



Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006

No. 33, 2006

**An Act to amend the *Bankruptcy Act 1966*, and for
related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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**An Act to amend the *Bankruptcy Act 1966*, and for
related purposes**

[Assented to 3 May 2006]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Bankruptcy Legislation Amendment
(Anti-avoidance) Act 2006*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	3 May 2006
2. Schedule 1	The 28th day after the day on which this Act receives the Royal Assent.	31 May 2006

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Bankruptcy Act 1966

1 Subsection 5(1) (definition of *examinable period*)

Repeal the definition, substitute:

examinable period has the meaning given by section 139CA.

2 At the end of section 77C

Add:

- (3) Notes taken down and signed by a person who attends before the Official Receiver or an authorised officer under paragraph (1)(b), and the transcript of the evidence given by the person at the attendance:
 - (a) may be used in evidence in any proceeding under this Act whether or not the person is a party to the proceeding; and
 - (b) may be inspected:
 - (i) by the person, without fee; and
 - (ii) if the notes and evidence relate to matters concerning the bankruptcy of the person or of another person—by the trustee and a person who states in writing that he or she is a creditor, without fee; and
 - (iii) by any other person on payment of the fee prescribed by the regulations.

3 Paragraph 81(17)(a)

Omit “in which the person is a party”, substitute “whether or not the person is a party to the proceeding”.

4 Paragraph 116(1)(c)

After “section 139D”, insert “or 139DA”.

5 At the end of paragraph 116(1)(d)

Add “or 139EA”.

6 At the end of subsection 120(1)

Add:

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

7 Subsection 120(3)

Repeal the subsection, substitute:

- (3) Despite subsection (1), a transfer is not void against the trustee if:
- (a) in the case of a transfer to a related entity of the transferor:
 - (i) the transfer took place more than 4 years before the commencement of the bankruptcy; and
 - (ii) the transferee proves that, at the time of the transfer, the transferor was solvent; or
 - (b) in any other case:
 - (i) the transfer took place more than 2 years before the commencement of the bankruptcy; and
 - (ii) the transferee proves that, at the time of the transfer, the transferor was solvent.

8 After subsection 120(3)

Insert:

Rebuttable presumption of insolvency

- (3A) For the purposes of subsection (3), a rebuttable presumption arises that the transferor was insolvent at the time of the transfer if it is established that the transferor:
- (a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or
 - (b) having kept such books, accounts and records, has not preserved them.

10 At the end of subsection 120(5)

Add:

- ; (e) if the transferee is the spouse of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

11 At the end of subsection 121(1)

Add:

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

12 Paragraph 121(4)(b)

After “know”, insert “, or could not reasonably have inferred,”.

13 After subsection 121(4)

Insert:

Rebuttable presumption of insolvency

- (4A) For the purposes of this section, a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:
- (a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor’s business transactions and financial position; or
 - (b) having kept such books, accounts and records, has not preserved them.

15 At the end of subsection 121(6)

Add:

- ; (e) if the transferee is the spouse of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

15A After section 121

Insert:

121A Transactions where consideration given to a third party

- (1) This section applies if:
- (a) a person who later becomes a bankrupt (the *transferor*) transfers property to another person (the *transferee*); and
 - (b) the transferee gives some or all of the consideration for the transfer to a person (a *third party*) other than the transferor.

- (2) Sections 120 and 121 apply as if the giving of the consideration to the third party were a transfer by the transferor of the property constituting the consideration.
- (3) If the giving of the consideration to the third party is void against the trustee in the transferor's bankruptcy under section 120 or 121, the trustee has the same rights to recover the property constituting the consideration as the trustee would have if the giving of the consideration had actually been a transfer by the transferor of the property constituting the consideration.

16 Division 4A of Part VI (heading)

Repeal the heading, substitute:

Division 4A—Orders in relation to property of entity controlled by bankrupt or from which bankrupt derived a benefit

17 After section 139C

Insert:

139CA Definition of *examinable period*

- (1) For the purposes of this Division, the *examinable period* is:
 - (a) in the case of an application for an order in relation to a related entity of the bankrupt—the period beginning:
 - (i) if, at a time or times during the period of 1 year beginning 5 years before the commencement of the bankruptcy, the bankrupt became insolvent—at that time, or at the first of those times, as the case may be; or
 - (ii) in any other case—4 years before the commencement of the bankruptcy;and ending on the day on which the application is made; or
 - (b) in any other case—the period beginning:
 - (i) if, at a time or times during the period of 3 years beginning 5 years before the commencement of the bankruptcy, the bankrupt became insolvent—at that time, or at the first of those times, as the case may be; or
 - (ii) in any other case—2 years before the commencement of the bankruptcy;

and ending on the day on which the application is made.

- (2) For the purposes of subparagraphs (1)(a)(i) and (b)(i), a rebuttable presumption arises that a bankrupt became insolvent at a time during the period referred to in the relevant subparagraph if it is established that the bankrupt:
- (a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or
 - (b) having kept such books, accounts and records, has not preserved them.

18 Subsection 139D(1)

After "section 139A", insert "for an order in relation to a respondent entity other than a natural person".

Note: The heading to section 139D is altered by adding at the end "**other than a natural person**".

19 Paragraph 139D(1)(d)

After "derived", insert "(whether directly or indirectly)".

20 After section 139D

Insert:

139DA Order relating to property of natural person

If, on an application under section 139A for an order in relation to a respondent entity that is a natural person, the Court is satisfied that:

- (a) during the examinable period, the entity acquired an estate in particular property as a direct or indirect result of financial contributions made by the bankrupt during that period; and
- (b) the bankrupt used, or derived (whether directly or indirectly) a benefit from, the property at a time or times during the examinable period; and
- (c) the entity still has the estate in the property;

the Court may make an order of a kind referred to in subsections 139D(2) and (3), whether or not the bankrupt has ever had an estate in the property.

21 Subsection 139E(1)

After “section 139A”, insert “for an order in relation to a respondent entity other than a natural person”.

Note: The heading to section 139E is altered by omitting “**entity’s net worth**” and substituting “**net worth of entity other than a natural person**”.

22 After section 139E

Insert:

139EA Order relating to increase in value of property of natural person

If, on an application under section 139A for an order in relation to a respondent entity that is a natural person, the Court is satisfied that:

- (a) during the examinable period, the value of the entity’s interest in particular property increased as a direct or indirect result of financial contributions made by the bankrupt during that period; and
- (b) the bankrupt used, or derived (whether directly or indirectly) a benefit from, the property at a time or times during the examinable period;

the Court may, by order, direct the entity to pay to the applicant a specified amount not exceeding the amount by which the value of the entity’s interest in the property increased as a result of the financial contributions made by the bankrupt.

23 Subsection 139F(1)

After “section 139D”, insert “or 139DA”.

24 Subsection 139F(2)

After “section 139E”, insert “or 139EA”.

25 Paragraph 139G(1)(a)

After “section 139D”, insert “or 139DA”.

Note: The heading to section 139G is altered by omitting “**sections 139D and 139E**” and substituting “**this Division**”.

26 Subsection 139G(2)

After “section 139D”, insert “or 139DA”.

27 Subsection 139G(3)

After “section 139E”, insert “or 139EA”.

28 Subsection 139H(1)

After “section 139D”, insert “or 139DA”.

29 Subsection 139H(1)

After “section 139E”, insert “or 139EA”.

30 Application of amendments

- (1) The amendment made by item 2 applies in relation to an attendance under section 77C of the *Bankruptcy Act 1966* that occurs on or after the commencement of this item.
- (2) The amendment made by item 3 applies in relation to an examination under section 81 of the *Bankruptcy Act 1966* that occurs on or after the commencement of this item.
- (3) The amendments made by items 6 to 15 apply to a transfer of property made on or after the commencement of this item.
- (4) The amendments made by items 1, 4 and 5 and 16 to 29 apply in relation to an examinable period that commences on or after the commencement of this item.

*[Minister's second reading speech made in—
House of Representatives on 7 December 2005
Senate on 27 March 2006]*

(189/05)