

New Zealand Law Society

Submission on Insolvency Amendment Bill

General

1. The reforms proposed in the bill represent, for the most part, policy decisions, on which the Society does not take a position.

Clause 4 – New Sections 204 and 205 substituted

2. The proposed provisions are, generally, more favourable to the Official Assignee and creditors than the balance in the current legislation.
3. A donee might argue that the opportunity to prove solvency in proposed new s 205(2) should extend to gifts in the period up to 2 years prior to adjudication. This might be thought logical, given that a donee who receives a gift in the period beginning 2 years before adjudication and ending 5 years before adjudication can challenge a cancellation of the gift by showing that the bankrupt was solvent at any time up to adjudication.
4. The explanatory note at p 11 refers to the “*long standing presumption that a debtor is technically insolvent over a certain period of time before formal insolvency is preserved*”. However, this is only a presumption for the convenience of the Official Assignee. A debtor may become insolvent only during the 2 year period. There is no reason in principle why a donee should not be given an opportunity to prove that he or she received a gift before the debtor became insolvent.

Recommendation

5. That consideration is given to whether the proposed revision strikes the correct balance between creditors’ and donees’ interests.

Absence of definition of ‘gift’

6. The 2006 Act does not define “*gift*”. This may be problematic.

7. Section 54(6) of the Insolvency Act 1967 defined ‘gift’, for the purposes of the voidable gift provisions in s54, to mean “*any disposition made otherwise than in good faith and for valuable consideration*”. As a consequence, it was not necessary to prove an intention to make a gift, which is a requirement of gifts at general law. Arguably, under the Insolvency Act 2006 it would be necessary to prove an intention to make a gift, assuming “*gift*” is given its sense under general law.
8. The significance of the point is illustrated by *Robertson (as Trustee of the G & A Fisher Family Trust v. The Official Assignee* [2008] NZCA 500, which was decided under the 1967 Act. In that case, there was no intention to make a gift because the debtor understood that the share proceeds were already the property of the trust. The payment of the share proceeds to the trust was, nevertheless, a gift for the purposes of s54 by virtue of subsection (6). It would not have been a gift at general law.

Recommendation

9. That consideration should be given to introducing a definition of “*gift*”, as in the 1967 Act.

Non-application of voidable gift provisions to no asset procedure (NAP)

10. The explanatory note at p3 records that the insolvent gift provisions do not apply to people in the NAP but suggests this is mitigated by the fact that the Official Assignee may be able to terminate the NAP if the Official Assignee “is satisfied, on reasonable grounds that – a) the debtor has concealed assets with the intention of defrauding his or her creditors ” (Insolvency Act 2006, s364(a)).
11. Most gifts would not fall within s364(a). Further, arguably, even transfers to trust will be caught only where an intention to defraud creditors can be proved.

Recommendation

12. That consideration be given to the question of whether and how the voidable gift provisions should apply to the NAP.

Clause 8 – New section 377A inserted

13. Section 375 of the 2006 Act provides that: “*Except in the case of termination by discharge under section 377, the debtor's debts that became unenforceable on the debtor's entry to the no asset procedure become again enforceable on termination of the debtor's participation in the no asset procedure.*” (emphasis added)
14. The literal effect of the proposed repeal of s377(2) and introduction of the proposed new s377A is that the debts identified in s377A(2) are not cancelled but remain unenforceable, since s375 does not apply to them.

Recommendation

15. That subsection 377A be amended by:
- inserting the words “*Subject to subsection (2)*” at the beginning of subsection (1);
 - and
 - substituting the words “*the following debts are not cancelled and become enforceable on discharge under section 377*” for the words “*subsection (1) does not apply to*” in subsection (2).

Clause 11 – New section 449A inserted

16. Under the proposed new s449A information will be kept permanently for those who have been bankrupted twice or bankrupted and discharged from the no asset procedure. A debtor might argue that this is excessive, given the stated policy objective of rehabilitation and the debtor’s privacy interests. While it appears from the explanatory note that these points have already been taken into account, concerns remain as to whether the right balance has been struck.