Chapter 3

Key concerns regarding the BADAR bill

3.1 Debt agreements in Australia have continued to increase in popularity while the number of bankruptcies has declined. Between 2007 and 2016, new debt agreements increased from 6,560 to 12,640 per year and new bankruptcies declined from 25,754 to 16,842 per year.[1] The Australian Financial Security Authority (AFSA), reported that 'in 2016–17, debt agreement administrators received $263.5 million from debtors in payments pursuant to debt agreements.'[2] As at 30 June 2017, 46,651 debt agreements were being administered by debt agreement administrators.[3]

3.2 Despite the growing popularity with debt agreements, a recent study found that debtors are being signed up to unsuitable or unsustainable agreements; insufficient information is being provided to debtors; some debt agreement administrators are charging 'excessive or unwarranted fees'; and there exists a lack of redress for debtors.[4]

3.3 The BADAR Explanatory Memorandum notes the objective of the bill:

> It is intended that the measures in the Bill will boost confidence in the professionalism of administrators, deter unscrupulous practices, enhance transparency between the administrator and stakeholders, and ensure that the debt agreement system is accessible and equitable.[5]

3.4 This chapter discusses the main concerns raised by submitters about the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 (BADAR bill). These concerns included:

- the tightening of registration standards for debt agreement administrators;
- the introduction of a three year limit for debt agreements;
- the reasonableness of the payment to income ratio;
- doubling the asset threshold;
- restricting the voting process; and
- the potential effect the BADAR bill may have on bankruptcies.

---

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

2 Australian Financial Security Authority (AFSA), *Submission 5,* BADAR bill, p. 3.

3 AFSA, *Submission 5,* BADAR bill, p. 3.

4 Ms Vivien Chen, Ms Lucinda O'Brien and Mr Ian Ramsay (Chen et al), 'An Evaluation of Debt Agreements in Australia', *Monash University Law Review*, 44(1), 2018, pp. 39–41.

5 BADAR Explanatory Memorandum, p. 2.

Debt agreement administrators

3.5 The BADAR bill proposes to tighten the registration standards of debt agreement administrators. The BADAR Explanatory Memorandum notes that currently, in certain circumstances, a debt agreement is able to be administered by a person who is not a registered debt agreement administrator.[6] Item 1 of the BADAR bill would limit the type of practitioners who are able to administer a debt agreement to include a registered debt agreement administrator, registered trustee or the Official Trustee. Additionally, Schedule 3, Part 2 of the BADAR bill enables the Attorney-General to set industry conditions for registered debt agreement administrators. As explained by the AGD, '[a] legislative instrument is a flexible mechanism which could be used to set appropriate advertising, advisory and disclosure standards to prevent misconduct.'[7]

3.6 Submitters were generally supportive of the proposed changes to strengthen the registration and standards of debt agreement administrators and some considered that the bill could go further. For example, SRMC Limited (SRMC) recommended that all administrators be required to complete a personal insolvency course as well as undertake ongoing formal education.[8] SRMC also suggested that administrators be required to hold membership of a professional body with a commitment to a Code of Conduct.[9] Additionally, SRMC argued for brokers to hold a sub-registration:

> In current bankruptcy law, a debt agreement administrator is not appointed until such time as the proposal is accepted by the majority of creditors (in value), and becomes a debt agreement. It is this irregularity that has created the situation of 'external' brokers becoming involved in the regime. This company has for many years, been urging the Australian Financial Security Authority to introduce a sub-registration system for those wishing to be brokers. It is this submissions view that a broker should be aligned to an administrator and should hold a sub-registration attached to the debt agreement administrator’s registration similar to the manner in which a real estate sales person can only conduct business by being sub-licenced to the principal. Such a system would alleviate many of the criticisms and cause the administrator to be liable for the actions of its broker.[10]

3.7 Mendelsons National Debt Collection Lawyers, Prushka Fast Debt Recovery, and Zurick Capital and Finance Pty Ltd (Mendelsons), argued for tighter regulation for advertising of debt administrator services and for more information to be provided

---

6 BADAR Explanatory Memorandum, p. 10.

7 Attorney-General's Department (AGD), *Submission 17,* BADAR bill, p. 4.

8 SRMC Limited, *Submission 2*, BADAR bill, p. 2. See also Fox Symes & Associates, *Submission 10*, BADAR bill, p. 2.

9 SRMC Limited, *Submission 2,* BADAR bill, p. 2.

10 SRMC Limited, *Submission 2*, BADAR bill, p. 4.

to debtors both prior to entering into a debt agreement as well as at other stages of the debt agreement.[11]

3.8 A joint submission from Consumer Action Law Centre, Financial Rights Legal Centre, and Financial Counselling Australia (CALC, FRLC and FCA) recommended that debt agreement administrators be required to join the Australian Financial Complaints Authority (AFCA), as a condition of registration.[12] CALC, FRLC and FCA observed the following:

> While the expanded voiding provisions are a vast improvement on the current voiding provisions in the Act, they will not provide a remedy for breaches of the general consumer law prohibitions against misleading and deceptive conduct and unconscionable conduct—claims that may be available based on the pre-agreement conduct of the administrator. While a debtor could pursue these remedies through the courts, the reality is that such litigation is complex, inaccessible, expensive and risky for most people, and entirely inaccessible without legal representation.[13]

3.9 At the hearing, Ms Cat Newton, Policy Officer of CALC, explained that lenders and people providing debt consolidation or financial advice are required to maintain membership of AFCA and that this same requirement should extend to debt agreement administrators.[14] Ms Newton noted that AFCA is a free service and is therefore more accessible for debtors.[15]

Three year limit

3.10 Currently, the Act does not specify a maximum timeframe for making payments under a proposed debt agreement. New subsection 185C(2AA) sets a three year limit on debt agreements. It provides 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.

3.11 The BADAR Explanatory Memorandum explains that the three year timeframe 'aligns with the length of income contributions under bankruptcy.'[16] Further, that the absence of a limitation on the proposed timeframe of a debt agreement could result in debtors prolonging a debt agreement through a variation as

---

11 Mendelsons National Debt Collection Lawyers, Prushka Fast Debt Recovery, and Zurick Capital and Finance Pty Ltd (Mendelsons), *Submission 11,* BADAR bill, pp. 3–4.

12 Consumer Action Law Centre, Financial Rights Legal Centre, and Financial Counselling Australia (CALC, FRLC and FCA), *Submission 18,* BADAR bill, p. 21. Note, the Australian Financial Complaints Authority is due to commence operations by 1 November 2018 and is the amalgamation of the Credit Investment Ombudsman and the Financial Services Ombudsman.

13 CALC, FRLC and FCA, *Submission 18,* BADAR bill, p. 21.

14 Ms Cat Newton, Policy Officer, CALC, *Proof Committee Hansard,* 5 March 2018, p. 15.

15 Ms Cat Newton, Policy Officer, CALC, *Proof Committee Hansard,* 5 March 2018, p. 15.

16 BADAR Explanatory Memorandum, p. 22.

well as contribute to unreasonably high dividend rates for lower income debtors.[17] As explained in the BADAR Explanatory Memorandum:

> For example, if a debtor can only afford to pay a certain amount of money per month, it will always be possible to lengthen an agreement to meet that monthly payment. A creditor or the proposed administrator is therefore able to request an unreasonably high dividend or remuneration rate. [18]

3.12 AFSA reported that of the new debt agreements in 2016–17, more than 85 per cent were for a duration of five years.[19] While AFSA was able to provide some figures in relation to the rate of return for debt agreements that were five years in term, compared to three years in term, they were not able to predict the sustainability of the proposed changes:

> We do see at the moment the average rate of return for debt agreements of five years or longer having around 60 cents in the dollar return to creditors and for those of three years in the current pool around 69 cents in the dollar to creditors. It's not possible to predict the sustainability or the impact to the returns to creditors in the three-year mark if more were consolidated into that three-year pool. That would require, if they were looking at the same returns, a higher cents-in-the-dollar return to creditors as a result of that. We wouldn't be able to determine the sustainability. But we have seen that trend to reduction in the fees to creditors since 2011 and 2012 from around 74 cents in the dollar down to 69 currently, and, through that same period, a marginal increase to the debt agreement administrator fees in that area from around 22 cents in the dollar to 23½.[20]

3.13 The Attorney-General's Department (the Department) noted that 'the most influential factor to determine what will happen in this space will be the intentions or behaviour of creditors in voting on debt agreement proposals.'[21]

3.14 While debt agreement administrators were supportive of placing a timeframe on the term of a debt agreement, they considered the three year timeframe to be unreasonable and instead suggested that a five year timeframe was more suitable.[22] The Australian Bankers' Association (ABA) explained why it disagreed with the three year limit:

> Reducing the period to 3 years will mean one of two things - increased payments meaning fewer debtors will be able to service a debt agreement

---

17 BADAR Explanatory Memorandum, p. 22.

18 BADAR Explanatory Memorandum, p. 22.

19 AFSA, *Submission 5,* BADAR bill, p. 3.

20 Mr Gavin McCosker, Deputy Chief Executive, AFSA, *Proof Committee Hansard,* 5 March 2018, p. 63.

21 Mr Michael Johnson, Acting Assistant Secretary, Civil Law Unit, Attorney-General’s Department, *Proof Committee Hansard*, 6 March 2018, p. 60.

22 SRMC Limited, *Submission 2*, BADAR bill, p. 3; DCS Group, *Submission 6*, BADAR bill, p. 5; Fox Symes & Associates, *Submission 10,* BADAR bill, p. 5; and Mr Michael Lhuede, *Submission 15,* BADAR bill, p. 3.

> over the shorter term because the amounts payable will be higher, or lower payment plans which creditors will be less likely to accept because of the reduced amount offered compared to payments made over 5 years.
>
> Inevitably, this means more debtors' plans will be rejected with debtors likely to resort to formal bankruptcy, increasing the numbers of bankruptcies.[23]

3.15 DCS Group submitted that the introduction of a three year timeframe for debt agreements would have the effect of reducing creditor returns by two-fifths, given the current life of a debt agreement was five years.[24] Mr Clifford Mearns, Director, SRMC, explained that creditors would be reluctant to accept the return offered over the three years:

> …creditors have a very rough time accepting a debt agreement that doesn't offer 60c. Now, some creditors demand 75c in the dollar, otherwise they reject it. I think the industry generally works on between 60c to 70c. If you have a debtor that can fall into that range, the possibility of acceptance is fairly good.[25]

3.16 Personal Insolvency Professionals Association (PIPA) provided the following table to illustrate that the return to creditors would decrease from 60 per cent to 36 per cent if debt agreement proposals were reduced from a five year term to a three year term:

Table 2: Return for creditors under five years compared to three years[26]

Debt Agreements	**5 year Regime – 60 months**	**3 year Regime – 36 months (Proposed)**
Unsecured Debt	$64,000.00	$64,000.00
Uncommitted income per month	$640.00	$640.00
Amount available to distribute	$38400.00 over 60 months	$23040.00 over 36 months
Effective Return	60c/$	36c/$

3.17 Professional bodies, such as the Institute of Public Accountants (IPA), supported the three year timeframe, however warned that the timeframe could have

23 ABA, *Submission 14*, BADAR bill, p. 2. Note that since making a submission the Australian Bankers' Association changed its name to the Australian Banking Association.

24 DCS Group, *Submission 6*, BADAR bill, p. 5.

25 Mr Clifford Mearns, Director, SRMC Limited, *Proof Committee Hansard*, 6 March 2018, p. 26

26 Personal Insolvency Professionals Association (PIPA), *Submission 13*, p. 5.

the unintended consequence of debtors choosing bankruptcy over debt agreements.[27] The Australian Restructuring Insolvency & Turnaround Association (ARITA) also expressed support for introducing a cap to the length of debt agreements but believed that a five year cap would equally address the current issue of having unlimited debt agreements.[28]

3.18 In contrast, other submitters, such as Professor Christopher Symes, supported what he considered being 'the most substantial amendment that is to impose for the first time a limitation of the time-period for making payments under the proposed debt agreement.[29]

3.19 CALC, FRLC and FCA noted that it 'strongly support[ed] the proposed reform…to limit the maximum length of debt agreements to 3 years'[30] and explained the reason they supported this proposal:

> When the debt agreement regime was first introduced, debt agreements were expected to last no longer than three years, with a possible extension of six months for payment delays. The length of debt agreements has increased over time. In 2010, 54 percent of debt agreements were expected to run for 5 years. By 2016, this had increased to nearly 85 percent.
>
> It can be very difficult for a person in financial stress to make a realistic assessment of their capacity to meet repayment schedule for 5 or more years into the future. Making such calculations—generally during a time of high financial stress—poses an unfair risk to the debtor of termination, should their circumstances unexpectedly worsen later in the debt agreement. If the agreement falls over in the later years, the debtor may have incurred significant costs and consequences for little benefit.[31]

3.20 The Department confirmed that on average, creditors receive 59.68 cents per dollar owed under debt agreements, compared to 1.15 cents per dollar under bankruptcies.[32] While the Department acknowledged that the three year timeframe could reduce returns to creditors, it noted that the returns under debt agreements 'remain an appealing option to creditors':

> The proposed amendment balances the interests of creditors in maximising returns with reducing the prevalence of unsustainable debt agreements which place debtors under additional financial stress. Given the variation between creditor returns under debt agreements and bankruptcies, debt agreements are likely to remain an appealing option to creditors even if returns are reduced in some circumstances due to the three year limitation.

---

27 Institute of Public Accountants, *Submission 7,* BADAR bill, pp. 2–4. See also PIPA, *Submission 13,* BADAR bill, p. 4.

28 ARITA, *Submission 9,* BADAR bill, pp. 7–8.

29 Professor Christopher Symes, *Submission 16,* BADAR bill, p. 1.

30 CALC, FRLC and FCA, *Submission 18,* BADAR bill, p. 19.

31 CALC, FRLC and FCA, *Submission 18,* BADAR bill, p. 19.

32 AGD, *Submission 17,* BADAR bill, p. 4.

> Moreover, during earlier consultation in development of the Bill, creditor groups expressed support for a three year timeframe, in part because a shorter timeframe entails a lower risk.[33]

3.21 At the hearing, the Department explained that the three year limit also provides a safeguard for debtors:

> Debt agreements which extend beyond three years are often a sign that the debt repayment schedule is burdensome and unsustainable. It certainly results in a debtor being under the rigours and associated stresses of debt repayment for longer. Limiting proposals to three years encourages austere but realistic debt repayment schedules to be put forward. It is important to note that the three-year limit only applies to proposals for debt agreements, and mechanisms exist to extend the repayments schedule where they have not been completed by the end of the three-year term.[34]

3.22 Mendelson's Mr Roger Mendelson shared the views expressed by the Department stating that the three year timeframe could 'give a degree of certainty to creditors.'[35] Mr Mendelson explained that in his view, the three year limit would ensure that debtors were more likely to complete debt agreements:

> Once you get out to four and five years, it's a long way away. I would prefer to see agreements in place which can work, which can expunge the debt—which is really what it is about—and get some cash back on the table for creditors who, with these small debts, don't have that many options. It avoids them having to enforce the option to sue and garnish the wages of the debtor. It does reduce that. I believe it will make them much more workable because it's a time frame that debtors can work to. Once you get to four and five years, it's just too far out. I would rather get $0.50 in the dollar over three years then $0.65 over five years.[36]

Variations

3.23 In addition to proposing a maximum three year timeframe for debt agreements, paragraph 185M(1C)(1D) of the BADAR bill states that the proposal must not seek to vary the agreement beyond the three years beginning on the day the agreement was made. While the proposed amendment would prevent variations to a debt agreement that attempted to extend its term beyond three years, the effect of current section 185QA of the *Bankruptcy Act 1966* would allow debt agreements to run for up to a further six months where a debtor has defaulted on payment for up to that period of time. After which, the debt agreement is automatically terminated for being in arrears for six months.

---

33 AGD, *Submission 17*, BADAR bill, p. 4.

34 Mr Michael Johnson, Acting Assistant Secretary, Civil Law Unit, AGD, *Proof Committee Hansard*, 5 March 2018, p. 2.

35 Mendelsons, *Submission 11*, BADAR bill, p. 2.

36 Mr Roger Glave Mendelson, Chief Executive Officer, Pruska Fast Debt Recovery Pty Ltd, *Proof Committee Hansard*, 6 March 2018, p. 39.

3.24 AFSA noted that currently 'around 80 per cent of variations are actually to increase the length of the debt agreement.'[37]

3.25 A number of submitters raised concern with the inflexibility of this proposed provision in cases where a debtor's financial circumstances unexpectedly changes. One submitter noted that where a debtor has lost their job or becomes very ill, debt agreement administrators currently put forward a variation to extend the term of the debt agreement, which results in a low rate of terminations.[38] Ms Newton explained that if agreements are terminated early, creditors are able to commence collection action 'on the full undiscounted amount of the debt and backdate all the interest.'[39]

3.26 PIPA also expressed concern with proposed paragraph 185M(1C)(1D) and explained how the rigidity of this provision may have unintended consequences:

> If a Debt Agreement extends over the time limit and is terminated due to this reason, the current legislation allows creditors and [debt purchasing companies] to reinstate all the interest, fees and penalties applicable whilst in a Debt Agreement. The prohibitions proposed by the changes to Section 185M fails to recognise the dynamic nature of the industry [registered debt agreement administrators] work in. Debtor's circumstances frequently change and [registered debt agreement administrators] need to be able to adapt to these changes in order to ensure the successful completion of the debt agreement. Restricting a debt agreement to 3 years without the ability to vary the term for unforeseen circumstances creates a rigid rule that inevitably will see many debt agreements fail and debtors pushed towards either bankruptcies or…unregulated lengthy debt agreements with [debt purchasing companies].[40]

3.27 Mrs Melissa Glenn, Committee Member of PIPA also noted the following:

> There seems to be a suggestion that variations are common as the arrangement was unaffordable in the first instance. We reject this argument, as affordability is a key consideration to any [registered debt agreement administrators]. As an [registered debt agreement administrator] myself, a variation means many hours of unpaid extra work. Like other PIPA members, we do variations as a last resort and in exceptional circumstances. Entering into an unaffordable debt agreement is nonsense, as failure is inevitable, which is in no-one's interest.[41]

---

37 Ms River Paul, Australian Financial Security Authority Statistician, AFSA, *Proof Committee Hansard,* 5 March 2018, p. 65.

38 Ms Janice Paris, *Submission 12,* BADAR bill, pp. 1–2.

39 Ms Cat Newton, Policy Officer, Consumer Action Law Centre (CALC), *Proof Committee Hansard,* 5 March 2018, p. 17.

40 Personal Insolvency Professionals Association (PIPA), *Submission 13,* BADAR bill, p. 6.

41 Mrs Melissa Glenn, Committee Member, PIPA, *Proof Committee Hansard,* 5 March 2018, p. 47.

3.28 CALC, FRLC and FCA suggested that AFSA be provided discretion to 'allow a proposal to extend a debt agreement to four years where there is a *genuine* and *significant* change in circumstances.'[42]

3.29 However, the Department argued that the proposed amendment maintains a degree of flexibility by allowing debt agreements to continue for six months after the three year timeframe until it is terminated by default by virtue of it being six months in arrears:

> The debt agreement system still maintains its flexibility and allows debt agreements to continue running beyond the three year mark if the payment obligations have not yet been discharged. An undischarged agreement will continue to run until it terminates by six months arrears default, or earlier by another termination mechanism.[43]

Payment to income ratio

3.30 Currently paragraph 185C(2D)(c) of the Act requires a debt agreement administrator to certify that the debtor is likely to be able to discharge the obligations under the debt agreement as and when they fall due. Item 20 of the BADAR bill, which proposes to insert new paragraph 185C(4)(e), provides 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.[44] Pursuant to new subsection 185C(4B) of the BADAR bill, the minister may determine this percentage by legislative instrument and that this percentage may exceed 100 per cent.

3.31 The BADAR Explanatory Memorandum notes that this would allow the minister to 'calibrate the determined percentage to a three year payment schedule', which is 'a key consumer-protection safeguard.'[45]

3.32 DCS Group explained how the ratio might be applied:

> For example, The Minister sets the threshold at 60% (20% per year). Person A lives on a Disability Support Pension ($442.20/week). Person A would be living on just $353.76 per week after 20% of their income went to the Debt Agreement.[46]

3.33 A number of submitters were concerned that setting a payment to income ratio would negatively impact low-income debtors. Mr Michael Lhuede expressed the view that 'an income ratio test will immediately exclude anyone on a nominal income, such as a young adult or non-working spouse.'[47]

---

42 CALC, FRLC and FCA, *Submission 18*, BADAR bill, p. 20.

43 AGD, *Submission 17*, BADAR bill, p. 3.

44 BADAR Explanatory Memorandum, p. 15.

45 BADAR Explanatory Memorandum, pp. 15-16.

46 DCS Group, *Submission 6*, BADAR bill, p. 4.

47 Mr Michael Lhuede, *Submission 15*, BADAR bill, p. 3.

3.34 Some submitters suggested other mechanisms would be more appropriate to calculate the amount a debtor should pay towards a debt agreement. For example, DCS Group argued that using the 'Henderson Poverty Line'[48] to determine the amount a debtor should pay would provide a fairer outcome as it would allow high-income earners to contribute more than low-income earners.[49] DCS Group explained that the basic income amount set by the Henderson Poverty Line would be subtracted from the person's income, which would provide an amount that should be paid to creditors.[50]

3.35 Fox Symes & Associates (Fox Symes) argued that, given the circumstances of each debtor is different, a debtor's circumstances should be assessed on an individual basis rather than applying a set ratio for all debtors.[51] Ms Deborah Southon, Executive Director of Fox Symes, elaborated on this point:

> …again, we think that careful consideration should be given to this amendment, because debtors' circumstances do vary and they are affected by things like where they live. If I live in regional Australia, compared with metropolitan Sydney or whatever, that may impact on things like my cost of living. If I live in the Kimberleys, that may impact on my food bill, for example, because it's remote. There are other issues: for example, the age of the debtor. If I'm 60 years old, I'm likely to have reached my maximum earning capacity compared to someone who is 25. The number of dependents that a debtor has has a great impact, as does their age and whether they are healthy. There are journey-to-work factors. So just legislating for a payment-to-income ratio is problematic, and I'm not sure the government should regulate how much a debtor should repay their creditors.[52]

3.36 Fox Symes suggested that instead, the National Consumer Credit Protection should be enacted:

> In 2009 the Government enacted the National Consumer Credit Protection Act (NCCP). A key component was the introduction of the responsible lending provisions. The NCCP moved away from relying upon the use of indexed percentages (ratios) or statistical benchmarks to using actual borrower living expenses to access how much a borrower could afford to borrow or more critically, afford to repay. It was argued this would logically lead to a superior outcome.[53]

---

48 The Henderson Poverty Line provides a benchmark income that is required to support the basic needs of a range of family sizes and circumstances. Where a person or family earns below the set benchmark, they are said to be living in poverty. The poverty lines are updated every quarter: http://melbourneinstitute.unimelb.edu.au/publications/poverty-lines (accessed 7 March 2018.

49 DCS Group, *Submission 6,* BADAR bill, p. 4.

50 DCS Group, *Submission 6,* BADAR bill, p. 4.

51 Fox Symes & Associates, *Submission 10,* BADAR bill, p. 4.

52 Ms Deborah Southon, Executive Director, Fox Symes & Associates, *Proof Committee Hansard,* 5 March 2018, p. 41.

53 Fox Symes & Associates, *Submission 10,* BADAR bill, p. 4.

3.37 CALC, FRLC and FCA were supportive of the introduction of a payment to income ratio, stating that the current framework 'has no effective mechanism to gauge sustainability.'[54] However, CALC, FRLC and FCA suggested that if the ratio were to be applied, it should be applied to the person's income after the deduction of housing costs.[55]

3.38 Submitters expressed mixed views in relation to the actual income ratio that should be set by the minister. For example, DCS Group argued that for debt agreements to be a viable alternative to bankruptcy, the income ratio should be set at a minimum of 50 per cent, and realistically, higher than 100 per cent.[56] However CALC, FRLC and FCA were 'strongly opposed' to the ratio exceeding 100 percent and instead suggested that an appropriate ratio would be 15 percent over the three years.[57]

3.39 The Department explained that the ratio 'would only prevent certain types of agreements, rather than deeming lower income debtors ineligible. Therefore, the Bill preserves debtors' access to the system while protecting them from undertaking excessive payment schedules.'[58]

Doubling of asset threshold

3.40 Currently, paragraph 185C(4)(c) of the Act prevents a debtor from proposing a debt agreement to the Official Receiver if the value of the debtor's property is greater than the asset threshold, which is currently $111,675.20.[59] Item 17 of the bill proposes to double the asset threshold to account for Australian property prices, and 'to ensure a greater proportion of debtors have access to the debt agreement system.'[60]

3.41 Submitters were generally of the view that the increase to the asset threshold would not have much impact on the debt agreement regime and suggested that all three thresholds which limit a debtor's access to the debt agreement regime should be reconsidered.[61] Mr Clifford Mearns, argued that if the asset threshold were to be increased as proposed, then the debt threshold and income threshold should also be doubled—'All three thresholds should be equal as they have been in the past.'[62]

---

54 CALC, FRLC and FCA, *Submission 18*, BADAR bill, p. 18.

55 Ms Cat Newton, Policy Officer, CALC, *Proof Committee Hansard*, 5 March 2018, p. 19.

56 DCS Group, *Submission 6*, BADAR bill, p. 4.

57 CALC, FRLC and FCA, *Submission 18*, BADAR bill, p. 18.

58 Attorney-General's Department, *Submission 17*, BADAR bill, p. 5.

59 BADAR Explanatory Memorandum, p. 14.

60 BADAR Explanatory Memorandum, p. 14.

61 ARITA, *Submission 9*, BADAR bill, p. 7.

62 Mr Clifford Mearns, Director, SRMC Limited, *Proof Committee Hansard*, 6 March 2018, p. 25.

3.42 CALC, FRLC and FCA were supportive of the increase to the asset threshold. However, the submitters recommended that a minimum threshold be concurrently introduced.[63] Ms Newton explained how the minimum eligibility would work:

> You would be presumed to be ineligible for a debt agreement if two conditions applied: firstly, you have no realisable assets, assets that you would lose in bankruptcy; and, secondly, your income is below the threshold for compulsory contributions. We would suggest that that is a rebuttable presumption—and you could rebut that presumption if there is a clear demonstrable benefit for being in the debt agreement.[64]

Restriction on voting

3.43 Item 39 of the BADAR bill would require the Official Receiver to not request a vote on a debt agreement from a 'proposed administrator' or 'a related entity of the proposed administrator'.[65] The BADAR Explanatory Memorandum notes that this current situation creates a conflict of interest and consequently, 'undermines public and creditor confidence in the debt agreement system.'[66] The Department elaborated further on the potential for a conflict of interest to exist:

> Creditor confidence in the debt agreement administrator industry could also be undermined by proposed administrators or their related entities voting on debt agreements. This situation occurs when the debtor has not paid the administrator the full upfront fee at the proposal time. The administrator then becomes a creditor for the unpaid amount of the upfront fee. Alternatively, the administrator could be a creditor due to money they lent the debtor at an earlier time. In other circumstances, an organisation may separately operate credit and administrator functions, in which case the two businesses would be related entities.
>
> A voting administrator, or related entity, has a conflict of interest when voting on debt agreements, because most of the administrator's remuneration is dependent on the agreement being approved. Conversely, other affected creditors would primarily base their vote on the merits of the agreement, such as the risk and return of entering into the debt agreement, relative to other recovery options. Enabling an administrator or their related entity to vote would thereby distort the voting process and increase the likelihood that substandard debt agreements are approved.[67]

3.44 Credit Corp Group (Credit Corp) disagreed with this proposal. Credit Corp explained that it is both a debt purchasing company, as well as a debt agreement administrator and hold the status of a creditor through one or both of those means.[68] It

---

63 CALC, FRLC and FCA, *Submission 18,* BADAR bill, p. 20.

64 Ms Cat Newton, Policy Officer, CALC, *Proof Committee Hansard,* 5 March 2018, p.19.

65 BADAR bill, subsection 185EA(4).

66 BADAR Explanatory Memorandum, p. 19.

67 AGD, *Submission 17*, BADAR bill, p. 4.

68 Credit Corp Group, *Submission 8,* BADAR bill, pp. 2–3.

argued that as a genuine creditor, it should be provided the opportunity to participate in the voting process.[69] Credit Corp argued that the conflict of interest does not exist with it being a creditor and an administrator, but rather when debt agreement administrators are also involved in debt management services:

> …there is indeed a fundamental conflict which arises in the voting process when a proposed administrator is also a creditor in circumstances where their presence as a creditor arises solely out of debt management activities and other activities associated with the debt agreement proposal. For example, where debts exist that are attributable to marketing of debt agreements or debt management services, advertising and referral expenditure associated with debt agreement services, advice to consumers in relation to budgets, credit files and debt agreements and the preparation and proposal process then the integrity of the voting process is undermined.[70]

3.45 However a majority of other submitters supported this proposed amendment, with some submitters, such as Ms Southon, arguing that the bill should go further:

> In all other insolvency regimes—that is, administrations and liquidations under the Corporations Act; bankruptcy and personal insolvency under the Bankruptcy Act—the concept and application of the independence of the administrator is sacrosanct. ASIC's definition of 'independence' includes that an administrator of an insolvent estate must not have or should not have had a close personal or business relationship with any person or entity involved in the insolvency. It is important that, at all times, the administrator is both independent and expected to be independent. We are therefore curious as to why, under the debt agreement regime, an affected creditor can also be an administrator. We therefore recommend that the bill prevent a [debt agreement administrator] from acting as an administrator for an administration in which it is an affected creditor, and this therefore allows it to conform to all other insolvency administrations.[71]

Increase to the number of bankruptcies

3.46 An underlying concern raised by many submitters was that the proposed changes to the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 and the BADAR bill would have the effect of decreasing the number of debt agreements and increasing the number of bankruptcies. ARITA warned that the changes to debt agreements, combined with the proposed change to the default period for bankruptcy from three years to one year, could have 'the potential for those changes to shift the focus of those in financial distress from one personal insolvency option to another.'[72]

69 Credit Corp Group, *Submission 8,* BADAR bill, p. 6.

70 Credit Corp Group, *Submission 8,* BADAR bill, p. 6.

71 Ms Deborah Southon, Executive Director, Fox Symes & Associates, *Proof Committee Hansard,* 5 March 2018, p. 42.

72 Mr John Winter, Chief Executive Officer, ARITA, *Proof Committee Hansard,* 5 March 2018, p, 57.

3.47 However, a number of submitters were of the view that debtors generally did not file for bankruptcy if their debt agreement proposal was rejected or terminated. For example, Ms Southon noted that in her experience, the number of people who file for bankruptcy after their debt agreement is terminated 'is not significant'.[73] Mr Benjamin Paris, Registered Debt Agreement Administrator, DCS Group stated the following:

> My personal experience demonstrates that Australians do not want to file for bankruptcy. They'll avoid it at all costs. It's an error in logic to think that insolvent debtors are choosing between bankruptcy and debt agreements. Bankruptcy for most people is never on the table. It's also an error to think that, because the bankruptcy return is low, creditors will be willing to accept a dramatic drop in debt agreement returns. Creditors know that debtors in reality are choosing between debt agreements and hardship arrangements. AFSA's data shows that very few people whose debt agreements are rejected or terminated actually file for bankruptcy.[74]

3.48 In relation to the amount that creditors would receive under the proposed changes to both bills, Mr Michael Johnson, Acting Assistant Secretary, Civil Law Unit of the Department, explained that it was unlikely to have an impact in the bankruptcy regime but that they were not able to make a determination under the debt agreement regime:

> Under the reforms to that regime, creditors in most respects will receive the same amount of money. From the debt agreement regime, there would likely be an impact, but, again, that's the necessary outcome of the balance drawn through these proposals of trying to make those debt agreement repayments for debtors more sustainable and less financially detrimental to the debtors.[75]

3.49 Additionally, Mr Johnson acknowledged that debtors who are no longer eligible under the debt agreement regime may file for bankruptcy, however, may alternatively avail themselves to another approach under the regime:

> I think you are correct to a degree, Senator, in saying that, if you are no longer eligible for the debt agreement regime, you may turn to bankruptcy either on your own volition or your creditor's behest, but there is a bunch of other options as well, including continuing to pay off your debts without the structured legal regime around it. That also goes to the crux of the government's intention in these reforms, which is to provide options which are suited to different situations. The debt agreement regime is suitable in a particular context, with the asset threshold and the income threshold and the debt threshold, provided they are met and in a circumstance where creditors

---

73 Ms Deborah Southon, Executive Director, Fox Symes & Associates, *Proof Committee Hansard,* 5 March 2018, p. 44.

74 Mr Benjamin Paris, Registered Debt Agreement Administrator, DCS Group, *Proof Committee Hansard,* 6 March 2018, pp. 43–44.

75 Mr Michael Johnson, Acting Assistant Secretary, Civil Law Unit, AGD, *Proof Committee Hansard,* 5 March 2018, p. 11.

are satisfied with the return that they're getting, taking into account the other options that might be out there. The bankruptcy regime is suited to a slightly different context. I wouldn't put it that the debtors have the choice. There was a witness earlier today who said it's not quite like that, and I would agree with that. But, between the debtors and the creditors and the professional advice that they avail themselves of, they have different approaches available to them under the regime.[76]

76 Mr Michael Johnson, Acting Assistant Secretary, Civil Law Unit, AGD, *Proof Committee Hansard*, 6 March 2018, p. 61.