

Chapter 6: The consequences of bankruptcy: Part 8

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Summary

There are many different consequences of bankruptcy. Some of the concepts are quite complicated. It is important to have a broad understanding of the principles and to be familiar with problems that might arise so that you know what questions to ask the client and when to seek more advice on their behalf.

This section is broken up into segments. Parts 1 – 5 covers:

1. What happens to debts?
2. What property is protected?
3. What property will be taken by the Trustee?
4. Whether the client has to pay income contributions and how much.
5. What other consequences there might be.

Financial counsellors should be aware of the content of all these parts at least in broad terms as they are relevant to all clients.

Parts 6 – 9 need only be referred to if they are relevant to your client's individual circumstances. They cover in order:

6. Small Business
7. Family Law
8. Gambling and hazardous speculation
9. Death

Introduction

Your client must understand the following potential impacts of bankruptcy before making an informed decision whether to go bankrupt:

- **Debts** – will they go away?
- **Assets** (past, present and future) – will the trustee in bankruptcy ('the Trustee') take them? Can the Trustee undo past transactions and get at assets now owned by others? What about assets your client may acquire in the future?
- **Income** – will the client have to pay a portion of their income towards their debts ('income contributions') and if so, approximately how much?
- What other limitations might there be on the client's life as a result of the bankruptcy?

These are all covered in this Chapter.

Note: The same consequences apply when the client has been made bankrupt on a Creditor's Petition, although in that case there is no decision for the client to make. You can refer to this Chapter to advise your client about what to expect during bankruptcy. You should also refer to the bankrupt's obligations in **Chapter 8**. If your client has very recently been made bankrupt and does not think this should have happened, refer to **Chapter 10** – A sequestration order has been made against my client – Is there anything he or she can do? Advise your client to seek urgent legal advice.

Part 8: Gambling and hazardous speculation

Summary

Where gambling or hazardous speculation is found to have materially contributed to a client's insolvency, they can be charged with an offence under the Bankruptcy Act. Selecting gambling as a cause of bankruptcy in the statement of affairs may increase the likelihood of scrutiny for the offence but is far from the only indicator used.

Importantly, gambling must have materially contributed to the client's insolvency and not merely been a factor or existed prior to the bankruptcy. The amounts also, generally need to be very high.

Where Financial Counsellors can provide evidence from qualified health care professionals

that the client has a mitigating circumstance such as a genuine, documented gambling addiction, this may assist in advocating against a client from being referred to investigation.

The offence

Where it becomes apparent that gambling may have been a contributing factor leading to a client's insolvency, financial counsellors need to advise the client of the following provision of the Act:

Section 271

A person who has become a bankrupt after the commencement of this Act and:

(a) within 2 years before the presentation of the petition on which, or by virtue of the presentation of which, he or she became a bankrupt, whether the petition was presented before or after the commencement of this Act, materially contributed to, or increased the extent of, his or her insolvency; or (b) during any period between the presentation of that petition and the date on which he or she became a bankrupt, lost any of his or her property; by gambling or by speculations that, having regard to his or her financial position at the time and any other material circumstance, were rash and hazardous, being gambling or speculations not connected with a trade or business carried on by him or her, is guilty of an offence and is punishable, on conviction, by imprisonment for a period not exceeding 1 year.

How likely is it that my client will be prosecuted?

AFSA's Enforcement area has primary responsibility for investigating and referring alleged bankruptcy related offences to the Commonwealth Director of Public Prosecutions (CDPP). [AFSA's approach to enforcement is outlined for all offences in Inspector General Practice Statement 14.](#)

Prosecution action involves four steps:

1. The Trustee is required by s 19(1)(h)&(i) of the Act to consider whether the bankrupt has committed an offence under the Act, and if so, the Trustee is required to refer the apparent offence to Enforcement. Failure to do so may constitute an error and breach of a Trustee's duty. The same requirements apply to debt agreement administrators under s 185LA(1)(d) and (e) of the Act. If the offending is minor or inconsequential (that is, it has minimal or no impact on the administration of the estate), that the matter should not be referred.
2. Enforcement examines the evidence and circumstances involved and then makes a decision whether to refer the alleged offence(s) to the CDPP. This process may involve investigation by Enforcement, which could include the bankrupt being interviewed and providing a statement. In some cases, Enforcement may decide that no further action is to be taken after giving the bankrupt a 'warning letter'.

3. If the matter is referred to the CDPP, the CDPP will examine the matter and evaluate the likelihood of obtaining a successful prosecution. In a number of cases a decision is made not to proceed with prosecution action.
4. If the CDPP decides to prosecute, the matter goes before a Magistrate in a State Local Court (or County Court, Magistrate's Court or equivalent jurisdiction) who decides whether to convict the bankrupt or not, and if convicted, the nature of the penalty.

If you have a client who is being investigated for a potential breach of this provision and you believe that the client has a gambling addiction, then you can advocate for your client by providing evidence to support your claim, including any report from a relevant health professional and evidence of steps the client is taking to address the problem (if any). If your client discloses gambling prior to filing a Debtor's Petition, consider obtaining this evidence prior to filing the petition.

The provision is intended to punish and deter those who seek take advantage of the bankruptcy system after expending their available financial resources on gambling activities instead of paying their creditors, or those who become increasingly insolvent as a result of gambling, when it appears likely (or inevitable) that they will become bankrupt.

Australian cases show that the prosecutor must be able to demonstrate all the elements of the offence. In one case the defendant was acquitted because the conduct, while hazardous, was not 'rash'. In another case the conduct had not been shown to have 'materially contributed' to the bankrupt's insolvency. There has, however, however been successful prosecutions including the case below:

Case Study

On 21 February 2017, Mr Rosenberg was sentenced after pleading guilty at the Sydney Downing Centre Local Court to an offence of materially contributing to his insolvency by gambling.

Mr Rosenberg filed for voluntary bankruptcy in June 2014. Between June 2012 and June 2014, Mr Rosenberg gambled at various casinos in Australia and New Zealand and participated in online gambling. As a result of these activities, he lost over \$1.3 million.

The Magistrate found the offence proven and commented that there needs to be a deterrent. Mr Rosenberg was released on a good behaviour bond for twelve months without conviction.

In summary the likelihood of your client being prosecuted for breaching s 271 of the Act is

not very high (unless the amounts involved are very high and have materially contributed to the insolvency) and only a very small number of matters that are referred to AFSA result in a conviction. Only 2 charges for breaching s 271 were prosecuted during the period July 2017 to December 2023. Your clients must, however, be informed of the possibility where this is relevant.