

1996

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BANKRUPTCY LEGISLATION AMENDMENT BILL

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Items to be Moved on Behalf of the Government

(Circulated by authority of the Hon Daryl Williams AM QC MP, Attorney-
General and Minister for Justice)



BANKRUPTCY LEGISLATION AMENDMENT BILL

Outline

The proposed amendments relate to four main areas.

1. The proposed amendments will make amendments to Part IX that introduces a new form of insolvency arrangement to be called debt agreements. In particular the proposed amendments will:

- (a) allow registered trustees to process debt agreement proposals,
- (b) streamline the procedure for accepting debt agreement proposals, and
- (c) correct a drafting error in the formula for calculating the income threshold for debt agreement proposals.

2. Item 356 that proposed section 204A is omitted as a consequence of the High Court decision in *Brady v Human Rights and Equal Opportunity Commission* with consequential amendments resulting from this change. These changes restore the current position regarding the effect of special resolutions of creditors where they have resolved that a person become a bankrupt. Following a creditors' resolution a debtor must either present a debtor's petition or, if the debtor does not present a petition, a creditor must apply to the Court for a sequestration order.

3. A minor amendment to sections 189A and 189B is proposed to require reports to be provided to creditors following the giving of an authority under section 188 of the Act.

4. Amendments to give legislative effect to the abolition of the Federal Court of Bankruptcy are also proposed.

Financial Impact Statement

The proposed amendments have no financial impact.

Amendments to be moved on behalf of the Government

Amendments proposed as a consequence of the abolition of the Federal Court in Bankruptcy

Amendments 1-6, 42, 43

1. The last serving judge appointed to the Federal Court of Bankruptcy retired on 28 June 1995. On 30 September 1995 the Court was abolished. Amendments 1 - 6 (inclusive) and 42, 43 are proposed as a consequence of the abolition of the Federal Court of Bankruptcy.

Amendments proposed as a consequence of amendment number 35

Amendments 7-14, 29, 30, 33, 34, 36 - 41, 44 - 47

2. Amendments 7-14 (inclusive) 29, 30, 33, 34, 36 - 41, 44 - 47 (inclusive) are proposed as a consequence of the amendment to item 356 proposed in amendment 35 to omit proposed section 204A.

Proposed amendments to Part IX - Debt Agreements

3. Item 325 proposes the establishment of a new form of insolvency administration to be known as debt agreements.

Amendment 15 - Deadline for acceptance of proposals

4. Amendments to item 325 page 72 (lines 22 - 24) and page 73 (table) are proposed. The term "deadline" is used in various provisions to set time limits for the certain actions. The proposed amendment replaces the table with new provisions that make it easier to work out the deadline by reference to working days. Instead of a different deadline according to the month of acceptance of a proposal, the deadline will be at the end of the 25th working day after the proposal has been given to, or accepted by, the Official Trustee.

5. A working day is any day that is not a Saturday, Sunday or Public Holiday in the relevant bankruptcy district.

Amendment 16 - Trustee to inform creditor to whom notice is to be given

6. Amendment 16 is required as a consequence of amendments to item 325 to allow registered trustees to process debt agreement proposals. The proposed amendment provides that the trustee must inform the creditor to whom the statement required under proposed section 185A is to be given and that the statement must be given before the deadline. The statement will be given to the trustee who is processing the debt agreement proposal.

Amendment 17 - Debtor to authorise a person to deal with property

7. The proposed amendment is required as a consequence of amendments to item 325 to allow registered trustees to process debt agreement proposals. Proposed paragraph 185C(2)(c) provides that a debt agreement proposal must authorise the Official Trustee to deal with property identified in the debt agreement proposal in the way specified in the proposal. Amendment 17 proposes that the debtor not be restricted to authorising the Official Trustee. It is proposed that the debtor may authorise a specified person other than the Official Trustee to deal with property identified in the debt agreement proposal that is to be dealt with under the agreement.

Amendment 18 - Remuneration of a person dealing with identified property

8. The proposed debt agreement scheme is to be a low cost alternative to bankruptcy and Part X arrangements. It proposed that the Official Trustee will not charge fees for the acceptance or processing of debt agreement proposals. However, if a person is required to deal with property identified under the agreement, for example to sell an asset, it is proposed that fees may be charged for that work.

9. Amendment 18 provides for the remuneration of a person, other than the Official Trustee, authorised to deal with property in accordance with paragraph 185C(2)(c). No fees are payable in respect of accepting a debt agreement proposal by the Official Trustee or for processing a debt agreement proposal by either the Official Trustee or a registered trustee (see proposed amendment 28). It is expected that the remuneration under this provision will be limited to the recovery of costs associated with dealing with the property.

Amendment 19 - Circumstances in which the debtor cannot give the Official Trustee a proposal

10. Proposed subsection 185C(4) sets out restrictions on debtors making proposals for debt agreements. Proposed subsection 185E(3) sets out the circumstances where the Official Trustee must not accept a debt agreement proposal. In order to simplify the procedure for accepting debt agreement proposals a number of amendments to these provisions are proposed.

11. In addition to the restrictions in proposed paragraphs 185C(4)(a) and (b), under the amendments proposed, a debtor will also not be able to give the Official Trustee a debt agreement proposal if at the proposal time the value of the debtor's property that would be divisible among creditors if the debtor were bankrupt is more than the threshold amount (until 20 September 1996, \$52,026.52), or the debtor's after tax income in the year beginning at the proposal time is likely to exceed half the threshold amount (until 20 September 1996 \$26,013.26).

12. It was originally proposed that a debtor who had income in excess of the threshold amount in any one of the three years immediately before the proposal

time could not give a proposal to the Official Trustee. This condition is removed by the proposed amendment.

13. The effect of the proposed amendments is that a debtor will not be able to give a debt agreement proposal to the Official Trustee in the circumstances set out in section 185C. Originally it was proposed that the agreement could be given to the Official Trustee but the proposal would not be accepted for processing by the Official Trustee if at the proposal time the value of the debtor's property that would be divisible among creditors if the debtor were bankrupt is more than the threshold amount, or the debtor's after tax income in the year beginning at the proposal time is likely to exceed half the threshold amount. It is considered that the single stage procedure now proposed is easier to understand and implement.

14. The proposed amendment in paragraph 185C(4)(d) also simplifies the formula for calculating threshold income and corrects an error in the formula which did not restrict debt agreements to relatively low income debtors. The threshold amount is defined in proposed subsection 185C(5).

Amendment 20 - Definition

15. Amendment 19 defines the term **after tax income** to mean the likely taxable income of the debtor for the year less the income tax and medicare levy imposed on that taxable income.

Amendment 21

16. Amendment 21 corrects an omission in proposed section 185D by inserting the words "for processing".

Acceptance of proposal for processing

Amendment 22

17. Amendment 22 is required as a consequence of amendments proposed in amendment 19. If the Official Trustee thinks that subsections 185C(2) and (4) have been complied with and the statement of affairs is in order then the Official Trustee may accept the debt agreement proposal for processing.

Amendment 23

18. Amendment 23 is required as a consequence of amendments proposed in amendment 17. The Official Trustee must not accept a debt agreement for processing if the Official Trustee thinks that the creditor's interests would be better served by not accepting the proposal for processing. The conditions originally proposed to be included in section 185E have now been included in proposed section 185C.

Amendments 24 - 27

19. Amendments 24 - 27 inclusive are required as a consequence of amendment 28 that will allow registered trustees to process debt agreement proposals.

Amendment 28 - Official Trustee may delegate powers

20. Amendment 26 proposes the addition of provisions that will allow the Official Trustee to delegate powers in relation to the processing of debt agreement proposals.

21. Proposed section 185Y provides that the Official Trustee may delegate to a registered trustee all or any of the Official Trustee's powers and functions in relation to a particular proposal concerning a debt agreement that has been accepted for processing.

22. The delegation can be made only with the consent of the debtor and the registered trustee. It is expected that unless there is a compelling reason not to do so, the Official Trustee will delegate his powers where consent is given. This will enable registered trustees to process debt agreement proposals in some circumstances.

23. Any delegation will be subject to conditions which will, amongst other things, include a requirement to provide information required by the Official Trustee to enable the National Personal Insolvency Index to be maintained.

24. Proposed section 185Z deals with remuneration of persons dealing with property under a debt agreement. The amount of any remuneration that is to be paid must be specified in the debt agreement.

25. A registered trustee cannot either directly or indirectly be paid remuneration in respect of processing debt agreement proposals. The Official Trustee will not be remunerated in respect of either accepting debt agreement proposals or processing them. The Official Trustee may charge fees in respect of dealing with property or acting as trustee of agreements if this is provided for in agreements. Section 163 of the Bankruptcy Act provides for remuneration of the Official Trustee.

Amendments 31 and 32 - Statement to be provided to creditors

26. Proposed sections 189A and 189B require reports and statements prepared in accordance with these sections to be provided to the Official Trustee. Amendments 31 and 32 require a copy of the report or statement to also be provided to creditors.

Amendment 35- Effect of a creditor's resolution for bankruptcy

27. Item 356 proposes the insertion of new section 204A dealing with the effect of a creditor's resolution for bankruptcy. Under the new provision a debtor would have become bankrupt 15 days after being informed of the special resolution being passed. Following the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*, it is considered that this proposed provision may be invalid as it would permit a debtor to be made bankrupt, other than on his or her own petition, by a process other than a judicial process.

28. Accordingly, amendment 35 omits item 356.