

THE CLE CENTRE

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**COMMERCIAL LITIGATION
DEBT RECOVERY & BANKRUPTCY**

ARMIDALE CONFERENCE

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CURRICULUM VITAE OF

SALLY SUSAN NASH

Sally is acknowledged as a leading insolvency lawyer in NSW, Australia. She was admitted to practice in 1977 and has practiced in insolvency, general commercial litigation and debt recovery litigation since that time. Her practice is in all NSW State and Australian Federal Courts involving commercial and insolvency litigation acting for creditors, Trustees, Liquidators, bankrupts and directors. She also has extensive experience acting for secured creditors in the enforcement of their securities. Sally has been involved in many leading cases and is very highly regarded by her clients and fellow practitioners.

Sally is a member of the Law Society of NSW, Law Council of Australia, Commercial Insolvency and Reconstruction Committee; Insolvency Practitioners Association of Australia; Turnaround Management Association Australia and Member of the Smaller Practice Issues Committee of INSOL International, International Association of Restructuring, Insolvency and Bankruptcy Professionals.

In the past Sally has lectured at the College of Law and Newcastle University. In 2008 Sally reviewed and updated the Lawyers Practice Manual for New South Wales debt recovery chapter.

See also website www.sallynashandco.com.au

1. Introduction

- 1.1 In 1789 Benjamin Franklin stated *"in this world nothing can be said to be certain, except death and taxes"*.
- 1.2 Usually every case involves a recovery of a debt, even if it is an order for costs. Therefore understanding debt recovery techniques is important at the beginning of a case.
- 1.3 The ITSA 2010 statistics show 4,589 business related bankruptcies and 22,918 non business bankruptcies.
- 1.4 The 2009-2010 ASIC statistics show 9,281 companies being wound up.
- 1.5 Unless the other party has insurance or identifiable assets, recovery may be impossible.

2. Bankruptcy Reform

- 2.1 The Bankruptcy Amendment Act, 2010 and Regulations have commenced.
- 2.2 Bankruptcy is for 3 years. The statutory monetary limit for a Bankruptcy Notice and Creditors Petition has increased from \$2,000 to \$5,000.
- 2.3 Some of the Bankruptcy Regulations commenced on 1 August 2010 (Bankruptcy Notice and procedural issues)
- 2.4 The Amended Bankruptcy Act commenced on 11 August 2010.
- 2.5 Further amendments to the Bankruptcy Regulations commenced on 1 December 2010 (Trustee remuneration issues).

3. What searches should be undertaken and what do they show?

Before suing, a client may want to assess if the litigation should proceed.

3.1 Australian Securities and Investment Commission ("ASIC") Search:

- Initially, a search should be undertaken of the ASIC database to confirm that the business is either a registered company or registered business name in Australia. Such search will confirm the type of trading entity i.e. sole trader, partnership, proprietary limited company, publicly listed company.
- It will also advise you of the correct details of the registered office, the trading address, the relevant office holders of a company.

- If the entity is a company, the search will advise of any present or past applications which have been made against the company for the winding up of it. This may be important in determining whether the company is slow paying its debts.
- If the entity is a company, the search will also advise of any fixed and/or floating charges over the company. Note the Australian Government is planning a change to this law from May 2011 with the proposed introduction of the Personal Property Security Act.
- A Director and officers search of your individual client will show his/her address and other corporate involvement.

3.2 Credit Rating Search:

- There are a number of credit reporting agencies ("CRA") in Australia, the most well-known being Baycorp Advantage now VEDA. The purpose of such agencies is to provide information and analysis for financial risk management decisions.

3.3 Department of Fair Trading:

- A search to show if the Business Name is registered and who owns it or when it changed hands.
- It is prima facie evidence of the owner of the Business Name.

3.4 National Personal Insolvency Index:

- This is a search of the database maintained by the Insolvency and Trustee Service of Australia regarding bankruptcies in Australia.

3.5 LPI Search

- A purchaser's index search should be obtained.
- A LPI search on the debtor's address should be obtained to see who owns it, if it is mortgaged a copy is obtained of the mortgage and last transfer to estimate the equity in the property.

3.6 During the course of litigation it may be wise to update searches, especially real estate which the debtor may own and upon which the client may have no caveatable interest.

4. Guidelines for pursuing outstanding debts

4.1 The Australian Securities and Investment Commission and the Australian Competition and Consumer Commission issued a joint publication titled *Debt Collection Guideline for Collectors and Creditors*. The guideline was developed to provide a useful guidance on appropriate conduct to anyone involved in debt recovery. A copy of the guidelines can be found on the ASIC website at www.asic.gov.au.

4.2 The guidelines provide a helpful insight into professional conduct in collecting debts and some of the main points are as follows:-

- Contact with debtor's should be for a reasonable purpose only and you must establish that you are speaking with the relevant person who is liable for the debt;
- Contact should be made at reasonable times of the day;
- Contact should be made on reasonable intervals;
- Contact should be made to the address of the debtor which is best suited. For example, a debtor who owes money for a personal loan should not be constantly contacted at work unless the creditor is given specific instruction to do so;
- Privacy obligations;
- Importance of record keeping;
- Settlement negotiations;

5. First Contact – Letter of Demand

- 5.1 The first step that a legal representative generally takes is to issue a letter of demand to the debtor. It may be that the client has already issued a letter of demand to the debtor, however, the effect of a legal letter of demand can be quite different. It is not uncommon for a debtor to take a legal letter more seriously as the ramifications can be quite serious if legal action is commenced against them.
- 5.2 The letter will put the debtor on notice that the debt is due and payable and sometimes provides you with the opportunity to negotiate an informal scheme for payment or ascertain with the legal representative as to whether there is going to be any dispute either regarding the quantum or the existence of the debt.
- 5.3 Costs of the letter of demand cannot be claimed unless there is a specific term in the client's contract, or litigation is commenced.

6. Litigation For Recovery of Debts

- 6.1 Attached is a Schematic Flow Diagram showing the procedure in the Courts for debt recovery.

7. E-Court Justice Link

- 7.1 Since October 2010 Court process can be lodged electronically using xml language. There is a problem with this process as xml is not word and most firms will have to write a new program. It is hoped the problems associated with Justicelink will be fixed, and there will soon be commercially available programmes for bulk users and practitioners.

8. Court Process:

- 8.1 If there is no satisfactory response to the letter of demand, the decision must be made as to whether legal proceedings are to be commenced in the Courts.
- 8.2 Consideration will need to be had to preliminary matters to be undertaken in the Supreme Court or Federal Court for:-
- Preliminary discovery as to liability
 - Asset preservation order
 - Security for costs
- 8.3 The choice of the Court in which to commence proceedings will be determined by the amount of the outstanding debt. In New South Wales, the three relevant Courts are:-
- The Local Court with jurisdiction up to \$100,000.00;
 - The District Court with jurisdiction up to \$750,000.00 for debt claims;
 - The Supreme Court with no limit on its jurisdiction.
 - I will not deal with the CTTT which also has specialist jurisdiction between builders, tradesman, landlords and tenants, but useful to bear in mind if your client has a building type dispute with a licensed builder.
- 8.4 The Statement of Claim for a liquidated debt is prescribed. Since 2005, the Statement of Claim form has been the same in each jurisdiction, after the introduction of the *Civil Procedure Act 2005 (NSW)*.
- 8.5 The Statement of Claim, usually contains the following:-
- The formal requirements in relation to the names and addresses of the parties and registered offices of a defendant who is a company;
 - A statement of each of the causes of action, being the reason for the legal proceedings being commenced, and also details of the debt which is outstanding;
 - Details of any documents which are relied upon and the date which the document came into existence. This will prove the existence of an agreement between the parties for payment of the amount outstanding;
 - Interest and whether it is claimed under the specific rules of the Courts or under an agreement between the parties. At the current time, interest is able to be claimed pursuant to the *Civil Procedure Act 2005 (NSW)* at the rate of 8.75% p.a. under section 100 (since 1 January 2011).
 - It is also important that the Statement of Claim set out the date on which the debt was incurred. So the Court and other party is aware that it is not statute barred.
- 8.6 Choose the jurisdiction carefully as costs penalties apply if judgment is for less than certain amounts currently under \$40,000.00 in the District Court.

9. Service:

- 9.1 A copy can be served by ordinary prepaid post to a Company to its registered office, but the Affidavit of Service must set out how it was served not swear to "posting it". See: *Brown v Bluestone Property Services Pty Ltd [2010] NSWSC 869*. The Affidavit of Service must say it was placed in an envelope, how it was addressed, that the envelope was stamped and that it was put into the post box. Usually a clerk will do the posting and it is that person who must swear the Affidavit of Service not the Solicitor who can only swear on information and belief.
- 9.2 A business name can be served by ordinary post to the business name address, registered at the Department of Fair Trading.
- 9.3 A person can be served:-
- i) by the Local Court by post for a fee
 - ii) by a Process Server personally or by leaving it at the usual place of abode or with a person over 16 years in the Local Court.
 - iii) personally.
 - iv) by substituted service orders.
- 9.4 A company can be served by ordinary pre-paid post addressed to its registered office.

10. Interest

- 10.1 From 1 July 2010 the interest rate under the Civil Procedures Act has been harmonised, with Courts in the rest of Australia.

Section 100 Interest up to judgment

"(1) In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:

- (a) on the whole or any part of the money, and*
- (b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect."*

Schedule 5 Civil Procedure Rules sets out the interest rates up to 30 June 2010. The current interest rate is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced, ie 30 June and 31 December each year. At present the rates are:

- 1/7/10 – 31/12/10 8.5%
- 1/1/11 to date 8.75%

Section 100 interest:

- “(a) in respect of the period from 1 January to 30 June in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and*
- (b) in respect of the period from 1 July to 31 December in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced.”*

Section 101 Interest after judgment

- (1) Unless the court orders otherwise, interest is payable on so much of the amount of a judgment (exclusive of any order for costs) as is from time to time unpaid.
- (2) Interest under subsection (1) is to be calculated, at the prescribed rate or at such other rate as the court may order, as from:
- (a) the date on which the judgment takes effect, or
- (b) such later date as the court may order.

The Uniform Civil Procedures Rule 2005 prescribes the rates for section 100 and section 101 as follows:-

Section 101 interest:

- “(a) in respect of the period from 1 January to 30 June in any year – the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and*
- (b) in respect of the period from 1 July to 31 December in any year – the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced.”*

10.2 The interest rate on judgments is:-

- | | | |
|----|-------------------|--------|
| a) | 1/7/10 – 31/12/10 | 10.5% |
| b) | 1/1/11 to date | 10.75% |

10.3 Interest prior to 1 July 2010 is dealt with under Civil Procedures Rules, eg 1/1/10 to 30/6/10 was 9% p.a.

11. Default Judgment:

11.1 The Statement of Claim gives the Defendant 28 days after service of the document to pay the debt, come to an arrangement with the Plaintiff for payment of the debt by way of instalments, or file a Defence to the Claim. If the Defendant fails to do any of these things, the Plaintiff is entitled to apply for judgment in default of one of these matters taking place.

11.2 The steps for applying for default judgment involve an authorised officer of the Plaintiff swearing an Affidavit confirming that the debt remains outstanding, except for debts under \$10,000.00 in the Local Court. A Solicitor can swear the Affidavit

of Debt for debts commenced for less than \$10,000.00 in Local Court. Such affidavit, along with a Notice of Motion and an Affidavit proving service, is filed in the relevant Court registry. The Motion is then processed and judgment is confirmed for the debt, interest and the scale of costs. This then forms the judgment which can be enforced against the judgment debtor.

- 11.3 Any Judgment can be enforced for up to 12 years, but a judgment can only be used for a Bankruptcy Notice for up to 6 years.

12. Hearings

- 12.1 Each Court has practice notes for conduct and preparation of a hearing.
- 12.2 It is common for all matters to be prepared on Affidavits and for all evidence in chief to be by written Affidavit. Cross examination is limited in some matters.
- 12.3 In all matters the Court practice directions require agreed facts, contentions and submissions. Some Judges have their own variations to the prescribed practice notes. Different types of matters have their own practice notes, eg in Supreme Court Equity; possession.
- 12.4 It is fair to say most matters are front end loaded with the emphasis being on preparation and submissions, the theory being that there will be less Court time and also more prospects for settlement.
- 12.5 The Federal Court may require compulsory mediation prior to litigation.

13. Application to set aside Judgment

- 13.1 In the case of a default judgment, the burden is upon the debtor (*Woolf v Donovan* (1991) 29 FCR 420) to show that there is a bona fide question as to the existence of consideration for the default judgment at which time it is then bound to exercise its power and discretion to look at what is behind the judgment. The Defendant has to show:-
- a) a bona fide Defence and draft Defence and;
 - b) a reason for not filing the Defence within time.
 - c) The Defendant must swear an Affidavit in Support detailing this information.
- 13.2 In the context of final judgments and final orders, the court has a different approach depending upon whether or not there has been a judgment on the merits or the judgment is obtained 'by default'. If there has been a judgment on the merits, it would be normal for the court to decline to go behind the judgment unless it could be shown that it was obtained in circumstances involving fraud, collusion or a miscarriage of justice (*Olivieri v Stafford* (1989) 24 FCR 413).

14. Instalment Orders – stay of execution

- 14.1 At any time, subsequent to the entering of judgment, a judgment debtor may apply to the Court to pay the judgement debt by instalments.

- 14.2 The judgment debtor, whether an individual or a company, must complete an Affidavit setting out the assets and liabilities of the judgment debtor, along with weekly income and expenditure. The judgment debtor must also indicate an amount that the judgment debtor feels he is able to pay either weekly, fortnightly or monthly to the judgment creditor.
- 14.3 An officer of the relevant Court will deal with the application in chambers and make a determination as to whether such instalment application is appropriate. The Court will decide:-
- That the application is granted;
 - That the application is refused as the judgment debtor does not have the means to meet the proposed payments;
 - That the application is refused as the debt will take too long to pay off;
 - That the application is refused as the debtor can afford to pay more than what is being offered.
- 14.4 If an instalment order is made, the judgment creditor has the option to object to the orders by making an application to the Court. If there is an objection, the application will be listed before a Registrar of the relevant Court for each party to make submissions as to the appropriateness of the order.
- 14.5 Whilst an instalment order is in place, the judgment will be stayed, meaning that it cannot be enforced.
- 14.6 If the judgment debtor fails to make payments in accordance with the instalment order, the judgment creditor must file an Affidavit of Non-Compliance in the Court registry which will lift the stay and allow enforcement of the judgment debt.
- 14.7 In *American Express v Viscariello* [2007] FMCA 1574 the position in bankruptcy of an application to pay by instalments is discussed.
- 14.8 Prior to being able to issue a Creditor's Petition, it is essential that within six months prior to the presentation of that petition, the debtor has committed an act of bankruptcy (s 43(1)(a)). It is not necessary for the act of bankruptcy to be committed in respect of the debt owing to the petitioning creditor, although this is normally the case.
Of the acts of bankruptcy relied upon in practice, the most common is that arising from the issue, service and non-satisfaction of a Bankruptcy Notice (s 40(1)(g)).
- 14.9 Generally the Local Court will only allow an instalment arrangement if the debt is to be paid within a couple of years. Usually with the District Court and Supreme Court the debts are too large for a successful instalment application to be made.
- 14.10 It must be remembered under s136 of the Civil Procedures Act, 2005, any payment by instalments is first to be deducted from the interest which has accrued after judgment under s101 Civil Procedures Act which changes every 6 months.
- 14.11 In *Hellier Capital Pty Limited v Richard Albarran* [2009] NSWSC 403, Justice McDougall in the Supreme Court ordered an instalment arrangement in favour of

the judgment debtor who was an insolvency practitioner and an employee of an accounting firm Hall Chadwick who did a lot of insolvency work. The debt will not be repaid until February 2013. The instalments were approximately \$23,000.00 per month.

- 14.12 A stay of execution under section 67 Civil Procedures Act is not the same as an application to pay by instalments.
- 14.13 The provisions for a stay do not apply to registration of costs assessment certificates which is an administrative function and not a judgment until the costs assessment certificate is registered.

15. Examination Notice:

- 15.1 Although this is not an enforcement method, it can be a useful tool if you know little or nothing about your debtor. An Examination Notice will allow you to obtain from a judgment debtor, information about its financial position with regard to assets and liabilities, income and expenditure. Attached is the form.
- 15.2 The Examination Notice is served on the judgment debtor. The Notice will request that the debtor provide answers to particular questions and also may request the judgment debtor to forward certain documents to the creditor. The judgment debtor has 28 days from the date of service within which to provide the answers or documents requested.
- 15.3 The judgment creditor may wish to ask the judgment debtor questions about:-
- Current employment;
 - Current income;
 - Property owned in the judgment debtor's name, including real estate, shares, motor vehicles, art and jewellery;
 - Details of funds held in bank accounts and credit union accounts;
 - Current liabilities including mortgage repayments per month;
 - Number of dependants;
 - Weekly expenses such as petrol, food, fares, school fees, motor vehicle expenses, gas, electricity, water.
- 15.4 Such documents which you may wish to request are as follows:-
- Recent bank statements evidencing bank balances for the last six months;
 - Cheque books;
 - Mortgage or charge documents;
 - Wage slips or group certificates for the 12 months prior;

- Income tax returns for the past two years;
 - All partnership agreements;
 - Deeds or other documents evidencing the ownership of motor vehicles, real estate, shares, or any other property the judgment debtor may own such as jewellery or art;
 - Registration papers for motor vehicles or boats;
 - Insurance policy over goods or land;
 - Loan agreements and repayments books;
 - Lease agreements;
- 15.5 If the judgment debtor fails within the requisite time frame to provide a response to the Examination Notice, the creditor can apply to the Court for the issue of an Order for Examination which will require the person served with the Examination Notice to attend at Court at a designated time to answer questions which are put by the Solicitor for the judgment creditor. The examination is an informal procedure which is not conducted by the Court, unless the court directs it to be. Also this is not usually attended by the debtor.
- 15.6 The information obtained from an Examination Notice or Order for Examination will assist in determining which enforcement procedure will be best suited to the judgment debt. It may also assist you to advise the client whether to write off the debt.

16. Garnishee Orders:

- 16.1 If the creditor is aware of any debts due or accruing to the judgment debtor, they may wish to consider applying to garnishee them. Money owing by a third party to a judgment debtor may be attached by the service of a Garnishee Order for the benefit of a judgment creditor.
- 16.2 The most common garnishee which is served is that on a Bank or other financial institution where the debtor holds an account. This is why it is relevant to obtain bank account details of the debtor on any Credit Application, and also to keep copies of payments made by the customer by cheque.
- 16.3 A Garnishee Order may also be served on a Contractor of the company for example if a customer is owed money for building a block of units, the garnishee can be served on the company that owes the customer that money, or on an agent who is collecting rent.
- 16.4 If the Garnishee Order is not complied with, a Garnishee Summons may be issued to the garnisheed party to show cause why the payment has not been made. In these circumstances, the Court may give judgment in favour of the Judgment creditor against the party who has been garnisheed.

- 16.5 A further form of Garnishee Order is the wage garnishee which can be served on the employer of the judgment debtor. The weekly compensation amount effective from 1 October 2010 is \$409.10.
- 16.6 To work out the company bank account an ASIC search will disclose any charge and this will assist to know the trading bank.

17. Writ of Execution

- 17.1 Probably the most common mode of enforcing the judgment debt against either an individual judgment debtor or a company judgment debtor is to issue a Writ of Execution.
- 17.2 A Writ of Execution is a direction to the Sheriff or Bailiff to attend at a given address and take into his possession items belonging to the judgment debtor, to be sold at public auction, for the benefit of the judgment creditor. A Writ of Execution, in general terms, lasts for one year. The Writ of Execution can be extended on application to the relevant Court, or a fresh Writ of Execution can be issued if a previous one has lapsed.
- 17.3 The address at which execution should be made is, if a company, the principal place of business and not the registered office. This can be ascertained from the ASIC search, from the white pages, or from details previously provided by the judgment debtor.
- 17.4 The usual address for execution of a Writ of Execution against an individual is the home address.
- 17.5 The only property which can be levied upon at the given address is property which is in the name of the judgment creditor or owned by him/her. This can become problematic when a company is being sued and the majority of goods at the execution address are under lease/hire or under a charge. It may also be problematic if the judgment debtor is an individual and resides with family members, who jointly own assets.
- 17.6 The Sheriff has the power to execute on a wide range of goods such as furniture, motor vehicles, boats, household appliances, art, jewellery, stock on hand, general office equipment such as facsimile machines and computers and other goods found at the address belonging to the judgment debtor.
- 17.7 Once the Sheriff attends at the address and finds that there are goods owned by the judgment debtor, the Sheriff will "tag" such goods. The Sheriff will then send a notification to the judgment creditor advising of the goods found and requesting payment of further fees which may be required to be paid to continue with the execution. The standard fee is \$70.00, however, if it necessary to tow a motor vehicle or boat, the fees can be around \$900.00. If the fee is not paid, the Sheriff will withdraw his claim over the goods.
- 17.8 Once any required fees are paid, the Sheriff will send a final notice to the judgment debtor advising that if the debt is not paid by a certain date, the goods will be taken and sold at public auction. Such notification will include the original judgment debt, interest and the costs of the Writ of Execution.

- 17.9 After the goods have been taken, the Sheriff will proceed to sell the goods and any proceeds will be forwarded to the creditor, after the deduction of the Sheriff's fees.
- 17.10 It is common for the judgment creditor to receive a Notice of Non-Levy from a Sheriff listing reasons as follows:-
- All property is jointly owned with the spouse or the business partner of the judgment debtor;
 - The person is no longer at the given address;
 - All goods are subject to a bill of sale, charge, or under lease hire; or
 - There are no goods at the address upon which levy can be made.
- 17.11 If a Notice of Non-Levy is received noting that the debtor has left the given address, enquiries ought to be made to establish a new address, as the Writ of Execution can be re-directed on the payment of a further fee of \$70.00.

18. Writ on Land

- 18.1 All Courts now permit land to be taken under a Writ of Execution. The Sheriff is not required to exhaust attempts of execution against the personal property of the judgment debtor prior to proceeding against land.
- 18.2 A Writ on land can be lodged at the LPI. It is valid for 12 months and can be issued once the Writ is issued to the Sheriff. The LPI form is attached. The Writ details are required to be obtained from the Court and there is no form to assist in applying to the Court so I send a letter of request and pay a fee as if it were an order (currently \$52.00).
- 18.3 The Writ on land is not the same as a Caveat. It does not give an interest in the land. The Judgment creditor is unsecured, not secured. The Writ can be stayed on an application to pay by instalments.

19. Bankruptcy Notice:

- 19.1 If the judgment debt is for a substantial amount and the judgment debtor is an individual, the judgment creditor is entitled to enter a Bankruptcy Notice against the Judgment debtor. Usually a Bankruptcy Notice will only be issued for debts in excess of \$10,000.00, however at present, they can be issued for any debt over \$5,000.00. This change occurred on 11 August 2010. The current fee for issue is \$440.00.
- 19.2 The Bankruptcy Notice is issued by the Insolvency & Trustee Service Australia ("ITSA"). The costs and fees are not added to the Bankruptcy Notice and are only claimed if a Creditors Petition is issued. It is not a Court issued document. The Bankruptcy Notice forms the starting point of proceedings for the bankruptcy of the debtor, which are proceedings commenced in the Federal Court of Australia or Federal Magistrates Court of Australia. A new form of application and Bankruptcy Notice commenced on 1 August 2010. A copy of each is attached.

- 19.3 The Bankruptcy Notice is a very important document and the form must comply strictly with the Rules and Regulations governing same. A Bankruptcy Notice can be set aside if it does not comply with the Bankruptcy Regulations. A Bankruptcy Notice can only be issued with respect to a Judgment that is not older than 6 years.
- 19.4 The Bankruptcy Notice will attach to it a copy of the judgment or order awarded by the relevant Court. The judgment debtor has 21 days after service to comply with the Bankruptcy Notice, by either paying the debt as outlined, or by entering into an arrangement satisfactory to the judgment creditor.
- 19.5 A Bankruptcy Notice can be issued electronically. A copy can be sent to ITSA for issue and then sufficient copies for service can be made by the solicitor. Unlike other matters a photocopy can be served of the issued Bankruptcy Notice.

20. Getting the act of bankruptcy right

Service of Bankruptcy Notices

- 20.1 The Official Receiver retains a copy of the Notice as issued and allocates a number for the Notice – this is not a court proceeding number.
- 20.2 Service of Bankruptcy Notices is now regulated under the Bankruptcy Regulations. Regulation 16.01 provides as follows:

Service of documents

- (l) *Unless the contrary intention appears, where a document is required or permitted by the Act or these Regulations to be given or sent to, or served on, a person (other than a person mentioned in Regulation 16.02), the document may be:*
- (a) *sent by post, or by a courier service, to the person at his or her last-known address; or*
 - (b) *left, in an envelope or similar packaging marked with the person's name and any relevant document exchange number, at a document exchange where the person maintains a document exchange facility; or*
 - (c) *left, in an envelope or similar packaging marked with the person's name, at the last-known address of the person; or*
 - (d) *personally delivered to the person; or*
 - (e) *sent by facsimile transmission or another mode of electronic transmission.*
- 20.3 A practice had arisen to make applications for substituted service of a Bankruptcy Notice, but now reg 16 is usually invoked. This is not something that is permitted specifically under s 40(1)(g), which provides for service 'on the debtor in Australia or, by leave of the Court, elsewhere', as the leave of the court is only required for the purposes of service outside the Commonwealth of Australia. The power to order substituted service therefore would appear to again arise from the powers contained in s 30(1) and s 309(2) of the *Bankruptcy Act*.
- 20.4 Section 309(2) provides:
Service of notices etc.

...

(2) Where a notice or other document is required by the Act to be served on or given to a person, the Court may, in a particular case, order that it be given or served in a manner specified by the Court, whether or not any other manner of giving or serving the notice or other document is prescribed.

- 20.5 In *Drake t/as TH Drake & Associates v Stanton* [1999] FCA 1635; BC9907684 (5 November 1999), Tamberlin J also had to consider the issue of whether or not service had been effected in accordance with reg 16.01(a), having being sent by post 'to the person at his or her last known address'. His Honour considered whether in fact the meaning of 'last known address' was the same as 'ordinary place of residence or ordinary place of business and concluded that it was not. It was the last known address of the debtor known to the creditor. This case states (at [5]):

The references to 'usual place of abode', of course, and to 'resides', refer to the residential address of Mr Stanton. That is not the expression which is used in the relevant provision ... The relevant expression is 'the last-known address of the person' and it does not matter whether the debtor currently lives or resides there or not. The expression is difficult...

And further (at [8]):

In my view, on the language of reg 16.01(1)(c), the reference to 'last known address of the person' is to that address which has been made known by the applicant as at the time closest to the date in question ...

- 20.6 In the matter of *T & S Recoveries Pty Ltd v Skalkos* [2004] FCA 816; the court found that it was consistent with the policy of the *Bankruptcy Act* that a person not benefit from evading service. Regulation 16.01(a) permits service to be effected by post to a person at his last known address and that is to be interpreted in a common sense manner, having regard to the evidence available to the judgment creditor.
- 20.7 Having regard to the significance of service of the Bankruptcy Notices, Registrars are applying the above case to the requirements of service. If there is no personal service, then the Registrar will require additional evidence that the address is 'the last known address' — for example:
- real property search;
 - advice from process server of conversations;
 - correspondence;
 - rate notices;
 - copy of an Affidavit of Service in other proceedings; and
 - copy of Affidavits sworn in other proceedings or pleadings — for example, a Defence.
- 20.8. A useful guide is on the Federal Magistrates Court and Federal Court website setting out the Court requirements for substituted service.
- 20.9 Section 309 of the *Bankruptcy Act* enables a notice or other document to be 'served in a manner specified by the court whether that manner is prescribed'. The application for substituted service is usually ex parte supported by the same type of evidence as set out in the previous paragraph, together with Affidavits of the

process server outlining attempts to serve the Bankruptcy Notice. Both Courts on their website list “Bankruptcy – Guide to applications for substituted service.”

20.10 In an unsuccessful application for annulment, *Raheem Khan v Kerr* [2007] FMCA 512, Barnes FM, the court found that service of the Creditor’s Petition was in accordance with the court order for substituted service and that there was no explanation by the bankrupt as to why he did not receive the documents in circumstances where:

- it was the address at which his parents resided;
- it was the address on his driver’s licence and where he continued to receive mail;
- it was the address from which he operated his business;
- it was the address to which his solicitor addressed mail; and
- it was the address used by him in applications to the court and Affidavits filed in the proceedings.

20.11 The validity of all Bankruptcy Notices is to be determined as at the date of issue: *Re: Henry Frederick Heaton Walsh v Deputy Commissioner of Taxation* No G249 of 1982.

20.12 If the judgment debtor fails to comply with the Bankruptcy Notice, an Act of Bankruptcy will be committed, entitling the judgment creditor to petition the Federal Court or Federal Magistrates Court for the making of a Sequestration Order.

20.13 A Sequestration Order can be made even if the debtor disputes service of the Bankruptcy Notice. See *Van der Munnik v Stewart* [2010] FMCA 116

21. Issues to set aside a Bankruptcy Notice

21.1 Section 40(1)(a) Bankruptcy Act requires that a Bankruptcy Notice only be issued with respect to a final judgment or final order being one ‘the execution of which has not been stayed’. In this context:

- a Bankruptcy Notice either served or issued while a stay of execution remains in force will be bad: *Re di Giacomo ex parte Boral Steel Ltd* (1983) 68 FLR 106;
- if a stay is granted after the service of a Bankruptcy Notice, it has no effect on the Bankruptcy Notice: *Schekeloff; ex parte Schekeloff v Hopkins Group Pty Ltd* (1989) 86 ALR 645; and
- if the stay is obtained after the expiry of the service of the Bankruptcy Notice, it is of no effect: *Re Padagas; ex parte Carrier Air Conditioning Pty Ltd* (1977) 30 FLR 170.
- Where interim costs have been ordered and assessed but the matter is not finalized the Bankruptcy Notice is invalid. See *Albarran & Anor v Wily* [2009] FMCA 982.

21.2 Where a stay has been in force in respect of the final judgment or final order which is sought to be the subject of the Bankruptcy Notice, the stay is not regarded as having been removed until the requirements of the Rules of the relevant court for the removal of the stay have been satisfied. If they have, then it is possible to issue a valid Bankruptcy Notice; if they have not, the Bankruptcy Notice is invalid (*Re*

Frasersmith; ex parte Blackwood & Son Ltd (1992) 36 FCR 144). In this respect an Affidavit of Noncompliance must be filed before issuing the Bankruptcy Notice.

- 21.3 In a bankruptcy matter, the Federal Court and Federal Magistrates Court can go behind a judgment. The nature of a Sequestration Order is that it affects the rights of all of the creditors of the debtor, not merely the petitioning creditor. However, in (*Wren v Mahony* (1972) 126 CLR 212 at 234), where reason is shown for questioning whether there was 'in truth and reality' a debt due to the petitioning creditor, the court decided it does not have to accept the judgment as satisfactory proof. The court can exercise its power and discretion to look at what is behind the judgment. It is however, a two-stage process.
- 21.4 The Federal Court of Australia, in *Commonwealth Bank of Australia v Jeans* (2005) 219 ALR 22; [2005] FCA 569; BC200502872 (6 May 2005), considered the history of the entitlement to go behind a judgment. Hely J refused to go behind the judgment where the debtor said that he had not signed a guarantee but there had already been a number of preliminary hearings. His Honour relied on the dicta in *Wren v Mahony*:
- The High Court held that the bankruptcy court not only may go behind a judgment but must do so if there appear to be substantial reasons for doubting whether there really was a debt due to the petitioning creditor. However, a judgment after the trial of an action will not usually be re-opened unless a prima facie case of fraud, collusion, or miscarriage of justice is made out.*
- 21.5 In *Palicare Pty Ltd v O'Farrell* (2009) FMCA 9 the Court considered a contested Creditors Petition wherein the debtor asserted the debtor was estopped from being the subject of the Petition due to a variation of agreement. The Court considered the agreement but still bankrupted the debtor.
- 21.6 In *Coshott v Barry* [2009] FCA 1521 (18 December 2009) Edmunds J refused to set aside the Bankruptcy Notice but extended time for compliance until determination of a District Court appeal from a review of a Costs Review Panel determination.
- 21.7 A Bankruptcy Notice was set aside where it was found to be confusing as to overstatement and calculation of interest. See *Apps & Anor v Campbell* [2010] FMCA 1.

22. Other Available Acts of Bankruptcy

- 22.1 It is often useful to think about the many other acts of bankruptcy which are set out in the Bankruptcy Act. A creditor may need to move swiftly, and, to do so, neither a judgment debt nor a Bankruptcy Notice is required.
- 22.2 In recent cases, the Court has accepted the following available acts of bankruptcy:
- (a) a debtor absenting himself from a meeting – see *Puels v Exelerate Funding Pty Ltd* [2005] FCAFC 38;
 - (b) an unsatisfied Writ of Execution (see above);

- (c) a debtor leaving the jurisdiction and remaining outside the jurisdiction – see *Edge Technology v Wang* [2000] FCA 1586; and
 - (d) keeping house.
- 22.3 If the debt is 6 years old a Bankruptcy Notice cannot issue, then a writ can issue and be the basis of an act of bankruptcy. See *The Owners SP 8857 v Norley* [2004] FMCA 863; *David Patrick Ousley; ex parte Deputy Commissioner of Taxation* [1994] FCA 883, Herey J. Paragraph 4 of the Creditors Petition refers to the unsatisfied Writ of Execution rather than unsatisfied Bankruptcy Notice.

23. Creditor's Petition

- 23.1 The Creditors Petition is the formal document filed in the Federal Court or Federal Magistrates Court seeking orders for the bankruptcy of the judgment debtor. Again, the Creditors Petition must state that the judgment debtor owes in excess of \$5,000,00 and must comply with the prescribed rules. The Creditors Petition must also be verified by a relevant officer of the judgment creditor who is able to confirm that they have checked the records of the judgment creditor and can confirm that the debt remains outstanding.
- 23.2 A judgment debt is not required for a Creditors Petition. Even if the judgment debt in the Bankruptcy Notice has been paid the creditor can still proceed on other debts. See *Owners Strata Plan 50164 v O'Connor* [2010] FMCA 833. The petitioning creditor can also refuse the tender of the debt and seek to proceed to a Sequestration Order.
- 23.3 There is a discretion to make a Sequestration Order. However prima facie the petitioning creditor is entitled to an order if every document is correct. See *Cain v Whyte* (1933) 48 CLR 639.
- 23.4 If the documents are incorrect, eg there is a defect in the Bankruptcy Notice a to interest, the Court may dismiss the Creditors Petition. See *Chulio & Anor v Kelly* [2010] FMCA 193.
- 23.5 Section 306 Bankruptcy Act is the general dissenting section to rectify defects. See *Adams v Lambert* [2006] 228 CLR 409.
- 23.6 ***Adams v Lambert* (2006) HCA 10**
The High Court determined that a formal defect or irregularity of a Bankruptcy Notice was insufficient to have the Bankruptcy Notice set aside. Section 306 of the Bankruptcy Act states that bankruptcy proceedings should not be dismissed simply because of a “formal defect or irregularity”. The meaning of that phrase had in past years been given a narrow interpretation. It amounts to a degree of defect. Is a Bankruptcy Notice a nullity if it “fails to meet a requirement made essential by the Act”. The Court indicated that one must not conclude that a Bankruptcy Notice is invalidated by defect. One must consider whether it was capable of misleading

“Section 306 in its application to Bankruptcy Notices, makes it plain that some instances of non-compliance with the requirements as to form of a notice will not invalidate the notice. The practical significance of an error or deficiency could vary according to the circumstances of each particular

case. Errors or deficiencies in compliance with requirements as to form may involve questions of degree as of kind”.

“Given that Section 306 relieves against the invalidating consequences of some mistake in the preparation of Bankruptcy Notices, the mistake that was made in this case falls within its terms”

- 23.7 The Creditors Petition can be issued in the Federal Magistrates Court or Federal Court.
- 23.8 The filing fee for a Creditor’s Petition in the Federal Court and Federal Magistrates Court for a company is \$1,983.00 and for an individual is \$828.00. Both Courts have the same fees for bankruptcy.
- 23.9 Once the Creditors Petition is filed and served personally on the judgment debtor, a hearing date is allocated before the Court. At such hearing, the creditor must prove certain facts, including service of the Bankruptcy Notice or the facts relating to the act of bankruptcy and Creditors Petition and also that the debt remains outstanding as at the day of the hearing. If the Court is satisfied with the creditors evidence, the Court will make a Sequestration Order, appointing a Trustee to attend to the affairs of the judgment debtor.
- 23.10 An Affidavit of Debt must be sworn within 24 hours of the hearing confirming the debt. The Affidavit can be filed as a facsimile. The solicitor retains the original in the event it is called upon.
- 23.11 An Affidavit of Search is sworn within 24 hours of the hearing confirming no bankruptcy, not Part X and no debt agreement. A current NPII search must be annexed. The original is to be filed at the hearing.
- 23.12 If a s188 authority has been signed under Part X Bankruptcy Act the Creditors Petition is stayed until the first meeting of creditors. See *HP Mercantile Pty Ltd v Turco* [2010] FMCA 114.
- 23.13 The hearing is usually before a Registrar. The Registrars for the Federal Magistrates Court and Federal Court are the same. If the matter is contested it will be referred to a Federal Magistrate or Judge for directions and a hearing date.
- 23.14 The Bankruptcy Regulations require notice be given to ITSA of:-
- Filing of Creditors Petition
 - Making of adjournment
 - Making of order
- Notice is by service of the sealed Court order and must be within 24 hours. If notice is not given then a fine will be issued by ITSA to the relevant creditor. Notice is given to registry@itsa.gov.au. Notice must be given to the Trustee in Bankruptcy within 24 hours of the Sequestration Order being made.
- 23.15 The Trustee in Bankruptcy is vested with the assets of the judgment debtor, therefore if the judgment debtor is the half-owner of real estate property, the Trustee will therefore be entitled to take the judgment debtor’s place as the

registered half-share owner. The Trustee will also make investigations with regard to payments the judgment debtor may have made to other creditors prior to bankruptcy and also income which the judgment debtor is to receive during the time of his or her bankruptcy.

- 23.16 Once a Sequestration Order is made, the judgment creditor has no entitlement to pursue the debt against the judgment debtor. A Proof of Debt is lodged in the estate of the debtor, with the Trustee, and the creditor will be paid a dividend if the Trustee is able to realise assets for the benefit of all creditors.
- 23.17 The period of bankruptcy is 3 years from the date of the filing of the Statement of Affairs, which is a document the bankrupt is required to file pursuant to the *Bankruptcy Act*, which sets out details of his or her assets and liabilities. If the judgment debtor fails to file same, the bankruptcy will continue until three years after the same is filed.
- 23.18 It is of note that the Courts do not see bankruptcy proceedings as a form of enforcement and therefore, the Court often encourage creditors to proceed on the Creditors Petition applications, rather than to adjourn them to evoke payment.
- 23.19 A useful summary of the effects of bankruptcy can be found at www.itsa.gov.au. This is useful both when acting for debtors and creditors.

24. Section 50 of the Bankruptcy Act and Section 37A Conveyancing Act

- 24.1 An application can be made under s 50 of the Bankruptcy Act once a Bankruptcy Notice has been issued and served for the appointment of a Trustee in Bankruptcy:

50. Taking control of debtor's property before sequestration

- (1) *At any time after a bankruptcy notice is issued, or a creditor's petition is presented, in relation to a debtor, but before the debtor becomes a bankrupt, the Court may:*
- (a) *direct the Official Trustee or a specified registered trustee to take control of the debtor's property; and*
 - (b) *make any other orders in relation to the property.*
- (1A) *The Court may give a direction or make an order only if:*
- (a) *a creditor has applied for the Court to make a direction; and*
 - (b) *the Court is satisfied that it is in the interests of the creditors to do so; and*
 - (c) *the debtor has not complied with the bankruptcy notice.*
- (1B) *If the Court directs a trustee to take control of the debtor's property, the Court must specify when the control is to end.*
- (2) *Without limiting the generality of subsection (1), the Court may, at any time after giving a direction under subsection (1), summon the debtor, or an examinable person in relation to the debtor, for examination under this section in relation to the debtor.*

- 24.2 The Court is inclined to make such an order in circumstances where the Bankruptcy Notice has been issued and served. The Court will usually order a bond of about \$10,000.00 to cover the Controlling Trustee's costs and

remuneration. The alternative is for the Court to make a freezing order over the assets of the bankrupt. The Court can also order a public examination of related persons within the s 50 order.

24.3 Jurisdiction is an issue because many State Courts have their own provisions for setting aside a void transfer without bankruptcy, for example, in New South Wales, s 37A of the Conveyancing Act. See also *Puglia v Basol* (2005) NSW SC 127, *Cannane v J Cannane* (1998) 192 CLR 557, *Langdon v Gruber* (2001) NSW SC 276 and *Nick Houvardas v Zaravinos* (2003) NSW SC 387, *Chen v Marcolongo* [2009] NSWCA 326. Section 37A Conveyancing Act states:-

- “(1) *Save as provided in this section, every alienation of property, made whether before or after the commencement of the Conveyancing (Amendment) Act 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.*
- (2) *This section does not affect the law of bankruptcy for the time being in force.*
- (3) *This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.”*

25. Annulments and Review of Sequestration Orders

- 25.1 A Bankruptcy can be annulled in three ways:
- by operation of s 73 of the Bankruptcy Act;
 - administratively under s 153A of the Bankruptcy Act by payment of all debts, costs, and charges of the bankruptcy administration; and
 - annulment by the Court under s 153B on the basis that the order ought not to have been made.
- 25.2 Pursuant to s 153B, the Court must be satisfied that the order ought not to have been made. In this respect, each of the Federal Court Rules and Federal Magistrates Court Rules imposes an obligation on the Trustee to file an Affidavit setting out in report form the bankrupt’s conduct, his or her examinable affairs, and, generally, under the administration of the bankrupt’s estate, including whether or not a Statement of Affairs has been filed (O 77 r 45 FCR; Pt 31 FMC).
- 25.3 On an annulment application the Court can go behind the judgment and find that the judgment was not in fact due and owing.
- 25.4 However, more often than not, the application for annulment is made in circumstances where a party did not appear. See *Re Anasis; Ex Parte Total Australia Ltd* [1995] 11 FCR 127, which followed the High Court in *Cameron v Cole* [1944] 68 CLR 571.
- 25.5 The procedure when dealing with an annulment on the basis that a party did not appear is that the Petition is reinstated and reheard. A second Sequestration Order can then be made in relation to the same facts and evidence.
- 25.6 Because both the Federal Court Rules and Federal Magistrates Court Rules have procedures for setting aside court orders made in the absence of a party (O 35 r 7

FCR), it has also been found that there is power in each court to set aside the order which also reinstates the Creditor's Petition which can be reheard (*Re Daskalovski; Ex Parte The Austral Brick Co Pty Ltd* [1999] FCA 111).

- 25.7 Both the Federal Court and Federal Magistrates Court exercise jurisdiction to review the decision of the Registrar hearing the matter either to set aside the Sequestration Order or to confirm the order of the Registrar, see Raphael FM, *Adelaide Bank Ltd v Badcock* [2002] FMCA 10; *Peter John Brady v Official Trustee in Bankruptcy Perth* [2002] FMCA 100, Raphael FM, 31 May 2002.
- 25.8 It had been thought that s 27, which prevents the setting aside of a Sequestration Order, would prevent a review of that same order by a Registrar, but this has been held not to be the case.
- 25.9 A review in either court is a hearing de novo. *Martin & Anor* [2001] FCA 87 was an appeal from a judge reviewing a Registrar's Sequestration Order.
- 25.10 At a de novo hearing, it is necessary to have all fresh Affidavit evidence including Affidavit of Debt and Affidavit of Search, and for the matter to be otherwise ready to proceed. On this basis the matter could be dealt with on numerous grounds and, in theory, a fresh Notice of Opposition filed. The review must be filed within 21 days of the making of the order. For a recent consideration of the attitude of the Federal Magistrates Court in relation to review and/or annulment applications, see *Raheem Khan v Kerr & Anor* [2007] FMCA 512; *G. Ferella v Otvosi & Ors* [2006] FMCA 334; and *A. Ferella v Otvosi & Anor* [2006] FMCA 231. It is extremely difficult in a contested application to set aside a Sequestration Order or to annul the order and for the bankrupt to succeed without the support of the Trustee and payment of all creditors including the petitioning creditor. There is a very real public interest policy which the Court considers.
- 25.11 As to the form of conditions imposed on a bankrupt for payment of costs, see *Quirk v Hampshire* [2009] FMCA 545

26. Why bankruptcy?

- 26.1 The Bankruptcy Act specifies that the duties of the trustee of the estate of a bankrupt include the following:
- notifying the creditors of the bankruptcy;
 - determining whether the estate includes property that can be realised to pay a dividend to creditors;
 - In bankruptcy the bankrupt must complete a Statement of Affairs.
 - reporting to creditors within 3 months of the date of the bankruptcy on the likelihood of creditors receiving a dividend before the end of the bankruptcy;
 - giving information about the bankruptcy to a creditor who reasonably requests it;
 - determining whether the bankrupt has made a transfer of property that is void against the trustee;
 - taking appropriate steps to recover property for the benefit of the creditors;
 - taking whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt's duties under the Act;
 - considering whether the bankrupt has committed an offence under either Act;

- referring to relevant law enforcement authorities any evidence of an offence by the bankrupt or director against this Act;
- administering the estate as efficiently as possible by avoiding unnecessary expense;
- exercising powers and performing functions in a commercially sound way.
- In a bankruptcy lodging a Notice of Objection to Discharge.
- Holding the passport.

26.2 Information on the property available to trustees is available as a downloadable publication titled [Assets - What happens to my assets if I go bankrupt? From the ITSA website](#).

26.3 There are a number of other provisions for the recovery of property of the bankrupt which relate to avoiding transactions during various periods prior to bankruptcy and avoiding sham transactions.

26.4 The transactions which may be voidable include-

- Execution against property of a debtor who becomes a bankrupt (Section 118), eg a sheriff's sale, garnishee on wages.
Time period: 6 months before the presentation of a petition
- Transfer of property for less than market value (Section 120) eg transferring a house to the spouse for a figure less than market value.
Time periods:
 - For transfers to related entities: 4 years before the commencement of the bankruptcy.
 - For transfers to non-related entities: 2 years before the commencement of the bankruptcy. Transfers outside these time periods may still be voidable if the transferee is unable to prove that the bankrupt was solvent at the time of the transaction and the transfer occurred up to the 5 years before the commencement of the bankruptcy.
- Transfers to defeat creditors (section 121) eg transfer for less than market value at the time debtor was insolvent to prevent creditors enforcing rights against the property. Time period: No backwards limit.
- Preferences - Transfer of property by person who is insolvent in favour of a creditor is void if the transfer gives the creditor a preference over other creditors and was made in the prescribed period (Section 122) eg payment made to one of many unsecured creditors from sale of business 2 months before bankruptcy.

26.5 Time periods: 6 months before the presentation of a creditors petition if the bankruptcy resulted from a creditor's petition, 6 months prior to presentation of the debtor's petition if the bankruptcy resulted from a debtor's petition where there was no creditor's petition pending & commencement of bankruptcy if bankruptcy resulted from a debtor's petition where a creditor's petition was pending.

26.6 The trustee is also able to recover property:

- owned by an entity that, during the 'examinable period', was controlled by the bankrupt and benefited from his or her personal services.

eg property which appears to be owned by a trust or company but has come into existence through the personal efforts of the bankrupt and in reality is beneficially owned by the bankrupt.

- owned by a natural person but which, during the 'examinable period', the bankrupt uses or derives a benefit from and either;
 - (i) the property is acquired as a direct or indirect result of the bankrupt's financial contributions; or
 - (ii) the value of the person's interest in the property increases as a direct or indirect result of the bankrupt's financial contributions (Section 139A)

eg: where a bankrupt has diverted his income to purchase a house property in his partner's name, and the bankrupt derives a benefit from living in that property. Time period: the 'examinable period' is either 4 years prior to the commencement of the bankruptcy in relation to property acquired by a related entity, or from the first point of insolvency in the year prior to that if the bankrupt became insolvent in that year. For non-related entities the 'examinable period' is either 2 years prior to the commencement of the bankruptcy, or from the first point of insolvency in the 3 years previous to that if the bankrupt became insolvent in those 3 years.

- 26.7 By far the most common areas of recovery by trustees relate to the proceeds of execution against the debtors property, preferences and S120 transfers at under value. The Official Receiver has the power to enforce the Bankruptcy Act by the issue of a statutory demand on behalf of a bankruptcy trustee in the form of a notice under section 139ZQ requiring repayment of monies equal to the value of the property received by a creditor where the Official Receiver is of the opinion that the creditor has received a preference or a transfer at less than market value.
- 26.8 The trustee of a bankrupt estate has extensive powers of enquiry and investigation. The Official Receiver usually at the request of a trustee can enforce the Act by:
- issuing search warrants providing full and free access to all premises and books for any purpose relating to the administration of a bankruptcy
 - summoning a person for the production of documents and/or to give evidence under oath relating to a bankrupts affairs.

Examples of related entities are business partners, parents, children, relatives, trustees and beneficiaries of trusts that are related to the bankrupt or the bankrupt's spouse (Section 5 Bankruptcy Act).

27. Winding Up proceedings against a corporation

- 27.1 Similar to bankruptcy proceedings against individuals, winding up proceedings are proceedings brought against judgment debtors that are companies. As with bankruptcy proceedings, winding up proceedings will generally only be brought against a company where the debt is in excess of \$10,000.00, however the statutory minimum debt is \$2,000.00 only (s459E Corporations Act)
- 27.2 The process of corporate insolvency, where a judgment debt exists, is usually by the issue and service of a Statutory Demand for payment. Such demand will set out details of the judgment including the amount, additional interest which may

have accrued, the date of the judgment and the jurisdiction in which judgment was obtained. The Statutory Demand is issued pursuant to Section 459E of the *Corporations Act 2001 (Cth)*.

- 27.3 A Statutory Demand need not be issued pursuant to a judgment provided there is a debt exceeding \$2,000.00 and the creditor swears an Affidavit verifying the debt and confirming there is no genuine dispute, a demand can then be issued.
- 27.4 The Statutory Demand requires:-
- payment within 21 days OR
 - the filing and service of an Application under 459G, 459H Corporations Act disputing the debt. This can be in the Federal Court or Supreme Court.
- 27.3 The Statutory Demand is not considered to be a means of enforcing a debt by the Court, however, on many occasions, a company will tend to comply with the requirements of a Statutory Demand as the consequences of not complying is presumed insolvency.
- 27.4 A Statutory Demand is not issued through the Court, and no fee is payable. The form of the Statutory Demand, as with the Bankruptcy Notice, is prescribed by the relevant rules, and must be strictly complied with (Form 510H Corporations Act).
- 27.5 The Statutory Demand must be served on the registered office of the company and the company has 21 days within which to comply with the Statutory Demand, by either paying the debt as outlined, by entering into an arrangement satisfactory to the judgment creditor or by making an application to the Supreme Court or Federal Court to set aside same on the basis that there is a genuine dispute as to the existence of the debt.
- 27.6 If the judgment debtor fails to comply with the Statutory Demand, the creditor is entitled to presume that the company is insolvent and proceed to issue an Originating Process in the Supreme Court or the Federal Court seeking the winding up of the company and the appointment of a Liquidator (s459A, 459C Corporations Act).
- 27.7 The Originating Process for winding up must state that the judgment debtor owes in excess of \$2,000,00 and must comply with the prescribed Court rules. The Originating Process must also be verified by an Affidavit by a relevant officer of the judgment creditor who is able to confirm that they have checked the business and financial records of the judgment creditor and can confirm that the debt remains outstanding and that the Statutory Demand has not been complied with.
- 27.8 Once the Originating Process is filed, a hearing date is allocated before the Court.
- 27.9 Within 24 hours notice to ASIC of the Originating Process must be given. This is by lodgement of an ASIC Form 519.
- 27.10 the Originating Process, Affidavit of Service of Statutory Demand, Consent of Liquidator and Affidavit in Support of the Originating Process must be served within 7 days of filing in Court and not less than 14 days before the hearing.

- 27.11 The hearing must be advertised in a local newspaper, eg if the company is registered in NSW, the Sydney Morning Herald or Daily Telegraph; if in Victoria The Age etc.
- 27.12 A Consent to Act as Liquidator must be obtained, and the proposed Liquidator must confirm there is no conflict and attach his firm fee rates.
- 27.13 At a hearing, the creditor must prove certain facts, including service of the Statutory Demand and the Originating Process, proof that the creditor has advertised that an application has been made of the winding up of the company and also that the debt remains outstanding as at the day of the hearing. If the Court is satisfied with the creditors evidence, the Court will make orders for the winding up of the company and appointing a Liquidator to manage the affairs of the judgment debtor.
- 27.14 Upon a winding up order being made, notice by Form 519 must be given to ASIC and a copy of the order lodged with ASIC and the Liquidator.
- 27.15 The Liquidator has duties prescribed by the *Corporations Act 2001 (Cth)* to investigate the affairs of the company in Liquidation. The Liquidator will make investigations with regard to payments the judgment debtor may have made to other creditors prior to the Liquidation, property which the company may own, amounts which are due to the company by its debtors, details of loans the directors of the company may have taken from the company and evidence of whether the company may have traded whilst it was insolvent. He can also recover money paid within 6 months of liquidation as a preference.
- 27.16 As with the Sequestration Order, once an order is made appointing a Liquidator the company, the judgment creditor has no entitlement to pursue the debt against the judgment debtor. A Proof of Debt is lodged in the liquidation of the company, with the Liquidator, and the creditor will be paid a dividend if the Liquidator is able to realise assets for the benefit of all creditors.

28. Useful High Court cases

Foots v Southern Cross Mine Management Pty Ltd (2007) HCA 56

The High Court determined that a costs order made against a bankrupt was not a provable debt in his bankruptcy which occurred before the costs order. Although Judgment had been given against the bankrupt the final determination of the costs had not been made. Nevertheless, after Judgment but before determination of costs the debtor filed a Debtor's Petition. He argued that the costs order was a provable debt. He lost because the costs are entirely in the discretion of the Court and is not a debt or liability from an obligation incurred prior to his bankruptcy and nor was the liability incidental to a provable debt. Because costs of a proceeding are in the discretion of the Court and are not automatically an order that "costs follow the event" and as there is no absolute rule in the respect to the exercise of power to award costs. There was no provable debt for the costs order in the bankruptcy. The creditor could make him bankrupt again.

Coventry v Charter Pacific Corporation Limited (2005) HCA 67

Only certain debts are provable in bankruptcy unless they have been converted into a Judgment debt. Only liquidated debts are provable in bankruptcy without a Judgment. Obviously goods sold and delivered claims under a guarantee claims for services rendered are such claims. However the claim in Coventry related to damages for breach of Trade Practices Act and Corporations Act by engaging in misleading and deceptive conduct in security dealings. Coventry was made bankrupt in 1994 and discharged in 1997 and in 1994 Chartered Pacific commenced the proceedings which came to hearing in 2000. Coventry unsuccessfully argued that any claim was a provable debt in bankruptcy and therefore he was not personally liable for the debt even though the cause of action arose before bankruptcy and Judgment was entered after his discharge from bankruptcy. Other issues discussed were whether, if the claim was a provable debt, leave to proceed against the bankrupt was required, even for a costs order.

Trustees of the Property of John Daniel Cummins v Cummins [2006] HCA 6

This was a claim by a Trustee against a bankrupt's former wife for part of the matrimonial home. The Trustee won in the High Court with a 13 year relation back as the bankrupt, a QC, had not paid tax for 25 years:-

"71. *The present case concerns the traditional matrimonial relationship. Here, the following view expressed in the present edition of Professor Scott's work respecting beneficial ownership of the matrimonial home should be accepted:*

"It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase."

To that may be added the statement in the same work:

*"Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them."
(footnote omitted)*

72. *That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses. There is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common. The subsistence of the matrimonial relationship, as Mason and Brennan JJ emphasised in *Calverley v Green*, supports the choice of joint tenancy with the prospect of survivorship. That answers one of the two concerns of equity, indicated by Deane J in *Corin v Patton*, which founds a presumed intention in favour of tenancy in common. The range of financial considerations and accidental circumstances in the matrimonial relationship referred to by Professor Scott answers the second concern of equity, namely the disproportion between quantum of*

beneficial ownership and contribution to the acquisition of the matrimonial home. “

29. Bankruptcy and deceased estates

29.1 In the financial year ended 30 June 2010 there were in Australia 36,506 insolvency administrations. This includes bankruptcies, Part X and Part IX Agreements. Generally bankruptcy lasts for 3 years from the date of filing of the Statement of Affairs. Contrary to popular belief that bankruptcy is only for 3 years, it can be extended by Notice of Opposition or simply by the bankrupt not filing the Statement of Affairs.

29.2 Upon bankruptcy all of the divisible assets of the bankrupt vest in the Trustee in Bankruptcy. Joint tenancies are severed. The right to have a deceased estate properly administered at law is an asset. The High Court decided in *Official Trustee in Bankruptcy v Schultz* (1990) 170 CLR 306 that:-

“15. The right which any beneficiary has in an unadministered estate springs from the duty of the executor to administer the estate, to preserve the assets and to deal with them in the proper manner. Each beneficiary has an interest in seeing that the whole of the assets are treated in accordance with the executor’s duties ...”

17. Mrs Schultz’s right to due administration arose from cl. 3(a) and (g) of the will. That right vested in the Official Receiver as soon as it vested in Mrs Schultz, since it was clearly “property” as defined in s. 5(1) of the Bankruptcy Act. It follows, from what has been said above, that the interest derived from that right also passed to the Official Receiver at that time.”

29.3 It is recommended that the following changes be incorporated into practice when dealing with a deceased estate:-

- (a) That a bankruptcy search be obtained on the deceased immediately instructions are given to act for the Executors or spouse of the deceased estate. Understandably bankruptcy is not discussed within families and if a person has become bankrupt their assets may be vested in a Trustee in Bankruptcy and not be available for distribution to the beneficiaries. Further, a Notice of Death will be unable to be lodged at the Land & Property Management Authority as the joint tenancy would have been severed and the law of survivorship would not apply.
- (b) That a bankruptcy search be obtained with respect to each beneficiary. At the minimum, such a search must be obtained prior to any distribution, in much the same way that a final search is obtained on purchase of real estate. If a beneficiary is bankrupt or has been bankrupt, then it will be necessary to contact the Trustee and pay the amount due in the deceased estate to the Trustee who will then distribute the money under bankruptcy law. Once all of the unsecured creditors, remuneration, interest and estate charges have been paid by the Trustee, any surplus will be paid to the bankrupt beneficiary.

- 29.4 It is not sufficient protection to obtain a Statutory Declaration from the beneficiary to the effect that the beneficiary has not been declared bankrupt and is not an undischarged bankrupt. This is common practice. The better practice is to conduct a bankruptcy search and have the accurate information firsthand. It is then not necessary to obtain such a Statutory Declaration.
- 29.5 Ignorance is no defence. If the Executors pay the distribution to the bankrupt, they are paying it to a third party who has no entitlement and are in breach of their duty as Trustees to properly administer the deceased estate. It is the right to have the deceased estate properly administered which vests in the Trustee in Bankruptcy.
- 29.6 The right to a proper distribution vests at the date of death. Therefore if a person is an undischarged bankrupt, at the date of death their interest in the deceased estate vests in the Trustee in Bankruptcy. Also if the date of death was prior to bankruptcy and the deceased estate is unadministered at the date of bankruptcy, then the right to a proper administration also vests in the Trustee in Bankruptcy. In other words, there is a very long lead time for the vesting in the bankrupt estate either as an asset or an after acquired asset.

30. Part XI Bankruptcy Act – administration deceased estate

- 30.1 Part XI of the Bankruptcy Act contains the provisions for the administration of insolvent estates of deceased persons.

“244. Administration of estates under this Part upon petition by creditor

(1) Subject to this section, where:

- (b) a debt of not less than \$5,000 was owing by a deceased person at the time of his or her death to a creditor, or debts amounting in the aggregate to not less than that amount were so owing to any 2 or more creditors;*
- (c) a debt incurred by the legal personal representative of a deceased person of not less than \$5,000 is owing to a creditor, or debts so incurred amounting in the aggregate to not less than that amount are owing to any 2 or more creditors; or*
- (d) a debt of not less than \$5,000, or debts amounting in the aggregate to not less than that amount, which a deceased person would have been liable to pay to a creditor or any 2 or more creditors if he or she had not died becomes or become owing after his or her death;*

*the creditor or creditors to whom the debt or debts is or are owing may present a petition to the Court for an order for the administration of the estate of the deceased person (in this section referred to as **the deceased debtor**) under this Part.*

- (10) The Court may, if it is satisfied that there is no legal personal representative of the deceased debtor and that there are special circumstances that justify its so doing, by order dispense with service of the petition, either unconditionally or subject to conditions.*
- (11) At the hearing of the petition, the Court shall require proof of:*
 - (a) the matters stated in the petition (for which purpose the Court may accept the affidavit verifying the petition as sufficient);*

(b) *service of the petition, unless service of the petition has been dispensed with; and*

(c) *the fact that the debt or debts to which the petition relates is or are still owing;*

and if it is satisfied with the proof of those matters, may make an order that the estate be administered under this Part.

(12) *If the Court is not satisfied with the proof of any of those matters or is of the opinion that for other sufficient cause the order sought ought not be made, it may dismiss the petition.*

(13) *Where proceedings have been commenced in a court for the administration of a deceased person's estate under a law of a State or Territory, a petition for an order under this section in relation to the estate shall not be presented by a creditor except by leave of the Court and on such terms and conditions (if any) as the Court thinks fit.*

30.2 The advantage to Executors in administering insolvent deceased estates in bankruptcy is that the Executor is not personally liable for any alleged maladministration of the deceased estate.

30.3 See *Owners of Strata Plan 1915 v Estate of Edwin John Strang* [2010] FMCA 967. The deceased estate had not been administered for 5 years and the Court considered it in the public interest for the deceased estate to be placed in administration under Part XI.

31. Bankruptcy and vesting of property

31.1 The bankrupt's interest in a deceased estate vests under s58 of the Bankruptcy Act either:

"58(1)(a) *forthwith when the debtor becomes a bankrupt; and*

(b) *after-acquired property of the bankrupt vests, as soon as it acquired by or devolves on, the bankrupt ..."*

31.2 The property which vests is not the property owned by the deceased. The property is a chose in action being the right to have the deceased estate properly administered.

31.3 The High Court held in *Official Trustee in Bankruptcy v Schultz* (1990) 170 CLR 306 that:-

"15. *The right which any beneficiary has in an unadministered estate springs from the duty of the executor to administer the estate, to preserve the assets and to deal with them in the proper manner. Each beneficiary has an interest in seeing that the whole of the assets are treated in accordance with the executor's duties ..."*

17. *Mrs Schultz's right to due administration arose from cl. 3(a) and (g) of the will. That right vested in the Official Receiver as soon as it vested in Mrs Schultz, since it was clearly "property" as defined in s. 5(1) of the Bankruptcy Act. It follows, from what has been said above, that the interest derived from that right also passed to the Official Receiver at that time."*

- 31.4 These definitions of property and this case were recently considered and again adopted by the High Court in *Kennon v Spry; Spry v Kennon* [2008] HCA 56. Although a family law case it is interesting to consider the widening definition of “property”.
- 31.5 The debts, funeral and testamentary expenses must first be paid, before the beneficiaries can receive their interest in the deceased estate.
- 31.6 Therefore the property which is vested in the Trustee in Bankruptcy is the entitlement to have the deceased estate property administered. If there is a Will, this is easily resolved. The Will will identify if the bankrupt is a beneficiary and name the Executor who should administer the deceased estate.
- 31.7 The determination of deceased estates is governed by the Succession Act, 2006 (since 1 March 2008) and the Probate & Administration Act, 1898 (previously the Wills, Probate & Administration Act), Succession Amendment (Family Provisions) Act, 2008 (since 1 March 2009).
- 31.8 Until the Will is administered, personal and real property of the deceased is vested in the Public Trustee. This vesting occurs whether or not there is a Will.

32. Bankruptcy and joint tenancy

- 32.1 If property is owned jointly, then on death it vests in equity in the other joint owner. It becomes vested in law once the requirements of the joint ownership are met in each State.

Example

- 32.2 A husband and wife own a house as joint tenants. The husband dies. His interest vests in equity in his wife. In New South Wales the legal title is transferred by a form of Notice of Death being lodged at the Land Titles Office and there is no need to obtain a Grant of Probate. If the wife then goes bankrupt her interest vests in the Trustee in Bankruptcy and there is no need for Probate. The Trustee in Bankruptcy takes the property without the need to administer the deceased estate by transmission and the filing of a BAP.
- 32.3 Upon bankruptcy a joint tenancy is severed and the bankrupt’s interest is vested in the Trustee in Bankruptcy and may be transmitted by filing a Bankruptcy Application form at the LPI. If bankruptcy intervenes prior to death the Trustee in Bankruptcy retains the bankrupt’s ½ interest but the law of survivorship no longer applies to the real property.

33. Succession Act, 2006 – Family provisions orders

- 33.1 In New South Wales the eligible persons under s57 Succession Act, 2006 being an aggrieved beneficiary can make a claim from the deceased estate for a greater share because of illness, education, inequality of treatment or for other sufficient cause. The matters to be considered by the Court are set out in s60 of the Succession Act.

33.2 This is a personal right and does not vest in the Trustee in Bankruptcy. Even if the deceased either died before or during the bankruptcy, the Succession Act interest is a personal right. However if exercised, either before or during the bankruptcy such as to give an increased interest in the deceased estate that interest vests in the Trustee in Bankruptcy.

33.3 The Trustee in Bankruptcy cannot make a claim for a greater percentage of the deceased estate. If the death is before or during bankruptcy and the bankrupt is then discharged from bankruptcy and brings a claim, that claim is personal to the bankrupt and does not vest in his Trustee in Bankruptcy.

34. Bankruptcy and family law issues

34.1 Section 79 Family Law Act states:-

“Alteration of property interests

(1) *In property settlement proceedings, the court may make such order as it considers appropriate:*

(a) *in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or*

(b) *in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage--altering the interests of the bankruptcy trustee in the vested bankruptcy property; including:*

(c) *an order for a settlement of property in substitution for any interest in the property; and*

(d) *an order requiring:*

(i) *either or both of the parties to the marriage; or*

(ii) *the relevant bankruptcy trustee (if any);*

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

(10) *The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the **subject marriage**):*

(a) *a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;*

(aa) *a person:*

(i) *who is a party to a de facto relationship with a party to the subject marriage; and*

(ii) *who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;*

(ab) *a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;*

(b) *any other person whose interests would be affected by the making of the order.*

(10A) *Subsection (10) does not apply to a creditor of a party to the proceedings:*

(a) *if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the Bankruptcy Act 1966); or*

(b) *if the party is a debtor subject to a personal insolvency agreement--to the extent to which the debt is covered by the personal insolvency agreement.*

(10B) If a person becomes a party to proceedings under this section because of paragraph (10)(aa), the person may, in the proceedings, apply for:

- (a) an order under section 90SM; or
- (b) a declaration under section 90SL;

in relation to the de facto relationship described in that paragraph.

(11) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage:

- (i) when the application was made, the party was a bankrupt;
- (ii) after the application was made but before it is finally determined, the party became a bankrupt; and

(c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings; the court must join the bankruptcy trustee as a party to the proceedings.

(12) If a bankruptcy trustee is a party to property settlement proceedings, then, except with the leave of the court, the bankrupt party to the marriage is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(13) The court must not grant leave under subsection (12) unless the court is satisfied that there are exceptional circumstances.

(14) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage (the **debtor party**):

(i) when the application was made, the party was a debtor subject to a personal insolvency agreement; or

(ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and

(c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings; the court must join the trustee of the agreement as a party to the proceedings.

(15) If the trustee of a personal insolvency agreement is a party to property settlement proceedings, then, except with the leave of the court, the party to the marriage who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.

(16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.

(17) For the purposes of subsections (11) and (14), an application for an order under this section is taken to be finally determined when:

(a) the application is withdrawn or dismissed; or

(b) an order (other than an interim order) is made as a result of the application."

34.2 Coleman J in *Lemnos v Lemnos* [2009] FAMC 20 had this to say in relation to bankruptcy and family law:

“96 There is no legislative provision which expressly or impliedly constrains the Court from making orders with respect to “property”. Common sense and experience suggests that there will be many cases in which alterations to parties’ interests in property will be appropriate or necessary notwithstanding that the parties have unsecured liabilities which may exceed the parties’ total equity in such property. Subject to s90AE(3)(b), I perceive there to be no legislative impediment to the making of property settlement orders in such circumstances.

97. Accordingly, in cases where there is “property” of the parties to the marriage or either of them, the effect of the 2005 amendments is that the Court has jurisdiction to make orders which have an adverse impact upon unsecured creditors. In this regard, the term “property” includes property vested in the trustee of a bankrupt spouse.”

34.3 It is important in this context to also recognise what Coleman J. said:

“61. On a proper construction of the legislation, I conclude that the reconciliation of the conflicting rights of unsecured creditors of the bankrupt and the rights of the bankrupt’s spouse involves the exercise of discretion. That discretion is clearly exercised by reference to the facts as found, and the relevant provisions of the FLA.

99.the effect of the insertion of s79(1)(b) in the FLA is that the interests of unsecured creditors do not automatically “trump” the interests of the non-bankrupt spouse and that the legislation now requires the Court to balance their competing claims in the exercise of the wide discretion conferred upon the Court by s79.”

34.4 The jurisdiction concerning the change in law bringing about the amendment from 18 September 2005 whereby the Trustee in Bankruptcy is treated as a party to the marriage was considered in two decisions being

a) *Zachary v Zachary & Ors* (2008) FMCA Fam 1209 in which it was found that a bankruptcy which occurred before the amending legislation was not caught by the amending legislation.

b) *Etrard & Etrard and Ors* [2009] FamCA 167 where it was found the bankruptcy which occurred after the commencement of proceedings and after the commencement of the legislation was also not caught by the current amendments, where the Family Law proceedings commenced before these events.

34.5 The Full Court of the Family Court in two recent Judgments considered the history of the Family Law/Bankruptcy amendments. In *Commissioner of Taxation v Worsnop & Anor* (2009) FAMAFC the Full Family Court determined that the Deputy Commissioner of Taxation had the right to intervene in Family Court proceedings as a creditor but that such intervention gave the Deputy Commissioner of Taxation no greater rights than any other unsecured creditor. By analogy, any creditor can

seek to intervene in the Family Court proceedings. Obviously such intervention would be at the creditors own risk as to costs and as to how that creditor is to be treated. There is no law which states that creditors are to be given a priority.

- 34.6 A bankruptcy of a husband and the effect of the intervention of a bankruptcy was considered by the Full Court of the Family Court in *Trustee of the property of G Lemnos, a bankrupt and Lemnos v Lemnos (2009) FAMCAFC 20*. The appeal in that matter was upheld. The husband had claimed substantial and improper tax deductions over many years which far exceeded the net equity in the matrimonial home. He was made bankrupt because of his unpaid taxes. The real property was registered solely in the name of the husband. At first instance the trial Judge granted to the wife a 50% interest in the house registered to the husband as matrimonial property. On appeal the Court determined that the trial Judge erred in exercising his discretion in considering the circumstances of the acquisition and maintenance of the property. The wife asserted that the husband should be seen as having wasted assets in the sense of *Kowaliw* and that the husband's tax losses incurred by him should not be attributed to the matrimonial property but should solely be attributed to the husband because he acted recklessly and negligently in filling out his income tax returns thereby occasioning the loss. The Trustee in Bankruptcy asserted that the creditors of the bankrupt should be paid in first priority out of the bankrupt's assets and only after determination of the net assets of the bankrupt should allowance be made for determining the matrimonial assets. The matter has not finally been determined because the appeal was allowed and further submissions were sought for the form of orders.
- 34.7 In summary unless both the Bankruptcy and the Family Law application have both commenced after the amending legislation on 18 September 2005 the new provisions will not apply.
- 34.8 The trustee in Bankruptcy stands in the shoes of the bankrupt. All too often the Trustee regards itself only as standing in the shoes of the creditors.
- 34.9 Under the new regime the Trustee is involved in the family law dispute between the husband and wife. Often the bankruptcy may occur close to a hearing already allocated by the Court.
- 34.10 The Trustee is now joined to a family law dispute under s79 Family Law Act and the following items are taken into account under s75 Family Law Act.
- 34.11 In the *Commissioner of Taxation & Worsnop & Anor [2009] FamCAFC4* judgment the Full Court dealt with applications made by the Deputy Commissioner of Taxation in effect seeking some level of priority which might not otherwise be available. The determination of the Court was that an unsecured creditor who sought to intervene in proceedings between parties to a marriage under Section 79 of the *Family Law Act 1975* gained no priority vis-à-vis its position in connection with other creditors in respect of any particular order that might be made. What was required of the Court was to determine the application as provided for under Section 79 of the *Family Law Act 1975* exercising relevant discretionary powers for "just and equitable" apportionment of property having regard to the statutory criteria provided for under Section 75 and under Section 79 of the *Family Law Act 1975*.

- 34.12 There can be no doubt about that proposition having regard to the structure of the *Family Law Act 1975* and the *Bankruptcy Act 1966* following upon the commencement of operation of the amendments. The power to in effect (from a bankruptcy viewpoint) take “property” off a trustee in bankruptcy and for it to be removed from power of distribution amongst ordinary unsecured creditors, has been specifically given by the legislation to the Family Court of Australia/Federal Magistrates Court of Australia exercising jurisdiction under the *Family Law Act 1975*. Parliament clearly intended as is reflected in the legislation to take away the prior conundrum under which property vested in a trustee of the property of a bankrupt ceased to be available for distribution/apportionment in accordance with the exercise of powers under Section 79 of the *Family Law Act 1975*.
- 34.13 It is fair to say that Trustees in Bankruptcy do not wish to be embroiled in a Family Court dispute and are happy to resolve issues as quickly as possible.