

Insolvency Amendment Bill

Government Bill

As reported from the Commerce Committee

Commentary

Recommendation

The Commerce Committee has examined the Insolvency Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The Insolvency Amendment Bill amends the Insolvency Act 2006 in response to issues that have arisen since it was enacted. The bill addresses four areas: fraudulent debts, the discharge period under the no asset procedure, insolvent gifts, and personal insolvency public registers.

This commentary covers the main amendments we recommend to the bill, which are all in the nature of clarification. It does not cover technical amendments.

Criteria for entry to no asset procedure

We recommend inserting new clause 6A to clarify that insolvent gifts would be realisable assets for the purposes of entry into the no asset procedure, so the existence of such a gift would disqualify a person

from entry to the procedure. This change would ensure that a debtor could not conceal assets from creditors by gifting them to another person, by aligning the definition of “realisable asset” with the current practice of the official assignee, to put the matter beyond doubt.

Discharge from no asset procedure

The committee noted that under existing law, if a debtor is found to have committed an offence under bankruptcy, such as obtaining credit by a false representation, the official assignee will terminate the no asset procedure. The bill is intended to ensure that fraudulent debts the debtor manages to conceal are not written off on discharge from the no asset procedure. We recommend amending clause 8, by inserting new section 377A(3), to clarify that fraudulent debts become enforceable again once a debtor is discharged from the no asset procedure, and that the debtor is liable to pay interest and penalties accrued during the procedure. As the bill was originally drafted, it was open to interpretation that fraudulent debts could remain unenforceable once a debtor was discharged.

As a related clarification, we recommend the insertion of new clause 6B amending section 375 to confirm that accrued penalties and interest would be payable following early termination of participation in the no asset procedure.

Retrospective application of the fraudulent debt provisions

It is a general principle that statutes and regulations operate prospectively, that is, they do not affect existing situations. This principle is set out in the Interpretation Act 1999 which provides that enactments do not have retrospective effect.

The bill proposes to apply the proposed new law in relation to the treatment of fraudulent debts under a no asset procedure retrospectively to all no asset procedures that remain undischarged on the date the bill was introduced into the House, and to all new no asset procedures that are entered into after this date.

We are of the view that the very limited retrospective application is justified in this case as it maintains the integrity of the no asset procedure process by preventing a debtor from being rewarded for a fraudulent act or behaviour, and therefore does not affect any person’s legitimate interest.

Discharge of joint debtors

We recommend inserting new clause 8A to clarify that a discharge from the no asset procedure does not release any person who, at the date of discharge, was a business partner, co-trustee, joint debtor, or guarantor of the discharged debtor. This would make it clear that it is only the debt of the no asset procedure debtor that is forgiven under the procedure, and that such other people would need to apply separately for their own debts to be discharged. This would replicate for no asset procedure debtors the exclusion provided in the Insolvency Act in relation to bankrupts.

Practical requirements for public register provisions

We propose some additions to clarify the practical requirements regarding the details required on the public register in relation to a debtor after multiple insolvency events.

We recommend amending clause 11 by inserting new section 449A(3) to confirm that the public register would include a record for each insolvency event of a person who had had two or more bankruptcies or who had been both bankrupt and discharged from the no asset procedure. At present, the bill is silent about the practicalities of reintroducing details of a debtor's earlier insolvency events onto the register should they again be deemed insolvent; and the original information would have been removed from the register seven years after bankruptcy.

We recommend amending clause 11 by inserting new section 449A(4) so that bankruptcies under the Insolvency Act 1908 would not be counted for the purposes of identifying multiple insolvency events. We are advised that records prior to the 1967 Insolvency Act can be unreliable, and we therefore consider that they should not be used for the purposes of determining multiple insolvencies.

We recommend that clause 17(3) be amended consequentially by removing the requirement for the public register to include information about bankruptcies under the Bankruptcy Act 1908.

Amendment to the Privacy Act 1993

We recommend inserting new clause 18 to amend Part 1 of Schedule 2 of the Privacy Act 1993 to the effect that the summary instalment

order public register is also subject to the privacy principles of that Act. This would correct what appears to be an inadvertent omission. The Insolvency Act provides for a public register to be kept and maintained for persons entering into bankruptcy, no asset procedure and summary instalment order. Schedule 2 of the Privacy Act lists all the public registers that are subject to its privacy principles. While the list includes the no asset procedure and bankruptcy public register, the summary instalment order public register is omitted. We can see no sound policy reasons for the summary instalment order public register not to be subject to the privacy principles under that Act.

Other issues considered by the committee

Length of time on public insolvency registers

The bill proposes to lengthen the time that information about a debtor remains on the public insolvency registers, from one year in the case of a no asset procedure to five years, and from seven years to indefinitely in the case of multiple insolvencies (two or more bankruptcies, or a no asset procedure and a bankruptcy). We considered carefully the appropriateness of these periods.

We heard that lengthening the time a no asset procedure debtor remains on the public register would dilute the important distinction between bankruptcy provisions and the no asset procedure. The procedure was introduced to provide a one-off opportunity for financially distressed individuals to avoid the stigma of bankruptcy and to rebuild their lives. It is the view of the Privacy Commissioner that a total of three years on the public register for a no asset procedure debtor would be more consistent with the purposes of the procedure, and more proportionate to the period for which individuals are publicly listed following bankruptcy.

The majority of us, however, accept the advice that it is a matter of balancing the interests of debtors—who seek, understandably, to move on with their lives—and creditors, who require reliable information about a debtor’s history on which to make informed business decisions; and we consider that the approach proposed in the bill strikes a reasonable balance between these interests. The diversity of reasons for financial distress means that the length of time that information remains on the public registers will inevitably be more appropriate for some debtors than others, no matter what period is

chosen. We have examined the approach taken in overseas jurisdictions and note that there is no international consensus.

The Labour Party members believe that there should be further consultation on this part of the bill before proceeding to make what are significant changes to the public register provisions. We note that these provisions were not an essential component of this bill which was essentially designed to deal with fraudulent debts and as a result had a shorter report back requirement than would normally be expected. It is the Labour Party members' view that there has not been sufficient consultation with key stakeholders which is reinforced by the concerns raised by the Office of the Privacy Commissioner. We would thus prefer that the public register provisions be separated from the rest of the bill.

Appendix

Committee process

The Insolvency Amendment Bill was referred to the committee on 24 March 2009. The closing date for submissions was 16 April 2009. We received and considered 11 submissions from interested groups and individuals. We heard four submissions.

We received advice from the Ministry of Economic Development.

Committee membership

Hon Lianne Dalziel (Chairperson)

John Boscawen

Charles Chauvel

Clare Curran

Te Ururoa Flavell

Jo Goodhew

Melissa Lee

Peseta Sam Lotu-Iiga

Katrina Shanks

Insolvency Amendment Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Simon Power

Insolvency Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Insolvency Amendment Act **2009**.

2 Commencement

(1) **Section 8** is deemed to have come into force on **10 March 2009**. 5

(2) The rest of this Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act amended

This Act amends the Insolvency Act 2006.

**Part 1
Amendments to Insolvency Act 2006**

Insolvent gifts

5

4 New sections 204 and 205 substituted

Sections 204 and 205 are repealed and the following sections substituted:

“204 Insolvent gift within 2 years may be cancelled

A gift by a bankrupt to another person may be cancelled on the Assignee’s initiative if the bankrupt made the gift within 2 years immediately before adjudication. 10

“205 Insolvent gift within 2 to 5 years may be cancelled if bankrupt unable to pay debts

“(1) A gift by a bankrupt to another person may be cancelled on the Assignee’s initiative if— 15

“(a) the bankrupt made the gift within the period beginning 2 years immediately before adjudication and ending 5 years immediately before adjudication; and

“(b) the bankrupt was unable to pay his or her debts. 20

“(2) A bankrupt is presumed to have been unable to pay his or her debts for the purpose of **subsection (1)(b)** unless the party claiming under the gift proves that the bankrupt was immediately after the making of the gift, or at any time after that up to his or her adjudication, able to pay his or her debts without the aid of the property that the gift is composed of.” 25

5 Limits on recovery

Section 208 is amended by repealing paragraph (b) and substituting the following paragraph:

“(b) a reasonable person in A’s position would not have suspected, and A did not have reasonable grounds for suspecting, that,— 30

“(i) in the case of an insolvent gift, the bankrupt was, or would become, unable to pay his or her debts

without the aid of the property that the gift is composed of; or

- “(ii) in the case of any other irregular transaction referred to in section 206(1), the bankrupt was, or would become, unable to pay his or her due debts; and”.

6 When Assignee may recover difference

Section 212(b) is amended by omitting “due” in each place where it appears.

*Extension of time for automatic discharge from
No asset procedure* 10

6A Criteria for entry to no asset procedure

Section 363(2) is amended by adding “, but does include any assets (for example, gifted assets) that might be recoverable by the Assignee if the debtor were adjudicated bankrupt on the date of application for entry to the no asset procedure and if the irregular transaction provisions in subpart 7 of Part 3 applied”. 15

6B Effect of termination

Section 375 is amended by adding “, and the debtor is liable to pay any penalties and interest that may have accrued”. 20

7 Discharge

- (1) Section 377 is amended by omitting the heading and substituting the following heading: “**Time of discharge**”.

- (2) Section 377 is amended by adding the following subsections as subsections (2) to (7): 25

- “(2) However, a debtor is not automatically discharged if the Assignee—

- “(a) is satisfied that the 12-month period should be extended for the purpose of properly considering whether the debtor’s participation in the no asset procedure should be terminated; and 30

- “(b) sends a written deferral notice to the debtor’s last known address before the expiry of the 12-month period.

- “(3) The deferral notice must state an alternative date for automatic discharge, which must be no later than 25 working days after the expiry of the 12-month period.
- “(4) The deferral notice is effective whether or not the debtor receives it. 5
- “(5) The Assignee must₂ as soon as practicable₂ send a written notice of the deferral to each creditor of the debtor known to the Assignee.
- “(6) The debtor is automatically discharged from the no asset procedure on the date stated in the deferral notice. 10
- “(7) The Assignee may revoke a deferral notice in the same way in which it was sent, in which case, the debtor is automatically discharged from the no asset procedure on—
- “(a) the expiry of the 12-month period in subsection (1), if the notice is revoked before that date; or 15
- “(b) in other cases, the date of revocation.”

*Which debts are cancelled on discharge from
no asset procedure*

8 New section 377A inserted

- (1) Section 377 is amended by repealing subsection (2). 20
- (2) The following section is inserted after section 377:
- “377A Effect of discharge**
- “(1) On discharge under section 377, the debtor’s debts that became unenforceable on the debtor’s entry to the no asset procedure are cancelled, and the debtor is not liable to pay any part of the debts, including any penalties and interest that may have accrued. 25
- “(2) However, **subsection (1)** does not apply to—
- “(a) any debt or liability incurred by fraud or fraudulent breach of trust to which the debtor was a party: 30
- “(b) any debt or liability for which the debtor has obtained forbearance through fraud to which the debtor was a party.
- “(3) The debts and liabilities referred to in **subsection (2)** become again enforceable on discharge under section 377, and the debtor is liable to pay any penalties and interest that may have accrued.” 35

8A New section 377B inserted

The following section is inserted after **section 377A**:

“377B Discharge does not release partners and others

A discharge under section 377 does not release any person who, at the date of discharge, was— 5

“(a) a business partner of the discharged debtor; or

“(b) a co-trustee with the discharged debtor; or

“(c) jointly bound or had made any contract with the discharged debtor; or

“(d) a guarantor or in the nature of a guarantor of the discharged debtor.” 10

*Public registers***9** **Purposes of public registers**

Section 448(3)(a) is amended by inserting “and persons discharged from that procedure under section 377” after “persons currently admitted to the no asset procedure”. 15

10 **General information that must be held in public registers**

(1) Section 449(1) is amended by omitting “The public registers must contain the following information in respect of a person (P) who is or has been bankrupt or who is subject to a current summary instalment order or currently admitted to the no asset procedure” and substituting “The public registers must contain the following information in respect of a person (P) who is or has been bankrupt, or who is subject to a current summary instalment order, or who is currently admitted to the no asset procedure, or who has been discharged from that procedure under section 377”. 20

(2) Section 449(1)(b) is amended by inserting “or has been discharged from the no asset procedure under section 377,” after “is currently admitted to the no asset procedure,”. 25

(3) Section 449(1) is amended by inserting the following paragraph after paragraph (h):

“(ha) if P is discharged from the no asset procedure under section 377, the date when P was so discharged.”. 30

- (4) Section 449(3) is amended by adding “, and the bankruptcy that was so annulled does not count for the purposes of **section 449A**”.
- (5) Section 449 is amended by inserting the following subsection after subsection (4): 5
 - “(4A) All information relating to a person who has been admitted to the no asset procedure must be removed from the public register maintained under section 368—
 - “(a) 4 years after the date of discharge under section 377; or
 - “(b) as soon as practicable after a termination under section 372(a), (c), or (d).” 10
- (6) Section 368(1) is consequentially amended by adding “and persons discharged from that procedure under section 377”.

11 New section 449A inserted

The following section is inserted after section 449: 15

“449A Information kept indefinitely on public register after multiple insolvency events

- “(1) This section applies in the case of a person who—
 - “(a) is or has been bankrupt on 2 or more occasions; or
 - “(b) is or has been both bankrupt and discharged from the no asset procedure under section 377. 20
- “(2) Information about the person must not be removed from the public register under this Act and, in particular, section 449(4), **(4A)**, and (5) do not apply to the person.
- “(3) The Assignee must ensure that the public register contains all of the information required by this Act about the person and each insolvency event. 25
- “(4) Bankruptcies under the Insolvency Act 1967 count for the purposes of **subsections (1) and (3)**, but bankruptcies under the Bankruptcy Act 1908 do not count for either purpose.” 30

12 Search criteria

- (1) Section 453(2) is amended by inserting the following paragraph after paragraph (d):
 - “(da) is discharged from the no asset procedure under section 377; or” 35

- (2) Section 453(2) is amended by adding “; or” and also by adding the following paragraph:
 “(h) is subject to **section 449A** (which relates to permanent retention of information on the register after multiple insolvency events).” 5

13 Search purposes

- (1) Section 454(b) is amended by omitting “or is currently admitted to the no asset procedure” and substituting “is currently admitted to the no asset procedure, or is discharged from that procedure under section 377”. 10
- (2) Section 454 is amended by adding the following paragraph:
 “(e) by any person for the purpose of ascertaining whether **section 449A** applies to another person.”

Part 2

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Insolvent gifts

14 Amendments relating to insolvent gifts apply only to bankruptcies commenced after Act comes into force

The principal Act applies to any bankruptcy that is commenced before the day after the date on which this Act receives the Royal assent as if **sections 4 to 6** of this Act had not been enacted. 20

Which debts are cancelled on discharge from no asset procedure 25

15 Amendments relating to cancellation of fraudulent debts under no asset procedure

- (1) Any debt that is cancelled under section 377(2) of the principal Act in the period before the enactment of **section 377A of the principal Act by section 8 of this Act**, but that is later revived by the enactment of **section 377A(2)**, must be treated as if the debt had not been cancelled. 30

- (2) In particular, the debtor is liable to repay any part of the debt, including any penalties and interest that may have accrued during the period when the debt was cancelled.
- (3) **Subsection (2)** does not limit **subsection (1)**.
- (4) Any proceedings for enforcement of the debt may be commenced or continued after the enactment of **section 377A** as if the debt had never been cancelled. 5

Public registers

16 Amendments relating to 4-year period for public registers apply to all debtors admitted to no asset procedure after Act comes into force 10

The principal Act applies to any debtor who is admitted to the no asset procedure before the day after the date on which this Act receives the Royal assent as if **sections 9, 10, 12, and 13** of this Act had not been enacted. 15

17 Amendments relating to retention of records if multiple insolvency events

- (1) **Section 449A** of the principal Act (as enacted by **section 11** of this Act) applies to any person regardless of whether any of the insolvency events referred to in **section 449A(1)** occurred before or after the enactment of that section. 20
- (2) As soon as practicable after this section comes into force, the Assignee must ensure that the public register contains all of the information required by the principal Act (as amended by this Act) about any person to whom **section 449A** applies. 25
- (3) To avoid doubt, the requirement in **subsection (2)** includes a requirement to ensure that the public register contains information about bankruptcies under the Insolvency Act 1967 ~~or the Bankruptcy Act 1908~~ in respect of any person to whom **section 449A** applies. 30

Amendment to Privacy Act 1993

18 Schedule 2 of Privacy Act 1993 amended

- (1) This section amends the Privacy Act 1993.

Insolvency Amendment Bill

(2) The item relating to the Insolvency Act 2006 in Part 1 of Schedule 2 is amended by inserting “354,” after “62,”.

Legislative history

9 March 2009
24 March 2009

Introduction (Bill 19-1)
First reading and referral to Commerce Committee
