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Dear sir,

## **REVIEW OF THE OFFENCE PROVISIONS IN THE BANKRUPTCY ACT**

Thank you for the opportunity to comment on this important issue. This is a response to the Discussion Paper issued by the government on this issue.

Wesley Community Legal Service provides a specialist legal service to problem gamblers and those affected by them. Whilst most of this submission relates to our work with problem gamblers, some parts have more general application. See the notes at the end for details of our arrangements with the N.S.W. Responsible Gambling Fund.

### **Is change needed?**

The possibility of prosecution is an important sanction used to secure compliance with the Bankruptcy Act. Bankrupts are warned of the possibility of prosecution in the explanatory documentation, in interviews with financial counsellors and other advisors, and by their Trustee. The vast majority of bankrupts comply with their legal obligations without further need for sanctions to be threatened or applied.

Unlike the common criminal law, Bankruptcy offence provisions are largely technical and bankrupts would not be aware of them unless they are explained in advance. So there is only limited deterrent value in much of the deterrent regime. Rather, bankrupts are presented with an overall picture of a very powerful trustee, who has wide-ranging powers to ensure compliance. Some of these powers involve prosecution for offences, other powers involve quasi-sanctions, such as extending the period of bankruptcy. As there has been a shift in the administration of bankruptcies from ITSA to private practitioners, so the potential for abuse of powers has increased. For marketing reasons, private practitioners are anxious to impress upon their customers, creditors, that they are tough, diligent and active in enforcing the law against bankrupts. This sometimes results in an

unnecessary enthusiasm for the prosecution of bankrupts or at least, the making of threats of prosecution against bankrupts.

The Bankruptcy enforcement regime is currently working well. There is no need for a major overhaul. In particular, there has been a high level of compliance with the legal requirements by bankrupts, so that prosecutions have been few. There are of course a few notable bankrupts who have not complied with the law and it is important that the offence provisions are adequate to manage this group.

### **Consistency and clarity**

Because bankruptcy law is difficult to understand and apply, it is desirable that there be consistency in the penalty regime. The elements of each offence should be clearly defined in the legislation, particularly the element of intention and possible defences. This is important for consumer advocates who may be called upon to explain the prosecution and penalty process, or even hazard a guess as to the possible penalty that may apply to a particular offence.

Generally we consider that offence provisions should be grouped into 4 categories:

1. **Serious offences** that involve active steps of fraud or concealment of assets or income. These offences would include s. 263(1), 263A, 265(3), 265(4), 265(5), 265(7), 266, 267(2), 268(1), 268(3), 268(7), 269. A period of imprisonment of 3 years should be the standard.

In New South Wales, some common general offences involving gamblers under the Crimes Act 1900 are:

s.178BA(1) *“Whosoever by any deception dishonestly obtains for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years.”*

s.178BB(1) *“Whosoever, with intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, makes or publishes, or concurs in the making or publishing, any statement (whether or not in writing) which he or she knows to be false or misleading in a material particular or which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or false or misleading in a material particular shall be liable to imprisonment for 5 years.”*

s.178C *“Whosoever incurring any debt or liability obtains credit by any false pretence or by any wilfully false promise or partly by a false pretence and partly by a false promise or by any other fraud shall be liable to imprisonment for one year.”*

We consider that these offences and their penalties can be used as a guide for bankruptcy. However, there is no need to increase the maximum penalty to 5 years or even 10 years. A 3 year sentence is a more than adequate punishment for bankruptcy offences. The general criminal law involves a much wider range of crimes than bankruptcy and a greater need for deterrence.

In Queensland, s.408C Criminal Code 1899 provides for a maximum sentence of 5 years except where there are special circumstances, in which case a maximum sentence of 10 years applies. Those special circumstances include s.408C(2)(d) "*if the property, or the yield to the offender from the dishonesty, is of a value of \$5,000 or more.*" This might well be applicable to the Bankruptcy Act, where there is a great disparity in dollar amount between the fraudulent acts of "high-flyer" bankrupts, and the fraudulent acts of ordinary consumer bankrupts.

2. **Standard offences** including offences where the onus of proof is reversed, requiring a defendant to establish a reasonable defence to avoid conviction. These offences would include s.263(2), 265(1), 265A, 267B, 268(5), 270, 272(1)(a)&(b). A period of imprisonment of 1 year should be the standard.
3. **Lesser offences or strict liability offences** when only a short custodial sentence is required. These offences would include s.54, 80, 139U, 152, 263C, 264A, 264C, 264D, 264E, 267D, 267F, 267G, 272(1)(c), 272(3), 277A. A period of imprisonment of 6 months should be the standard.
4. **Minor offences** where a fine only is warranted. These offences include s. 168, 276, Regs.6.18, 7.01, 8.14. We suggest a fine of 50 penalty units apply to each offence.

### **The retrospective offence provisions**

The most problematic offence provisions are s.265(8) and s.271 Bankruptcy Act. These retrospectively apply to the conduct of the person prior to bankruptcy. In most cases they relate to conduct that is completely lawful, such as gambling, which mysteriously becomes a crime upon the making of a sequestration order. Significantly the persons at risk of prosecution for these offences are usually unaware of them until they become bankrupt, or are seeking assistance from a financial counsellor immediately prior to bankruptcy.

Whilst ITSA has issued a paper explaining the circumstances in which s.271 may be applied, these retrospective offences remain a problem. In our view, the s.265(8) and s.271 offences should be abolished.

One of our concerns with section 271 is that provides a deterrent to honest reporting of gambling as a cause of bankruptcy. Typically a gambler who becomes bankrupt will have difficulties with credit, relationship problems,

employment stresses etc. Any of these are possible causes of bankruptcy. Usually more than one cause will apply. Threaten the gambler with prison and the disclosed cause of bankruptcy is likely to be anything other than gambling. By repealing s.271, the disclosed causes of bankruptcy are likely to be more reflective of the real situation.

## **Different penalties should apply to Business and Consumer Bankruptcies**

A distinction should be made between the penalties applicable to business bankruptcies and consumer bankruptcies. The community expects business people to exhibit a higher level of responsibility in relation to financial and legal matters than individual consumers. Businesses are required to have a much greater level of documentary records for taxation purposes. They have access to commercial lending and business credit.

Business bankruptcies mostly involve a much greater level of debt than consumer bankruptcies. Different circumstances are involved. Business people are generally financially literate and may have recourse to sophisticated legal and accounting advice when their businesses fail.

To ensure the ongoing efficiency of the commercial sector, it is important that commercial lenders and business creditors have confidence in the power of the bankruptcy system to properly administer business failures.

By contrast, the vast majority of consumer bankrupts have limited financial literacy, and only a handful of “high-flyers” have access to legal or accounting advice. Many consumers are experiencing significant personal crises at the time of bankruptcy, such as loss of employment, relationship breakdown, poor health. These bankrupts may break the law because they don’t have the literacy skills to complete a Statement of Affairs.

The community expects businesses to keep proper books accounts and records. It is a legal requirement for taxation purposes. It is a basic business requirement. Failure to keep proper books accounts and records suggests tax evasion. By contrast, the community does not expect individuals to keep proper books accounts and records. It is not a legal requirement, nor is it a widespread practice.

We recommend that a general direction to the courts be inserted in the Bankruptcy Act to the effect that when imposing a sentence, the court is to take into account whether or not the bankruptcy is a consumer bankruptcy or a business bankruptcy.

## **Strict liability offences**

Removal of the requirement to prove guilty intention creates the potential for injustice. Strict liability offences should involve no more than short custodial sentences. It is better to have a reverse presumption, e.g. s.80 makes it a strict liability offence for a bankrupt to fail to immediately

notify a change of address. However, it makes no provision for situations where a bankrupt is very ill, or illiterate, or has some other genuine reason for failing to notify the trustee of a change of address.

## **Comments on specific offences**

Information is provided as to the current maximum penalty and the number of prosecutions for each offence in 2004/05 nationally.

### **54 Fail to file or update statement of affairs**

#### ***\$550(5 penalty units)***

*76 Prosecutions in 2004/05*

This is a strict liability offence, so it doesn't matter that what the bankrupt intended. Obviously a lot more than 76 people took over 14 days to file a statement of affairs, so presumably only those who indicate a refusal to file are prosecuted. Some were fined the maximum penalty of \$550. Whilst penalty seems inadequate in regard to importance of the SOA to administration of bankruptcy, what about the "innocent" bankrupts who don't file or update due to mental state, health, ignorance etc.

We think that there is a strong argument to introduce a custodial sentence, say 6 months, as a sanction.

### **80 Fail to notify change or name or address**

#### ***6 months***

*4 Prosecutions in 2004/05*

This is also a strict liability offence. No-one received a jail sentence last year, the maximum fine was \$500. This penalty seems incongruous with the penalty for s.54, as failing to file a statement of affairs is a more serious issue. In this case, the bankrupt may be sent to prison for 6 months even if there was no intention to hinder the bankruptcy administration. The bankrupt might be illiterate, or ill, or suffer mental or emotional difficulties, or simply have forgotten to notify the trustee.

### **139U Fail to give trustee full details of income**

#### ***6 months***

*3 Prosecutions in 2004/05*

The maximum fine imposed was \$300. The elements of this offence include subsection (2), which states that "*the particulars that a bankrupt is required to include in a statement given to the trustee ...are all the particulars that are known to the bankrupt and any particulars that the bankrupt can readily obtain.*". This means that bankrupts who are unable to provide full details of income for a good reason will have a defence. We consider that there is need for a short custodial sentence as a deterrent and the current 6 month sentence is appropriate.

### **152 Failure of discharged bankrupt to assist trustee**

#### ***6 months***

*Nil prosecutions*

This is a necessary provision to ensure compliance following discharge. If it were not available, there would be more objections to discharge. To convict a discharged bankrupt, it is necessary to establish that the trustee's

requirements were “reasonable”. It is not a strict liability requirement, so that the bankrupt’s intention must be proven. A bankrupt who did not understand the trustee’s requirements (e.g. due to illiteracy) would have a defence. We consider that there is need for a short custodial sentence as a deterrent and the current 6 month sentence is appropriate.

**263(1) Concealment of property**

**3 years**

*Nil prosecutions*

This is a serious offence, and the requirement of “intent to defraud” must be established.

The penalty of 3 years imprisonment seems appropriate for this offence.

**263(2) Dispose of seized property**

**1 year**

*Nil prosecutions*

To secure a conviction under this section, it is necessary to prove intention.

The penalty is appropriate.

**263A Make false affidavit**

**summary-\$200/6 months, indictment- 4 yrs**

*Nil prosecutions*

To secure a conviction, it is necessary to prove intention. The dual penalty regime is confusing, as is the maximum fine of \$200. The maximum penalty should be the same as that applying to s.263(1), as it is likely that in most cases the making of false statements in affidavits will relate to concealment of property or similar actions. However, the fine limitation is undesirable and reduces the sentencing options available to a court.

**264A Failure to attend before a Court**

**6 months**

*Nil prosecutions*

A person will not be convicted under this section if they can establish a “reasonable excuse”. The section provides an alternative to proceedings for contempt and provides a useful threat for trustees who want to ensure compliance with the Act. Because it can be combined with the power of arrest in s.264B, there is no need for a lengthy sentence. The 6 month maximum is all that is necessary.

**264C Refusal to be sworn or give evidence**

**\$1,000 or 6 months**

*Nil prosecutions*

The comments made regarding s.264A apply here.

**264D Prevarication or evasion in the course of examination**

**\$1,000 or 6 months**

*Nil prosecutions*

Again, this is an alternative to contempt of court prosecution and only a short custodial sentence is desirable as a deterrent.

**264E Offences in relation to examination**

**\$1,000 or 6 months**

*Nil prosecutions*

Again, this is an alternative to contempt of court prosecution and only a short custodial sentence is desirable as a deterrent.

**265(1) Failure of bankrupt or debtor to disclose property etc**

**1 year**

*14 Prosecutions in 2004/05*

Max penalty imposed was an 18 month suspended sentence (presumably for multiple offences). Some of these have a defence where the act or omission was done without intent to defraud any of his or her creditors. This is a common head of prosecution and central to the effective administration of the estate. We think there is a strong argument to increase it to 3 years.

**265(3) False representation to creditors**

**3 years**

*Nil prosecutions*

**265(4) Conceal or remove property etc**

**1 year**

*1 Prosecution in 2004/05*

This is a more serious offence that requires the prosecution to prove an intention to commit fraud. There is a strong argument to increase it to 3 years.

**265(5) Fraud by bankrupt**

**3 years**

*5 Prosecutions in 2004/05*

This is another serious offence that warrants a prison sentence. The prosecution must prove fraudulent intent. See comments made in relation to s.263(1).

**265(7) Concealment or fraud within 1 year prior to bankruptcy**

**1 year/3 years**

*1 Prosecution in 2004/05*

This is another serious offence that warrants a prison sentence. Prosecution must prove fraudulent intent.

**265(8) Debts contracted within 2 years prior to bankruptcy**

**1 year**

*Nil prosecutions*

The main problems with this offence are that it retrospectively makes conduct unlawful and it is not necessary to prove intention.

In a society in which consumers are bombarded with offers of easy credit, it can be difficult for them to be objective about their financial situation or the likelihood of being able to repay the money they borrow. There are

many lenders who make little or no effort to assess whether the people they lend money to can afford the repayments. Credit is knowingly provided by some lenders to people who cannot afford it. It is wrong for the bankruptcy laws to penalise the borrowers by making their conduct a crime, whilst taking no action against the lenders concerned.

Many people who enter bankruptcy are unemployed (54%), low income (69% under \$30,000 pa). For consumer bankruptcies, the main causes are unemployment (35%), excessive use of credit (26%), domestic discord (14%) and ill health (12%). 73% of bankrupts owed creditors less than \$50,000. This group of bankrupts are vulnerable to offers of easy money. While they usually have a subjective desire to repay what they have borrowed, they may fail the objective criteria of “*without having at the time of contracting it any reasonable or probable ground of expectation, after taking into consideration his or her other liabilities (if any), of being able to pay the debt.*”

In our view, there is no need for s.265(8). It is an unfair law and should be repealed. Alternatively it should have an element of intention incorporated into it, to make it consistent with s.266.

## **266 Disposing of or charging property**

### **3 years**

#### *Nil prosecutions*

This offence covers dispositions of property in the 12 months prior to bankruptcy as well as after bankruptcy. It differs from s.265(8) in that it is necessary to prove intent to defraud creditors in order to secure a conviction. The penalty is appropriate.

## **267(2) False declaration by debtor or bankrupt**

### **1 year**

#### *13 Prosecutions in 2004/05*

This is an important provision in the compliance regime. To secure conviction it is necessary to establish that the person knew that they were making a false declaration. In our view, it would be appropriate to increase the penalty for this offence to 3 years imprisonment.

## **267B Failure of person to provide information**

### **1 year**

#### *12 Prosecutions in 2004/05*

This is another important compliance provision. However, it has a reverse presumption of intention. A person who fails to provide information is presumed guilty unless they satisfy the court that they have a “reasonable excuse”. This is very different to s.267(2). A person may subjectively believe that they have a good reason for failing to provide the information, yet that explanation may not meet the objective “reasonable excuse” criteria. There is no element of dishonesty or falsehood in this provision. Although there may be some cases that warrant a custodial sentence, they would be rare. We believe that the 1 year penalty is appropriate for this provision.

**267D Failure of person to attend**

**6 months**

*2 Prosecutions in 2004/05*

Failure to comply with s.77C(1) may be enforced by the issue of a warrant for arrest. Obvious some penalty needs to apply as a sanction and in our view the 6 month penalty is appropriate.

**267F Refusal to be sworn or give evidence**

**6 months**

*Nil prosecutions*

In our view this penalty is appropriate.

**267G Prevarication or evasion in the course of giving evidence**

**6 months**

*Nil prosecutions*

In our view this penalty is appropriate.

268 Offences in relation to personal insolvency agreements

**268(1) False or misleading answer**

**1 year**

*Nil prosecutions*

This is an important provision in the compliance regime. To secure conviction it is necessary to establish that the person knew that they were making a false declaration. In our view, it would be appropriate to increase the penalty for this offence to 3 years imprisonment.

**268(3) False representation**

**3 years**

*Nil prosecutions*

This is an important provision in the compliance regime. To secure conviction it is necessary to establish that the person knew that they were making a false declaration. In our view, it would be appropriate to increase the penalty for this offence to 3 years imprisonment.

**268(5) Failure to fully disclose dispositions of property**

**1 year**

*Nil prosecutions*

No guilty intention needs to be proven to secure a conviction. The 1 year penalty is appropriate.

**268(7) Disposal of property with intent to defraud creditors**

**1 year**

*Nil prosecutions*

This is an important provision in the compliance regime. To secure conviction it is necessary to establish intention. In our view, it would be appropriate to increase the penalty for this offence to 3 years imprisonment.

**269 Obtain credit etc without informing person of bankruptcy**

**3 years**

*22 Prosecutions in 2004/05*

This is an important provision. However, it is not necessary to prove any intention to defraud creditors or to fail to repay a debt etc. In our view the penalty for this provision is appropriate.

**270 Failure to keep proper books of account**

*1 year/ 3 years*

*Nil prosecutions*

Although there is a retrospective element to this offence, it only applies to businesses. Bearing in mind the requirements of the Australian Taxation Office, it would be the view of most in the community that businesses that fail to keep proper books of account are failing in their duty to the community. In our view, the level of penalty is appropriate.

**271 Gambling or hazardous speculations**

*1 year*

*Nil prosecutions*

As stated above, this is an unnecessary and onerous provision that should be repealed.

**272(1) Leaving Australia with intent to defeat creditors**

*3 years*

*9 Prosecutions in 2004/05*

Subsections (a) and (b) require the prosecution to prove intent to defeat or delay creditors. Subsection (c) does not. In one recent case we represented a bankrupt who was arrested at Sydney Airport. She had a return ticket to Australia and was only visiting a relative overseas for a week.

Notwithstanding this she was prosecuted and fined \$1,000. There was no effect on the bankruptcy, nor did she have any intention to defeat or delay creditors. In our view, there should be an element of intention to defeat or delay creditors in s.272(1)(c) in order to justify the possible custodial sentence.

**272(3) Contravention of conditions of consent**

*6 months*

*1 Prosecution in 2004/05*

This seems an appropriate penalty, bearing in mind the wide range of possible circumstances.

**277A Keeping of books in respect of period of bankruptcy**

*6 months*

*Nil prosecutions*

This seems an appropriate penalty.

**Reg.6.18 Fail to give notice of change in particulars**

*\$1,100*

*Nil prosecutions*

This seems an appropriate penalty.

## **CONDUCT BY THIRD PARTIES**

### **265A Offences relating to s.77A or 130**

*1 year*

*1 Prosecution in 2004/05*

This is a coercive investigative power to force 3<sup>rd</sup> parties to provide documentation and information about the bankrupt. A defence of “reasonable excuse” applies.

The penalty seems appropriate.

## **CONDUCT BY CREDITORS**

### **263C False claims about a creditor’s entitlement to vote**

*6 months*

*Nil prosecutions*

This seems an appropriate penalty.

## **CONDUCT OF TRUSTEES**

### **168 Payments into private bank account**

*\$500*

*Nil prosecutions*

A trustee earns this in less than 2 hours. The penalty should be increased.

### **276 Acting as trustee under a void or terminated PIA**

*\$20/day*

*Nil prosecutions*

A trustee earns this in less than 5 minutes. The penalty should be increased.

### **Reg 7.01 Failure to inform OR within 7 days of bankrupt’s return to Aus. \$110**

*Nil prosecutions*

A trustee earns this in about 20 minutes. The penalty should be increased.

### **Reg.8.14 Failure to give notification of finalisation within 7 days**

*\$110*

*Nil prosecutions*

A trustee earns this in about 20 minutes. The penalty should be increased.

## **IMPORTANT NOTES:**

**1. Financial assistance for the Project was provided by the New South Wales Government from the Responsible Gambling Fund.**

**2. The views expressed in this publication are solely those of the author and do not represent the views of the Responsible Gambling Fund or the New South Wales Government.**

For more information, please contact the writer.

Yours faithfully,

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PRINCIPAL SOLICITOR

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