



AUSTRALIAN BANKERS' ASSOCIATION INC.

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Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
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Parliament House
CANBERRA ACT 2600

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Dear Mr Hallahan,

Bankruptcy Legislation Amendment Bill 2009

The Australian Bankers' Association (ABA) appreciates the opportunity to provide its submission on the reforms set out in the Bankruptcy Legislation Amendment Bill 2009 (Bill).

The reforms in the Bill have been refined over a period of months by the Attorney-General's Department following the release of a short proposals paper in May 2009 and an Exposure Draft Bill in August 2009 to which the ABA provided comments.

In our earlier response to the May 2009 proposals we were not supportive of the proposal to reduce the period of bankruptcy for first time bankrupts to one year. Our concern was that while the Government's well intentioned objective had been to lessen the incidence of bankruptcy, we believed that overseas experience indicated that the proposal could have had the completely opposite effect with a likely increase in bankruptcy numbers.

We commend the Government having reviewed this proposal and its decision not to shorten the bankruptcy period accordingly.

Our comments in relation to certain other matters in the current reform proposals follow.

Increasing the stay period to 28 days following a declaration of intent to file a debtor's petition

The ABA considers that it is important for debtors intending to petition for bankruptcy to obtain advice beforehand.

The Bill retains the 28 days moratorium proposed in the August Exposure Draft Bill. The ABA agrees that the current 7 days stay period is too short but that a 28 days stay period is too long, particularly where further information and notice to creditors is to be required.

The Bill will require the debtor to provide a statement of affairs at the time the debtor's declaration of intent is presented. If the Official Receiver accepts the declaration, the Official Receiver will be required to provide written notice of acceptance to each of the creditors disclosed on the debtor's statement of affairs.

The ABA supports this additional disclosure and notification regime. A debtor will be more likely to have sought the assistance of a financial counsellor or other adviser to assist with the preparation of the statement of affairs. Further, the statement of affairs will assist creditors to form a better view, and sooner, of the debtor's circumstances and options that may be available to deal with the debtor outside of bankruptcy.

Insolvency and Trustee Service of Australia (ITSA) provides a booklet under Regulation 4.11 of the Bankruptcy Regulations to inform debtors who have filed a declaration of intention to present a debtor's petition setting out alternatives to and the consequences of bankruptcy. The booklet is some 28 pages in length. The ABA is not aware whether a shorter version or key point summary or alert might be helpful for debtors who may decide not to read the booklet before filing the declaration.

In setting the longer stay period of 28 days for an intending debtor petitioner to consider alternative solutions before entering bankruptcy, it is important to understand the behaviour of the debtor in the current 7 days period and whether

- (1) debtors seek advice, and if so, what advice and from whom;
- (2) a debtor had sought advice before filing the declaration and from whom;
- (3) debtors would have revised their original decision to file the declaration had they received advice within the period;
- (4) debtors proceed to petition despite advice having been received; and
- (5) debtors would take greater advantage of a longer period, if available, in which to seek appropriate advice.

The ABA is not aware of research that may assist in setting a suitable period that is neither too short nor too long.

In these circumstances, the ABA considers that the stay on creditors' rights of enforcement for 28 days is too long when taking into account the interests of creditors whose judgment debts cannot be enforced in that period and that 14 days would be a better balance with the need for the debtor to understand the implications of bankruptcy and other options that may be available.

The ABA would be supportive of an information or education program for debtors to complement an extended notification period of 14 days and believes that this should be considered as part of these reforms.

At this stage the ABA suggests that 14 days should be considered a reasonable period for debtors to evaluate their options.

Increase minimum amount for a creditor's petition to \$10,000

The ABA agrees with the proposal to increase the threshold for a creditor's petition as the current threshold of \$2000 is too low.

However, whether the increase should be as sudden a jump to \$10,000 or a lesser amount of say \$5,000 should be reconsidered.

It is unclear how the proposed threshold has been arrived at and may operate as a disadvantage to small business operators who are generally owed debts of much smaller amounts.

A change of this magnitude further signals to a debtor that a failure to pay far lesser amounts is unlikely to result in bankruptcy at the suit of a debtor's creditors and so dilute the importance to the debtor of the debtor's obligation to pay.

Where a debtor's liabilities to pay accrue over time, for example a strata title owner's payments to their body corporate management company, it may take several years before enforcement action with the prospect of bankruptcy can be undertaken.

Further, a threshold of \$10,000 could induce unscrupulous creditors to allow debtors to run up debts and incur interest payments without the creditor actually seeking to enforce payment until the threshold is exceeded and recovery is pursued by a creditor's petition.

The ABA recommends that a more cautious threshold of \$5000 is implemented.

On a more technical aspect, Schedule 4 Part 1 provides that the amendments increasing the threshold amounts from \$2,000 to \$10,000 for both bankruptcy notices and creditors petitions will apply to those documents after commencement of the amendments. As each of these amendments will commence 28 days after Royal Assent the ABA believes a transitional provision may be necessary.

Please consider this scenario.

- (1) Some time (it could be one month or more) before commencement the creditor serves a bankruptcy notice on the debtor claiming \$5,000 to be paid within 21 days after service on the debtor.
- (2) The debtor defaults in payment.
- (3) The creditor considers whether to petition for bankruptcy of the debtor but in the meantime the increased threshold of \$10,000 for a creditor's petition has commenced.
- (4) The creditor has lost the right to bring a bankruptcy petition against the debtor.

The ABA considers that the commencement of the \$10,000 threshold for the creditor's petition should not apply with respect to a pre-commencement bankruptcy notice that has been served for an amount less than \$10,000.

Increasing the debt agreement income, asset and debt thresholds for voluntary debt agreements

The ABA agrees with this proposal as it will provide a better alternative to bankruptcy for a debtor who has the capacity and the intent to pay the debtor's creditors.

Despite recent amendments to the Bankruptcy Act that were intended to provide better regulation of debt agreement administrators and a resulting improvement in the confidence of creditors with debt agreement arrangements, concerns remain particularly over the level of fees charged by debt agreement administrators.

The ABA would like to see further initiatives by the government to ensure that the debt agreement regime works in the interests of all parties – debtors, administrators and creditors.

Trustee Remuneration

The ABA supports the review and setting of a clearer and streamlined regime for trustees' remuneration.

The Government has assessed the sum of less than \$5,000 as a basic amount for a trustee's remuneration to cover the essential tasks that every trustee must undertake and for which the approval of creditors is not required.

The ABA supports the underlying principle that sound administration by trustees of insolvency administrations is dependent on high calibre trustees who are willing to undertake the role of administrator and who are therefore appropriately remunerated.

It appears from the proposed amendments that section 167 will provide a regulation-making power to set out the processes by which the Inspector-General may review a trustee's remuneration and costs.

To avoid the risk that the proposed basic remuneration amount of just less than \$5,000 becomes the norm for all administrations, it is important that the regulations to be made pursuant to proposed section 167 are timed to coincide with the commencement of the regime.

Removal of Bankruptcy Districts

The ABA supports the objective of delivering a more efficient, national personal insolvency regime through the removal of bankruptcy districts.

Yours sincerely

A handwritten signature in black ink, consisting of a large, loopy initial 'I' followed by a horizontal line and a small flourish.

Ian Gilbert