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14 Sept 2009

Bankruptcy Policy Branch
Civil Law Division
Attorney-General's Department
Central Office
3-5 National Circuit
BARTON ACT 2600

By Email: *bankruptcy@ag.gov.au*

Dear Sir

SUBMISSION TO THE ATTORNEY GERNERAL
BANKRUPTCY LEGISLATION AMENDMENT BILL 2009

We refer to the release of an exposure draft of the *Bankruptcy Legislation Amendment Bill 2009 (BLAB)* in order to facilitate further public consultation on proposed reforms to the bankruptcy regime. We note that the objects of this Bill are:

1. to provide a more streamlined process for fixing trustee remuneration and a more transparent process for reviewing that remuneration;
2. strengthen the penalties for some offences and ensure these are in line with the penalties for other similar offences;
3. to remove the outdated concept of Bankruptcy Districts in order to provide more flexibility in personal insolvency administration;
4. to increase the minimum debt for a creditor's petition to reflect changes in the economic environment;
5. to increase the stay period that follows a declaration of intent to file a debtor's petition to allow debtors to better assess their options; and
6. to increase the debt, income and asset tests thresholds for debt agreements to ensure the thresholds keep pace with increasing wages and the increasing availability of credit.

We are pleased to provide our comments to the proposed reforms.

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About Pitcher Partners

Pitcher Partners is an accounting and business advisory firm to the middle market, particularly small to medium public companies and privately owned businesses. Pitcher Partners is an association of independent Australian accounting firms located in Melbourne, Sydney, Perth, Brisbane and Adelaide. Nationally, this independent association has 83 partners and more than 800 professional and support staff.

In Melbourne, Pitcher Partners is the fifth largest accounting firm in Victoria and it comprises 41 partners and over 500 professional and support staff. The firm also has an insolvency division that specialises in corporate and personal insolvencies and this division has 3 partners and 40 professional and support staff. Two of the division's partners, namely Gess Rambaldi and myself are registered trustees in bankruptcy and together they currently act as trustees to over 200 bankrupt estates.

Summary of Submission

We support the efforts of the Attorney General to reform the bankruptcy legislation and in this regard, we have no objection to the most of the proposals. However, we provide our objections to the following proposals:

1. The proposed increase of the minimum debt threshold for a creditor's petition to $10,000; and
2. The proposed extension of the 7 day moratorium under s 54A of the Bankruptcy Act to 28 days.

The reasons for our objection are set out below.

<u>The proposed increase of the minimum debt threshold for a creditor's petition to $10,000</u>

The objects of the BLAB are inter alia, "to increase the minimum debt for a creditor's petition to reflect changes in the economic environment".[1] It is <u>not</u> clear in the Explanatory Memorandum to the BLAB as to what particular changes in the economic environment have warranted an increase of the minimum debt for a creditor's petition.

The Explanatory Memorandum states that "there has been a significant change in the value of money and levels of individual indebtedness since 1996 when the Bankruptcy Act was last amended in this respect".[2] The minimum threshold of $2,000 to petition for a debtor's bankruptcy has been in existence for over a decade (since 1996). Therefore, only an increase in this threshold to an amount in line with CPI over this period could be justified to reflect the "significant change in the value of money".

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[1] Section 1 – General Outline 1.(d) Explanatory Memorandum to the BLAB
[2] Explanatory Memorandum to the BLAB at paragraph 133

For example, a debt of $2,000 incurred in 1996 would as a result of inflation, be the equivalent to incurring a debt in 2008 in the amount of $2,751.67.[3] Notwithstanding that the $2,000 threshold was proposed "as early as 1988 in the Harmer Report"[4], a debt incurred in 1988 would only equate to $3,686.33 in 2008. These amounts are substantially less than the proposed threshold increase to $10,000, and do not, in our submission, justify an increase to this amount on the basis that there has been a "significant change in the value of money".

We further note that the equivalent amount in the Corporations Act in relation to Statutory Demands is and remains at $2,000[5], and this has not been indexed.

We are also concerned about the inconsistent and loose commentary that the Explanatory Memorandum provides to justify the proposed increase. It firstly states that "it is wrong to set in motion all the machinery of bankruptcy for the purpose of winding up a debtor's estate when, *as is often the case* (our emphasis added), one creditor has a debt due to him if an amount not much more than $2,000".6

The Explanatory Memorandum appears to contradict itself by stating that 1551 of the 1953 sequestration orders made across Australia during 2008-09 (approximately 79%) resulted from Bankruptcy Notices where the amount was greater than $10,000, and *only* 174 of those 1953 sequestration orders were for amounts between $2,000 and $5,000, i.e. 8%. [6]

It cannot be said therefore that 8% of sequestration orders that relate to debts that range from $2,000 to $5,000 be deemed to be "*as is often the case*". Consequently, raising of the threshold to proposed $10,000 would have little impact on the number of bankruptcies occurring by Sequestration Order, and therefore there appears to be no real justification for doing so.

Furthermore, the Explanatory Memorandum was silent by not stating the overall level of liabilities that were disclosed by those debtors in their statement of affairs who were made bankrupt for debts of just over $2,000. The point we make here is that even though a person was to be made bankrupt for $2,000, that person will, in most circumstances, owe monies to other creditors as well.

The real impact of increasing the threshold however would be to deny creditors whose debts are below the $10,000 threshold the ability to petition for an insolvent debtor's bankruptcy. Many small to medium enterprise creditors whose businesses and livelihoods are dependent upon cash flow would be unable to pursue the debtor to bankruptcy in an effort to recover their debt. The Attorney-General stated in a press conference on 25 August 2009[7] that increasing the threshold "will have creditors... look at the alternatives to sending a person bankrupt". The fact remains that in majority of instances the bankruptcy process (particularly in regards to the use of Bankruptcy Notices) is only utilised by creditors as a valuable last resort for debt collection where alternative debt recovery steps have been unsuccessful.

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[3] Source: RBA Inflation Calculator http://www.rba.gov.au/calculator/calc.go
[4] Explanatory Memorandum to the BLAB at paragraph 133
[5] Corporations Act 2001 section 9, section 459E
[6] Explanatory Memorandum to the BLAB at paragraph 134
[7] Press Conference - Hurstville Electorate Office, Sydney, 25 August 2009

The Attorney-General further states that bankruptcy and its effect on a person's credit record, "for a young person in particular, it can have a significant impact on their ability to get a car loan, a housing loan, or even a business loan". This comment ignores the fact that default judgments are recorded on a person's credit file and their ability to obtain finance is compromised long before the advent of bankruptcy.

Whilst we acknowledge that "raising the threshold amount of the petitioning creditor's debt will lessen the opportunity to use bankruptcy procedures as a debt collection process"[8] the converse is also true. Raising the threshold amount opens the door for an insolvent debtor to incur greater debt with impunity, providing an unfair protection form compulsory bankruptcy. The losses associated with those further debts that may be incurred are ultimately met by many of Australia's small and medium sized businesses. Individuals who are insolvent should not be able to incur further debt and potentially avoid the consequence of bankruptcy by restricting their indebtedness to any one creditor to less than the threshold amount.

But there are real unintended consequences to creditors themselves, and many will involve small businesses and credit providers. It would seem that any credit provider will have very little real means of recovering a debt if it was owed less than $10,000, even if that credit provider was to incur legal costs to obtain judgment. After all, it is only once the threat of bankruptcy is applied, that a debtor is forced to confront what has happened and seek professional help. The debtor may also think twice about sinking deeper into debt.

The lifting of the threshold could cause a number of small businesses to write off those debts as it would be too cost prohibitive to recover small debts, and that would be detrimental to their businesses.

If there are no real consequences where debtors are not made accountable for their actions, this could leave the door open to abuse – consider a scenario where a debtor could incur credit of $9,000 with 10 different creditors without any possibility of a creditor petitioning for his or her bankruptcy. Small businesses and credit providers that rely on the self governing nature of bankruptcy could be in a far worse position by supplying credit to persons who are able to incur credit with impunity.

It is for the reasons above that we oppose the proposed increase of the threshold for a creditor's petition to be $10,000.

<u>The proposed extension of the 7 day moratorium under s 54A of the Bankruptcy Act to 28 days.</u>

We object to the proposed extension of the 7 day moratorium to 28 days.

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[8] Explanatory Memorandum to the BLAB at paragraph 133

The Explanatory Memorandum indicates that the purpose of seeking an extension is to provide more time to debtors to consider their options. It states that a "7 day stay period does not give debtors enough time to assess their options. If a debtor is not fully informed about their options they may act precipitously.........Given that most professional advisors that a debtor may wish to consult during the stay period are open during normal working hours it would be very difficult for a debtor to obtain adequate advice during the 7 day stay period".

We disagree with these comments.

There are about 30,000 Australians who are made bankrupt every year, and to put things in perspective, just over 400 persons took up the option of the 7 day moratorium last year. The Explanatory memorandum does not provide any indication of how many of those 400 persons chose not to proceed with their bankruptcy despite being insolvent. If most of those 400 persons proceeded with bankruptcy then it is pointless to extend the moratorium period and it would seem that this particular amendment only applies to a minority.

For a person to consider bankruptcy, it usually means that most credit providers, their debt collection agents and solicitors would have pursued the debtor through all available channels and if the debtor has not, by that stage, sought advice with regard to his or her options, then a moratorium of 28 days will not make a difference. The current 7 day moratorium requires the debtor to stop procrastinating, not incur further debt at the expense of other creditors and seek professional advice immediately. Most experienced insolvency practitioners are able to provide debtors with advice and their options easily within this timeframe.

It is for the reasons above that we oppose the proposed extension of the current moratorium period.

This concludes our submission. We would be pleased to answer any queries you may have and in this regard, our contact details are set out below:

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Yours faithfully
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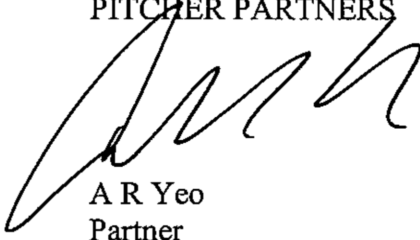

A R Yeo
Partner