

# Chapter 1

## Introduction and background

1.1 On 30 November 2017, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the provisions of the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 (BAEI bill) to the Senate Legal and Constitutional Affairs Legislation Committee (the committee).<sup>1</sup> On 7 December 2017, the provisions of the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 (BADAR bill) were referred to the committee through a similar means.<sup>2</sup>

1.2 Both bills were referred for inquiry and report by 19 March 2018.

### Conduct of the inquiry

1.3 In accordance with usual practice, the committee wrote to a number of persons and organisations, inviting submissions to the BAEI bill and the BADAR bill by 31 January 2018 and 16 February 2018 respectively. The inquiries were also made public on the committee's website.

1.4 The committee received 20 submissions to the BAEI bill inquiry and 19 submissions to the BADAR bill inquiry, which are listed at Appendix 1. Submissions are also available in full on the committee's website.<sup>3</sup>

1.5 The committee held concurrent public hearings for both bills in Sydney on 5 March 2018 and in Melbourne on 6 March 2018.

### Bankruptcy verses debt agreements

1.6 The *Bankruptcy Act 1966* (Cth) (the Act) provides a number of options for a debtor with unmanageable debt to take control of their personal affairs, while also allowing for creditors to receive a portion of what they are owed. Debt agreements, which were introduced in 1996 in Part IX of the Act, were 'designed to be a low cost alternative to bankruptcy for persons with few if any divisible assets, and low income levels.'<sup>4</sup>

1.7 The eligibility requirements and restrictions differ between the schemes. The following table, produced by the Australian Financial Security Authority (AFSA), compares a number of the key eligibility requirements and restrictions for bankruptcies and debt agreements:

---

1 *Journals of the Senate*, No. 75, 30 November 2017, pp. 2401–2402.

2 *Journals of the Senate*, No. 79, 7 December 2017, pp. 2512–2513.

3 The committee's website can be found at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs)

4 Bankruptcy Legislation Amendment Bill 1996, Explanatory Memorandum, p. 34.

**Table 1—Comparison between bankruptcies and debt agreements<sup>5</sup>**

	<b>Bankruptcy</b>	<b>Debt Agreement</b>
<b>Australian connection</b>	Must have a residential or business connection.	No residential or business connection required.
<b>Previous insolvency</b>	While previous insolvency does not by itself make a person ineligible, the Official Receiver may not accept the petition if the debtor was previously bankrupt and some other conditions are met.	Must not have been a bankrupt, proposed a personal insolvency agreement or made a debt agreement in the previous 10 years.
<b>Income threshold</b>	No.	Yes, a person cannot propose a debt agreement if their after tax income for the year is more than \$83,756.40
<b>Asset threshold</b>	No.	Yes, a person cannot propose a debt agreement if their divisible property is more than \$111,675.20.
<b>Debt threshold</b>	No.	Yes, a person cannot propose a debt agreement if their unsecured debts are more than \$111,675.20.
<b>Ability to retain assets</b>	No, unless it is exempt property (for example, household furniture, tools of trade up to a certain value).	Yes, unless terms of the agreement provide otherwise.
<b>Ability to travel overseas</b>	Prior consent of trustee required. A fee is payable where the trustee is the Official Trustee.	No statutory restrictions.
<b>Ability to be a director of, or otherwise manage, a corporation</b>	No.	Yes.

<sup>5</sup> Key elements of the eligibility requirements and restrictions have been copied from tables produced by the Australian Financial Security Authority (AFSA). A more detailed comparison between bankruptcy, debt agreement and personal insolvency agreement can be found on the AFSA website: [afsa.gov.au/insolvency/i-cant-pay-my-debts/compare-formal-options](https://afsa.gov.au/insolvency/i-cant-pay-my-debts/compare-formal-options) (accessed 6 March 2018).

## Purpose of the bills

1.8 The two bills propose significant changes in relation to bankruptcy and debt agreements.

### ***Bankruptcy Amendment (Enterprise Incentives) Bill 2017***

1.9 The BAEI bill proposes to amend the Act to provide for a reduction of the default period, and other time periods associated with bankruptcy, from three years to one year.<sup>6</sup>

1.10 The Explanatory Memorandum to the BAEI bill sets out the purpose of the proposed amendments:

The aim of the Bill is to foster entrepreneurial behaviour and reduce the stigma associated with bankruptcy while maintaining the integrity of the regulatory and enforcement frameworks for the personal insolvency regime.<sup>7</sup>

1.11 Introducing the bill into the Senate, the Assistant Minister to the Prime Minister, Senator the Hon. James McGrath, explained that under existing arrangements, personal insolvency laws have heavy consequences for those declared as bankrupt. Bankrupts are subject to penalties such as being locked out of their profession, the inability to travel overseas, and having to identify as a bankrupt. Under current law, these penalties are applied to the bankrupt person for a period of three years following the declaration of bankruptcy.<sup>8</sup> The Assistant Minister stated that these penalties are viewed as 'stigmatising and penalising failure'.<sup>9</sup>

1.12 The proposed amendments address a recommendation made by a Productivity Commission report in 2015 that the default bankruptcy period should be reduced, particularly in relation to restrictions on travel, finance and employment.<sup>10</sup>

### ***Bankruptcy Amendment (Debt Agreement Reform) Bill 2018***

1.13 The BADAR bill provides for tighter regulation of the debt agreement regime, which is intended to boost confidence in the sector's integrity, 'deter unscrupulous practices, enhance transparency, and ensure that the regime is accessible and equitable'.<sup>11</sup>

---

6 Bankruptcy Amendment (Enterprise Incentives) Bill 2017, Explanatory Memorandum (BAEI Explanatory Memorandum), p. 2.

7 BAEI Explanatory Memorandum, p. 5.

8 Senator the Hon. James McGrath, Assistant Minister to the Prime Minister, *Senate Hansard*, 19 October 2017, p. 8029.

9 Senator the Hon. James McGrath, Assistant Minister to the Prime Minister, *Senate Hansard*, 19 October 2017, p. 8029.

10 Productivity Commission, *Business Set-up, Transfer and Closure: Productivity Commission Inquiry Report*, No. 75, 30 September 2015, p. 2.

11 Bankruptcy Amendment (Debt Agreement Reform) Bill 2018, Explanatory Memorandum (BADAR Explanatory Memorandum), p. 2.

1.14 The Attorney-General, the Hon. Christian Porter MP, explained the rationale for the proposed changes to the debt agreement regime as follows:

Between 2007 and 2016, new debt agreements increased from 6,560 to 12,640 per year. Over the same period, new bankruptcies declined from 25,754 to 16,842 per year. To respond to increasing usage of debt agreements and evidence of consumer exploitation by the debt agreement industry, the government is proceeding with a comprehensive reform of Australia's debt agreement system.

It will boost confidence in the professionalism of debt agreement administrators, deter unscrupulous practices and enhance transparency. This bill will ensure that the debt agreement system is accessible to debtors who have the financial capacity to enter into debt agreements.<sup>12</sup>

### **Key provisions of the bills**

#### ***Bankruptcy Amendment (Enterprise Incentives) Bill 2017***

1.15 Section 149 of the Act currently provides that a bankrupt qualifies for an automatic discharge after a period of three years, and is subject to a number of restrictions during the period of bankruptcy. The bill would reduce the default period of bankruptcy to one year. As part of the reduction of the default period, other relevant time periods associated with bankruptcy would also be reduced to one year.

1.16 The key proposed amendments include:

- inserting a new subsection to section 149 that would provide for an automatic discharge after one year of bankruptcy to apply to persons who become bankrupt after the commencement of the new subsection, which would remove certain restrictions such as overseas travel, obtaining credit and company board eligibility (Items 18 and 19) at the expiration of the bankruptcy period; and
- repealing subsection 80(1) and replacing it with a requirement for the bankrupt to notify the trustee within 10 business days of changes to their name, address, and phone number during the 'prescribed period'. It also would insert a new definition of 'prescribed period' and of 'bankrupt' for the purposes of section 80 (Items 4 and 5).

1.17 The amendments in the BAEI bill would commence six months after receiving Royal Assent in order to allow trustees, debtors and creditors to adjust and to prepare any objections to discharge.<sup>13</sup>

#### ***Bankruptcy Amendment (Debt Agreement Reform) Bill 2018***

1.18 The provisions of the BADAR bill would enact a suite of reforms to Australia's debt agreement regime. The amendments would address a broad spectrum

---

12 The Hon. Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 14 February 2018, p. 7.

13 BAEI Explanatory Memorandum, p. 2.

---

of areas regarding debt agreements, including who can be a registered debt agreement administrator, the powers of the Official Receiver and the Inspector-General, and the administration of debt agreements.

1.19 The key proposed amendments include:

- amending subsection 185C(2) to restrict the category of persons who may be authorised to deal with debtor's property (Schedule 1, Items 1 and 2);
- inserting 185C(2AA), which would provide that a debt agreement proposal cannot propose for payments to be made under the agreement for a timeframe longer than three years from the day the agreement was made;
- amending subsection 185C(4)(c) to increase the asset value threshold for a debtor entering a debt agreement<sup>14</sup> (Schedule 1, Item 17);
- inserting subsection 185C(4)(e), which would provide that a debtor cannot give the Official Receiver a debt agreement proposal if the total payments under agreement exceed the debtor's income by a certain percentage (Schedule 1, Item 20). Further, the percentage may be determined by the Attorney-General by legislative instrument as per new subsection 185C(4B) (Schedule 1, Item 21);
- inserting subsection 185E(2AB), which would provide that the Official Receiver can refuse to accept a debt agreement proposal for processing if the Official Receiver reasonably believes that the debt agreement would cause undue hardship to the debtor (Schedule 1, Item 23);
- amending section 185LA to extend the duties of a debt agreement administrator to reflect those conferred on trustees under paragraphs 19(1)(h) and (i) of the Bankruptcy Act (Schedule 2, Item 23); and
- conferring power on the Inspector-General to refuse to approve an application for registration as a registered debt agreement administrator if the individual is not a fit and proper person (Schedule 3, Items 5 and 6).

1.20 The majority of the amendments in the BADAR bill would commence six months after receiving Royal Assent. According to the BADAR Explanatory Memorandum, this would allow debt agreement administrators and AFSA time to sufficiently prepare for the commencement of the reforms.<sup>15</sup> Amendments under Division 2 of Part 1 Schedule 1 would commence twelve months after receiving Royal Assent.

### **Reports of other committees**

1.21 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) noted that subsection 80(1) of the Act requires a bankrupt to 'immediately' inform the trustee, in writing, of a change of name or principal residence

---

14 This would increase the asset threshold from \$111,675.20 to \$223,350.40.

15 BADAR Explanatory Memorandum, p. 8.

that occurs during their bankruptcy.<sup>16</sup> The Scrutiny Committee noted that pursuant to subsection 80(1) of the BAEI bill this would be amended to 'within 10 business days' and the way in which the trustee is informed would be amended to 'a manner determined or approved by the trustee'.<sup>17</sup>

1.22 The Scrutiny Committee reported that, pursuant to subsection 80(1A) of the Act, a breach of this requirement is subject to six months imprisonment and that this offence is a strict liability offence.<sup>18</sup>

1.23 The Scrutiny Committee raised concern that the punishment of six months imprisonment for a strict liability offence is beyond the recommended punishment of up to 60 penalty units for a strict liability offence, as outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.<sup>19</sup>

1.24 In response to this concern, the Attorney-General acknowledged that proposed subsection 80(1) does not comply with the Guide and that he 'will seek to amend item 4 Schedule 1 of the Bill to ensure compliance with the Guide'.<sup>20</sup>

1.25 The Scrutiny Committee made no further comments in light of the Attorney-General's undertaking.

1.26 The Parliamentary Joint Committee on Human Rights (PJCHR) also considered the BAEI bill and reported that the bill does not raise human rights concerns.<sup>21</sup>

1.27 At the time of writing, neither the Scrutiny committee nor the JCHR have commented on the BADAR bill.

## Report outline

1.28 This report consists of four chapters:

- this chapter provides a brief background and overview of the bills, as well as the administrative details of the inquiries;
- chapter 2 sets out the issues raised by submitters in relation to the BAEI bill;
- chapter 3 sets out the issues raised by submitters in relation to the BADAR bill; and
- chapter 4 outlines the committee's views and recommendations in relation to both bills.

---

16 Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee), *Scrutiny Digest 13 of 2017*, 15 November 2017, p. 4.

17 Scrutiny Committee, *Scrutiny Digest 13 of 2017*, 15 November 2017, p. 4.

18 Scrutiny Committee, *Scrutiny Digest 13 of 2017*, 15 November 2017, p. 4.

19 Scrutiny Committee, *Scrutiny Digest 13 of 2017*, 15 November 2017, p. 5. See also Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

20 Scrutiny Committee, *Scrutiny Digest 15 of 2017*, 6 December 2017, p. 7.

21 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: 12 of 2017*, 28 November 2017, p. 96.

**References to the Hansard transcript**

1.29 References to the Hansard are to the proof Hansard. Page numbers may vary between the proof and the official transcript.

**Acknowledgements**

1.30 The committee thanks all organisations and individuals who made submissions and provided evidence to this inquiry.

