

Personal Bankruptcy

Australian Council of Trade Unions' submission in response to
the Attorney-General Department Personal Insolvency
Discussion Paper dated September 2023

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Contents

Introduction	1
About the ACTU	1
ACTU's Response to the Personal Insolvency (Bankruptcy) Consultation.....	1
Recommendation.....	1
Background	1

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

ACTU's Response to the Personal Insolvency (Bankruptcy)

Consultation

Recommendation

The ACTU welcomes the opportunity to make a submission to the Department's Personal Insolvency Consultation. This submission should be read in conjunction with the ACTU's submission (attached) to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate insolvencies in Australia.

The ACTU does not object in principle to the reforms outlined in the consultation paper insofar as they relate to personal bankruptcies which stem from personal/consumer debts and in circumstances where the individual will not be involved in future business activities.

However, the ACTU is concerned about the application of proposed reforms to personal bankruptcies that are related to: (a) a past business failure; (b) past conduct while in business; (c) operation of a future business and (d) the ability to assess fit and proper person tests.

In particular the proposal to have personal bankruptcies struck from the public record after seven years needs to be recast. In this regard this submission responds to questions 7-12.

Background

Notwithstanding that the consultation paper makes mention of the parallel Corporate Insolvencies in Australia Inquiry report the personal bankruptcy paper is vague on the intended scope and application of the reforms in an area where there are significant policy and legislative overlaps between personal bankruptcy and corporate insolvencies.

Generally personal bankruptcy can be linked to business in three ways:

1. Natural person(s) conducting business using an unlimited liability form (ie. as a sole trader or general partner) are made bankrupt as a result of personal assets such as the family home being used as security in business related loans/transactions or to recoup liabilities incurred in the course of doing business;
2. Business operators and/or directors and officers have traded while insolvent and/or breached other directors' duties and/or laws (ie industrial manslaughter), and as a consequence, have become personally liable for debts;
3. A natural person, who is bankrupt or is a former bankrupt, wants to start a business and/or seeks to form a company and/or become a company director or office bearer.

In addition, a person's personal bankruptcy status is relevant to fit and proper person tests that are commonly applied by private organisations to meet statutory requirements.

Here a number of observations the ACTU made in its corporate insolvency submission are directly relevant to this consultation. They include:

- a) A failure to successfully run a business in the past is a strong predictor of future failure;
- b) A significant proportion of personal bankruptcy debt is related to business failures;
- c) Lack of financial literacy is a major causal factor in business failures; and
- d) The significant monetary and social cost of business failures is routinely externalised on the wider community (government, workers, creditors).

Given the frequency of instances of misconduct and sharp practice the ACTU is opposed to Australia's business regulatory and enforcement regime becoming even more permissive than it is currently. This stance is consistent with our submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate insolvencies in Australia.

As such personal bankruptcies related to business failures or conduct as a director/officer/operator should remain on the public record indefinitely. This is especially important in cases where business operators have traded while insolvent and/or breached other director's duties/laws and as consequence become personally liable for debts.

A person's bankruptcy history remaining on the public record is potentially also an important safeguard for workers and creditors in circumstances where that person seeks to become involved in business at some future point in time. The following case study illustrates how

personal bankruptcy provisions can be tactically deployed by sharp business operators to escape accountability and responsibility for their conduct/debts.

While a persuasive argument has been made that individuals who have been made bankrupt as a result of personal/consumer debts have that struck from the public record the ACTU is of the view that record should be reactivated if the person seeks to become involved in business as a beneficial owner, director, officer, related person, trustee, partner, sole trader and/or exercises control of over a business.

Case Study

An ACTU affiliate is currently suing a company and its managing director for underpaying their workers and breaching the general protections provisions of the FW Act by driving his car at two union officials in an attempt to run them over.

On 20 September 2023, our affiliate was informed administrators were appointed on 24 August 2023 and that the company had gone into voluntary administration.

Our affiliate discovered through the Creditors report:

- that the former director (who our affiliate is also suing) was acting as a shadow director after moving the company into his wife's name; and
- that he had withdrawn \$4 million out of the company which isn't accounted for.

In a case management hearing held on 28 September 2023, the former director flagged he would be seeking advice to file for personal bankruptcy.

Our affiliate was informed on 4 October 2023, that on 28 September the creditors resolved to place the company into liquidation.

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