INSTITUTE OF
PUBLIC
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Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

February 2018

15 February 2018

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

Email: legcon.sen@aph.gov.au

Dear Committee Secretariat,

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

On behalf of the Board and Members of the Institute of Public Accountants (**IPA**) thank you for the opportunity to put forward a submission on the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 to amend the Bankruptcy Act 1966 (t**he Act**).

We would like to acknowledge Ivan Glavas from Worrells in the preparation of this submission. Worrells is a specialist solvency and forensic accounting firm.

In considering the content of the proposed reforms, we note the following:

- In the 2016/17 financial year Debt Agreements made up 13,597 of the 30,161 total personal insolvency appointments, that is, approximately 45% of total personal insolvencies for the year.

- There remain some mixed views as to the value of Debt Agreements given the overall rate of return to creditors compared with the associated costs of administering the debt agreement.

- The proposed amendments will provide for an extension to the Debt Agreement period to no more than 3 years, which in our view is a vast improvement on the current 3 to 5 years average time frame. However, the incentive of entering into a Debt Agreement when compared with the proposed 1 year bankruptcy term (which is also being proposed by Government) needs to be considered carefully.

  We understand that the Productivity Commission's enquiry into business set up, transfer and closure (**the PC Report**) recognises that shortening the period in which an individual remains bankrupt in Australia ought to be considered. The current (standard) period is 3 years and one day. International experience would appear to suggest that a shorter bankruptcy period may be more beneficial for the overall economy. This "ideal" is in keeping with the PC Report's intention to promote the entrepreneurial spirit and in so doing support business growth in Australia.

  With this in mind, we are of the view that the overall benefit of the proposed amendments to the Debt Agreement legislation may be substantially affected if a 1 year bankruptcy period is introduced for the following reasons:

1. If and when a debtor has to consider a Debt Agreement or Bankruptcy[1], we believe it is more likely that a debtor will choose the administration with the shortest timeframe to completion. Whilst it is proposed that Debt Agreements will be limited to no more than 3 years, the introduction of the proposed 1 year bankruptcy would potentially be seen as a disincentive for the debtor to enter into a Debt Agreement, primarily as either will inevitably appear on the debtor's personal credit rating for at least 5 years and thus limit their capacity to borrow.

   The current "general" rules[2] with respect to credit rating and Debt Agreements is as follows:

   > The Debt Agreement appears on an individual's credit report for 5 years from the start date of the Debt Agreement. This can sometimes be longer in certain circumstances.
   >
   > The National Personal Insolvency Index ("**NPII**") is a public record of all insolvency proceedings in Australia. The name of the individual who entered into the Debt Agreement appears on the NPII for a limited time. This however depends on how the agreement was finalised. If the Debt Agreement was completed, information regarding the Debt Agreement will be removed from the NPII:
   >
   > - 5 years from the date the debtor enters into the Debt Agreement; or
   > - the date the obligations are discharged, whichever is later.
   >
   > If the debtor or their creditors terminate the Debt Agreement due to a termination proposalhttps://www.afsa.gov.au/glossary/termination-proposal-debt-agreement, or a six-month arrears default, information about the Debt Agreement will be removed from the NPII:
   >
   > - 5 years from the date the debtor enters into the Debt Agreement; or
   > - 2 years from the date of termination, whichever is later.
   >
   > In contrast, the current "general" rules[3] with respect to credit reporting agencies and keeping a record of bankruptcy are:
   >
   > - 5 years from the date the individual is declared bankrupt; or
   > - 2 years from when the bankruptcy ends, whichever is later.
   >
   > If a person is declared bankrupt, their name will permanently appear on the NPII.

   In light of the above, we are of the view that consideration ought to be given to the credit rating rules which underpin the debtor's ability to obtain finance in the future and thus support the PC Reports notion of promoting the entrepreneurial spirit. To this end, we would recommend the period of credit default were reduced to say 3 years for all forms of personal insolvency administration including Debt Agreements. We expect that this would have a material impact to the current personal insolvency regime.

[1] Note: We have not commented on the effect upon Part X - Personal Insolvency Agreements (PIA) with the introduction of the proposed changes to Debt Agreements as we are of the view that there will be very little effect given the number of PIA's executed in the 2016/17 financial year.
[2] Refer AFSA website for a broader explanation of credit ratings and Debt Agreements.
[3] Refer AFSA website for a broader explanation of credit ratings and Bankruptcy.

2. The repercussion of less Debt Agreements being entered into would (broadly) impact the overall quantum of return to creditors (as a collective pool) simply because more debtors would be incentivised to opt for the 1 year bankruptcy.

- We note under the proposed amendments to the Debt Agreement legislation, it is anticipated that the threshold to access the Debt Agreement process will double for the value of the debtor's property. In so doing, it is anticipated that this will make the Debt Agreement process more accessible. We are of the view that the increase in value of the asset threshold is warranted.

Technical comments on aspects of the proposed changes to legislation:

- In giving consideration to the Bill's intention to allow debtors who are eligible to lodge a debt agreement proposal by doubling the asset threshold amount it should also be considered whether a minimum rate of return be provided to creditors of the debt agreement given the substantial increase in assets in order to qualify for the arrangement. In so doing, this would potentially avoid creditors being forced to accept sub-standard offers in lieu of the assets held by the debtor and having regard to the lack of necessary investigations being conducted under the Debt Agreement proposal system as it currently stands.

- We agree with the recommendations that Debt Agreements ought not to last longer than 3 years from the date the agreement is made, although as noted above, if a 1 year bankruptcy period is introduced, this may be a moot point if the debtor is able to remove themselves from personal insolvency within a shorter period of time.

- We agree with the intention of the Bill to make it an offence for a Debt Agreement administrator to provide an incentive to a creditor to vote in a certain way on the Debt Agreement proposal or on a variation or termination of the proposal.

- We agree that the Debt Agreement administrator ought to be a suitably qualified registered trustee or the official trustee or a suitably qualified Debt Administrator as prescribed by the Act.

- We agree with the proposed legislation requirement for Professional Indemnity insurance to be maintained by the registered Debt Agreement administrator, similar to those imposed upon by registered trustees under the Bankruptcy Act.

- We agree with the introduction of a "fit and proper person" test for the registration as a Debt Agreement administrator.

- We agree with the proposal that where there is a variation to the proposed Debt Agreement, the administrator of the Debt Agreement must certify that the debtor is likely to be able to discharge their obligations created by the agreement as and when they fall due.

- We agree with the requirement that a Debt Agreement administrator must consider whether the debtor has committed any offences under the Bankruptcy Act consistent with the requirements of a bankruptcy trustee and if so, refer the potential offence to the Inspector General in Bankruptcy or to a relevant law enforcement agency.

- We agree with the proposed amendments that Debt Agreement administrators use a trust account in the keeping of proper records to ensure consistency under the Bankruptcy Act.

- We agree that the Inspector General ought to be allowed to investigate the conduct of a registered Debt Agreement administrator including an investigation from when the Debt Agreement administrator and debtor first engaged, including any of their advertising practices.

Should you have any questions in relation to our comments above, please direct your enquires in the first instance to Vicki Stylianou at

Yours faithfully

Vicki Stylianou
Executive General Manager
Advocacy & Technical
Institute of Public Accountants

About the IPA Group

The IPA is one of the three professional accounting bodies in Australia. We have over 35,000 members and students in Australia and in over 80 countries, with offices across Australia, London, Beijing, Kuala Lumpur and Hong Kong. Our members work in industry, commerce, government, academia and private practice. Three-quarters of the IPA's members work in or with small business and SMEs, making the IPA well placed to comment on issues of concern for small business and SMEs. The IPA represents the interests of our members, the accounting and finance profession, small business, SMEs and always strives to act in the public interest. In 2015 the IPA merged with the Institute of Financial Accountants of the UK, making the new IPA Group the largest accounting body in the SMP/SME sector in the world.