



Bankruptcy Legislation Amendment Bill 2009

PaoYi Tan
Law and Bills Digest Section

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Bankruptcy Legislation Amendment Bill 2009

Date introduced: 28 October 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement: Schedules 1, 2, and Part 2 of Schedule 4 commence on a single day to be fixed by Proclamation (which need not be the same day for all three Schedules), or the day after 6 months from Royal Assent, whichever occurs first. Schedule 3 commences on the day after Royal Assent. Part 1 of Schedule 4 commences on the 28th day after Royal Assent. The rest of the Act commences on the day of Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Bankruptcy Act 1966* (the Act) to make a range of amendments, most notably:

- to increase the threshold for bankruptcy from a minimum debt of \$2000 to \$10 000
- to increase timeframes under the Act to give potential bankrupts more time to pay before creditors can take action to recover debts
- to widen the availability for debtors to enter voluntary debt agreements with creditors
- to remove an outdated and unnecessary system of 'Bankruptcy Districts' from the Act
- to create a new infringement notice regime with updated penalties for offences under the Act, and
- to update the methods of determining the remuneration of trustees under the Act.

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Background

Basis of policy commitment

The Attorney-General [announced](#) the proposed reforms to bankruptcy legislation in August 2009.¹ In his second reading speech, the Minister commented that the reforms contained in the Bill are the result of ongoing consultation with industry dating back to 2007 and 2008.² The proposed reforms contained in this Bill are a response to an identified need for modernisation of the legislation, to account for the changing climate of consumer spending and debt levels; and also to adjust statutory income and remuneration thresholds to recognise the changing value of money since 1996.

An [exposure draft](#) was released for public consultation in 2009.³ Seventeen submissions were received.

The Bill was introduced into the House of Representatives on 28 October 2009 and was passed unamended through the House on 1 December 2009, with the support of the Opposition.⁴ It was introduced into the Senate for debate on 2 December 2009.

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 2 February 2010. Details of the inquiry are at the [Committee website](#).⁵

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1. R McClelland MP (Attorney-General), *Reforms to personal bankruptcy laws*, media release, 25 August 2009, viewed 4 January 2010, http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_25August2009-ReformstoPersonalBankruptcyLaws
 2. See R McClelland MP (Attorney-General), *Reform to remuneration of bankruptcy trustees*, media release, 30 October 2008, viewed 13 January 2010, http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_FourthQuarter_30October2008-ReformofRemunerationArrangementsforBankruptcyTrustees; and R McClelland, *Speech to the Insolvency Practitioners Association of Australia National Conference, Sydney*, speech, 22 May 2008, viewed 13 January 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FA2JQ6%22>
 3. Attorney-General's Department, 'Bankruptcy Legislation Amendment Bill 2009 – Exposure Draft', Attorney-General's Department website, viewed 13 January 2010, http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_BankruptcyLegislationAmendmentBill2009-ExposureDraft
 4. S Ley MP, 'Second reading speech: Bankruptcy Legislation Amendment Bill 2009', House of Representatives, *debates*, 26 November 2009, p. 152.

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Key issues

Increase of the minimum debt threshold for bankruptcy

The Explanatory Memorandum indicates that the decision to increase the threshold for bankruptcy is based on a number of factors, such as:

- the relative cost of winding up a debtor's estate
- the changed value of money since the \$2000 threshold was first established in 1996, and
- the general increase in levels of personal debt.⁶

However, there is no indication in the Explanatory Memorandum that the decision to set the new threshold at \$10 000 is based on any assessment of acceptable debt levels. Rather, the Explanatory Memorandum provides statistics on recent bankruptcy activity:

During 2008–09, of 1953 sequestration orders made across Australia and matched by amounts in Bankruptcy Notices, 1551 were for an amount greater than \$10,000; 217 were for an amount between \$5,001 and \$10,000; and 174 were for an amount between \$2,000 and \$5,000.⁷

Submissions received by the Attorney-General's Department in response to the exposure draft of the Bill in 2009 showed a mixed response to the proposed increased bankruptcy threshold of \$10 000.

For example, Abacus – Australian Mutuals Limited (an association of building societies and credit unions) noted that an increase in the threshold is necessary, but that \$5000 would be a more appropriate threshold:

Multiple credit card and personal loan debts are common... A single debtor could feasibly have three credit card debts of \$8,000 each plus a personal loan of \$8,000 with four creditors – a \$32,000 debt and in some circumstances, reasonable grounds for bankruptcy should all other options be exhausted.

Increasing the threshold to \$5,000 rather than \$10,000 will minimise this problem. Alternatively, should the threshold increase to \$10,000, Abacus recommends the inclusion of an aggregation measure that allows any creditor to petition for

5. Available at http://www.apf.gov.au/Senate/committee/legcon_ctte/bankruptcy/index.htm.

6. Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 2009, pp. 23–24.

7. *Ibid.*, p. 24.

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bankruptcy on a debt less than \$10,000 should the aggregate debts across all creditors exceed the threshold.⁸

Other stakeholder submissions agreed with the increased threshold but expressed a view that finer details of the threshold's application should be reviewed (such as the application of the threshold to aggregate debts, or recognition of original debts as opposed to final judgment debts).⁹ The Law Council of Australia does not support the amendment, stating that no case has been made out to support the increase of the threshold.¹⁰

Introduction of a new infringement notice regime for offences under the Act

Under the proposed new infringement notice scheme in the Bill, infringement notices can be issued to people who contravene a range of provisions in the Act relating to a range of less serious, strict liability matters as an alternative to prosecution. The proposed scheme is not set out in the Bill; rather, the Bill provides for the making of regulations establishing the scheme.¹¹ Infringement notices will be able to be issued by a non-judicial officer to suspected offenders, and allow suspected offenders to pay a penalty fee to avoid prosecution. The penalties payable are set out in **item 82 of Schedule 2** of the Bill and should not exceed one-fifth of the maximum fine payable for the offence under the Act.¹² This new infringement notice regime is supported by widened powers of investigation for the Inspector-General contained in the Bill.¹³

In his second reading speech, the Attorney-General stated that these amendments will 'assist in highlighting the different treatment for bankrupts who engage in criminal activity compared with those who are simply unfortunate'.¹⁴

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8. Abacus – Australian Mutuals Limited, Submission to the Attorney-General's Department, *Bankruptcy Legislation Amendment Bill 2009 – Exposure Draft*, 23 September 2009, p. 3.
 9. See Consumer Action Law Centre, Submission to the Attorney-General's Department, *Bankruptcy Legislation Amendment Bill 2009 – Exposure Draft*, 14 September 2009, p. 4; also Legal Aid NSW, Submission to the Attorney-General's Department, *Bankruptcy Legislation Amendment Bill 2009 – Exposure Draft*, 14 September 2009, p. 2.
 10. Law Council of Australia, Submission to the Attorney-General's Department, *Bankruptcy Legislation Amendment Bill 2009 – Exposure Draft*, 30 September 2009, p. 2.
 11. Proposed section 277B in **item 82 of Schedule 2** to the Bill.
 12. **Item 83 of Schedule 2** to the Bill; proposed paragraph 315(2)(l).
 13. **Items 2–4 of Schedule 2** to the Bill.
 14. R McClelland MP (Attorney-General), 'Second reading speech: Bankruptcy Legislation Amendment Bill 2009', House of Representatives, *Debates*, 28 October 2009, p. 11169, viewed 13 January 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-10-28%2F0012%22>

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Voluntary debt agreements

Debt agreements are set out in Part IX of the Act. The Part sets out a statutory framework for debtors and creditors to enter a voluntary agreement which is processed, approved and monitored by the Official Receiver. Access to debt agreements is based on an income threshold test. Again, as a recognition of the changed value of money and the increased debt levels of individuals recently, the income threshold for entering voluntary debt agreements is being raised by 20 per cent under the Bill.¹⁵ This will make the debt agreement scheme accessible to more individuals.

Main provisions

Schedule 1 – Trustee remuneration

Schedule 1 to the Bill makes amendments to the *Bankruptcy Act 1966* dealing with the remuneration of trustees of estates of bankrupts.

Item 1 repeals subsections 64U(2) to (4) of the Act. **Items 2–6** make consequential amendments to section 64U. These paragraphs deal with the way the issue of remuneration is dealt with at a meeting between a bank’s creditors and a trustee.

Item 7 inserts a **new subsection 64ZBA(2A)** into the Act. The section details what a notice outlining a trustee’s proposal to creditors must include if it relates to how a trustee is to be remunerated. It requires the inclusion of information about the rate of remuneration or commission, including an estimate of the total amount of the trustee’s remuneration.

Item 9 replaces current subsection 161B(1) with a revised provision. The subsection currently sets the minimum entitlement of a trustee’s remuneration at \$1109. **Item 9** amends the subsection to increase the statutory minimum entitlement for trustees to \$5000, or an amount prescribed by the regulations.

Item 12 amends subsection 162(4) of the Act, which deals with remuneration which has not been fixed by a creditor’s resolution or the committee of inspection. The subsection currently defaults to the regulations for determining the amount of remuneration.¹⁶ The amendments create a new system for determining remuneration, allowing a trustee to make an application to the Inspector-General for determination of his or her remuneration.

15. **Item 11** of **Schedule 4** to the Bill.

16. The Explanatory Memorandum (p. 5) explains that the Regulations currently sets out a default remuneration scale based on the IPAA Guide to Hourly Rates, and that use of this default scale has been judicially criticised.

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Item 13 repeals current section 167 and inserts **new sections 166** and **167**.¹⁷ The current section 167 deals with the taxation of costs incurred by the trustee. Provisions dealing with taxation of trustees are contained in the [Bankruptcy \(Fees and Remuneration\) Determination 2008](#).¹⁸

New sections 166 and **167** outline how remuneration is to be dealt with by trustees. **New section 166** deals with payments for services provided by third parties, and states that the trustee must give notices about such payments as required by the regulations. **New section 167** deals with reviews of remuneration, and also largely refers to the regulations for instruction on how such reviews must be conducted. The regulations could be subject to parliamentary disallowance under Part 5 of the *Legislative Instruments Act 2003*.

Schedule 2 – Offence provisions

Schedule 2 to the Bill sets out a range of provisions dealing with offences under the *Bankruptcy Act 1996*. The Explanatory Memorandum explains that these are intended to ‘strengthen the penalties for some offences and ensure these are in line with the penalties for other similar offences’.¹⁹ **New paragraph 12(1)(bc)**, inserted into the list of functions of the Inspector-General under the Act, enables the Inspector-General to make such inquiries and investigations as he or she thinks fit with respect to whether a person has committed an offence under the Act (**item 2**). **New subsections 12(2A)–(2E)** set out the procedure providing notices to persons who are believed to have information relevant to such an inquiry or investigation (**item 4**). Failure to comply with these notices is an offence punishable by up to 12 month’s imprisonment (**new subsection 12(2C)**).

Various provisions in **Schedule 2** deal with penalties under the Act, and are consequential to the introduction of a new infringement notice regime (see **items 82 and 83**). These provisions insert some new penalties (generally, of 5 penalty units) and increase some existing penalties (to 25 penalty units). Offence provisions are amended relating to matters such as:

- sequestration orders
- filing statements of affairs
- compositions and arrangements
- powers of official receivers
- surrender of passports

17. There is currently no section 166 in the Act.

18. Available at <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/EFD3A9500413CFD3CA25746C001BDBC1?OpenDocument>, viewed 14 January 2010.

19. Explanatory Memorandum, p. 1.

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- notification of annulments
- trustee's requirement to provide certificate of registration
- trustee not to pay money into a private bank account
- annual estate returns, trustees books, records and accounts, and
- notification of death of trustee or administrator

Item 82 inserts a **new section 277B – Infringement notices for offences** into the Act. The new section enables regulations to be made for the issuing of infringement notices for contravention of the Act. The regulations (and thus the details of the infringement notice scheme) would be subject to parliamentary disallowance under Part 5 of the *Legislative Instruments Act 2003*. The table in new subsection 277B(2) sets out the penalties payable for alleged offences. Most of the offences listed attract only 1 penalty unit, with no offence attracting higher than 5 penalty units. **Item 83** inserts a provision into the Act allowing for penalties to be paid for alleged offences in lieu of prosecution.

Item 84 sets out the application for the new and changed offence provisions in Schedule 2.

Schedule 3 – Removal of bankruptcy districts

Schedule 3 sets out provisions for the removal of references to 'Bankruptcy Districts' in the Act, a system which has been deemed outdated.²⁰

Schedule 4 – Other amendments

Schedule 4 sets out other amendments to the Act, notably, to increase the threshold of the amount required for a creditor to file a petition, or for the issue of a bankruptcy notice against a debtor. The amendment increases the amount from \$2000 to \$10 000 (**items 1–4**).

Also of note are:

- **item 5 of Schedule 4**, which amends the definition of *stay period* from 7 days to 28 days. The *stay period* is the period of time after a debtor gives the Official Receiver a declaration of intent to file a debtor's petition (that is, to commence the bankruptcy process) before a creditor can take action against that debtor to recover debts, and
- **item 11 of Schedule 4**, which increases the threshold amounts for eligibility for debtors to enter into debt agreements.

20. Further details about Bankruptcy Districts are available in the Explanatory Memorandum, pp 21-23.

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