

**The effectiveness and limits in the uses of public examinations under the  
*Bankruptcy Act 1966***

**Khaled Metlej**

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## INTERACTION OF BANKRUPTCY LAWS AND ASSET PROTECTION

A person who is unable to pay his or her creditors as and when debts fall due is insolvent<sup>1</sup> and may be adjudged bankrupt. However, it is not uncommon for persons who may be technically solvent, but who do not wish to pay the claims of their creditors, to veil themselves in the protections of bankruptcy. While the law permits numerous methods by which a person can seek to minimise one's liability to his or her creditors, many asset protection techniques may be illegal. Bankruptcy heralds a significant change in status for a person. Numerous benefits are conferred onto a bankrupt, most notably, the release of a bankrupt from his or her liability to creditors upon discharge from bankruptcy.<sup>2</sup> However, an equally fundamental feature of bankruptcy law is the vesting of the assets of a bankrupt in a Trustee in Bankruptcy who is charged with distributing those assets on a *pari passu* basis.<sup>3</sup> To allow for a distribution amongst creditors, it is essential that the extent of a bankrupt's property be known to the trustee in bankruptcy. Accordingly, it is illegal for a person (including the bankrupt) to seek to conceal the assets which may otherwise be divisible amongst creditors of a bankrupt estate.<sup>4</sup>

While the *Bankruptcy Act 1966 (Cth)* (“**the Act**”) imposes obligations upon the bankrupt to, *inter alia*, “*aid to the utmost of his or her power in the administration of his or her estate*”<sup>5</sup> and specifically, to “*give such information about any of the bankrupt's conduct and examinable affairs as the trustee requires,*”<sup>6</sup> it will be unsurprising that many bankrupts do not voluntarily meet these duties. Instead, the laws of bankruptcy have sometimes been employed as a safe harbour for persons who seek to defeat the claims of their creditors. In recognising this, the explanatory memorandum to the *Bankruptcy Amendment Act 1987 (Cth)* considered:<sup>7</sup>

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\* Unless otherwise indicated, all section references are references to the *Bankruptcy Act 1966 (Cth)*

<sup>1</sup> Section 5(2)-(3)

<sup>2</sup> Section 153

<sup>3</sup> Section 108, section 140

<sup>4</sup> Section 263

<sup>5</sup> Section 77(1)(g)

<sup>6</sup> Section 77(1)(ba)

<sup>7</sup> *Griffin v Pantzer* [2004] 137 FCR 209 per Allsop J at [158]

*“...there is an increasing incidence of bankruptcies involving persons who become bankrupt as a deliberate device to defeat the claims of their creditors. Frequently it is a feature of such bankruptcies that the persons involved have made use of sophisticated and complex commercial structures of companies and trusts as a device to conceal property, the use and enjoyment of which is reserved to the bankrupt but which has the appearance of being owned by the company or trust. Upon a bankruptcy the bankrupt is protected from the claims of the creditors but the secreted property is beyond the reach of the trustee in bankruptcy...”*

While as Keay has noted, reasons for unwillingness to co-operate with a trustee are manifold, and may include a number of practical reasons such as time commitments, indifference to the management of their estate, and the want of a “clean-break”<sup>8</sup>, in the case of a person who seeks to remove the availability of assets, assisting the trustee in the administration of their bankruptcy through identification of assets for distribution amongst the creditors of the bankrupt estate may very well be in direct conflict to the person’s reasons for going bankrupt - there will sometimes be an active concealment of divisible property.

The concealment of property by bankrupts is an often-employed technique employed to the defeat of creditor claims. It is submitted that examination procedures that have developed in the context of bankruptcy laws are a significant response to illicit asset protection techniques. However, it is also submitted that the examination procedure is not without its limitations and the savvy or well-advised bankrupt is able to avail themselves of these limitations in avoiding his or her obligations to make a full and frank disclosure of their assets.

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<sup>8</sup> Keay, *Bankruptcy Examinations Under Section 81 of the Bankruptcy Act (1992-1993)* 17 UQLJ 35 at 35

## NATURE OF THE POWER TO EXAMINE

In the face of the abuse of the protections of bankruptcy, the case for expansive investigatory powers by a trustee in bankruptcy of the affairs of a bankrupt is compelling. Paine J recognised in *Re Anderson; Ex Parte Official Receiver*:<sup>9</sup>

*“it is of the utmost importance that a trustee should have this power of investigating all matters relating to the estate which he is called upon to administer, and much of which might often be lost to creditors if he were compelled to rely upon such information as the bankrupt may be able or willing to give, and such facts as he can ascertain from persons ready to assist him voluntarily.”*

Thus, in some instances, the bankrupt will need to be compelled by law to assist the trustee in the administration of his or her bankruptcy, and there must be consequences for failing to do so.

By virtue of section 81 of the Act, a bankrupt or an “examinable person” can be compelled to attend before the Court or a Registrar<sup>10</sup> for the purpose of being examined in relation to affairs of a bankrupt.<sup>11</sup> An application for the issue of an examination summons may be made by the Trustee in Bankruptcy, the Official Receiver, or a creditor of the bankrupt estate.<sup>12</sup> For a creditor’s application for the issue of an examination summons to be successful, the creditor is required to demonstrate that their conduct of an examination would result in some benefit flowing to the bankrupt estate.<sup>13</sup> However, where an examination summons is issued on the application of a trustee, creditors may participate in the examination by asking the bankrupt questions – their role is not merely to supplement questions asked by a trustee in bankruptcy.<sup>14</sup> In Australia, creditors cannot compel the Trustee to make an application for an

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<sup>9</sup> (1937) 10 ABC 284 at 288 as cited in Keay (1992) *op cit* 8.

<sup>10</sup> In some circumstances, an examination may be conducted before a Magistrate of a State or Territory.

<sup>11</sup> Section 81(1)

<sup>12</sup> Section 81(1)

<sup>13</sup> *Ex parte Nicholson; in Re Wilson* (1880) 14 Ch D 243

<sup>14</sup> *Re Clyne; Ex parte Deputy Commissioner of Taxation* (1986) 68 ALR 603, Keay, *Bankruptcy Examinations and the Involvement of Creditors* (1992) 11 UTLR 121 at 127

examination – this can be contrasted with the position in the United Kingdom whereby if one-half of the bankrupt’s creditors require, the Official Receiver must conduct a public examination of the bankrupt.<sup>15</sup>

The breadth of the examination power is wide. The person being examined is compelled to “*answer all questions that the Court, the Registrar or the magistrate puts or allows to be put to him or her*”<sup>16</sup> and “*subject to any contrary direction by the Court, the Registrar, or the magistrate, the relevant person is not excused from answering a question merely because to do so might tend to incriminate the relevant person.*”<sup>17</sup> The Court or Registrar is empowered to allow to be put to the examinee all questions relating to the bankrupt’s examinable affairs. Examinable affairs is defined widely under the Act to mean:<sup>18</sup>

*“(a) the person’s dealings, transactions, property and affairs; and (b) the financial affairs of an associated entity of the person, in so far as they are, or appear to be, relevant to the person or to any of his or her conduct, dealings, transactions, property and affairs.”*

Where a person being examined fails to give an answer to a question put to him or her, the Court has the power to punish the person for being in contempt of Court.<sup>19</sup> The power to punish for contempt is not exercisable by a Registrar conducting the examination, but a Registrar may adjourn the proceedings before the Court, and in doing so, the Registrar may submit a report with respect to the examination as he or she thinks fit.<sup>20</sup> The Act also creates several offences for persons who fail to comply with the requirements of an examination.<sup>21</sup>

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<sup>15</sup> *Insolvency Act 1986*, section 290

<sup>16</sup> Section 81(11)

<sup>17</sup> Section 81(11A)

<sup>18</sup> Section 5

<sup>19</sup> *Federal Court of Australia Act 1976*, section 31

<sup>20</sup> Section 81(5)

<sup>21</sup> Section 264A – 264E

The examination power essentially is one to be exercised for the benefit of creditors of the bankrupt. As was identified by the Full Court in *Karounos v Official Trustee*:<sup>22</sup>

*“The procedure is basically designed to establish what assets the bankrupt had, what has happened to those assets, and whether action should be begun (or continued) to recover them.”*

However, notwithstanding the wide nature of the power, the power to examine a bankrupt is not unfettered and arguments are still made by bankrupts in avoiding a full disclosure to a trustee of the bankrupt’s financial affairs.

### **HISTORY OF THE POWER OF EXAMINATION**

The power to examine has existed since the first bankruptcy legislation was passed in the reign of King Henry VIII.<sup>23</sup> During those times and up until the late 18<sup>th</sup> Century, bankruptcy was considered a crime and the failure to pay creditors was itself fraudulent. Accordingly, the response of legislation was one of investigation into the wrongdoings of a bankrupt, punishment of the offence, and where possible, compensation to the “victim” creditors of a bankrupt.

Initially, the power to examine passed in the 1542 statute extended only to persons believed to be concealing the property of a bankrupt, and by apparent oversight, did not expressly provide for the direct examination of a bankrupt.<sup>24</sup> However by 1604, legislation specifically provided for the examination of the bankrupt<sup>25</sup>- the legislation allowed for the “*Commissioner ...to examine the said offender*” and if the bankrupt refused to be examined, “*or to answer fully every interrogatory*”, the Commissioners were empowered to imprison the bankrupt until such time as the “*offender*” conformed to the requirements of the

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<sup>22</sup> [1988] FCA 180 per the Court at [11]

<sup>23</sup> *AN Acts againste suche persones as doo make Bankrupte.* 34 & 35 Hen VIII c.4, (1509-1545) 3 Statutes of the Realm 899

<sup>24</sup> *Ibid*

<sup>25</sup> *AN Act for the better Reliefe of the Creditors againste suche as shall become Bankrupt.* (1547-1624) 1 Jac I c. 15 4 Statutes of the Realm 1031

examination. By way of punishment for a debtor who committed perjury, the legislation also provided that:<sup>26</sup>

*“if upon his ... examination, if it shall appear that he ... [has] committed any wilful or corrupt perjury tending to the hurt or damage of the creditors of the bankrupt ... [the offender shall] be indicted...and upon being lawfully convicted thereof, shall stand upon the pillory in some public place ... and have one of his ears nailed to the pillory and cut off.”*

While by 1732 there was a “*new spirit of tolerance towards honest debtors*,”<sup>27</sup> and not all bankrupts were considered offenders, the machinery of investigation into delinquent bankrupts was by then well-developed and has remained intact.

#### **BANKRUPTS AND ‘EXAMINABLE PERSONS’**

In many cases, a bankrupt who seeks to conceal the existence of divisible property will have sought aid from associates. Accordingly, it is an important feature that the power of examination extends to persons beyond the bankrupt.

An “*examinable person*” is defined by section 5 of the Act to include:<sup>28</sup>

- a) any associated entity of the bankrupt who may be able to give information about the examinable affairs of the bankrupt;
- b) any debtor (or a person believed to be debtor) of the bankrupt; and
- c) any person who has possession of the books of a bankrupt.

Earlier bankruptcy legislation specifically provided that the wife of bankrupt could be examined.<sup>29</sup> While the present Act does not specifically provide for the examination of a bankrupt’s wife, it is considered that the present definition of examinable person is wide enough to encompass the spouse of a bankrupt and is not intended to remove a spouse of a bankrupt as an examinable person. The fact that the wife of a bankrupt is examinable is significant as the

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<sup>26</sup> Ibid

<sup>27</sup> Rose, D *Lewis Australian Bankruptcy Law*, 9<sup>th</sup> Ed, Lawbook Co, 1990 at p.14

<sup>28</sup> Section 5

<sup>29</sup> *Bankruptcy Act 1825*, section 37

testimonial privileges provided for in the *Evidence Act 1995*, which exclude the compellability of a spouse in criminal proceedings for the purposes of giving evidence against her husband,<sup>30</sup> are likely not to apply to examinations.<sup>31</sup>

Section 80(1) specifically allows for the examination of a person who has been discharged from bankruptcy.<sup>32</sup> This reflects the possibility that the administration of complex bankruptcies may take many years, and extend beyond the discharge of the bankrupt.

It is also possible to examine a person who has been made bankrupt in a jurisdiction outside Australia. In *Dick v McIntosh*<sup>33</sup>, Cooper J noted that subject to the rules of private international law, a bankruptcy order of the High Court of Justice (of the United Kingdom) will be recognised by Australian Courts, and Australian Courts exercising jurisdiction under the *Bankruptcy Act 1966* are to act in aid of courts of other countries having jurisdiction in bankruptcy.<sup>34</sup> Section 29 of the *Bankruptcy Act 1966* reflects this principle of comity. In that case, acting under section 29 of the *Bankruptcy Act 1966*, Cooper J was satisfied to make an order for the examination pursuant to section 81 of a person made bankrupt in the United Kingdom who was present in Australia.

However, in *Southwell v Maladina*<sup>35</sup>, Dowsett J considered that section 81 did not confer jurisdiction on the Court to make orders for examination pursuant to section 81 where persons were neither Australian citizens, nor present or resident in Australia.<sup>36</sup>

It is also notable that an examination may occur of a debtor prior to becoming a bankrupt. Section 50 of the Act empowers the Court to give directions to the Official Trustee (or a registered trustee) to take control of a debtor's property prior to a sequestration order being made where a debtor has failed to comply

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<sup>30</sup> *Evidence Act 1995* (Cth), section 18

<sup>31</sup> In *Griffin v Pantzer* [2004] 137 FCR 209, Allsop J considered that examinations were not proceedings to which the *Evidence Act 1995* applied. In any event, even if the Act applied, it applies subject to the operation of other Acts. By its inquisitorial nature, the nature of an examination is not one in which evidence is adduced.

<sup>32</sup> Section 80(1)

<sup>33</sup> [2002] FCA 1135

<sup>34</sup> *Dick v McIntosh* [2002] FCA 1135 at [17]

<sup>35</sup> [2002] FCA 802

<sup>36</sup> *Southwell v Maladina* [2002] FCA 802 at [4]



with a bankruptcy notice.<sup>37</sup> Upon making an order under section 50, the Court is empowered to issue a Summons to the debtor or an examinable person.<sup>38</sup> The provisions of section 81 apply with necessary modifications to an examination order made under section 50.<sup>39</sup>

## PURPOSES OF AN EXAMINATION

While as expressed by Paine J in *Anderson, Ex Parte Official Receiver*,<sup>40</sup> at its simplest, the purpose of the examination power is to discover, and assist in the realisation of, the assets of the bankrupt, the section 81 examination is wider in compass. It is likely that the power to examine may be called into aid of any one of the Trustee's duties. Those duties are set out in section 19 of the Act, and notably, in addition to the realisation of property, include:<sup>41</sup>

“ ...

*(h) considering whether the bankrupt has committed an offence against this Act;*

*(i) referring to the Inspector-General or to relevant law enforcement authorities any evidence of an offence by the bankrupt against this Act... ”*

Noting that the *Bankruptcy Act 1966* makes it an offence for a bankrupt to conceal any property with the intent to defraud creditors, or indeed failing to disclose their property and its value,<sup>42</sup> it would seem that the power under section 81 of the Act is wide enough to permit a trustee to conduct an investigation for the purposes of collecting evidence for use in a criminal prosecutions against an evasive bankrupt.

Thus, in *Griffin v Pantzer*, Allsop J stated:<sup>43</sup>

*“The public examination of the bankrupt is not merely for the identification and collecting of assets, but also for the purpose of*

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<sup>37</sup> Section 50

<sup>38</sup> Section 50(4)

<sup>39</sup> Section 50(5)

<sup>40</sup> (1937) 10 ABC 284 at 288 as cited in Keay (1992) *op cit* 8.

<sup>41</sup> Section 19

<sup>42</sup> Section 265

<sup>43</sup> *Griffin v Pantzer* (2004) 137 FCR 209 at [76]

*protection of the public by a full and searching examination to be carried out as to the conduct of the debtor, in order that a full report may be made... ”*

By its inquisitorial nature, it has been recognised that the power of examination essentially permits the examiner to ask questions of a bankrupt even where there is presently an insufficient basis for making certain allegations against a bankrupt. That is, Driver FM in *Cohen v Prentice* considered:<sup>44</sup>

*“Although the affidavit in support of the notices of motion objects to the summonses as a fishing expedition, it is clear to me that a public examination conducted under s.81 is, of its nature, a fishing expedition, given that its purpose to discover information reasonably required for the performance by the trustee of his or her duties. Section 81 is, in my view, a licence to go fishing although there are some limits on that licence.”*

The use of curial procedures that are inquisitorial in nature to compel bankrupts to disclose offences that they may have committed is unusual in the English legal system. This was recognised by Jessel MR in *Ex Parte Willey*, where in speaking of the relevant examination power, the Master of the Rolls stated:<sup>45</sup>

*“Now that is a very grave power to entrust to any Court of any man, viz., the power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information and to get any information from him, although the information may be extremely hostile to the interests of the man himself. It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding up of company (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought be to be very carefully exercised.”*

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<sup>44</sup> [2002] FMCA 227 at [12]

<sup>45</sup> *Ex parte Willey; In re Wright* (1883) 23 Ch D 118 at 128, as cited by Keay (1992) *op cit* 8 at p.44

Thus, while undoubtedly the power of examination aids in the investigation of offences of the bankrupt, it does not necessarily follow that the power will be permitted to be used to the detriment of the bankrupt in every instance. For example, in *Re Gordon*<sup>46</sup>, Pincus J expressed the view that questions which are put to a bankrupt whose purpose appears to obtain evidence to assist in the proof of a charge which has already been laid should be disallowed.<sup>47</sup>

### **LIMITS ON THE POWER OF EXAMINATION**

Where an examination is used for an improper purpose, the Court will usually set aside the examination summons.<sup>48</sup> The Courts have considered a number of categories in which an improper purpose has been found, leading to the examination summons being discharged, or the examination being adjourned. However, it in determining whether an examination is being utilised for an improper purpose, regard is to be had to the intention of the examiner, not to the result that would be produced by the examination.<sup>49</sup>

The use of an examination summons before or concurrently with litigation by the trustee (for example, proceedings for the recovery of assets), has been the subject of significant judicial authority. In *Karounos v Official Trustee*<sup>50</sup>, it was held that the mere fact that litigation was pending or contemplated does not create a presumption that the examination summons should be set aside. The Court stated:<sup>51</sup>

*“It would normally only be set aside if the application were defective in some way or the Court found some improper motive behind the application. It would be adjourned if the balance of justice and convenience in the particular case so required. In some cases it might be appropriate to defer examination on a particular topic. In all cases the Registrar or the Court will be*

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<sup>46</sup> (1988) 80 ALR 289

<sup>47</sup> *Re Gordon* (1988) 80 ALR 289 at 297

<sup>48</sup> *Karounous v Official Trustee* [1988] FCA 180

<sup>49</sup> *Karounous v Official Trustee* [1988] FCA 180

<sup>50</sup> [1988] FCA 180

<sup>51</sup> *Karounous v Official Trustee* [1988] FCA 180 At [11]

*careful to see that injustice is not occasioned in the course of examination by the particular questions asked...*"

Indeed, where proceedings are on foot for recovery of assets, it is legitimate for the trustee to examine a bankrupt in relation to the very matters subject of the existing proceedings.<sup>52</sup>

Particular motives which were considered improper were identified by Sundberg J in *Crawford v Sellars*,<sup>53</sup> where his honour considered that an abuse of process might arise where:<sup>54</sup>

- (a) a potential witness to litigation is summons only for the purpose of destroying his or her credit;
- (b) the examination is being used as a dress rehearsal for cross-examination in other proceedings;
- (c) the examination is being used as de facto discovery where discovery in other proceedings has been refused;
- (d) the examination is being used for the purposes of gathering evidence in existing or contemplated litigation brought by someone other than the trustee.

It is also likely to be an improper use of the power of examination if the predominant purpose of an examination is to extract an offer of settlement from party to existing or foreshadowed litigation brought by a trustee in bankruptcy; however it may not be improper where such a motive is only ancillary.<sup>55</sup>

In *In the matter of Robalino; Ex parte Butterell*<sup>56</sup>, the Court set aside an examination notice which was found to be used for the purposes of resisting the Bankrupt's appeal against a sequestration order, and not in furtherance of the Trustee's duties.

## **CONDUCT OF EXAMINATION**

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<sup>52</sup> *Crawford v Sellars* [2000] FCA 162 at [6]

<sup>53</sup> [2000] FCA 162

<sup>54</sup> *Crawford v Sellars* [2000] FCA 162 at [5]

<sup>55</sup> *Ostenton v Worrell* [1995] FCA 90

<sup>56</sup> (1998) (Unreported, Federal Court of Australia, 22 September 1998, Emmet J)

In 1890, legislation was passed in the United Kingdom decreeing that every examination of a bankrupt was to be held in public – prior to that time, all examinations were conducted in private. In Australia, private examination of persons other than the bankrupt continued under the *Bankruptcy Act 1924*, but by the time that the *Bankruptcy Act 1966* was passed, all examinations (whether of bankrupts or associates) were to be conducted in public.<sup>57</sup> An examinee is required to give his or her answers on oath<sup>58</sup> - it is an offence for an examinee to refuse to take an oath.<sup>59</sup>

Section 81 also permits that the Court or a Registrar require the person being examined to produce at the examination books and records of the bankrupt relating to the bankruptcy.<sup>60</sup>

If answers given by an examinee reveal that the examinee is indebted to the bankrupt estate, or is in possession of property of the bankrupt that would be divisible amongst creditors, the Court or Registrar before whom the examination is being conducted may forthwith order the examinee to pay the trustee the debt owed, or deliver the property of the bankrupt to the trustee, as the case may be.<sup>61</sup>

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<sup>57</sup> Keay (1992) *op cit* 8 at 39, *Bankruptcy Act 1966*, section 81(2)

<sup>58</sup> Section 81(1A)

<sup>59</sup> Section 264C

<sup>60</sup> Section 81(1B)

<sup>61</sup> Section 81 (12)-(13)

## EXAMINATION AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

In *Rochfor v Trade Practices Commission*<sup>62</sup>, Murphy J remarked that:<sup>63</sup>

*“The privilege against self-incrimination is a human right, based on the desire to protect personal freedom and human dignity.”*

The privilege against self-incrimination has been heralded as one of the fundamental features of the common law system. The history of the privilege arises from the abolishment of the Court of Star Chamber in 1641, which had adopted inquisitorial methods of compelling a person to confess or accuse himself or herself of crime, delinquency or other neglect.<sup>64</sup>

Given the wide ambit of questions permitted in an examination, the privilege against self-incrimination might be considered to be a particularly important safe harbour for bankrupts who have engaged in illicit asset protection. It might have been thought that a Bankrupt could invoke the privilege in relation to questions put by a trustee in relation to illegal conduct engaged in by a bankrupt, say for example, in the concealment of assets, or money laundering activities.

Bearing in mind this sacrosanct tenant of the English legal system, the most explicit indication of the robustness of an examination under section 81 can be found in the way which the laws relating to the examination of a bankrupt have abrogated the privilege in respect of self-incrimination in respect of bankrupts.

For some time the common law of bankruptcy struggled with the extent to which a bankrupt could be permitted to rely upon the privilege. In 1813, there were suggestions that the privilege was still available to a bankrupt, permitting a bankrupt to decline from answering a question that tended to incriminate him.<sup>65</sup> However, in *Re Worrall; Ex Parte Cossens*,<sup>66</sup> Lord Eldon considered

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<sup>62</sup> [1982] HCA 66

<sup>63</sup> *Rochfor v Trade Practices Commission* [1982] HCA 66 at [9]

<sup>64</sup> *Sorby v Commonwealth* [1983] HCA 10 per Brennan J at [9]

<sup>65</sup> *Re Oliver; Ex parte Oliver* (1813) 1 Rose 407 at 414, as cited in *Griffin v Pantzer* (2004) 137 FCR 209 at [82]

<sup>66</sup> (1820) Buck 513 At [540] cited *Griffin v Pantzer* (2004) 137 FCR 209 at [83]

that perhaps an exception existed in relation to the examination of a bankrupt. In *Re Kirby and Thomas; Ex parte Kirby*<sup>67</sup>, Lord Lyndhurst LC upheld a bankrupt's claim to rely upon privilege, even if such examination would be advantageous to the administration of a bankrupt estate.<sup>68</sup>

A reconciliation of approaches was attempted by the Court in *R v Scott*<sup>69</sup>, where the majority of the Court noted:<sup>70</sup>

*The result seems to be that a question cannot be put to a bankrupt which does not touch his trade, dealings, or estate, or the direct object of which is to shew that he has committed a criminal act, yet that he cannot refuse to answer a question which does touch his trade, dealings, or estate, although the answer may tend to shew that he has concealed his effects, or been guilty of any other offence connected with his bankruptcy.*

However by 1883, the *Bankruptcy Act 1883* (UK) specifically provided that a bankrupt could be compelled to give evidence that could later be used against him.<sup>71</sup> In referring to *R v Scott* and upon considering the 1883 Act, Lord Colridge considered:<sup>72</sup>

*“Whether Parliament was aware of Reg v Scott ... and meant to remove all doubt or ambiguity I know not; but it has done so...Therefore, it is plain that a bankrupt is bound to answer questions which the Court allows to be put, and the answers, although they tend to criminate him, may, by the express words of the Act of Parliament, afterwards be read in evidence against him.”*

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<sup>67</sup> (1829) Mont & M 212

<sup>68</sup> At 229-30, as cited in *Griffin v Pantzer* (2004) 137 FCR 209

<sup>69</sup> (1856) 169 ER 909

<sup>70</sup> *Griffin v Pantzer* (2004) 137 FCR 209 at [98]

<sup>71</sup> Section 17(8)

<sup>72</sup> *In Re a Solicitor* (1890) 25 QBD 17 as cited in *Griffin v Pantzer* (2004) 137 FCR 209 at [107]

In *Re Paget; Ex parte Official Receiver*<sup>73</sup>, following the earlier authority in *Re Atherton*,<sup>74</sup> Lord Hanworth MR concluded, that:

*“...in the course of the public examination of a debtor the debtor is not entitled to refuse to answer questions put to him on the ground that the answers thereto may incriminate him, the purpose of the Act being to secure a full and complete examination and disclosure of the facts relating to the bankruptcy in the interests of the public and not merely in the interests of those who are the creditors of the debtor.”*

Subsequent courts in England and Australia have followed the decision in *Re Paget*.<sup>75</sup>

In consideration of the present legislation, section 81(11AA) of the *Bankruptcy Act 1966* (Cth) provides:

*“Subject to any contrary direction by the Court, the Registrar or the magistrate, the relevant person is not excused from answering a question merely because to do so might tend to incriminate the relevant person.”*

The section has been regarded as sufficient to abrogate the privilege.<sup>76</sup> However, as Allsop J noted in *Griffin v Pantzer*, when the context of the common law is understood, and certainly by the time the *Bankruptcy Act 1924* (Cth) was passed, there was no scope for the operation of a privilege against self-incrimination, even in the absence of the express legislative words abrogating the privilege.<sup>77</sup>

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<sup>73</sup> [1927] 2 Ch 85

<sup>74</sup> [1912] 2 KB 251

<sup>75</sup> *Griffin v Pantzer* (2004) 137 FCR 209. See for example, *In re Jawett* [1929] 1 Ch 108,

<sup>76</sup> *Griffin v Pantzer* (2004) 137 FCR 209 at [192]

<sup>77</sup> *Griffin v Pantzer* (2004) 137 FCR 209 at [126]



In the United States of America, it has been held that the privilege in respect of self-incrimination does not apply to the statutory transfer of title: *Johnson v United States*<sup>78</sup>, and *In Re Fuller*<sup>79</sup>.

There does seem to be some reprieve for bankrupts with the passing of the 1966 Act which makes the requirement for a bankrupt to answer a question that tends to incriminate the bankrupt, “*subject to any contrary direction by the Court, the Registrar or the magistrate*”. Those words create a discretion, which if exercised, would have the effect of restoring the privilege on a question-by-question basis. In *Griffin v Pantzer*, the Court declined to lay down rules to guide how the Registrar might exercise this discretion.<sup>80</sup>

In *Cohen v Prentice*, Driver FM similarly reached the conclusion that the Court should not seek to fetter the discretion of the Registrar to disallow incriminating questions by imposing restrictions by reference to any class of questions,<sup>81</sup> although there was an expectation that a Registrar conducting an examination would give adequate protection to a bankrupt by excusing the bankrupt from particular questions that would “*unfairly prejudice his interests as an accused person in known proceedings.*”<sup>82</sup>

While noting that the authorities suggest that it is paramount that a Trustee in Bankruptcy have wide investigatory powers into the affairs of a bankrupt, there appear to be little guidance available to the Court or a Registrar as to when a question might be “unfairly prejudicial.” It is submitted that perhaps the distinction identified in *R v Scott* above may provide useful guidance to the conduct of an examination. That is, questions relating directly to the administration of the bankruptcy should be allowed regardless as to whether such questions are incriminating, but questions which are incriminating that have only a peripheral relevance to the administration of the bankruptcy might be disallowed.

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<sup>78</sup> 228 US 457

<sup>79</sup> 262 US 91

<sup>80</sup> *Griffin v Pantzer* (2004) 137 FCR 209 at [190]

<sup>81</sup> [2002] FMCA 227 at [20]

<sup>82</sup> [2002] FMCA 227 at [29]

The Act provides for the use of notes taken during the course of an examination, and the transcript of the evidence given by an examinee. In so far as is relevant, section 81 provides:

“ ...

*(15) The Court, the Registrar or the magistrate, as the case may be, may cause such notes of the examination of a person under this section to be taken down in writing as the Court, the Registrar or the magistrate, as the case may be, thinks proper, and the person examined shall sign the notes.*

*(17) Notes taken down and signed by a person in pursuance of subsection (15), and the transcript of the evidence given at the examination of a person under this section:*

*(a) may be used in evidence in any proceedings under this Act whether or not the person is a party to the proceeding; and*

*(b) shall be open to inspection by the person, the relevant person, the trustee or a person who states in writing that he or she is a creditor without fee and by any other person on payment of the fee prescribed by the regulations.*

...”

The use of a transcript in proceedings other than under the *Bankruptcy Act 1966* has been subject to significant judicial consideration. Section 255(2) provides that:

*“(2) The transcript or recording is admissible as evidence of the matters described by a person whose words are recorded in the transcript or recording, unless the Court, or a court in which the transcript is sought to be introduced, makes an order to the contrary.”*

It is noted that the bankruptcy court, or a Court before whom the transcript is adduced, may disallow the evidence.<sup>83</sup> Thus, for example, a court may disallow evidence on the basis that it is unfairly prejudicial to the examinee in the context in which the evidence is sought to be relied upon.

While at first glance section 255(2) would appear to allow evidence obtained in the course of an examination to be used in proceedings at large, in *Douglas-Brown (Official Liquidator of Woomera Holdings Pty Ltd) v Furzer*<sup>84</sup>, the Full Court of the Supreme Court of Western Australia noted that, in considering that section 81(7) contemplates that testimony obtained during the course of an examination will only be used against a the examinee in the course of proceedings under the *Bankruptcy Act 1966*.<sup>85</sup>

*“... the apparently broad terms of s 255(2) must be qualified so as to make a s 81 transcript admissible (subject to the power of the Court to make an order to the contrary) only in proceedings under the Bankruptcy Act to which the examinee is a party.”*

Accordingly, the interpretation contended for by the Full Court would seem to limit the use of the evidence gained in the course of an examination significantly. In *Cohen v Prentice*, Counsel for a bankrupt submitted that even if a transcript of the examination could not be tendered in evidence in other proceedings (in those circumstances, criminal proceedings), the transcript could be *“used by prosecuting authorities to undertake a course of inquiry to gather the same evidence or other evidence to be used in the criminal proceedings.”*<sup>86</sup> Driver FM considered:<sup>87</sup>

*“That seems to be an inevitable risk in any case where there are pending criminal proceedings at the time of a public examination. I am not persuaded that that in itself is a reason for adjourning the public examination.”*

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<sup>83</sup> Section 255(2)

<sup>84</sup> (1994) 13 ACSR 184

<sup>85</sup> (1994) 13 ACSR 184 at 434

<sup>86</sup> [2002] FMCA 227 at [9]

<sup>87</sup> [2002] FMCA 227 at [22]

It is significant to note that section 81(11AA) of the Act abrogates the privilege only as against a Bankrupt. By its terms, it does not operate to remove any right to claim a privilege against self-incrimination with respect to a person being examined other than the Bankrupt. The recognition that the privilege is available to an examinee other than a bankrupt has existed since at least 1877.<sup>88</sup>

It would seem that this limitation on the use of the examination power may itself be of some significant hindrance to the trustee in bankruptcy. It has been alleged that in some of the most notable Australian bankruptcies, for example, in the bankruptcy of Alan Bond, the bankrupt employed the assistance of third-parties to assist in the concealment of their assets.<sup>89</sup> The fact that these third-parties can avail themselves of the privilege will mean that a trustee in examinations is prevented from requiring persons to disclose the location of property of the Bankrupt, or admit to their concealment.

Section 128 of the *Evidence Act 1995 (Cth)*, permits a Court to grant a Certificate to a person who gives self-incriminating evidence, the effect of which prohibits the use of that evidence (or any evidence any information, document or thing obtained as a direct or indirect consequence of the person having given evidence) in any proceedings in an Australian Court against the person. In *Griffin v Pantzer*, Allsop J (with whom Ryan and Heerey JJ agreed) considered that the *Evidence Act* did not apply to examinations under section 81 as evidence the procedure was inquisitorial and evidence was not “adduced”.<sup>90</sup>

In *Kansal v United Kingdom*<sup>91</sup>, the European Court of Human Rights held that the use in criminal proceedings of transcripts obtained in the course of a public examination during which evidence of the examinee tended to self-incriminate was a violation of Art 6 of the European Convention for Human Rights (the right to a fair hearing).

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<sup>88</sup> *Ex parte Schofield; In re Firth* (1877) 6 Ch D 230

<sup>89</sup> See for example the allegations made in *Bond v Rozenes, Palmer & AG* [1996] DCA 1545

<sup>90</sup> *Griffin v Pantzer* (2004) 137 FCR 209 [201]

<sup>91</sup> [2004] BPIR 740

## EXAMINATION AND LEGAL-PROFESSIONAL PRIVILEGE

A bankrupt, or a legal adviser to a Bankrupt, might refuse to answer a question on the basis of legal-professional privilege. In Australia, the communications between a person and their legal adviser have been found not to be “property” which ordinarily vests in the trustee in bankruptcy. Accordingly, the Courts have held that there is no provision in the *Bankruptcy Act 1966* which would seem to have abrogated the privilege and the privilege remains largely intact.<sup>92</sup> In *Steele, Ex parte Official Trustee in Bankruptcy*<sup>93</sup>, having regard to a privileged communication, Ryan J considered:<sup>94</sup>

*... the Act gives the Official Trustee no right to inspect it. I do not regard the provisions of the Act which vest the property of the bankrupt in his trustee as affecting the conclusion that I have reached nor do I regard them as vesting the privilege itself in the Official Trustee. This is not to say that there may not be communications between a bankrupt and his or her legal advisers which are so closely connected with the property of the bankrupt which vests in the trustee that the bankrupt is precluded from asserting legal professional privilege as against the trustee.* (emphasis added).

Thus, his Honour alluded to the possibility that there may be some circumstances where the privilege is not maintainable by the Bankrupt. There has been little consideration as to the circumstances of when a communication might be “*so closely connected with the property of a bankrupt*” as to remove the right of the bankrupt to claim privilege. However, it would seem that a communication to a solicitor relating to the location of an illegally concealed asset must fall within such a category and may well not be protected by legal-professional privilege. The occasion for applying the exception identified by Ryan J in *Steele* does not appear to have arisen in subsequent decisions.

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<sup>92</sup> *Steele; Ex parte Official Trustee in Bankruptcy* [1994] FCA 905

<sup>93</sup> [1994] FCA 905

<sup>94</sup> [1994] FCA 905 at [39]

A further important exception to legal professional privilege was identified in *Re Bond; Ex parte Ramsay*<sup>95</sup> arising from the very nature of legal-professional privilege. Sheppard J considered that:

“[The Queen v Cox and Railton (1884) 14 QBD 153]... *is authority for the proposition that only those communications passing between solicitors and their clients in professional confidence and in the legitimate course of professional employment of their solicitor are privileged. Thus communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it are not privileged from disclosure.*” (emphasis added)

In applying this authority, it would seem then that legal-professional privilege does not apply to a bankrupt who, during the course of an examination, seeks to object to a question to a legal adviser regarding the potential or intended concealment of assets that a person proposes to undertake upon being adjudged a bankrupt.

The English jurisprudence in relation to the claim by a bankrupt to legal-professional privilege has diverged from the Australian approach. In *In Re Konigsberg (A Bankrupt); ex parte Trustee of the Property of the Bankrupt v Konigsberg*<sup>96</sup>, Geoff J found that a bankrupt's entitlement to legal professional privilege vests in the trustee so that the privilege could not be relied upon in the course of an examination. However, in *Foxley v United Kingdom*<sup>97</sup>, the European Court of Human Rights found that the opening of a bankrupt's legal correspondence by the trustee in bankruptcy without statutory authority was a breach of Art 8 of the European Charter of Human Rights (Protection of Correspondence).<sup>98</sup>

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<sup>95</sup> [1994] 126 ALR 720

<sup>96</sup> [1989] 1 WLR 1257

<sup>97</sup> [2000] ECHR 224; (2001) 31 EHRR 25

<sup>98</sup> As cited in *R v Dunwoody* [2004] QCA 413.

## NON-ATTENDANCE AND/OR NON-PARTICIPATION IN AN EXAMINATION

It is an offence for a person who is summons for the purposes of an examination, to fail to attend in accordance with the requirements of the Summons.<sup>99</sup> The Act provides that where such an offence has been committed, a person may be sentenced to imprisonment for a period up to six months. It is a defence to failing to attend if a person has a “*reasonable excuse*”.<sup>100</sup>

There have been instances where medical reasons have been called upon by bankrupts and/or their associates as to why they should not be examined. In *Re Wyatt*<sup>101</sup>, Gibbs J was considered whether a medical certificate in general terms could be the foundation of a “reasonable excuse” for the purposes of failing to attend. His Honour considered:<sup>102</sup>

*“It is unnecessary to lay down any general rules as to the procedure that should be followed where a person summoned under s 81 has tendered on his or her behalf a medical certificate. Obviously the Registrar before whom such a document is tendered must keep in mind two things: first, the necessity to ensure that no warrant is issued for the apprehension of a person who was in truth too ill to attend before the Registrar, and, secondly, the general principle that a decision should not be made adverse to any person who has not had a full and fair opportunity of being heard before the decision was made.”*

Consideration might be had to hearing evidence from a doctor who has certified that a persons summons is unfit to attend. The adjournment of a summons for examination is an option available for the purposes of accommodating an temporarily ill examinee. Where it is contended that a person will be permanently unfit to be examined, a summons might be discharged.<sup>103</sup> However, in *Official Trustee v Povey*<sup>104</sup>, Lindgren J considered

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<sup>99</sup> Section 264A

<sup>100</sup> Section 264A(1B)

<sup>101</sup> (1969) 15 FLR 374

<sup>102</sup> 1969) 15 FLR 374 at [377]

<sup>103</sup> *Official Trustee v Povey* [1998] FCA 1760

<sup>104</sup> [1998] FCA 1760

that in an application for the discharge of a summons on medical grounds, the public interest in an examination of a bankrupt must be weighed against the harm or inconvenience to the examinee. Such a weighing exercise is for the Court to undertake, and not a medical professional.<sup>105</sup>

A Court is empowered to issue a summons for the arrest of a person who has failed to attend an examination.<sup>106</sup> In *Skase; Ex parte Donnelly*<sup>107</sup>, Drummond J considered the issue of a warrant for the failure of Christopher Skase to attend an examination in circumstances where Mr Skase resided on the island of Majorca. It was accepted that such warrants could not be executed extraterritorially. Drummond J considered that notwithstanding that his Honour considered that the Court had the power, the issue of a warrant in those circumstances would be an empty gesture, and his Honour declined to issue such a warrant.<sup>108</sup>

It should also be noted that it is an offence for an examinee to refuse to answer a question allowed to be put to him or her in the course of an examination, or to refuse to take an oath or affirmation as to the truthfulness of any answer.<sup>109</sup> An examinee will also be guilty of an offence if the examinee evades or prevaricates in answering a question in the course of an examination<sup>110</sup>.

In *Coward v Stapleton*<sup>111</sup>, the High Court reinforced the distinction between failing to answer a question, and giving an answer which is not believed. In that case, the Court held:

*It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer. A disbelief on the part of the court in the truth of the purported answer is not, without more, a sufficient foundation for such a conviction...It is essential not to lose sight*

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<sup>105</sup> *Official Trustee v Povey* [1998] FCA 1760

<sup>106</sup> Section 264B

<sup>107</sup> (1992) 37 FCR 509

<sup>108</sup> (1992) 37 FCR 509 at [10], [26]

<sup>109</sup> Section 264C

<sup>110</sup> Section 264D

<sup>111</sup> (1953) 90 CLR 573



*of the sharp distinction that exists between a false answer and no answer at all. Of course a purported answer may be so palpably false as to indicate that the witness is merely fobbing off the question. His attitude in the box may show that he is simply trifling with the court and is making no serious attempt to give an answer that is worth calling an answer. In such cases it may well be right to say that the witness refuses to answer the question, but it cannot be too clearly recognized that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt...*

It is submitted that the a conviction for perjury is markedly more difficult to found as opposed to a summary conviction for contempt in the face of the Court. Thus, there appears to be limited scope to punish an examinee who is willing to falsify answers on oath, but the falsity of which may not be able to be proved on the appropriate criminal standard. For instance, it would seem that it would be difficult to prosecute the “forgetful bankrupt” for failing to answer questions relating to his or her examinable affairs. Similarly, it would be difficult to establish that such a bankrupt did indeed remember the answers to the questions which he or she has been asked, and accordingly, a prosecution for perjury would be equally difficult.

#### **CONCLUDING REMARKS: EXAMINATIONS AND ASSET PROTECTION**

In the English legal system, the difficulties faced by the concealment of assets by bankrupts have been a problem that can be traced through legislative response since at least the time of Henry VIII. In response to attempts by “fraudulent bankrupts” to seek to remove their divisible assets by concealment or other means, the examination powers in bankruptcy are expansive powers that enable trustees to conduct a full investigation into techniques of illicit asset protection. The examination procedure, by its inquisitorial nature and in the manner in which it has removed privileges against self-incrimination in respect of a bankrupt, is a unique power which is unlikely to exist outside of the law of bankruptcy and liquidations. In Australia, an exception still exists in relation to claims relating to legal-professional privilege and this may dilute the

effectiveness of an examination. Further, there are limits on the consequences of untruthful answers. With exception to questions asked for an improper purpose, where a question relates to the examinable affairs of a bankrupt, there is little limitation on the questions that may be asked in the course of an examination. Further, in recent times, it has been recognised that the power exists not only to assist in recoveries for the benefit of creditors, but also to permit an investigation in the public interest. The wide scope of the examination power indicates that it will remain a relevant and important tool in the collection of a bankrupt's assets.

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