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# BROKE, NOT BROKEN

LIFE AFTER GOING UNDER

You can go broke. You don't have to stay broken.



**DOUG CONSTABLE**

# **BROKE, NOT BROKEN**

An Insider's Guide to Bankruptcy, Insolvency  
and Starting Again in Australia

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Broke, Not Broken - An Insider's Guide to Bankruptcy, Insolvency and Starting Again in Australia

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First edition, 2026.

## About This Book

This is a book about moving on after a setback - how I did it, and how the people in these pages did it. It's about rebuilding your strength when everything has fallen apart.

Along the way you'll find out who your real friends are. Some will put an arm around your shoulder and tell you they'll help you through this - then proceed to take whatever they can while they're standing there. You'll learn to see them coming.

But this book is also for the others - the friends and partners who believed in you and respected you. I want them to know the truth: you haven't lost anything. You've gained the knowledge to build again, bigger and better.

That's what this book is really about. Not going broke. Moving on.

## A Word Before We Start

This book is general information and lived experience - mine and my clients'. Names and identifying details in the client stories have been changed.

My biggest advantage is that I'm not a lawyer, an accountant or a financial adviser. I learnt everything the hard way, and I've lived most of what you're going through. This book is not financial, legal or investment advice.

The law in this area moves. Dollar thresholds, time limits and procedures change regularly. Before you act on anything in this book, check the current position with AFSA ([afsa.gov.au](http://afsa.gov.au)), ASIC ([asic.gov.au](http://asic.gov.au)), or a professional - and get the right people around you. Helping you find and coordinate those people is exactly what I do.

# **PART ONE - Going Broke & Moving On**

## **Who is this book for?**

Everybody. Everybody who works, buys property, runs a business, takes out a loan, borrows money or signs a guarantee of any kind.

The best time to read it is before you start a business, before you buy a property, before you sign with a bank - before you enter any financial transaction, secured or unsecured. The second-best time is right now, whatever stress you're under.

I hope insolvency lawyers read it. I hope accountants read it. Most of all I hope you read it, find stories you recognise, and use them - either to avoid financial stress or to find your way through the stress you're already in. Pass it on to your friends, your neighbours, your family.

If you're facing bankruptcy or insolvency, the message at the heart of this book is simple: it's not the end of the road. With the right assistance it can put you on a better path than the one you were on before the trouble started.

This book is not for scoundrels. It won't teach you to dodge debts you can pay, cheat your creditors or scam anyone. Some aggressive trustees and liquidators would rather I hadn't written it - they'd prefer the loopholes and truths about bankruptcy and insolvency stayed shrouded in mystery. To anyone dismayed that I've removed the mystery: no apologies.

I believe two things at once. When you commit to pay a debt, you should make every effort to honour it. And when, despite your best intentions, that's simply not possible, it shouldn't be the end of the world. Everybody deserves the chance to push the reset button, learn from their mistakes and start again. A society that preys on people already in distress is not a society with much hope.

## **What is this book about?**

Let me be as clear as I can.

This book is about personal bankruptcy and company insolvency and how they actually work. It's a guide to avoiding financial calamity where you can - and where you can't, minimising the damage to your emotional health, your relationships and your future.

The stories in these pages aren't in any textbook. You won't find them on the internet, and it's unlikely your professional advisers can tell you what they teach. Not because they don't want to - they simply don't have the experience. I hope people hand this book to their accountants and lawyers. My job would be easier if more of them knew these principles.

If bankruptcy or insolvency is unavoidable, enter it with a plan and an understanding of how the machinery works. Because it is machinery - the bankruptcy and insolvency industries are exactly that, industries, full of businesses turning a profit every day. This book is about how to make those mechanisms work for you instead of against you.

Don't believe you can come out of a financial predicament intact? Consider this: nothing in the insolvency and bankruptcy laws says you must come out the other end worse off than when you went in. If they did, it would defeat the reason the laws exist. Yes, the laws protect your creditors - and your creditors, if they're businesses, likely carry insurance against bad debts. Everyone else is covered and protected. Why shouldn't you be? You are. You just need to know how, what and why. That's what I'm going to share with you.

## **Who am I? What do I do?**

Hardly a day passes without somebody asking me, "Doug, what is it exactly that you do?"

It's hard to explain, because most people know very little about personal bankruptcy or company insolvency until it happens to them - and surprisingly little even then.

The best answer came from a client I'd helped achieve an annulment of his bankruptcy - wiped, as if it never happened. He said:

*"What is Doug Constable? He's The Conductor."*

If you've been to the symphony you'll know what he meant. An orchestra is made up of families of musicians - woodwind, strings, brass. Each family sounds fine on its own. Together, properly conducted, they're something else entirely.

Now imagine one family is your legal service, another your accountant, another your financial adviser. Individually respected, hopefully efficient. Ever wished they'd play in unison? That's what I do. I'm not a solicitor, an accountant, a barrister, a valuer, a trustee or a liquidator. My role is to build the strategy and conduct your professional services so they work together - through this phase and through the years that follow.

Another client calls me the Master Strategist. That fits too. A strategy is the most important tool in your toolbox. Conducting without one is conducting without a score - it doesn't work. The ability to create an effective strategy is what separates what I do from anyone else you might have asked for help.

You can't study what I do at any institution. It only comes from years of dealing with insolvent people and insolvent businesses. That's what I have - experience - and this book is me sharing it.

You won't read what I'm about to tell you anywhere else. There are shelves of books about the law of bankruptcy, the rights of creditors, the role of the trustee, biographies of famous bankrupts. I can't find one that teaches ordinary people the strategies and techniques to build a better financial future from here. So I wrote it.

## My story

Everybody has a story - a point where things changed and could never go back to how they were. Mine started at six o'clock one Wednesday morning.

The house phone next to our bed starts ringing. It wakes me, and I know exactly who it is. My heart races. Panic rises through my half-asleep body. My wife is lying next to me. Things haven't been great lately - my fault. I've been stressed, secretive, nervy and grumpy, none of which makes for a harmonious marriage.

I ignore the phone. My wife is awake and I can feel her tense beside me. What is she thinking? A girlfriend calling? An angry business associate? A prank?

I lay there embarrassed and ashamed. I know now I should have felt neither. But in the early nineties I thought - like most people did - that anyone who couldn't pay their debts was a scoundrel.

The phone rings again. I'm immobilised with fear. My options? Ignore it and tell my wife the truth - that everything we've worked for over twenty years may be lost. Answer it and bluff. Or hope aliens abduct me before I have to face any of it.

In about five seconds I made the decision that changed my life. I decided to be honest and tell my wife everything.

"Jane, I have something to tell you. Without fully understanding what I was doing, I've acted as guarantor for hundreds of insurance brokers."

"I don't understand," she said. "What do you mean, guarantor?"

Over the next thirty minutes I explained how I had let hundreds of insurance brokers sell insurance under my licence, on behalf of several insurance companies. I hadn't done it for money - I received no commission. That only made her angrier. Why carry

that risk for no reward? Fair question. I wish I'd asked it myself, earlier.

The insurance companies paid those brokers generous upfront commissions. Buried in the contracts was a clause: if claims were made on the policies, the companies could claw those commissions back - from the licensed broker. That broker was me.

"Tell me what this means," she demanded. "Will we lose the house?"

"Probably," I admitted. If I didn't feel alone before, I did now.

What I did next is exactly what I'll spend this book telling you not to do.

First, I acted like an ostrich. I knew I had debts I couldn't repay without selling or heavily re-mortgaging the family home - and I went into denial anyway. Ostriches bury their heads when something they don't want to face turns up. I wanted the nightmare to go away. It wasn't going to.

Second - probably my biggest mistake - I took advice from friends. People who thought they knew what they were talking about and knew nothing. The most dangerous advice was a referral to so-called experts: mates' lawyers, and people who'd been bankrupt themselves back in the sixties and seventies. "Ah, it's no big deal," the old bankrupts said. It was a very big deal. Computers and electronic communication between institutions had changed everything since their day, irrevocably.

Third, I had no strategy. Without a plan I had no way forward. How could I have made one? I'd never been here before. I didn't understand credit law, guarantees, protected and unprotected assets. Was that my fault? Maybe. At the very least I should have found someone who did know how things worked. I wish someone like me had been around to help me then. Maybe they were - I didn't know how to find them.

Here's the summary I need you to take from this, even if you read nothing else:

- I acted like an ostrich and pretended things would fix themselves. They don't.
- I took advice from friends. Well-meaning, and wrong.
- I had no strategy. Without one you can't protect your future or start fixing things.

The truth is I didn't need just a lawyer, who saw things only through a legal lens. I didn't need just an accountant, who saw a tax problem. I didn't need just a financial counsellor, whose goal was to work out which shoestring I could live on. I needed someone who looked at things from a life perspective - who could see every side of my situation and work with me, not just for me, on a plan to rebuild my financial and personal future.

That person is who I became. I look at my clients' lives and help them turn bankruptcy into a means of rebuilding their fortune.

Think bankruptcy is the worst thing that could happen to you? I'll show you how it could be the best. Didn't think you could come out of bankruptcy ahead? I can show you how.

## **Let's get the emotional stuff out of the way**

Money isn't emotional. Never let your head get in the way of business. It's not personal, it's just business. Money doesn't make you happy.

You've heard every one of those cliches. They're easy to say and hard to live. The reality: financial stress gets into your head and it gets in the way of business. Creditors can say it's not personal - it sure as hell feels personal. And money may not make you happy, but a lack of it makes you decidedly unhappy.

The clients I meet every day - in my office, on the phone, in the coffee shop downstairs - are emotional, and who can blame them?

They're stressed, they're being harassed, and every part of it feels personal. Having been there, I understand exactly how personal it feels.

I've been where you are today. My story isn't that different from yours. My recovery was built on setting the emotional barriers aside and putting my energy into a plan for a strong financial future for my family.

Why am I confident dealing with life after bankruptcy? Because I've been there - and come back stronger, wealthier and more experienced than possibly any other adviser you'll come across. I like to fix things. To take away people's stress, and where bankruptcy can't be avoided, to help them navigate it and build a post-bankruptcy life better than they imagined possible.

But first, the emotional side of things has to be dealt with. So here goes.

## **Who's to blame? Who cares.**

Life isn't fair. Deal with it and move on.

Sometimes the only way to make sense of things is to accept there's no fair explanation for why they happened. There it is - out loud and in writing.

A million kindergarten teachers would challenge me on that, because it's the opposite of what we teach children: share, play nicely, be fair, take responsibility, put your wrongs right. Everything we teach them is about justice and fairness.

The reality is different. Bad things happen to good people. People lie. People break promises. Good decisions end badly. And - hardest of all to accept - what you believe is right and just may differ from what others believe is right and just. If more people understood that life is nothing like kindergarten, there'd be less

angst, less stress and far fewer long, expensive court battles fought in the name of 'fairness'.

Why open the book with this? Because throughout these pages you'll read about essentially good people hit by misfortune, unjust acts and plain bad luck. What matters is not what happens to you. It's how you respond - how quickly you accept the situation for what it is and act to fix it. Lingering on the fairness of it helps no one.

Many a person has gone broke insisting the principle of the matter is what counts, dwelling on the justice of it instead of fixing it. Don't get me wrong - principles matter, and I'm not suggesting you abandon yours. But focusing only on principle gets in the way of logical, best-result solutions. The people who respond instead of react are the people who end up able to claim success.

When financial stress starts biting your business, your relationships and your health, clarity is the first casualty. In many ways that's been my job all these years: helping people see through the emotion and down the right path - back to stable ground, where rebuilding can start. People have called me Mr Fixit over the years. I pride myself on that.

*Success is not final. Failure is not fatal. It is the courage to continue that counts.*

- Winston Churchill

I can't count the clients who needed to tell me 'their side of the story' - to establish that the blame for their circumstances sits firmly with somebody else. There's a misconception that if the blame lands elsewhere, the consequences will be different. They won't. It genuinely does not matter whose fault it is. It changes nothing about how things get resolved.

I ask one question: do you care more about whose fault this is than about putting your life back together and moving on? Almost everyone answers the latter. Good. Because the energy you need

to work through the fix is the same energy you'd burn apportioning blame, and you don't have enough for both.

Beyond every solution I've built over the years, the single best piece of guidance I've ever offered is this: let it go and move on. Sometimes that's the only guidance needed. Some people take it. Some don't.

Take Owen. Over five years, Owen came to see me three times. The first two times he chose his own course instead of the one I mapped for him.

### **Owen's story**

*Owen ran a small photography business - a one-man show for twenty years, until he won a school photography contract. He hired photographers to share the load and a bookkeeper to run the office. Almost overnight his world changed. He was flat out, school to school every weekday, processing photos in the studio on weekends. Cashflow was the best he'd ever seen.*

*Six months in, Owen realised he had more bills than money in the bank. Baffled - things were going so well - he looked closer at the books and discovered his bookkeeper had been ripping him off.*

*Distressed, Owen spent the next month chasing the staff member down, intent on putting things right and recovering what was his. Meanwhile his business suffered. He lost contracts because he couldn't manage his calendar. His two photographers left when the work became sporadic. Eventually Owen defaulted on his mortgage, and the bank did what banks are entitled to do: repossessed his home and sold it.*

*At that point I advised Owen to take a deep breath, move on, and start rebuilding. He couldn't. Now he had someone new to blame: the bank, which in his opinion sold the house for at least \$50,000 under market value. Banks are big institutions. Their*

*business is money, they hate losing it, and they'll fight every fight to protect their reputation. They hire top legal advice and they have bottomless pockets. Decide to fight a bank and make sure your pockets are as deep.*

*Owen's weren't. He fought anyway - it was 'the principle of the matter'. Banks don't care about principles. Banks care about money. Full stop.*

*Three years into fighting the bank, Owen had run up over \$200,000 in legal bills in the name of the \$50,000 principle. He hadn't won and wasn't likely to. Simple maths says a \$50,000 injustice can't be righted by a \$200,000 legal bill. Owen maintains that's not the point. The reality: it's exactly the point.*

*On his third visit to my office, Owen conceded he could no longer pay his legal bills. The fight had taken his marriage - he was mid-divorce - his business was headed for liquidation, and he was considering personal bankruptcy.*

The guidance I'd given Owen five years earlier was simple: focus on rebuilding the photography business, and contact creditors to explain the situation and ask for extended terms. Had he taken it, he'd likely still have his home, his marriage and a thriving business. He has none of them - but he does have his principles.

The world is full of broke individuals who lost the business, the marriage, the family home and the respect of their colleagues, but insist they still have their principles.

Do I have a contrasting story - someone who came to me early, the moment they saw their finances spiralling? Of course I do.

## Glenn's story

*Glenn ran a paper products supply business. Good contracts through referrals from trusted friends had grown it strongly over a couple of years. Things were good: overseas holidays, nice restaurants, new cars, talk of the beach house his wife always wanted. Buoyed by success, Glenn expanded - financed three new delivery vans and leased a bright shiny warehouse.*

*Then his largest contract - the one the expansion relied on - went into liquidation owing him more than \$100,000 for an order he'd already fulfilled. Devastated but still confident he'd be paid, Glenn attended the creditors meeting and discovered his debt was one line in a very long list. Recovery suddenly looked unlikely.*

*Glenn arrived at my office in a state - angry, determined to pursue the debtor who had 'ruined his life'. Like most people, Glenn needed someone to blame. An emotional response, and an entirely common one.*

After some consideration we established that although the unpaid debt was a massive blow to cashflow, given time it wasn't unrecoverable. Glenn accepted that apportioning blame wasn't going to help his business recover. The difference between Glenn and Owen: Glenn let go of who was to blame and worked the plan.

The guidance was the same I'd given Owen: focus on rebuilding, and contact your creditors for extended terms. Here's what we did and why it worked.

- We contacted every outstanding creditor and explained the situation. Creditors are business people. They mostly just want to be paid. They have no interest in making life difficult or forcing businesses into liquidation - that helps no one. Never be afraid to contact your creditors, explain, and ask for help.

- Glenn's creditors knew about the collapse that left him in the lurch. They also understood that the more business Glenn won, the sooner their bills would be paid. Within days of our calls, the phone started ringing - referrals from Glenn's own suppliers.
- We met Glenn's bank to request an overdraft. The bank supported it because we showed them a clear recovery plan.

With a clear plan to follow, Glenn put his energy into running the business instead of into whose fault it was. Within months he'd paid off his business debts and improved his position with the bank. He kept the new customers his creditors had sent him, and today he runs a thriving business with all the trappings of success.

Glenn still maintains it wasn't his fault in the first place. He's right. But he accepted that pursuing the matter on principle wasn't going to get his family to that holiday in Thailand. It'll be a long time before Owen has a stress-free holiday anywhere.

### **What can you learn from these stories?**

- Never underestimate the motivations of your creditors.

Creditors are in the business of recovering their money, not making your life difficult. Any sensible creditor offered a payment plan that assures recovery over time will cooperate. Most accept that forcing a business into insolvency serves their goal - recovering the debt - very little. What matters is that you're upfront. Don't mislead them or make false promises. Wrong them, and there's no guarantee they won't act on their principles.

- Be sure there's a clear case for financial gain before you fight.

Very few people who've taken a financial institution to task on principle are currently enjoying a family holiday in Thailand. If you do go down that road, make sure your pockets are as deep as theirs. If you're not Rupert Murdoch or James Packer, I suggest you let go and move on.

- Energy spent pursuing those who wronged you is energy taken from your business.

Business is competitive, and it takes everything you've got to stay ahead. I've seen healthy businesses that could have survived an unfortunate financial event fail because the operator took their eye off the day-to-day to chase the principle of the matter. The sooner you let go of who's to blame, the sooner you take back control. If your energy is going into the fight, what's left to rebuild with? Control of your own life and energy is a powerful force. Harness it at every opportunity.

To be clear, I'm not saying principles are irrelevant. I'm saying: accept that unfair things happen - things that aren't morally correct - and move on anyway. Accepting how things are has nothing to do with principles. It has everything to do with self-preservation.

- Sometimes a negative financial event really can become a positive.

If Glenn hadn't been forced to build a new plan, he'd never have gained the business his creditors sent his way. He might still be plodding along, head just above water - and nowhere near Thailand. By taking control, he turned a negative into a positive.

- You can't control what happened. You take back control by making a plan.

Even calculated decisions built on sound financial principles can fail. Businesses risk going broke every day because of someone else's actions. Not every part of life is controllable. How you respond is.

## The ostrich technique doesn't work - act soon, act quickly

The most common line uttered in my office by clients considering bankruptcy: "I wouldn't need to do this if I just had more time to pay my bills."

If time was all anyone needed, there'd be no Bankruptcy Act. It's true that with more time, some things might resolve. But sometimes you have to accept you've run out of time - and that more time can actually make things worse. Bankruptcy exists for precisely this reason: people sometimes run out of the time they need to pay their bills.

I can't say it enough. If your financial affairs are spiralling, acting like an ostrich won't help. The sooner you act, the sooner you take back control of your life.

Take the very different stories of two neighbouring farming families.

### Brian and Emily's story

*Brian and Emily ran a small family dairy farm - a mum-and-dad operation, enough to pay the bills but not enough to hire staff or expand. Life for farmers hasn't been easy: drought, floods, supermarket wars and plenty beyond their control. Brian and Emily were hard workers and careful ones. They didn't make rash decisions. They held things together and paid their bills.*

*Then a change of stock feed caused health issues in their milking herd, and cows started dying. The milk cheque they'd carefully calculated shrank fast. The damage would have been felt sooner had they not had an overdraft and family to lean on. Instead of taking a hard look at their position, they chose to ignore it and assume everything would be fine. A completely normal human reaction to stress, I might add. A friend referred them to me - but they insisted they didn't need help with a*

*strategy. They simply needed more time, and things would come good.*

*Things were not going to be fine. Each month the overdraft grew and the milk cheque shrank as more cows fell ill and died. After six months Brian and Emily faced mounting farm debts they couldn't pay - living month to month, shuffling credit cards, waiting for the good months that would surely come.*

*They sought help from Emily's parents, who gifted them a significant sum of cash. They refinanced their livestock, and Emily's parents went guarantor. That's all we need, they told themselves - until things get better.*

*Things didn't get better. How could they? There was no plan to make them better. And it wasn't their fault, they reasoned - the blame lay with the stock feed supplier. Having placed the blame elsewhere, they let themselves believe ignoring the problem would make it go away. They were wrong.*

*Brian and Emily eventually chose bankruptcy. A good decision - about six months too late. Their trustee investigated and found the livestock in their name, mortgaged to the bank. Brian and Emily argued Emily's parents had funded the cattle, but couldn't produce a shred of evidence. The bank called the mortgage, the cattle were sold, the proceeds were seized. Now they were bankrupt and had no means of operating the farm.*

## **Gary and Allison's story**

*Gary and Allison ran the farm down the road. Same district, same stock feed, same problem: their herd developed health issues, and they didn't understand why or whose fault it was. What they did understand was that it was about to cause them serious problems. They came to see me about two weeks after they realised - referred by a friend, early in their financial crisis, knowing their home and livelihood were at risk and that they needed a strategy.*

*What each family did next created the entire difference in the outcome.*

*Together we built a plan. Gary and Allison accepted that blaming the stock feed supplier might feel satisfying, but a long and expensive legal battle wasn't going to put their business back on track.*

*We contacted their creditors and explained the situation. Like Brian and Emily, they had good relationships and a solid credit history with their suppliers. The difference: Brian and Emily ignored their creditors' calls and letters, hoping they'd go away. Gary and Allison's creditors agreed to extended terms - the 'more time' the neighbours never got by hiding.*

*Gary's recently retired parents drew on their superannuation and lent them money to rebuild the herd - on nominal interest terms, with a solicitor engaged to document the loan and register their interest over the cattle.*

*That document mattered. If the plan had failed and Gary and Allison were forced into bankruptcy, the trustee's investigation would have found a registered interest in the cattle held by Gary's parents - and no value in seizing them. If Brian and Emily had done the same when Emily's parents gave them money, their trustee would likely never have taken the cattle. They'd probably still be farming today.*

*Gary and Allison rebuilt the herd almost immediately. The deaths in the herd turned out to be a short blip - because they acted swiftly and got a plan, it stayed a short blip.*

## **What can you learn from these stories?**

- Procrastinating isn't a strategy.

Ignoring problems doesn't make them go away. It can make them worse. If Brian and Emily had sought help before things became dire, the loan from Emily's parents could have rebuilt the herd instead of servicing dead debt, and the milk cheque would have recovered sooner. They ran out of time because they left it so long before looking for help.

- Document every loan and every interest in property - properly.

If family or friends lend you money to bridge a gap, don't assume their kindness will be recognised by the administrator of your estate if you go under. It won't be. Make sure every loan is documented and registered appropriately. The small legal bill might seem like an economy you can't afford at the time. It could end up the cheapest money you ever spent.

- Make a plan - it gives you the energy to keep going.

With a plan in place and someone in their corner, Gary and Allison found the energy to keep the farm running while they dug themselves out. It's hard to know what to do next without a plan. With one, they had a clear path - and control of their situation again.

- I'll say it again: act soon, act quickly.

The sooner you act to fix the problem, and the quicker you put the steps into action, the sooner your life is back on track.

# PART TWO - Company and Business Insolvency

## The basics

Companies go into liquidation. Individuals go bankrupt.

The distinction matters, because the laws and rules governing the two are very different - even though the scenarios often travel together, and the stories in this book cross between them.

Liquidators handle company insolvency. Trustees manage personal bankruptcy. Related in principle, managed in distinctly different ways. Some firms handle both, but it's rare to find a practitioner who knows insolvency as deeply as they know bankruptcy, and vice versa.

So let's deal with company insolvency first.

When a company can't pay its debts, the equivalent of drawing a line in the sand is placing it into liquidation. That happens one of two ways:

- Voluntary liquidation - highly recommended, more on that shortly; or
- Involuntary liquidation.

Voluntary liquidation happens when the directors determine the company can no longer pay its debts - preferably before it starts trading while knowingly unable to pay them (that's insolvent trading) - and approach their own preferred liquidator and hand the business over.

Involuntary liquidation is when a creditor establishes you can't pay, takes you to court to recover their funds, wins a judgment, and the court places your company into the hands of a court-appointed liquidator.

Whichever path, at that point you give up control of your company - and probably what feels like control of your own life.

My view: if you believe your company is at risk of an insolvent trading claim, or a creditor is preparing to force you into the hands of a court-appointed liquidator or receiver, you should strike first. Choose your own liquidator and begin the process yourself.

How do you know it's time? In your gut, you know. You may be hopeful something will change or things will get better. The reality is they usually don't, and you're much better off in the hands of a chosen liquidator than a court-appointed one.

One more thing before the warning signs. Liquidation - voluntary or otherwise - is no longer the only formal move on the board. Since the first edition was drafted, the law has opened a middle path between limping on and shutting up shop. We'll cover it properly in a few pages: Small Business Restructuring and safe harbour. Read that chapter before you decide anything.

### **Warning signs you may be insolvent**

This list, adapted from ASIC, may help. It's likely in your company's best interest to consider voluntary steps if you're experiencing some or all of the following:

- ongoing losses
- poor cash flow
- absence of a business plan
- incomplete financial records or disorganised internal accounting procedures
- lack of cash-flow forecasts and other budgets
- increasing debt (liabilities greater than assets)
- problems selling stock or collecting debts
- unrecoverable loans to associated parties

- creditors unpaid outside usual terms
- solicitors' letters, demands, summonses, judgments or warrants issued against your company
- suppliers placing your company on cash-on-delivery (COD) terms
- issuing post-dated cheques or dishonouring payments
- special arrangements with selected creditors
- payments to creditors in rounded sums not reconcilable to specific invoices
- overdraft limit reached, or defaults on loan or interest payments
- problems obtaining finance
- change of bank or lender, or increased monitoring by your financier
- inability to raise funds from shareholders
- overdue taxes and superannuation liabilities
- board disputes, director resignations, or loss of management personnel
- increased complaints or queries from suppliers
- an expectation that the 'next' big job, sale or contract will save the company

## So what happens next?

### Involuntary liquidation

If a creditor has forced you into liquidation, here's what happens. Your court-appointed liquidator either closes the business down and starts investigating, or walks into your premises and takes over the day-to-day running while they determine the extent of the insolvency. You'll be asked to hand over the accounts and files. To all intents and purposes, you're now locked out of your own business, and things are completely out of your hands.

Most liquidators will protest this description. They'll maintain their goal is to resurrect the business, straighten things out, save jobs and return it to profitable trading. It's simply not true - and not practical to expect. However experienced your liquidator is, they can't be a business expert in every kind of business that crosses their desk. What they specialise in is investigating your affairs to see how much money can be extracted for themselves and your creditors.

A story about a major engineering group that entered receivership illustrates how little compassion can be on offer at an already highly emotional time. Within 24 hours of the appointment, staff were told - by text message - that they were stood down for 28 days without pay. Hardly compassionate, and hardly the way to restore a company's standing.

The footnote to that story: the directors knew for a long time the company was in trouble. Had they acted earlier, they could have avoided the whole unfortunate chain of events.

As absurd as it sounds, you'll likely be consulted last in this process. You probably understand your business better than anyone, yet most liquidators will dismiss your knowledge and input. And really, who can blame them? As far as many liquidators are concerned, you're the person who caused the problem. They're

unlikely to consider that you might also be the person with the best solutions. You know you are - but finding a liquidator who agrees is a difficult proposition.

The reality - though few will admit it - is that getting your business back on track quickly works against their interests. Keeping your file open for a few years and extracting the fees their own business needs to survive is the model. That's not a conspiracy theory; it's simply how the industry stays in business.

Many liquidators will tell you otherwise and work to win your confidence. As honourable as that sounds, don't lean on it. Remember that the only person entirely on your side is you. Wear your armour whenever you deal with them. Using a third party helps here - more on that later.

If you've been through this, you'll know: dealing with a court-appointed liquidator can be a stressful, anxiety-filled period. You were told liquidation was a pressure-release valve, yet ever since you pushed the button your life has felt like it's in a vice. You're not paranoid - as well as losing your livelihood, reputation, pride and the business you put your heart into, there genuinely are parties looking to take whatever else is exposed. They rely on your limited understanding of the process. What you need is to regain control, and the knowledge in this book is the armour.

## **Voluntary liquidation**

In case you've concluded I think all liquidators are vultures intent on dismantling your business and pursuing your last dollar - I don't believe that at all. Some are, and over the years I've seen remarkable acts of aggression from registered, reputable liquidators. I've seen directors pushed to the brink, businesses and families destroyed in the pursuit.

On the other hand, I'll defend them too. Their job isn't easy: dissecting a business's affairs while communicating with a stressed

owner, anxious staff and angry creditors. No one said it was easy - though they are paid handsomely for the stress.

The best guidance I can give: do your research. Use a service like mine (if you can find one) to help you prepare before you take your business to your own chosen liquidator. Be organised. Have your files in order. Make the liquidator's job as easy as you possibly can. I've worked with a number of wonderful, compassionate liquidators who apply common sense to their approach.

Voluntary liquidation is a much better option if you can take it. You're likely to have time to get your affairs in order and establish a relationship with your liquidator, and the process should be far less painful in the long run.

Placing your business - sometimes your life's work - into someone else's hands may feel like the hardest thing you've ever done. Take control of your own destiny and find a liquidator you can trust. Better still, remove the emotional aspect: engage a third party to manage the negotiations and handle the liquidator's questions.

If you're transparent and answer the liquidator's questions honestly and on time, you have a greater chance of influencing the outcome. A third party such as myself also gives you breathing room. You must respond promptly - but it's often wise to think answers through so the liquidator gets complete information. That's hard when you're emotional or confronted. It's easier through an intermediary who can defuse the emotion.

## **The middle path - Small Business Restructuring and safe harbour**

When I first drafted this book, a director whose company couldn't pay its debts had two real choices: limp on and hope, or liquidate. That's no longer the whole story. Two reforms changed the board - safe harbour in 2017, and Small Business Restructuring in 2021. Understand both before you decide anything, because the right move now might be neither limping on nor shutting up shop.

### **Small Business Restructuring (SBR)**

SBR is a formal restructuring process for small companies under the Corporations Act. Here's why it gets people's attention: you stay in control. No liquidator walks your floor. No administrator takes your keys. You appoint a restructuring practitioner, you get 20 business days to put a plan to your creditors, your creditors vote, and if a majority in value of those who respond say yes, the plan binds them all. The plan runs for up to three years, and the company's unsecured debts - very often dominated by the ATO - are compromised, frequently for cents in the dollar. The company survives. You keep trading. Clean.

The ATO is usually the biggest creditor in the room, and it has supported plenty of sensible plans. That's a genuine shift - for years the ATO's only answer to a struggling company was pressure.

So why isn't every struggling company doing one? Because the promoters of SBR tend to skip three things: the gate, the price, and the failure case.

### **First, the gate**

Before you can even put a plan up, the company must meet all of the following:

- total liabilities under \$1 million (excluding employee entitlements);

- all tax lodgements up to date - every BAS, every return;
- all employee entitlements, including superannuation, paid in full;
- the company (and its directors) haven't used SBR or simplified liquidation within the last seven years; and
- the company is insolvent or about to be.

Read that list again. Many companies in real trouble fail it on day one. If you're behind on super and behind on lodgements - and most distressed companies are - you're not eligible until you fix that, and fixing it costs money you may not have. The companies that sail through the gate are usually the ones whose trouble is one big clean debt, not years of mess.

### **Second, the price**

SBR ends up an expensive alternative to the other options available. The practitioner's fee for preparing and putting up the plan is a fixed amount agreed up front - in the market I see, typically around \$15,000, sometimes more - and then a percentage of every dollar paid under the plan on top. Add the cost of getting your lodgements and super current just to qualify, and the 'cheap rescue' isn't cheap. In some cases an orderly voluntary liquidation and a fresh start costs less and gets you to the same place faster. Run both sets of numbers before you commit. That's exactly the comparison I build for clients.

### **Third, the failure case**

Here's the risk nobody puts on the brochure. The practitioner's fee for putting up the plan is payable whether or not the creditors approve it. If the vote fails, the money is gone - normally around \$15,000 - and you're back exactly where you started, except poorer, with your creditors now fully alerted, and usually heading into the liquidation you were trying to avoid. You don't get a refund for an honest try.

That doesn't make SBR a bad option. It makes it an option you price properly before you swing. The single most valuable piece of work you can do is testing creditor appetite - above all the ATO's - before the fee is committed. If the major creditor's posture says the plan won't carry, you've just saved yourself \$15,000 and a wasted month. If it says the plan will carry, SBR is the cleanest outcome on the board: company alive, debts compromised, no liquidator, no director changeover, and you still hold the keys.

### **What can you learn from this?**

- Check the gate first. Eligibility is binary - if super or lodgements are behind, deal with that before anyone talks you into anything.
- Price the failure case, not just the success case. Ask the practitioner what happens to their fee if the plan is voted down, and get it in writing.
- Compare SBR against a clean voluntary liquidation on numbers, not on emotion. 'Saving the company' at any cost is emotion.
- Test creditor appetite before you pay. The vote is decided by majority in value - in most small companies that means the ATO decides. Know the answer before you ask the question.

### **The DPN clock - why procrastination costs you the house**

Before we leave the ATO, one more piece of machinery you need to understand, because it changes the maths on everything in this chapter: the Director Penalty Notice, or DPN.

For years, directors took comfort in the company structure. The company owed the tax; the director didn't. The DPN regime ended that comfort. The ATO can now make you personally liable for the company's unpaid PAYG withholding, superannuation and GST. Your company's tax debt can become your debt - attached to your name, your assets, your family home.

Whether it does comes down almost entirely to timing, and that's why I'm telling you about it here.

If your lodgements went in on time, a DPN gives you 21 days to act. Put the company into the hands of a liquidator, an administrator or a restructuring practitioner within that window, and the personal liability is remitted - it dies with the decision. The door is open, but only for 21 days, and the clock starts when the ATO posts the notice, not when you get around to opening the envelope.

If your lodgements were months late - or never went in - the ATO can issue what's known as a lockdown DPN. There's no 21-day door. The debt is locked to you personally, and nothing the company does afterwards - not liquidation, not an SBR, nothing - takes it off you.

Sit with that for a moment, because it's the whole book in one mechanism. Every chapter so far has told you the same thing: act soon, act quickly, the ostrich technique doesn't work. With a DPN, the law doesn't just reward the director who acts early - it punishes the one who doesn't, by converting the company's debt into a personal one. Procrastination is the worst thing you can do with a DPN. Not the riskiest. The worst. The director who lodges on time and moves inside the window walks away clean. The director who sat on the paperwork carries the debt for life.

There's another that runs a close second: borrowing money to pay the debt without ever solving why the debt was created. I see it constantly. A DPN lands, panic sets in, and the director refinances the house, drains the redraw or leans on family to make the ATO go away. Six months later the company - which still has the same costs, the same pricing, the same leak in the bucket - has run up the same debt again. Only now the family home is mortgaged to the hilt and there's nothing left to borrow. Remember Brian and Emily: their parents' money didn't save the farm, because there was no plan for the money to be part of. Money without a plan

doesn't fix a business. It just buys the same problem twice, and the second time you own it personally.

If a DPN is in play, the order of operations is simple. Find out which kind it is. Know your dates. Get the right people around the table inside the window. And before a single borrowed dollar goes anywhere near the debt, answer the only question that matters: what created it, and what's changed?

## Safe harbour

The second reform matters even if you never use SBR. Since 2017, the Corporations Act has offered directors safe harbour from insolvent trading liability - the very accusation we covered a few pages back.

It works like this. The moment you suspect the company may be insolvent, you start developing a course of action reasonably likely to lead to a better outcome for the company than immediate liquidation. While you're genuinely pursuing that course, the insolvent trading provisions can't touch you for debts incurred along the way. The protection holds only while you meet the conditions:

- keep employee entitlements - including super - paid as they fall due;
- keep your tax lodgements up to date;
- take advice from an appropriately qualified adviser; and
- document the plan, and document every step you take under it.

Remember William and his letter of offer? William improvised his armour - proof, kept in a drawer, that he wasn't trading insolvent. Safe harbour is that same armour, written into the law. But it isn't automatic and it isn't a magic word. Directors who say 'safe harbour' while paying no super, lodging nothing and writing nothing down have no protection at all - they've simply documented that they knew about the insolvency. The pattern should be familiar by now: the protection goes to the director who acts early, gets the

right people around the table, and keeps records. The same behaviour that wins every other battle in this book.

## **Insolvency terms you should understand**

A glossary of company insolvency terms appears at the back of this book. The definitions are adapted from ASIC's published guidance. Skim it now or refer back as you read - whichever works.

## **Getting down to the nitty gritty - tricks and techniques**

So far my stories have focused on the emotional energy tied up in financial trouble, plus some indulgent waffle about my role. I can hear you asking: "Aren't there some tricks you can teach me?" You didn't come here for a self-help book on emotional wellbeing. I get it. I just think a clear mind and an unemotional approach is half the battle of rebuilding your fortunes.

Surprising as it may sound right now, with the right mental approach you might even enjoy the next stages of the journey. I guarantee they won't be boring.

There are many tricks - let's call them techniques. 'Tricks' sounds deceitful, and I need to be very clear: the techniques I've deployed or witnessed over the years as people navigated personal and business insolvency were, to the best of my knowledge, legal techniques - allowed for under the Bankruptcy Act and the law. I'm not a lawyer and I don't give legal advice. The techniques in this book are simply that: techniques, and some would say smart moves, deployed by clear-headed businesses and individuals.

They've helped countless people use bankruptcy and insolvency for exactly what the law intends:

- a fair process for dealing with the financial affairs of insolvent debtors;

- an orderly distribution of the bankrupt's estate among creditors; and
- the rehabilitation of the bankrupt or insolvent company where possible.

We don't live in Ancient Greece, where a man unable to pay his debts - along with his wife and children - was forced into debt slavery until the creditor recouped his losses through their physical labour. Even then, the state placed limits: most debtors were released after five years. Today in Australia, bankruptcy exists to protect creditors from rogue traders, and to protect individuals from having their lives destroyed by financial misfortune. The laws have been exploited - which is why the Bankruptcy Act keeps being updated to prevent exploitation by the scurrilous. Read: Skase and Bond.

Laws updated to capture the scurrilous often entrap the less scurrilous too. Remember this: insolvency - the inability to pay your debts - is not a criminal act in most instances. It used to be. That's not the world we live in today, and it's important to hold onto, because creditors and debt collectors have been known to use the fear of criminal proceedings to intimidate people into paying.

There are circumstances where a court may treat actions as criminal fraud - acts deliberately undertaken to deny creditors what they're due. Seek qualified legal advice to make sure your own actions don't fall into this category. Acts that may include:

- attempting to put property or assets beyond the reach of creditors (gifting property, or putting it in the name of family or friends); and
- going into hiding, or attempting to leave the country.

These will get you into trouble with the law and make it hard to argue you're simply someone who unfortunately can't pay their bills. Courts treat deceptive behaviour as exactly that - deceptive.

Your failure to pay a debt is not, in itself, an act of bankruptcy. It's how you handle what comes after that determines how your situation resolves.

## **Setting things up the right way at the beginning**

If you're reading this before starting a new business - or before starting over - this is the most important thing I can offer you: set it up right at the beginning and you'll avoid the calamities if it doesn't end well.

It never ceases to amaze me how often I'm called in to untangle business and family assets that are intertwined. Matters that simple steps at the beginning would have made completely avoidable.

## **Setting up a business**

When people set up businesses, very little thought goes into how the business should be set up. I'm not saying no thought - I just don't think people consider the aspects that matter most.

Sure, they have a great idea. They've produced a shiny business plan for the bank and they're feeling positive. Starting a business is exciting - everybody around you is excited. Your accountant sees more work and more fees. The bank sees the chance to lend money and lift its profits. You see the bright lights of a prosperous future.

Let's face it: nobody starts a business expecting it to fail. Which is exactly the problem. Your accountant advises you on how to set up to minimise tax. The bank makes sure its liabilities are covered if your business does fail - banks minimise risk every day. And you throw caution to the wind, believing you've taken sensible steps toward prosperity.

Go back. Look at the steps you took with your accountant. The advice was no doubt solid: a structure designed to increase profits and minimise tax. No argument from me. But did your accountant

talk to you about what happens if the business fails? Who did they suggest should be the directors? Everybody involved in the business, is my best guess.

It's a common misconception that everyone entering a partnership or a new business gets a say by becoming a director. Having a say in the business is an attitude, not a clause in the Corporations Act. Being a director is about one thing: RESPONSIBILITIES. Responsibilities to conduct yourself according to the rules ASIC enforces - and it means you share the LIABILITIES.

It's the liabilities I need you to look at. Time after time I come across partnerships - friends, or husband and wife - where every party is listed as a director. Think hard about whether that's necessary. Every extra director is another person exposed if things go wrong.

## **The delaying technique**

Since we've touched on legal proceedings, let's begin with a technique for dealing with aggressive or intimidating creditors and debt collectors. I call it the delaying technique. One of my favourites, actually. It's proved very effective over the years.

Under the Bankruptcy Act, failing to pay your debts is not, of itself, an act of bankruptcy. But a creditor can move to make you bankrupt if your debt is provable, over the statutory minimum, and they believe you're deliberately avoiding payment when you have the means.

In most cases they'll take you to court first to recover the funds by judgment - or they may serve a creditor's petition and ask the court to declare you bankrupt. Their goal with the second route is to recover their debt from the sale of your assets. The risk for them: once you're bankrupt, they share the proceeds with every other creditor. So most will first try to claim the money for themselves -

which is what happened to my client Michael a couple of years back.

### **Michael's story**

*Michael ran a business supplying scaffolding to medium-sized property developers. When the GFC hit, several of his clients found themselves in strife, and Michael's bill made their list of bills they couldn't pay. As happens in business, the domino effect followed, and Michael found himself unable to pay one of his own suppliers.*

*He'd always had a good relationship with that supplier - always paid within terms, account growing steadily in the good times. But this one supplier was aggressive, and treated Michael's failure to pay as a near-criminal act. They threatened court action and other forms of retribution we'll leave out of this story. Michael needed to pay \$15,000 'or else'. It wasn't possible. Feeling threatened, Michael suggested maybe he should pay them and wear the consequences with the other creditors we'd already negotiated arrangements with.*

*We tried negotiating for more time. The creditor was having none of it - aggressive, and in my opinion not very commercially minded. Negotiations failed, and they took my client to court. I told Michael: let them do what they intend to do, and tell them we'll see them in court.*

The day before the hearing we again offered a settlement: \$5,000 now, and a promise of more funds in time. They declined. They were determined to have their day in court - and as they pointed out, they were entitled to it. Fair enough. Who was I to stand in the way of their entitlements?

As it transpired, my capacity that day was as adviser to the debtor during his court case. As it happened, on the morning of the hearing I was genuinely unwell. I sent a medical certificate to the

court and the matter was adjourned. The creditor's legal meter, though, was already running - they'd incurred a full day of legal costs and the case hadn't even been heard.

The next month, when the case was again scheduled, I was back on my feet. In my enthusiasm I mentioned that a \$5,000 offer had already been made in good faith on my client's behalf. That was a mistake on my part: judges aren't allowed to know an offer has been made, because knowledge of it can be deemed to cloud their judgment. The case was now compromised, a new judge was needed, and that meant another day in court - another expensive day for the creditor and his beefed-up legal team, with the case still unheard.

By my estimate the creditor had spent around \$4,000 on the barrister alone before his solicitor's preparation costs. Suddenly the \$5,000 my client was offering looked pretty good. The creditor gave up, accepted the original settlement and cut his losses. Had he pursued it, he could easily have run up \$15,000 in legal fees chasing a \$15,000 debt.

Let me be straight before the lesson, because this story is easy to misread. I'm not teaching you to game the court. The medical certificate was real, and the slip about the offer was exactly that - a slip, not a stunt. I'd never advise anyone to manufacture a delay or play games with a hearing; courts see straight through it and come down hard, and it's the fastest way to turn a sympathetic judge against you. The lesson has nothing to do with working the court. It's about creditor economics - a lever you pull out in the open, at the negotiating table.

### **What can you learn from this story?**

- Time costs your creditor money. Litigation runs a meter, and a commercially minded creditor eventually does the maths on chasing a debt that costs more to pursue than it's worth.

- A reasonable settlement offer, made early and renewed consistently, positions you as the sensible party - and looks better and better as their costs mount.
- Don't be stood over. 'See you in court' is sometimes the most commercial answer to an uncommercial creditor - but say it from a genuine willingness to be there, not as a bluff or a stalling tactic.

## Other tips for directors

### Overcoming directors' guarantees

I couldn't count the clients who ended up in strife because, with the best intentions, they signed a director's guarantee. I was a victim of the consequences myself, way back when. I wish I knew then what I know now.

So how do you deal with a director's guarantee being called at a time when you have no capacity to fulfil it? Quite simply: if creditors sue the company and you've signed guarantees, you're wide open for them to come after you personally. The best technique I've seen deployed is demonstrated by Peter's story.

### Peter's story

*Peter ran a construction business that relied on large contract supplies. He recognised the market had changed dramatically and his company was likely to become insolvent very soon. The personal guarantees he'd given his creditors worried him most.*

*Peter took the sensible step of writing to ASIC advising he intended to declare himself bankrupt. Because you cannot be a company director while bankrupt, ASIC deregistered Peter as a director, and the company moved toward liquidation. As a result, Peter was no longer a director - and the guarantees attached to his directorship were dealt with inside his bankruptcy rather than hanging over him indefinitely.*

## **Tip - avoiding being banned from being a director in the future**

Under the Corporations Act, ASIC can disqualify you from managing companies if you've been an officer of two or more companies that failed within seven years. The simplest way to avoid confronting this is not to be a director of a company when it goes into liquidation if your role isn't necessary.

## **Most of the directors should consider resigning - early, not at the brink**

If you're in a position to think clearly, this makes perfect sense - yet I'm always surprised how infrequently it's adopted. I understand the solidarity in the face of adversity. But seriously? It's dumb. Plain dumb.

Sit down and have a rational, honest talk about who has the most to lose and who has the least, and come to an arrangement about the future. There's no sense in everybody collecting a strike against their name when some of the parties can avoid it. No sense at all. Easier said than done, I understand - but the truth is it makes sense, and it needs to happen well before the company is on the edge, not three days out.

Over the years I've seen people try all sorts of tactics. Some of them worked once and would now land you in serious trouble. I'm including the next one precisely because people still think it's clever - and it isn't anymore. Take it as a warning about how much the ground has shifted.

## **Jerry and Bill's story - and why it doesn't work today**

*Years ago, Jerry and Bill ran a medium-sized import/export business that reached the point where they could no longer pay their bills. Jerry's brother-in-law Mike was about to go to jail for a lengthy stretch for matters we'll leave unmentioned. So Jerry and Bill appointed Mike as director and both resigned. Neither was a director when the company went into liquidation, so - back then - neither collected a strike against their name, and neither had to deal with the liquidators.*

Here's why that story belongs in the past, and why you must not copy it. Installing a 'straw director' - someone with nothing to lose - to take the fall ahead of a liquidation is exactly the behaviour the anti-phoenixing laws and the Director Identification Number regime were built to stamp out. Today, resigning doesn't wipe your slate: the law still treats you as an officer if you held the role within the twelve months before the winding up, so you cop the consequences anyway. Every director now carries a director ID for life, so the trail doesn't disappear when a name changes on the register. And the people who set up a dummy director - along with the dummy - can face prosecution.

So the lesson isn't the trick. It's the opposite: there is no clever shuffle of names that makes directors' responsibilities go away. The only thing that genuinely protects you is the honest version we just covered - work out early who actually needs to be a director, resign the people who don't well before the company is on the edge, and do it for real reasons, on the record. Shortcuts that worked in a paper-file world are now the express lane to personal liability.

## Secure your records before the locks change

When a business goes into liquidation, one of the first things that happens is you're locked out of the premises. Anything left inside, you can no longer get to - you simply no longer have the legal right to enter. There's a good chance your financial records are in there, and in the mayhem that follows they're easily lost. That sounds like it might work in your favour. It doesn't - and Rachel's story shows why you want to be on the right side of it.

### Rachel's story

*Rachel's bridal dressmaking business went into liquidation. The locks were changed and she could no longer get in to retrieve any paperwork. When the liquidator asked for the company's financial records, Rachel told him she didn't have them - they were locked inside the premises. The liquidator had to chase the landlord, and by then the landlord had cleared the premises for a new tenant. The records were gone, and the liquidator found it hard to follow anything up.*

Now, don't read that as a happy ending or a handy dodge. 'The landlord threw them out' is one of the oldest lines in the book, and liquidators and ASIC treat missing records exactly as you'd expect - with suspicion. As a director you have a legal obligation to keep proper books and to hand them to the liquidator. If you can't produce them, a court is entitled to presume the company was insolvent, which makes an insolvent trading claim far easier to run against you - and failing to keep or deliver records is an offence in its own right. Missing records don't make your problems disappear. They make you look like you've got something to hide.

The genuine lesson - and it's a valuable one - is the reverse of how this story is usually told. The moment liquidation is on the horizon, get your records out and organised before the locks change. Copies of everything, somewhere safe, ready to hand over. The director who walks in with a tidy, complete set of books is the one

who controls the narrative and shortens the investigation. The director with no records is the one who gets examined under oath about why.

## **Directors should clear loans they owe the company - properly**

It's common and entirely legal for directors to owe loans to their own companies. Just as common is leaving those loans outstanding when the company goes into liquidation. What many directors don't realise: the liquidator has the right to pursue repayment.

I can hear the obvious question: "If I had the money to put back into the company, don't you think I would have - to avoid liquidation in the first place?" Absolutely. In a perfect world every loan account would be repaid in cold hard cash and your company would be travelling along nicely. The reality is you probably don't have the cash, or don't think it wise to put good money after bad.

## **John's story - the right way and the wrong way**

*John owed his company \$45,000, and through circumstances beyond his control the company was facing liquidation. He knew the liquidator would pursue the outstanding loan. Over the years John had done a lot of work for the business, as most directors do. So he billed the company \$45,000 and, rather than taking cash, agreed the invoice would cancel out his loan. Within weeks the company entered liquidation, and the accounts no longer showed John owing anything.*

Whether John was fine or in serious trouble comes down to one thing: was that invoice real? If John genuinely did \$45,000 of work, at proper market rates, and there's a contemporaneous record of it, a set-off like this can be perfectly legitimate. If the invoice was conjured up on the eve of liquidation to make a debt disappear - notional work, a round number that happens to match the loan, dated to suit - then it's a textbook unreasonable director-related

transaction. A liquidator can unwind it and come after the \$45,000 anyway, and creating an invoice for work that didn't happen is making false records, which is a different and far more serious problem.

So here's the lesson, and it's the same discipline that runs through this whole book: do it in real time, in the open, and don't leave it to the eve of liquidation. If you work for your company, invoice it as you go - every year, at market rates, properly recorded - and keep your loan account current and documented. Do that, and when trouble comes a set-off stands up to scrutiny because it's true. Try to build it overnight when the liquidator is at the door, and you've turned a recoverable position into an indefensible one. A real set-off is armour. A manufactured one is a confession.

## **How to beat the insolvent trading accusation**

Under Australian corporations law it's an offence to keep trading a business when you're aware it cannot pay its bills. That's insolvent trading. As a director, you can be pursued for it personally if it can be proven.

Liquidators know this - and the problem, in my opinion, is that liquidators are themselves running businesses. From my experience, plenty are more interested in making money for themselves than recouping it for the creditors they're appointed to represent. Liquidators have been known to play up the threat of insolvent trading as a means of squeezing money out of directors. It's an effective threat. Over the years, thousands of directors have paid significant sums from their own pockets to make it go away.

Criminal prosecutions for insolvent trading are genuinely rare. Civil claims and negotiated settlements are where the action is - which is exactly why the threat gets waved around. Hollow or not, it's stressful for any director, and it can seem difficult to prove

otherwise. Not so. Let me show you how to answer the liquidator at their own game. William's story best illustrates it.

### **Secure an offer of finance - William's story**

*William owned a chain of shoe stores. Retail pressure forced him to place the company into liquidation. A liquidator was appointed and began investigating the business's activities to see what money could be recovered for creditors (and for their own fees - which, by the way, come out of the pot first).*

*William had taken sound legal advice when he set up the business and had protected his personal assets from recovery for business debts. Nothing deceitful about it - smart, and entirely legal. The liquidator discovered William had personal assets, and realised they were out of reach. So the liquidator tried intimidation: hand over money from your personal estate, or face a charge of trading whilst insolvent.*

*Unfortunately for the liquidator, William had been a client of mine for some time. We'd worked on a strategy - first to try to save the business, and then, when we decided the economic climate held too many hurdles for a bricks-and-mortar retailer, to make liquidation the best decision for it.*

*Well before the liquidation, William had recognised he could later be accused of insolvent trading. He wasn't convinced throwing more money at the business was wise, but he organised finance options anyway - just in case. He secured a letter of offer from a finance company and kept it somewhere safe.*

*That proved fortuitous. When the liquidator accused him of insolvent trading, William produced the letter of offer. Proof, as a director, that he was not trading while insolvent: he had access to finance should he require it. He couldn't have obtained that*

*offer if the company were truly insolvent. The liquidator couldn't argue with that.*

Sounds simple? It is. You just need to know the techniques. I have more to share.

### **The balance sheet - a warning, not a technique**

As well as the offer-of-finance technique, I've watched directors try to answer the insolvent trading threat by 'fixing up' the balance sheet - manufacturing paper transactions between related companies so the books show a healthy net worth on the day the music stops.

I'm including this so you recognise it, not so you copy it. A liquidator's job is to test exactly these transactions. Invoices for notional work between your own entities, raised when trouble is already in view, are voidable - and creating records for work that didn't happen is creating false records. The director who tries it usually converts a defensible position into an indefensible one.

The legitimate version of this lesson is simple and boring: keep your balance sheet real, keep it current, and document genuine related-party dealings properly and contemporaneously. A clean set of books, like William's letter of offer, is armour. A doctored set is an admission.

### **Tell the liquidator you are considering bankruptcy**

As already touched on, liquidators are in the business of making money. It's remarkable how quickly they lose interest in a cause when they believe there's no money in it. If you can show your liquidator there's nothing to be gained, they'll likely leave you alone. Why would they pursue a lost cause? Why go to court and burn time and resources for no financial return?

Two of the best defences my clients have deployed: provide a verified statement of assets and liabilities showing that even if the liquidator wins, there's nothing for them to collect; or tell the

liquidator you're considering becoming personally bankrupt. Either way the liquidator will ask for proof - so you have to be prepared to back it up and follow through. Richard's story shows how that plays out.

## **Richard's story**

*Richard found me through an article that had been written about me. He didn't know where to turn. He ran a business printing business cards and flyers - profitable for years, until COVID-19 hit and trade started to struggle.*

*The break came with the rain. In 2023 a flood inundated his factory, destroyed his work in progress and damaged his equipment. Richard had run out of money to get back up and going again, and couldn't pay his suppliers. One of them placed the company into liquidation - and the liquidator was one of the more aggressive ones. He wanted money.*

*After going through Richard's options, we provided a verified statement of assets and liabilities. It showed plainly that there was nothing to be gained by pursuing him. The liquidator lost interest.*

That's the whole lesson in one story. The liquidator wasn't moved by Richard's hardship, the flood or the pandemic. He was moved by the numbers - and once the numbers showed no return, the pursuit stopped. Show them there's nothing in it, prove it, and most of the time they move on.

## **Debt collectors - how to slay the dragon**

Many of my clients arrive worn down by the exhaustive, intimidating tactics of debt collectors. Many have been bullied into demands they felt they had no choice but to comply with. Often my most important job is helping clients take back control of their lives.

Debt collectors work much like the playground bully from your school days. Much of their behaviour is bluff. They work on fear and intimidation, and they appear - aggressively - to take control of the situation. Plenty of my clients have felt powerless against the common garden variety.

One of the most frequent threats: "I'll make you bankrupt." My suggested response: "Go ahead." Most debt collectors understand that once you're bankrupt they have even less chance of recovering the debt. Making someone bankrupt is also an expensive exercise, as we covered earlier. The likelihood of a debt collector actually forcing you into bankruptcy is slim.

I can tell you about one debt recovery agency that used to settle with debtors for as little as ten cents in the dollar. Before long, this company - which shall remain unnamed - worked out they recovered more by hassling debtors over a long period instead. That's the business model you're up against: persistence, not legal action.

So how do you take back control? Understand your rights. Debt collectors must act within the law when recovering debts.

### **Debt collectors cannot:**

- use physical force or coercion;
- harass or hassle you to an unreasonable extent;
- mislead or deceive you;
- take unfair advantage of any vulnerability, disability or similar circumstance affecting you - if they try, point out that this is known as 'unconscionable conduct'.

These rights don't cover only you. They extend to your spouse or partner, family members and anyone else connected with you. One caveat: while these laws protect your interests, a breach by a collector doesn't expunge your liability for the debts owing.

## Debt collectors are prohibited from:

- using or threatening force of any kind toward you or anyone connected with you;
- damaging or threatening to damage your property;
- blocking access to your property or blocking your way;
- entering your property when you've refused permission, or failing to leave when asked;
- shouting, abusing you, using obscene or racist language, or making personal or demeaning comments;
- contacting you more frequently than necessary or at unreasonable hours - including phoning continuously or late at night to demoralise or exhaust you;
- threatening or harassing any person connected with you;
- making unauthorised contact with a child under 18;
- discussing your situation with other people - family members, neighbours or co-workers - which breaches privacy laws;
- drawing attention to your situation - open letters to a shared post box, messages others can hear, or revealing their identity and purpose to people you live or work with;
- making false statements about the amount you owe or the status of your debt;

False statements include, for example:

- saying you owe a debt when you don't;
- saying the debt is greater than it is;
- saying you have no choice but to pay (unless there's been a court judgment);
- saying a relative must pay your debt;
- claiming there's been a court judgment when there hasn't;

- claiming you could be arrested or jailed - being in debt is not a crime;
- suggesting your children could be taken away from you (also false);
- suggesting you'll be made bankrupt 'immediately' (there's a process, and it is not immediate);
- suggesting your goods will be seized when there's no mortgage over them - and even where there is, you must still be given notice and 30 days to pay;
- saying your wages will be garnisheed without a court order;
- saying your credit rating will be damaged when that's not true - privacy laws limit what a credit reporting agency can hold, for how long, and who can access it.

### **Unconscionable conduct - debt collectors must not:**

- take advantage of you if you're specially disadvantaged by illness, disability, age, illiteracy or other circumstances;
- take unfair advantage of you if you don't understand the law, the debt recovery process, or the consequences of not paying.

It's a long list, isn't it? Financial institutions succeed with intimidation because they rely on debtors not having a clear understanding of their rights. Now you know. Next time a debt collector threatens you, mention the ACCC and ASIC debt collection guideline and watch how quickly they back down.

Taking control is easier when you know your rights. Don't let them intimidate you - the threats are often hollow. I'm not suggesting you retaliate or wind them up. Stay calm, and let them know you're aware of your rights. You're under no obligation to answer personal questions about yourself or your circumstances, whatever they tell you. Your privacy has protection too.

I find the best way to respond to a bullying debt collector is to tell them you know your rights and you know they're breaking the law by harassing you. Ask for their full name and contact number, and tell them you'll be in contact when you've resolved your debt situation. By then, you'll probably know your rights better than they do.

# PART THREE - Personal Bankruptcy

## Bankruptcy - smashing the myths

It's a commonly held belief - pushed by financial counsellors, financial advisers, accountants, solicitors and other professionals - that bankruptcy is a terrible thing. This baffles me no end. I find it difficult to comprehend how financially educated professionals still maintain that bankruptcy is the last resort and the worst possible outcome for someone in financial stress.

I strongly disagree, and here's why. If you're in financial distress with no clear way to pay your debts, bankruptcy is a fantastic solution. It lets you press pause, clears the unsecured debts you're struggling with in most instances, and gives you time to take a deep breath and start again.

How can that be a last resort? Financial stress happens to the best-intentioned, hardest-working people. Marriages break down. Businesses fail. Debtors don't pay. Things happen - often beyond an individual's control - and people find themselves drowning in debts they cannot pay.

The basis of the bankruptcy laws is a principle worth repeating: people are more valuable than debts.

Bankruptcy's reputation is outdated, surrounded by urban myths and old wives' tales. So let's clear up the more outlandish ones.

### Myth 1: Only losers go bankrupt

Some of the smartest people I know have been bankrupt. Ask them, and I have no doubt they'll tell you it was one of the best financial decisions they ever made. No one plans for financial trouble, and often it arrives through events beyond your control. Drawing a line in the sand so you can take a deep breath and get back on your feet isn't a loser's act. Handled correctly, it's a smart decision.

## **Myth 2: I'll be bankrupt forever and never able to buy a house**

Bankruptcy doesn't mean you can never buy a house. If you own a house now, it's entirely possible you'll keep it - loan and all - through bankruptcy. If you don't own one, I'm guessing your current financial stress makes saving a deposit impossible anyway.

Bankruptcy could actually be what helps you buy your own home sooner, by clearing your debts so you can start building.

Flip it around: if you're struggling to pay your debts and keep struggling, you'll more than likely never save a deposit without pressing the pause button.

As for 'forever' - bankruptcy isn't forever. Comply with your trustee's requests and lodge your annual income details, and in most instances you're automatically discharged after three years. It's also possible to negotiate an annulment with your creditors after you've become bankrupt - in those circumstances your bankruptcy could last as little as six months. Hardly forever, is it?

Consider this: an unpaid judgment can sit on your credit file for years. A bankruptcy comes off your credit report after five years (or two years after it ends, whichever is later). The maths isn't hard.

## **Myth 3: I'll have to keep paying my creditors even though I only earn enough to live on**

Believe it or not, no one expects you to live on baked beans or rifle through garbage bins to survive. The point of bankruptcy is to take the pressure off and calm your creditors down. Most people make no contributions at all after they become bankrupt. The government sets clear income thresholds before any contribution is required - and the thresholds rise with each dependant you support. Most of my clients actually end up living on more after bankruptcy than they did in the months leading up to it.

#### **Myth 4: Even bankrupt, my creditors can still hassle me**

They can't. That's the point. There are laws protecting you from creditors once you've declared bankruptcy and your creditors have been notified. It's important to list every creditor on your Statement of Affairs so your trustee can make sure they all know. You'd be surprised how quickly creditors back off when they realise they're wasting their time and there's no money in it.

#### **Myth 5: If I become bankrupt I won't be able to travel overseas**

It's true that you cannot leave the country without your trustee's written permission. That doesn't mean you're denied the right to travel - it means exactly what it says: you need written permission. I'm yet to have a client's travel request denied.

#### **Myth 6: Everyone I know will find out**

I suspect you'd be surprised how many people you know have been bankrupt. It's fair to say it's not something people discuss freely. You're correct that bankruptcy is a matter of public record - your name goes onto a government register called the National Personal Insolvency Index. Do your friends and neighbours search that index as often as you do? Not often, or at all, I'd imagine. The only people your trustee is required to notify are your creditors.

#### **Myth 7: Going bankrupt means ripping off my creditors**

I've had clients convinced that the right thing by their creditors was to keep paying their debts off, even at tiny amounts over a very long period. The truth: that helps nobody. It prolongs your financial stress and delays the day you can start rebuilding - and it doesn't help your creditors much either.

From your creditors' point of view (believe it or not), your bankruptcy may actually help them recover faster. Many carry insurance for exactly these circumstances, or can claim the bad

debt in their tax return. I bet you never considered that going bankrupt might be doing your creditors a favour.

### **Myth 8: If I'm bankrupt I won't be able to work**

Not true. Bankruptcy doesn't prevent you from having a job. There are restrictions on being a company director, but not on employment. You can keep working and take new jobs much as anyone else can - subject to the income thresholds already covered. Note that some licensed occupations and industry associations have their own rules about bankrupts, so check yours.

### **Myth 9: I'll lose the family home**

You're more likely to lose the family home by defaulting on your mortgage and having the bank repossess it. It's possible that becoming bankrupt could actually save your family home. It depends on individual circumstances - but plenty of my clients saved the family home precisely by becoming bankrupt.

### **Myth 10: I'll lose my car**

You're allowed to keep a car when you become bankrupt. There are limits to the value - but in most instances where a car is financed, its actual equity is less than the threshold anyway. And if your car was repossessed before you went bankrupt and your financier hasn't yet sold it, you may actually be in a position to ask for it back if you can show you can now maintain the repayments.

Not convinced yet? You're asking: if bankruptcy isn't really a bad thing, why the reputation? Why don't more people understand how it works?

I don't know the answer. My guess: the government holds these laws in place as a safeguard for people who can't see a way out - but it would also prefer not to create a society that leans on bankruptcy to dodge its debts. Bankruptcy balances the needs of creditors and individuals. It stops creditors harassing debtors, and it gives people a path back to a community standard of living. The

government's job is keeping that balance. A difficult balance - but bankruptcy doesn't deserve its negative reputation.

If you've ever faced financial trouble, or known anyone who has, you'll agree there needs to be a mechanism that lets people press pause. A compassionate, regulated mechanism. Unfortunately, a great number of the professionals who service bankrupt people don't clearly understand the processes - so the real opportunity in bankruptcy is often missed.

Bankruptcy, managed properly, presents wonderful opportunities to rebuild. Don't believe me? Read on.

## **Becoming bankrupt**

I promised this book isn't about the clinical mechanics of bankruptcy - there are bookshelves full of those. But it's important to outline the legal steps and the obligations a bankrupt must meet.

### **Qualifying for bankruptcy**

To become bankrupt in Australia you need a personal or business connection with Australia. There's no minimum or maximum income, no minimum or maximum assets - and if you're declaring bankruptcy yourself, no minimum debt either.

### **The formal process**

There are clear, regulated steps. The process isn't complicated and the steps are relatively straightforward. Managing them can feel daunting, but with the right guidance it can be cathartic - the path out of what feels like a financial wilderness toward stable ground.

It feels painful right now, I know. But the process itself is relatively painless, and many of my clients describe a feeling of relief once it's underway. Often they feared the anxiety would never go away. I assure you it does. Bankruptcy is designed to be a compassionate process, not an attacking one. The government recognises that

people in financial stress need an orderly, uncomplicated way to be relieved of it. Hence the Bankruptcy Act in the first place.

### **First things first**

There are two ways to become bankrupt. One is voluntarily. The other is being made bankrupt by a disgruntled creditor - they'll need to be owed at least \$10,000, apply to the court, and have you declared bankrupt by sequestration order. For this section we'll discuss the voluntary process. (We'll get to handling disgruntled creditors later.)

If you've decided voluntary bankruptcy is the best path, you'll complete a Bankruptcy Form incorporating your Statement of Affairs. These documents set out your personal situation - the money you owe and the assets you own. They're lodged with AFSA - the Australian Financial Security Authority, the government body responsible for administering personal insolvency - or handled through a selected private trustee (more on the benefits of private trustees later).

You can submit the forms yourself or have them submitted on your behalf.

### **What comes next?**

Your application has been lodged. Breathe again - you've taken the first step toward resurrecting your financially secure future.

Within about 48 hours you (or your representative) will be contacted with your bankruptcy number. Give that number to any creditor who keeps contacting you. Legally, once creditors have your bankruptcy number, most are prohibited from contacting you directly. If you've been harassed by creditors or debt collectors, you can sleep soundly knowing the harassment must legally stop.

## **The investigation**

Your appointed trustee then begins investigating your affairs. They'll contact the creditors you've listed and run their own searches to confirm the exact position of your assets. In days gone by, assets were easier to hide. In today's connected world, with agencies sharing data, you do yourself no favours by failing to disclose anything when you file. Many a well-meaning friend - someone who's 'been where you are' - has advised my clients they needn't declare everything. More often than not, that advice leads to deeper investigations than would ever have occurred had they been upfront at the beginning.

The trustee will likely notify the financial institutions of your bankruptcy, and they may freeze accounts or cancel credit cards. Inconvenient, usually temporary - but be forewarned.

The investigation normally takes six to twelve weeks. During this time the trustee will likely come back to you to clarify information. I highly recommend a third party to assist your communication during this period. Be honest and be timely - delay or deceit isn't just illegal, it antagonises your trustee and makes the whole experience unpleasant.

## **How long will you be bankrupt?**

The standard period is three years (and one day). It can be extended - but generally, if you've cooperated with your trustee and lodged your required income details each year, you'll be automatically discharged at the end of the standard period.

You don't have to stay bankrupt the full term. If you can come to an arrangement with your creditors during the period and they agree to an annulment, it ends early. I'll cover how to achieve an annulment later in the book.

## **How will this affect my credit file?**

Your bankruptcy appears on your credit report for five years from the date you became bankrupt, or two years from the date it ends, whichever is later. The NPII record is permanent - but as covered in the myths, it's a register almost nobody in your daily life ever looks at.

## **Are there other restrictions on my business life?**

You can't be a company director while bankrupt. In most instances you can still operate your business - at the discretion of your trustee.

## **Will the trustee take my assets?**

If the trustee establishes there's equity in assets you own at the time of bankruptcy, they can require those assets be sold to pay your creditors. (Certain assets are protected - tools of trade and vehicles up to set limits, most superannuation, ordinary household goods.)

## **What are my obligations as a bankrupt?**

Under the Bankruptcy Act you must comply with the following (the full list is on the AFSA website):

- Change of name or address - notify your trustee of any change.
- Overseas travel - obtain the trustee's written permission before travelling; conditions may be imposed and you may have to surrender your passport.
- Change of income - notify your trustee of any change, especially if your new income is close to the threshold limits.
- Change of assets - notify your trustee if you inherit property, win money or receive any assets while bankrupt.
- Cooperate with your trustee - provide information when requested. You may be asked to attend meetings or answer

questions at an examination under oath. Fail to cooperate and your bankruptcy can be extended.

## **How can you make your bankruptcy an easier journey?**

As I outlined earlier, becoming bankrupt may be the best action - not the worst - you can take to secure your financial future. Believe it or not, I have many clients who'll tell you exactly that. They'll tell you bankruptcy saved their life, their marriage, their business. Hard to believe, I realise - especially if you're currently staring down the debts hanging over you.

Whether your bankruptcy is a smooth ride (and potentially a profitable one) comes down to something I touched on early in this book: planning. Having a strategy, and following it through.

My second piece of guidance - after 'have a strategy' - is to engage someone like me to help you build it. A fresh, unemotional party involved in planning the strategy and walking the journey with you. I won't deny I get immense satisfaction from the role. There's real professional reward in watching the transformation: the distraught individual who first arrives in a cloud of stress and debt, emerging through the journey as the person I imagine they were before the debts became insurmountable. Watching families rebuild their future is the best reward I could ask for.

Don't get me wrong - I'm not suggesting it's an easy road. It can be confronting and emotional, with ups and downs. But follow a clear strategy and it's highly likely you'll come out the other end - in a shorter time than you imagined - with a clear financial record, a clean slate, and the energy to tackle the world head on.

A few truths and lessons before we get to planning the strategy. Indulge me - these observations matter at this stage of the book.

## Choose your professional services wisely

I work daily with lawyers, accountants and financial advisers, and many of my client referrals come directly from these professionals, whom I hold in the highest esteem. I don't think any of them would be offended by what I'm about to say:

*It's very rare to come across a lawyer, accountant or financial adviser who really and truly understands the ins and outs of bankruptcy. It's rarer still to find one capable of helping you create a strategy that takes in all the angles you need for your bankruptcy journey to be a beneficial experience.*

Lawyers (mostly) are fantastic at providing legal advice and keeping you within the requirements of the Bankruptcy Act. Accountants (mostly) are fantastic at viewing your affairs through the lens of the ATO and the Act's reporting requirements. Financial advisers (sometimes) are fantastic at helping you plan your money matters.

What's unlikely is finding anyone - except someone like me - with the experience to look at your circumstances from all three angles at once and build one clear strategic plan covering everything you need for a successful outcome. And even when you find astute professionals happy to collaborate, there's always the risk of what gets lost in communication between them.

Not convinced? Consider this.

### Lawyers

Lawyers play an important role in the insolvency process - though not as pivotal as they'd have you believe. Consider their weaknesses from three perspectives.

First, lawyers are running a business. Expensive offices, holidays to fund, cars to maintain. To some lawyers you look like a gold mine. Few are in the business of altruism. A successful outcome

for them equals large fees from you. Your goal is escaping insolvency without paying any more large bills.

Second - I can tell you categorically, from personal experience - few lawyers are insolvency experts. You wouldn't ask your GP to perform major surgery. Don't just visit the family lawyer. Find an expert insolvency lawyer.

Third - and I believe this is the Achilles heel of lawyers acting in an insolvency advisory role - they aren't really allowed to advise you properly. Their professional oath requires them never to advise you to do something legally wrong, even when it's morally the right thing to do. Would you take pre-emptive action against somebody you knew was going to harm your family? Legally questionable; morally, perhaps right. A lawyer can't advise anything pre-emptive. They can't, for instance, advise you to keep something up your sleeve so you have something to offer your creditors. Yet having something up your sleeve is what gives you the chance to turn the tables and take back control. How do you expect to negotiate an annulment when, legally, you can own very little while bankrupt? It's a quandary they face every day.

Paul and Linda's story is a perfect illustration of how well-intentioned solicitors create difficult circumstances with poor advice at the beginning of the bankruptcy process.

### **Paul and Linda's story**

*Paul was facing bankruptcy. Knowing it was inevitable, he wanted to protect the family home. He worked out - correctly - that a sensible step was transferring his half of the home to his wife. His lawyer suggested using the 'love and affection' ruling: no money changes hands, no stamp duty, the transfer value is effectively zero. Sounds straightforward and sensible from the outside, doesn't it? Unfortunately his lawyer was not an insolvency expert, and the saving was short-lived.*

*When you declare bankruptcy the trustee asks whether you've sold or transferred any assets in the last five years. Any transfer at less than market value - and this one was, under the love-and-affection ruling - can be treated as an attempt to defraud your creditors. So although Paul saved the stamp duty, his rather aggressive trustee (remember, trustees act for the creditors) was able to force the sale of the property and distribute Paul's share to creditors. Paul and Linda learnt the hard way that lawyers aren't always the best people to take guidance from.*

So what should they have done? Kane and Nicola's story shows the better approach.

### **Kane and Nicola's story**

*Like Paul, Kane was facing bankruptcy and wanted to protect the family home. Kane took advice from a lawyer who was an insolvency expert. Although transferring his share to Nicola under love-and-affection was perfectly legal, Kane's lawyer knew from experience that the cheapest option isn't always the best one.*

*Instead, Kane transferred his share of the home to Nicola as a fair-market-value purchase and paid the required stamp duty. When he later went bankrupt and his trustee investigated, the transfer clearly stood at market value. There was no case for Kane to answer. It's a pity Paul and Linda's story didn't have the same ending.*

Kane and Paul's stories illustrate the danger of assuming all lawyers are experienced in all fields. Andrew and Lisa's story illustrates the opposite trap - the so-called clever move a mate passes on at the pub. It's the kind of thing your lawyer would never advise, and for good reason. This one is a warning, not a recipe.

## Andrew and Lisa's story

*Andrew and Lisa owed combined debts of \$150,000. When they filed for bankruptcy they had \$100,000 in the bank. A friend had told them a story he'd heard about someone in a similar spot, so before they filed they withdrew the \$100,000 and got rid of it. When the trustee investigated, there was no lump sum left to find.*

*That is exactly where they went wrong. A trustee's first job is to follow the money. They look back over your bank records, and a \$100,000 withdrawal on the eve of bankruptcy doesn't slip past - it lights up like a beacon and invites a far deeper investigation than would ever have happened otherwise. The trustee hauled Andrew in and asked, under oath, where the money had gone. Andrew said he'd gambled it away at the casino.*

Losing your own money at a casino is foolhardy, but it isn't in itself illegal - and that's the only reason this story didn't end far worse for Andrew. Here's what people miss: if he'd lied about where the money went, that's a criminal offence, full stop. If he'd handed it to a relative or a mate to 'mind', the trustee could have clawed it straight back as an attempt to defeat creditors, and Andrew would have been explaining himself to investigators. He didn't beat the system. He gambled - in every sense - and got away with the technicality. Plenty don't.

I remember Andrew asking me, some time later, why his lawyer had never told him 'this is something people do'. Simple: a lawyer takes an oath to uphold the law. Even where something isn't strictly illegal, no licensed professional is going to point you toward conduct that could blow up in an examination - it would put their own ticket at risk. Lawyers are in the business of predicting and protecting against the worst possible outcome. That's the basis of their profession, and be sure of this: your lawyer protects himself first.

So take the lesson, not the method. The trustee can examine you under oath, can look back over years of transactions, and can claw back money you've tried to put beyond reach. Lying to them is a crime. The people who come through bankruptcy best aren't the ones who got cute with a lump sum the week before they filed - they're the ones who, like Kane, got proper advice early and structured things the right way, in the open, well before the trustee was ever in the picture. Acting early and honestly beats a clever trick every time.

## **Accountants**

As much as I respect the many accountants I work with on behalf of clients, they suffer some of the same shortcomings lawyers do.

Accountants are running a business and are in the business of making money. Let's face it - if you're running a business and hoping it succeeds, raising revenue has to be front of mind. Accountants are perhaps better at this than most professions; they spend their whole day with money matters in front of them.

And just like lawyers, few accountants are qualified and knowledgeable across all areas of financial trouble. That's not a criticism - like every professional discipline, it's almost impossible to be expert at everything. So choosing the right accountant matters as much as choosing the right lawyer when you're working out how to resolve a financial crisis.

Like lawyers, accountants are loath to give you morally correct advice if they consider it might compromise their professional reputation.

Although financial matters are about dollars, there's no denying a myriad of emotions attached. It's imperative you find someone who treats you like a person with emotions, not a number. And it's just as important to understand that an accountant who's competent at

the day-to-day isn't necessarily watching for the trap that catches you when things go wrong. Greg's story shows exactly that.

## **Greg's story**

*Greg ran a landscaping business. Like a lot of trade businesses, most of his work came from a single source - one builder. You can probably guess what happened. The builder went broke, and almost overnight Greg lost the bulk of his income. There's a lesson in that on its own: never put all your eggs in one basket, because when that basket goes, it takes you with it.*

*Greg's company couldn't survive the hit and was placed into liquidation. The same accountant and bookkeeper had been doing his books for years. Somewhere along the way Greg had taken out a bank offset account, and on their watch all the business money was channelled through it - including the monthly repayments on the mortgage over Greg's home.*

*The liquidator saw the dollar signs immediately. He honed in on one fact: the business had, in effect, been paying the mortgage on Greg's house. Those payments were company money that had gone to Greg's personal benefit, and the liquidator was entitled to pursue them. Greg walked out of his company's liquidation with a massive personal debt he now had to find a way to repay.*

Here's the part that matters. Greg wasn't a crook and he wasn't trying to pull anything - he was just running his money the way his bookkeeper set it up, the way it had worked fine for years. The structure that looked tidy in the good times became a loaded gun in liquidation. His accountant was perfectly competent at lodging returns and keeping the books, but nobody was looking at the business through the lens of 'what happens to Greg personally if this company fails?' That's the question that separates a bookkeeper from a strategist, and it's the question almost nobody asks until it's too late.

Two lessons, then. First, the obvious one: don't build a business that lives or dies on a single customer. Second, the one that cost Greg his savings: the way you channel money between your business and your personal life - offset accounts, loan accounts, who pays what - is fine until the day a liquidator reads it backwards. Get someone to look at that structure before trouble arrives, not after. By the time the liquidator is honing in on your home loan, the damage is already done.

### **Financial advisers**

Financial advisers are most often engaged when you're already experiencing financial stress. A significant proportion are community or council based, and will help you build a plan to minimise expenses, pay your creditors and live within your means. 'Living within your means' is the phrase they reach for most.

In all seriousness: if people were already capable of living within their means, they wouldn't need a financial adviser. By the time debts have grown insurmountable, there isn't much hope of a budget that delivers any quality of life. Plenty of advisers proclaim their service is designed to save you from bankruptcy. The reality: if you had the extra money to pay your debts, you'd probably be paying them now. They view bankruptcy as a last resort. They may be experienced at budgets - very few have any experience negotiating with creditors, or building a plan for financial prosperity that includes bankruptcy.

### **Financial planners**

A financial planner prepares planning across personal finance: cash flow, education, retirement, investment, risk and insurance, tax, estate and business succession. A detailed strategy tailored to your specific situation and goals - with inflation-adjusted, risk-adjusted returns as a key objective.

In my experience financial planners are very good at retirement planning and long-term wealth strategies in most (not all)

circumstances. Their experience with personal bankruptcy and their understanding of its mechanism is very limited. I doubt you'll find their services helpful if you've gone to them already in financial distress. That's not a slur on the profession - it's simply not what they specialise in.

## **Public trustee and private trustees**

The other key players are the trustees.

The government trustee is the Official Trustee, administered by AFSA - the Australian Financial Security Authority. AFSA oversees dealings between creditors and debtors, and operates on two levels: it can serve as your appointed trustee, it can see your file assigned to a registered trustee, and it's the governing body of the registered trustees on its panel.

Even if you lodge through a private trustee, your details are still recorded with AFSA, which holds the records of all registered bankrupts on file.

AFSA supports both debtors and creditors. Don't be fooled into thinking they're your friend. In my experience there's still a culturally ingrained view that bankrupts are bad, bad people and creditors are victims. Not necessarily deliberate derision on the part of the public trustee - somehow it's just the nature of the game.

I'm constantly amazed at the contrasting reception I get when I contact AFSA on behalf of a creditor versus a bankrupt client. Without fail, two distinct receptions. Phoning on behalf of a creditor: compliant, sympathetic, as helpful as customer service gets. Phoning on behalf of a bankrupt: significantly less friendly, clouded with suspicion, more inquisitive and investigative, and invariably quick to warn me of the penalties for not doing something correctly.

Despite AFSA's assertion that it's an independent body representing both sides - and I have no evidence to challenge that - I hope you can deduce my suspicion: creditors are viewed more

favourably than bankrupts. It's hard to convince myself this isn't an ingrained cultural view in our society, permeating through to this efficient government service.

### **Private trustees**

Private trustees are also in the business of running a business. I know this surprises most of my clients, but I can't say it enough. Very few people go to work without the ambition of financial reward. However friendly and understanding they may (or may not) be about your situation, their primary motivation is running their own business successfully.

If they see an opportunity to capitalise and make money out of you, rest assured they'll make their best attempt. There are 'friendly' trustees - and the reverse is also true. I've had many clients who encountered the very aggressive, money-hungry trustee. One of the privileges entrusted to registered trustees: they're entitled to receive their fees before they're required to distribute to your creditors. It makes sense to assume that, to justify their fees, they'll make every endeavour to recover the maximum amount.

What matters here is ensuring your business affairs are set up properly in advance - so that when the trustee makes their initial investigations, the picture is so tidy they carefully weigh effort against potential return. Peter's story is a good example.

### **Peter's story - the annulment**

*Peter's company had been placed in the hands of liquidators just before he declared himself bankrupt. The company had gone into involuntary liquidation, so Peter had no say in the appointed liquidator.*

*Some two years later, Peter's bankruptcy trustee had completed his creditors report, and Peter had made an offer to his creditors for annulment: \$50,000, payable over two years. The liquidator*

*of his company then lodged an insolvent trading claim against Peter for \$400,000 on behalf of the company's creditors.*

*The creditors in Peter's bankruptcy totalled \$130,000 - so a new \$400,000 claim blew them out of the water, and to all intents and purposes the annulment had no hope of succeeding.*

*A friendly conversation with the major creditor ensured they understood the bankrupt's position, and the trustee prepared the creditors report on the basis that this creditor understood the offer comprised funds they'd be unlikely to ever see if Peter simply waited out his bankruptcy discharge at the end of the standard period.*

*The creditor agreed to the \$50,000 offer to settle matters with all creditors - of which they'd receive roughly \$35,000. The creditors report went out, and the liquidator responded by rejecting the offer because it ran over two years: keeping their file open that long wasn't financially viable, so they'd vote against the proposal at the creditors meeting.*

This is business practice overriding common sense and any level of compassion. You're right that it doesn't make sense: by rejecting the offer, the liquidator stood to receive nothing instead of \$35,000 over two years. The truth is that keeping a file open - however dormant - is treated as a cost under their business model. It isn't really; a file sitting open doesn't cost anything meaningful to operate. But their practices override common sense.

### **What you can learn from this**

- Control your own destiny by choosing your own liquidator.

Choosing your own liquidator doesn't mean hiding things from them, or paying them to hide things from creditors. It means establishing the relationship early, building trust, and giving them a greater understanding of your circumstances. All liquidators are in

the business of making money - but the more cooperative and transparent you are, the better the outcome tends to be.

- Act quickly. Delaying the decision raises the risk of an insolvent trading claim - and of a liquidator not of your choosing being appointed.
- Get your affairs in order before the trustee arrives at them.
- Engage a third party to remove the emotional aspect.

### **Beware the ever-changing world of technology**

I'm old enough - you may be too - to remember a world before the web. A world where financial and reporting agencies weren't digitally connected, where personal information moved slowly, and where records of assets and transactions took weeks or months to recover, if they could be recovered at all.

That's not the world we live in. Acquaintances of mine who went bankrupt in the eighties certainly managed to retain assets and hide details from their trustees. Today that's not only impossible - attempting it is folly.

Consider what's now wired together. The ATO runs data matching across bank accounts, property, share registries, crypto exchanges and even ride-share and online-marketplace income. Banks report through that same web. Property settlements run through PEXA, so a transfer leaves a digital trail the day it happens. Every director now carries a Director Identification Number that follows them from company to company for life - the days of quietly disappearing from one failed company and surfacing in the next are over. And AFSA's records sit across the top of all of it.

Put simply: by the time a trustee or liquidator asks you a question, they usually already know the answer. The old game of hiding assets and hoping no one joins the dots can't be played anymore - the dots join themselves. Honesty isn't only your legal obligation. It's the only practical strategy left, and the good news is it's also the

one that produces the best outcomes. Everything in this book works better when you're the transparent party in the room.

### **Learn to keep your mouth shut**

If you present your file in person at AFSA's office, it's likely an officer will be available to interview you on the spot and ask questions about your Statement of Affairs. At the time of declaration, a bankrupt is experiencing a lot of emotions and may not be thinking clearly. If your situation is at all complicated, or you're feeling nervous and stressed, presenting your file in person may not be the best option.

Any answers you give in that interview go on the record and feed the trustee's investigation of your file. I'm not suggesting you delay answering for the purpose of being deceitful. I'm suggesting you give yourself the breathing space to answer accurately. Instead of presenting in person, my guidance to clients is to lodge the application and have the trustee put their questions to you in writing.

The same applies for the entire period of your bankruptcy. You must answer the questions your trustee raises. It's also fair and reasonable to ask your trustee to put the questions in writing so you can respond appropriately.

A law enforcement officer of some reputable esteem once told me that most people in jail talked their way in there. Even innocent people can talk themselves into trouble.

### **James and Amelia's story**

*James ran a family business selling second-hand car parts. Through a series of bad transactions and mismanagement, James ran up debts he couldn't pay. After much soul-searching he accepted he could no longer trade, and filed. The business went into liquidation; James and Amelia drew a line in the sand and got on with rebuilding their lives.*

*A particularly disgruntled creditor requested a transfer of trustee - from the official trustee to a private one. That creditor knew James ran a side business doing up and selling vintage cars, registered in his wife's name. Nothing wrong in itself. It's what happened next that caused the problem.*

*The creditor tipped off the trustee to advertisements in a vintage car sales magazine listing James's mobile number as the contact. The trustee paid a visit to James's home and began asking questions about the car business. James - believing it important to comply, and eager to show he was a cooperative bankrupt - answered everything. He thought his wife's business was protected, he had no interest in it, and helpfulness could only help his case.*

*From James's answers, the trustee established that James had intimate knowledge of the business dealings: how many cars the business owned, what regular payments it made, a clear understanding of its operation. The trustee determined James was clearly involved - in fact a shadow director - and that the business was effectively his, in his wife's name to protect assets and income from creditors.*

What could James have done? He was under no obligation to answer the trustee's questions on the spot. No one is suggesting dishonesty - but the law also protects individuals from intimidation by investigators. Had James asked me, I'd have suggested he tell the trustee he was happy to answer any and all questions - in writing. James was entitled to that courtesy.

And although he helped his wife with her business, as husbands do, he was under no obligation to answer questions on his wife's behalf about a business clearly and legally hers. He simply should have said: it's my wife's business - please ask her. James was a very honest individual, but not a very fast learner.

*About two years into the bankruptcy, James and Amelia decided to buy a house. James was still bankrupt, so technically the purchase couldn't rely on him. It's rare to find a lender who'll finance a bankrupt - not impossible, but rare. They bid on their dream home at auction and put down the non-refundable deposit. Amelia applied for finance based on the income of the car renovation business - in her name, and her name alone.*

*Their broker was confident, and reported a verbal offer with formal paperwork to follow the next day. In the meantime the lender had a few extra questions. Instead of phoning the broker, as is normal practice, they phoned Amelia's mobile - the business number. Amelia had popped out and James had her phone. He answered, explained Amelia was out, and offered to help: it was his business too, he knew all the details, and Amelia wouldn't mind.*

*The result? The lender concluded the income was actually James's, and that Amelia's involvement was on paper only. They decided James was the real business operator - a bankrupt - and withdrew the offer. James and Amelia lost the deposit, and were pursued by the vendor for breaking the contract.*

What should James have done? Nothing. The moment he realised who was calling, he should have said: this is my wife's business, and only she can answer your questions. James was trying to be helpful. The consequences were disastrous. If he'd simply treated his wife's affairs as exactly that - his wife's affairs - there would have been an entirely different outcome.

## Moving On - A Final Word

We've covered a lot of ground. Bankruptcy and liquidation, trustees and liquidators, debt collectors and director penalties, the new tools and the old traps. If your head is spinning, don't worry about remembering all of it. The detail is here whenever you need it.

What I want you to walk away with is simpler than any of it.

Here's the whole book in a handful of lines.

- Act soon, act quickly. Time is the one thing you can't get back, and the ostrich technique has never worked for anybody. The sooner you face it, the more options you have - and options are everything.
- Stop asking whose fault it is. It changes nothing about how you fix it, and the energy you spend on blame is energy stolen from rebuilding. Let it go and move on.
- Get the right people around you - early, and in the open. Not the mate at the pub with a clever trick, not the friend who puts an arm around you and helps himself while he's there. The people who come through best are the ones who got proper advice before the trouble landed and stayed transparent all the way through.
- Honesty beats every clever trick. The dots join themselves now. A clean set of books, a real offer of finance, a properly documented loan - that's your armour. A manufactured one is a confession.
- Bankruptcy and insolvency are not the end. They exist to let good people who've had a bad run draw a line, take a breath, and start again. Handled with a plan, they can be the best decision you ever make - not the worst.

I know how it feels, because I've been there. I lay in bed one Wednesday morning listening to a phone ring, certain I'd lost

everything. I hadn't. What I lost was a set of debts and a few illusions about who my friends were. What I gained was the knowledge that built everything I've done since - and the experience I've spent the years since handing to people exactly where you might be right now.

That's the message I most want you to take from this book. When a business fails, you don't lose your worth. You don't lose what you know, what you've learnt, or what you're capable of building next. The setback is real, but it isn't the end of your story - it's the part where you find out what you're made of.

So if you're in the thick of it: take a breath. Make a plan. Get the right people in your corner. And understand that going broke doesn't make you broken. It makes you someone who now knows how to build again - bigger, smarter, and better than before.

That's what I do for my clients. It's why I wrote this book. And it's the truth I want you to hold onto when everything feels like it's falling apart:

*You can go broke. You don't have to stay broken.*

Now go and rebuild.

- Doug Constable

## Appendix - Insolvency Glossary

A brief explanation of terms you may come across in company insolvency proceedings, adapted from the Australian Securities and Investments Commission. This glossary is general guidance only - many terms have specific technical meanings in certain contexts not covered here.

**AFSA** - The Australian Financial Security Authority - the government body that administers personal bankruptcy (formerly ITSA).

**ARITA** - The Australian Restructuring Insolvency and Turnaround Association - the leading professional body for insolvency practitioners (formerly the IPA).

**Asset** - Any property of value owned by a person, tangible or intangible.

**Bankruptcy** - An insolvency procedure that applies to a natural person, not to a company.

**Charge** - A form of security for a debt taken by a creditor over company assets. A mortgage is a type of charge.

**Committee of creditors** - A small group of creditors (or their representatives) appointed at the first meeting in a voluntary administration to consult with the administrator, receive and consider reports, and approve fees as required.

**Committee of inspection** - A small group of creditors and shareholders appointed to assist the liquidator - often called on to approve the liquidator's fees, compromises of debts, or long-running contracts.

**Compromise** - Agreeing to accept a lesser sum in full payment of a debt.

**Contingent asset / liability** - An asset or liability that might arise if a certain event occurs - for example, the outcome of current legal action.

**Contributory** - A shareholder who may be liable to contribute toward a company's debts in liquidation if their shares are not fully paid.

**Controller** - A person appointed by a secured creditor to deal with assets subject to a charge. Includes a receiver, and receiver and manager.

**Court liquidation** - A liquidation that starts by court order, made after an application - usually by a creditor.

**Creditor** - A person who is owed money.

**Creditors' trust** - A separate legal arrangement set up to deal with creditor claims, to which claims can be transferred as part of a deed of company arrangement.

**Creditors' voluntary liquidation** - A liquidation for insolvent companies, initiated by the company. Creditors may replace the liquidator appointed by the company.

**Debenture** - A document acknowledging that a company will repay money lent to it by the holder.

**Debt / Debtor** - An amount owed; a person who owes a debt.

**Declaration of indemnities / relevant relationships** -

Declarations a voluntary administrator or liquidator must provide to creditors about indemnities given and relevant relationships, so creditors can make informed decisions about independence.

**Deed administrator** - The external administrator appointed to oversee a deed of company arrangement.

**Deed of company arrangement (DOCA)** - A binding arrangement between a company and its creditors governing how the company's

affairs will be dealt with after voluntary administration. Aims to maximise the chance of the company (or its business) continuing, or to deliver creditors a better return than immediate winding up.

**Director** - A person appointed as a director, responsible for directing and managing the company's affairs. Includes a shadow director.

**Dividend** - A share of profit paid to shareholders of a solvent company; also a sum paid to creditors out of the assets of an insolvent company.

**Eligible employee creditor** - A creditor (including the ATO for the superannuation guarantee charge) who would be paid employment entitlements in priority to other unsecured debts in a winding up, with special voting rights on a DOCA that seeks to modify that priority.

**Excluded employee** - An employee who has also been a director (or a director's relative) in the 12 months before external administration - entitled to only limited priority for their entitlements.

**External administrator** - A general term for an external person formally appointed to a company or its property: provisional liquidator, liquidator, voluntary administrator, deed administrator, controller, receiver, or receiver and manager. Sometimes called an insolvency practitioner.

**FEG** - The Fair Entitlements Guarantee - the government scheme that assists employees owed entitlements after their employer's liquidation or bankruptcy (replaced GEERS).

**Fixed charge** - A charge over particular company assets, which the company cannot dispose of without the lender's consent.

**Floating charge** - A charge over general assets (such as stock and debtors) that the company can deal with in the ordinary course of business - converting to a fixed charge on certain events, such

as the appointment of a liquidator. (Under the PPSA, now generally a 'circulating security interest'.)

**Indemnity** - An agreement between the external administrator and a third party to cover the fees and debts the administrator incurs.

**Insolvent** - Unable to pay all debts as and when they fall due.

**Liquidation** - The orderly winding up of a company's affairs: realising assets, ceasing or selling operations, distributing proceeds among creditors and any surplus among shareholders. Three types: court, creditors' voluntary, and members' voluntary.

**Liquidator** - The person appointed to administer a liquidation.

**Member** - A shareholder.

**Members' voluntary liquidation** - A liquidation of a solvent company, initiated by the company.

**Officer** - A director, secretary or, in most cases, external administrator of the company.

**Poll / Pooling** - A creditor voting procedure counting both numbers and debt value; the practice of treating the affairs of a group of companies as a single external administration.

**Priority creditor** - An unsecured creditor entitled to be paid ahead of others - employees, for example.

**Proof of debt** - The prescribed form a creditor completes at the liquidator's request, setting out their claim.

**Provisional liquidator** - A liquidator appointed by the court to preserve a company's assets until a winding-up application is decided.

**Proxy** - A person appointed to represent and vote for another at a meeting.

**Public examination** - A court process allowing a liquidator, administrator or ASIC to question directors or others about the company's affairs.

**Receiver / Receiver and manager** - An external administrator appointed (usually by a secured creditor) to realise charged assets to repay the secured debt; a receiver and manager also has power to manage the company's affairs.

**Report as to affairs** - The prescribed form directors and the secretary must complete, detailing the company's assets, liabilities, creditors and debtors.

**Secured creditor** - A creditor holding security (such as a charge or mortgage) over some or all of the company's property.

**Shadow director** - A person not formally registered as a director who nonetheless directs and manages the company's affairs - treated by the Corporations Act as a director.

**Uncommercial transaction** - A transaction unreasonable for the company to have entered, voidable by a liquidator if it occurred within two years before winding up while the company was (or became) insolvent.

**Unfair preference** - A payment or benefit that puts one creditor ahead of other unsecured creditors, recoverable by the liquidator if made within six months before liquidation while the company was (or became) insolvent.

**Unsecured creditor** - A creditor holding no security over the company's property.

**Voluntary administration** - A procedure where directors (or a substantially secured creditor) appoint a voluntary administrator to investigate the company's affairs and recommend whether creditors should accept a deed of company arrangement, wind the company up, or hand it back to the directors.

**Winding-up order** - A court order to wind up a company - the first step in a court liquidation, usually on a creditor's application.