Submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the Bankruptcy Amendment (Enterprise Incentives) Bill 2017.

My Background

I am a Chartered Accountant and former registered liquidator, with more than 25 years' experience in financial and professional services at Nab, ANZ Bank, and Ernst & Young.

In my current role I lead complex loan workouts across the Institutional and Corporate platforms at Nab, and I am member of the ARITA Vic./Tas. State Committee and ARITA National Board.

I very much appreciate the opportunity to provide a submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the *Bankruptcy Amendment (Enterprise Incentives) Bill 2017*, which for clarity represent my personal views, and is not made on behalf of either my employer, or ARITA.

Background

The amendments will reduce the default bankruptcy period from three years to one year, which is intended to 'reduce stigma, encourage entrepreneurs to re-engage in business sooner and encourage people…to pursue their own business ventures.'

The ending of bankruptcy means that a debtor regains legal capacity to travel overseas, act as a director of a company, and incur credit without giving notice of their bankruptcy. As a consequence of the amendment, debtors will regain that capacity two years earlier than they do currently.

The income contribution regime - which currently ends when bankruptcy ends - will be extended to apply for two years beyond bankruptcy. This will maintain the current three year income contribution regime, presumably intended to ensure that the return to creditors is not reduced by the shorter term.

Bankruptcy trustees can only issue an 'objection' – which extends bankruptcy – *during* a bankruptcy. In the two year post-bankruptcy period trustees will therefore be unable to respond to the non-delivery of information or non-payment of contributions by lodging an objection, as they do now.

The effect of the amendments is therefore to remove the very effective and low cost administrative enforcement mechanism by which trustees currently deal with non-compliance in the last two years of the income contribution regime. The only course of action available to trustees will be to report non-compliance with the *Bankruptcy Act* to the Australian Financial Security Authority (AFSA) for prosecution.

Issues with the legislation as drafted

1. **There are no anti-abuse protections.**

   There are no restrictions on access to the shorter period, and no limitation on the number of times a person may access the shorter period.

   If the one-year bankruptcy is available without restriction then we risk a new form of 'phoenixing' whereby individuals incur credit, declare bankruptcy and then one year later repeat the cycle for as long as they wish.

2. **Impact on the workload of AFSA, the DPP, and the Court System**

Only a minority of bankrupts will have an actual liability to pay income contributions, but all bankrupts have an obligation to provide information so that an assessment can be undertaken. The course of action that was previously a last resort – referral to AFSA for prosecution – will be the only available course of action for a trustee to deal with non-provision of information. In that sense the amendments will operate to effectively 'criminalise' non-compliance.

If referral to the AFSA is necessary for only 2% of the more than 50,000 current bankrupts, there will be at least 1,000 referrals to AFSA for action by the Department of Public Prosecution, each year. It would be an unintended and regrettable consequence if other more serious offences were not properly addressed because DPP and Court resources were inappropriately diverted.

3. **Lower returns to creditors**

Unless AFSA is able to action each and every referral on a timely basis – which seems unlikely – then income contribution collections will diminish. If it becomes widely known that non-compliance is not addressed on a consistent and timely basis then there is the risk that overall compliance will worsen, compounding the original problem.

In other words, it seems likely that there will be an adverse effect on returns to creditors.

Suggested solutions

There is no compelling policy justification to proceed with the proposed shortening of the bankruptcy period – and there is a superior policy-based option.

A more direct path to achieve the legislators' intention

It is not necessary to shorten the bankruptcy period to allow individuals to act as a director, travel overseas, and incur credit. The simplest and most direct way to achieve this is to amend the *Bankruptcy Act* (and the *Corporations Act* as regards capacity to act as a director) so that they may do whilst bankrupt, after twelve months have expired.

This would mean that the term of bankruptcy and the term of the income contribution regime would continue to align. This would preserve the current utility of the objection-to-discharge process, thereby maintaining returns to creditors without a significant uplift in the referral of *Bankruptcy Act* offences to AFSA.

Such a legislative change would clearly contribute to de-stigmatising bankruptcy.

However, if the bankruptcy period is to be shortened, then there should be:

Anti-abuse protections

If the shorter bankruptcy period is introduced then there should be some restriction on a debtor's ability to access the shorter bankruptcy period, to avoid abuse – including the possibility of personal 'phoenixing.'

I suggest that a debtor should not be permitted to access the shorter bankruptcy period more than once every ten years – except with the consent of the Court.

Additional administrative remedy to address non-compliance

If the income contribution regime is to extend beyond the term of bankruptcy then we should look for a low-cost administrative process by which trustees can address the non-provision of information or non-payment of contributions, to avoid excessive additional workload for the AFSA, the DPP, and the Court System, and diminution of returns to creditors.

For example, granting bankruptcy trustees the power to issue a notice to a debtor which clearly identifies any non-compliance with the income contribution regime. On receipt of such a notice, the debtor loses the capacity to act as a director, travel overseas, and incur credit (i.e. the current position), until they have remedied the non-compliance.

As a safeguard against misuse, such a regime should be subject to appeal to the Administrative Appeals Tribunal and/or the Inspector-General in Bankruptcy, to provide affected debtors with access to a low cost dispute resolution process.