



**BUSINESS ADVISORS & INSOLVENCY SPECIALISTS**

## COMMONLY ASKED QUESTIONS ABOUT BANKRUPTCY

### 1. Why do people go bankrupt?'

Personal reasons:

- Consumer debt, eg credit card debt
- Personal guarantees
- Poor financial management
- Poor liquidity
- High borrowing cost, particularly in dealing with non-conventional lenders
- Matrimonial/ Family law disputes and outcomes
- Unemployment
- Increased credit facilities
- Insufficient savings
- Unsatisfied demands for payments
- Adverse legal actions

Business reasons:

- Poor budgeting and forecasting
- Changing consumer demands
- Poor costings
- Poor quoting procedures
- Poor credit control
- Poor financial and/or accounting knowledge
- Excessive business holding cost
- Increased unserviceable debt
- Poor margins
- Excessive salaries
- Poor marketing strategies
- Inadequate insurance
- Lack of succession planning
- Lack of business records
- Lack of asset control
- Unsatisfied demands for payments
- Adverse legal action
- Economic conditions affecting industry, including competition, falling retail prices or increased costs

## 2. How many people a year go bankrupt?

Australian statistics;

2004/ 2005: 20507 bankruptcies

2003/2004: 20497 bankruptcies

Victoria 2004/2005: 4492 bankruptcies

Victoria 2003/2004: 4237 bankruptcies

% change in Victoria - increase 6.2%

% change in Australia - increase 0.05%

Victoria has gone against the trends, particularly in Queensland, South Australia, Northern Australia, Western Australia and Tasmania, recording an annual decline in bankruptcies in the period 2004/2005, compared with 2003/2004.

## 3. How easy is it to go bankrupt?

An insolvent debtor can either go bankrupt voluntarily by presenting a debtor's petition to the Official Receiver or have a judgment creditor (for an amount in excess of \$2,000) applying to the Federal Court of Australia to have a person made bankrupt.

## 4. What are the advantages of going bankrupt?

The person made bankrupt is relieved of any obligation to pay any personal debts incurred up until the date of the bankruptcy other than penalties or fines imposed by Court in respect of an offence against a law, whether a law of the Commonwealth or not. Penalties or fines including any Pecuniary Penalty Orders made under the Corporations Act, any Order made under a proceeds of Crime Law and any traffic offences/ parking fines are not provable in bankruptcy. As such, such penalties and fines would continue to be required to be paid despite the individual's bankruptcy.

In ordinary circumstances a bankrupt is automatically released from bankruptcy or discharged 3 years from the date the bankrupt files a Statement of Affairs with the Official Receiver. However, an objection to discharge may be lodged by a Trustee thereby extending the period of bankruptcy to a period of either 5 or 8 years (refer Section 149D of the *Bankruptcy Act, 1966* attached).

## 5. What are the disadvantages of going bankrupt?

Any assets belonging to the bankrupt as at the date of bankruptcy are no longer the property of the bankrupt and vest in the appointed Trustee in Bankruptcy, other than the following:

- motor vehicle to the value of \$6,000
- tools of trade to the value of \$3,050
- normal kitchen equipment
- sufficient household furniture
- sufficient beds for the members of the households
- educational, sporting or recreational items (including books) that are wholly or mainly for the use of children or students in the household
- one television set
- one set of stereo equipment
- one radio
- either (i) one washing machine and one clothes dryer; or (ii) one combined washing machine or clothes dryer.
- one generator if relied upon to supply electrical power to the household
- one telephone appliance
- one video recorder
- sporting, cultural, military or academic awards made to the bankrupt in recognition of his or her performance and has sentimental value for the bankrupt and is identified by a special resolution passed by the creditors (75 % in value of debts and by a majority in number voting on the resolution) before the Trustee realises the property.

Unable to travel overseas without the written consent of the Trustee in Bankruptcy.

Must notify the Trustee if the bankrupt changes his/ her name, principal residential address or daytime telephone number.

Unable to obtain credit of \$4170 or more or carry on a business under another name without disclosing to any person the bankrupt deals with in business that the bankrupt is an undischarged bankrupt, particularly in relation to the following;

- Obtain goods or services by writing a cheque (or other financial instrument) for \$4,170 or more;
- Enter into a lease or hire purchase agreement for goods when more than \$4,170 is involved;
- Obtain goods or services by promising to pay \$4,170 or more.

Unable to manage a corporation.

## 6. What should people do to avoid going bankrupt?

People should allow their personal assets to be used for their personal life style and let their business assets be used for their business debts and the two should never be mixed. However, in practice generally to obtain financial loans it will be necessary to put up personal assets as security. As such, any borrowing for business purposes should not exceed the value of the business assets, thereby preserving the personal assets.

## 7. When someone goes bankrupt what happens to those that are owed money?

The bankrupt's assets are realised and distributed as follows;

- 1) 8% realisation charge payable to the Commonwealth of Australia on gross realisations
- 2) Payment of Trustee in Bankruptcy's expenses and other fees, costs and charges payable by the Trustee in administering the bankrupt's estate
- 3) Payment of Petitioning Creditor's taxed costs
- 4) Trustee's lawful remuneration

- 5) Payment to employees of the bankrupt under contract of employment, limited to \$3550
- 6) Workers compensation payable to employees
- 7) Payments to employees of the bankrupt in relation to long service leave, extended leave, annual leave, recreational leave or sick leave
- 8) Payments to Apprentices
- 9) Balance is distributed to creditors

**8. What does the bankrupt get to keep - house, car, tv, etc.**

Refer question 5.

**9. Is it possible to structure your affairs so that even if you go bankrupt others can't get their hands on your money?**

Refer question 6.

Under current legislation it is becoming more and more difficult to structure affairs to defeat creditors. For example, in the past use of the Family Law Act and the creation of Discretionary Trusts have been encouraged by advisors as a means to defeat creditors' claims. However, the Bankruptcy Act is continually amended to provide power to the Trustee in Bankruptcy to challenge these structures.

Where an insolvent debtor specifically structures his or her affairs to defeat creditors it may trigger the date of the first act of bankruptcy, being the date from which a Trustee in Bankruptcy may set aside transactions which have occurred within the last five years of this date, or where the transfer is specifically to defeat creditors and is considered fraudulent there is no time limitation within the Trustee in Bankruptcy is required to recover the asset. In all other circumstances, a Trustee has a 20 year time limitation in making any claim against any property of the bankrupt.

**10. Does putting your house or other assets in your spouse's name protect your assets?**

Not necessarily. Refer question 9.

Even though property may be held in your spouse's name, a Trustee in Bankruptcy may pursue any equitable interest.

**11. How much income can the bankrupt earn before being required to make compulsory contributions to the bankrupt estate?**

The basic income threshold amount is \$37,146.20 (net of tax) with no dependants. The gross income amount is \$48,639.71. It is adjusted upwards by the number of dependants a bankrupt has (refer attached schedule).

**12. How much can a dependant earn before no longer being considered a dependant of the bankrupt?**

\$2627 per annum.

**13. What are the alternatives to bankruptcy?**

Part IX – Debt Agreement

Part X – Debt Agreement

**14. Who can enter into a Debt Agreement?**

A Debt Agreement is available to a debtor having an asset and liability threshold of not greater than \$74,292.40 and after tax income not exceeding \$55,719.20 in the preceding year. Before entering into a Debt Agreement, the debtor can not have been a bankrupt or utilised the Part X provisions of the *Bankruptcy Act, 1966* within the last ten years.

**15. What is a Personal Insolvency Agreement?**

It is an Agreement with creditors to avoid bankruptcy where the debtor offers by written proposal to the unsecured creditors a return of less than 100 cents in the dollar.

**16. Can a debtor who is bankrupt or has entered into a Debt Agreement manage a corporation?**

Not whilst bankrupt or the subject of a Debt Agreement.

Paul A. Pattison  
**Trustee**

11 October 2005