

EVALUATION OF SUNDRY PROVISIONS – INTERIM EVALUATION REPORT

Section 1 - Purpose of the paper

1. To provide details of the on-going evaluation work being undertaken in respect of the sundry provisions of the Enterprise Act 2002 (EA).

Section 2 – Background and Purpose of Evaluation

2. The EA introduced the following changes:

- Repeal of bankruptcy offences under sections 361 and 362 of the Insolvency Act 1986 - 'failure to keep proper accounting records' and 'gambling and rash and hazardous speculation'. Instead, conduct of this nature will be addressed under the Bankruptcy Restrictions Order (BRO);
- Repeal of the summary administration regime and the amendment of section 289, in order that the OR has discretion in whether to exercise his power to investigate a bankrupt's affairs. The criteria to be used will not be restricted to the issue of the size of deficiency (as was previously the case) but on the extent to which the initial information provided to him explains the causes of the bankruptcy and that these causes do not indicate misconduct or the commission of criminal offences; and
- Sanction is required for a trustee to pursue antecedent recoveries. It had been presumed that, with the necessary sanction, a trustee could use bankruptcy assets to bring such actions, but this appeared not to be the case following the decision in *Lewis v. Commissioners of Inland Revenue and Others* and subsequent legal advice. Therefore, following the Lewis case, a trustee could not use money available for distribution to fund an antecedent recovery and in effect, the EA provisions reverse this position.

3. The respective objectives of these sundry provisions are:

- To provide more effective protection of the public and the commercial community
- To enable the OR to allocate investigative resources to the cases that merit investigation, rather than based on the size of the bankrupt's deficiency
- To allow the creditors the choice as to whether estate funds should be used to fund antecedent recovery action

4. The principal aim of the evaluation is to provide a comprehensive assessment of whether, to what extent and how the sundry provisions meet these policy objectives. The evaluation also provides information and data that can be used to inform future policy decisions.

5. The Insolvency Service made a commitment to the Government to undertake an evaluation of the EA within 3 years of commencement of the various provisions. The provisions of the EA relating to the repeal of offences under sections 361/2 and discretionary investigation of a bankrupt's affairs by the OR commenced on 1 April 2004, and therefore, the evaluation is due to be completed by 31 March 2007. The provisions of the EA relating to sanction of antecedent recoveries commenced on 14 September

2003, but the evaluation is not due until 31 March 2007. This is an interim report to summarise the evaluation work and findings to date.

Section 3 – Approach

6. The evaluation uses both quantitative and qualitative evaluation methods, including:
- Analysis of data on individual insolvency cases held on The Insolvency Service's internal Information Technology system
 - Sampling and review of files on individual insolvency cases to supplement information from other sources
 - Meetings with professionals within the insolvency sector to seek their views regarding the appropriateness and impact of insolvency legislation
 - Structured questionnaires and interviews with bankrupts, creditors, and other members of the public to obtain their views and experience of the impact of insolvency legislation and to obtain feedback on the wider issues associated with bankruptcy
7. In order to ascertain the impact of the Enterprise Act 2002 provisions, benchmark information was obtained regarding the operation and effect of the existing legislation, i.e. before the implementation of the Enterprise Act 2002 provisions.
8. A copy of the evaluation planning paper is contained at [appendix 1](#).

Section 4 – Work Carried Out to Date

9. Only benchmarking information has been obtained to date.

Repeal of offences under section 361 and 362: To provide more effective protection of the public and the commercial community

10. The objective relates to the change in the nature of action that can be brought against a bankrupt whose conduct was punishable under sections 361/2. The evaluation looks at the level of protection offered and customer satisfaction with that protection.

11. Details of the benchmarking information obtained in respect of this objective is contained at [appendix 2](#).

Repeal of the summary administration regime: To enable the OR to allocate investigative resources to the cases that merit investigation

12. This objective relates to the change in the OR's duty to investigate. The evaluation looks at the working practices of the OR and the level of investigation work carried out by the OR.

13. Details of the benchmarking information obtained in respect of this objective is contained at [appendix 3](#).

Sanction is required for a trustee to pursue antecedent recoveries: To allow the creditors the choice as to whether estate funds should be used to fund antecedent recovery action

14. This objective relates to the creditors committee agreeing to the trustee using money that would otherwise be available for distribution to fund antecedent recoveries. The evaluation looks at the impact (if any) on the level and results of antecedent recoveries.

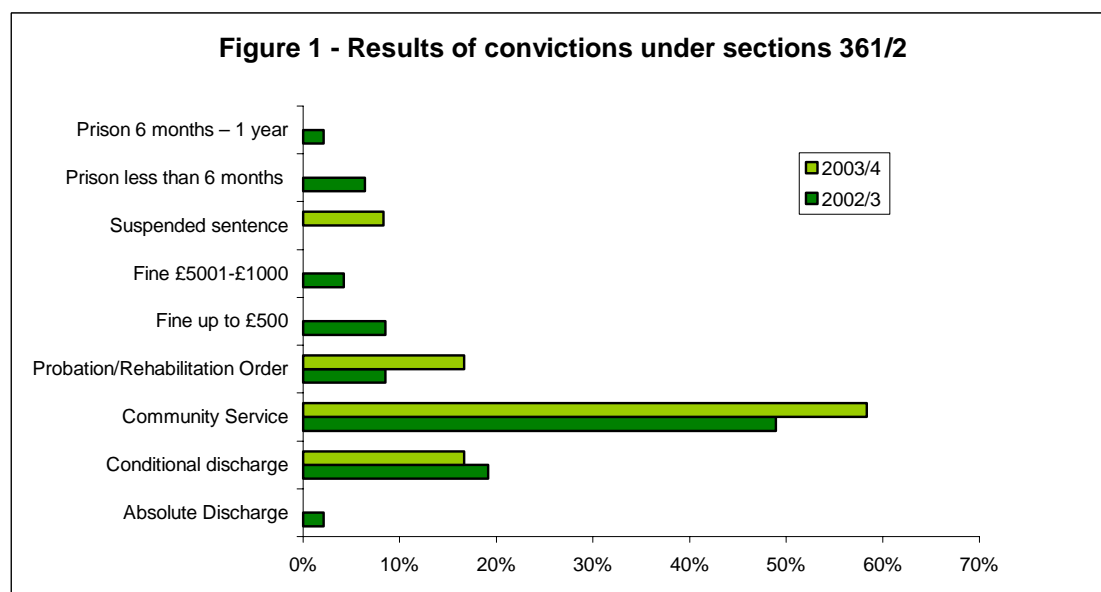
15. The benchmarking information is defined as the number and results of antecedent recoveries made under a court order in the period November 2000 to 14 September 2003. In the absence of any appropriate records from which to extract this data, the Insolvency Service has sought case study material from insolvency practitioners. However, no example cases have been identified to date.

Section 5 - Preliminary conclusions and recommendations

16. From the benchmarking information available, the following observations can be made:

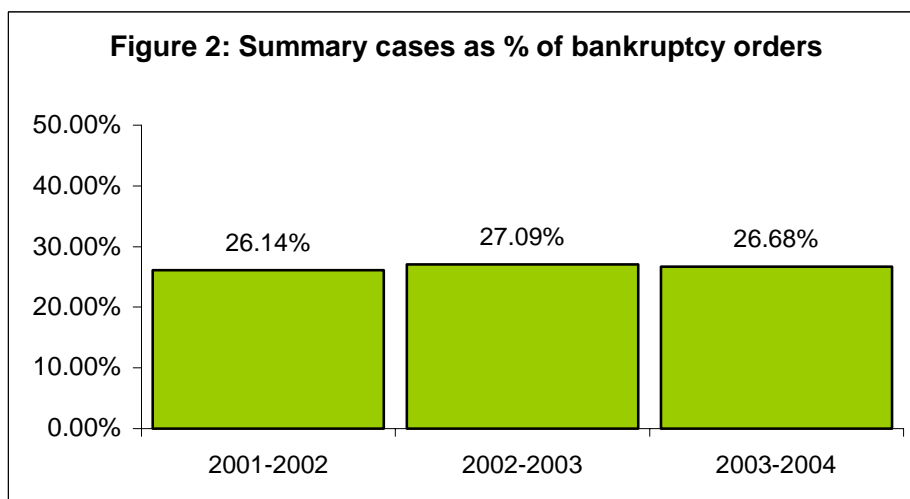
Repeal of offences under section 361 and 362: To provide more effective protection of the public and the commercial community

- The number of potential offences under sections 361/2 has remained consistent in 2002/3 to 2003/4, but such offences account for a greater proportion of the total number of potential offences identified.
- A potential offence under sections 361/2 is identified in around 0.5% of bankruptcy cases.
- From details of convictions obtained to date, where a conviction is obtained in respect of a section 361/2 offence, the majority of bankrupts receive a community service sentence (see figure 1).



Repeal of the summary administration regime: To enable the OR to allocate investigative resources to the cases that merit investigation

- The level of summary administration cases compared to all bankruptcy orders remained consistent (see figure 2).



- As detailed in appendix 3, due to process changes introduced, there is no further reliable comparative information available from which the impact of the repeal of the summary administration regime can be evaluated.

17. I would recommend that as regards the evaluation of the repeal of the summary administration regime, the evaluation measures relating to the level of investigation cases, investigation time and investigation unit costs (as detailed in the evaluation planning paper under b) 2,3,4 and 5) are abandoned.

Caroline Burton
March 2005