

# Insolvency Law Reform Bill

5 December 2005

Attorney-General

## LEGAL ADVICE

### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: INSOLVENCY LAW REFORM BILL

1. We have considered whether the Insolvency Law Reform Bill ("the Bill") (PCO 5106/10) is consistent with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). We understand that the Bill is likely to be considered by the Cabinet Business Committee on 12 December 2005.
2. Our view is that the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act. In reaching this preliminary conclusion, we considered potential issues of inconsistency with sections 14, 18, 19, 21, 25(c), and 26(1) of the Bill of Rights Act.
3. The Bill repeals and replaces the Insolvency Act 1967, which deals with personal insolvency, and introduces a new procedure for personal debtors.
4. The Bill also creates a new business rehabilitation regime. The overall objectives of the Bill are to provide orderly and fair procedures for realising assets of a bankrupt and distributing funds to her or his creditors, and to provide the bankrupt with a "fresh start" by cancelling any remaining debts. For example, the Bill:
  - provides for the application by a debtor for her or his own adjudication to the Official Assignee (the "Assignee");
  - modernises the provisions for creditors' meetings; and
  - provides for dealing with property acquired by the bankrupt after the commencement of bankruptcy.

## SUMMARY OF THE BILL OF RIGHTS ACT ISSUES

5. Below is a summary of how the issues of inconsistency with sections 14, 18, 19, 21, 25(c), and 26(1) of the Bill of Rights Act arise. A more detailed analysis of these issues follows this summary.
6. Several clauses in the Bill require the debtor or bankrupt and other persons to attend an examination conducted by the Assignee. These clauses give rise to an issue under section 14 of the Bill of Rights Act (right to freedom of expression) because they compel an individual to provide information.

7. The Bill contains three clauses that place criminal or civil sanction on a debtor or bankrupt should they prepare or attempt to leave, or leave New Zealand (or remain overseas). This has the effect of limiting or restricting a debtor or bankrupt's ability to leave New Zealand which gives rise to an issue under section 18(3) of the Bill of Rights Act (everyone has the right to leave New Zealand).
8. We considered whether an issue with the right to be free from discrimination as affirmed by section 19(1) of the Bill of Rights Act arises in the Bill. Some clauses require a bankrupt's spouse, partner, or a family member to do (or refrain from doing) certain things due to their relationship with the bankrupt, potentially giving rise to a *prima facie* issue of discrimination on the grounds of family status.
9. The Bill empowers the Assignee to search documents, compel the production of documents and information, and to seize property and assets to reimburse creditors. These powers give rise to an issue under section 21 of the Bill of Rights Act (the right to be free from unreasonable search and seizure).
10. The Bill contains several reverse onus offences and some presumptions that a defendant must rebut to escape liability. These clauses give rise to an issue under section 25(c) of the Bill of Rights Act (right to be presumed innocent until proved guilty). In addition, several offences contained in the Bill apply to activities that occur in the years prior to a person being adjudicated bankrupt. These offences would apply retroactively to activities prior to the Bill coming into force as an Act, and therefore give rise to an issue under section 26(1) of the Bill of Rights Act (protection against retroactive offences).
11. Where an issue arises, a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. We have reached the conclusion that, upon consideration of these issues under section 5 of the Bill of Rights Act, the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

#### **SECTION 14: FREEDOM OF EXPRESSION**

12. Section 14 of the Bill of Rights Act provides:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form.

13. The right to freedom of expression in section 14 has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>[1]</sup>
14. The Bill contains several clauses that compel an individual to provide information, which gives rise to *prima facie* inconsistency with section 14 of the Bill of Rights Act. In particular, some clauses require the debtor or bankrupt, the bankrupt's spouse, partner,<sup>[2]</sup> or other relevant third parties to attend an examination by the Assignee, and be compelled to answer questions. The relevant clauses are:

- clause 141(c) and (d) - Bankrupt must give Assignee information relating to property;
- clause 163(1)(a) - Assignee may summon bankrupt and others to be examined;
- clause 168 - Examination provisions also apply when Assignee appointed receiver and manager of debtor's property;
- clause 175 - Conduct of examination; and
- clause 180 - Assignee may examine company documents, personnel, and shareholders.

15. Where an issue arises, a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold:

i whether the provision serves an important and significant objective; and

ii whether there is a rational and proportionate connection between the provision and that objective.<sup>[3]</sup>

16. The objective of these provisions is to enable the Assignee to obtain further information for the proper administration of the bankruptcy, where the information supplied by the bankrupt is insufficient.

17. We consider that in these circumstances it is reasonable for the Assignee or the Courts to have the powers of examination to gather additional information and check information supplied by debtors and bankrupts, because the process of determining their financial positions requires strong safeguards to ensure that it is not abused (for example, by debtors who seek to hide their assets). We also consider it important that the decisions taken by the Assignee or the Courts are based on accurate information.

18. In our view there is a rational and proportionate connection between the objective and the means used to achieve the objective. In forming our view, we have noted that these powers of examination are subject to various safeguards. Examinations must be recorded in writing and the information obtained during this process is not to be used for any other criminal proceedings, unless the proceedings relate to charges of perjury, or the offence of making false or misleading statements or failure to answer questions (clause 434). In addition, the subject-matter of the examination is confined to matters relating to the bankrupt's property, conduct, and dealings (clauses 163 and 175 and 180 refer).

19. We, therefore, conclude that the limitation these clauses place on the right to freedom of expression is justified.

## **SECTION 18: FREEDOM OF MOVEMENT**

20. Section 18 of the Bill of Rights Act affirms the right to freedom of movement within New Zealand, including the right to leave New Zealand (section 18(3)).
21. The Bill proposes to enact three clauses which impact on a debtor or bankrupt's ability to enter and leave New Zealand:
- clause 20 - Departure from New Zealand;
  - clause 420 - Offence in relation to Leaving New Zealand; and
  - clause 427(1)(f) - Summary offences.
22. These clauses place criminal or civil sanction on a debtor or bankrupt should they prepare or attempt to leave, or leave New Zealand. This has a chilling effect on a debtor or bankrupt's ability to leave New Zealand which gives rise to an issue under section 18(3) of the Bill of Rights Act.
23. Where an issue arises, a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of the Bill of Rights Act.[\[4\]](#)

### **Clause 20 - Departure from New Zealand**

24. Clause 20 (Departure from New Zealand) provides that a debtor commits an act of bankruptcy if the debtor prepares to leave, attempts to leave, or leaves New Zealand (or remains overseas) with the intent of defeating or delaying her or his creditors. If a debtor breaches clause 20 then he or she can be adjudicated bankrupt as the debtor is deemed to have committed an act of bankruptcy.
25. The important objective behind this clause is to enable creditors to apply to have the debtor adjudicated bankrupt in an effort to recover some or all of the debt owed and to deter debtors from fleeing their financial responsibilities. The Ministry of Economic Development (MED) has advised that in most cases it is extremely difficult for creditors to recover debts from debtors outside of New Zealand, and yet relatively easy for debtors to travel or emigrate, taking realisable assets with them, in order to avoid their creditors.
26. In our view, this clause is a rational and proportionate response to the problem as it only applies to situations where the debtor is intending to defeat or delay his or her creditors. Furthermore, a debtor leaving with that intent is merely deemed by the Bill to have committed an act of bankruptcy which may lead to the debtor being adjudicated bankrupt - the clause does not prevent a debtor from leaving New Zealand.
27. On balance, we consider that the limitation clause 20 places on the right to leave New Zealand as affirmed in section 18(3) of the Bill of Rights Act is justified.

## **Clause 420 - Offence in relation to Leaving New Zealand and**

### **Clause 427(1)(f) - Summary Offences**

28. Clause 420 (Offence in relation to leaving New Zealand) makes it an offence for a bankrupt to prepare or attempt to leave, or leave New Zealand (either temporarily or permanently) and take with her or him property to the value of \$1000 or more that ought, by law, to be divided among the creditors. In addition, it will be an offence for a bankrupt to leave or prepare to leave New Zealand within three years of being adjudicated bankrupt without the permission of the Assignee (clause 427(1)(f) - Summary offences).
29. These offences are aimed at preventing abuse of the bankruptcy procedures in the Bill by a bankrupt, and in particular the following mischiefs:
- the bankrupt travelling to avoid delivering property or information to the Assignee, or otherwise avoiding compliance with any obligation relating to bankruptcy;
  - the bankrupt removing assets from New Zealand or accessing property located overseas with the intention of preventing the Assignee from recovering that property;
  - the bankrupt funding travel with money that has been vested in the Assignee or could otherwise be applied to repaying creditors; and
  - the bankrupt travelling when that would otherwise prejudice administration of the bankruptcy.

These offences serve a significant and important objective of preventing abuse of the bankruptcy process by a bankrupt.

30. We consider that these clauses appear to be a rational and proportionate means of achieving the objective as they only apply to situations where a bankrupt is abusing the bankruptcy process (for example by failing to get the consent of the Assignee, or defeating his or her creditors by removing assets and money from New Zealand). A bankrupt is able to leave New Zealand where she or he is not taking property which ought to be divided among creditors, or with the permission of the Assignee, and an Assignee cannot unreasonably withhold consent. Furthermore, a bankrupt can appeal the Assignee's decision under clause 224 (Appeal from Assignee's decision).
31. We consider that the limitations clauses 420 and 427(1)(f) place on the right to leave New Zealand as affirmed in section 18(3) of the Bill of Rights Act are reasonable.

### **SECTION 19(1): RIGHT TO BE FREE FROM DISCRIMINATION (Revised)**

32. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include family status, which encompasses:

- being married to, or being in a civil union or de factor relationship with, a particular person; or
- being a relative of a particular person.

33. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:

Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?

Does the distinction involve disadvantage to one or more classes of individuals?

34. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue of "discrimination" under section 19(1) of the Bill of Rights Act. As noted above, where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.<sup>[5]</sup>

35. Some clauses in the Bill require a debtor's or bankrupt's spouse,<sup>[6]</sup> partner, or relative to do (or refrain from doing) certain things due to their relationship with the bankrupt. For example, the clauses may require a spouse, partner, or relative to be a witness or deliver documents, or prohibit the debtor or bankrupt from entering into financial or business arrangements with these people:

- clause 150 - Bankrupt must vacate land or buildings if required to do so;
- clause 163 - Assignee may summon bankrupt and others to be examined;
- clause 180 - Assignee may examine company documents, personnel, and shareholders; and
- clause 297 - Court may restrict bankrupt from engaging in business after discharge.

These provisions appear to give rise to issues under section 19(1) of the Bill of Rights Act.

#### **Realisation of assets: clauses 150, 163, and 180**

36. Clause 150 (Bankrupt must vacate land or buildings if required to do so) creates a distinction between the relatives of a bankrupt and other persons occupying land or buildings vested in the Assignee. The clause provides that the bankrupt and her or his relatives may be vacated by the Assignee, but it does not extend to other occupiers. MED advise that the distinction is required because tenancy legislation, used by the Assignee to vacate ordinary tenants from buildings etc, is unlikely to apply to a bankrupt's family members. Given the outcome to parties is the same, regardless of whether they are ordinary tenants or family members, we do not consider that this clause gives rise to an issue of *prima facie* discrimination.

37. We understand from MED that the distinction drawn in clauses 163, and 180 follows past instances where debtors or bankrupts have used a spouse, partner, or relative (with or without their knowledge) to hide assets to prevent their future distribution to creditors, or to circumvent the bankruptcy regime. In effect, these clauses create a presumption of knowledge (in the same way as a business partner may be presumed to have certain knowledge) and on this basis the clauses require family members to participate in the bankruptcy procedure. Despite this distinction, we do not consider that the clauses themselves give rise to material disadvantage. They enable the Assignee to exercise a presumption; once this is exercised the family member receives the same treatment as any other party to proceedings.
38. We considered an additional question of whether these clauses of this Bill have the effect of placing a family member under suspicion or exposing her or him to potential prejudice by virtue of being a spouse, partner, or relative of the bankrupt, regardless of their role in the bankrupt's affairs. We have concluded that any such prejudice would flow from the stigma that attaches to bankruptcy, rather than the clauses themselves. However we note for completeness that should a spouse or partner receive less favourable treatment, for example, in the provision of goods or services (whether from the private or public sector) because his or her partner is a bankrupt - then that treatment (whether by virtue of a statutory provision in an enactment other than this Bill, or a business' credit policy) could become the subject of a complaint and fall to be considered under the Human Rights Act 1993.
39. To conclude, in our view, the differential treatment in these clauses does not itself give rise to material disadvantage for a family member; therefore, these clauses do not give rise to a *prima facie* issue of discrimination on the grounds of family status.

#### Clause 297 - Court may restrict bankrupt from engaging in business after discharge

40. Clause 297 empowers the Court to prohibit a bankrupt from being employed by a relative or an organisation managed or controlled by a relative. The objective behind the clause is to prevent a discharged bankrupt from managing a business in circumstances where they may not be the right person to do so, (eg: where they have been convicted of serious fraud). To avoid the risk of a bankrupt attempting to circumvent this objective (ie: by putting family members in positions of ostensible control while running the business from "behind the scenes"), the provision extends to situations in which the bankrupt is being employed by a relative of the bankrupt.
41. This clause is a rational and proportionate response to the problem as it does not provide a blanket prohibition. Instead the Court's discretion would be exercised on a case by case basis. In deciding whether such applications should be accepted, the Court would have regard to the interests of the community and of creditors.
42. We consider the limitation clause 297 places on the right to be free from discrimination as affirmed in section 19(1) of the Bill of Rights Act is justified.

## SECTION 21: RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH AND SEIZURE

43. Section 21 provides:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.

44. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

### Searches

45. The requirement to produce documents under statutory authority constitutes a search for the purposes of section 21 of the Bill of Rights Act.[\[7\]](#)

46. Several clauses require the debtor or bankrupt to provide information and documents to the Assignee relating to the debtor or bankrupt's property, creditors and debtors, financial records, and personal information:

- clauses 64(1)(b), 140, 141, 142, 143, 144, 163(1)(b), 169, and 340[\[8\]](#) empower the Assignee or administrator to compel the bankrupt or debtor, their spouse or partner, and any other person to provide relevant books, records, documents and information to the Assignee or the administrator;
- clause 100 (Creditors' right to inspect documents) allows creditors and their agents to inspect and take copies of certain documents belonging to the bankrupt;
- clause 148 (Warrant to search for and seize bankrupt's property) allows the Court to grant the Assignee or any other person a search warrant if there is reason to believe that there is concealed property in a particular locality; and
- clause 180 (Assignee may examine company documents, personnel, and shareholders) allows the Assignee to examine company documents.

47. The objective of these provisions is to assist the Assignee in gaining access to accurate information about the debtor's or bankrupt's affairs, assets, and property to assist in the repayment of creditors and where necessary the realisation of assets for this purpose.

48. We are of the view that there is a rational and proportionate connection between the provisions listed above and the objective of the bankruptcy regime. The Assignee needs the power to require the debtor or bankrupt and others to provide documents and other information in order to ensure that she or he has full and accurate information for carrying out the role. Without disclosure to the Assignee, dishonest bankrupts could attempt to hide their assets and honest bankrupts would not have the same opportunity to improve their financial position.



49. We also consider the requirement for the bankrupt to disclose property that she or he has acquired (whether before or after adjudication) is reasonable. This information is essential for the Assignee to determine how the realisation of assets should proceed.
50. We note that the Assignee must obtain a warrant from the Court in order to physically search for and seize the bankrupt's relevant property or documents relating to the bankrupt's property or affairs. It is our view that the warranted search power is reasonable, as the Court must be satisfied, on reasonable grounds, that relevant property is being concealed in order to issue the search warrant.
51. In addition, the Assignee's search powers are subject to the following further checks and balances:
- the documents that individuals may be compelled to provide to the Assignee only relate to the bankrupt's 'conduct, dealings or property';[\[9\]](#) and
  - the bankrupt has a right to inspect and copy various documents held by the Assignee, including the bankrupt's accounting records, statement of affairs, answers to prescribed questions, and records of oral examinations.[\[10\]](#)
52. We, therefore, conclude that these provisions do not constitute unreasonable searches in terms of section 21 of the Bill of Rights Act.

## Seizures

53. Several clauses in the Bill provide for the Assignee to seize the bankrupt's property:
- clauses 50(3), 64(1)(e), 99, 106, 114, 122, 124, 135, 138, 139, 149, 209, 210, 211 and 216[\[11\]](#) provide for the Assignee to take possession of property, vest the bankrupt's property in the Assignee, allow the Assignee to receive money from the bankrupt pursuant to a Court order, provide for seizure and sale of the bankrupt's real and personal property and for the recovery of money from third parties; and provide for the remuneration of an expert to assist the Assignee; and
  - clauses 111 and 205[\[12\]](#) respectively allow a purchaser to acquire good title to the debtor's property, and allow the Court to make an order to re-transfer the property of the bankrupt on the cancellation of an irregular transaction.
54. The objective behind these clauses is to permit the transfer of the bankrupt's property to the creditors in order to discharge the debts. The Assignee acts as a neutral intermediary in these situations. Without vesting the property in the Assignee (a fundamental aspect of the insolvency regime), creditors would be required to take individual action against debtors to get paid. The Assignee's power to seize property is essential in order to facilitate the realisation of the bankrupt's assets.

55. These powers of seizure are rationally connected to the policy objective of enabling the discharge of the bankrupt's debts. We have formed the view that the seizure powers are a proportionate means to achieve the policy objective. In forming this view, we note that the seizure powers are subject to the following checks and balances:

- the Assignee must obtain a warrant from the courts in order to physically search for and seize the bankrupt's relevant property or documents relating to the bankrupt's property or affairs (clauses 148 and 149);
- while the bankrupt's property vests in the Assignee, the bankrupt is allowed to keep basic necessities such as tools of trade and household effects in some circumstances (clause 157 - Bankrupt may retain certain assets with consent of creditors);
- if there is any surplus money left after the Assignee has repaid creditors, it must be paid to the bankrupt (clause 279 - Payment of surplus to bankrupt).
- a transaction between a third party and the bankrupt is valid where the third party dealt with the bankrupt in good faith, gave valuable consideration and the transaction was completed without the intervention of the Assignee (clause 111).

56. We, therefore, conclude that these provisions do not constitute unreasonable seizures in terms of section 21 of the Bill of Rights Act.

#### **SECTION 25(c): PRESUMPTION OF INNOCENCE**

57. Section 25(c) provides:

Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.

58. This means that an individual must not be convicted where reasonable doubt as to her or his guilt exists, meaning the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the defendant is guilty. Reverse onus offences and presumptions give rise to an issue of inconsistency with section 25(c) because the defendant is required to *prove* (on the balance of probabilities) the defence (or disprove a presumption) to escape liability; whereas, in other criminal proceedings a defendant must merely *raise* a defence in an effort to create reasonable doubt. Where a defendant is unable to prove the defence (or disprove a presumption), then she or he could be convicted even though reasonable doubt exists as to her or his guilt.

59. The Bill contains several reverse onus offences and some presumptions that a defendant must rebut to escape liability. As noted above, where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.<sup>[13]</sup> Our analysis of these offences is set out below.

## Reverse onus offences - Defences

### *Defences of informing the creditor of the debtor or bankrupt's financial position*

60. Clause 355 (Offence of obtaining credit) of the Bill makes it a summary offence for a debtor who is subject to a summary instalment order to incur further debts of more than \$100 either alone or jointly with another person, to obtain credit for another person or enter into a hire purchase agreement. It is a defence, under clause 355(2), if the debtor can prove that she or he informed the person giving the credit that the debtor was affected by a summary instalment order.
61. Clause 427(1)(g) (Summary offences) makes it an offence for an undischarged bankrupt to obtain credit alone or jointly with another person or to incur liability to any person for the purpose of obtaining credit for another person. It is a defence, under section 428 (Defences to summary offences of obtaining credit) if the bankrupt can prove that the person giving the credit was informed that the person incurring the liability was an undischarged bankrupt.
62. The objective of these provisions is to deter and prevent the debtor or bankrupt from obtaining further credit during the bankruptcy process, which would be likely to result in harm to both existing and prospective creditors.
63. In our view, it is reasonable that the debtor be put to the proof in relation to obtaining further credit, as the intent of the legislation is to protect creditors and enable an insolvent to resolve financial difficulties. Accordingly, we consider that the limit that these provisions place on the right to be presumed innocent is justifiable in terms of section 5 of the Bill of Rights Act.

### *Defence of absence of intent to defraud*

64. The defendant can escape liability for several offences if she or he can prove on the balance of probabilities that she or he had no intent to defraud (clause 421 - Defence of absence of intent):
  - clause 414 (Offences in relation to property) provides that it is an offence for a bankrupt to conceal or remove property;
  - clauses 415 (Offence in relation to written statement to creditor, etc), 418(1) and 418(2) (Offences in relation to credit, etc) provide offences for making statements to creditors and obtaining property on credit, respectively; and
  - clause 420 (Offence in relation to leaving New Zealand) makes it an offence for a bankrupt to leave, attempt to leave, or prepare to leave New Zealand and take with her or him property which is part of the pool of realisable assets of the bankrupt.
65. Clause 416 (Offence in relation to documents, etc) provides that it is an offence for a bankrupt to, *inter alia*, conceal, alter, or destroy any document relating to the bankruptcy. The defendant can defend the charge by proving on the balance of

probabilities that she or he had no intent to conceal the state of her or his affairs or to defeat the law (clause 421 - Defence of absence of intent).

66. The purpose of these provisions is to ensure the effectiveness of the bankruptcy regime, to provide an incentive for the bankrupt to comply with the bankruptcy procedures, and to prevent further financial harm to creditors.
67. We consider that the reverse onus is justifiable for these offences because the information that can exonerate the defendant (the reasons why the defendant has deliberately not complied with their obligations under the regime) is information that is particularly in the realm of the defendant.
68. In our view these provisions constitute justified limitations on the right to be presumed innocent as affirmed by section 25(c) of the Bill of Rights Act.

#### **Reverse Onus Offences - "Without Reasonable Excuse"**

69. Clause 427(1)(a) (Summary offences) imposes some fundamental responsibilities on the bankrupt with relation to bankruptcy, such as filing a statement of affairs, attending an examination by the Assignee, and allowing examination of a company controlled by the bankrupt. Clause 434(1)(c) (False or misleading statements or refusal to answer questions) makes it an offence if the bankrupt fails or refuses to answer any questions put forward by the Assignee. In addition, clause 430(1)(b) (Offence by bankrupt in relation to management of companies) makes it an offence for an undischarged bankrupt to enter into business without the consent of the Assignee or the Court. These offences are reverse onus offences because the bankrupt is required to prove a reasonable excuse for her or his actions to escape liability.
70. The objective behind clauses 427(1)(a) and 434(1)(c) is to assist the Assignee to collate all information regarding the bankrupt's assets and debts, enabling the Assignee to realise the assets and reimburse creditors. These offences also aim to provide an incentive to comply with the bankruptcy procedures. We note that in these situations the bankrupt is best placed to adduce evidence as to the reasons for her or his actions.
71. The objective of clause 430(1)(b) is to prevent a bankrupt person being in charge of a company. The offence aims to avoid harm to creditors by reducing the risk that a bankrupt will go on to incur further debts. We note that where legitimate reasons exist as to why the bankrupt should enter into business, the bankrupt has the opportunity of applying to the Assignee or the Court for consent.
72. For the reasons outlined above we consider that the objectives of these provisions justify the limitation on the presumption of innocence under section 25(c) of the Bill of Rights.

## Presumptions

### *Clause 413 (Offences in relation to debts) and clause 203 (Presumption of insolvent gift)*

73. Clause 413(3) (Offences in relation to debts) establishes a presumption in relation to defaulting in payments and incurring further debts. This clause presumes that the bankrupt has no reasonable ground for believing that she or he would be able to pay the debt when it fell due for payment.
74. We consider that this presumption is reasonable, as the information needed to rebut the presumption is solely in the realm of the debtor, who can adduce evidence why, despite the personal financial context in which the transaction occurred, she or he believed they would be able to pay the debt when it fell due. The defendant can escape liability by proving on the balance of probabilities that, for example, the default occurred for a reason such as job loss or bank error. This evidence may emanate from the bankrupt's personal knowledge to which the Assignee would not have access.
75. Clause 203 (Presumption of insolvent gift) presumes that gifts made within 6 months immediately before the bankrupt's adjudication are made at a time when the bankrupt is unable to pay his due debts, unless the contrary is proven. A defendant may need to disprove this presumption to avoid liability under clause 414 (Offences in relation to property). MED advise that this clause is necessary to prevent the debtor gifting her or his property to family and friends prior to adjudication in order to avoid that property being realised as part of the bankrupt's assets to be distributed to the creditors. The information to rebut this presumption is particularly within the realm of the defendant.
76. In our view, this presumption is necessary and reasonable to achieve the policy objective. We consider that these presumptions are justified limitations.

### *Clause 426 (When bankrupt deemed not to have kept or preserved proper record)*

77. Clause 426 (When bankrupt deemed not to have kept or preserved proper record) provides a deeming provision for the purpose of establishing whether the bankrupt has kept or preserved a proper record of transactions. A defendant may need to disprove this presumption to avoid liability under clause 423 (Failure to keep and preserve proper record of transactions). We consider that it is justifiable that the bankrupt be put to the proof of why proper records were not kept. This is also consistent with various other provisions in the Companies Act 1993 relating to proper record keeping.

### *Clause 427(1)(f) (Summary offences)*

78. Clause 427(1)(f) (Summary offences) makes it an offence for a bankrupt to leave, attempt to leave or prepare to leave New Zealand within three years following adjudication without the consent of the Assignee. The clause presumes that unless

the bankrupt has obtained consent of the Assignee, the bankrupt is evading the bankruptcy process by absconding to another country.

79. We are satisfied that this presumption is necessary and reasonable, because it is important for the bankrupt to remain in New Zealand to provide all the necessary information and assistance to the Assignee. In forming this view, we note that the Bill does not completely ban the bankrupt from travelling overseas, but prescribes that the Assignee's consent must be sought. MED advise that where good reason to leave exists (such as attending a funeral) the Assignee's consent cannot be unreasonably withheld. There is also a right of appeal against the Assignee's decision.

### **SECTION 26(1): PROTECTION AGAINST RETROACTIVE OFFENCES**

80. Section 26(1) affirms the right that no one should be convicted of an offence where that offence did not exist at the time when the individual committed that act or omission.

81. Several offences contained in the Bill apply to activities that occur in the months and years prior to a person being adjudicated bankrupt:

- clauses 414(1)(a) and 414(2) - Offences in relation to property;
- clause 415 - Offences in relation to written statement to creditor, etc;
- clause 416 - Offences in relation to documents;
- clause 417 - Offences in relation to fictitious losses or expenses;
- clause 418(1) and 418(2) - Offences in relation to credit, etc;
- clause 420 - Offence in relation to leaving New Zealand;
- clause 423 - Failure to keep and preserve proper record of transactions; and
- clause 427(1)(e) - Summary offences

82. For example, a bankrupt would be guilty of an offence if she or he obtained property on credit by false representation, fraud, false statement of financial position or his affairs, under the false pretence of carrying on business and dealing in the ordinary course of trade within 3 years before an application is filed for adjudication or after it is filed, (clause 418(1) - Offences in relation to credit, etc).

83. There are no transitional provisions in the Bill to cover the situation where a bankrupt is charged with these offences in relation to activities committed before the Bill comes into force as an Act. Therefore, a *prima facie* issue arises under section 26(1) of the Bill of Rights Act because it appears on the face of the Bill that a bankrupt could be held liable for activities that did not constitute an offence at the

time they were committed. Where an issue arises, a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act.<sup>[14]</sup>

84. MED has advised that these offences are necessary because an individual or a company does not become insolvent overnight. It is a gradual process that takes some time. The accounting records and personal financial records of the individuals or the company, if properly kept, would provide some warning of the financial difficulties. Therefore, the potential bankrupt has a window of opportunity to take actions which frustrate the bankruptcy process and ultimately deprive creditors of money owed.
85. In addition, these offences are manifestly the same as the offences under the Insolvency Act 1967,<sup>[15]</sup> with the following exceptions. The threshold for when an offence is committed is higher in the Bill for clause 414 (increased property value from \$50 to \$500) and clause 420 (increased property value from \$100 to \$1000) than in the Insolvency Act 1967. This means that the bankrupt is in a better position under the new regime set out in the Bill, than the old regime of the Insolvency Act 1967.
86. The penalty for the offence in clause 427(1)(e) has diversified; the Court now has the option of a maximum \$5000 fine or 12 months imprisonment whereas the penalty under the Insolvency Act 1967 was a maximum of 12 months imprisonment. We note that under section 25(g) an individual has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty. Arguably, the introduction of a monetary penalty as an alternative to imprisonment lessens the effect on the bankrupt, and is less serious than a term of imprisonment.
87. In our view, these offences are a justified limit on the protection against retroactive offences affirmed by section 26(1) of the Bill of Rights Act.

## CONCLUSION

88. Overall, we have formed the view that the Insolvency Law Reform Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of this legislation, and the need to create a workable, consistent insolvency regime.

Jeff Orr  
Chief Legal Counsel  
Office of Legal Counsel

Stuart Beresford  
Senior Legal Adviser  
Bill of Rights / Human Rights Team

## Footnotes

1 *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4<sup>th</sup>)1

2 Clause 3 of the bill defines spouse to include a de facto or civil union partner.

3 In applying section 5, the Ministry of Justice has regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4<sup>th</sup>)

4 See n.2

5 See n.2

6 Clause 3 of the bill defines spouse to include a de facto or civil union partner.

7 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC).

8 Clause 64(1)(b) (Outline of what happens on adjudication), clause 140 (Bankrupt must give Assignee accounting records and other documents), clause 141 (Bankrupt must give Assignee information relating to property), clause 142 (Bankrupt must give Assignee information relating to income and expenditure), clause 143 (Bankrupt must notify Assignee of change in personal information), clause 144 (Bankrupt must give Assignee financial information); clause 163(1)(b) (Assignee may summon bankrupt and others to be examined), clause 169 (Assignee may obtain documents) and clause 340 (Form of application).

9 Clauses 87 (Bankrupt may be required to attend and be questioned), 148 (Warrant to search for and seize bankrupt's property), 163 (Assignee may summon bankrupt and others to be examined), 169 (Assignee may obtain documents), 175 (Conduct of examination) and 182 (No privilege against self incrimination) refer.

10 Clause 151 (Bankrupt's right to inspect documents)

11 Clause 50(3) (Application for appointment of Assignee as receiver); clause 64(1)(e) (Outline of what happens on adjudication); clause 99 (Creditors may appoint expert or Committee to assist Assignee); clause 106 (Court may order that money due to bankrupt is assigned to Assignee); clause 114 ((Executions and attachments in good faith); clause 122 (Transmission of interest in land); clause 124 (Assignee may transfer shares and other securities); clause 135 (Effect of notice to Assignee of application for adjudication); clause 138 (Bankrupt must deliver property to Assignee on demand); clause 139 (Bankrupt must take all steps required in relation to property and distribution of proceeds to creditors); clause 149 (Seizure of bankrupt's property); clause 209 (Assignee may recover difference in value); clause 210 (When Assignee may recover difference); clause 211 (Court may order recipient to pay value to Assignee); and clause 216 (Assignee must not sell bankrupt's property before first creditors' meeting).



12 Clause 111 (Purchaser under sale by sheriff acquires good title); and clause 205 (Court may order re-transfer of property or payment of value).

13 See n.2

14 See n.2

15 cl.414 = s.126(1)(b) & (g) of the Insolvency Act; cl.415 = s. 126(e) of the Insolvency Act; cl.416 = s.126(1)(f)(i) – (v) of the Insolvency Act; cl.417 = s.126(1)(h) of the Insolvency Act; cl.418 = s.126(1)(i) of the Insolvency Act; cl.420 = 126(1)(k) if the Insolvency Act; cl.423 = s.127(1) of the Insolvency Act; and cl.427(1)(e) = s.128(1)(e) of the Insolvency Act.

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