

PART 1 – Exam Notes

TOPIC OVERVIEW

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Bankruptcy Administration

1. **State:** Bankruptcy Act s7 states the BA applies to debtors being persons who are not Australian citizens and persons who have privilege of Parliament and s7(1A) states that the BA applies to debtors whether or not they have attained the age of 18 years.
2. **Note:** National Personal Insolvency Index can be searched. It is a public record that can be searched upon payment of fee of \$15
 - a. Maintained by Inspector General
 - b. Stores data such as bankrupt's name, address, date of birth, status and crucial dates like discharge, annulment, orders
3. **Issue 1: Who can do Insolvency work?**
 - a. Insolvency work is usually done by accountants (in Australia)
 - i. However, they do not have to be accountants, or chartered accountants.
 - ii. They do have to have an accounting degree, and various other qualifications and experience and be 'fit and proper', their education is to have studied company law accounting, and a course in insolvency.
4. **Issue 2: Who can become a registered trustee?**
 - a. **State:** Per Bankruptcy Act Schedule 2 Division 20, A natural person must lodge an application with the Inspector-General in Bankruptcy.
 - i. The application must be accompanied by the prescribed application fee (currently \$2,200) and certain documents.
 - ii. Once a complete application has been received with the required documents and application fee, the Inspector-General will convene a committee to consider the application.
 - iii. Per Insolvency Practice Schedule (Bankruptcy) 20-20, within 45 business days after interviewing the applicant, the committee must decide whether the applicant should be registered as a trustee or not. The committee must decide that the applicant should be registered as a trustee if it is satisfied that the applicant:
 1. (a) has the qualifications, experience, knowledge and abilities prescribed; and
 2. (b) will take out:
 - a. (i) adequate and appropriate professional indemnity insurance; and
 - b. (ii) adequate and appropriate fidelity insurance; against the liabilities that the applicant may incur working as a registered trustee; and
 - c. (c) has not been convicted, within 10 years before making the application, of an offence involving fraud or dishonesty; and
 - d. (d) is not, and has not been within 10 years before making the application, an insolvent under administration; and
 - e. (h) is otherwise a fit and proper person; and
 - f. (i) is resident in Australia or in another prescribed country.
5. **Issue 3: Trustee Accountability**
 - a. In Schedule 2 1-1 it provides that "The object of this Schedule is to ensure that any person registered as a trustee:

- i. (a) has an appropriate level of expertise; and
- ii. (b) behaves ethically; and
- iii. (c) maintains sufficient insurance to cover his or her liabilities in practising as a registered trustee.
- iv. (2) The object of this Schedule is also:
 - 1. (a) to regulate the administration of regulated debtors' estates consistently, unless there is a clear reason to treat a matter that arises in relation to a particular kind of estate differently; and
 - 2. (b) to regulate the administration of regulated debtors' estates to give greater control to creditors.

6. Issue 4: How to remove/change a trustee

- a. **State:** Per Sch 2 90-35, The trustee of a bankrupt estate may convene a creditor meeting at any time and MUST convene them in particular circumstances, such as:
 - i. Where there is a committee of inspection and the committee of inspection directs the trustee to do so; or
 - ii. The creditors direct the trustee to do so by resolution; or
 - iii. At least 25% in value of the creditors direct the trustee to do so in writing; or
 - iv. Both of the following are satisfied:
 - 1. Less than 25%, but more than 10%, in value of the creditors direct the trustee to do so in writing; and
 - 2. security for the cost of holding the meeting is given to the trustee before the meeting is convened.
- b. **Note:** Creditors can, by resolution at a meeting, remove the trustee; but they may NOT do so unless at least five business days' notice of the meeting is given to all persons who are entitled to receive notice of it.
 - i. A former trustee, who has been removed as trustee of the bankrupt estate by resolution of the creditors, may apply to the Court to be reappointed as trustee of the bankrupt estate.
 - ii. If the Court sees fit to do so, it may then consider orders on the costs of the application and the remuneration of the former trustee to be covered.

7. Issue 5: What can Committees of Inspection do?

- a. **State:** Per Insolvency Practice Schedule 80-35 a committee of inspection has the following functions:
 - i. (a) to advise and assist the trustee of the regulated debtor's estate;
 - ii. (b) to give directions to the trustee of the regulated debtor's estate;
 - iii. (c) to monitor the conduct of the administration of the estate;
 - iv. (d) such other functions as are conferred on the committee by this Act;
 - v. (e) to do anything incidental or conducive to the performance of any of the above functions.
- b. **Note:** The trustee of a regulated debtor's estate must have regard to any directions given to the trustee by the committee of inspection, but the trustee is not required to comply with such directions. If the trustee of a regulated debtor's estate does not comply with a direction, the trustee must make a written record of that fact, along with the trustee's reasons for not complying with the direction.

Commencement and Bankruptcy Notices

1. **How to actually go 'bankrupt':** There are 2 ways to go bankrupt once 'an act of bankruptcy' has been committed:
 - a. Voluntary, administrative process where bankruptcy petition is presented (electronically) by debtor to a government bankruptcy official; OR
 - b. Involuntary, court process where upon the creditor's petition the court makes a 'sequestration' order.
 - c. BA s27 jurisdiction is given to Federal Court of Australia and Federal Circuit Court of Australia
2. **What happens once bankruptcy is declared?**
 - a. Non-exempt Property owned by bankrupt at commencement of bankruptcy vests in trustee
 - b. Divisible property is realised and distributed by dividends to creditors in proportion
 - c. Discharge, occurs 3 years from the filing of the statement of affairs and so bankrupt released from almost all debts – a fresh start after 3 years.
3. **Have any of the following 'acts of bankruptcy' been committed?**
 - a. **Section 40(1)(g) – the BIG MAIN ONE! (not complying with bankruptcy notice)**
 - i. If a creditor who has obtained against the debtor a final judgment or final order, being a judgment or order the execution of which has not been stayed, has served on the debtor in Australia, or by leave of the Court, elsewhere, a bankruptcy notice under this Act and the debtor does not comply:
 1. (i) where the notice was served in Australia – within the time specified in the notice (usually 21 days); or
 2. (ii) where the notice is served elsewhere – within the time fixed for the purpose by the order giving leave to effect the service; comply with the requirements of the notice or satisfy the court that he or she has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt or sum payable under the final order, as the case may be, being a counterclaim, set-off or cross demand that he or she could not have set up in the action or proceeding in which the judgment or order was obtained;
 - a. **Note:** If the debtor has a cross-claim that could have been raised when the final judgement was made, this will not count. It will not satisfy the court, and they will still have committed an act of bankruptcy and will need to pay the notice.
 - b. **Section 40(1)(a) – Paying off a creditor with partial payment to settle a debt. (rare)**
 - i. if in Australia or elsewhere (a debtor) he or she makes a conveyance or assignment of his or her property for the benefit of his or her creditors generally.
 - c. **Section 40(1)(b) – Moving property before declaring bankruptcy. (rare)**
 - i. if in Australia or elsewhere (a debtor)
 1. (i) he or she makes a conveyance, transfer, settlement or other disposition of his or her property or of any part of his or her property;

2. (ii) ...creates a charge...;
 3. (iii) he or she makes a payment; or
 4. (iv) he or she incurs an obligation; that would, if he or she became bankrupt, be void as against the trustee
- d. Section 40 (1)(c) – Leaving Australia/usual place of living with a lot of debt.**
- i. A debtor will commit act of Bankruptcy if, with the intent to defeat or delay his or her creditors (a debtor),:
 1. (i) he or she departs or remains out of Australia;
 2. (ii) he or she departs from his or her dwelling-house or usual place of business;
 3. (iii) he or she absents himself or herself; or
 4. (iv) he or she begins to keep house;
 - ii. **Note:** Because intent is so hard to prove, it usually makes sense to use s 40(1)(g) (the main one) to issue a BN instead.
- e. Section 40 (1)(d) – Execution issued against the person.**
- i. if:
 1. (i) execution has been issued against him or her (the debtor) under process of a court and any of his or her property has, in consequence, either been sold by the sheriff or held by the sheriff for 21 days; or
 2. (ii) execution has been issued against him or her under a process of a court and has returned unsatisfied;
- f. Section 40 (1)(daa) – Filing out a form declaring bankruptcy**
- i. if the debtor presents a debtor’s petition under this Act;
- g. Section 40(1)(da) - Filling out a form intending to declare bankruptcy.**
- i. If the debtor presents to the Official Receiver a declaration under section 54A
 1. this is the declaration of the debtor’s intention to present a debtor’s petition
- h. Section 40 (1)(e) –Saying you’re going to sign a debtors petition or s 188 authority declaring bankruptcy and not actually doing it as agreed.**
- i. if, at a meeting of any of his or her creditors:
 1. (i) he or she consents to present a debtor’s petition under this Act and does not, within 7 days from the date on which he or she so consented, present the (debtor’s) petition or
 2. (ii) he or she consents to sign an authority under section 188 and does not, within 7 days from the date on which he or she consented, sign such an authority and inform the chairman of the meeting, in writing, of the name of the person in whose favour the authority has been signed;
- i. Section 40(1)(f) – If, at a meeting, you admit to being insolvent.**
- i. If, at a meeting of any of his or her creditors, he or she admits that he or she is in insolvent circumstances and, having been requested by a resolution of a majority of the creditors present at the meeting either in person or by attorney to bring his or her affairs under the provisions of this Act, he or she does not, within 7 days from the date of the meeting, either:
 1. (i) present a debtor’s petition; or