Submission on Freedom of Movement applying to Australian bankrupts

Under Bankruptcy law in Australia bankrupts shall *forthwith* give to the trustee the bankrupt’s passport unless they are excused by the trustee. The handing over of the passport is not meant to be a punishment by preventing overseas travel but is warranted to facilitate the administration of the estate. It is one of a number of disabilities that have long been part of the bankruptcy landscape. The right to freedom of movement may well be one that would not be expected to be lost when becoming bankrupt but the Bankruptcy Act is a model of simplicity and clarity when providing for the forfeiture of the passport.[[1]](#footnote-1)

The AFSA[[2]](#footnote-2) media releases make regular mention of cases that have come before the courts involving bankrupts and their passports which suggests that the issue of bankrupts requiring their passports and freedom for overseas travel is an unexpectedly time consuming matter for the government bankruptcy regulator, trustees and the courts not to mention the bankrupt.[[3]](#footnote-3) The question it raises is should passports, that are required to be handed into trustees upon bankruptcy, be the subject of so much attention. In fact it raises the question of this restriction on freedom of movement and whether Australia needs this restriction in its Bankruptcy law at all?

The passport is the property of the Australian Government (or any other government who has issued one to the individual) not property of the individual so it is not property that vests in the bankruptcy trustee. Why then are bankrupt Australians treated so differently to their fellow Australian non-bankrupts. The answer seems to lie in the real possibility of ‘flight’ to escape the consequences of being a bankrupt in Australia or that their departure will make the administration of their bankruptcy estate difficult. Yet why should this be the case in Australia given that most, if not all, other jurisdictions do not treat bankrupts like this.

My submission is that it is time to review the practice of restriction Australian bankrupt freedom to travel.

Whether for business, study or tourist holidays there are vast numbers of Australians leaving and returning to this country every year. Australia is a multi-cultural society which equates to many Australians having relatives who live overseas. Additionally, it is an island nation with major import/export activity which equates to business and employment requiring overseas travel. The right to issue passports is part of the prerogative of the Crown. The issue of a passport is matter within the exclusive domain of the Australia government and they can impose conditions and restrictions which they deem fit and they can use the passport as a means of controlling movement abroad of Australian nationals. In this way the right to travel as a fundamental freedom of movement remains exclusively a matter for the Australian legal system to define and control.

The Bankruptcy Act provides that a bankrupt give his or her passport to the trustee in bankruptcy.[[4]](#footnote-4) As international travel is made easier and globalisation and immigration impact upon employment and families, the loss of the freedom of international movement is becoming a significant issue for some Australian bankrupts.

There are three main sections of the *Bankruptcy Act 1966* (Cth) that the issue of bankrupts and their passports regularly invoke. These are sections 77, 272 and 178.

 A *Three provisions for bankrupts.*

Section 77 Duties of bankrupt as to discovery etc of property

77(1) [Duties, etc] A bankrupt shall, unless excused by the trustee or prevented by illness or sufficient other cause:

1. forthwith after becoming a bankrupt, give to the trustee:
	1. …
	2. the bankrupt’s passport, if any;

Section 272 Leaving Australia with intent to defeat creditors etc

272(1) [Offence] A person who:

(a) …

(b) …

(c) after he or she become a bankrupt and before he or she is discharged from the bankruptcy, without the consent in writing of the trustee of his or her estate, leaves Australia, or does an act preparatory to leaving Australia;

is guilty of an offence and is punishable, on conviction, by imprisonment for a period not exceeding 3 years.

272(2) [Consent of trustee] The trustee may impose written conditions on a consent given for the purposes of paragraph (1)(c). If the bankrupt is liable to make a contribution to the trustee under section 139P or 139Q, the conditions may include conditions regarding the payment of that contribution.

272(3) [Contravention of conditions of consent] If the bankrupt contravenes any condition imposed by the trustee, the bankrupt is guilty of an offence and is punishable, on conviction, by imprisonment for a period not exceeding 1 year.

Section 178 Appeal to court against trustee’s decision etc.

178(1) [Right to appeal] If the bankrupt, a creditor or any other person is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable.

178(2) [Tine limit] The application must be made not later than 60 days after the day on which the person became aware of the trustee’s act, omission or decision.

As the legislation expressly refers to passports the interpretation of s77 is clear and is an expression of that exercise of statutory power over the Australian freedom of movement. Likewise while s272 does not expressly refer to passports it does firstly make it an offence to leave Australia or do an act preparatory to leaving without trustee consent. Then it provides that if written consent to leave Australia or do an act preparing for this is made that conditions can be imposed. Finally the section provides that contravening a condition is also met with an offence.

Section 178 can be used in all sorts of contexts but for the bankrupt who seeks written consent in compliance with s272(2) then can use this section to seek the court to intervene and permit them leaving Australia providing its just and equitable. This would mean that if successful at this level the court would require the passport to be made available to the bankrupt, it could also mean that conditions could be imposed by the court similar to those that might be used by the trustee.

 *B Two provisions for debtors*

Debtor are prevented from overseas travel due to two main provisions namely ss 30 and 50.

Section 50 Taking control of debtor’s property before sequestration

50(1) [Court may make direction] At any time after a bankruptcy notice is issued or a creditor’s petition is presented, in relation to a debtor, but before the debtor becomes a bankrupt, the court may:

(a) …

(b) make any other orders in relation to property.

Section 30 General powers of courts in bankruptcy

30(1) [General powers] The Court:

1. has full power to decide all questions, whether of law or of fact, in any case of bankruptcy or any matter under Part IX, X and XI coming within the cognizance of the court and
2. may make such orders (including declaratory orders and orders granting injunctions or other equitable remedies) as the court considers necessary for the purposes of carrying out or giving effect to this Act in any such case or matter.

These two sections along with s78 that provides for the arrest of a debtor (and bankrupts) bring into play the restrictions of freedom of movement, that is, for overseas travel for those not yet bankrupt.

In the *Bankruptcy Act 1966* (Cth) there are restrictions provided by law which adversely affect the right to leave Australia. Restrictions, which are not provided for in the law or are not in conformity with the requirements of the human rights protocols violate the rights guaranteed. In creating the restriction, as found in s77 of the *Bankruptcy Act 1966* (Cth) Australia should have been guided by the principle that the restrictions must not impair the essence of the right of freedom of movement. Under human rights protocols the laws authorizing the application of restrictions, such as those found in the Bankruptcy Act, should use precise criteria and may not confer unfettered discretion on those charged with their execution. There is no precise criteria in ss77, 272 or 178 of the *Bankruptcy Act 1966 (*Cth) in this regard.

Under human rights protocols it is indicated that it is not sufficient that the restrictions serve the permissible purposes, they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instruments amongst those, which might achieve the desired result; and they must be proportionate to the interest to be protected. This principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

An application by a bankrupt for permission to travel overseas requires careful consideration of all the relevant circumstances. These considerations must be made in light of the fact, that as ordinary Australians, bankrupts still wish to have the freedom of movement to pursue their legitimate commercial or personal desires and who, it must be remembered, are neither criminal nor under criminal restraint to travel.

One solution is to remove the requirement to hand over the passport altogether.

Hypothetically what would the removal of the requirement do? Certainly it would mean bankrupts would travel freely and for whatever reason, yet they would still be expected to return and assist as the estate administration continues. There are still consequences for not assisting the trustee, not the least being a delayed discharge.[[5]](#footnote-5) For those bankrupts that did not return they could face extradition proceedings, and Australian courts and bankruptcy trustees could use the cross border laws to assist in the pursuit of examinations and to enable recovery of assets.[[6]](#footnote-6) Additionally, they could choose to assist the administration from abroad.

Presently it can be argued that the freedom of movement for bankrupts will disrupt the administration of the bankrupt estate however consideration must be given to modern forms of communication. Communication between trustee and bankrupt is very important and essential for the good administration of the estate. Modern forms of communication mean that people who travel overseas are contactable. They use blogs, email, internet cafes, texting, and phone to contact those they know back in Australia so surely it could be an expectation that the bankruptcy trustee would be able to seek answers and keep in communication with a bankrupt who is travelling abroad.

Australia has had this requirement of bankrupt’s handing over passports for many years yet a brief look at a number of other countries’ insolvency laws suggests that they do not impose passport restrictions in the manner found in Australia. For example countries with similar bankruptcy regimes such as United Kingdom, New Zealand, Canada, the United States and South Africa have no such law. In the corporate arena, the Corporations Act does not require all directors of failed companies to immediately hand over their passports yet if a similar business was operated as a sole trader or partnership the Bankruptcy Act provides a very different treatment. Australian bankrupts cannot be less reliable, less helpful and more prone to ‘flight’ than those in the countries already mentioned nor can they be less reliable, less helpful or more prone to ‘flight’ than their incorporated cousins, the directors, in the corporate world.

Finally, if the primary purpose of the Bankruptcy Act is to provide a mechanism whereby a debtor‘s property can be taken and used to pay creditors, to the extent that there is a shortfall to allow the debtor to be freed from the burden of accumulated debts and the scheme is not intended to be punitive[[7]](#footnote-7) then is even one dollar added to an insolvent estates’ assets for distribution by the administration of a bankrupt’s passport.[[8]](#footnote-8) The provision requires time to be spent collecting the passport, to process a release of the passport, and time and expense for the court proceeding to establish that the decision is correct. The process must also balance matters so that it refrains from making the outcome punitive. Since the provision was introduced communication and travel have progressed so much that it is time to review this particular bankrupt ‘disability’ and give serious consideration to removing the requirement for bankrupts to hand over their passports and re-establishing a freedom of movement for these Australians.

Assoc Professor Christopher F Symes

Adelaide Law School

University of Adelaide

1. For a more detailed discussion particularly on the jurisprudence of this topic see Symes, Bankrupts and Passports: A Call to Repeal ss77(1)(a)(ii) and 272(1)(c) of the Bankruptcy Act 14(3) *QUTLJ.* [↑](#footnote-ref-1)
2. ITSA changed its name to AFSA in August 2013. [↑](#footnote-ref-2)
3. <https://www.afsa.gov.au/about-us/resources/media-kit/media-archive>. For example <https://www.afsa.gov.au/resources/media-kit/media-archive/bankrupt-harris-nsw-convicted-for-travelling-overseas-without-permission-13-april-2012?searchterm=pass> [↑](#footnote-ref-3)
4. *Bankruptcy Act 1966* (Cth) s77(1)(a)(ii). [↑](#footnote-ref-4)
5. *Bankruptcy Act 1966* (Cth) s149D. [↑](#footnote-ref-5)
6. *Bankruptcy Act 1966* (Cth) s29 and *Cross Border Insolvency Act 2008*(Cth). [↑](#footnote-ref-6)
7. As set out by Reithmuller FM in *Nguyen v Pattison* [2004] FMCA 517 at [22]. [↑](#footnote-ref-7)
8. Perhaps AFSA would consider collecting statistics on this matter and incorporating them into future Annual Personal Insolvency Statistics reports. [↑](#footnote-ref-8)