

BANKRUPTCY AMENDMENT (DEBT AGREEMENT REFORM)  
BILL 2018

SUBMISSION

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## **INTRODUCTION**

SRMC Limited is a Registered Debt Agreement Administrator (720) operating on a national basis within Australia. It has been registered since 2007 and prior to registration operated as an unregistered debt agreement administrator commencing late 1999.

We consider that we are held in high regard by all stakeholders.

The Company derives its new business utilising the services of a related-entity broker in Credit Counsellors Australia, a wholly owned subsidiary.

This submission refers to the Exposure Draft and Explanatory Memorandum of the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 by paragraph and where there is no reference to a particular paragraph, this submission has no significant comment.

## **SUBMISSION**

### **General Outline:**

#### **Paragraph**

2. The Outline clearly expresses the success of the Part IX Regime in:
  - a. Reducing new bankruptcies; and
  - b. Performing a 'significant' financial advising function.

The growth in debt agreement submissions, and acceptances, coupled with the above has shown the confidence creditors now have in the debt agreement system.

4. This submission applauds the intent to minimize and deter unscrupulous practices but states that the registration of debt agreement administrators is too relaxed and there remains a distinct lack of interest in legislating the necessity for ongoing formal education of those acting as registered debt agreement administrators. All administrators should be required, by legislation, to undertake the on-line course offered by Bond University's Personal Insolvency Program and there should be a requirement that all registered administrators hold membership of the professional body Personal Insolvency Practitioners Association (PIPA) ensuring a commitment to its Code of Practice.

### **Overview of the Bill:**

#### **Paragraph**

16. It is not unreasonable to state that where there is not a broker involved in the setting up of a debt agreement proposal, the administrator will charge a set-up fee. It is also a distinct possibility that a broker could be established at arms-length from an administrator thereby creating an unrelated entity. It is, in the view of this submission, important that a reputable broker deal initially with a financially distressed debtor, rather than the administrator creating a possible conflict by:
  - a. Marketing the services available; and
  - b. Administering the debt agreement.

It is, in our view, a conflict of interest for the administrator to undertake both tasks, as listed, because the debtor has an expectation that the first contact (the broker) will act in their interests in discussions and negotiations with affected creditors. Once accepted, *and only at that time*, management of the debt agreement becomes the responsibility of the appointed administrator and the relationship becomes one of ensuring that the terms and obligations to the agreement are maintained, and essentially ensuring that the interests of the affected creditors are paramount.

These areas are two distinct functions.

Whether or not a debt agreement proposal is formulated and collated by a broker or the administrator there is considerable investigation to be undertaken and the work involved is not of minor consideration. The cost of undertaking these tasks involves high labour costs and expenses associated with operating a commercial operation.

**19.** The statute refers to a separate account, into which contributions should be paid, and is not defined as a Trust Account.

**70.** Doubling the threshold amount will permit a greater proportion of debtors to have access to the debt agreement regime *however* that benefit will be lost by the intended introduction of the three (3) year timeframe to complete all obligations. Our experience indicates that the return to creditors will be significantly reduced should the time to meet obligations to the agreement be limited to three (3) years.

**72.** There is a need for the term '*undue hardship*' to be defined.

Undue: Unwarranted, Excessive, Unjustified

Hardship Privation, Poverty, Destitute, Suffering

These definitions are not appropriate to debtors who may be suffering financial distress due to an over commitment to credit, particularly where the household has an income stream.

**75.** It appears illogical to double the threshold but cap the timeframe to three (3) years. In the current economic climate of rising living costs and slow wage growth the timeframe should be based on the current average timeframe (borne from economic conditions) which, as an industry standard, has become five (5) years. Or, the timeframe may be adjusted between three to five years having regard for the level of indebtedness.

Based on indebtedness of \$200,000 and *without* adding fees and charges contributions over a 156week timeframe amount to \$1,282.00 weekly. Common sense indicates that such a payment is beyond the scope of those consumers with high debt levels, which makes the threshold increase somewhat fanciful. It also undermines one of the main principles of a debt agreement eg: Allowing a debtor to maintain assets where contractual payments can be made.

Limiting a debt agreement to a timeframe of three (3) years will, by the very nature of the required contributions exclude a large portion of consumers who sincerely desire to avoid the consequences of bankruptcy. To that end, the proposed amendments may be construed as *anti-social, discriminatory or a form of exclusivity*.

**79.** Undue hardship is an issue of social significance and this submission agrees that consumers should not be placed into a position of severe suffering or privation however the causes of hardship are often self-inflicted or borne from irresponsible lending practices. The term '*Undue Hardship*'

reflects a position that is *unjustified, excessive or unwarranted* and a claim of 'hardship' is often an excuse for debt avoidance or debt evasion.

**95.** Introducing an amendment depriving the administrator/broker of voting rights on a debt agreement proposal does not, in the opinion of this paper, create a conflict of interest any more than any other related entity voting on a proposal. If the amendment goes forward, it will simply create a situation where the broker seeks full payment prior to lodgement. AFSA require an immediate payment by the debtor of \$200 in lodgement fees but in order to process documents as quickly as possible these fees are billed to the administrator on a current account basis. In many cases, the broker's fees are included into the debt agreement with payment being received over the term of the debt agreement. It is difficult to understand the reasons for this proposed amendment when a valid, rightfully due debt is deprived of voting rights.

**111.** This submission maintains that debt agreements should be limited to a timeframe of five (5) years, including any variations to the agreement; alternatively, the timeframes should be based on the level of indebtedness.

### **CONCLUSION**

A summary of this submissions view of the proposed amendments:

- a. Bankruptcy, with a discharge of one (1) year appears more favourable than making any effort to repay affected creditors.
- b. A large portion of financially distressed debtors will be excluded from being in a position to propose a debt agreement due to the limited timeframe of three (3) years.
- c. Creditors in particular will be disadvantaged by a debtor's inability to make a reasonable offer due to the three (3) year limitation.
- d. Contrary to Paragraph 4 – General Outline: Debt agreements will be neither accessible nor equitable.

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.

There have been considerable statements over the years heaping scorn on both brokers and administrator's fees. No consideration appears to be given to:

- e. The time frame over which agreements are managed;
- f. The costs associated with maintaining a professional service including, but not limited to:
  - (a) Salaries
  - (b) Office rent
  - (c) Telephone & fax
  - (d) Registration fees
  - (e) Licencing fees
  - (f) Accounting fees

- (g) External audit fees
- (h) Insurances, including EDR
- (i) Printing, stationery and associated expenses.
- (j) Education expenses.

This company employs, in the main, staff with graduate and post-graduate degrees in commerce, finance, economics and law. Our team also includes graduates of ARITA and the Bond University Personal Insolvency Program.

Financial counsellors and others diminish debt agreements on a never-ending basis sighting hardship arrangements, debt waiver and other methods of debt assistance as being a better option. We challenge that thesis and state from experience:

- g. In hardship a debtor must deal with each creditor independently and by their nature, each creditor will seek to receive as much as possible on a regular basis. In order to meet the creditor's requirements, the debtor will agree. These arrangements generally are not serviceable, cause more hardship and ultimately fail. Not all creditors will agree to freeze ongoing interest.
- h. Financial counsellors claim that they can arrange the waiver of debt. That is a possibility with some financial institutions where there are extenuating circumstances; but not all financial institutions will waive their right to payment of debts. Creditors are unlikely to waive debt where there is a proven income stream and a capacity to pay. A debtor with numerous creditors is unlikely to have all debts waived by all creditors leaving the debtor open to civil court proceedings.
- i. Debt agreements serve both a debtor and the affected creditors:
  - (1) The debtor benefits from:
    - peace of mind;
    - Cessation of civil court proceedings
    - Protection of assets
    - Freezing of ongoing interest
    - Freedom of movement
    - An ability to repay creditors based on the capacity to pay.
    - Avoiding the consequences of bankruptcy.
  - (2) The creditor benefits from:
    - Receiving a higher return from the debtor than could be expected in bankruptcy
    - Not losing any rights, in the event of termination
    - Creating a commercial bond with the debtor that may afford future new business when obligations are completed.

Clifford Mearns

Director & Registered Debt Agreement Administrator