

## When Family Law meets Bankruptcy Law

There have been important amendments to both the Bankruptcy Act and the Family Law Act in closing a major loophole whereby a bankrupt spouse could hide behind a Binding Financial Agreement (BFA) in order to defeat his or her creditors.

The purpose of a BFA is to allow spouse parties to make an agreement as to the financial consequences before, during or after their marriage. It was possibly not envisaged that such agreements would be used by some people to ensure that assets would not be available to creditors in the event of bankruptcy. *Australian Securities and Investments Commission and Rich and Anor* [2003] Fam Ca 1114.

Mr Rich at the time a director of One Tel Limited and his wife entered into a Binding Financial Agreement under the *Family Law Act*. The Agreement had the overall effect of transferring to his wife and children assets exceeding \$9 million. ASIC, as a third party, made an application to the Family Court for an order seeking to set aside the Financial Agreement as One Tel was in liquidation. The court held that ASIC did not have the jurisdiction to be heard, and its application failed. There was a great deal of public protest following that decision.

The new amendments mean that bankrupts, or potential bankrupts, can no longer protect assets by entering into a BFA with their spouses under the *Family Law Act*. The *Family Law Act* has now been amended to allow third party proceedings to apply to the Family Court to set aside a BFA, but a further step BFA's are now specifically excluded for the definition of maintenance agreements in the Bankruptcy Act.

On 18 March 2005, the *Bankruptcy and Family Law Legislation Amendment Act 2005* was assented. Importantly the Act now:

- confers the Family Court with jurisdiction in bankruptcy;
- enables a bankruptcy trustee to be joined in applications relating to Financial Agreements; and
- empowers the court to review Financial Agreements where a party becomes bankrupt.

These amendments will assist a spouse of a bankrupt, by allowing the non-bankrupt spouse to make an application for property settlement under the *Family Law Act* in the Family Court even though their spouse was bankrupt or subject to a personal insolvency agreement at the time the application is made.

However, if a party to a marriage becomes insolvent as a result of a transfer of property under a Financial Agreement, this is now a further act of bankruptcy pursuant to the *Bankruptcy Act 1966* (Bankruptcy Act). This would then entitle a trustee in bankruptcy to "claw back" any such transfer in accordance with the provisions of the Bankruptcy Act.