

# **BANKRUPTS AND PASSPORTS: A CALL TO REPEAL SS 77(1)(A)(II) AND 272(1)(C) OF THE BANKRUPTCY ACT**

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*Should passports be forfeited in bankruptcy? Upon bankruptcy the bankrupt is required to give their passport to the trustee in bankruptcy. This means that they no longer have the legal freedom of movement to engage in international travel without their trustee's consent. Some bankrupts have cause to undertake international travel and for them it is a significant issue and the loss of the freedom of movement for international travel and the requirement to seek permission is a significant disability. There have been numerous reported cases involving bankrupts and the use of their passports.*

*This paper canvasses the current law from the Bankruptcy Act and the significant cases of *Re Tyndall* and *Re Hicks*. Following a prelusory discussion on the freedom of movement as a human right the paper contemplates several reasons for the removal of the substantive law. The paper concludes that the repeal of the subsection should be addressed in light of human rights considerations, the ease of present methods communication with trustees and the presences of other established means of corraling the bankrupt's assistance.*

## I INTRODUCTION

Despite liberty of movement being, in the words of the UN, “an indispensable condition for the free development of the person”,<sup>1</sup> under the *Bankruptcy Act 1966* (Cth) (*‘Bankruptcy Act’*) in Australia bankrupts shall forthwith give to the bankruptcy trustee the bankrupt's passport unless they are excused by that 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 bankrupt's estate. It is one of a number of disabilities that have long been part of the bankruptcy legal landscape.

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<sup>1</sup> Human Rights Committee, *General Comment No 27: Freedom of Movement (Art.12)*, 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9, (2 November 1999), [1] <<http://www.refworld.org/docid/45139c394.html>>.

Furthermore, it is a relatively simple law to enforce in that the Commonwealth Government operates a 'Portwatch' security system that will detect a bankrupt who has failed to hand over their passport when they attempt to cross the nation's borders. The freedom of movement may well be one freedom that would not be expected to be forfeited when becoming bankrupt. From the outset it should be noted that in practice not every trustee collects passports.

There have been numerous reported cases involving bankrupts and the use of their passports<sup>2</sup> since 1966 and the AFSA<sup>3</sup> media releases occasionally feature unreported judgments on such matters.<sup>4</sup> The issue of bankrupts forfeiting their passports and then requiring them and this freedom of movement for overseas travel is an unexpectedly time consuming matter for the government bankruptcy regulator, trustees and the courts, as well as for the bankrupt. The question all this raises is: "should passports be forfeited in bankruptcy?"

Australian bankrupts have the disability imposed upon them because of the real possibility of 'flight' to escape the consequences of being a bankrupt in Australia and that their departure will make the administration of their bankruptcy estate difficult.

There are essentially three groups affected by this issue; bankrupts attempting to leave Australia without having sought consent, bankrupts who have sought consent from their trustee and have been denied who then appeal to the courts and the final group; those debtors already subject to bankruptcy notices but not yet bankrupt who are yet to have the 'disabilities' of bankruptcy imposed upon them but have future travel plans. This paper argues that it is time to repeal the provisions requiring the

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<sup>2</sup> For example *Heshmati v Burness* [2012] FMCA 1097; *Dunwoody v Official Receiver* [2005] FMCA 1634; *Gu v Pascoe* [2006] FMCA 367; *Hill v Piscopo* [2007] FMCA 814; *Luna v Pattison* [2004] FMCA 237; *Re Hicks*; *Ex parte Lamb* (1994) 217 ALR 195; *Re Tyndall*; *Ex parte Official Receiver* (1977) 30 FLR 6; *Mulharn v Pearce* [2012] FCA 631; *Casella v Prentice* [2004] FMCA 237; *Mayger v Prentice* [2000] FCA 99; *Bethune v Newman* (1996) 19 ACSR 99; *Re Hepburn ex parte: James v DCT* [1992] FCA 116; *El-Maghraby v Patterson* [2003] FMCA 103; *Grujin v Patterson* [2002] FMCA 213; *Re Peter Clyne v DCT* [1984] FCA 161; *ASIC v Johnston* [2011] FCA 920; *Molina*; *Ex parte Wily* [1995] FCA 1760; *McGregor*; *Ex parte Hans Sens Pty Ltd* [1994] FCA1430; *Watts v Bendigo and Adelaide Bank Ltd* [2010] FCA 1013; *Sims v CBFC Ltd* [2006] FCA 1074; *Groves, in the matter of Groves (Bankrupt) v Robinson (Trustee)* [2013] FCA 490.

<sup>3</sup> ITSA changed its name to AFSA in August 2013.

<sup>4</sup> Australian Financial Security Authority, *News and Media Releases* <<https://www.afsa.gov.au/about-us/resources/media-kit/media-archive>>. See eg, Australian Financial Security Authority, 'Bankrupt (Harris, NSW) convicted for travelling overseas without permission' (Media Release, 13 April 2012) <<https://www.afsa.gov.au/resources/media-kit/media-archive/bankrupt-harris-nsw-convicted-for-travelling-overseas-without-permission-13-april-2012?searchterm=pass>>.

forfeiture of the passport and in doing so discusses the relevant legislative provisions and the seminal cases.<sup>5</sup>

## II THE RELEVANT PROVISIONS OF THE *BANKRUPTCY ACT*

Bankruptcy causes a number of legal ‘disabilities’. Bankrupts are legally ‘disabled’ in running for public office or managing a corporation.<sup>6</sup> They are prohibited from entering some transactions without informing the other party to the transaction that they are ‘disabled’, that is, they are a bankrupt.<sup>7</sup> Another of these ‘disabilities’ is that upon bankruptcy the bankrupt is required to give their passport to the trustee in bankruptcy.<sup>8</sup> This means that they no longer have the legal freedom of movement to engage in international travel without their trustee’s consent. For a large percentage of bankrupts this disability will have no effect as they have no cause to travel but for others international travel is a significant issue and the loss of the freedom of movement for international travel and the requirement to seek permission is a significant disability.

There are two main subsections of the *Bankruptcy Act* that the issue of bankrupts and their passports regularly invoke. These are subsections 77(1)<sup>9</sup> and 272(1), with subsections (2) and (3) also having a consequential relationship:

### **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:

- (a) forthwith after becoming a bankrupt, give to the trustee:
- (ii) the bankrupt’s passport, if any;

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<sup>5</sup> *Re Hicks; Ex parte Lamb* (1994) 217 ALR 195 (*‘Re Hicks’*); *Re Tyndall; Ex parte Official Receiver* (*‘Re Tyndall’*) (1977) 17 ALR 182; (1977) 30 FLR 6; [1977] FCA 15.

<sup>6</sup> *Corporations Act 2001* (Cth) s 206B(3); *Australian Constitution* s 44.

<sup>7</sup> *Bankruptcy Act 1966* (Cth) ss 149D(1)(c), 304A(g).

<sup>8</sup> *Ibid* s 77(1)(a)(ii).

<sup>9</sup> The legislative history of s 77 is that it was s 76 of *Bankruptcy Act 1924* (Cth) (repealed); however, no mention is made of passports in this earlier Act. A reference to the handing over of passports forthwith was inserted into the current *Bankruptcy Act 1966* (Cth). There was a *Bankruptcy Amendment Act 1987* (Cth) which amended s 77 by repealing most of it and then inserting new wording, and the subsection reference to passports was re-inserted without discussion in Hansard or the explanatory memoranda.

**Section 272 Leaving Australia with intent to defeat creditors etc**

272(1) [Offence] A person who:

(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.

There are other sections which are related, although these have less significance. Section 178 permits bankrupts (and others) to appeal to court when they are affected by an act of the trustee and this could include a decision to deny travel. The application must be made not later than 60 days after the day the bankrupt became aware of the decision.<sup>10</sup> The court can require the passport to be made available to the bankrupt and it could impose conditions. For debtors who are yet to become bankrupt s 50(1)(b) permits a court to make “any other orders in relation to property” and can be used to restrict a debtor’s freedom of movement. Section 30(1)(a), is a general power of the courts to decide ‘any matter’ and s 30(1)(b) permits the court to make ‘any orders’ for the purposes of carrying out or giving effect to the Act and together these can restrict a debtor’s freedom of movement.

Section 77 expressly refers to “passports” and there is no problem of interpretation, the subsection is clear and it is an exercise of statutory power over the Australian bankrupt’s freedom of movement to travel. Section 272 does not expressly refer to “passports” though it does make it an offence to leave Australia without the trustee’s consent and leaving would require a passport. Section 272 provides that if written

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<sup>10</sup> *Bankruptcy Act 1966* (Cth) s 178(2).

consent is granted to leave Australia or to do an act preparing for this, then conditions can be imposed and to contravene a condition is also an offence.

### III *RE TYNDALL AND RE HICKS*

There are essentially two cases that are regularly used to assist the court to decide how to apply the relevant legislative provisions. Both cases, *Re Tyndall; Ex parte Official Receiver* ('*Re Tyndall*'),<sup>11</sup> and *Re Hicks; Ex parte Lamb* ('*Re Hicks*'),<sup>12</sup> are single judge decisions of the Federal Court.

#### A *Re Tyndall*

In this exemplary judgment by Deane J (as he then was) in the Federal Court, the matter of permission to travel overseas is carefully analysed.

Deane J commenced his analysis by looking at the task thus:

It can be said at once that I do not regard a decision by the trustee on an application by a bankrupt for permission to travel overseas as coming within the category of decision which should be treated as being within the ordinary day-to-day administration of a bankrupt estate. Even though applications for such leave are not uncommon, they must always be treated as being of fundamental importance, requiring careful consideration of all relevant circumstances for the reason that they are ordinarily related to the freedom of a subject, who is neither criminal nor under criminal restraint, to travel to pursue his legitimate commercial or personal desires.<sup>13</sup>

Later Deane J expresses a view on the difficulty of this law:

It is only in recent years that the Commonwealth bankruptcy legislation has made it an offence for a bankrupt to travel overseas without the consent of his trustee and has required a bankrupt to surrender his passport to this trustee once a sequestration order is made. Bankruptcy does not, of itself, involve any criminal offence. A citizen should be free to travel if and when his commercial activities or personal desires prompt him so to do. Restrictions upon such travel under the bankruptcy legislation must be seen as being aimed at insuring the proper administration of the bankruptcy laws and of bankrupt estates under such laws and not as a penalty imposed upon a citizen as a consequence of inability to pay debts leading to the making of a sequestration order. In some cases, the possibility

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<sup>11</sup> (1977) 17 ALR 182; (1977) 30 FLR 6; [1977] FCA 15.

<sup>12</sup> (1994) 217 ALR 195.

<sup>13</sup> *Re Tyndall; Ex parte Official Receiver* (1977) 17 ALR 182; (1977) 30 FLR 6; [1977] FCA 15 [13].

that the bankrupt has committed offences under the Act and is seeking to abscond from possible prosecution will be extremely relevant.<sup>14</sup>

Finally, Deane J commented on the relevant provisions, stating that:

The provisions of s 77(a) and s272 of the Act recognize that a bankrupt's legitimate desires to travel overseas must, in an appropriate case, be subordinated to what is necessary for the proper and efficient administration of his estate in bankruptcy and the administration of the bankruptcy law.<sup>15</sup>

Deane J also interpreted the wording of s 178 of the *Bankruptcy Act* as conferring on the court the widest possible discretion as to the appropriate order which should be made in a particular case.<sup>16</sup> The power went beyond interfering only if the trustee had acted or made decisions that could be considered absurd, unreasonable or in bad faith. The court could order in the matter as it thinks just and equitable. This is important to the topic of bankrupt's appeals on refusals to permission to travel.

### *B Re Hicks*

In this case, Heerey J required three questions that were at the forefront of the matters to be considered in exercising the court's discretion.

These were:

- (i) Is the proposed visit genuine?
- (ii) Is the bankrupt likely to return to Australia as promised?
- (iii) Will the visit hamper the administration of the estate?

Both *Re Tyndall* and *Re Hicks* are regularly cited with approval in the usually short judgments of the courts when bankrupts appeal due to the refusal by their trustee.

#### *1 Is the proposed visit genuine?*

To answer this question, it requires the bankrupt to have genuine reasons for overseas travel. By comparison, Australians who are not bankrupt are able to leave Australia without providing a genuine reason.<sup>17</sup> The trustee must exercise their discretion after considering the reasons put forward by the bankrupt. While it is impossible to

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<sup>14</sup> Ibid [25].

<sup>15</sup> Ibid [26].

<sup>16</sup> Ibid [11].

<sup>17</sup> The usual process for departure includes completing a departure card that requests where the Australian will spend the majority of their time and ticking a box suggesting 'business, conference, holiday or other'.

forecast every ‘genuine reason’ most will relate to personal visits particularly to visit elderly family members residing overseas, employment and business, health treatment and other reasons like court attendances. Such cases will turn on the particular circumstances of the bankrupt and so the cases that follow provide examples of ‘genuine reasons’ without carrying much precedential value.

### **1.1 Personal visits due to compassionate reasons<sup>18</sup>**

An example of a genuine reason based upon compassion is found in *El-Maghraby v Pattison* where the bankrupt wished to visit his ill mother in Egypt.<sup>19</sup> He applied to his registered trustee to travel, but was unsuccessful, and so appealed this decision using s 178 of the *Bankruptcy Act*. The evidence before the court and corroborated by the bankrupt’s cousin (an Australian Federal Police officer) was that his mother was seriously ill and that he had a legitimate *prima facie* claim to travel on compassionate grounds.

### **1.2 Employment/business<sup>20</sup>**

An example of employment and related activities as evidence of their ‘genuine reasons’ for travel is *Casella v Prentice*<sup>21</sup> where the bankrupt was unemployed but had the opportunity of employment and a letter from a potential employer indicating that the employment would require overseas travel. The nature of the employment would mean frequent travel and at times at very short notice. The cases assessing genuine reason related to employment exhibit particular circumstances unique to the bankrupt and demonstrate the growing importance of travel to many Australian employees.

### **1.3 Health treatment<sup>22</sup>**

There are fewer cases of health reasons as genuine reasons for overseas travel. An example is *Jackson-Grose v OR*<sup>23</sup> where the bankrupt wished to travel to France with

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<sup>18</sup> Other examples include: *Weiss v Official Trustee in Bankruptcy* (1983) 1 FCR 40 (visit elderly mother for Christmas and conduct some business); *Jatkar v Rambaldi* [2003] FMCA 355 (visit critically ill mother).

<sup>19</sup> [2003] FMCA 103.

<sup>20</sup> Other examples include: *Luna v Pattison* [2004] FMCA 237 (employed as an experienced international retail buyer who attended trade fairs); *McGregor Ex parte Hans Sens Pty Ltd* [1994] FCA 1430 (appointment as international business travel consultant); *Watts v Bendigo and Adelaide Bank Ltd* [2010] FCA 1013 (required travel for consultancy work and conference attendance); *Lees v O’Dea* [2014] FCA 571 (prospective appointment would be jeopardised). See also Symes C, ‘The ABC of a Bankrupt’s Overseas Travel Consents’ (2013) 13 (10) *Insolvency Law Bulletin* 237.

<sup>21</sup> [2002] FMCA 48.

<sup>22</sup> See also *Clyne v O’Brien* [1984] FCA 161 (second medical opinion and sanatorium treatment not available in Australia).

her youngest child (9 months old) and six year daughter, as she was suffering from post-natal depression and believed the trip to visit family would assist her.

#### 1.4 Court-related travel

There are instances where there are genuine reasons for travel due to court proceedings. In *Talacko v Talacko*<sup>24</sup> a debtor who ultimately became bankrupt under the *Bankruptcy Act* wished to travel to Europe to assist his cause in court proceedings involving restitution and an equitable compensation claim under a family arrangement. The debtor had been under travel restrictions also from the Victorian court for fear that he would deal inappropriately with the overseas properties.<sup>25</sup>

In all of the above examples it was the particular circumstances of the bankrupt that determined the ultimate decision by the court to permit travel.

#### 2 *Is the bankrupt likely to return to Australia as promised?*

Such a question presupposes that the bankrupt's physical presence in Australia is important to the administration of the estate. Arguably such a position has changed over time with the access to technology such as mobile phones, internet and email, skype, and other forms of technology. Evidence put forward by bankrupts on this matter usually includes claims that they have permanent Australian employment, or the existence of and the care for family members who reside in Australia, or they are in receipt of an Australian pension,<sup>26</sup> or that there is a limited time they can spend overseas due to the expiry of visas.

#### 3 *Will the visit hamper the administration of the estate?*

Again, the question will evoke different answers depending on the bankrupt's circumstances. For example a short trip with promises to return and few if any outstanding requests by the trustee for information could present strong evidence to satisfy this question.<sup>27</sup> Additionally if there are no specific events relating to the administration of the estate planned for the time whilst the bankrupt plans to be

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<sup>23</sup> [2002] FMCA 239.

<sup>24</sup> [2010] FCA 193.

<sup>25</sup> In the Full Court decision, *Talacko v Talacko* [2010] FCAFC 54, the court was not expected to deal with the passport provisions but the general powers of the court under the *Bankruptcy Act 1966* (Cth) s 30 and the arrest power in s 78. In *obiter*, the court supported *Re Tyndall*: see [33], [35].

<sup>26</sup> See eg, *Dunwoody v Official Receiver* [2005] FCA 1634 [8]; *Re Hicks* (1994) 217 ALR 195, 198.

<sup>27</sup> See eg, *Hill v Piscopo* [2007] FMCA 814 [13]-[15].



overseas that would require their attention this would surely assist the bankrupt being permitted to travel.<sup>28</sup>

### C *The use of conditions imposed by trustees*

Section 272(2) of the *Bankruptcy Act* permits the trustee to impose conditions on a bankrupt's travel and upon the return of their passport document. The provision mentions conditions may be imposed relating to contributions, but is otherwise silent on any other conditions that may be imposed.

A review of those cases making it to court suggest sensible conditions are imposed, such as the return of the passport to the trustee within two days or some other specified time, a copy of the proposed itinerary, a copy of the ticket, the address and other contact details for the bankrupt while they are overseas.<sup>29</sup>

### D *The reasons given by trustees and/or courts for refusing permission to travel*

As the discretion of the trustee is not subject to detailed provisions set out in the legislation, each individual bankrupt is going to present different issues. Some cases have exposed the reasons given by trustees for refusing the return of the passport. In *Mulhern v Pearce*,<sup>30</sup> the judgment repeats the reasons that were set out in a letter sent to the bankrupt. In this case the trustee had refused based on ten reasons including no offer of surety, no identifiable assets in Australia, personal debts of over \$60m, two trips overseas without permission of trustee, no undertakings to return offered to the court, a failure to attend public examinations, breaches of undertakings previously given to the court, mention to the trustee's solicitors that upon leaving Australia the bankrupt would 'never return' and that the bankrupt had 'generally failed to comply' with his duties. Some of these reasons point to breaches of the *Bankruptcy Act* while others fall into a very arbitrary field.<sup>31</sup> For example, there is no express legal requirement that a bankrupt should have to provide a surety to be permitted to travel or that due to the magnitude of debt the bankrupt should be refused their freedom to travel.

## IV FREEDOM OF MOVEMENT AS A HUMAN RIGHT

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<sup>28</sup> See eg, *Re Hicks* (1994) 217 ALR 195, 198.

<sup>29</sup> See eg, *El-Maghraby v Pattison* [2003] FMCA 103 [16], [17].

<sup>30</sup> [2012] FCA 631 [20].

<sup>31</sup> The concern here is that the reasons take on a criminal law flavour such as posting a bond, obtaining a surety, previous record (of refusal of permission to travel), treating the application differently if the bankrupt is on their second bankruptcy, requiring evidence of who is funding the travel, etc.

Australia is a multi-cultural society, which means many Australians visit relatives overseas and Australia's major import/export commercial activity results in business and employment requiring overseas travel. Therefore, freedom of movement is a crucial human right for Australians, including those who are bankrupt. In a seminal article on passport law in 1982, Lancy commences:

The age of jet travel has ushered in an unprecedented growth in the number of Australians travelling overseas. It is this growth in overseas travel that has raised the question of whether there is a 'right' to travel and if so, what is the exact nature of that right. It has also called into question the precise nature and effect of the principal travel document, the passport. For it is upon this modest and relatively obscure document that the right to travel is predicated.<sup>32</sup>

Lancy states that under common law, it appears that the right to issue passports is part of the prerogative of the Crown. He claims:

[N]o one is entitled as of right to demand a passport; no subject has any remedy if he or she is denied a passport. The Crown retains a discretion to refuse a passport although this discretion is seldom exercised.<sup>33</sup>

The statutory power to issue and cancel a passport in Australia is conferred on the Federal government by the *Passports Act 1938* (Cth) and its major Amendment Act in 1979. There is a general discretionary power to issue or refuse passports with the Minister for Foreign Affairs. In summary, then, the issue of a passport is matter within the exclusive domain of the Australia government and it can impose conditions and restrictions which it deems fit and it 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 remains exclusively a matter for the Australian legal system to define and control. A passport is the property of the Australian Government (or any other government who has issued one to the individual<sup>34</sup>) not property of the individual so it is not property that vests in the bankruptcy trustee.<sup>35</sup>

There is no Federal government legislation that guarantees the freedom of movement within the Commonwealth of Australia or a right to leave. Australia, though, is a

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<sup>32</sup> Robert S Lancy, 'The Evolution of Australian Passport Law' (1981-1982) 13 *Melbourne University Law Review* 428.

<sup>33</sup> *Ibid*, 432.

<sup>34</sup> This can present further complications if the bankrupt holds more than one passport and the following question arises: should they have to hand up both their Australian passport and other country's passport?

<sup>35</sup> Cf *Bankruptcy Act 1966* (Cth) s 58.

party to seven core international human rights treaties and there is a right to freedom of movement which is contained in the International Covenant on Civil and Political Rights ('*ICCPR*').<sup>36</sup> The freedom of movement can be restricted; either under Article 4 of the *ICCPR* by way of derogation, or on permissible grounds under Article 12(3) such as protecting national security, public order, public health or morals or the rights and freedoms of others. Such restrictions should not only serve the permissible purposes, but they must also be the least intrusive means of achieving the desired result, and they must be necessary and proportionate.<sup>37</sup> The Federal Attorney General's Department explains the right to leave in this way:

The freedom to leave a country pertains to both (sic) short-term, long-term and permanent departures. It cannot be made dependent on establishing a purpose or reason for leaving. Citizens have a right to obtain passports or other travel documents from their country of citizenship. The right to leave, and to possess a passport, may be restricted, most notably if the person's presence is required due to their having been charged with a criminal offence.<sup>38</sup>

Australian bankrupts are guaranteed freedom of movement with Australia's participation in these international human rights treaties. The test for the legislation that restricts Australian bankrupts therefore is to comply with the permissible restrictions in the *ICCPR*. While the bankrupt being restricted in their freedom of movement is unlikely to be grounded in national security or public health, a case could be made that their restriction assists public order and protects the rights of others. To date, this has not been the subject of debate. It is interesting to note that the explanation by the Attorney General's Department gives as the most notable example of restriction is one linked to criminal matters; the very topic Deane J recalls in *Re Tyndall* is to be distinguished. The test is that the restrictions used are the "least intrusive means of achieving the desired result"<sup>39</sup> and in the case of bankrupts, that is the efficient administration of the estate. Furthermore, the restriction must be

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<sup>36</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts. 12 & 13.

<sup>37</sup> This Guidance is taken from the Human Rights Committee, *General Comment No 27: Freedom of movement, Article 12*, 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (18 October 1999) [14].

<sup>38</sup> Attorney-General's Department, Australian Government, *Right to freedom of movement* <<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttofreedomofmovement.aspx>>.

<sup>39</sup> Attorney-General's Department, Australian Government, *Right to freedom of movement* <<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttofreedomofmovement.aspx>>.

“necessary” and “proportionate”<sup>40</sup> and, again, in the case of bankrupts, it will be a matter of efficient administration of the estate.

In creating the restriction as found in s 77 of the *Bankruptcy Act*, Australian law should be guided by the principle that the restrictions must not impair the essence of the right of freedom of movement. Under international human rights articles, the domestic laws authorizing the application of restrictions, such as those found in the *Bankruptcy Act*, should use precise criteria and should not confer unfettered discretion on those charged with their execution.<sup>41</sup> There are no precise criteria in ss 77, 272 or 178 of the *Bankruptcy Act* in this regard. Judges have been interpreting the provisions of the statute, and following precedents such as *Re Tyndall*, in matters of permission to travel overseas without having to contemplate the international law aspects raised here.<sup>42</sup> Presently the judges exercise close to unfettered discretion with the efficient administration of the estate the only ground to restrict a bankrupt’s freedom.

#### V THE REPEAL OF SECTION 77(1)(A)(II)

The immediate repeal of these subsections would mean bankrupts would travel freely and for whatever reason, although they would still be expected to return and assist as the estate administration continues.<sup>43</sup> At present, the *Bankruptcy Act* provides consequences for bankrupts who do not assist the trustee, not the least of which is a delayed discharge, and there is no suggestion that such consequences require change.<sup>44</sup> Bankrupts that do not return from overseas can face extradition proceedings, and Australian courts and trustees may use existing cross-border laws to assist in the pursuit of examinations and to enable recovery of assets.<sup>45</sup> Upon repeal, bankrupts can travel abroad unrestricted while still assisting their trustee and the estate administration, most likely by way of modern forms of communication.<sup>46</sup>

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<sup>40</sup> Ibid.

<sup>41</sup> Human Rights Committee, *General Comment No 27: Freedom of movement, Article 12*, 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (18 October 1999) [13].

<sup>42</sup> For a discussion on the international instruments recognising the importance of the right to travel, see *Talacko v Talacko* [2010] FCAFC 54.

<sup>43</sup> See eg, *Bankruptcy Act 1966* (Cth) ss 19AA, 77, 77AA, 81 and 264A.

<sup>44</sup> Ibid ss 149B(2), 149C, 149D.

<sup>45</sup> See eg, *Cross Border Insolvency Act 2008* (Cth) Sch 1, art 27.

<sup>46</sup> It is observed that the subsections in question were introduced prior to many current forms of communication that are used by overseas travelers to communicate back to Australia. Common examples include texting, worldwide roaming of mobile phones, email and the use of internet cafes and WiFi.

Two other reasons are advanced for the repeal of the subsections. First, the present treatment is unusual in the common law world.<sup>47</sup> Secondly, the treatment of company directors who have been managing an insolvent corporate person is quite different, yet these directors may possess similar information, such as the whereabouts of property that assists in the efficient insolvency administration. Under the *Corporations Act 2001* (Cth), liquidators have the power to apply for court orders to prevent officers from absconding from Australia rather than the legislative forfeiture of passports.<sup>48</sup>

## VI CONCLUSION

The primary purpose of the *Bankruptcy Act* is to provide a mechanism by which the property of a debtor who becomes bankrupt can be taken and used to pay creditors and, to the extent that there is a shortfall, to allow the debtor to be freed from the burden of accumulated debts. The scheme is not intended to be punitive.<sup>49</sup> Insolvent estates are unlikely to be enhanced by the administration of a bankrupt's passport.<sup>50</sup> The current subsections require significant time spent on collecting the passport, processing a release of the passport and when refused, time and expense for a court to decide if the bankrupt can travel. The process requires, as Deane J suggests in *Re Tyndall*, careful consideration of all the relevant circumstances, because the bankrupt is neither criminal nor under criminal restraint and can pursue their legitimate commercial or personal desires to travel. The repeal of the subsections should be addressed in light of human rights considerations, the ease of present methods of communication with trustees regardless of where the bankrupt is physically, the presence of other established means of corralling bankrupt's assistance, and the non-conformity with other common law jurisdictions and existing corporate insolvency. Such a repeal of the passport forfeiture would modernise a small segment of Australia's bankrupt 'disability' law and may even save trustees' time.

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<sup>47</sup> The passport of a bankrupt is not legislatively forfeited in the UK, USA, Canada, New Zealand, South Africa, Malaysia, Singapore or India. There was a discussion in the Republic of Ireland, in 2012, when reforms were being made to their personal insolvency statute; however, it was decided not to proceed with the forfeiture: ShoutingIsLeadership, 'New Personal Insolvency Legislation: Bankrupts forced to surrender passports? Why?' on *Politics.ie* (31 May 2012) <<http://www.politics.ie/forum/economy/189740-new-personal-insolvency-legislation-bankrupts-forced-surrender-passports-why.html>>.

<sup>48</sup> *Corporations Act 2001* (Cth) ss 486A and 486B.

<sup>49</sup> *Nguyen v Pattison* [2004] FMCA 517 [22] per Reithmuller FM.

<sup>50</sup> Perhaps AFSA would consider collecting statistics on this matter and incorporating them into future Annual Personal Insolvency Statistics reports.