



AUSTRALIAN BANKERS' ASSOCIATION INC.

Ian Gilbert
Director

Level 3, 56 Pitt Street
Sydney NSW 2000
Telephone: (02) 8298 0406
Facsimile: (02) 8298 0402

14 September 2009

Mr David Bergman
Assistant Secretary
Bankruptcy Policy Branch
Attorney General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Mr Bergman,

Reforms to Personal Bankruptcy Laws

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

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 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 proposed 28 days moratorium proposed in May 2009. The ABA agrees that the current 7 days stay period is too short.

However, the ABA remains concerned that extending the period to 28 days is too long when taking into account the interests of creditors whose judgment debts cannot be enforced and balancing this with the need for the debtor to understand the implications of bankruptcy and other options that may be available.

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 the ABA's earlier submission we supported an information or education program for debtors to complement an extended notification period and query whether this will be considered as part of these reforms.

In setting a longer period of time 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.

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 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 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.

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 is intent on paying the debtor's creditors.

Trustee Remuneration

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

The Government has assessed the sum of \$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 Inspector-General may review a trustee's remuneration and costs.

To avoid the risk that the proposed basic remuneration amount of \$5,000 becomes the norm for all administrations, it 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.

Debt Agreements

The ABA and its members participate in a number of major creditor forums that are conducted by ITSA. These forums provide an excellent two-way exchange between ITSA and major creditors on how the debt agreement regime under the Act is operating in practice.

The ABA is strongly supportive of the continuation of these forums which in addition to the Attorney General's Bankruptcy Reform Consultative Forum provide the Government and creditor representatives with first hand information and policy ideas for how the debt agreement regime can be improved for all concerned.

Please contact me if you wish to discuss these comments.

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