



6 October 2023

Attorney-General's Department

via email: [bankruptcy@ag.gov.au](mailto:bankruptcy@ag.gov.au)

Dear Sir/Madam,

### **Targeted and timely reform opportunities to improve Australia's personal insolvency system**

We welcome the opportunity to comment on reform options proposed by the Attorney-General's Department (AGD) to improve the personal insolvency system. These proposals will better balance the interests between the debtor and creditors, provide a bankruptcy system that is more effective and aligned to the contemporary economy, and provide debtors with a genuine opportunity for a fresh start. We make the following comments:

#### **1. Increasing the bankruptcy threshold from \$10,000 to \$20,000**

We support the AGD's proposal to increase the bankruptcy threshold from \$10,000 to \$20,000, which better aligns with the modern cost of living, wage and economic growth, unemployment rate and inflation impacts. We encourage the Australian Financial Security Authority to continue promoting available financial counselling services to debtors, such as the National Debt Helpline, Small Business Debt Helpline and other debt management tools on the financial capability initiatives database for smaller debts. Financial counselling will equip debtors with budgeting and money-management skills, so they are less likely to have financial problems in the future and more likely to return to solvency. Informing and driving actions to improve the financial capability of Australians aligns with the intent of the *National Financial Capability Strategy 2022*.

#### **2. Increasing the period for a debtor to respond to a bankruptcy notice from 21 to 28 days**

We support the AGD's proposal to increase the period for a debtor to respond to a bankruptcy notice from 21 to 28 days. We share the AGD's view that this revised timeframe would effectively balance the interests of the debtor and creditors, while giving the debtor reasonable additional time to respond to the notice. The increased timeframe would better support business-related debtors, who may have more complex debts and number of creditors involved. The increased timeframe also aligns with the small business restructuring and simplified liquidation timeframe of 20 business days (*Corporations Act 2001* s. 500A, *Corporations Regulations 2001*, 5.3B.03, 5.5.03).

#### **3. Reducing the period of time for which a discharged bankrupt is recorded on the National Personal Insolvency Index (NPII) from a lifetime public listing to 7 years**

We support the AGD's proposal to reduce the period of time a discharged bankrupt is publicly recorded on the NPII to 7 years. We share the AGD's stakeholders' view that a lifetime public listing of the bankrupt on the NPII stigmatises the debtor and punishes them for life, hindering their ability to make improvements and for a genuine fresh start. We consider the 7-year timeframe to be reasonable as it balances protecting potential new creditors, while allowing the debtor a genuine opportunity for a fresh start following the conclusion of their bankruptcy period.

We support the AGD's proposal that the NPII record remain available for certain Commonwealth agencies with information gathering powers, to allow agencies to investigate allegations of criminal activity and identify serial bankrupts.



#### 4. Repealing paragraphs 40(1)(ha) and 40(1)(hb) of the *Bankruptcy Act 1966*

We support the AGD's proposal to repeal paragraphs 40(1)(ha) and 40(1)(hb) of the *Bankruptcy Act 1966* (Bankruptcy Act), so that entering into a debt agreement or having the debt agreement accepted by creditors is no longer considered an 'act of bankruptcy'. We agree that this reform would mitigate reluctance by debtors who may not enter into a debt agreement because submitting a proposal is considered an act of bankruptcy.

We wish to draw parallels to a similar provision in the *Corporations Act 2001* s. 455A(2) on small business restructurings. Under this section, a company proposing a restructuring plan is taken to be 'insolvent'. Similar to the AGD's concerns with regard to s. 40(1)(ha)(hb) of the Bankruptcy Act, we are concerned that s. 455A(2) of the Corporations Act may be deterring small businesses from restructuring early and pursuing a path to viability. We consider that s. 455A(2) goes against the intention of Part 5.3B of the Corporations Act, which is to enable *financially distressed but viable* firms to restructure their existing debts and to encourage more small businesses to seek debt restructuring earlier, increasing their chances of regaining viability.<sup>1</sup>

We consider this matter to be an opportunity for greater harmonisation between the Bankruptcy Act and the Corporations Act for small business insolvencies. As such, we will be recommending to the Treasury to amend s. 455A(2) of the Corporations Act. We encourage the AGD to likewise cooperate with the Treasury on a harmonised approach with the *Corporations Act 2001* to these provisions for small business-related bankruptcies.

The AGD roundtable in March 2023 raised these and other personal insolvency matters for reform, including a small business-specific insolvency regime, general harmonisation of corporate and personal insolvency systems, modernisation of the Bankruptcy Act, reducing the bankruptcy period from 3 years to 1 for some bankrupts and a review of the insolvency system. The AGD noted these latter issues will require further analysis and be captured in a later consultation. We look forward to continuing our engagement with the AGD on these important matters.

We note that in July 2023, the Parliamentary Joint Committee on Corporations and Financial Services recommended that the Australian Government commission an independent, comprehensive and timely review of Australia's insolvency law, encompassing both corporate and personal insolvency. We support this recommendation, as an insolvency framework that adequately incorporates the distinctive characteristics and needs of small and family businesses would facilitate entrepreneurship, economic dynamism and productivity growth.

If you require any further information, please do not hesitate to contact Ms Ekaterina Grazhdannikova on 02 5114 6141 or at [ekaterina.grazhdannikova@asbfeo.gov.au](mailto:ekaterina.grazhdannikova@asbfeo.gov.au).

Yours sincerely

**The Hon Bruce Billson**

Australian Small Business and Family Enterprise Ombudsman

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<sup>1</sup> Parliament of Australia, *Explanatory Memorandum to the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020*, p. 13