Australian Government
Attorney-General's Department

Bankruptcy Amendment (Enterprise Incentives) Bill 2017

Submission to the

Senate Legal and Constitutional Affairs

Legislation Committee

The Attorney-General's Department (the Department) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the opportunity to make a submission on the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 (the Bill).

This submission is provided to reinforce the policy rationale of the Bill, advise the Committee of proposed Government amendments and address key concerns raised by submissions received by the Committee as of 29 January 2018.

Policy rationale

The Bill implements reforms announced by the Prime Minister, the Hon Malcolm Turnbull MP, and the then Minister for Industry, Innovation and Science, the Hon Christopher Pyne MP, on 7 December 2015 as part of the National Innovation and Science Agenda innovation statement.

The Agenda fosters economic growth and job creation by focussing on measures designed to encourage innovation and entrepreneurship. Reducing the default period of bankruptcy to one year is designed to foster entrepreneurial activity by reducing the negative effects that harsh bankruptcy laws may have on prospective entrepreneurs.

A reduced bankruptcy term is intended to decrease the stigma associated with entering into bankruptcy by recognising the importance of giving bankrupts a 'fresh start'. This is intended to encourage entrepreneurs to re-engage in business sooner and encourage people, who may have previously been deterred by the punitive bankruptcy laws, to pursue their own business ventures.

The development of the proposed Bill was informed by public and targeted consultation. On 29 April 2016, the Department and the Department of the Treasury released a joint proposals paper, *Improving Bankruptcy and Insolvency Laws*. In response, 71 submissions were received; including from credit providers, financial counselling services and academics. Many of these stakeholders supported encouraging entrepreneurship and reducing the stigma surrounding bankruptcy.

The measures proposed in the Bill offer a simple and unified approach to achieve the Government's Innovation Agenda.

Item 4 and proposed Government amendments

On 15 November 2017, the Senate Standing Committee for the Scrutiny of Bills released their *Scrutiny Digest No. 13 of 2017*, which raised a query in relation to item 4 of Schedule 1 of the Bill.

Subsection 80(1) of the *Bankruptcy Act 1966* (the Act) currently requires bankrupts to immediately notify the trustee of a change to their name or principal place of residence. Item 4 of the Bill will repeal subsection 80(1) and replace it with a requirement for the bankrupt to notify the trustee within 10 business days of changes to their name, address and phone number during the prescribed period. Both the existing and proposed new subsection make breach of this requirement a strict liability offence which is subject to a penalty of up to 6 months imprisonment.

The amendment contained at item 4 of the Bill is intended to support the administration of income contribution payments by providing a clear and realistic timeline for the bankrupt to notify the trustee of changes in contact details. Notwithstanding, neither the existing nor the proposed new subsection comply with the Department's *Guide to Framing Commonwealth Offences* (the Guide) as they impose a penalty of imprisonment for a strict liability offence.

The Government will therefore propose amendments to remove the penalty of imprisonment and substitute a penalty of 60 penalty units for breach of the new subsection 80(1).

Civil penalties imposed by a court in respect of an offence are not provable in bankruptcy and therefore would not be enforced until after a bankrupt is discharged (subsection 82(3) of the Act). This approach is currently used for most other offences under the Act.

Strict liability offences are appropriate in this area of regulation, as it is necessary to strongly deter misconduct that can have serious consequences for affected parties. Such offences also reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by the Australian Financial Security Authority (AFSA). Strict liability is particularly beneficial to regulatory bodies such as AFSA, as it enables offences to be dealt with expeditiously, thereby maintaining public confidence in the regulatory regime.

A penalty of 60 penalty units is appropriate to justify the cost of appearing at court and complies with the requirements for strict liability offences set out in the Guide. The proposed amendments also support the Bill's objectives of reducing the stigma associated with bankruptcy and fostering entrepreneurial behaviour.

Compliance and anti-abuse protections

The Department notes submissions provided to the Committee raise concerns that the Bill does not include anti-abuse protections and threatens the ability of trustees to enforce debtor compliance with their obligations, including income contribution requirements. Suggested solutions of restricting access to the one year default period were considered during previous consultations with stakeholders in the development of these reforms.

Limiting a one year bankruptcy to first-time bankrupts, or restricting access to return bankrupts to once every 10 years, would contradict one of the core aims of the reforms, being to reduce the stigma associated with bankruptcy. To effectively combat the stigma, the reforms must ease bankruptcy laws for all debtors, without discrimination. Creating additional requirements for certain types of debtors also threatens the simplicity of the reforms and the bankruptcy regime.

The Bill incorporates safeguards against the risk of current bankrupts acting in financially irresponsible ways. The proposed commencement date of the measures, being six months after Royal Assent, is intended to give trustees sufficient time to prepare any objections to discharge of bankruptcies on foot at commencement. Additionally, the transitional provisions included with the

Bill ensure any bankruptcies which have already been extended to five or eight years before commencement under a section 149B objection, will not be discharged on commencement.

Other compliance mechanisms already present in the bankruptcy regime, for example the requirement to advise trustees of changes to contact information, have been adapted to ensure they continue to have effect post-discharge from the one year bankruptcy default period and throughout the contribution assessment periods. As noted above, item 4 of Schedule 1 of the Bill will impose a civil penalty on breach of the requirement to provide a trustee with changes in contact information. Penalties are considered an effective mechanism to encourage compliance.

All existing enforcement and income contribution collection mechanisms, such as garnishee notices and the supervised account regime, will remain. Imposing additional barriers for non-compliance threatens to undermine the core policy driving this reform – to provide bankrupts with a ‘fresh start’.

The measures introduced by the Bill will also be comprehensively reviewed by the Department three years after commencement to ensure the reforms are effective and fit for purpose.