

# SURETY REVIEW

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## The Enterprise Act 2002

**In our Autumn 2003 Special Issue we focused on the new provisions of Part 10 of the Enterprise Act 2002 ("the Act") relating to corporate insolvencies. On 1 April 2004 further provisions of Part 10 will come into force introducing significant changes to personal insolvency.**



In a drive to encourage entrepreneurship, the government has sought to introduce a less draconian regime for those facing personal insolvency. It aims to provide a fresh start for those who fail "honestly" whilst providing protection against Bankrupts who abuse their creditors and the public.

*"Fresh Start" proposals for personal bankruptcy are based on the recognition that honest failure is an inevitable part of a dynamic market economy".<sup>1</sup>*

### Key Provisions

The main changes introduced by the Act are:

- The duration of bankruptcy will be reduced;
- There will be greater post-discharge restrictions for those who abuse creditors;
- The powers of Trustees to recover a Bankrupt's home and income will change;
- There will be amendments to the individual voluntary arrangements regime.

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### Duration of Bankruptcy

Currently, Bankrupts are discharged from bankruptcy after three years unless the court:

- (i) Orders a summary administration (low value of creditors); or
- (ii) Suspends automatic discharge when the Bankrupt has failed to co-operate; or
- (iii) If the debtor has been bankrupt within the last fifteen years or remains subject to an existing criminal bankruptcy order.

Although the rule is subject to some exceptions, generally it is a "one size fits all" measure - the duration is the same regardless of culpability.

### The Changes

After April 2003 the majority of Bankrupts will be automatically discharged from bankruptcy after one year. However, this period can be reduced or extended depending on the co-operation of the individual. The amendments will operate retrospectively to a limited extent: Individuals who are bankrupt prior to 1 April 2004 will be discharged on 31 March 2005 or earlier if their bankruptcy was due to end earlier under the old rules.

### The Effect

This will enable Bankrupts to have a 'Fresh Start', earlier. This should mean that cases are concluded and dividends paid to Creditors more quickly, but it may also

<sup>1</sup> White Paper - Productivity and Enterprise: Insolvency - A Second Chance - 31 July 2001

mean that investigations are time pressured. However, the ability to suspend discharge where the Bankrupt fails to comply with an obligation will remain and new post-discharge restrictions may be imposed on a Bankrupt effectively continuing the effect of the bankruptcy beyond discharge for culpable behaviour. As under the current legislation, once a Bankrupt's 'estate' is vested in a Trustee it does not re-vest on discharge but remains with the Trustee until annulment of the bankruptcy or it is released (save in relation to the Bankrupt's home - see below).

## Restrictions on Activities

Some of the restrictions which currently apply to Bankrupts (such as disqualification from holding certain offices) are removed by the Act. However, as a counter measure to the new softer regime, new Bankruptcy Restrictions Orders will be introduced to impose longer restrictions on Bankrupts whose conduct has been dishonest or otherwise culpable, either before or after bankruptcy. The procedure is similar to the Directors Disqualification procedure.

Due to the changes in the period of bankruptcy, the majority of Bankrupts will be free from any restrictions which survive the Act (for example disqualification to act as a Company Director) after a period of one year. However, Bankrupts that are considered to have abused the system or their creditors will have more lengthy restrictions imposed on them. The court can determine the length of time for which those restrictions are to apply from between 2 and 15 years. Examples of such culpable conduct are a failure to keep proper accounting records, gambling, rash and hazardous speculation and entering into transactions at undervalues or preferential transactions.

## The Effect

The major change to the restrictions comes as a result of the shortening of the Bankruptcy period. The onus will be upon the Official Receiver and the Secretary of State to apply in cases where they see fit to have

restrictions, in particular the prevention of the debtor taking office as a company director, extended to survive the automatic discharge. Information from creditors will be helpful to support such applications.

## Bankrupt's Home

The Bankrupt's main asset is usually his or her home. Currently, after a period of one year, the interests of creditors are deemed to take preference over those of the Bankrupt's family and the Trustee can take steps to realise his interest in the property. However, this can take many years causing further hardship to the bankrupt as the Bankrupt's interest remains vested in the Trustee until it is realised or released by agreement.

The new provisions provide that if the Trustee's interest is not realised (by charge, the granting of an order for possession or by agreement) within three years following the date of the bankruptcy it automatically reverts to the Bankrupt.

## Individual Voluntary Arrangement (IVA)

The Act introduces changes to encourage greater use of IVAs. Currently there are approximately 7000 IVAs made each year and they generally provide a better return to creditors than Bankruptcy. The changes relate to post-bankruptcy arrangements.

Firstly, the Act enables Official Receivers to act as nominees and supervisors of arrangements, giving a choice of public or private sector supervision of the arrangement. It is anticipated that this will have cost implications for the arrangements. Secondly, it provides a new, fast track scheme. The Official Receiver seeks approval of the court. No meeting of creditors is called and creditors will only be able to approve or reject the arrangement rather than modify it. If approved (by three quarters in value of creditors), the Official Receiver will file an application with the court to the proposal; to annul the bankruptcy order.

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For further information about Surety and Bonds generally, please contact our Surety Team. If you have any comments or would like further copies of our Surety Update, please email [scain@halliwells.co.uk](mailto:scain@halliwells.co.uk) in our Business Development department or telephone on 0161 831 2633.

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