Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Bankruptcy Legislation Amendment Bill 2009*

November 2009

pilch homeless persons' legal clinic

17/461 Bourke St Melbourne VIC 3000
Tel: (03) 8636 4408 | Fax: (03) 8636 4455
www.pilch.org.au

Author

James Farrell, Manager/Principal Lawyer
PILCH Homeless Persons' Legal Clinic

Acknowledgments

The PILCH Homeless Persons' Legal Clinic gratefully acknowledges the significant contributions to this submission of **Chris Fenwick** and **Charles Driscoll** of **Blake Dawson** and PILCH volunteer **Rachana Rajan**.

Endorsements

This submission is endorsed by the **QPILCH Homeless Persons' Legal Clinic** and the **Housing Legal Clinic**.

James Farrell

Manager/Principal Lawyer
PILCH Homeless Persons' Legal Clinic

Contents

1. Executive Summary 1

2. Background 2

2.1. Overview of the HPLC 2

2.2. Homelessness and bankruptcy 3

2.3. Purpose of the Bill 3

3. Increasing the minimum debt 4

4. Bankruptcy and Centrelink debt 6

4.1. Homelessness and social security 6

4.2. Centrelink debts 6

4.3. Additional penalties and interest 8

4.4. Bankruptcy and Centrelink debt recovery 9

4.5. Conclusion 9

5. Bankruptcy and infringements 9

6. Consequences of bankruptcy 11

6.1. National Personal Insolvency Index (NPII) 11

6.2. Reduction of the period of bankruptcy to 12 months 12

6.3. Security deposits or bonds for utilities 13

6.4. Insurance, bank accounts and employment 14

7. **Disputes with trustees 14**

1. Executive Summary

This submission is made by the Public Interest Law Clearing House (***PILCH***) Homeless Persons' Legal Clinic (***HPLC***) in response to the *Bankruptcy Legislation Amendment Bill 2009* (Cth) (***Bill***).

The HPLC welcomes the Government's proposed reform of the bankruptcy laws to protect vulnerable and marginalised individuals. However, in the HPLC's view, these changes do not go far enough to protect the interests of individuals who are, and will continue to be, severely disadvantaged by the harsh and enduring penalties contained in the bankruptcy laws.

Recommendations

The HPLC makes the following recommendations for reform:

Recommendation 1: The Bill should ensure that the minimum individual debt amount required for a creditor's petition in bankruptcy should be raised to at least $10,000.

Recommendation 2: The Federal Government must make amendments to the Bill to enable the discharge of infringements and non-provable Centrelink debt as part of bankruptcy or a debt agreement for people in recognised categories of special circumstance (ie. low income, assets and debt).

Recommendation 3: The Federal Government must make amendments to the Bill to enable the discharge of infringements as part of bankruptcy or a debt agreement for people in recognised categories of special circumstance (ie. low income, assets and debt).

Recommendation 4: The Federal Government must make amendments to the Bill so that no entries relating to debt agreements are recorded in the National Personal Insolvency Index.

Recommendation 5: The Federal Government must make amendments to the Bankruptcy Regulations so that a person's entry on the NPII is removed after 7 years.

Recommendation 6: The Federal Government must make amendments to the Bill to reduce the period of bankruptcy from 3 years to 12 months for less complex bankruptcies.

Recommendation 7: The Federal Government must make amendments to prohibit bankruptcy, debt agreements or an entry on the NPII being used as the sole basis for a retailer of essential services requesting a security deposit prior to connection.

Recommendation 8: The Federal Government must make amendments to prevent first time bankrupts with low levels of debt being automatically subject to the ordinary statutory restrictions on employment. The trustee in bankruptcy should be given power to recommend these types of bankrupts be subject to employment restrictions if necessary.

2. Background

2.1. Overview of the HPLC

The HPLC is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.[1] The HPLC is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. While the HPLC recently received confirmation of a one-off funding boost from the Federal Government, it does not currently receive recurrent funding from the Federal Government.

Free legal services are offered by the HPLC on a weekly basis at 14 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.[2] Since its establishment in 2001, the HPLC has assisted over 4000 people at risk of, or experiencing, homelessness in Victoria.

The HPLC has the following aims and objectives:

to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;

- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights. In 2009 it received a Melbourne Award for contribution to community in the City of Melbourne.

The HPLC operates and provides its services within a human rights framework. Central to the human rights framework is the right to participate, including individual and community participation and consultation, which creates an empowering environment for individuals to assert their rights and contribute to the democratic

---

1 See http://www.pilch.org.au.

2 Host agencies include Melbourne Citymission, Café Credo, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre, Homeground Housing Service and St Kilda Crisis Centre. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Arnold Dallas McPherson, Baker & McKenzie, Blake Dawson, Clayton Utz, Corrs Chambers Westgarth, DLA Phillips Fox, Freehills, Mallesons Stephen Jaques, Minter Ellison and Stella Suthridge & Associates.

process. The HPLC recognises the right to participate by working and consulting directly with a range of key stakeholders, the most important of which is the Consumer Advisory Group (***CAG***). The CAG was established by the HPLC in 2006 and is comprised of people who have experienced homelessness or who are currently homeless. The role of the CAG is to provide guidance and advice, and make recommendations to the HPLC with a view to enhancing and improving the quality of the HPLC's service delivery, policy, advocacy, law reform and community development activities. The CAG not only provides feedback and guidance to the HPLC but also gives people who have experienced homelessness a voice to actively represent their interests and build the participation and engagement of the general community around the issue of homelessness.

2.2. Homelessness and bankruptcy

On any given night in Australia approximately 105,000 people are experiencing homelessness.[3] Between 2001 and 2006 there was an increase in homelessness of almost 5 per cent.[4] That five-year period also saw an increase in the number of people sleeping rough, the number of homeless family households and the extent of homelessness in the indigenous population.[5]

For people experiencing homelessness, problems with debt are common. A 2007 survey conducted by Wesley Mission found that 88% of those who became homeless entered the pathway through accumulated debt and unforseen financial crises.[6] Many face problems in making repayments on credit cards, mobile phone bills, utilities, rent and other everyday items. This often leads to people experiencing homeless being subjected to various credit management or debt recovery procedures causing them stress and anxiety. The HPLC often receives requests for advice on how to voluntarily enter bankruptcy so that clients can put an end to these procedures. Whilst the HPLC advises that bankruptcy should be a last resort, many still choose to voluntarily enter bankruptcy despite the severe consequences.

2.3. Purpose of the Bill

One of the policy objectives of *Bankruptcy Legislation Amendment Bill 2009* (Cth) (**Bill**) is said to be to make amendments to the bankruptcy process which *"recognise that the majority of bankruptcies relate to consumer debts and involve bankrupts with relatively few assets and little income".*[7] The Explanatory Memoranda to the Bill states that small bankruptcies *"tend to involve a bankrupt who has simply fallen on hard times rather than misdeed".*[8]

---

3 Australian Bureau of Statistics (ABS), *Counting the Homeless 2006* (2008).

4 Compare ABS 2001 data (99,900) with ABS 2006 data (104,676) and shows an increase of approximately 4.78% in the homeless population in Australia

5 Australian Bureau of Statistics, *Counting the Homeless 2006* (2008), viii - xii; see also Australian Bureau of Statistics, *Counting the Homeless 2001* (2003).

6 Wesley Mission, *More than a bed: Sydney's homeless speakout* (2007)

7 Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth) .

8 Ibid, 3.

According to the Explanatory Memoranda, the main objects of the reforms are:

- to provide a more streamlined process for fixing trustee remuneration and a more transparent process for reviewing that remuneration;
- to strengthen the penalties for some offences and ensure these are in line with the penalties for other similar offences;
- to remove the outdated concept of Bankruptcy Districts in order to provide more flexibility in personal insolvency administration;
- to increase the minimum debt for a creditor's petition to reflect changes in the economic environment;
- to increase the stay period that follows a declaration of intent to file a debtor's petition to allow debtors to better assess their options; and
- to increase the debt, income and asset tests thresholds for debt agreements to ensure the thresholds keep pace with increasing wages and the increasing availability of credit.

3. Increasing the minimum debt

The Bill proposes to increase the minimum debt amount required for a creditor's petition in bankruptcy from its present level of $2,000 to $10,000.

The HPLC strongly supports this change. As stated in the explanatory memorandum,[9] "*there has been a significant change in the value of money and levels of individual indebtedness since 1996 when the Bankruptcy Act was last amended in this respect*". The court has also expressed doubt about the need to use bankruptcy to recover small debts especially where cheaper, simpler options are available such as recovery of a judgment debt.[10]

The HPLC puts forward several arguments in support of increasing the minimum debt to *at least* $10,000.

First, an increase to the minimum amount is long overdue given that the amount has been $2,000 since 1996 and was proposed as the minimum amount as early as 1988 in the *Harmer Report.*[11] The proposed increase to $10,000 takes into account inflation, the raised cost of living and the more generous provision of credit (particularly credit cards) in the past 20 years. Due to these factors, it is common for people to have debts larger than $2,000. The change ensures that such debtors with small debts do not suffer the severe

[9] Ibid, 24.

[10] *Vaucluse Hospital v Phillips* (2000) FMCA 44

[11] Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth), 23.

long term consequences of bankruptcy. Raising the minimum debt to $10,000 would reduce the number of people who risk accumulating trustee fees, as well as losing their home and equity in it due to a small debt only.

Second, the proposed minimum of $10,000 is consistent with the overall policy of encouraging the use of Part 9 Debt Agreements which are *"principally aimed at consumer debtors with lower levels of income, assets and debts"*.[12] The consequences of creditor's petition for debts under $10,000, such as losing one's home, are disproportionate to the small debt owed. Consumers with less income and assets would find these consequences even more detrimental.

Case Study 1 [1]

A debtor became bankrupt on a creditor's petition. This action was taken by a debt collector acting for the creditor on a debt of less than $7,000. The debtor had been making agreed repayments but was unable to maintain them when he became unemployed. When the bankrupt and his family realised the risk to their family home, they vigorously opposed action to sell it. The appointed trustee accumulated fees of more than $70,000. A financial counsellor and community lawyer became involved. When alerted to the risk to its reputation, the creditor resolved the matter by paying the fees of the trustee and releasing the debtor from his liability. The creditor did not recover the original debt which led to the bankruptcy.

Third, case studies from a report by Eastern Access Community Health (**EACH**)[13] show that the use of bankruptcy to collect small debts can be problematic for not just the debtor.

In one of the case studies cited by EACH, a creditor released the debtor from his liability and paid $58,000 in trustee's fees after poor handling of collection of a debt of less than $5,000.[14] These two cases (involving debts of $5,000 and $7,000) highlight problems for creditors in petitioning in bankruptcy for small debts – they may not recover the debt owed and may also incur considerable expense in terms of trustee fees. In *Vaucluse Hospital v Phillips*,[15] where the use of a creditor's petition was questioned, the debt was approximately $5,000. This is further support for increasing the minimum debt to a figure more than $5,000.

The *Homes at Risk Report* suggested that the value be $10,000. The HPLC supports this view. The minimum debt should be *at least* $10,000 because of inflation, increased cost of living, increased provision of credit and because Part 9 aims to protect consumers with small debts, as outlined above. Furthermore, roughly 79% of sequestration orders made between 2008 and 2009 were for debts of more than $10,000[16] so increasing the limit to $10,000 would not prevent these larger debts being recovered for by creditor's petition. The increase only affects small debts, where using creditor's petition is unjust.

---

12 Ibid, 25.

13 Jan Pentland, *Homes At Risk: Using Bankruptcy to Collect Small Debts*, Eastern Access Community Health (2007).

14 Ibid, 15.

15 (2000) FMCA 44.

16 Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth), 24.

It may be argued that a person could owe debts of less than $10,000 to several different creditors without risking creditor's petition in bankruptcy and therefore aggregate debts of more than $10,000 should give rise to a right for creditors to petition in bankruptcy. If applied to aggregate debts, many creditors that were only owed a small amount each but were owed $10,000 collectively could petition together. The proposed increase is primarily aimed to protect people with smaller debts from being bankrupted, and if the limit applied to aggregate debts this aim would not be upheld. Therefore, the $10,000 limit should apply to individual debts.

For these reasons, the HPLC submits that the minimum individual debt amount required for a creditor's petition in bankruptcy should be raised to *at least* $10,000. Small debts can be recovered through instalment orders, judgment debt recovery proceedings and repayment by sale of an asset.

Recommendation 1: The Bill should ensure that the minimum individual debt amount required for a creditor's petition in bankruptcy should be raised to at least $10,000.

4. Bankruptcy and Centrelink debt

4.1. Homelessness and social security

Due to the high proportion of people experiencing homeless who are on some form Centrelink payment, Centrelink debt and/or penalties are also common. Most Centrelink debt is incurred through people receiving payments they were not entitled to. Often this was because they failed to report employment income to Centrelink or because their circumstances changed and they were no longer entitled to the payment.[17]

4.2. Centrelink debts

Overpayment and lack of qualification to receive a payment are just some of the reasons why an individual may incur a debt to Centrelink. Debts may be incurred through no fault of the individual or through the result of deliberate fraud. Two common causes of debts are discussed below.

Debts arising from 'participation failures'

The *Social Security Act 1991* (Cth) (**SS Act**) prescribes certain conditions and ongoing obligations that must be satisfied before an individual can receive Newstart Allowance, Youth Allowance, Austudy Payment, Parenting Payment (single or partnered) or Special Benefit. The definition of participation failure varies according to the type of allowance being received.[18]

---

[17] Ibid, 103

[18] See, eg, Austudy **participation failure** has the meaning given by s 576 of the *Social Security Act 1991* (Cth (**SS Act**); Newstart **participation failure** has the meaning given by s 624; **parenting payment participation failure** has the meaning given by s

The consequences of a participation failure will depend on the nature of the failure. For a first or second participation failure, clients will generally be given an opportunity to avoid a penalty by meeting the requirement they initially failed to meet. If the client does reengage, then they will incur no loss of payment. However, that participation failure will be noted on their record for the purpose of determining whether or not an eight-week penalty (suspension of payments) should apply for a third participation failure in a 12-month period.

A first or second participation failure can also result in payment being stopped without backpay until a person re-engages with Centrelink or their provider of Australian Government employment services. Centrelink policy guidelines state that a participation penalty will not be imposed until Centrelink has spoken to the person and considered their reasons for failing to meet their requirements. Centrelink policy guidelines state that Centrelink must make two attempts over two days to talk to the person.[19]

Debts arising from fraud

Centrelink will conduct an investigation to determine if the matter should be referred to the Commonwealth Director of Public Prosecutions (**DPP**) for prosecution. Part of this investigation may consist of a prosecution interview with the person suspected of fraud. At this interview a warning should be provided that any information provided by the person might be used to prove offences against them.[20]

Following the investigation, the decision whether or not to prosecute will be made by the DPP. The Prosecution Policy of the Commonwealth[21] indicates which factors will be taken into account. Primarily, they include whether the DPP is satisfied that there is sufficient evidence available and that the prosecution would be in the public interest.

The overlap between the welfare fraud provisions in the *Social Security (Administration) Act 1999* (Cth) (**Administration Act**) and the general federal offence provisions contained in the *Crimes Act 1914* (Cth) means prosecuting authorities have a discretion as to which provisions to use. The general rule is that the provisions of the specific Act (that is, the Administration Act) are to be relied on unless to do so would not adequately reflect the criminal conduct disclosed by the evidence.[22]

500ZA; **special benefit participation failure** has the meaning given by section 740; **youth allowance participation failure** has the meaning given by s 550.

19 The Social Security Handbook, Ch 43, [10.3.5].

20 National Welfare Rights Network, *Fact Sheet — Prosecution of Social Security Offences*, at http://www.welfarerights.org.au/Factsheets/fs_prosecution.doc.

21 Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, at http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf.

22 Prosecution Policy of the Commonwealth, 2.22.

The maximum penalty for the offence of intentional misrepresentation is one year of imprisonment.[23] This maximum penalty is likely to be imposed only in the most serious cases of fraud or where the person has previous convictions. The court may also order that the amount wrongly paid to the person be repaid to the Commonwealth.[24] Centrelink may recover an amount by various other means, whether or not the person is convicted of a social security offence.[25]

4.3. Additional penalties and interest

If a person obtains the benefit of a social security payment, and was not entitled for any reason to obtain that benefit, then the SS Act provides that the amount of that benefit is a debt due to the Commonwealth.[26] The SS Act deems the debt to arise when the person obtains the benefit of the payment.[27]

Centrelink is entitled to apply a 10% penalty to an individual's debt in the following circumstances:

- if the person refused or failed to provide information in relation to their income from **personal exertion** (generally, this refers to income received as an employee); or

- if the person knowingly or recklessly provided false or misleading information about their income from 'personal exertion'.[28]

However, Centrelink is not entitled to add the 10% if the Secretary is satisfied that the person has a 'reasonable excuse' for not providing the information;[29] if the person was not notified of the requirement to provide the information; if the person was under 16 at the time of the overpayment or if the debt is in respect of Family Tax Benefits, Child Care Benefit, Age Pension or Carer Payment and Carer Allowance.[30]

Penalty interest can also be charged (at the rate of 3% per annum) pending the negotiation of a repayment agreement. However, certain notification requirements must be met by Centrelink before this penalty interest can be charged.[31] The interest will stop accruing when the debtor either agrees to pay reasonable instalments or resumes making repayments to which they have previously agreed.[32]

---

23 Administration Act, s 217.

24 Administration Act, s 218.

25 SS Act, Part 5.2.

26 SS Act, s 1223(1). This section of the chapter focuses on the recovery of debts incurred under the SS Act. Many debts incurred before 1 October 1997 may not be 'debts due to the Commonwealth' for the purposes of the SS Act. See the Social Security Handbook, [3.1], [3.3]

27 SS Act, s 1223(1).

28 SS Act, s 1228B; see the Social Security Handbook, Ch 43, [5.3].

29 SS Act s 1228B(4).

30 See National Welfare Rights Network, *Fact Sheet — Debts — What to do if you have a social security debt*, at http://www.welfarerights.org.au/Factsheets/fs_debts.doc.

31 See the Social Security Handbook, Ch 43, [5.2].

32 See the Social Security Handbook, Ch 43, [5.2].

4.4. Bankruptcy and Centrelink debt recovery

The rules surrounding Centrelink's ability to recover debts from debtors who become bankrupt are complex. In general terms, the debtor is not required to repay the debt to Centrelink for the duration of the bankruptcy period. Centrelink is unable to recover the debt via the methods discussed above (that is, deductions, instalment payments, garnishee, or legal proceedings) because the debt is no longer 'due to the Commonwealth' for the purposes of the SS Act.[33]

However, this is not the case for debts that are the subject of a Court order. The Commonwealth has the ability to initiate legal proceedings to recover a Centrelink debt,[34] provided the proceedings are not commenced after the end of the period of six years starting on the day on which the debt or overpayment arose.[35] If a court is satisfied that there is a debt, then Centrelink can seek court orders to enforce its repayment. Such orders can include the forced sale of property.[36]

Following the bankruptcy period, Centrelink can also recover debts if they were incurred through fraud.

4.5. Conclusion

The law of social security is complex, and debts can arise in a number of ways, often through no fault of the recipient debtor. However, debts to Centrelink may be characterised as either provable or non-provable in bankruptcy, depending on a complex set of rules and processes.

In order to simplify this system, the HPLC recommends that all debts to Centrelink should be provable in bankruptcy.

Recommendation 2: The Federal Government must make amendments to the Bill to enable the discharge of debts to Centrelink as part of bankruptcy or a debt agreement for people in recognised categories of special circumstance (ie. low income, assets and debt).

5. Bankruptcy and infringements

Infringements are a major problem for people experiencing homelessness, as a recent Law and Justice Foundation of NSW Report concluded:

---

[33] National Welfare Rights Network, *Fact Sheet — Debts — What to do if you have a social security debt*, at http://www.welfarerights.org.au/Factsheets/fs_debts.doc.

[34] SS Act, s 1232.

[35] SS Act, s 1232(2). See the Guide to Social Security Law, [6.7.2.40] for detail of modifications and extensions to the six-year limitation period.

[36] Social Security Handbook, Ch 43, [6.5].

> *…fines [are] a major problem for many homeless people who, because of their lack of private housing and economic disadvantage, were more likely to be publicly visible. They consequently accrue multiple fines for street offences such as drinking in public spaces and public transport fines.*[37]

It is not just the incurring of fines, but also the further debt that accumulates when people experiencing homelessness are unable to pay these fines which present problems, as the report found:

> *Further, homeless people may be unable to afford to pay the original fine, or, without a regular address, they may not receive notification of the fine. As penalties and interest are added to the original fines, homeless people accumulate fine-related debt.*[38]

Currently fines and penalties are not provable in bankruptcy, meaning that these debts survive the process and are not discharged.[39] This policy has been enforced strictly by the courts, which have held that a penalty or fine is not discharged by bankruptcy *"irrespective of what the seriousness of the particular offence might be thought to be".*[40]

Failure to pay fines leads to further legal problems for people experiencing homelessness and disadvantage such as government debt recovery procedures and importantly loss of drivers licence or car registration.

This hard line approach to infringements unfairly disadvantages people experiencing homelessness, who often incur more fines due to their public visibility and also accumulate further penalties and interest on their original fines due to not having a fixed address. In Victoria, the State Government has to some extent recognised the difficulty that infringements pose to the homeless by implementing special circumstance procedures for dealing with fines under the *Infringements Act 2006* (Vic).[41] Powers under that Act allow an enforcement authority or a court to discharge or withdraw the fines on the basis of homelessness.[42]

Whilst they should be commended, systems such as that under the Victorian *Infringements Act* often require applications to be made to enforcement agencies or a Court for each infringement. Given the many fines and penalties that the homeless may accumulate, it is very difficult for a person experiencing homelessness or agencies to make an application on each and every fine. Furthermore, the regulation of infringements varies from state to state. A more universal approach to the discharge of fines would reduce the burden on the Court systems and benefit people experiencing homelessness and disadvantage, who simply do not have access to the resources required to gain discharge of these debts where it is warranted.

---

37 Law and Justice Foundation of NSW 2005, *No Home, No Justice,* 105.

38 Ibid.

39 *Bankruptcy Act 1966* (Cth), s 82(3).

40 *State of Victoria v Mansfield* [2003] FCAFC 154, 51.

41 See *Infringements Act 2006* (Vic), s 3 (definition of "special circumstances").

42 Ibid, s 25, 65, 160.

The HPLC recommends a federal approach to the discharge of infringements on the basis of special circumstances as part of bankruptcy or a debt agreement. Dealing with multiple penalties or fines in one process would provide a more streamlined and cost-effective means for the disadvantaged to deal with infringements along with their other debts and gain the 'fresh start' they are in need of.

Recommendation 3: The Federal Government must make amendments to the Bill to enable the discharge of infringements as part of bankruptcy or a debt agreement for people in recognised categories of special circumstance (ie. low income, assets and debt).

6. Consequences of bankruptcy

There are serious consequences for a person who becomes bankrupt. A permanent lifetime entry on the publicly accessible National Personal Insolvency Index (**NPII**) means that bankrupts and former bankrupts face difficulty in many facets of life long after discharge of their debts. In line with the policy objective of these reforms in recognising that many small bankruptcies involve *"a bankrupt who has simply fallen on hard times rather than misdeed"*[43] the HPLC recommends that a number of changes be made to ensure that persons in small bankruptcies are not burdened in the longer term.

6.1. National Personal Insolvency Index (NPII)

The NPII is a publicly available register of all persons who have been bankrupt or who have entered into a debt agreement. It is one of the most severe consequences of bankruptcy or a debt agreement. The HPLC recommends that a number of changes be made to the use of the register.

Debt agreements are designed to provide an alternative to bankruptcy and are aimed at consumer debtors with lower levels of income, assets and debts.[44] They are supposed to provide an important alternative to bankruptcy for people experiencing homelessness and disadvantage, and can benefit creditors due to the lower costs involved. However, we understand that debtors are encouraged to enter into these agreements where they have assets which they seek to protect, and creditors can coerce debtors into entering these agreements as an alternative to entering bankruptcy.

Currently the entry into a Part IX debt agreement is recorded on the NPII. The recording of these agreements on the NPII and the harsh consequences that follow from this seems at odds with the purpose of debt agreements in providing an attractive alternative to the more expensive and onerous requirements of bankruptcy.

The HPLC recommends that no entries relating to debt agreements be recorded in the NPII. This is in line with the overall policy of the *Bankruptcy Act* in encouraging alternatives to bankruptcy. The HPLC notes that

[43] Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth), 3

[44] Ibid, 25.

similar recommendations have also been made by the Debt Agreement Practitioners Association[45] and the Consumer Action Law Centre.[46]

Recommendation 4: The Federal Government must make amendments to the Bill so that no entries relating to debt agreements are recorded in the National Personal Insolvency Index.

At present an entry on the NPII is permanent, meaning that persons on the register can face difficulties for the rest of their life in obtaining employment or credit should any potential employer or credit provider choose to search the register. This is inconsistent with the idea of giving a debtor a 'fresh start' and means that a person who may have simply "fallen on hard times" is punished for life if they enter bankruptcy or enter into a debt agreement. A permanent entry on a public record is also inconsistent with a person's right to privacy.

In line with the overall policy objectives of these amendments, the HPLC recommends that a person's entry be removed from the NPII after 7 years, in line with current credit reporting practices. This balances the need for creditors to be aware of potential credit risks against the need to give debtors a fresh start and not burden them for life with the stigma of bankruptcy.

Recommendation 5: The Federal Government must make amendments to the Bankruptcy Regulations so that a person's entry on the NPII is removed after 7 years.

6.2. Reduction of the period of bankruptcy to 12 months

The present bankruptcy period is three years. It is possible for the trustee in bankruptcy to extend this period if they are dissatisfied with the bankrupt's conduct. A bankrupt's ability to obtain credit or employment is heavily restricted during this three year period.[47] Whilst the administration of a large complex bankruptcy may take the entire three years, small estates such as those involving people experiencing homelessness and other disadvantaged persons require substantially less time. For people experiencing homelessness a three year period of bankruptcy is an unnecessarily long period of time.

The HPLC notes that a discussion paper released by the Attorney General's Department earlier this year suggested introducing a maximum bankruptcy period of 12 months for first time bankrupts with the possibility of earlier discharge.[48] It was noted in the paper that *"*[a] *three year bankruptcy period serves little purpose when the vast majority of bankrupt estates have few assets and provide no return to creditors."* The Insolvency Practitioners Association gave in principle support for this proposal for less complex

---

[45] *DAPA submission to the Bankruptcy Law Reform Committee* available at http://dapa.org.au/latest-news/dapa-submission-to-the-bankruptcy-law-reform-committee-2 (accessed 10 September 2009)

[46] Consumer Action Law Centre, *e-bulletin no. 36*, December 2005 available at http://www.consumeraction.org.au/downloads/DL39.pdf (accessed 10 September 2009)

[47] An undischarged bankrupt must disclose his or her bankruptcy status when obtaining credit of $3,000 or more: s 269 *Bankruptcy Act 1966.* Employment restrictions include for example those under the *Estate Agents Act 1980* (Vic), *Liquor Control Ac 1987* (Vic) and *Commonwealth Constitution s 44(iii).*

[48] Attorney General's Department, *Discussion Paper – Proposed Amendments to the Bankruptcy Act 1966,* 28 May 2009.

bankruptcies.[49] However, the HPLC understands that the Government recently rejected this proposal. The HPLC strongly supports a 12 month period of bankruptcy and asks that this proposal be reconsidered. A 12 month bankruptcy period represents a much fairer system, especially for those who are experiencing homelessness or disadvantage with little or no assets to distribute to creditors.

Recommendation 6: The Federal Government must make amendments to the Bill to reduce the period of bankruptcy from 3 years to 12 months for less complex bankruptcies.

6.3. Security deposits or bonds for utilities

Persons who have an entry on the NPII (whether through bankruptcy or a debt agreement) or other bad credit history are often asked for a security deposit before they are provided with utilities such as power, gas, water and telephone. Having to provide a large lump sum of money up front, which can be up to 37.5% of the average annual bill,[50] is often a barrier to those with little or no income obtaining connection of these services. Of the 242 families assisted in the two year *Commonwealth Family Homelessness Prevention Pilot* which was aimed at preventing homelessness among families, it was found that only 5% had sufficient funds to cover bonds or emergencies.[51]

Currently each state regulates to some extent the taking of security bonds for essential services (power, gas and water). In Victoria, under the *Energy Retail Code* if an energy retailer considers that a customer has an "unsatisfactory credit rating" it can request that they enter into an instalment plan and if that is refused they can request a security bond.[52] Similar provisions apply in New South Wales.[53]

The HPLC submits that better regulation is required to specify when bankruptcy, a debt agreement or an entry on the NPII can be used as the basis for imposing extra requirements such as the payment of a security deposit for connection of essential services. Given that these services are necessary for basic standards of living, it is critical that they are easily and readily available to those with an entry on the NPII or with bad credit history.

Recommendation 7: The Federal Government must make amendments to prohibit bankruptcy, debt agreements or an entry on the NPII being used as the sole basis for a retailer of essential services requesting a security deposit prior to connection.

---

[49] Insolvency Practitioners Association, *Bankruptcy Legislation Amendment Bill 2009 – IPA submissions to be made* available at http://www.ipaa.com.au/default.asp?menuid=258&artid=719 (accessed 2 September 2009).

[50] Essential Services Commission, *Energy Retail Code,* clause 8.1(c)

[51] RPR Consulting, *FHPP Interim Evaluation Repor*t, pp. 5–6.

[52] Essential Services Commission, *Energy Retail Code,* clause 8.1(a)

[53] See Independent Pricing and Regulatory Tribunal of NSW Website at http://www.ipart.nsw.gov.au/

6.4. Insurance, bank accounts and employment

Bankrupts and former bankrupts often find it difficult to obtain insurance, open bank accounts, and obtain employment in certain positions.

The statutory restrictions placed on former bankrupts with regards to employment appear discriminatory and unnecessarily prolong the bankrupt's reprimand. Considering the recognition by the government in these reforms that many small bankruptcies *"tend to involve a bankrupt who has simply fallen on hard times rather than misdeed"*[54] it is surprising to find, for example, that an undischarged bankrupt cannot be a member of the police force, be a security guard or hold a builders license. These statutory employment restrictions appear to be based on the outdated notion that all bankrupts are immoral and dishonest. Whilst there is still a need for these restrictions for complex bankruptcies where an element of dishonesty may be involved, those with few assets and small levels of debt who may simply have "fallen on hard times" should not be punished by these restrictions.

The HPLC recommends that amendments be made to prevent first time bankrupts with low levels of debts being automatically subjected to any statutory restrictions on employment. The trustee in bankruptcy could be given power to recommend that a bankrupt with lower levels of debt be subject to the employment restrictions if necessary.

Recommendation 8: The Federal Government must make amendments to prevent first time bankrupts with low levels of debt being automatically subject to the ordinary statutory restrictions on employment. The trustee in bankruptcy should be given power to recommend these types of bankrupts be subject to employment restrictions if necessary.

7. Disputes with trustees

Complaints about trustees can be made to the Bankruptcy Regulation division of Insolvency and Trustee Service Australia (**ITSA**). They are able to handle complaints about the trustee's actions in relation to:

- filing of a notice of objection to discharge;
- issuing an income contribution assessment;
- rejecting a hardship application with respect;
- an income contribution assessment;
- using a supervised account for recovering; and
- income contributions.
- However, the Bankruptcy Regulation division cannot handle complaints in relation to actions about:
- Selling an asset

[54] Ibid, 3

- Admitting or rejecting a proof of debt

The only avenue of complaint for these actions is to apply to the Court for review.

ITSA's procedure for handling these complaints is firstly to contact the trustee and discuss the complaint via telephone, and then if necessary conduct an investigation. ITSA can *"also facilitate meetings between parties with a view to quicker resolution of disputes*".[55] It aims to resolve the matter within 60 days, after which a trustee's decision is automatically confirmed if no other decision is made by ITSA.

A person then has the option of making an application to the Administrative Appeals Tribunal, the Federal Court or the Federal Magistrates Court if they are still not satisfied with the decision.

While bankrupts can seek the direction of the court or make a complaint to ITSA, there is no provision for a negotiated resolution between a bankrupt and their trustee. As noted above, ITSA can facilitate meetings between parties with a view to quicker resolution of disputes; however, this is not a formal step in the grievance process. The HPLC suggests that Government review this area of regulation, to ensure that appropriate dispute resolution options are available where a bankrupt has a grievance against a trustee.

[55] ITSA fact sheet *Resolving Complaints about Trustees and Administrators,* March 2008