



## ASIC - Serious About Bankrupts

ASIC are on the warpath against undischarged bankrupts participating in the management of companies. This all comes from Part 2D.6 of the Corporations Act.

If a bankrupt is found to be managing a corporation whilst bankrupt, the bankrupt is subject to a fine of \$5,500, 1 year imprisonment or both.

As you all know under Section 206B(3), an undischarged bankrupt is disqualified from managing corporations. ASIC are focussing on directors and former directors who were such before they became bankrupt.

Recently ASIC have visited 112 bankrupts and found 102 complying with the law and 10 that are under the microscope. The 10 are possibly facing criminal charges, according to ASIC, which indicates they are quite serious about this breach.

Such a proactive approach begs the question; What exactly is managing a corporation? Obviously continuing to be a director is a fait accompli. However Section 206A (1) takes this further and specifies what they actually mean. To paraphrase the section the Bankrupt appears to be participating in managing the corporation if he or she makes or participates in making decisions that affect the whole or substantially the whole of the business. He or she may act in such a way that affects significantly the corporation's financial standing.

In addition they cannot communicate instructions or wishes to directors if they know that the directors are accustomed to act on those instructions or they have made those instructions or wishes known intending the directors act on them.

You have to think this initiative is a good thing but what are they really trying to achieve. They say to stop Bankrupts putting companies and their creditors at risk which is really the rationale behind the legislation.

One would think it will create the odd time where an entrepreneur thinks twice about using Bankruptcy as a tool of the trade or more likely they will just make it harder for ASIC and ITSA to spot the fact of actual control unless someone within their framework puts them in or the people included are examined publicly through the Bankruptcy and spill the beans.

Terrible thing to admit but I guess the other likely impact is that in terms of defensive structuring for high risk individuals may be a rise in the use of Trusts for housing assets that they do not want risked without the use of a corporation as a Trustee. This has the potential to create other problems but would get around the managing of the corporation issues.

As ever we are always happy to entertain your enquiries without obligation.



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