Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Secretary,

We write regarding the exposure draft of the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018.

Background

In December 2017 the then Attorney General, George Brandis, released the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018. In the accompanying Explanatory Memorandum he stated that "the commercial debt agreement administration industry now performs a significant financial advising function ... Consequently, debtors, creditors and the public should have reason to place trust and confidence in the system."

Thus the underlying premise of the Reform Bill was to address the deficiencies that exist in the system so as to engender "trust and confidence" in it. This implies that a lack of trust and confidence exists. A broken, unworkable system generates complaints and protests against it. If the debt agreement system is "broken" where is the evidence to support this?

The Debt Agreement System

Currently around 13,000 Australians have a debt agreement accepted annually and there are currently over 40,000 active debt agreements. There are around 40 Registered Debt Agreement Administrators (DAAs) who are regulated by Bankruptcy Regulations and Enforcement (Regulations). A division of the Australian Financial Security Authority (AFSA)

AFSA issues an annual report. Included in this report is the number of complaints lodged against DAAs. In the 2017 financial year there were 29 complaints lodged against DAAs.

Many DAAs including Fox Symes are a member of an external dispute resolution scheme (EDR), usually CIO or FOS. Both of these entities publish an annual report which lists the number of complaints lodged each year against categories of credit providers or, as is the categorisation of DAAs, debt management entities. In the 2017 financial year there were 5,892 complaints lodged with CIO of which 50 fell into the debt management category.

To date Fox Symes DAA division has not had a complaint upheld by either AFSA or CIO.

We acknowledge and accept that there are issues with the practices, behaviours and ethics of some DAAs and these include:

1. Problematic advertising.
2. Rapacious up-front fees.
3. A lack of disclosure regarding all options, their benefits and their consequences.
4. The "selling" of a single option and that is a debt agreement.
5. "Falsifying" budgets to ensure the offer to creditors is acceptable.
6. Submitting a debt agreement proposal which is unaffordable and unsustainable and subsequently, varying it after acceptance.
7. Submitting a debt agreement proposal for a debtor whose sole or primary source of income is Centrelink.

These behaviours do not mean that the system has "broken" rather they point to the inadequate registration process and the failure of the Regulators to prevent and address breaches and unacceptable practices and its unwillingness to revoke registration where it is clear that a DAA is non-compliant with their obligations under the Bankruptcy Act 1966 (the Act).

Is there a "debt agreement administration industry"

Lending pre-exists debt and therefore the two are inextricably linked. The debt agreement remedy was introduced into the Act in response to the increasing availability of credit and an increasing number of debtors who were struggling with debt. It was created to be an alternative to bankruptcy. However, nothing could predict or foresee the explosion of credit availability and the vast range of credit providers. Furthermore it is questionable as to why this remedy, which differs from bankruptcy, was included in the Act.

We challenge the term "debt agreement administration industry" used in the Explanatory Memorandum because a debt agreement is one of a number of remedies available to a debtor who is struggling with unmanageable debt. It is our position that the "industry" sits within the much larger lending/debt industry and, given the number of Australians who rely upon it to address their debt, it is a "bit player".

Why are DAAs viewed negatively?

This raises the question of why DAAs receive so much attention and negative publicity.

To date Fox Symes has assisted 64,424 Australians to repay their debt under a debt agreement. We estimate 86% have or will successfully complete their agreement. To date dividends paid to creditors from our clients have been close to $800 million. Additionally we have paid $55 million to AFSA in realisation charges and application fees.

If these debtors had filed for bankruptcy most would not have been liable for compulsory contributions. If they were left to address their debt through the normal debt collection processes, then it could be argued that many would still be in debt.

It is common practice for debt collection entities to purchase portfolios of impaired debt for 10-20 cents in the dollar of the original debt level. However they have the legal right to pursue the debtor for the balance of the original debt plus interest. We have evidence of debtors being offered repayment plans of greater than 10 years, thus ensnaring them in debt for an extended period.

Consider the practice of obtaining a judgment debt which, in NSW for example, allows a debtor to be pursued for 12 years from judgment date. Again, this extends indebtedness.

Hardship is an option for many debtors although the impediment many face is that creditors are unwilling to approve hardship applications or, if it is approved, it is for a short period only.

Compare these options with a debt agreement. In this case all provable creditors are captured by the debt agreement; the repayment amounts are agreed to by both the debtor and their creditors; fees and charges are disclosed upfront, the term of the agreement is known and both the debtor and their creditors are bound by law. Furthermore the DAA is regulated.

Debt is a social, economic and psychological issue. There has to be a system to address unmanageable debt which allows a debtor to enter into an affordable, viable and sustainable arrangement to repay their debt and to do so over a defined period of time which is fair and reasonable. A debt agreement achieves this objective.

This raises the question of why there is this continued scrutiny on DAAs.

Since Fox Symes commenced administering debt agreements in 2000 there has been a sustained and unrelenting campaign against DAAs. Currently there is campaign titled “Debt Vultures” aimed at the debt management industry which, unfortunately, includes DAAs. Other entities such as some debt collection and lending entities have been equally vociferous in their opinion of DAAs and debt agreements.

In October 2017 Fox Symes commissioned Galaxy Research to conduct a survey of its’ customers. The objectives of the study were to identify:

1. The reasons why a debtor’s debt became unmanageable
2. How difficult it was to admit that their debt was unmanageable
3. The actions they took to resolve their debt before they sought help from Fox Symes
4. How they would rate their understanding of budgeting and money management before and after assistance from Fox Symes
5. How difficult it was to live without access to credit or with restricted credit.

Some of the key take-outs from the study concluded that overall customers had a very positive experience with Fox Symes; the majority said their understanding of budgeting and ability to manage their personal finances after receiving assistance from Fox Symes was good or very good compared to beforehand and, the majority said that in the future they would avoid credit and therefore getting into unmanageable debt again.

We fully endorse and support the proposition that debtors, creditors and the public should have confidence in the debt agreement system and we are committed to ensuring that we meet this objective. As stated previously debt agreements are not the problem rather the problem is the problematic and unacceptable practices of some DAAs.

It is our position that the agenda for this reform is being partially driven by particular entities that have a vested interest in eliminating DAAs. Firstly, some have a philosophical objection to the for-profit sector operating in this environment while others appear resistant to their loss of control over a debtor which can result in a reduced return to them.

Is Reform necessary?

Household debt in Australia is at historically high levels. Insolvency, indebtedness and the emotional and financial burdens indebtedness imposes are not felt by the debtor alone. A debtor's family, work, creditors and their future are affected. To date the Act has played a key role in the Australian economic and social framework. It has been amended on multiple occasions but in an ad hoc manner. The question which must be posed is does it meet the needs of the 21st century debtor?

There is a Royal Commission underway into the banking industry and, as stated previously, lending and debt are inextricably linked. Thus any recommendations from the Royal Commission will inevitably flow through to the debt industry. We suggest that it would therefore be premature and short-sighted to amend one section of the Act before the Commissioner releases his recommendations.

However if the Government is intent on passing the Bill then we acknowledge that we support the proposed Reforms with the exception of two items. These are the payment to income ratio (Part 4 of Schedule 1) and the length of a debt agreement (Part 1 of Schedule 2).

In 2009 the Government enacted the National Consumer Credit Protection Act (NCCP). A key component was the introduction of the responsible lending provisions. The NCCP moved away from relying upon the use of indexed percentages (ratios) or statistical benchmarks to using actual borrower living expenses to access how much a borrower could afford to borrow or more critically, afford to repay. It was argued this would logically lead to a superior outcome.

Every debtor is different and it therefore is logical to assess their circumstances individually as prescribed by the NCCP.

Section 185C (2d) of the Act prescribes DAA certification requirements which carries mandatory elements. To properly certify, a DAA must have had reasonable grounds for believing that the debtor is likely to be able to discharge the obligations created by the agreement as they fall due. This cannot be done without a thorough assessment and analysis of a debtor's income and expenses supported by evidence. Essentially the DAA has to certify that the debt agreement proposal is affordable and sustainable and this process complies with the requirements under the NCCP.

Why is there a need to amend the Act and insert the payment to income ratio (Part 4 of Schedule 1) as an indexed percentage (ratio) when, firstly it contradicts the requirements of the NCCP and, secondly this obligation is already imposed on a DAA? If a DAA fails to comply with this obligation then their registration should be revoked.

We agree that a debt agreement should have a defined and legislated term and the absolute timeframe should never exceed five years. To reduce the term to three years will inevitably push down the rates of return to creditors and in some cases to commercially acceptable levels. This will result is a significant decline in creditor acceptance of debt agreements, regrettably at a time when there is an increasing need for this option and the protection it affords the debtor.

A debt agreement is a practical and affordable alternative for many debtors dealing with unmanageable debt. It therefore makes no sense to legislate a change which will effectively cripple this valuable option.

A debt agreement was enacted to be an "alternative to bankruptcy" although it was part of the Bankruptcy Act. Why? Has the Government considered repealing Part IX of the Act and creating a separate piece of legislation to deal with unmanageable debt for those debtors who have the capacity and willingness to repay their debt, and to do so without the punitive consequences imposed by the Act?

Conclusion

Debt agreements offer Australians a practical and affordable option to deal with unmanageable debt. They are working.

Indeed there are issues with the system and the primary issue is the problematic and unacceptable practices of some DAAs which could easily be resolved through deregistration. Furthermore the unwillingness of some stakeholders to accept for-profit DAAs as legitimate, credible and ethical practitioners that focus on providing support, information and advocating on behalf of Australians struggling with unmanageable debt is an impediment to the success of the system.

Finally, the payment to income ratio (Part 4 of Schedule 1) will not work in practice and contradicts the requirements of the NCCP. Moreover reducing the length of a debt agreement (Part 1 of Schedule 2) to a mandatory 3 years will severely restrict debt agreements as a viable option and, in fact, it may lead to its'demise.

We welcome the opportunity for consultation and to answer questions or provide information, including the findings of the Galaxy Research study, to the Committee and other key stakeholders. We can be contacted on

Yours sincerely

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