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Update Summary

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AUSTRALIAN BANKRUPTCY LAW & PRACTICE**

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Commentary has been updated as per below:

Section 5: Interpretation

Insolvency tests assess the ability to pay all current and future debts as they become due. Courts typically avoid looking far into the future due to uncertainties but may consider longer periods based on case specifics, as seen in *Anchorage Capital Master Offshore v Sparkes* (2023) 111 NSWLR 304; [2023] NSWCA 88; and *In the matter of IOUpay Ltd (Administrators Aptd)* [2023] NSWSC 568.

In *Canstruct Pty Ltd v Project Sea Dragon Pty Ltd* [2024] FCA 112, the court found the company insolvent as it lacked an assured agreement for funding from its parent company, which could cease funding at any time. The funds provided were deemed unsecured debt swaps, with no sufficient commitment for future financial support.

See [5.10.05].

Section 27: Bankruptcy courts

A "proceeding is caught by the exclusive jurisdiction provisions of s 27" where the claims made "seek to strike at the heart of [the] bankruptcy by challenging its length and the decision making and actions of those who acted as trustees": *McEwan v Burke* [2023] QSC 114. See [27.1.10].

Section 54: Bankrupt's statement of affairs

Due to s 27(2) of the *Bankruptcy Act 1996* (Cth) and s 68(2) of the *Judiciary Act 1903* (Cth), the offence created by s 54(1) may be prosecuted in State Courts, including as a summary offence in a state Magistrates Court: *Cooper v DPP (Cth)* [2023] SASC 83. See [54.1.20].

Section 58: Vesting of property upon bankruptcy—general rule

A contempt finding for breaching a non-monetary order can proceed despite the individual's bankruptcy, as it is not considered a creditor's action for a provable debt: *Victorian Legal Services Board v Nida (No 2)* [2023] VSC 154. See [58.3.10].

Section 60: Stay of legal proceedings

A bankrupt's negligence claim against former solicitors for defamation advice is not preserved under s 60(4) as a personal injury claim: *Lee v Lawfirst Pty Ltd* [2023] WASCA 59. See [60.4.07].

Section 120: Undervalued transactions

In *Scott v Stolyar (No 5)* [2024] FCA 37, the court ordered that Longworth Avenue property be sold to secure payment to the trustee. The trustee was appointed as receiver to oversee and fund necessary work for the sale, under s 53 or s 57 of the *Federal Court Act 1976* (Cth).

A transferee cannot use set-off under s 86 of the *Bankruptcy Act 1966* (Cth) to defend against a trustee's claim under s 120 to avoid a payment. This is because the liability to the trustee is not a debt owed to the bankrupt, lacking the required mutuality for set-off: *Roufeil v Tarrant Enterprises Pty Ltd* (2023) 299 FCR 204; [2023] FCAFC 142.

See [120.0.30].

A transaction's legal effectiveness, not economic impact, is key, and ulterior motives don't invalidate genuine, legally effective transactions: *Kirk v Smith* [2024] FCA 240. See [120.0.50].

In the case of *Macks v Lee (No 2)* [2023] FedCFamC2G 815, it was identified that the term "property", as it appears in s 120(1), falls within the notion of "property of the bankrupt" as that expression appears in s 58(1) and that expression is defined in s 5(1) to mean, except for ss 58(3) and 58(4) "the property divisible among the bankrupt's creditors", and "any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become bankrupt". Then s 116 identifies the "property divisible among the bankrupt's creditors". See [120.1.10].

It is the bankrupt's interest in the property transferred that is divisible among the bankrupt's creditors that is to be valued: *Macks v Lee (No 2)* [2023] FedCFamC2G 815. See [120.1.17].

Section 153: Effect of discharge

Fraud in the equitable sense, that does not require the bankrupt to have had an actual intention to defraud, will meet the description "fraud or a fraudulent breach of trust": *Maxwell v Chittick* [1994] NSWCA 196; *Re Bosun Pty Ltd (in liq)* (2000) 34 ACSR 597; [2000] SASC 180; *HBSY Pty Ltd v Lewis* (2022) 108 NSWLR 558; 368 FLR 382; [2022] NSWSC 841. See [153.2.10].

