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Mr Tim Watling
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Mr Watling

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

The Australian Bankers' Association (to be re-named Australian Banking Association) is pleased to have this opportunity to provide views about this Bill. The ABA agrees with the need for further regulation of the Part IX debt agreements regime in the Bankruptcy Act.

Introductory remarks

In summary, the ABA:

1) Supports the proposed registration for Debt Agreement Administrators (**DAAs**) with an added requirement for qualifications and experience for DAAs commensurate with those of registered trustees.

2) Requests that a safeguard is included that requires the debtor and the DAA to ensure that the debtor first seeks financial hardship relief from its creditors which have hardship relief programs, such as banks, where the debtor may be able to avoid the consequences of the Bankruptcy Act and excessive fees unless such relief is not available.

3) Does not support the proposed reduction in the maximum term of a Debt Agreement (**DA**) to 3 years because the term is not the issue and sustainability of plans from the outset should be the determining factor. Longer term plans that fail usually have "step ups" (see below) involved. We believe that with an uplift in requirements (points 4 and 9) longer term plans are expected to be of greater success.

4) Requests that the amendments deal with what are described as "step ups" that is, for example, increased debtor payments in the remaining 2 years of the term of the agreement for which no affordability assessment is made at the outset. Step ups should be supported with documentation, for example the debtor is returning from extended leave or there is confirmation of an end date for other debts which could support the increase.

5) Considers that the merits (if any) of doubling of the assets threshold for debtors, coupled with a proposed but unseen regulatory calibration methodology for determining the percentage of a debtor's payments over a 3-year period should be examined carefully.

6) Requests that a debtors' free-of-charge independent complaint and dispute resolution mechanism is made available for debtors to resolve disputes with their DAA.

7) Requests that provision be made for debtors who want to pay out their debts following annulment of their DA to do so.

8) Requests that DAA administrator fees are reviewed to ensure there is a better relationship between charges for the work in involved in preparing a debt agreement proposal for a debtor. When the Part IX debt agreement system was established the intent was to

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deliver a cost-effective alternative to bankruptcy. With the introduction of for-profit administrators there is an available opportunity to realign to that goal. One option is for DAA fees as a percentage of total debt to be abolished.

9) Requests that AFSA's framework for determining whether a Debt Agreement Proposal (**DAP**) is suitable or unsuitable is reviewed, clarified and published. Only approximately 1-2% of DAPs are determined to be unsuitable at this initial point which is considered to be very low given the arrangements that are rejected at a later stage with the added consequences of the Bankruptcy Act for debtors and their creditors.

Registration of DAAs

The administration of the debt agreements regime under Part IX of the Act is undertaken largely by private sector for-profit entities. These administrations are implemented under the Act and involve similar responsibilities imposed on DAAs as bankruptcy trustees, strongly suggests that DAAs should be subject to a scheme of registration with the level of, education, knowledge, expertise and skill to be commensurate with bankruptcy trustees.

Precautionary measure

Banks, and some other financiers, utilities and other commercial financial and services providers will have processes to deal with their customers who fall into financial difficulties in meeting their commitments. These arrangements generally can provide the customer with some relief and assess whether their circumstances are likely to improve so they can revert to making payments including under some modified form of sustainable payment arrangements. These arrangements do not operate under the Act.

An important precautionary and protective measure for debtors would be for the Act to include a provision requiring a debtor to first seek out its creditors to see whether financial hardship arrangements are offered by them and whether they are able to receive some assistance. If the debtor's situation is such that no financial hardship relief is available, only then may a DAA offer to prepare a debt agreement for the debtor. Banks are concerned that often the customer has approached a DAA without first considering available alternative options.

Maximum 3 years term for debt agreement

The ABA believes a maximum period of 5 years should be set.

Reducing the period to 3 years will mean one of two things - increased payments meaning fewer debtors will be able to service a debt agreement over the shorter term because the amounts payable will be higher, or lower payment plans which creditors will be less likely to accept because of the reduced amount offered compared to payments made over 5 years.

Inevitably, this means more debtors' plans will be rejected with debtors likely to resort to formal bankruptcy, increasing the numbers of bankruptcies.

The existing practice by some DAAs providing for "step ups" in debt agreements to lift the overall dividend rate to ensure creditors' acceptance often results in unsustainable payment obligations for some debtors causing undue financial hardship for the debtor. If "step ups" are to be retained, an affordability assessment should be made by the DAA prior to including these in a debt agreement proposal.

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Doubling the threshold limit

As the ABA understands, the maximum asset limit is proposed to be doubled i.e.to $223,350. The intention is to give as greater proportion of debtors' access to the debt agreement system. This is based on recent rises in Australian property prices.

The doubling of the asset threshold will not necessarily mean that debtors have an increased capacity to make higher payments, particularly if the maximum term of the debt agreement is 3 years.

Further, the Minister will be able to make a regulatory calibration for the percentage of payments to accord to a 3-year term payment schedule.

This proposed calibration methodology is not available for consideration yet.

The concern for industry will be how the increase in the assets value and the payment schedule together might result in dividends for creditors, less approval of debt agreements by creditors and a resulting increase in bankruptcies.

For debtors, this may mean lowered expectations for working out their debt repayments and turning to an apparent simpler one year bankruptcy which on discharge will leave them with a fresh start.

The ABA believes these changes should be considered carefully.

An independent dispute resolution mechanism for debtors

These types of schemes (external dispute resolution schemes) are common in the financial services market and in some other industries.

There is currently no such mechanism for dealing with debtors' disputes with their DAAs.

The Inspector General is expected to receive extended investigatory and inquiry powers regarding the conduct of a DAA. It is unclear whether the Inspector General will be able to mediate or arbitrate settlement of a dispute between a debtor and their DAA or to award compensation or other remedies for the debtor which an external dispute resolution scheme could provide.

Banks have received complaints from their customers that they have nowhere to go if they are in dispute with their DAA.

Review of DAA charges

There are reported examples where DAAs have charged significantly higher charges for an administration where the circumstances of the debtors concerned are similar. For example, it is unclear why the charges by a DAA for a debtor who has the same number of creditors as another debtor can be significantly higher simply because of the level of indebtedness given this has no material impact on the work involved in setting up a repayment plan.

The ABA strongly believes that a current assessment of DAA charges is undertaken.

AFSA's discretion to determine whether a debt proposal is unsuitable.

The ABA would support greater transparency in the factors on which AFSA bases its decisions on the suitability or unsuitability of a debt agreement proposal. Experience is suggesting that perhaps more proposals are being approved as suitable when on review were found to be unsustainable.

The ABA looks forward to the Committee's deliberations on this important initiative.

Yours faithfully

Ian Gilbert
Executive Director Legal and Regulation