



## Submission in relation to the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

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### DETAILS OF PARTIES MAKING THE SUBMISSION

- 1) This submission is made on behalf of Mendelsons National Debt Collection Lawyers Pty Ltd ACN 125 099 701 ('Mendelsons'), Prushka Fast Debt Recovery Pty Ltd ACN 005 962 854 ('Prushka') and Zurich Capital and Finance Pty Ltd ACN 147 034 697 ('Zurich').
- 2) Mendelsons is the in house law firm of Prushka and it focusses on debt recovery and insolvency in all Australian jurisdictions.
- 3) Prushka has a 41 year history and handles debt collection work for over 55,000 businesses across Australia, mostly being SMEs but also for larger corporate clients. Prushka acts on the No Recovery – No Charge basis and has a strong presence across regional Australia.
- 4) Zurich is an entity related to both Mendelsons and Prushka and is dedicated to acquiring large volume debt ledgers. It is believed that Zurich may be a party to approximately 5% of the total value of debt agreements each year from a diverse range of debtors.
- 5) This submission is written by Roger Mendelson, Principal Lawyer of Mendelsons and CEO of Prushka and Alison Lee, Special Counsel and Practice Manager of Mendelsons.

### OVERALL COMMENTS ON THE BILL

- 6) Much research and commentary indicates that the use of debt agreements to avoid bankruptcy has increased over the years.
- 7) The aims of the Bill are stated to “boost confidence in the professionalism of administrators, deter unscrupulous practices, enhance transparency between the administrator and stakeholders and to ensure that the debt agreement system is accessible and equitable”.<sup>1</sup>
- 8) We overall applaud the Bill and agree that it goes some way to achieve the above aims. Many of the reforms in the Bill are well overdue.
- 9) We feel that the reforms will lift confidence in the quality of debt proposals with the introduction of the reforms including:
  - Ensuring that only those that are appropriately registered can act as debt administrators and that they obtain adequate and appropriate insurance, including the introduction of a fit and proper person requirement.

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<sup>1</sup> Explanatory Memorandum: Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

- Providing that a debt agreement proposal must detail the types of expenses a debt administrator can recover and ensuring that creditors and debtors have an opportunity to assess the reasonableness of a debt administrator's practices in relation to expenses.
  - Requiring that a debt agreement proposal does not propose to make payments for a timeframe longer than 3 years from the day the agreement was made, which can give a degree of certainty to creditors.
  - The minimisation of conflicts of interest with the requirement on an administrator to record details of any broker or referrer information and the declaring of affected creditors that are also related entities.
  - Introduction of an offence for a proposed administrator who gives, agrees, or offers to give an affected creditor an incentive for voting a certain way on a debt agreement proposal.
  - The extension of a debt administrator's duties to refer offences in line with those carried out by bankruptcy trustees under the *Bankruptcy Act 1966 (Cth)* ('the Act').
  - Giving the Inspector-General extended investigation and inquiry powers including the ability to obtain information concerning a debt agreement administrator or registered trustee's debt agreement trust account from a bank without first issuing a show-cause notice where it reasonably suspects that in connection with that account, the debt agreement administrator has failed to properly carry out their duties or contravened a provision of the Act and/or a condition of their registration.
  - The additional administrative proposals to assist debt administrators and the Australian Financial Services Authority to perform its regulatory functions in various areas by increasing its consistency with the current bankruptcy regime.
- 10) We also believe that the reforms will reduce the number of debt agreements that would otherwise be at a high risk of default with the introduction of the other reforms including:
- Doubling the asset threshold in which debtors can obtain assistance from debt agreements, including those with equity in real property.
  - Disallowing debt agreement proposals where total payments under the agreement will exceed the debtor's income by a certain percentage, with the total payments including payments to creditors, the administrator's remuneration and the realisations charge.
  - Official Receiver can refuse to accept a debt agreement proposal if the Official Receiver reasonably believes that it would cause the debtor undue hardship in complying with the debt agreement.

## **INFORMATION TO DEBTORS**

- 11) Debt agreements provide debtors in financial stress obvious advantages such as compromising with creditors in a manner that has fewer adverse consequences than bankruptcy.
- 12) The reforms assist to remove the 'unsuitably' component of debt agreements and attempt to ensure that debtors do not enter into debt agreements that they cannot afford.
- 13) A debtor, creditor or the Official Receiver may apply to the Court for an order declaring that all, or a specific part, of a debt agreement is void. This is currently limited to 2 circumstances: if all or part of the debt agreement was not made in accordance with Part IX of the Act, or if the statement of affairs lodged with the debt agreement omitted a material particular or was incorrect. The Bill extends the grounds on which an application can be made to the Court for an order declaring that a debt agreement is void to include instances where administrators

are in breach of their duties or any condition imposed on them. The amendments are stated to ensure that a debtor can be put into a similar position that they would have been had the debt agreement not been entered into including the removing of the debtor's name from the National Personal Insolvency Index ('NPII'), awarding damages and declaring that the debtor has not committed an act of bankruptcy.

14) However, it remains the position that prior to the making and entering into of a debt agreement, debtors need to be advised of its consequences and of the other debt relief options available, in order to make a fully informed decision. This includes an understanding of the process and its effect at all stages from the putting forward of a proposal to its termination.

15) For instance, it must be pointed out to a debtor that each of the following, *inter alia*, constitutes an act of bankruptcy:

- The giving of a debt agreement to the Official Receiver<sup>2</sup>;
- If the debt agreement proposal given by the debtor to the Official Receiver is accepted by the debtor's creditors<sup>3</sup>;
- If the debtor breaches a debt agreement<sup>4</sup>.

16) As a result, if any of the above occur, including if the debt agreement proposal is not accepted by the Official Receiver or is rejected by the creditors, an act of bankruptcy exists on which a creditor's petition may be presented.

17) For all of the benefits that may come with debt agreements, the debtor may still be committing an act of bankruptcy and attract any stigma attached to this.

18) Debtors also need to be made aware that:

- The debtor will not be able to enter into another debt agreement for a period of 10 years.
- It will be recorded on the NPII for a period of time (that time dependent on the debtor's circumstances and how the agreement ends).
- The details may appear on the debtor's credit report for up to 5 years (or even longer in some cases) which will affect the debtor's ability to obtain future credit.
- The debtor will not either alone or jointly with another person be able to obtain credit (to the limit as provided for by the Act from time to time) ('credit limit') from a person or obtain goods or services (with reference to the credit limit) or engage in other specified business dealings in the Act without informing that person that they are a party to a debt agreement.

19) We propose that it be compulsory for the above information to be discussed with the debtor.

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<sup>2</sup> Section 40(1)(ha) *Bankruptcy Act 1966 (Cth)*

<sup>3</sup> Section 40(1)(hb) *Bankruptcy Act 1966 (Cth)*

<sup>4</sup> Section 40(1)(hc) *Bankruptcy Act 1966 (Cth)*

20) In addition, we believe that there should be tighter regulation for the advertising of debt administrators' services. In line with the view often expressed by consumer advocates, such services generally understate the consequences of a debt agreement relative to bankruptcy and market debt agreements as a quick and cheap option when it is not something that should be entered into lightly.

## **SUMMARY**

21) We welcome the proposed reforms to the debt agreements regime. However, a pro-active and continued focus on the provision of information to debtors accessing this form of financial relief needs to occur.

22) As various aspects of the proposals are yet to be finally determined and/or yet to be seen in practice (e.g. the fixing of the payments-to-income percentage, the extent to which the quality and practices of debt agreement administrators will improve), we will be monitoring the progress and outcome of the amendments closely.

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### **Contact**

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