



Australian Government

Australian Financial Security Authority

Chief Executive & Inspector-General
in Bankruptcy

15 February 2018

Mr Tim Watling
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee

Dear Mr Watling

Inquiry into the Bankruptcy Amendment (Debt Agreement Reform) Bill 2017

Thank you for the invitation to make a submission for the inquiry into the Bankruptcy Amendment (Debt Agreement Reform) Bill 2017 (the Bill).

Contents of the submission

This submission provides data and information derived from AFSA data holdings that may assist in providing context for the reforms proposed in the Bill. Part 1 includes a range of statistical information concerning the activities undertaken by Registered Debt Agreement Administrators. Part 2 relates deals with AFSA's regulatory activities in this area.

Background

The Australian Financial Security Authority ('AFSA') is an executive agency in the Attorney-General's portfolio.

AFSA's purpose is to maintain confidence in Australia's personal insolvency and personal property securities systems through delivering fair, efficient and effective trustee and registry services, and risk-based regulation. AFSA is responsible for administering the *Bankruptcy Act 1966*, the *Bankruptcy (Estate Charges) Act 1997* and associated Regulations. The Bankruptcy Act establishes:

Inspector-General in Bankruptcy—AFSA's Chief Executive is also appointed as the Inspector-General in Bankruptcy. The Inspector-General is responsible for the general administration of the Bankruptcy Act and has powers to regulate bankruptcy trustees and debt agreement administrators, review decisions of trustees and investigate allegations of offences under the Bankruptcy Act.

Official Receiver—On behalf of the Official Receiver, AFSA operates a public bankruptcy registry service with compliance and coercive powers to assist bankruptcy trustees to discharge their responsibilities.

Official Trustee in Bankruptcy—The Official Trustee in Bankruptcy, a body corporate created under the Bankruptcy Act, administers bankruptcies and other personal insolvency arrangements when a private trustee or other administrator is not appointed. [*Sentence on frequency of administration of DAs*]. AFSA provides personnel and resources to ensure that the Official Trustee can fulfil its responsibilities. The Official Trustee also has responsibilities under the *Proceeds of Crime Act 2002* and the *Customs Act 1901* to control and deal with property under court orders made under those statutes.

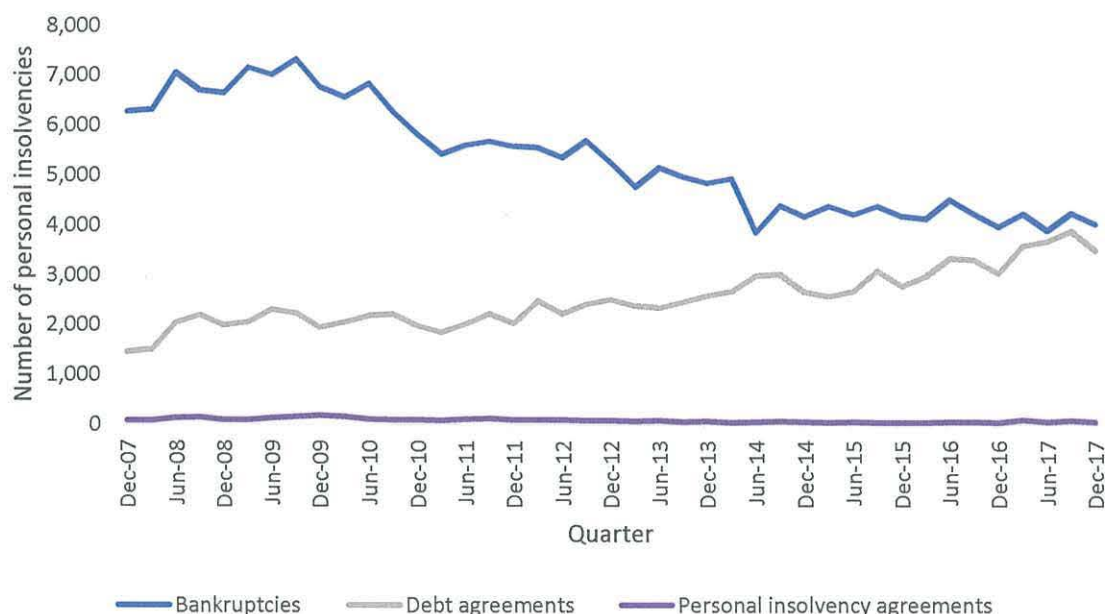
All of the above offices are performed through officials of AFSA.

Part 1 - Selected AFSA statistics

Changing composition of personal insolvencies

Debt agreements in 2016–17 were the highest level on record (13,597). They have reached new record highs each year since 2011–12. Over the same period, bankruptcies have declined in volumes. As a result, debt agreements account for an increasing proportion of personal insolvencies overall. In the 2017 calendar year, debt agreements accounted for 47% of total personal insolvencies.

Graph 1: Composition of personal insolvencies by quarter



Note: As significant reforms to the Debt Agreement system were implemented in 2007, this provides the best comparator. See **Attachment 1** for tabular data.

New debt agreements

While the number of debt agreement proposals lodged with the Official Receiver has increased significantly over the past 6 years, from 10,899 to 16,719, the percentage of proposals accepted by creditors has been relatively stable during that period, averaging 85.5%.

Table 1: Acceptance rates of debt agreement proposals

Financial year proposal received by the Official Receiver	Number of proposals given to the Official Receiver	Number of new agreements made (accepted by creditors)	% of debt agreement proposals accepted by creditors
2011–12	10,899	9,089	83.4%
2012–13	11,180	9,559	85.5%
2013–14	12,413	11,072	89.2%
2014–15	12,419	10,830	87.2%
2015–16	14,317	12,143	84.8%
2016–17	16,719	13,900	83.1%

Note: this information is based on the date that the debt agreement proposal was lodged with the Official Receiver. It does not reconcile with other statistics shown, or AFSA's published statistics, which use the date that creditors accepted the debt agreement proposal as the reporting date, in order to capture the DAPs that were not accepted.

In 2016–17, 86.9% of new debt agreements were for a duration of five years. This compares to 71.8% in 2011–12. Over this period, the most common estimated rate of dividend was 61 to 70 cents per dollar owed to creditors.

Table 2a: Length of accepted debt agreements based on initial proposal

	% of new debt agreements					
Length of debt agreement	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17
1 year or less	0.2%	0.4%	0.8%	0.3%	0.3%	0.4%
2 years	1.4%	1.7%	0.9%	0.7%	0.7%	0.4%
3 years	7.2%	6.7%	4.9%	3.7%	3.6%	2.6%
4 years	17.8%	17.1%	12.1%	8.9%	9.5%	8.1%
5 years	71.8%	72.7%	79.8%	84.9%	84.3%	86.9%
More than 5 years	1.7%	1.5%	1.3%	1.4%	1.7%	1.7%

In 2016–17, there were 2,569 variations to debt agreements lodged. It appears that a significant proportion of variations are to vary the length of the debt agreement. These are not captured in table 2a above, which shows the length proposed in the initial debt agreement proposal.

Table 2b: Variations to debt agreements

Financial year	Number of variations
2011–12	1,523
2012–13	2,100
2013–14	2,048
2014–15	2,370
2015–16	2,160
2016–17	2,569

Table 3: Rate of dividend to creditors estimated by debtor on debt agreement proposal

	% of new debt agreements					
Estimated rate of dividend (cents per dollar)	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17
Less than 31 cents	2.0%	2.1%	2.2%	2.0%	2.0%	2.0%
31 - 40 cents	2.8%	2.6%	2.6%	3.3%	3.5%	3.6%
41 - 50 cents	7.2%	5.8%	6.2%	10.1%	11.1%	12.4%
51 - 60 cents	17.0%	16.0%	18.5%	20.3%	19.5%	21.0%
61 - 70 cents	38.1%	44.3%	48.4%	48.4%	48.1%	45.5%
71 - 80 cents	30.7%	27.3%	18.9%	13.7%	13.7%	13.7%
81 cents or more	2.3%	1.9%	3.1%	2.2%	2.0%	1.7%

Funds held on trust

In 2016–17, debt agreement administrators received \$263.5 million from debtors in payments pursuant to debt agreements. At 30 June 2017, debt agreement administrators were administering a total of 46,651 debt agreements. Since 2011–12, funds received and held on trust by debt agreement administrators have increased by an average 8.8% each year. Over the same period, the number of debt agreements being administered by debt agreement administrators has increased by an average annual growth rate of 8.2%.

Table 4: Debt agreement receipts and payments

	Total receipts (\$M)	Payments: dividends (\$M)	Payments: fee (\$M)	Total payments (\$M)*
2011–12	\$172.7	\$126.9	\$37.4	\$171.2
2012–13	\$194.5	\$140.5	\$43.0	\$191.2
2013–14	\$211.3	\$151.8	\$47.3	\$208.2
2014–15	\$229.9	\$163.8	\$52.0	\$227.6
2015–16	\$242.1	\$167.5	\$55.5	\$240.2
2016–17	\$263.5	\$180.9	\$60.7	\$259.5

*Includes other payments.

Debt agreement proposals: status and outcomes

The following tables give a progressive summary of the outcome of each debt agreement proposal over the course of its life cycle as at 30 June 2017. We report these figures based on the date of lodgement of debt agreement proposals. As a result, they do not reconcile with other tables.

In 2016–17, the Official Receiver accepted 96.7% of debt agreement proposals received for creditor vote. Although the proportion of debt agreement proposals rejected by the Official Receiver increased in 2016–17, it remains relatively low (3.3%).

Table 5: Debt agreements – proposal status as at 30 June 2017

Debt agreement activity	2012–13	2013–14	2014–15	2015–16	2016–17
	Number				
Debt agreement proposals received	11,179	12,507	12,516	14,319	16,627
Proposals rejected by Official Receiver	255	241	256	431	554
Proposals accepted by Official Receiver for creditor vote	10,924	12,266	12,260	13,888	16,073
Proposals cancelled by Official Receiver during voting period	259	280	304	363	415
Proposals withdrawn by debtor during voting period	1	0	0	0	0
	Percent				
Proposals received that were rejected by Official Receiver	2.3%	1.9%	2.0%	3.0%	3.3%
Proposals received that were accepted by Official Receiver for creditor vote	97.7%	98.1%	98.0%	97.0%	96.7%
Proposals accepted by Official Receiver for creditor vote that were cancelled by Official Receiver during voting period	2.4%	2.3%	2.5%	2.6%	2.6%

At 30 June 2017, 16.7% of debt agreements lodged in 2012–13 were terminated. Of these, 10.0% were terminated by creditors. The remaining 6.7% of these debt agreement terminations were due to automatic termination under the Bankruptcy Act. This requires the Official Receiver to be satisfied that the designated six month arrears default has occurred.

It appears that the most common reason given by creditors for termination was that the debtor ceased payments and was unlikely to recommence (ie. the debtor stopped making payments and the creditor was unaware of any efforts being made to re-commence

payments). In addition, creditors also sometimes indicated that they terminated because of significant arrears, similarly with no prospect of payments being brought up to date.

Table 6: Outcome of new debt agreements as at 30 June 2017

Debt agreement activity	2012–13	2013–14	2014–15	2015–16	2016–17
	Number				
Terminated by creditors/court	958	820	575	373	69
Terminated by six-month arrears default	637	879	743	528	37
Agreements completed	3,319	1,450	496	167	28
Agreements not yet completed	4,640	8,006	9,093	11,078	12,015
	Percent				
Terminated by creditors	10.0%	7.4%	5.3%	3.1%	0.6%
Terminated by six-month arrears default	6.7%	7.9%	6.8%	4.3%	0.3%
Agreements completed	34.7%	13.0%	4.5%	1.4%	0.2%
Agreements not yet completed	48.6%	71.8%	83.4%	91.2%	98.9%

Part 2 - Regulation of Registered Debt Agreement Administrators

AFSA's Regulation & Enforcement Division publishes a *Personal Insolvency Practitioners Compliance Report* each year. This publication contains performance information on core regulation and enforcement functions. These functions are:

- Practitioner registrations
- Inspections
- Proactive monitoring
- Guidance
- Complaints
- Inspector-General reviews
- Disciplinary action
- Investigate offences against the Bankruptcy Act and prosecute if appropriate

The 2016/17 report has a range of information relating to the activities of Registered Debt Agreement Administrators (RDAs):¹

- Inspection of RDAs (p14)
- Advertising insolvency services (p17)

¹ The report is available at <https://www.afsa.gov.au/statistics/personal-insolvency-practitioners-compliance-report>

- Survey of creditors, bankrupts and debtors (pp18-20)²
- Complaints (p25)

Relevant excerpts are set out in **Attachment 2**.

If you require further information on this submission please do not hesitate to contact me or Andrew Sellars, who can be contacted on _____ by email

Yours sincerely

Hamish McCormick
Chief Executive and Inspector-General in Bankruptcy

² The 'Where to' survey referred to in the report is available at:
https://www.afsa.gov.au/sites/g/files/net1601/f/document_released.pdf

Attachment 1

Table 1: Personal insolvency administrations by type

Financial year	Number of bankruptcies	Number of debt agreements	Number of personal insolvency agreements	Total number of personal insolvencies
2007–08	25,961	6,620	347	32,928
2008–09	27,520	8,564	452	36,536
2009–10	27,509	8,427	603	36,539
2010–11	23,093	8,052	373	31,518
2011–12	22,163	8,955	388	31,506
2012–13	20,876	9,652	294	30,822
2013–14	18,601	10,705	208	29,514
2014–15	17,163	10,911	214	28,288
2015–16	17,202	12,150	175	29,527
2016–17	16,320	13,597	244	30,161

Attachment 2

Excerpts from *Personal Insolvency Practitioners Compliance Report 2016/17* (AFSA)

The excerpts below should be read in the context of AFSA's regulatory and compliance environment.




- There were 78 Registered Debt Agreement Administrators as at 30 June 2017.
- Both the number of practitioners nominated and the number of their files to be inspected were statistically validated in the planning phase of the inspection program.
- AFSA's risk-based inspection program is complemented by other regulatory tools such as complaint handling, monitoring of advertising, guidance and strategic/targeted programs of work.
- The survey of creditors, bankrupts and debtors undertaken on behalf of AFSA evidences AFSA's commitment to understanding the views of various stakeholders to help inform its regulatory approach. AFSA will include in future guidance materials, including in its next annual Personal Insolvency Practitioner Compliance Report for the financial year 2018/19, details of the steps it is taking, or has taken, to address the feedback received. The initiatives already underway include greater use of plain English in forms, simplifying guidance materials and improving access by provision of on-line services. A Major Creditor Forum was also convened in September 2017 to facilitate greater engagement with creditors.

Registered debt agreement administrators

Eight registered debt agreement administrators were inspected in 2016–17, along with 49 of their administrations. There were 16 errors identified and only one (6%) required remedial action. No unregistered debt agreement administrators were inspected during the year.

Of the total registered debt agreement administrator errors identified, the highest proportion (94%) were category C errors. Pleasingly, there were no category A errors identified.

Table 5: Registered debt agreement administrator errors by category, 2016–17

	CATEGORY OF ERROR			TOTAL
				
Errors identified	0	1	15	16
Proportion of errors (%)	0	6	94	100

The highest area of non-compliance for registered debt agreement administrators resulted from failure to comply with certification duties (44%). A common theme in this area was the affordability and completeness of debt agreement proposals that were submitted for creditor approval.

Continued guidance will occur through the annual registered debt agreement administrator forum and the PIR newsletter to improve performance standards

in these areas.

Table 6: Registered debt agreement administrator non-compliance areas, 2016–17

AREAS OF NON-COMPLIANCE	Number of errors	Proportion of errors
Failure to comply with certification duties: provision of prescribed information, affordability, accuracy and completeness	7	44
	5	31
Failure to maintain proper records	3	19
Failure to notify creditors of 3 months arrears default	1	6
Commonwealth Revenue implications	0	0
Unreasonable delays in timely action leading to delays in distribution	0	0
Remuneration and expenses not taken in accordance with provisions of debt agreement	0	0
Inadequate administration of the debt agreement	0	0
Defalcation or unlawful activities	0	0
Inadequate communication by administrator	0	0
Failure to notify Official Receiver of dates to maintain	0	0
Conflict of interest	0	0
Total	16	100

Advertising insolvency services

In 2016–17, we continued our proactive monitoring of debt agreement advertising by registered debt agreement administrators and brokers to ensure compliance with Inspector-General Practice Guideline 1. This guideline outlines the clear expectations of the Inspector-General on DAAs, brokers and other promoters, ensuring that they do not mislead potential (but unsuitable) debtors into debt agreements through their advertising and marketing.

Our monitoring activities expanded this year to include the review of advertising of debt agreements and services on television, radio, in print and online. A total of 18 compliance reviews were undertaken in 2016–17, comprising 12 website and five Facebook advertisement reviews. One firm was also reviewed based on its practice of ‘cold calling’ debtors.

As a result of our investigations, 10 registered debt agreement administrators were deemed to have advertisements in breach of IGPG 1 that required remedial action to correct/remove the misleading or unbalanced advertising.

The most common issues of concern were:

- inclusion of the phrases ‘government guaranteed’ or ‘government debt agreement’

- reference to or description of debt agreements as ‘debt consolidation’
- unbalanced advertising, i.e. inadequate comparison of negative and positive consequences of debt agreements
 - stating that a debt agreement makes it ‘easier to borrow money in future’ and has ‘less effect on your credit rating’. Advertising was a topic of discussion at the 10th annual RDAA forum hosted at the Gold Coast on 7 October 2016.

We continued our practice of referring potential breaches to the Australian Securities and Investment Commission (ASIC) and maintain a close working relationship with it to address instances of misleading and unbalanced advertising. ASIC issued a media release on 3 May 2017 noting that an infringement notice of \$10,800 had been issued against Capital Debt Australia Pty Limited and that that firm had removed false claims from its website. Capital Debt and Debt Assist Pty Limited removed false online statements that debt agreements were ‘Government approved’. Bankruptcy Experts removed testimonials that could not be substantiated.

Table 8: Registered debt agreement advertising, 2016–17

DEBT AGREEMENT ADVERTISING	Number
Number of advertising compliance reviews conducted	18
Number of RDAAs contacted with advertising that required remedial action	10
Proportion of reviewed RDAA advertising that required remedial action (%)	56

Survey of creditors, bankrupts and debtors

As a part of AFSA’s compliance programme for 2016–17 a survey was conducted, utilising the services of an external provider, of creditors, bankrupts and debtors under debt agreements. The survey sought feedback on a number of issues: including on the information utilised at the time a person decides to enter into a personal insolvency arrangement; communication by practitioners; and awareness of complaint processes. This information assists in identifying action that can be taken by AFSA to maintain confidence in the personal insolvency system, including through identifying areas of improvement for practitioners.

The survey has started to influence aspects of our compliance program, by ensuring that concerns and expectations that may erode confidence in the personal insolvency system are appropriately managed.

Feedback from creditors

As a beneficiary in a personal insolvency administration, creditors have a significant role in ensuring an efficient and effective insolvency system.

Interviews were held with 15 creditors, including a number from the top 20 creditors most commonly appearing in insolvent administrations. These creditors were approached to obtain information about their experience dealing with personal insolvency administrators and how they were impacted by bankruptcy, personal insolvency agreements or debt agreements.

Creditors expressed a general confidence in the personal insolvency administration system and the skill of practitioners. However, they identified two main areas of concern:

- that some insolvency administrators were seen to be ‘preying on the vulnerable’, resulting in people entering insolvency solutions that were not in their best interests
- their inability to influence practitioner fees—while acknowledging that they can vote on individual matters, they wanted additional guidance to assist in constraining what they saw in some matters as unreasonable prices.

The feedback from creditors is assisting to prioritise actions in area five of the 2017–18 AFSA’s Practitioner Compliance Programme on the topic ‘Information’. AFSA is taking action—through direct engagement and guidance—to ensure that creditors are fully engaged in the insolvency process and understand their role and their powers, as well as the role of the Inspector-General. We also intend to be more active in promoting our role with creditors, to ensure they understand how to have concerns about practitioner remuneration investigated. The first step being a creditor forum held in the second half of 2017. This has started to help us identify strategies to more effectively communicate important information to creditors.

Our aim is to have creditors fully engaged in the insolvency process, aware of their powers and how they can have remuneration concerns addressed.

Feedback from bankrupts and debtors

We sought to better understand personal insolvency arrangements from the perspective of bankrupts³ and debtors under debt agreements and to assess their understanding of information, including advice they received about options, obligations and the consequences of the various types of personal insolvency administrations.

Again, with the assistance of an external provider, a survey was conducted on a random sample of bankrupts and debtors under debt agreements who recently (within the previous three months) went into administration. Responses were received from over 650 individuals in a three-month period.

...

Debtors in debt agreements

Respondents to the survey were asked how they selected the person or organisation who arranged their debt agreement. They were able to select multiple reasons for this.

The findings showed that a substantial number of debtors did not compare insolvency administrators when making their choice—42% of debtors stated that they used the first insolvency practitioner they identified.

Others tried to compare different organisations online (21%) or used phone and email to get more information about an organisation (15%). Some also relied on referrals in making their decisions—including through colleagues, friends or family (12%), government websites (4%) and financial advisers (2%).

Respondents in the survey were asked if they were aware that they were able to access the services of free financial counsellors. Ten per cent of debtors in debt agreements said that they were aware of free financial counsellor services and received assistance.

Approximately one in five (17%) debtors said that they were aware of free financial counselling services but had decided not to consult them. The main reason they gave for this was a lack of faith that it would have helped (54%).

Approximately two-thirds (63%) of debtors were not aware that they could access the services of a free financial counsellor. Thirty-six per cent said that they thought access to a counsellor may have made a difference to their decision. Twenty-seven per cent of debtors felt that being able to access a financial counsellor's advice would not have altered their decision-making around insolvency.

Financial management was the main reason identified for insolvency for debtors entering debt agreements (57%), followed by divorce/breakdown of a relationship (36%) and retrenchment/unemployment/business failing (32%).⁵

I was vulnerable and at my wits end, perhaps I still made the right choice I don't know, but I should have spoken with an independent financial counsellor first, but when you are at wit's end and ashamed, a person on the phone who tells you this will be much better and the banks will stop calling you, seems like a really easy end to the pain.

— Debtor

Action has now begun on steps AFSA can take to best address the feedback from both bankrupts and debtors in debt agreements. The feedback relates directly to strategic focus area number five in AFSA's Practitioner Compliance Programme for 2017–18 on the topic of 'Information'