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Mr Timothy Watling

Committee Secretary, Legal and Constitutional Affairs Committee

The Senate, Parliament house

Canberra

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Dear Mr Timothy Watling:

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

I make comment on the exposure draft of the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 and its accompanying explanatory memorandum.

The government has produced a timely Bill to reform the divisions of Part IX of the Bankruptcy Act 1966 (Cth) dealing with debt agreements. The changes add to Australian insolvency law and fine-tune a number of the existing Part IX practices and procedures. The alignment in many areas with registered trustees in bankruptcy is to be commended.

As one of the few bankruptcy law academics in Australia and author of the undergraduate text in this area, the Bill has my support.

I support 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. The new provisions requires a debt agreement proposal to be no longer than three years from the day the agreement was made. It also ensures that any variation that made it longer than three years cannot be proposed. On this, I echo the submission of Professor Ramsay and Dr O'Brien and I have had the opportunity to read their study that will be published shortly in the Monash University Law Review and I support their findings.

There has been concern for some time that proposals of debtors for debt agreements are unsustainable. Therefore, I support the new provision that provides a formula that restricts the proposal being given to the Official Receiver if the total payments under the debt agreement exceed the debtor's after tax income in the year beginning at the proposal time by a certain percentage that will be determined by the Minister. Additionally, I note that the Official Receiver may refuse to accept a debt agreement proposal if they "reasonably believes that complying with the agreement would cause undue hardship to the debtor." Undue hardship is not defined. In the US there has been major concern in the area of bankruptcy and

student loans following the legislature failing to define 'undue hardship' and it has resulted in two judicial tests being developed one involving good faith repayment history and the other a calculation of the debtor's past, present and future reasonably reliable financial resources.[1] I note this Official Receiver refusal is envisaged to be used in exceptional circumstances because the formula and the professionalism that comes from only registered debt agreement administrators now performing in the role of preparing proposals, however consideration should be given to how undue hardship will be determined.

In recognition of the maturing of registered debt agreements administrators as a profession, I note the Act will now permit only a registered debt agreement administrator, registered trustee in bankruptcy or the Official Trustee to be authorised to administer a debt agreement. This is welcome. The professional body Personal Insolvency Professionals Association, (PIPA) has worked hard to increase the professionalism of debt agreement administrators and I have seen first-hand their fine endeavors to educate and advance the professional interests of their members. Although at this time the government should not entertain the suggestion of compulsory education and professional body membership for debt agreement administrators. [2] Evidence of the maturing of this profession is the proposed duty being placed upon them to report offences. I would expect that this will add to the integrity of Part IX and should see more enforcement activity of this sector.

The new Bill addresses matters of adequate and appropriate professional indemnity and fidelity insurance, satisfying fit and proper person requirements, and registration renewal. It is appropriate that these align with registered trustee in bankruptcy expectations.

What is a 'fit and proper person', which for debt agreement administrators is an individual or a company, is not defined by the statute.[3] Therefore, it will be up to the courts to define this phrase if challenged. Of course, the phrase or test is used in other areas of registration, including for the assessment of a registered trustee under the Bankruptcy Act. In *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127, a vehicle licensing case, Dixon CJ, McTiernan and Webb JJ stated that the purpose of the 'fit and proper person' test was "to give the widest scope for judgment and indeed for rejection." Posing the question of whether an applicant was a 'fit and proper person', their Honours said the 'fit and proper person' test "ought not to be confined to an inquiry into [the applicant's] character and … it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances." Such an approach is likely if the new provision for debt agreement administrators is to be judicially interpreted. In light of this situation perhaps consideration should be given to publishing some criteria for establishing a 'fit and proper person' in the assessment of debt agreement administrators. Obviously s186A can be the starting point for basic eligibility and Regulation 9.02 can be enlarged. I note there is the new power proposed under the Bankruptcy Act to enable the Minister to set industry standards and for the Inspector General to request written explanations from

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[1] L White, "Bankruptcy, Morality and Student Loans: A Decade of error in Undue Hardship Analysis" (2017) 43 *Ohio Northern University Law Review* 151, 185-186. See also R I Pardo & M R Lacey, "Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt" (2005) 74 *University of Cincinnati Law Review* 405, 421.

[2] As suggested by one submission to this Exposure Draft. Remember for insolvency practitioners the rule is that the applicant has completed the academic requirements for at least 2 course units accredited under the Australian Qualifications Framework Level 8 (or equivalent study) in the practice of external administrators of companies, receivers, receivers and managers, and trustees under the Act, (Insolvency Practice Rule 20-1(2) (b)) it does not prefer one academic institution over another, nor require ARITA or accounting professional body membership.

[3] For a discussion on the fit and proper person test in liquidator registration see: J Fitzpatrick, V Brand and C F Symes, "'Fit and proper': The integrity requirement for liquidators" (2010) 24 *Aust Jnl of Corp* Law 244.

debt agreement administrators to justify their continued registration, particularly if their behaviour indicates that they are not a fit and proper person. Such moves seem appropriate.

Thank you for the invitation and opportunity to comment.

Sincerely,

Professor Christopher Symes
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