



Review of the *Real Property Act 1886 (SA)*

Fact Sheet 11 – Interaction with Bankruptcy Law and Commercial Matters

Bankruptcy and Real Estate Transactions

When an individual is declared bankrupt under the *Bankruptcy Act 1966* (Cth) (***Bankruptcy Act***), interests in real property vest in the bankruptcy trustee. The bankruptcy trustee is then able to, pursuant to s 134(1)(a) of the *Bankruptcy Act*, deal with property in place of the legal owner. This includes selling real property to release funds for payment of the bankrupt's debts.

The trustee does not require orders of the court beyond the bankruptcy (whether court ordered or voluntary) to exercise these powers. This is because, under s 58 of the *Bankruptcy Act*, when a person is declared bankrupt, their property, both present and after-acquired, automatically vests in the bankruptcy trustee.

The duty of the bankruptcy trustee to act in the best interests of the creditors is implied in several sections of the *Bankruptcy Act*. For example, s 19 requires the trustee to take possession of the bankrupt's property and requires the trustee to exercise their powers in a way that achieves the best outcome for the creditors. However, while trustees are expected to realise the best price, direct and routine external oversight for each sale to ensure this outcome is not specified.

While the bankruptcy trustee's primary duty under the *Bankruptcy Act* is to the creditors, there are some duties that extend to the bankrupt as well. These are:

1. Administration in Good Faith: The trustee must administer the bankrupt's estate in good faith and in accordance with the law, ensuring fair treatment;
2. Duty of Care: The trustee must act with due care and diligence in managing the bankrupt's property; and
3. Provision of Information: The trustee must provide the bankrupt with information about the administration of the estate.

However, as the overarching duty is to act in the best interests of the creditors, this can sometimes mean taking actions that are not in the bankrupt's personal interest, such as selling property.

Prior to selling a property, the bankruptcy trustee must complete a transmission application, putting the property in their name (in their capacity as bankruptcy trustee). If a third party, for example, a potential purchaser, wishes to find out whether such an application has been made, they can conduct a historical search on SAILIS which will show all prior dealings with the property.

Commercial Matters and Real Estate Transactions

A person does not, however, have to be bankrupt for their property to be sold to realise debts. Orders for the sale of real property can be made by a court:

4. In mortgage recovery actions, where the lender is given the power of sale to recover the amounts owing to them;
5. to enforce judgement debts, where the Sheriff of the Court is given the power of sale; or
6. Under Partition provisions, allowed under the Law of Property Act 1936 (SA), where two owners of land (often commercial arrangements) cannot agree to how the land is to be dealt with.

Similar to a bankruptcy trustee, anyone selling a property pursuant to a court order will need to complete a transmission application prior to transferring the property to a new registered proprietor. This is with the exception of a mortgagee, who does not need to complete a transmission application and is also able to sell a property pursuant to a court order without removing any applicable caveats.



Consultation Questions

1. How should the exercise of the powers of sale be noted on the certificate of title for the benefit of an interested third party (ie potential purchaser)?
2. What oversight should there be to the exercise of the powers of sale?
3. What considerations should be made by a court when making an order under a partition application?

SALRI's consultation process will open on 8 July 2024 and close on 4 October 2024.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.

SALRI acknowledges the assistance of the SA Minister for Planning in providing grant funding for this project.

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15 July 2024