Memorandum for the Bill suggests that the effect of this amendment is that a court will be able to determine proceedings between a party to the marriage and the bankruptcy trustee in relation to spousal maintenance, it should be noted that the amendment does not refer specifically to spousal maintenance.

Item 13 inserts the term 'personal insolvency agreement' and defines it by cross-reference to the definition of that term in the Bankruptcy Act. Likewise, **item 16** inserts the term 'trustee' and defines it by cross-reference to the Bankruptcy Act.

Item 14 inserts the term 'property settlement proceedings' and defines it to include both proceedings with respect to the property of the parties to a marriage or either of them, and proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to a marriage. Similarly, **item 15** amends the definition of 'property settlement or spousal maintenance proceedings' to include reference to vested bankruptcy property.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

Item 18 inserts the term ‘debtor subject to a personal insolvency agreement’ and defines it to include a person who is a debtor who executes a personal insolvency agreement under Part X of the Bankruptcy Act and the agreement has not ended.

Item 22 amends section 72 of the Family Law Act (which deals with the right of a spouse to claim spousal maintenance) to provide that the liability of a bankrupt spouse to maintain the other spouse may be satisfied in whole or in part by the transfer of vested bankruptcy property.

Item 23 amends section 74 of the Family Law Act (which deals with the powers of a court in spousal maintenance proceedings) to provide that the bankruptcy trustee must be joined as a party to proceedings if the application for spousal maintenance was made when the party was a bankrupt (or if the party became bankrupt after the application was made but before it was determined) but only if the trustee applies to be joined as a party and the court is satisfied that the interests of the bankrupt’s creditors may be affected by the making of an order for spousal maintenance. If the bankruptcy trustee is joined as a party, then except with the court’s leave, the bankrupt spouse cannot make a submission to the court in relation to any vested bankruptcy property. **Item 23** also makes similar amendments in relation to a party who is a debtor subject to a personal insolvency agreement and the trustee of that agreement.

It is not entirely clear from the language used in **item 23** whether it applies to situations where the applicant for spousal maintenance is bankrupt (or insolvent) or where the respondent to the application is bankrupt, or both. However, the fact that the trustee is joined as a party and, except in exceptional circumstances, is permitted to make submissions in place of the bankrupt spouse (or spouse who is subject to a personal insolvency agreement) recognises that the bankrupt’s property has vested in the trustee. It may also mean that the court is in a better position to know exactly what property or income (if any) is available to satisfy a claim for spousal maintenance, primarily because such details would have been established as part of the bankruptcy procedure and because of the trustee’s ongoing role in managing the bankrupt’s financial affairs (including knowledge of creditors and their claims). The trustee may have access to court documents or spreadsheets prepared as part of the bankruptcy and these could easily be used as exhibits (or *aides-mémoire*) in the spousal maintenance proceedings. There may, however, be particular facts that are peculiarly within the bankrupt’s own knowledge, and in such circumstances, the court could give leave to the bankrupt spouse to make submissions in addition to those made by the trustee.

Item 24 amends subsection 75(2) to provide that in property settlement and spousal maintenance proceedings, the court must have regard to the effect of any proposed order on the ability of a creditor of a party to recover the creditor’s debt ‘so far as that effect is relevant’ to the family law proceedings. In this regard, it should be noted that the phrase ‘so far as that effect is relevant’ did not appear in the exposure draft of the Bill. It seeks to emphasise the fact that not every debt will be relevant. For example, some debts may be

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

nominal and/or they may not yet be due and payable, and they would not therefore be relevant to the proceedings.

Item 27 amends section 79 of the Family Law Act (which deals with the alteration of property interests) to provide that the court may make orders altering the interests of the parties to the marriage in property owned by the parties or one of them, and that the court may, in proceedings relating to vested bankruptcy property, alter the interests of the bankruptcy trustee.

Items 28–36 and 42–46 make consequential amendments to section 79 to clarify whether the provisions of section 79 apply to the parties to the marriage or to parties generally (including the bankruptcy trustee). For example, in assessing contributions to the welfare of the family, the court is only interested in contributions made by the parties to the marriage and not contributions made by the trustee. Likewise, they insert reference to vested bankruptcy property where general references to property of the parties to the marriage already occur.

Item 37 is perhaps an unnecessary amendment. It seeks to add the word ‘and’ at the end of paragraphs 79(4)(a)–(e), but as a matter of drafting practice and statutory interpretation, the addition is not required.

Items 39–41 amend subsection 79(5) (which deals with the adjournment of property settlement proceedings) to include reference to vested bankruptcy property and the role/rights of the bankruptcy trustee.

Item 48 inserts **proposed subsection 79(11)** in the same way that **item 23** amends section 74 (see above). It clarifies the role of the bankruptcy trustee (or trustee of a personal insolvency agreement) and limits the ability of the bankrupt spouse to make submissions to the court.

Item 51 inserts **proposed subsection 79A(5)** to make it clear that if a party is a bankrupt at the time when, or after, a property settlement order is made, then the bankruptcy trustee (or trustee of a personal insolvency agreement) is taken to be a person whose interests are affected by the order. (Section 79A deals with the setting aside of orders altering property interests.)

Item 52 inserts **proposed sections 79G, 79H and 79J** into the Family Law Act.

Proposed section 79G permits the Family Law Rules to provide for a bankrupt spouse (or debtor subject to a personal insolvency agreement) to notify the bankruptcy (or insolvency) trustee of a spousal maintenance application (under section 74), an application for a declaration of interests in property (section 78), an application for alteration of property interests (or property settlement) (section 79) or an application to set aside orders altering property interests (section 79A).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

Proposed section 79H permits the Family Law Rules to provide for a person, who becomes bankrupt (or insolvent) after filing an application under sections 74, 78, 79 or 79A but before the application is finally determined, to notify the court that the person has become bankrupt or has become subject to a personal insolvency agreement. Similarly, the Rules of Court may provide for the bankruptcy trustee to notify the court where the trustee has applied to a court under section 139A of the Bankruptcy Act for an order under Division 4A of the Bankruptcy Act in relation to property of an entity controlled by a bankrupt. **Proposed subsections 79H(5) and 79H(6)** define ‘finally determined’ to mean when the application is withdrawn or dismissed or when an order or declaration is made as a result of the application.

Proposed section 79J permits the Rules of Court to provide for the trustee to notify the non-bankrupt spouse when the trustee makes an application under section 139A of the Bankruptcy Act (mentioned above).

Item 53 amends section 80 of the Family Law Act to include **proposed subsections 80(4)–(6)**. Section 80 sets out the general powers of the court. The amendments make clear that the court can make an order directed to a bankruptcy trustee or a trustee of a personal insolvency agreement under paragraph 80(1)(d) requiring him or her to execute any necessary deed or instrument, or produce documents of title, or do anything that is necessary to enable an order to be carried out effectively, or to provide security for the due performance of an order. It is not clear why the amendments are limited to the powers of the court under paragraph 80(1)(d), when other paragraphs of subsection 80(1) would seem to be equally applicable to trustees. For example, it is not clear why the court could not make an order directed to a trustee under paragraph 80(1)(f) requiring him or her to make a payment direct to a party to the marriage if the trustee is a party to the proceedings.

Items 54–56 make consequential changes to section 83, which deals with the modification of a spousal maintenance order.

Item 57 amends section 106B of the Family Law Act. That section deals with the court’s power to set aside or restrain transactions designed to defeat claims made under the Family Law Act. The amendment inserts reference to the bankruptcy trustee or trustee of a personal insolvency agreement.

Item 59 inserts **proposed subsections 114(4)–(7)**. Section 114 deals with injunctions. Proposed subsection 114(4) makes it clear that if a party to a marriage is a bankrupt, the court may, on the application of the non-bankrupt spouse, grant a temporary injunction restraining the bankruptcy trustee from declaring and distributing dividends among the bankrupt’s creditors. Likewise, **proposed subsection 114(6)** makes it clear that if a party to a marriage is a debtor subject to a personal insolvency agreement, and the other party for the marriage applies for an injunction, the court may grant an injunction restraining the trustee from disposing of property subject to the agreement. However, the wording used in the amendment is somewhat ambiguous and it is not entirely clear if the injunction

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

operates subject to the agreement, or if the order can only restrain the trustee from disposing of property that is the subject of the agreement. Presumably, the latter is the correct interpretation.

Part 2 of Schedule 1 details the application of the amendments contained in Schedule 1. **Sub-item 60(1)** states that, subject to **sub-items (2) and (3)**, the amendments apply to bankruptcies that occur after the commencement of item 60 and to personal insolvency agreements executed ‘before, at or after’ the commencement of item 60. As **item 60** appears in Schedule 1, it is due to commence on proclamation or six months after the proposed Act receives Royal Assent, whichever occurs first. At first blush, it seems unfair to distinguish between bankruptcies and personal insolvency agreements, particularly when they are treated in a similar way elsewhere in the Bill. Also, the distinction may be unfair depending on the circumstances in which the personal insolvency agreement was entered into (particularly if it was entered into before item 60 commences) and the terms of the agreement. That said, the distinction may be unnecessary, given that **sub-items 60(2) and (3)** set out the provisions that apply to proceedings instituted after the commencement of item 60 regardless of whether the bankruptcy occurred before, on or after that date.

Schedule 2—Amendments relating to income contributions

Summary of Schedule 2

Schedule 2 amends the Bankruptcy Act to provide for a ‘supervised account’ regime. It is designed to improve the ability of bankruptcy trustees to collect income contributions from the bankrupt (in situations where the bankrupt continues to earn income during the bankruptcy). Such contributions can then be used to meet creditors’ claims. However, the amendments do not address the situation where the bankrupt may receive income in non-monetary forms or where the bankrupt minimises income (for example, if the bankrupt is a contractor and instructs an employer to make payments directly to a sub-contractor).

The ‘supervised account’ regime

The supervised account regime is a new concept. Many of the provisions in Schedule 2 are straightforward but detailed, and it would not be useful to summarise them. **Item 4** inserts **proposed subdivision HA**, which comprises **proposed sections 139ZIA–139ZIT** and sets out the ‘supervised account’ regime. The regime is designed to improve the likelihood that the bankrupt will have sufficient money to pay contributions to creditors (or instalments of those contributions) and to ensure that all monetary income received by the bankrupt is deposited in a single account (called the ‘supervised account’) so that the trustee can supervise withdrawals from the account.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

Schedule 3—Amendment relating to maintenance agreements

As noted in the Explanatory Memorandum for the Bill, the purpose of Schedule 3 (and Schedule 4) is prevent the use of financial agreements made under family law as a way to avoid payments to creditors.⁹

Item 1 of Schedule 3 amends the definition of the term ‘maintenance agreement’ in subsection 5(1) of the Bankruptcy Act to refer to maintenance agreements that have been registered in, or approved by a court (whether made under the Family Law Act or not) but to exclude a *financial agreement* (as defined in the Family Law Act).¹⁰ Currently, the definition in subsection 5(1) includes such financial agreements.

Schedule 4—Amendments relating to financial agreements under the Family Law Act

Item 1 of Schedule 4 amends subsection 40(1) of the Bankruptcy Act to provide that a person (called the ‘debtor’) commits an *act of bankruptcy* if the debtor becomes insolvent as a result of one or more transfers of property under a financial agreement (within the meaning of the Family Law Act) to which the debtor is a party.

Item 2 amends subsection 40(7) of the Bankruptcy Act to define the term ‘transfer of property’ to include the payment of money. It also states that ‘a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person’. The Explanatory Memorandum does not provide any further explanation for this provision.

Concluding Comments

The Bill gives effect to several recommendations made by the Joint Taskforce and is the product of a drawn-out and continuing evaluation of the inter-relationship between family law and bankruptcy. However, some issues have not yet been resolved, as highlighted by the fact that Schedule 1 of the exposure draft of the Bill does not form part of the current Bill (even though that schedule was of general application and not confined to family law), and the fact that the amendments contained in **Schedule 2** do not extend to situations where the bankrupt receives non-monetary income or minimises his or her income. Likewise, it is unclear if there is a distinction between the treatment of bankruptcies and personal insolvency agreements in family law.

As mentioned above, the Bill was the subject of a significant number of submissions made to the inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs. Many of the persons and organisations who made those submissions have considerable experience in family law and bankruptcy; their submissions were made in light of practical experience of the problems and cost of the current system. Even though some of the provisions in the current Bill were the subject of criticism or concern, the Committee did not recommend any alteration in light of the

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

submissions. Those provisions in the exposure draft that received the most criticism do not form part of the current Bill. Thus, given its history, the Bill seems to be generally sound.

Many of the provisions are non-controversial and do not require explanation. They have been inserted to clarify existing provisions and/or to make clear the rights and roles of spouses and trustees.

However, as noted in the Main Provisions section of this Digest, some provisions seem to be unnecessary (such as **item 37 of Schedule 1**). Also, the language used in some provisions may be ambiguous and may need some refinement (such as **item 23 of Schedule 1**), and sometimes the reason for restricting the operation of certain provisions is unclear (see **items 53 and 59 of Schedule 1**).

Endnotes

- 1 The Joint Taskforce report is available electronically at:
[http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/1A2C7BFEEC7AB954CA256D1900822B9D/\\$file/2FINAL%20REPORT%2002.02%20FOIXXX.pdf](http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/1A2C7BFEEC7AB954CA256D1900822B9D/$file/2FINAL%20REPORT%2002.02%20FOIXXX.pdf)
(at 2 November 2004).
- 2 Joint Taskforce, p. 4.
- 3 The Family Law Amendment Bill 2004 was referred to the Senate Legal and Constitutional Legislation Committee on 16 June 2004. The Committee's report, tabled on 3 August 2004, is available electronically at:
http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law_04/report/report.pdf.
- 4 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004*, Canberra, July 2004, Terms of Reference, p. viii.
- 5 According to the Committee's report, '98% of the more than 180 submissions to the inquiry opposed the proposed amendments to [Division 4A of the Bankruptcy] Act'. See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004*, Canberra, July 2004, p. 4 (paragraph 1.14).
- 6 Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004, Exposure Draft, Explanatory Memorandum, p. 1, paragraph 4.
- 7 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Exposure Draft of the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004*, Canberra, July 2004, Recommendation 2 (paragraph 3.46), pp. 35–36.
- 8 On 11 August 2004, the Bankruptcy and Family Law Legislation Amendment Bill 2004 was introduced in the House of Representatives but lapsed when the 40th Parliament was prorogued. While there were a few differences between the exposure draft and the Bill as introduced on 11 August 2004, those differences do not occur in the version of the Bill introduced in the Senate on 17 November 2004 at the commencement of the 41st Parliament.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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

- 9 Bankruptcy and Family Law Legislation Amendment Bill 2004, Explanatory Memorandum, p. 3.
- 10 The term ‘financial agreement’ is defined in subsection 4(1) of the Family Law Act as follows:

financial agreement means an agreement that is a financial agreement under section 90B, 90C or 90D, but does not include an ante-nuptial or post-nuptial settlement to which section 85A applies.

Sections 90B, 90C and 90D provide for the making of financial agreements before, during and after the marriage. The agreement must be expressed to be made under the particular section. Section 85A provides that the court may make such order as it considers just and equitable in relation to the whole or part of property dealt with by ante-nuptial and post-nuptial settlements made in relation to the marriage. However, the court cannot make an order under section 85A in relation to matters that are included in a financial agreement.

© Copyright Commonwealth of Australia 2004

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This paper has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Information and Research Service, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2759.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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