

PERSONAL INSOLVENCY (COMPLETED)

1. Definition of Insolvency

- *Bankruptcy Act 1966* (Cth) s. 5(1)
 - **The Statutory Definition:** A person is solvent if they are ‘able to pay all their debts, as and when they become due and payable.’ Conversely, a person who is not solvent is **insolvent**.
 - **The Cash-Flow Test:** Australia uses a **cash-flow test**, not a balance-sheet test.
 - *Bank of Australasia v Hall* (1907) 4 CLR 1514
 - The Court established that insolvency is determined by a ‘cash flow’ or ‘commercial’ test rather than a ‘balance sheet’ test.
 - *Bankruptcy Act 1966* (Cth) s. 5(2)
 - **It is not enough that a debtor’s total assets exceed total liabilities; they must be able to meet debts as they fall due.**
 - The core question is **whether the debtor has enough liquid assets** (cash or assets easily converted to cash) **to meet their debts as they fall due in the ordinary course of business**
 - *Sandell v Porter* (1966) 115 CLR 666.
 - **Evidentiary Presumption:** While the creditor ultimately bears the onus of proving insolvency at a petition hearing, a failure to comply with a valid Bankruptcy Notice creates a **statutory presumption of insolvency** under s **40(1)(g)**. The onus then shifts to the debtor to prove they are solvent to dismiss the petition (s **52(2)(a)**).

1.1 Threshold Requirements & Jurisdiction

- Before diving into specific bankruptcy procedures, always verify that the court has jurisdiction and that the statutory thresholds are met.

1.1.1 Debtor's Nexus

- The Court lacks jurisdiction to make a sequestration order unless the debtor has a strict statutory connection to Australia
 - *Bankruptcy Act 1966* (Cth) s. 43(1)
 - **Jurisdiction to make Sequestration Orders:**
 - (a) debtor committed an act of bankruptcy; (Pick earliest one)
 - *Bankruptcy Act 1966* (Cth) s. 40(1)-
 - (1) A debtor commits an act of bankruptcy in each of the following cases:
 - (a) if in Australia or elsewhere he or she makes a conveyance or assignment of his or her property for the benefit of his or her creditors generally;
 - (b) if in Australia or elsewhere:
 - (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;
 - (ii) he or she creates a charge on his or her property or on any part of his or her property;
 - (iii) he or she makes a payment;
 - (iv) he or she incurs an obligation;
 - that would, if he or she became a bankrupt, be void as against the trustee;
 - (c) if, with intent to defeat or delay his or her creditors:
 - (i) he or she departs or remains out of Australia;

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- (ii) he or she departs from his or her dwelling - house or usual place of business;
- (iii) he or she otherwise absents himself or herself; or
- (iv) he or she begins to keep house;
- (d) if:
 - (i) execution has been issued against him or her 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
 - (ii) execution has been issued against him or her under process of a court and has been returned unsatisfied;
- (daa) if the debtor presents a debtor's petition under this Act;
- (da) if the debtor presents to the Official Receiver a declaration under section 54A;
- (e) if, at a meeting of any of his or her creditors:
 - (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 petition; or
 - (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 so consented, sign such an authority and inform the chair of the meeting, in writing, of the name

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- of the person in whose favour the authority has been signed;
 - (f) 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 the creditors 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:
 - (i) present a debtor's petition; or
 - (ii) sign an authority under section 188 and inform the chair of the meeting, in writing, of the name of the person in whose favour the authority has been signed;
 - (g) 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:
 - (i) where the notice was served in Australia--within the time fixed for compliance with the notice; or
 - (ii) where the notice was served elsewhere--within the time specified 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 counter - claim, 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;

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- **Crucial Timing:** The nexus must be established **at the time when the act of bankruptcy was committed**. Do not look at their connection when the debt was created or when the petition is heard.
 - *Bankruptcy Act 1966* (Cth) s 43(1)(b) – for creditor's petitions.
 - (1) Subject to this Act, Where:
 - (b) at the time when the act of bankruptcy was committed, the debtor:
 - (i) was personally present or ordinarily resident in Australia;
 - (ii) had a dwelling - house or place of business in Australia;
 - (iii) was carrying on business in Australia, either personally or by means of an agent or manager; or
 - (iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;
 - The Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

1.1.2 *The Debt Threshold*

- For a creditor to petition, the debt owed must be at least **\$10,000**.
 - *Bankruptcy Act 1966* (Cth) s. 44(1)(a).
 - (1) A creditor's petition shall not be presented against a debtor unless:
 - (a) there is owing by the debtor to the petitioning creditor a debt that amounts to the statutory minimum or 2 or more debts that amount in the aggregate to the statutory minimum, or, where 2 or more creditors join in the petition, there is owing by the debtor to the several petitioning creditors debts that amount in the aggregate to the statutory minimum;

1.1.3 Liquidated Sum

- The debt cannot be an estimate or a speculative claim; it must be legally certain.
 - *Bankruptcy Act 1966* (Cth) s. 44(1)(b)
 - (1) A creditor's petition shall not be presented against a debtor unless:
 - (b) that debt, or each of those debts, as the case may be:
 - (i) is a liquidated sum due at law or in equity or partly at law and partly in equity; and
 - (ii) is payable either immediately or at a certain future time; and
 - **Exam Watchpoint – Tort vs Contract:**
 - A claim for breach of contract where the damages are formulaic or contractually agreed upon is usually a liquidated sum.
 - An unadjudicated claim in tort (e.g., a car accident where a court has not yet ruled on damages) is an unliquidated sum and cannot form the basis of a creditor's petition.
 - **The Pivot:** An unliquidated claim becomes a liquidated sum the moment a court passes a final judgment specifying an exact dollar amount.
 - **Liquidated Sum:** The debt must be a liquidated sum payable either immediately or at a certain future time.
 - *Bankruptcy Act 1966* (Cth) s. 44(1)(b).
 - (b) that debt, or each of those debts, as the case may be:
 - (i) is a liquidated sum due at law or in equity or partly at law and partly in equity; and
 - (ii) is payable either immediately or at a certain future time; and
 - **Time Limit:** The debt has to be realised and petitioned within 6 months before the presentation of the petition
 - *Bankruptcy Act 1966* (Cth) s. 44(1)(c)
 - (c) The act of bankruptcy on which the petition is founded was committed within 6 months before the presentation of the petition.

1.2 Involuntary Pathway: Testing the Validity of a Bankruptcy Notice

- If the scenario involves a Creditor's Petition based on a failure to comply with a Bankruptcy Notice under s 40(1)(g), you must audit the notice across three strict axes:
 - **1.2.1 Formal Validity**; and
 - **1.2.2 Substantive Accuracy**; and
 - **1.2.3 Flawless Service**.

1.2.1 Formal Validity

- A Bankruptcy Notice is issued by the Australian Financial Security Authority (AFSA) but drafted by the creditor. It must be a near-flawless instrument.
 - **The Underlying Judgment:** The notice must be based on a **final judgment or order** that is no more than **6 years old**
 - *Bankruptcy Act 1966* (Cth) s. 41(3)(c)
 - **The Attachment Rule:** A complete copy of the sealed court judgment or final order relied upon **must** be physically or electronically attached to the notice when served. If the judgment is entirely missing or decoupled from the electronic issuance by AFSA, the notice is a possible nullity at law
 - **May be remedied at the discretion of the Court**
 - *Bankruptcy Act 1966* (Cth) s. 306(1)
 - **The Strict 21-Day Window:** The notice must explicitly give the debtor **21 days** from the date of service to comply, secure, or compound the debt. This timeline includes weekends and public holidays.
 - *Bankruptcy Act 1966* (Cth) s. 40(1)(g)

1.2.2 The Dichotomy of Defects

- When an error is spotted on the notice, you must apply the High Court's test in *Adams v Lambert* (2006) 228 CLR 409 to determine if the notice survives or dies.
 - Is the requirement that was breached made **essential** by the Act or Regulations? If yes, the notice is a **nullity** and cannot be saved.
 - If it is not an essential requirement, is the error of such a nature that it could reasonably mislead or confuse the debtor as to what is required to comply? If yes, it is fatal.
 - If no, it is a 'formal defect or irregularity' saved by the Act.
 - *Bankruptcy Act 1966* (Cth) s. 306(1)

1.2.2.1 Common Technical Errors Saved by s 306(1) (Valid Notices)

- **Wrong Statutory Citation for Interest:** Citing the pre-judgment interest section instead of the post-judgment interest section of a court act—provided the dollar calculation of the interest itself is 100% correct and explicitly labelled as post-judgment interest (The exact facts of *Adams v Lambert (2006)*).
- **Minor Clerical Address Errors:** Listing the creditor's address as 'care of their solicitors,' provided a payment can still be safely and reasonably executed at that office.

1.2.2.2 Fatal Deficiencies (Nullifies the Notice)

- **Misleading Foreign Currency Conversions:** If the judgment is in foreign currency and the notice states an incorrect Reserve Bank of Australia (RBA) exchange rate, or rounds down a conversion calculation that understates/overstates the debt in AUD, it fails an essential regulatory requirement and is set aside.
 - *Coleman v Gannaway* [2023] FCA 224.
- **Misstating the Legal Entities:** A severe variance between the name of the debtor or creditor on the notice versus the exact name inscribed on the court judgment.
- **The Overstatement Trap (s 41(5)):** If a creditor overstates the amount actually due (e.g., they forgot to deduct a \$1,000 partial payment made after judgment):
 - The notice is not automatically invalid.
 - **The Burden on the Debtor:** The debtor must give the creditor a formal notice disputing the validity of the notice based on that overstatement within the 21-day compliance window. If the debtor does this, the notice becomes an incurable nullity
 - *Bankruptcy Act 1966* (Cth) s. 41(5)
 - *Grant v Green & Associates Pty Ltd* [2021] FCA 934.

1.2.2.3 Technical Rules of Service

- Even a perfectly drafted notice is dead on arrival if served incorrectly.
- **Ordinary Service Methods:** Service must comply with the *Bankruptcy Regulations 2021* (Cth). It can be personal service, left at the last known address in an envelope addressed to the person, or sent via registered post.
- **Electronic Service:** Can be served via email or fax only if there is an established course of business dealings or explicit consent showing the debtor accepts service via that specific digital channel.
- **Substituted Service:** If a debtor is evading service, the creditor must secure a formal court order for substituted service (e.g., text message, social media, leaving it with a relative). Serving a notice by an unapproved alternative method (like dropping it in a mailbox without an order) renders the service wholly invalid, meaning the 21-day clock never starts.

1.2.3 Commitment of an 'Act of Bankruptcy:'

- Must have occurred within **6 months** before the presentation of the petition (s 44(1)(c)). The most common acts of bankruptcy under s 40(1) are:
 - **Failure to comply with a Bankruptcy Notice:** The notice must be based on a final judgment/order of at least \$10,000, served correctly, and give the debtor 21 days to pay, secure, or compound the debt.
 - *Bankruptcy Act 1966* (Cth) s. 40(1)(g)
 - **Execution returned unsatisfied:** A sheriff or bailiff attempts to seize property to satisfy a judgment debt but finds nothing.
 - *Bankruptcy Act 1966* (Cth) s. 40(1)(d)
 - **Notice of suspension of payment:** The debtor tells creditors they are about to suspend payment of their debts.
 - *Bankruptcy Act 1966* (Cth) s. 40(1)(h)
- **Presentation of the Petition:** Filed by the creditor within the 6-month window.
- **The Hearing & Sequestration Order:** The Court hears the petition under s.43 of the *Bankruptcy Act 1966* (Cth). The court must be satisfied of:
 - The matters stated in the petition (the debt, service, nexus).
 - The fact that the debt is still owing.
 - That the act of bankruptcy was committed.
 - **Defence:** The court may dismiss the petition if the debtor can prove they are solvent, or that there is 'other sufficient cause' why an order should not be made.
 - *Bankruptcy Act 1966* (Cth) s. 52(2)

1.3 Voluntary Pathway: Debtor's Petition

- **Process:** The debtor files a debtor's petition against themselves accompanied by a Statement of Affairs.
 - *Bankruptcy Act 1966* (Cth) s. 55
- **Acceptance:** The Official Receiver must accept the petition unless it fails to comply with the prescribed form, or if the debtor is clearly not insolvent and is abusing the system.
- **Commencement:** Bankruptcy commences automatically upon acceptance of the petition by the Official Receiver.

2. Date of Commencement & The 'Relation Back' Period

- Once bankruptcy is established, you must calculate the exact date it legally commenced to identify which assets are caught.
- **The Statutory Rule:** The bankruptcy is deemed to relate back to, and commence on, the exact moment of the earliest act of bankruptcy committed within the 6 months immediately preceding the date on which the creditor's petition was presented.
 - *Bankruptcy Act 1966* (Cth) s. 115(1)
 - 6 Months Quick Reference
 - **December** = June
 - **November** = May
 - **October** = April
 - **September** = March
 - **August** = February
 - **July** = January
 - **June** = December
 - **May** = November
 - **April** = October
 - **March** = September
 - **February** = August
 - **January** = July
- **The 6-Month Hard Wall:** The court cannot look back further than 6 months from the date the petition was filed. If an act of bankruptcy occurred 7 months before presentation, it is completely ignored for the purposes of s 115(1).
 - **Why it matters:** Any property owned by the debtor on or after this commencement date becomes property divisible among creditors.

CORPORATE INSOLVENCY (COMPLETED)

1. Establishing Insolvency

- The threshold issue is whether the company was actually insolvent at the relevant time.

1.1 Definition of Insolvency:

- *Corporations Act 2001* (Cth)
 - **The Core Test (s 95A):** Under s 95A(1), a person is solvent if, and only if, they are able to pay all their debts as and when they become due and payable.
 - *Sandell v Porter (1966)* 115 CLR 666, [670]
 - **‘[Insolvency]’ is an inability to pay each and all of his debts as they fall due and become payable.**
 - Under s 95A(2), a person who is not solvent is insolvent.
 - **Restructuring Plan Presumption:** Note that under s 455A(1), a company may propose a restructuring plan to its creditors. Crucially, under s 455A(2), the company is *taken to be insolvent* at the exact time it does so (with timing regulations prescribed under s 455A(3)).

1.2 The Judicial Approach: Commercial Reality

- Courts apply a ‘commercial reality’ cash-flow test.
 - **The Global Financial Assessment:** Cite *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213, [54].
 - **The Court must look at the company’s financial position as a whole.** Temporary illiquidity does not automatically equal insolvency.
 - **Resource Mobilisation:** Look to what resources are practically available to the company to meet liabilities. Consider whether non-cash assets are realisable by sale or by borrowing upon security, and *when* those realisations can realistically be achieved.
 - **The Standard of Promptness:** An ongoing pattern of unpaid debts outside standard commercial terms, rather than a momentary glitch, establishes the state of insolvency.
 - *Star Recruitment Services Pty Ltd v Smith* [2025] QSC 334
 - An ongoing pattern of unpaid debts or inability to meet obligations, rather than a momentary lack of cash, indicates insolvency.

1.3 Liquidators Evidentiary Statutory Presumptions:

- If a liquidator is bringing an action, check if they can bypass proving actual insolvency on a specific day by triggering the statutory presumptions under **s 588E**:
 - **Failure to Keep Records:**
 - **Corporations Act 2001 (Cth) s 286(1)-(2)**
 - If the company has breached its strict obligations to keep proper financial records under **s 286**, it is presumed to have been insolvent for the entire duration of that record-keeping failure.
 - **Corporations Act 2001 (Cth) s 588E(3):**
 - If it is proved (or presumed due to the missing records rule 588E4) that the company was insolvent at *any single point in time* during the **12 months** ending on the **relation-back day**, the law automatically presumes the company remained **continuously insolvent** from that specific point all the way up to the relation-back day.
 - **Continuing Insolvency:**
 - **Corporations Act 2001 (Cth) s 588E(4):**
 - If it is proven that a company has breached its strict statutory obligations to maintain financial records under **s 286(1)** (keeping records that correctly record and explain its transactions, financial position, and performance); **OR**
 - **s 286(2)** (retaining those records for 7 years)
 - **The company is legally presumed to have been insolvent for the entire duration of that failure.**

1.3.1 The Rebuttal Provision

- It is crucial to remember that these are **rebuttable presumptions of fact**, not final determinations of law.
 - **The Onus Shifts:**
 - **Corporations Act 2001 (Cth) s 588E(9):**
 - a presumption can be turned off if the contrary is proved. The shifting burden means the liquidator can stand back and say, *'The law says you were insolvent; prove me wrong.'*
 - **The Defendant's Challenge:** A director or preferred creditor must present expert accounting reconstruction evidence to prove that the company actually had hidden cash reserves, an untouched overdraft facility, or firm, legally binding promises of third-party financial support that kept them solvent during the gap.
 - *Sandell v Porter (1966) 115 CLR 666*

2. Director's Duty to Prevent Insolvent Trading

- Once insolvency is established, you must analyse whether the directors breached their duty under s 588G.

2.1 Elements of the Breach – s 588G(1)

- **Identity:** The individual must be a 'director' under the broad definition of s 9-9AD. This includes *de jure* (formally appointed), *de facto* (acting as a director without formal appointment), and *shadow* directors (someone whose instructions the board is accustomed to following)
 - *Australian Securities and Investments Commission v King (2020) 270 CLR 1.*
 - *A person can be an officer of a corporation even if they do not hold a formal title or office, provided they have the **capacity to affect significantly the corporation's financial standing.***
- **Insolvency:** The company was insolvent at that time or became insolvent by incurring that debt.
 - *Sandell v Porter (1966) 115 CLR 666, [670]*
 - **Insolvency inability to pay each and all debts as they fall due**
 - *Hawkins v Bank of China (1992) 26 NSWLR 562*
 - A debt is 'incurred' when the company acts to expose itself contractually to an unavoidable obligation to future payments. Includes conditional engagements where the final amount may be uncertain.
 - *Corporations Act 2001 (Cth) s. 254V*
 - **Dividend Exceptions:** Fixing the time/amount of a dividend does not incur a debt; the debt arises only when the payment date arrives (unless the company's constitution provides otherwise upon declaration).
- **Reasonable Grounds:** There must be objective 'reasonable grounds for suspecting' that the company was insolvent or would become so.
 - *ASIC v Plymin (2003) 175 FLR 125*
 - Such as structural losses, liquidity ratios below 1, overdue taxes, supplier credit cut-offs (COD terms), or bouncing cheques.
- **The Standard of Suspicion:** The director must have a '**positive feeling of actual apprehension or mistrust, amounting to a slight opinion, but without sufficient evidence.**' Mere idle speculation or a vague worry is insufficient; it requires an objective basis.
 - *Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266, [303].*
- **s 588E(4):** If proven insolvent at one point in a period, it is presumed to have remained insolvent for the rest of that period.
- **Time Commencement:** That time is at or after the commencement of this Act.