Mr Michael Lhuede
C/- Level 24
385 Bourke Street
MELBOURNE VIC 3000

16 February 2018

By Email: seniorclerk.committees.sen@aph.gov.au
Original forwarded by Post

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO BOX 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

Submission to the Senate Legal and Constitutional Affairs Committee on the *Bankruptcy Amendment (Debt Agreement Reform) Bill 2018.*

I welcome the opportunity to make the following submission in relation to the *Bankruptcy Amendment (Debt Agreement Reform) Bill 2018* (**Bill**). In the event the Committee convenes public hearings and wishes to hear further on any aspect of this submission I will endeavour to make myself available in that regard.

Executive Summary

1. The Debt Agreement regime under Part IX of the *Bankruptcy Act 1966* (**Act**) is essentially a consumer debt relief mechanism in which banks and non-bank financial institutions (often by way of assignment of bank debts) are ordinarily the major creditors.

2. Until such time as the Royal Commission into Financial Services[1] provides its report and any recommendations, any amendments to the structure of Part IX of the Act that will materially alter its operation should be deferred.

3. Consideration should be given as to whether Part IX should be lifted out of the Act and become the cornerstone of a new Consumer Debt Relief Act that provides certain and just outcomes to consumer debtors and creditors alike in a regime separate to the bankruptcy regime which is irrelevant to the vast majority of consumer debtors.

[1] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

4. I am generally supportive of the measures to "*boost confidence in the professionalism of administrators, deter unscrupulous practices, enhance transparency ...and to ensure that the debt agreement system is accessible and equitable*."

5. However I am concerned that a number of proposed amendments may materially alter the operation of Part IX as to unintentionally limit and/or deter its application. This will likely have material adverse consequences for consumer debtors who then find themselves unable to utilise the protections of Part IX.

Personal Background

By way of background I am a partner of the national law firm Piper Alderman. I have practiced for over 25 years in insolvency and reconstruction law having particular expertise and experience in bankruptcy law which continues to form a material segment of my law practice. I am a former national chair of the Law Council of Australia's Insolvency and Reconstruction Committee, a current member of the ARITA Victorian/Tasmanian State Committee and a former representative of the Law Council of Australia on the Bankruptcy Reform Consultative Forum previously convened by the office of the Attorney-General. I have given evidence to a number of Commonwealth Parliamentary inquiries in relation to bankruptcy reform including in relation to the *Bankruptcy Legislation Amendment Bill 2002* that resulted in the repeal of the "early discharge" provisions within the Act.

This submission constitutes my personal views and does not necessarily constitute the opinion of my firm, Piper Alderman.

Submission

Part IX of the Act is all about consumer debt[2] relief. In the absence of these provisions consumer debtors will either be exposed to the vagaries of commercial debt collection or go bankrupt. While a possible one year bankruptcy might make this option more attractive anecdotal evidence suggests that consumer bankrupts don't want to go bankrupt and ordinarily wont unless forced.

Equally it needs to be recognised that in the vast majority of cases if persons entering an arrangement under Part IX were instead to go bankrupt invariably there will never be a return to creditors because there is little in the way of income or assets that would be available in a bankruptcy.

Therefore, when you consider the many millions of dollars in dividends delivered to creditors under Part IX since its inception (which returns are made net of costs), Part IX has been extremely successful. It has, on the assumptions noted above, delivered material financial returns to creditors they would not otherwise receive in bankruptcy while providing protection and certainty of outcome for debtors.

---

[2] I do not propose to embark on an exercise of attempting to define a consumer debt

In those circumstances great care should be taken in altering the fabric of Part IX in any manner that will work to exclude Part IX protection to those it is intended to protect.

For example the inclusion of an income ratio test will immediately exclude anyone on a nominal income, such as a young adult or non working spouse. Yet a debtor's family may well be supporting the proposal to ensure the debtor can obtain the relief from creditors under Part IX.

Equally the imposition of the arbitrary three year contribution period will no doubt have a profound impact. Remembering that there are protections around an Administrator being satisfied about the viability of a proposal for a debtor, the limited income and assets of the debtor, the costs of administering a proposal and the well known dividend demands of the institutional creditors, there is a real risk any viable proposal becomes impossible and a thing of the past if limited to three years. This is not to say there shouldn't be some limits on time but there must be a balance to ensure the system can continue to work effectively for all stakeholders. In the absence of a viable Part IX agreement consumer debtors will remain unprotected or ultimately forced to bankruptcy.

If we accept that the returns under Part IX are not and never will be available in bankruptcy and there is a need for some form of protection for consumer debtors other than through bankruptcy, then arguably these provisions should be subject of stand alone legislation dealing with Consumer Debt Relief. Equally if I am correct in assuming that banking and financial institutions remain the single largest creditor class in such arrangements then at the very least we should await the outcome of the Royal Commission into Financial Services before amending the Act in such a way that is likely to materially affect the application of Part IX.

If the Committee wishes me to elaborate on any aspect of this submission I will endeavour to do so.

Yours faithfully

Michael Lhuede