COMMONWEALTH OF AUSTRALIA

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Bankruptcy Legislation Amendment Bill 2009

THURSDAY, 28 JANUARY 2010

SYDNEY

BY AUTHORITY OF THE SENATE

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 28 January 2010

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Marshall

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin and Feeney

Terms of reference for the inquiry:

To inquire into and report on: Bankruptcy Legislation Amendment Bill 2009

WITNESSES

Committee met at 1.51 pm

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Bankruptcy Legislation Amendment Bill 2009. This inquiry was referred to the committee by the Senate on 29 October 2009 for inquiry and report by 2 February 2010. We have received 15 submissions for this inquiry. All those submissions have been authorised for publication and are available on the committee's website. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as a contempt. But it is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public, but under our resolutions you have the right to request to be heard in private session or in camera. You simply need to request that of the committee for that to occur.

CSETI, Ms Del, National Training and Marketing Manager, Australian Institute of Credit Management

MURRAY, Mr Michael Hugh, Legal Director, Insolvency Practitioners Association of Australia

CHAIR—I welcome our first witnesses, from the Insolvency Practitioners Association of Australia and the Australian Institute of Credit Management. We have submissions from each of your associations, which we have numbered 8 and 1 for our purposes. Before I invite you to make an opening statement, do you have any amendments or changes you need to make to those submissions?

Ms Cseti—No, thank you.

Mr Murray—No, thank you.

CHAIR—All right. Please address your submissions and then we will go to questions.

Mr Murray—I represent the Insolvency Practitioners Association, which is the peak professional body of insolvency practitioners, and in that respect we represent well over 80 per cent of registered trustees in bankruptcy. You have our written submission. I will just emphasise two points from that submission, one in respect of the increase in the threshold from $2,000 to $10,000 and one lesser comment in respect of the remuneration provisions of the bill.

In respect of the increase from $2,000 to $10, 000, the substance of our comments is that, if there is a case for the increase of that threshold, we do not think the case is made out in the information provided in the explanatory memorandum and elsewhere. We think that there should be clear statistical or other evidence that would show that, where a petitioning creditor's debt is under $10,000 or, let us say, close to $2,000, that results in a bankrupt estate of minimal assets and liabilities. That information, we feel, would be available, and we do not feel that the information that has been provided substantiates that.

We also take some issue with how the law is explained or stated in the explanatory memorandum. In respect of debtors' petitions, we point out that, while there seems to be a concern that bankruptcy should not be available for very small estates with small debts and small assets, there is no parallel threshold in respect of the presentation of a voluntary debtor's petition. In fact ITSA has its own discretion to reject a debtor's petition in circumstances where it considers there is an abuse of process, and very few rejections are made on the statistics.

In respect of the concept of debt collection, there are some fine legal points as to when debt collection arises in respect of the commencement of bankruptcy proceedings, and it is only in very confined circumstances that the law would say that bankruptcy is improperly used for debt collection. That is essentially paraphrasing very much that the creditor pursues the debtor for a debt knowing or reasonably knowing that the debtor is in fact solvent.

I will make two more points. In corporate insolvency law there is a threshold, in respect of the winding up of a company, of $2,000. We query why there should now be a disparity or, in fact, whether that is a parallel issue or concern in respect of corporate insolvency. In the end result, we do accept that the figure has remained at $2,000 for quite some substantial period of time and, if there were to be an increase, we would suggest a figure of $5,000.

I will quickly pass on to the point about remuneration. We are very pleased to see reforms in the area of trustees' remuneration, which has been the subject of submissions from the IPA and assistance in developing that process, and we support the changes that are made. The only comment we make is that the right of review should be available not only to the bankrupt or the creditors but also to the trustee in respect of any decision by the creditors that the trustee may want to take up by way of this review process that is now being instituted. We think it is a good idea that this review process is put in the regulations, which allow more flexibility in terms of how the process operates. We think that is a desirable approach.

I will make one concluding comment: it is only to mention that the Senate Standing Committee on Economics is conducting an inquiry into the insolvency profession in corporate insolvency. In our consideration of submissions for the purposes of that inquiry we are drawing upon some issues in personal insolvency, including in respect of remuneration.

Ms Cseti—I would just like to briefly say that you have our submission. In support of that, we share similar views to the IPA in that we have found it difficult to reconcile the need for an increase in the minimum debt based on the material that is in the public domain at the moment. Our concern is that this is a remedy that is very rarely used when you look at the statistics, as is stated in our submission. It is only used when it is

apparent that there is a reason to proceed. It is not undertaken frivolously or vexatiously. There is little point in taking such an action against a debtor who has little or no assets.

Mr Murray—It is self-defeating.

Ms Cseti—Absolutely. The more important aspect which we would like to highlight to the committee, though, is that there have been, as you would be aware, a significant range of really innovative legislative reforms in the last few months—in particular, the personal property securities acts and the national consumer credit protection acts. Those really innovative pieces of legislation, we would suggest, will change the dynamics of bankruptcy for individuals. The introduction of responsible lending requirements where verification of the applicant's financial position is required, where full and complete disclosure must be provided to the applicant and where they must be assessed for suitability and capacity to pay, we believe will change the dynamics and the landscape of bankruptcy. Together with personal property security reforms which will enable the securitisation of assets for a category which primarily affects our membership of, at the moment, unsecured creditors, we feel that it would be preferable to let those reforms take place and become part of the financial and credit and debt recovery domain before this amendment proceeds, because we feel that at that stage you may find that it is actually not necessary. We do not feel it is appropriate to comment on remuneration. That is outside our purview. That is what we would suggest strongly to you.

CHAIR—Thank you both. We will go to questions. I will start. I have a few questions I want to ask you about your submission. One of the issues that are raised consistently is the threshold level for personal insolvency versus corporate insolvency and the inconsistency in the amounts. Do you want to provide us with a comment about that?

Mr Murray—That was a point the IPA made in its submission. We see that there is a need for some alignment between personal and corporate insolvency just as a general proposition. There has been a parallel figure of $2,000 in each of these areas of insolvency for the last 20 years or so. If there is a significant issue about that amount being too small, it certainly has not been an issue that I have been aware of in corporate insolvency. I understand there are certain obvious differences in the two regimes in the impact upon debtors, but it might well be said that to be able to wind up a business operating through a trading company for $2,000 must lead to similar sorts of issues to those that may arise in personal insolvency. I do not know. I just think that there is an unfortunate prospective disparity between the two now if this is to be increased to $10,000 in bankruptcy.

CHAIR—What do you think are the obstacles for treating them similarly?

Mr Murray—I do not see any real obstacles in treating them similarly. I am making the point that I do not feel that the need for increase in personal insolvency has been substantiated. There has been no parallel move or comment or request for increase in corporate insolvency. One fundamental point about insolvency, in both personal and corporate, is that the debt upon which the petitioning creditor relies to trigger the insolvency is only a trigger amount and it could in fact result in an insolvency of a company or an individual with debts of substantially more than that, and of large number. A person could go bankrupt for a debt of, let us say, $2,000 and when they file their statement of affairs it could disclose debts of $1 million, conceivably. In fact, one point we made in the submission was that it might be said that if a person cannot pay a debt of $2,000 they are more truly insolvent than if they cannot pay a debt of $10,000. Essentially, that is what the bankruptcy process is for: to deal with insolvent debtors.

CHAIR—I see.

Senator FEENEY—Do you mind if I pursue that?

CHAIR—Go on.

Senator FEENEY—Can you tell me what the public policy virtue is of aligning the personal and corporate thresholds to the same level?

Mr Murray—That is a general approach of the IPA in respect of law reform. I am talking more about procedural issues that are common to both personal and corporate. As a slight tangent, I mean, for example, meeting procedures, proofs of debt and certain time limits which we feel are quite different between the two bodies of law. We have made separate submissions about those in other contexts. The threshold amount might fit within that alignment concept that I referred to, or maybe less so because it is not so much, as I say, a procedural issue that is on top of that—

Senator FEENEY—But you must feel that some increase is warranted, because you have suggested $5,000.

Mr Murray—Only, I suppose, in the sense that if $2,000 was the amount fixed—I cannot be accurate about the date, but it was some 15 or 20 years ago—

Senator FEENEY—CPI.

Mr Murray—CPI and whatever—

Senator BARNETT—I think it was 1996.

Mr Murray—1996—is that right? From memory, having been around a long time myself, I think it was $1,500 before that. That was the increase made in 1996, as Senator Barnett said.

Senator FEENEY—Did you have any particular methodology when you struck the number of $5,000?

Mr Murray—No, we did not. In fact I have seen some figures, which I cannot quote, where someone has done a CPI assessment of what that figure would be nowadays, and I think it was less than $5,000. If I may say so, from an overall bankruptcy consultancy perspective I think there is a lot of focus on this figure which is not necessarily relevant, as I say, to what the extent of the insolvency may ultimately be. I think the figures are there to demonstrate it, but they just have not been extracted. For example, we do not know to what extent, for petitioners with $2,000 worth of debt, a bankruptcy results with that being the only debt or with the other debts even smaller than that totalling no more than $5,000. It really is, as I said, just a trigger point—a trigger debt. Insolvency law requires a creditor to show that the debtor against whom they are bringing the proceedings is insolvent. That insolvency is in effect demonstrated by the fact that that debtor cannot pay on the bankruptcy notice an amount of $2,000. I do not want to get too much into the law but—

Senator FEENEY—You do not think it serves as a filter of any kind of the socioeconomic groups that are accessing insolvency law?

Mr Murray—It is low enough not to really operate as a filter at the moment—I do not think it does. If a creditor had a debt for $1,000, I do not think they would be bothered to go through the processes of bankruptcy given that to issue a bankruptcy notice costs you $400—I think that is it nowadays.

Senator FEENEY—Thank you.

CHAIR—There are a couple more questions I want to ask you before I pass on to Senator Barnett. On page 7 of your submission—I will get to the drafting errors, but it is a couple of paragraphs before that—you refer to how compliance with section 52(1A) may not always be possible within these time frames. Why is that and what can be done to assist? What would be a better time frame?

Mr Murray—If I may, I will restate or put more clearly what we were saying there. Again, it is a general approach that I think the IPA has in respect of law reform that there are a lot of cost sensitivities and timing sensitivities in insolvency. We are simply saying that what the legislature is proposing here relates to an existing regime whereby the lodging of a sequestration order with the official receiver so it is recorded on the database is still described as a manual process. We are fundamentally suggesting that, in other areas of corporate insolvency in particular, we are looking to a more expeditious electronic process whereby provisions like this really are not needed any more.

What the rule says in effect is that, once a sequestration order is obtained, within two days it has to be lodged on the National Personal Insolvency Index. For one thing, a trustee—or the world at large—needs to know pretty well on the day that a person is made bankrupt, and communications nowadays should allow that to occur. This is just perpetuating, it seems to me—and this is only, I would have to say, a very tangential comment—a regime that has been in bankruptcy for a century or so.

CHAIR—But it is a minor, modernising, change that could be made if we are going to actually amend this act.

Mr Murray—Yes, I agree with that.

CHAIR—It is the same with your issue on the drafting errors; you have suggested three or four areas where—

Mr Murray—My general comment there is—and I would quickly again draw some parallel with corporate insolvency—that the government last week announced a number of changes to corporate insolvency that are, in effect, fixing drafting errors that the IPA and others have drawn to the government's attention over a period of time, errors that have been pointed out by the courts or things that our members have found confusing. The

government has taken the opportunity to fix all those in some remedial legislation, and we very much support that occurring. The point we are simply making is that, when there is a bill going forward, there might be some opportunity as well to—

Senator FEENEY—Do some repair work.

Mr Murray—That is a good way of putting it. Again, that is a comment we make at the end of this submission.

CHAIR—I was going to ask you a question about remuneration. Paragraphs 34 and 35 of your submission go to a suggestion to stay right of recovery until the review by the Inspector-General is complete. Do you want to make a comment about that?

Mr Murray—While I am looking at that, just to allow me to answer your question, did you want to ask about paragraph 35 as well?

CHAIR—Yes, 34 and 35.

Mr Murray—One point we make about the reasons is that a lot of reviews of trustees' decisions almost come down, nowadays, to folklore. In corporate insolvency—and, to some extent, in personal insolvency—the courts make comment about what should and should not be claimed by way of remuneration. We just feel that, if the Inspector-General is taking on this role—which we support and encourage—of being a reviewer of trustees' remuneration, there should be a requirement at least to give some reasons as to why they might have made a decision on a particular case. I think that is a matter of just improving the knowledge of the profession.

CHAIR—And they do not currently have to do that?

Mr Murray—The Inspector-General does not have this role at the moment. We just suggest that the law require the Inspector-General to give reasons when they make a decision, for example, in favour of a trustee or against a trustee on a review.

Senator FEENEY—They do not do that now? So there is no body of precedent concerning judgements of trustees?

Mr Murray—There is in the courts. The courts, of course, are obliged to give reasons. To some extent, there is a process of review amongst taxing officers within the courts, but I am not really aware of any sort of taxing officers or court officials issuing any body of law in that respect. It is really just a matter of transparency and—

Senator FEENEY—Consistency.

Mr Murray—Consistency is important, of course, and also helping the profession understand. In that respect, the IPA itself has issued a code of professional practice in the last two years which gives a lot of guidance to our members on remuneration claims. I refer to that in paragraph 32 of our submission. We ourselves have taken the position that we would like to give guidance on how remuneration should be claimed, and it may well be that the Inspector-General will refer to the IPA's principles when they do these reviews. If that is to occur, we are simply saying that it would assist if the Inspector-General were to give some reasons for any decisions that they make. It is just a general comment; it is good to give reasons for decisions that are made.

Senator BARNETT—Thank you for your submission and for being here today. I have a question for both of you in terms of the impact of the global financial crisis—just a big-picture question. How has that affected the bankruptcy numbers in Australia and how has that affected the way you do business?

Ms Cseti—It clearly did have an impact—there is no question about that—but it has not been as extensive as was envisaged, because if you have responsible lending then people are not making available credit to an extent that is going to be unmanageable and unworkable for people. I think, possibly, that in a general sense we have been somewhat protected because the unemployment levels have not reached what was initially forecast. I think we have been very lucky compared with other countries in those terms. There has been a slowing of payments but not a substantial level of increase in defaulting, so that has been important and it is something we monitor. We do a national survey of our membership every year, which we publish on our website, where we track both our commercial credit and consumer credit membership activities. The primary report is of a slowing of payments, rather than going to default.

Senator BARNETT—Mr Murray, did you want to respond or add anything?

Mr Murray—Certainly as observers of the insolvency scene, the IPA has seen an increase in bankruptcies. I think we have also seen—and I cannot be quoted on this—an increase in debt agreements, which is the process of alternatives to bankruptcy. As a general approach to personal insolvency, we would support the debt agreement regime as being an alternative to rather formal and strict bankruptcy process for those, particularly consumer debtors, whose asset and income and liability position is best suited to that regime. Our practitioner members themselves tend to deal with the larger or more complex bankruptcies. In other words, most consumer bankruptcies and the increase in that area is dealt with by the official trustee in bankruptcy, which of course is a government agency. We can only really comment that, yes, there has been an increase. Probably the bulk of that has gone to the official trustee in the sense that they are consumer bankruptcies. Again, I cannot be quoted on this but there may be some change in business bankruptcies which may be as a consequence of the financial crisis.

Ms Cseti—Could I just add that our membership, when dealing with such situations, would prefer the debt agreement path. We have to be very careful because our membership is not in the role of financial advisers. They cannot formally counsel people as to the most appropriate way of going forward. That would be inappropriate. So it is an interesting scenario. But debt agreements are the preferred method. It gives us certainty and it gives a structure to a process. More importantly, it gives the person affected a chance to re-establish themselves without feeling that they have been subject to any form of censure.

We are very aware of the extensive work of ITSA and the efforts that they undertake to encourage people to consider all their options, but there is a document that is produced jointly by the ACCC and ASIC on debt collection. There are two versions. There is one for creditors and one for debtors. They are incredibly useful guides to help people understand what their alternatives are from both sides of the picture. We feel that, coming out of the legislative reforms, in particular national consumer credit protection, more material of that sort in this easy, usable, friendly format is going to assist people. Sometimes people get into a situation where they are not willing to talk, and when they stop talking is when the problems really escalate.

Senator BARNETT—Of course. Is that via ITSA as well? Is it on a website?

Ms Cseti—The debt collection guidelines is a joint publication by the ACCC and ASIC.

Senator BARNETT—Yes, but where can I get it? Off the website?

Ms Cseti—Off their websites. Either one of them have it on their websites.

Senator BARNETT—Does ITSA promote it as well?

Ms Cseti—Not that I am aware of.

Senator BARNETT—Should they?

Ms Cseti—I think it would be useful, yes. They may do—I may be doing them a disservice.

Senator BARNETT—Sure, but they are not here, so we cannot ask them.

Ms Cseti—Fair enough.

Senator BARNETT—Thank you very much for that. Mr Murray, just on this issue of the $2,000 threshold under this bill going up to $10,000; you indicated there was not any evidence to support that and in your submission you have referred to the explanatory memorandum and quoted from it. I think it is 1,953 sequestration orders in 2008-09 and there is a breakdown of that. The department has put forward the fact that 174 were for an amount between $2,000 and $5,000, sort of arguing that it really is not that important and therefore the figures should be higher. That evidence is not adequate in your view? If that is the case can you explain why, and also specifically let us know what sort of evidence you need to convince you one way or the other that $10,000 is not the right figure; that $5,000—or perhaps some other figure—is a better figure. And secondly, should it be indexed?

Mr Murray—The explanatory memorandum—and I am just reading from our submission—gives some rather bald figures. Sequestration orders made where the amount claimed was, in effect, below $10,000, do not seem to take the matter very far. Of those bankruptcies—and I am just speaking broadly—we would like to know to what extent they were very small bankruptcies in terms of number of debts and number of assets. That is not shown, and that is really the substance of what I think this whole issue is about.

If the $2,000 threshold is producing negligible assets and liabilities in certain bankruptcies, it may properly be said that that is not what the full rigour of the bankruptcy process is about. But that is not demonstrated from the figures, to me. As to how that would be done, I suppose I am speaking from a position of saying,

'Yes, these are easily extracted,'—I am not sure whether they are or not—but you would be able to find of those 174 estates what the ultimate consequence of them was in seeing how many debts there were.

Senator BARNETT—Why is that important to know the number of debts and the amount of assets in each case?

Mr Murray—Because it says to me that the whole stated purpose of this increase is to avoid the consequence of having bankruptcies with very small assets and very small debts. I suppose it is a matter of policy as to whether a person should be able to go bankrupt when their ultimate debt position is $4,000—they have got $4,000 worth of debts—and they have got $3,000 in the bank. Is that really what the three-year process of bankruptcy is all about? I think that there is a feeling that is not appropriate and that person might be dealt with in another way.

If that were to be the case, and it were to be demonstrated that the $2,000 threshold was leading to those sorts of consequences, then I think we may agree that it should be raised. We are just saying that there is not enough substantiation.

Senator BARNETT—What is an example where the $2,000 threshold would be appropriate?

Mr Murray—Reading some press comment, for example: if someone has a Mastercard bill of $2,000—I am speaking generally about Mastercard—and if it were to come along and bankrupt that person when that was the only debt that they had, then that may not be an appropriate use of the bankruptcy process to bring that in—in that sort of circumstance.

Senator BARNETT—Do you think that is what may be motivating the government for that?

Mr Murray—If that is occurring. There is nothing to indicate to me, or on the figures, that that is occurring.

Senator BARNETT—Ms Cseti, if you want to respond as well, please feel free, because we are trying to draw you out here in terms of this threshold—

Ms Cseti—Sure.

Senator BARNETT—and what is appropriate. I think the point you are making is a very valid one, Mr Murray, in terms of getting the evidence about the number of debts and the assets. The feedback that I have had from at least some small business groups is that it is going to become unfair for them if there is a threshold increase from $2,000 to $10,000. It make would make harder for them to get their debts paid. So what do you say to that view, and do you support it?

Ms Cseti—We would agree with that conclusion. The small business community often has small-value debts. For a small business to be viable they have to be paid. It is a very simple relationship. They need to be able to pursue small-value debts because unfortunately when people wish to be recalcitrant payers they will do everything they can to avoid their responsibilities. Small businesses—be they medical practices, dentists or tradespeople—and the people who undertake the recovery actions on behalf of those businesses, have expressed concern to us about this threshold being raised.

I understand why the government wants to ensure that people who are vulnerable are protected, and we support what my colleague Mr Murray has said, but when you look at the occupational profile you find that there has been a significant decline amongst the student and pensioner group but there has been an increase in the manager-professional groups. They are the people who seem to be trying to avoid their responsibilities far more. It goes against the stereotype, if I could put it that way.

Senator BARNETT—Mr Murrray, do you agree? Regarding my example of small business and the concerns of small business do you agree with Ms Cseti?

Mr Murray—Yes, but that is looking at it from the creditor's point of view. Fundamentally, if a debt is unpaid by a person a creditor is entitled to seek to demonstrate their insolvency and institute bankruptcy. Yes, a trader in that circumstance should be able to pursue a debt through bankruptcy. There would be an impact upon them if they could not. We also made a comment about Australia's debt recovery laws generally. There is an issue about what other remedies are available in those sorts of circumstances.

Senator BARNETT—I was going to ask, on this threshold issue, about other countries. I do not know whether you have any experience overseas—US, UK, New Zealand. What sorts of thresholds do they have? I am not aware.

Mr Murray—I am afraid I would have that information in my resources but not off the top of my head.

Senator BARNETT—Is it possible that you might be able to check and let us know?

Mr Murray—Certainly I could do that.

Senator BARNETT—I will ask the department. They might have all those answers but—

Mr Murray—Yes, they may well do but I will certainly make inquiries.

Senator BARNETT—Finally, just in regard to your $5,000 figure, you are really saying to us that you would prefer not to go there unless you had the evidence to support it. Is that what you are saying?

Mr Murray—Yes. I think that with regard to the $5,000 there was some acceptance that maybe there was going to be a move upwards. If there was an amount picked that was an amount that we selected—but not very scientifically selected I would have to say.

Senator BARNETT—Finally, should it be indexed?

Mr Murray—Off the top of my head I would have to think about that.

Ms Cseti—Yes.

Mr Murray—There is a certain logic that, if it is set at $5,000 in the year 2010, it should be set at $5,000 forevermore—whatever indexed amount that comes out to be. One point that Ms Cseti raised with me earlier was the suggestion that it appear in the regulations rather than the legislation, which would allow it to be more readily changed. Having said that, it is quite a significant amount, being the threshold trigger amount to start a bankruptcy. I do not have a concluded view on that, but there may be merit in retaining it in the legislation itself.

Senator BARNETT—Thank you very much

CHAIR—Thank you both for your submission. Thank you for taking the time to prepare for the committee and taking the trouble to appear before us today to assist us with our inquiry. It is appreciated.

Ms Cseti—It is a pleasure. Thank you.

Mr Murray—Thank you for the opportunity.

[2.30 pm]

GUTHRIE, Ms Fiona, Executive Director, Australian Financial Counselling and Credit Reform Association

RICH, Ms Nicole, Director, Policy and Campaigns, Consumer Action Law Centre

COX, Ms Karen, Coordinator, Consumer Credit Legal Centre (NSW) Inc

LANE, Ms Katherine, Principal Solicitor, Consumer Credit Legal Centre (NSW) Inc

Evidence from Ms Rich was taken via teleconference—

CHAIR—I welcome representatives from the Consumer Credit Legal Centre, the Consumer Action Law Centre and the Australian Financial Counselling and Credit Reform Association. We have submissions from each of your organisations, which are numbered 11, 3 and 15 for our purposes. Before I ask you to make an opening statement, do you have any changes or amendments you want to make to the submissions?

Ms Rich—I am happy for the witnesses that are there in person to make an opening statement because I suspect they would cover the same issues that I would.

CHAIR—Miss Lane, you are going to make an opening statement for all three organisations?

Ms Lane—I am, thank you. In summary, we support most of the reforms of the bill. The main exceptions are expanding eligibility for part IX debt agreements and requiring a statement of affairs to be filed with the declaration of intent. I cannot overstate that we strongly support raising the minimum debt amount for a bankruptcy notice or creditor's petition to $10,000, with indexation, to avoid having this conversation again. It should be indexed so that we do not have to review it again. We have advocated this reform for several years—all of us have been advocating it.

This reform is not really about bankruptcy, it is about preventing the misuse of the bankruptcy system for debt collection. Most bankruptcies are debtor initiated, so this will not affect most bankruptcies. Of the small number that are creditor initiated, most involve debt over $10,000.

This addresses a fringe practice of using bankruptcy rather than the cheaper alternatives—and, I might add, other enforcement options—to collect small debts. It is only used when someone has an asset, usually their home—the family home—so they can take that. We contend that $10,000 is the right amount. It is based on the statistics and the case studies, including the case studies in the only comprehensive report on this issue: *Homes at risk*. Five thousand dollars is clearly too low. There would be no point making this reform if this were the amount. It would not protect people, particularly given that solicitors' fees and legal costs have risen greatly since this has been put in. Worse, it would be less than the original amount of $500 set in 1966, adjusted for inflation—and that is not even taking into account the huge changes in personal debt since 1966. You would all be aware of the massive household and credit card debt which are all available on the Reserve Bank website.

You do not make good policy by simply picking a number roughly in the status quos; you make sure it is appropriately chosen. The policy underlying the bankruptcy system needs to deal with genuine insolvency. It has not been created simply to provide another tool for debt collection. Creditors using bankruptcy routinely in this way are not using it in line with the intention. It is simply false to suggest that they would be unable to collect debts otherwise. All of us routinely give advice to people who are subject to other very effective debt collection methods, including sale of their home, that have been created with an underlying policy of enabling debt collection. We also support the review of trustee fees. Trustee fees are a huge problem for our clients. They can mean the losing your house plus a significant amount of equity in your house, because they charge up to $400 an hour and the amounts can be anything from $30,000 to $90,000 in trustee fees, which is significant.

Part 9 debt agreements, we think, have not fulfilled their purpose at all. We dispute that they result in a better deal for creditors and debtors. In fact both parties are losing out. Hardly any of the debt agreements are completed. Only 3.7 per cent of accepted debt agreements have been completed over 2006, 2008, 2009. That is a ridiculously tiny percentage. It is not fulfilling its aim. Debtors often end up going bankrupt anyway, and that certainly is borne out by our case work experience. The creditors often do not get paid, and that is also significant. In particular, when people go to get a debt agreement, the debt agreement administrator says, 'Stop paying your creditors'—which I think is against public policy—'Stop paying your creditors and pay us the fee in instalments'. So creditors are losing out and it is unethical.

There is supposed to be a review of part 9 debt agreements this year. The consumer movement as a whole thinks part 9 debt agreements are extremely problematic and not fulfilling their purpose, and to make any changes prior to that review would be a travesty. We are absolutely opposed to changing any of the thresholds on part 9 debt agreements.

As a final matter, I want to add that part 9 debt agreements are supposed to be an alternative to bankruptcy and yet bankruptcies have increased massively while they have been going. So they are just not fulfilling their purpose in any way whatsoever. That is the end of my statement.

Senator BARNETT—Thank you. Ms Cox, did you want to add anything before you have to go?

Ms Cox—Thank you, because I really am on a very tight time frame. The only thing I can say is we do see people made bankrupt in exactly the circumstances that the previous witness is talking about: where they owe a relatively small amount on a credit card or a telecommunications debt. Strata management fees is another common one. Sometimes there has been solicitors' enforcement fees et cetera added to make the amount significantly higher than the original debt. The original debt can be around $2,000 to $3,000. By the time they are bankrupting them we are looking at $6,000 to $8,000, with all the fees added in. In those circumstances it is done by some creditors routinely before exploring any other options. There are a lot of creditors and debt collectors who act responsibly in this regard and only use bankruptcy as a last resort; those people should not be affected by this reform, because as it says in the stats most of them are actually using it for amounts of over $10,000. There are alternatives under $10,000.

It is an extremely punitive way of going about it because, as we said, the trustee fees are enormous. If you are looking at a person with a small debt and one main asset, being their family home, they lose their home because it has to be sold plus potentially tens of thousands of dollars in equity. The ramifications are very dire for the debtor and there are alternatives. There are garnishees, which are being used increasingly in New South Wales in particular. We have watched our statistics go up over the years. There are writs for levity of property that can be used over both real estate and personal debt. There are definitely alternatives.

The only other thing I would like to say is that we get a lot of calls about debt agreements. I think the profile of debt agreement administrators is huge and their advertising is extremely effective. I do not believe that the people who go into debt agreements would necessarily be bankrupts if debt agreements were not available. I think there are a whole lot of people caught up in that web who have just been brought into the whole bankruptcy scenario as a result of the very effective advertising in that sector. We get a lot of calls from people who have locked into a debt agreement only to find out that it does not suit them and that they have been made much worse off. They are no longer able to use mechanisms such as hardship to fix their problems because they have been told to stop talking to their creditors and to stop paying—and that completely ruins those relationships. We see a whole lot of other people who have gone into a debt agreement and a little while down the track it has become apparent that they either cannot pay or their circumstances changed yet again, whereas if they had been bankrupt in the first place or had had an informal agreement in place with their creditor they might have been on the way to getting back on track by that stage. Instead, they have to go through the bankruptcy process at that later date and a lot of the money does not go through to the creditors anyway. There is a situation where people are actually in limbo—that is, where they are not bankrupt, they are not in their debt agreement anymore and they may or may not be being sued—and it is really a big mess.

The other thing is that I would like to know a little bit about the figures behind the 76 per cent returns that are quoted on debt agreements. I would love to know whether those are based on the figures that are proposed at the outset of the bankruptcy or whether that is the amount actually recovered when you get right to the end of the debt agreement. Sorry; I am going to have to leave at that point. Thank you for that. I am sorry that I have to go.

CHAIR—Thanks, Ms Cox.

Senator BARNETT—Thanks, Ms Cox.

Ms Lane—It would seem to me that the 76 per cent figure is done at the outset. I do not think it could be anything else, because that is the only time they collect the information. I would say that figure is fundamentally misleading. The outset is not the issue we are interested in; it is completion. If the completion rate is 3.7 per cent, we have a big problem.

Senator BARNETT—You used the figure of 3.7 per cent, I think, in your statement. That is a very low percentage. Why is it so low? I do not quite comprehend why it could be so low.

Ms Lane—I think it is because of the inappropriate way they have been using debt agreements. They are either for people who should have been bankrupt or for people who should not have been in them in the first place. Predominantly, people who should have been bankrupt are actually completely insolvent and unable to pay the debt agreement. My casework experience is that, although I speak to a lot of people all the time, I have not ever seen a debt agreement that was appropriate. I am waiting for the day when I get to see an appropriate debt agreement. I am either looking at them and they are on Centrelink and they cannot pay or they are on a very low income and they cannot pay.

Senator BARNETT—What happens to these people if they are not completed, if they are halfway through? What actually happens?

Ms Lane—They have to wait for the creditor to terminate the debt agreement, which can take months, and then they go bankrupt. It is almost uniformly true.

Senator BARNETT—So in most cases they would go bankrupt. Is that right?

Ms Lane—Yes. They have spent a huge amount of time getting further behind on their debts and the interest on the debts has capitalised and the fees have capitalised and actually they are in a miles worse position at the end than they would have been. If they had got some financial counselling at the beginning instead of a debt agreement, they might have been able to be saved. It really is a tragedy.

Ms Guthrie—There is another problem, one that Kath has not covered—that is, they are now charging up-front fees, which are not regulated by the legislation.

Senator BARNETT—Who is that?

Ms Guthrie—It is the debt administration companies. Once the agreement comes into force, changes to the laws a few years ago mean that payment to the debt administration company must be spread over the agreement. They have set up separate companies to charge up-front preparation fees, ranging between $500 and $2,000. If those agreements are not accepted by the creditors or are knocked back by ITSA, that money is gone. About 2,000 of those were knocked back last year.

Senator BARNETT—Do you have examples of those?

Ms Lane—I have. They are actually debt agreement brokers. They have two companies, the main one that advertises—

Senator BARNETT—We may not have time now. But, if you are happy to take that on notice, let us know some examples because that is something that we should perhaps pursue either with the department or separately.

Ms Lane—That is why the review is needed.

Senator BARNETT—That is what I was just about to ask about. You mentioned the review. Could you tell us more about the review and when that is due to complete.

Ms Lane—I am not certain because it is in ITSA's hands, but it is supposed to happen this year, in 2010. Obviously, from a consumer perspective and from the statistics there is a real need for a review because it is not fulfilling its purpose as an alternative to bankruptcy. It is not an alternative if most people do not complete it, so it is nothing; it is just a waste of time and actually causes huge consumer detriment. What I find significantly annoying is that it is detrimental to creditors. I have met with creditors and they are very restless about the fact that this is a huge problem that actually takes money away from them. Part of our situation is that we spend a lot of time telling people how to make arrangements to pay their debts. We endorse the Treasurer's commitments in relation to financial hardship. We are really interested in working with financial hardship so people can pay their debts. This is completely at odds with that. It just does not work. It is a matter of public policy. We have financial hardship here and we have debt agreements here. Debt agreements are depriving creditors and consumers of money and are not actually achieving their purpose.

Senator BARNETT—I just want to go to the threshold issue, which we have discussed and which the previous witnesses talked about. They strongly opposed it being $10,000. They said they could not see the evidence. They wanted to see more evidence as to why it should be increased. That is what they said. I am not sure if you were here in the room when they put those views. I am seeking your response to that. Specifically, could you see it from the point of view of small business? How do you respond to small business when they say they are getting dudded by the increase being so big—that is, by it going from $2,000 to $10,000?

Ms Lane—Addressing the second point first, I think we need to state the obvious about small business. You would not proceed to bankrupt somebody unless they had a house. In fact, we have never seen bankruptcies where there has been no house because it would be absolutely pointless. All you are doing is making somebody bankrupt but you do not get anything for it. They have to have a house. We are talking about people's family home. You have to think about the fact that what they are doing is threatening people with and/or completing taking away their houses. You have to also take that in the context that they have a huge range of other enforcement options, including garnishees and sheriffs and there is even a writ of possession over $10,000 in New South Wales. They clearly chose $10,000 as a limit for personal property. There are examination summonses to find out what they have. There are all these other options. Bankruptcy must be the last resort.

Yet, we have had a change because they have all figured out that, as long as you have an asset, you can threaten people and people get incredibly desperate when their family home is threatened. It is just as serious—if not more serious—as being in mortgage stress. When they say, 'Look, we want to be able to threaten people that we will take their home'—because that is what we are talking about; bankruptcy is taking their home—as a matter of public policy that is not consistent with financial hardship or even homelessness because you are taking away those options to do with financial hardship and you are possibly making people homeless, which cannot be a good social policy outcome. That is the issue with the small business. From my casework experience, they have plenty of options and ethical businesses use those other options no trouble. There is a big bank I know of, Citibank, that has a policy of making people bankrupt if they own a home and they have a credit card debt. That is not consistent with the Treasurer's financial hardship policy, which they have signed up to. Unfortunately, that is an increasing trend and I think it is against the public interest.

Senator BARNETT—Thank you. Finally, Ms Guthrie or Ms Rich—who is on the telephone—do you want to add anything?

Ms Guthrie—I think we should go to Nicole. I am sure she will want to speak about this because it is the key issue for us.

Ms Rich—I would confirm that we agree it is really only fringe players that are using bankruptcy as a first resort to collect small debts. I would dispute that it would have a really huge impact on small businesses. Mainstream ethical creditors and debt collectors would not do this anyway, and there are plenty of other options. Frankly, even if it did have some impact on those fringe players that is not what the bankruptcy system was set up to do. It was not set up to give them some quick fix to debt collection. It was set up to deal with genuine insolvency, so it is actually a perversion of the policy intent behind the bankruptcy system in any case. I do not accept that argument for any reason.

Senator Barnett also asked about evidence. This is a common complaint whenever consumer reforms are proposed that businesses do not like for some reason. They always claim that there is no evidence and ask to be shown the evidence. In this case, as in many others, there is actually plenty of evidence to suggest that the amount should be raised to $10,000. The first time any other amount has been raised is during this process when they have tried to pick an amount in the middle because they do not like it being raised to $10,000.

The only comprehensive report in this area is the *Homes at risk* report which had 25 case studies. It based its recommendation on an analysis of all of those case studies and the law in the area. It came up with the figure of $10,000. We know from the statistics that ITSA provided in its submission and that are in the explanatory memorandum to the bill that it is only a small amount of creditors' petition initiated bankruptcies that are under the $10,000 limit again suggesting that is the correct amount and that it is only a small number of cases that it would affect. We have provided plenty of case studies in our submission and I know other groups did as well. These also suggest that $10,000 is the correct amount. The amount of $5,000 is patently too low.

As Katherine said in her introductory statement if you index the original amount of $500 from the 1966 act, it would come to more than $5,000 today and that is not even taking into account the fact that the world is a very different place from 1966. Credit cards did not even exist in 1966. Again $5,000 just indexed would be out of place in 1966 let alone in 2010. I would suggest that there is no evidence that an amount under $10,000 is appropriate. Of course to some extent it will always be an arbitrary amount—why is it not $10,500 or $9,900? But $10,000 is pretty much the right amount to set it at.

Ms Guthrie—I think the unsaid part of this debate is where there are no assets or the debtor has no money. The Australian Institute of Credit Management said why would you use bankruptcy vexatiously or frivolously. That is right. You would be mad to do that but you use it as a threat. It is a wonderful threat against people

because people want to pay their debts. That is generally our experience and it is incredibly stressful when you cannot pay your debts. Having that threat against people is completely inappropriate.

Senator FIELDING—On this issue of debt agreements and that number of 3.7 per cent is that the number of agreements which are—you used the term—'completed'. Is that the number completed in any one calendar year or is that the number of agreements that actually mature?

Ms Lane—Imagine they roll over so that you have a set of figures for how many went in and a set of figures for how many come out completed each year and they take two to three years or three to five years but usually around three to five I think. Given they have been going for some time the figure for the completion makes sense because it is reflecting the position over the period of time anyway. In other words there is a rolling amount. That is such a low figure that it is cause for alarm on any year. If this was the first year that debt agreements had started, it would be a meaningless figure but we are years in now.

Senator FIELDING—Can you tell me when they started?

Ms Lane—They really became a huge pain around the early 2000s. I think they have been in since the late 1990s. As a matter of history they were brought in for people to be able to do them with their neighbour or someone who was doing your administration. Then commercial entities came in and it is from there that we became very, very concerned because they stopped being what they were intended to be. That necessitated a review to licence debt agreement administrators and so forth.

They bear no resemblance to what they were back then, because there were very few of them and they were genuine. There were reports of people giving over paintings to sort out debts and debt agreements. This sort of thing has all gone. The way they are advertised now is that they are debt consolidation. Our advice line gets a huge amount of calls from people who just want to consolidate their debts. A part 9 debt agreement is not a debt consolidation in any sense. It is a form of bankruptcy. We get a whole heap of people who are very confused and end up in debt agreements thinking they are consolidating their debts, when in fact they are ruining their credit report for seven years and are not consolidating their debts and they might not be able to afford the repayments. It is a huge issue for us.

Senator FEENEY—So you would contend that a majority of debt agreements end in being cancelled by the trustee or the administrator?

Ms Lane—I contend that based on the statistics.

Senator FEENEY—Forgive me for my ignorance but when a creditor winds up a debt agreement or terminates a debt agreement how does that facilitate a declaration that the person is insolvent?

Ms Lane—It does not do anything. All it does is terminate the debt agreement and then the debtor is usually left to get further advice and then there is the debt harassment as people start calling about their debts. Then they usually see somebody and say, 'Look, I can't cope.' The debts have all gone up, they have not got repayment arrangements in place and everything has fallen over and at that point either they immediately go bankrupt in a desperate rush, because there are so many calls coming in, or they see a financial counsellor. They look at their overall position and they determine whether they can possibly dig themselves out or whether they are so insolvent they need to look at bankruptcy.

Ms Guthrie—It is an act of bankruptcy to go into a debt agreement. That is what your question is about, I think.

Senator FEENEY—Yes, that is what it was, and that was helpful too. So your evidence is that the incidence of bankruptcies has increased because bankruptcies have been facilitated by people failing their debt agreements.

Ms Lane—They are clearly related. You cannot say, 'Yes, we've got all these debt agreements falling over and we've got a steady increase in bankruptcy.' We cannot say it is definitely all of that, because clearly it is not. Some of it is from the global financial crisis and some of it is from massive household debt and overcommitment. But there is no real analysis of this. To me it seems like too much of a coincidence that we have got all these debt agreements failing and bankruptcies continuing to rise. I think if it walks like a duck and quacks like a duck it is a duck. I know, from my casework experience, that most of the people who have been through a debt agreement and who see our financial counsellors inevitably end up bankrupt.

Senator FEENEY—So why did at least one of the previous witnesses, Insolvency Practitioners Australia, commend debt agreements to us when you are saying that no-one ends up with their money?

Ms Lane—I was trying to understand that. I was sitting there thinking about why that could possibly be. I can only speculate. I wonder whether some of their members are debt agreement administrators. I cannot answer it. I do not know. Even creditors that I speak to do not like them.

Ms Guthrie—One answer is up-front fees.

Ms Lane—There is money to be made. It is a profit-making enterprise. I have had several calls with one major bank, with one major finance company and with credit unions and things like those. They are all saying—and I am not going to name them—the same sort of thing, that they do not like debt agreements. This conversation has been going on for ages. Every time I turn up at a meeting about this I say to the creditors, 'What have you got to like about it? They take money from you and put it in their own pockets.' To me that makes no sense. People can talk to me about this until the cows come home and it will not make sense. To me the idea is that the public policy thing you want to push is financial hardship and making arrangements between creditors and debtors whereby the creditors get paid, there is no third party getting any money and all the money that is coming in is going to the creditors.

Senator FEENEY—Thank you very much for that.

CHAIR—I have got one question that I wanted to ask you. I refer to the extension of the stay period and the recommendation that the current period be doubled to 14 days rather than quadrupled to 28.

Ms Guthrie—From seven to 28.

CHAIR—Yes. Do you support that position?

Ms Guthrie—Yes, we do, and for a couple of reasons. One is that the whole point of it is to give people an opportunity to seek some advice about their financial position. Seven days is just far too short a time to do that. You will not get an appointment with a financial counsellor, generally. As we said before, people are incredibly stressed in these circumstances. They need counselling and they need time. It certainly does not give you a chance to potentially negotiate with your creditors. So it has been an ineffective provision, other than allaying enforcement action, which is what happens. What is going to happen practically to implement that is that there will be some new processes within ITSA.

Ms Lane—I want to add a comment about the statement of affairs being completed with the declaration of intent, even if it is in a simpler form. The only time declarations of intent are used is where you are at risk of a sheriff coming around to take your car, your possessions or your house or if a garnishee cannot pay the rent—this type of thing. They are never used other than that. They are a stopgap measure to try and save the situation so you can get your kids to school, you can get to work and things like that because you are genuinely insolvent and you just need time to see a financial counsellor. We should not add a statement of affairs to the burden of doing that in a desperately difficult situation where you basically have about 10 minutes, because the sheriff has told you he is coming—he or she; I do not want to say that all sheriffs are men, because they are definitely not. I have spoken to women sheriffs and they are wonderful. The sheriff is coming at one o'clock the next day and you have an hour to put your declaration of intent in. The idea that you are going to be carefully filling out a statement of affairs is absurd. Nobody has time to do anything except put your name, address, who you are and that you need one.

The big problem I see is that, if we do the statement of affairs as part of the declaration of intent, I am really concerned about what happens when they eventually get to see the financial counsellor. Our standard advice to anyone considering bankruptcy is to see a free financial counsellor, because it is complex. There are things to consider. It is a last resort. Anybody who then goes to see the financial counsellor is suddenly in this awful position where they have filled out one form in a mad rush, in absolute terror of something terrible happening to them, and then they go to fill out a form with the financial counsellor and they do not match.

Everybody, even the most literate people, will make mistakes in a rush. The disadvantaged people are going to be absolutely unable to do it—and the consequence of that could be dire because they will be in a situation where a form that they have filled out and a form that needs to be put in will not match and their bankruptcy will be rejected. Worse, it is actually an offence, so we are facing criminal prosecution. I am hoping they would never do it, but it is in the act. I am absolutely mortified at the thought that people would be denied the ability to get into bankruptcy because of mismatching forms where one of them was completed in a hurry when they were thinking they could not pay their rent or could not use the car to get their kids to school. They would be rejected from bankruptcy, full stop, and then the enforcement action would continue. The amount of stress and serious consumer harm would be massive.

This is not to say that we do not want people to be negotiating during this period. We do. But making people fill out forms in a hurry is bad public policy. It is a recipe for disaster. I can understand the theories behind it and why ITSA wants to do it, but they are not the people on the ground, particularly the financial counsellors, who know that if the people who have put the declaration of intent in have to fill in more information it is going to be incorrect. It is not going to be intentional; it is simply because they are so stressed about the sheriff. So I think the statement of affairs has to go. The declaration of intent should be a simple document, and then the completed statement of affairs can go in with the bankruptcy, with the help of a hopefully free financial counsellor who can talk them through the situation. Any other outcome is going to be a very poor one for consumers.

CHAIR—Thank you for your submissions and for your attendance today. Thank you very much for your time this afternoon.

Ms Rich—Thank you.

Ms Guthrie—Thank you for listening to us.

[3.06 pm]

BERGMAN, Mr David, Assistant Secretary, Bankruptcy Policy Branch, Attorney-General's Department

INGA, Ms Giulia, Official Receiver, Insolvency and Trustee Service Australia

MITRA, Mr Dipen, Assistant National Manager, Information Registry, Insolvency and Trustee Service Australia

POPPLE, Dr James, First Assistant Secretary, Civil Law Division, Attorney-General's Department

CHAIR—I welcome representatives from the Attorney-General's Department and the Insolvency and Trustee Service Australia. I remind people that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or a minister. This resolution prohibits only questions asking for opinions; it does not preclude questions asking for explanations of policy or factual questions about how and when policies were adopted. I remind you that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for that claim. We have a submission from the Insolvency and Trustee Service Australia, which is No. 13. Ms Inga, do you need to make any changes to that at all?

Ms Inga—No, I do not need to make any changes.

CHAIR—All right. I invite each of you to make an opening statement, and then we will go to questions. We are going to start with you, Dr Popple.

Dr Popple—Thank you, Chair. I just have a few opening remarks. The principal purpose of the amendments in this bill is to modernise the national personal insolvency scheme and to make it more efficient. The provisions contained in this bill have been the subject of extensive consultation. Industry stakeholders were consulted early last year. After those discussions, the Attorney-General released an exposure draft of the bill and invited interested parties to make submissions. The government received submissions from a wide variety of stakeholders, including creditors, financial counsellors and members of the public. I note that many of those stakeholders have also made submissions to this committee.

The proposal to increase the threshold for creditor petitions to $10,000 has been the subject of the most stakeholder comment on the bill, including at today's hearings. Generally speaking, creditors and industry groups who represent creditors are against increasing the threshold to $10,000, although some creditors are not opposed to a smaller increase. By contrast, community sector organisations, consumer advocacy groups and financial counsellors are very supportive of an increase to at least $10,000. The government has balanced these competing views and decided on a threshold of $10,000. It believes that that threshold is appropriate given the magnitude of the consequences that bankruptcy has for a debtor, the cost and complexity of bankruptcy proceedings compared with other available debt collection methods and the increase in levels of consumer debt.

Opponents of the proposed increase say that it would make it more difficult for creditors to collect debts. The government is conscious of the importance to business, especially small business, of the prompt payment of bills. However, the government's view is that bankruptcy should be a last resort for creditors and debtors alike. The bankruptcy system should not be used to—in the words of a witness you heard from earlier this afternoon—pursue small-value debts. Creditors have other options available to collect small debts and should have systems in place to manage the debts owed to them. These options include negotiated payment arrangements, civil debt recovery, garnisheeing income and seizing assets. These are more appropriate options for recovering small debts than bankruptcy, and they are being used. Last financial year only 391, which is about 20 per cent, of sequestration orders related to debts between $2,000 and $10,000. There are approximately 1.93 million small businesses in Australia. And, of course, small business can be a creditor or a debtor.

I want to turn now to the proposal to increase the stay period from seven days to 28 days for declarations of intent to file. This proposal has also attracted considerable attention from stakeholders. In their submissions community sector organisations were unanimous in their support of this proposal, with some saying that the amendments did not go far enough. Creditors and industry groups who represent creditors generally agree that there should be an increase, but most of them argued for a smaller increase. The government believes a smaller

increase in the stay period to 14 days or to 21 days, for example, would not give debtors enough time to make a considered decision. There are long waiting lists for appointments with financial counsellors and if a person has multiple creditors it may take some time to negotiate with all of them. Creditors will also benefit from the new requirement that the official receiver must notify them when a declaration of intent is lodged. This allows creditors to be proactive in negotiating with debtors who can then possibly avoid bankruptcy. In addition, the requirement to file a simple statement of affairs with a declaration makes it more likely that debtors will have considered their situation and received advice before deciding what steps to take next. Of course, it will always be open to creditors and debtors to reach a negotiated agreement in less than 28 days.

I would also like to point out that creditors are likely to benefit from the proposed 20 per cent increase in the thresholds for debt agreements. This will give more debtors access to debt agreements. Debt agreements provide, on average, far superior returns to creditors than bankruptcy. In 2008-09, 60c in the dollar—this is dollars actually paid to creditors, contrary to what you have heard from witnesses earlier this afternoon—was paid through the agreement system. That compares with 1.34c in the dollar for all bankruptcies. You can find those figures in the ITSA annual report 2008-09, on pages 46 and 35 respectively.

Senator BARNETT—So, the bankruptcy—what was that?

Dr Popple—It is 1.34c compared with 60c for debt agreements. I say again: that is actually dollars paid to creditors rather than promised to be paid to creditors. It is also fair to say that it appears that creditors have more confidence in the debt agreement system since important reforms commenced on 1 July 2007. The rate of acceptance of debt agreement proposals has increased from around 70 per cent to well over 80 per cent, and there has been a significant reduction in the termination rate, which is about six per cent down from well over 30 per cent for debt agreements made since the 2007 reforms.

In summary, the government believes that the proposed amendments are measured and that they strike an appropriate balance between the needs of all users of the personal insolvency system.

CHAIR—Thank you, Dr Popple. Ms Inga, do you want to add anything? Do you have an opening statement for us?

Ms Inga—My opening statement is very simple. My organisation, ITSA, supports the legislative amendments, and we endorse that there is a correct balance between the rights of creditors and the debtors, particularly consumer debtors. I do not propose to add to what has already been provided.

CHAIR—I have two questions I want to ask you. Some submitters have queried the nature of the calculation which led to the figure of $10,000. Can you provide us with how you arrived at that and the reasons why it is $10,000 as opposed to $5,000.

Dr Popple—As I mentioned in my opening statement, the government is seeking to balance conflicting views about where that threshold should be taking into account changes in the CPI since the level was first set and also the increase in consumer debt during that period. On that basis, the government chose $10,000.

CHAIR—Is it a random figure or is it based on some sort of calculation?

Dr Popple—It is based on the existing rate, working out what CPI would have done to that and taking into account that there is greater consumer debt since then.

Senator FEENEY—What would the CPI have done to that?

Senator BARNETT—Yes, what would it have achieved?

Dr Popple—Mr Bergman might remember.

Senator BARNETT—It was changed in 1996.

Mr Bergman—It was something less than the $5,000. My recollection—we did not spend a lot of time focusing on this as an option, because we were trying to achieve something else—is that it was somewhere between $4,000 and $5,000.

Senator BARNETT—Why don't you take it on notice and let us know exactly.

Mr Bergman—We can do that very quickly.

Senator BARNETT—Can you do it based on the 1996 $2,000 level and the 1960 level—whatever it was?

Mr Bergman—$1,500 level.

Dr Popple—We can do that.

CHAIR—Have you considered arrangements such as indexing, or a limit of $5,000 or a graduated approach, and why those might have been rejected?

Mr Bergman—We considered all of these sorts of options. Another option is not to have it in the legislation at all; to have it somewhere else. But I guess we see that this is a very significant trigger for a creditor to pull on somebody to make them bankrupt and that parliament in enacting legislation in this area is making a very significant decision about what that figure should be. So we did not really want to have a situation where it was off in subordinate legislation.

CHAIR—Okay.

Mr Bergman—In terms of indexing it, again, the change from $2,000 to $10,000 is about more than just changes in the value of money; it is about recognising the cost and complexity of bankruptcy, the overall shift in the demographics of bankruptcy and the level of debt that is owed. So we did not really think that indexation was the right approach to take, particularly when the government is already proposing to make a very significant increase on that basis.

CHAIR—What about the scenario where there might be two debts of $7,000? How does the legislation affect that scenario?

Mr Bergman—Neither of those creditors would be able to initiate bankruptcy proceedings on their own.

CHAIR—Okay, so they are taken as a single debt of $10,000 or more?

Mr Bergman—That is right.

CHAIR—So limits in the future will not be predetermined; it will stay at $10,000, will it, until it is reviewed again?

Mr Bergman—That is correct—until parliament decides to do something to it.

CHAIR—So the $10,000 is not to be indexed?

Mr Bergman—There is no proposal to index it, that is correct.

CHAIR—The previous witness had concerns about the overuse of the debt agreements and the complexity of statements of intent to file the debtor's petition. Do you have a view or a reaction to those comments that we have previously heard?

Dr Popple—I have dealt with some of those comments in my introductory remarks.

CHAIR—Yes, I was just wondering whether you wanted to expand on that.

Dr Popple—I suppose I am a bit concerned that those comments might have been influenced by a misunderstanding of the figures. It is clear to us that creditors are embracing the debt agreement process. They are certainly getting significantly higher returns through that process than they would through the bankruptcy process on the figures available.

Senator FEENEY—I certainly take your point about these statistics—and the 3.7 statistic may prove to not be helpful—but I do not think the previous witness was advocating that going bankrupt was a superior alternative to debt agreements; I think the contention was more that debt agreements had attracted a new market, if you will.

Dr Popple—Yes, sorry, I did not mean to suggest that the previous witness had said that. But I took the previous witness to be saying that debt agreements were not successful and that creditors on the whole did not find them useful. The government is of the view that debt agreements so far—we have more work to do and there is a review that has been referred to that is coming up this year that needs to do more work on debt agreements—have been successful. That is our initial view, and certainly they have enabled creditors to have a greater return on their debts than otherwise. We think there are other advantages to both creditors and debtors—crucially, that the debtor does not need to end up bankrupt in the usual sense.

Senator FEENEY—If I can persist with that just a moment longer and the question of upfront fees, for my part there is an anxiety about the activities of theoretically unscrupulous brokers in this space. Are they things that you have an eye on and that the review will encompass?

Dr Popple—I am sure that is one of the things that the review will be looking into. The arrangement at the moment, of course, is that creditors make a decision about a debt agreement, whether or not to accept one, and included in that debt agreement are arrangements for the payment of the debt agreement administrator. It is certainly possible that some debt agreement administrators might be charging more than others, but the

arrangements at the moment are that creditors get to make that decision about whether they are happy with the agreement, including those payments. But we certainly intend to look at the entire operation of the debt agreement administration system, and that will be one of the aspects.

Mr Bergman—The scheduled review is really to consider, as much as anything else, the effectiveness of the 2007 amendments. That was where we saw the introduction of a formal registration regime for administrators, to lift professional standards, as well as some changes to the way that they are allowed to be paid, which appear to have had a positive impact on the system. If you look at the figures over a number of years, the percentage of all payments made by debtors to administrators which have been paid to the administrators as fees has declined. So more of the money—much, much more of the money—is finding its way to creditors than it used to.

Senator FEENEY—So if there is growth in the industry it is because the amount of money in the system has expanded, not their proportion or their margin, if you will.

Mr Bergman—On average. I think that is right. There is a slightly separate issue with the upfront fees because they are not regulated in the same way, but they are disclosed to creditors, who can then exercise their market power in terms of whether to vote for these agreements.

Senator FEENEY—Although one wonders how much market power such a person might feel they have.

Mr Bergman—We are talking about all the major banks, the tax office.

Senator FEENEY—I have one other question. I share Senator Crossin's concern about the declaration of intent. We have heard some evidence, which you will have heard, about the expanded obligations that a person now has with a declaration of intent. I wonder if you could—if for no-one else's benefit than mine—describe what those increased obligations are and then, more importantly, what the function is of those expanded obligations. How do those expanded obligations feed into an improved debt system?

Mr Bergman—A declaration of intent to become bankrupt is a pretty serious step because it does freeze enforcement action against your debts and it also constitutes an act of bankruptcy which a creditor can then use down the track to make you bankrupt, even if you do not do it yourself. So it is a significant proceeding within the system. At the moment it only stays the debts for seven days. Extending that to 28 days means that you will have a debtor who has probably already been in some trouble and has not been paying at least some of their creditors or has been trying to make ends meet, shifting money around their accounts—all the things that we know people do to try and stay ahead.

By the time that they are actually considering lodging this declaration it is likely—or we would hope—that they have already got some advice about what their options are. Their creditors are probably already passing the point of just ringing them up and reminding them that they have not paid; they are probably starting to consider serious action. This is a unilateral action by the debtor which is now going to stay enforcement action for a whole month. They can do it once a year under the act. We think it is important that debtors recognise the seriousness of this and that they do not enter into this process lightly.

The requirement to file a statement of affairs would be a new requirement. There have been some concerns about this, which I can understand if you look at the current statement of affairs that a debtor has to file in bankruptcy, which is 30 or so pages long and very complicated. The intention here—and Ms Inga might be able to speak a little bit more about the practicalities of this—is that the debtor would file a much simpler document, which is simply to ensure that they have considered their options. Presumably, if they have had some assistance in completing it, they have got some advice and they know what it is—

Senator FEENEY—But is that a presumption you are making as a matter of public policy?

Mr Bergman—I think it is, but I think it is a reasonable presumption to make.

I would say that we would expect it is more likely that a debtor will have got some advice or some information about what their options are if they are completing this document. But it is also to avoid the risk of dissipating assets during that period, that there is a record there. The debtor has to turn their mind to a simple declaration of what their affairs are on that date. We think that is important because this is really opening up a unilateral step that a debtor can take to prevent creditors from taking action for a further 28 days when creditors have probably already been unpaid for quite some time, that they should not be able to do it lightly.

Senator FEENEY—Those are all points well made. My concern is not only the increased obligations, but how can that statement of affairs then rear its ugly head again and again and again in terms of it being

inconsistent with later statements. Can it be used in evidence against the applicant? How does it inform the department in its respective spheres of work?

Mr Bergman—It is really a bit of protection for creditors if the person does proceed to bankruptcy, because it will allow the trustee to see what the difference is between the state of their affairs when they file their declaration and the state of their affairs in the future when they become bankrupt. What has changed? Has the debtor done anything during this period to frustrate their creditors' claims? They will have to complete another statement of affairs when they become bankrupt because it is for a purpose, it is on a different form and it is at a different time.

Senator FEENEY—And then they can be called upon to explain discrepancies?

Mr Bergman—Discrepancies between the two. The actual form of this statement of affairs is a matter that would be determined by ITSA. You might pursue that further.

Ms Inga—Perhaps if I assist in this regard. As Mr Bergman has set out, the seven days increases to 28 days and there is a longer period. As we understand the public policy that allows the debtor to talk with the creditor. The current statement of affairs that is used for a debtor's petition, which is the step for bankruptcy, or completed by a debtor after a sequestration order is made, which is also bankruptcy, is about 28 pages and it is very detailed. It holds a lot of information. Administratively ITSA is currently in the process of engaging with the peak body for financial counsellors, AFCCRA, and also creditor representatives to devise a form that is very simple, that would probably not exceed three pages. That might seem lengthy—

Senator FEENEY—It sounds like a grand improvement though.

Ms Inga—but essentially we would be looking for personal details—name, address and occupation, so some of the basics—and the most important thing for each party, which is assets and liabilities. For a meaningful dialogue to take place between a debtor and creditor, you would require some information about assets and liabilities. As I said, we are in the process of engaging with parties to devise that form. We see it as a 'tick box' vehicle in relation to unsecured liabilities, and a 'tick box' in relation to assets—do I have a house, is it mortgaged et cetera. So I cannot comment or speculate as to what condition the debtor will be in at any given point in time, but we would expect that a very simple document asking for what presumably they will know in round terms and round figures would be very useful to then provide to a creditor. The other ingredient is that the form—

Senator FEENEY—As long as that is the test, as long as it is not then later assumed to be a forensic document and used in evidence.

Ms Inga—It is not being prepared on the basis of being a forensic document. And, as I said, we have already had some conversations with the peak body. We have engaged with financial counsellors. Tomorrow we are meeting with the peak body and creditors again to actually look at the forms. We have designed some, and we are trying to make them very simple—to remove the complexity but get the basic facts that are required for parties to talk to each other. The other ingredient is that, in notifying the creditor—because we will have an obligation to notify the creditor and pass on the information—it is up to the debtor whether they nominate someone to act as their representative. So that is what I would add to what you have asked.

Senator BARNETT—To pursue that one a little further: if you are making it even more simple, with a three-page document, why do we need to extend the days from seven to 28?

Ms Inga—Again, it is not for me to speculate. But there is an issue of timing, and there is an issue of how quickly a creditor can necessarily meet, engage and discuss with a debtor. The time frame, one would expect, would give more scope for some sort of meaningful dialogue than the seven days. Ultimately, I think, the seven days would be there and would be seen as, 'I want to stop enforcement on my creditor, and my next step is bankruptcy,' whereas this would give more leeway to, 'I want to stop enforcement action; I want some time to talk, negotiate and then think, "Is this the option that I want?"' because there are other options.

Senator BARNETT—Sure. I would make two responses to that, though. Firstly, that is a policy matter for the government, obviously, but you are sharing a view. Secondly, the flip side is that it provides more time for the debtor to be doing things that perhaps they should not be doing, and one of the reasons for the seven days is to get action, and fast. I have submissions here from Westpac, the Australian Bankers Association, Bartier Perry, and others who are not here today making submissions, who would say, 'It's too long; in fact, far too long.' I think either IPA or the Institute of Credit Management—I cannot recall which witness it was—also indicated that it is too long. So I wonder if there is a happy medium, particularly in light of the fact that you are reducing the complexity from a 30-page document down to three or whatever.

Dr Popple—Perhaps I might address the question. The government would, I think, say that the 28 days is the happy medium. It is not just a question of the reduced complexity of the process at the beginning—which is very important, and to be encouraged, I think. It is the fact that this gives the debtor time to make a decision about what happens next. Ideally, the debtor seeks proper financial advice and may be in a position not to go into bankruptcy and in a position to come to some agreement or otherwise satisfy his or her creditors.

Senator BARNETT—Why isn't that 60 days or 90 days?

Dr Popple—Because, again, we are balancing the period of grace that, effectively, the debtor gets through this process against the justifiable need of the creditors to be paid. It is a matter of trying to find a balance between those two things.

Senator BARNETT—The trouble is that during that period of grace, as it were, the debtor might be doing things that the debtor should not be doing.

Dr Popple—It is always possible. But there is also the possibility that during that period of grace the debtor might get themselves back on their feet and be able to provide more return to their creditors than might otherwise be the case.

Senator BARNETT—All I am saying is: you have got a number of witnesses who have put pretty strong arguments to say that it is way too long. It has been seven days for I don't know how many years—you would know better than me—and now suddenly you are multiplying that by four.

Dr Popple—Part of the reason I think is that there is a concern over debtors' access to financial advice. The existing waiting lists are longer than seven days. The concern is that they need longer than that to really get that appropriate advice.

Senator BARNETT—Some of these submissions have talked about 14 days, but all right. Did you want to say anything Mr Bergman?

Mr Bergman—There is an important difference to note, too, and that is that creditors are going to be notified of this. They are not at the moment. They do not know anything about the seven days. But ITSA will notify them as soon as this declaration is made. So the creditors can actually be proactive, and if they think there is a way out of it they do not have to take 28 days to come to that.

The last point I wanted to make is in relation to the effect of this declaration being an act of bankruptcy. This goes to the question of what happens if the debtor uses that period to do the wrong thing. If they are doing that, they are also more than likely trying to not pay their debts; they are concealing assets or making other arrangements. If they then proceed into bankruptcy, that act of bankruptcy which has occurred before they actually become bankrupt, as long as it occurs within the six months prior to bankruptcy, will be the start of their bankruptcy. Everything that happened from the day that they file this declaration will be undone if they do eventually become bankrupt, which is arguably more likely if they are using that period to defeat their creditors.

CHAIR—We all know that is the law and the theory, but the practice is that things go missing and they get lost, and money goes to other places.

Senator FEENEY—This process was never a remedy for that phenomena.

CHAIR—What is the likely effect of this on the number of bankruptcies? Will it go up or down?

Mr Bergman—The effect of the whole bill?

CHAIR—Yes, the bill.

Mr Bergman—There is nothing in the bill that is specifically aimed at pushing the numbers up or down. Taken as a whole, if you look at the fact that debtors and creditors have a more reasonable opportunity to negotiate and some creditors, although not very many, may not be able to use bankruptcy, there may be a small decrease in the numbers. But bankruptcy numbers are driven by a whole lot of things, not just by what the bankruptcy law says.

CHAIR—Is the answer that you do not know or that you think the number might go up or it might go down?

Dr Popple—The answer is that the government's intention in this legislation is not to affect the bankruptcy numbers in that way; it is to improve the bankruptcy system. For reasons Mr Bergman has explained, some of those may have the effect of reducing the bankruptcy numbers, all other things being equal. But there are so

many other things that affect the bankruptcy numbers that we could not possibly say that this bill will affect them in any particular way.

CHAIR—Let me ask it in a different way: all other things being equal and if this legislation is passed are the bankruptcy numbers likely to go up or down?

Dr Popple—For the reasons Mr Bergman explained, I would say ever so slightly down, all other things being equal—but that is the difficulty.

CHAIR—A submission from the Bankers Association says:

In our earlier response to the May 2009 proposals we were not supportive of the proposal to reduce the period of bankruptcy for first time bankrupts to one year. Our concern was that while the Government's well intentioned objective had been to lessen the incidence of bankruptcy, we believed that overseas experience indicated that the proposal could have the completely opposite effect with a likely in increase in bankruptcy numbers.

Dr Popple—That proposal is not part of the bill. The proposal that is referred to in that paragraph is not part of the legislation that you are considering.

CHAIR—What is it about then?

Mr Bergman—In May 2009 we had circulated a paper canvassing a range of amendments, some of which have found their way into the bill. One of those was a proposal to reduce the standard period of bankruptcy for a first-time bankrupt from three years to one year. Following that consultation process, the government decided not to proceed with that change. This paragraph is suggesting that if the government had gone ahead with that amendment then it would be likely that bankruptcy numbers would have gone up, contrary to what the ABA perceived to be the policy intent.

CHAIR—Thank you for clearing that up.

Senator FEENEY—So you have already won that one!

CHAIR—That is sorted. Thank you for that. Can you provide some comparisons with the experience overseas—say, with the US, the UK and New Zealand—in terms of similar bankruptcy law indicators like the threshold, for example, and the 7-day and 28-day time frames? I am happy for you to take that on notice.

Dr Popple—I think we will have to take that on notice. We have some overseas information, but it does not go to that question.

CHAIR—Could you also provide any other overseas examples from your research regarding bankruptcy numbers versus debt agreements? They are the two key indicators, are they not: the number of bankruptcies and the number of debt agreements?

Mr Bergman—It is difficult to make a comparison because debt agreements are unique to the Australian system. Where a similar option exists in other countries, it is not necessarily in the same circumstances.

CHAIR—Okay. Could you at least focus on the threshold and the time frames. From Senator Feeney's earlier question, is the 3.7 per cent of debt agreements completed a correct figure or are you going to take that on notice and check it?

Dr Popple—It is not correct.

Senator BARNETT—I am aware of Dr Popple's advice regarding the 60c in the dollar versus $1.34 out of 100—

Mr Bergman—It is not correct. I have not been able to ascertain where the 3.7 per cent comes from. It is not referred to—

Senator BARNETT—How many debt agreements are completed each year?

Mr Bergman—There is a table—

Senator FEENEY—Perhaps you could provide us with some statistics that make that picture a little clearer than—

Mr Bergman—There is a table—

Dr Popple—We could point you to that but I think that it does need a bit of explanation because of the length of some of the debt agreements and their impact on those figures.

Mr Bergman—I am looking at the Inspector General's annual report on the operation of the Bankruptcy Act for 2008-09. At table 26, which is on page 45, it tracks what has happened to debt agreements that were

made from 2003 onwards. One of the problems with the way that this information has been presented—including, in my opinion, by a witness earlier today—is that when it shows the number of debt agreements completed in a particular year it is referring to the number of debt agreements which were made during that year and also completed during that year, because this is a cumulative table. It is the progress of debt agreements over a number of years.

One figure which has been quoted in some of the submissions as evidence of failure of the debt agreement system is that in the 2008-09 year only 29 debt agreements were completed. What that means is that 29 of the debt agreements which were made in that year were completed. So that includes debt agreements that were made a week before the end of the year. Given that most debt agreements run for three, four or five years, you would not expect the figure to be very high.

Senator BARNETT—What do they normally run for?

Mr Bergman—Three, four or five years. It varies. It is up to—

Senator BARNETT—Of those that run three, four or five years, what percentage are completed?

Senator FEENEY—Over the course of their life.

Senator BARNETT—You can take it on notice. We do not need it now.

Mr Bergman—I just need to explain something else about this. This table actually shows that. It will tell you, for example, that of debt agreements completed in 2005-06, which might be a useful starting point, only 31 per cent were completed. But that was before the amendments took effect in July 2007. We have already seen that those amendments have resulted in a very significant reduction in the failure rate. So this table is not really giving a very useful picture, in some ways, because it is showing a mixture of the old and the new systems.

Senator FEENEY—Are you saying that the failure rate is more like 70 per cent rather than 97 per cent?

Mr Bergman—No; all I am saying is that 31 per cent of debt agreements that were entered into in 2005-06 had been completed as at the end of the 2008-09 financial year.

Dr Popple—The remainder are not necessarily failures, because they might be continuing even now. We would point—as I did earlier—to the level of payment made under those agreements, as examples of their success.

Mr Bergman—As an example of how the figure is different because of the change in the law—

Senator BARNETT—Mr Bergman, that is fine. I know you are trying to explain this to us; it is not rocket science for us—

Senator FEENEY—Maybe it is.

Senator BARNETT—Let me put it another way. For any debt agreement of a duration of five years or less, can you advise what percentage have been completed? Take it from the 2003-04 year.

Mr Bergman—No.

Senator BARNETT—You cannot advise that?

Mr Bergman—I do not know how many of these agreements ran for five years or less because this is just a total figure. I think it would be fair to say that almost all of these agreements would be in the category of less than five years and that of all debt agreements made in 2003 and 2004, 58 per cent had been completed by the end of last year. Of those agreements made in the following year, 2004-05, 47 per cent had been completed. This table is tracking the progress of those agreements.

Senator BARNETT—But still, that is not a great percentage. If it is from 2003-04 and you had 58 per cent by last year—

Mr Bergman—This is where I say that it is very important to remember that on 1 July 2007 there were significant amendments enacted which have already stemmed the formal termination rate. So those agreements from 2003-04, 2004-05 and 2005-06 include debt agreements made under the old system when there was no regulation, you could do all these strange deals with creditors to try and meet individual creditor's demands and there was no scrutiny or very little scrutiny of the administrators' fees. We know that the failure rate was very high.

Senator FEENEY—What we really need to do is track the failure rate rather than track the completed--

Mr Bergman—And I can tell you, for example, that, when we did the review of debt agreements prior to the 2007 amendments, the formal termination rate was around a third, but only about a third of agreements were actually completed. There was this other group that just went off into limbo—people lost interest in them. So the actual termination rate was over 30 per cent. If you only look at debt agreements made under the new system, from 1 July 2007, until either the end of October or the end of November last year—so we are talking nearly 2½ years—6.1 per cent had been terminated.

CHAIR—So the system has got better since the changes in 2007.

Mr Bergman—That is right, and you would expect that there would be some failures because people's circumstances change and things happen to them—they might lose a job or get a sick child—that mean they cannot keep up the payments. In our view, those numbers demonstrate that the failure rate has diminished very significantly. So the way that the numbers are moving at the moment would suggest that, in a year or two, when we look at that table again and see what has happened to agreements that have been in place since July 2007—over four or five years—a much higher percentage of those will have been completed than had been under the old system.

Dr Popple—Senator, that is the reason, of course, why we think this year is the appropriate year to conduct that more detailed review of debt agreements—particularly the amendments made in 2007.

Senator BARNETT—When is that review due for completion?

Dr Popple—The undertaking from the Attorney was that it would happen in 2010, and we are certainly on track to achieve that.

Senator BARNETT—Can you give us any more details?

Dr Popple—We do not have a more detailed timetable at the moment.

Mr Bergman—Senator, the announcement was that there would be a review three years after the commencement of the amendments, which would mean it will happen soon after 1 July 2010.

Senator BARNETT—So it has not started yet.

Dr Popple—We have done some initial work.

Mr Bergman—Just some preliminary work so we can talk about what is going on in the system. But the commitment was for it to happen three years after commencement of those amendments.

Senator BARNETT—So it is going to start this year.

Mr Bergman—That is right.

Senator BARNETT—When will it finish—this year?

Dr Popple—We anticipate finishing this year as well, yes.

Senator BARNETT—Do you anticipate taking or calling for submissions?

Dr Popple—Yes.

Mr Bergman—I think we will look to engage very actively with the industry because there is a significant amount of interest in debt agreements.

Senator BARNETT—Who is undertaking the review?

Dr Popple—The department. We will rely heavily on the information that ITSA is able to provide us about statistics et cetera and, as Mr Bergman says, engaging with stakeholders.

Senator BARNETT—One of the arguments from an earlier witness is that we should not be doing radical reform prior to that review being completed. Do you subscribe to that view?

Dr Popple—I suppose I would not describe what these amendments do to debt agreements as 'radical'.

Senator BARNETT—So this is consistent with having a review.

Dr Popple—Yes.

Senator BARNETT—On previous occasions and at estimates I have asked about the latest numbers on bankruptcies and debt agreements. I am just wondering if you are happy to either table that now or perhaps on notice give us the latest figures—we have some figures in the explanatory memorandum which might be on a website somewhere—for the purposes of doing the committee report. I asked earlier about the impact of the

global financial crisis on bankruptcies and debt agreements and got a verbal response, but we have the experts at the table so, if you are happy to, could you either table that or perhaps take it on notice?

Ms Inga—I have information that can be tabled. It is not a problem in terms of—

Senator FEENEY—Does that mean that you are going to spare us the question at estimates now, Senator?

Senator BARNETT—I do not know—it depends on the answer!

Ms Inga—The figures have already been released, and we have published them. They are the December quarter figures. If that is what you are referring to—

Senator BARNETT—I want the latest figures, so if you have them there then perhaps you could give them to Monica.

Ms Inga—All right.

Senator BARNETT—That would be good. Then, while you are doing that, could you tell me about this: witnesses said earlier that there had been a significant increase, but perhaps not as large as they had expected, as a result of the global financial crisis. What is your response to that question?

Ms Inga—My response would be that in terms of total insolvency—including bankruptcies, debt agreements and also personal insolvency agreements—there has been an increase of around 11 per cent.

Senator BARNETT—Over what period?

Ms Inga—As against the last financial year.

Senator BARNETT—So December to December or—

Ms Inga—No, we do it by financial year. So it is 2008-09 in comparison to 2007-08. As I said, the increase is 11 per cent. I think that in the submission it has been noted that total insolvency typically has progressively been tracking at about a six per cent increase. Perhaps some of the relevant statistics addressing your question are that—again comparing 2008-09 to 2007-08—there was around a six per cent increase in bankruptcies, whereas there was a 29 per cent increase in debt agreements and a 48 per cent increase in personal insolvency agreements.

Senator BARNETT—Wow!

Ms Inga—However, personal insolvency agreements, in a comparative sense, only represent one per cent of total insolvency activity.

Senator BARNETT—Nevertheless, even the 29 per cent increase in the 2007-08 to 2008-09 period—is that right?—

Ms Inga—Correct.

Senator BARNETT—is still a very large increase.

Ms Inga—In a comparative sense, yes.

Senator BARNETT—Would you say that that increase has likewise continued from 2008-09 to 2009-10? I know we are only halfway through, but we are into January.

Ms Inga—No. I just gave up my quarterly stats then. Just bear with me one moment. What the quarterly statistics are showing in terms of total insolvency activity is that it is tracking at an increase of around two per cent—I am using round figures. Bankruptcy is increasing by two per cent. Debt agreements are actually tracking negatively.

Senator BARNETT—What is that figure?

Ms Inga—Minus 1.86 per cent. Personal insolvency agreements are significantly increasing. What we are talking about there with personal insolvency agreements, which are under part 10, is, for the quarter—that is what I am presently quoting—a movement of 62 as against 156.

Senator FEENEY—They are relatively small numbers, aren't they?

Ms Inga—Exactly. The only other observation that my colleague suggested I make is that the December period—that is the quarter of October, November and December—is traditionally, perhaps, a bit quieter than, say, another quarter.

Senator FEENEY—Enjoy Christmas and then panic!

Senator BARNETT—All right. Thanks for that. I will go on. We had evidence today from the IPA and the AICM regarding the $10,000 threshold, so perhaps we could just talk about that for a minute. They argued that there was not adequate evidence in support of that. The explanatory memorandum sets out the number of insolvencies, debt agreements and bankruptcy sequestrations, but it did not include the number of debts or the amount of assets that were referred to. That was in evidence from the IPA and the Institute of Credit Management this afternoon. Can you provide that evidence? Firstly, what is your response to that argument? Secondly, can you provide that evidence to support the increase to $10,000?

Mr Bergman—I would suggest that it is irrelevant. The reason we have not conducted that sort of research or looked at that evidence is that it is not relevant to the policy intent here. The policy intent here is to say to a creditor who is owed less than $10,000, 'We are taking away the right for you to commence bankruptcy proceedings.' It does not matter to that creditor what the overall indebtedness is. If, for example, I am owed $2,000 and you are owed $100,000 and you are not in a situation where you are undertaking bankruptcy proceedings, then why not? Why should I be allowed to commence the proceedings when I am owed $2,000? In its starkest sense, that is what this is about.

I think, to clarify, the evidence that you are referring to—I heard what the IPA said—was about the number of cases where the petitioning creditor's debt was between $2,000 and $10,000 and what the total debt and asset position was in each case. We have not looked at that. We would have to discuss with ITSA how easy it would be to extract that information. I suspect that it would not be desperately easy, and, as I said, we have not done it because we do not believe it is relevant.

Senator BARNETT—ITSA is here. Perhaps Ms Inga could respond to that and advise the committee.

Ms Inga—I want to clarify what point I am responding to. Would you mind clarifying that?

Mr Bergman—The question is: what if we just take out the number of bankrupt estates where the petitioning creditor's debt was between $2,000 and $10,000 and then analyse in those matters what the overall debt position was for each of those bankruptcies—and assets as well, I think I heard you say, Senator?

Senator BARNETT—Yes.

Ms Inga—I think we need to do an analysis of that. I am in a position to comment on the number of creditors petitions, for example, that were presented and accepted for the last financial year—2008-09. I can tell you the percentage of those petitions that were $10,000 or more, but I do not know that I can do the rest of the analysis now.

Senator BARNETT—Why don't you tell us that?

Ms Inga—I am happy to tell you that.

Senator BARNETT—We are really interested in $10,000 or less, with respect. To clarify, Dr Popple, I think that you said in your introductory statement—I do not want to misquote you—that there were 391 below the $10,000 figure for the last financial year.

Mr Bergman—In the last financial year, of the sequestration orders, 391—which is about 20 per cent—related to debts of between $2,000 and $10,000.

Dr Popple—As Mr Bergman has explained, that means that the petitioning creditors had debts of between $2,000 and $10,000. But it does not say anything about the total indebtedness.

Senator BARNETT—No. That is exactly the point, I think, that Mr Murray from the IPA is making. Perhaps Ms Inga wants to add value to that.

Ms Inga—I can make a general comment that in the given year 2008-09 some 12,000 bankruptcy notices were issued. The issue of a bankruptcy notice may eventuate as a creditors petition. The number of creditors petitions issued in 2008-09 in round figures—and I can give you the absolute figure—was 3,600. So there were 3,600 creditors petitions. Of those creditors petitions, there were, in round figures, some 2,000 sequestration orders, and the sequestration order is the resulting bankruptcy, not the creditors petition. The creditors petition is presented and then the sequestration order is made.

Backtracking to bankruptcy notices, approximately 17 per cent, in round figures, of bankruptcy notices resulted in a bankruptcy. Going to the question of the number under $10,000, of the 3,643 creditors petitions presented and accepted in 2008-09, 23 per cent, in round figures, were between $2,000 and $10,000.

Senator BARNETT—Are you able to answer the question I put to Mr Bergman and Mr Bergman's question to you that came from sideways in terms of some sort of analysis of that 23 per cent?

Ms Inga—We would need to take that on notice. I do not have that information at my fingertips. We would need to look into that.

Senator BARNETT—Frankly, I think it was a good question from Mr Murray and the IPA, because you are only looking at one part of this whole picture and you are not looking at the total picture. You are looking at the creditors' interests and the value, whether it be $5,000 or $8,000 or up to $10,000. You are not looking at the total picture for the debtor and the total amount of debt that the debtor has, nor the total amount of assets that the debtor has. You have put an argument to this committee that at least it should be $10,000. But what are the arguments in favour of that and what are the arguments against it? That is what we have got to weigh. It is a very important question.

Mr Bergman—I guess we are looking at it from the point of view of that particular creditor, because that is exactly about what that creditor is doing. They have no idea of the overall debt position of the debtor or even at that stage necessarily their complete asset position.

Senator BARNETT—I have got a letter here from Stephen Mullette, Executive Lawyer, Bartier Perry, who has made a quite comprehensive submission to our committee. Frankly, his submission is quite persuasive. He does a lot of work for, presumably, small business and the like. His second last paragraph says:

It is respectfully submitted that there has been no case made for any change to the threshold amount.

His argument, which is similar, I think, to that of Mr Murray and others, is that there needs to be evidence to support it. He is quite firm in his views about it. I am not going to go on about that. Obviously, that is on the public record. Then we have got the Westpac submission and we have got the Australian Bankers Association submission and they have got problems with the 28 days, which we touched on earlier, and the $10,000. They do not support the $10,000. They think it should be $5,000. It should be reconsidered, they say, and they put arguments in favour of that. Our concern is that we do not have submissions from small business associations. For whatever reason they have not put in a submission, whether it be COSBOA, ACCI or some of those other groups. That is a bit problematic for us. We have got to think through those issues.

Mr Bergman—On that point, I should say we did attempt to engage with the small business sector through—I will get this wrong if I try—whichever is the Commonwealth department that looks after the Office of Small Business. We released details of the exposure draft in the consultation as to that on the business.gov.au website to try to draw some—

Senator BARNETT—What did they say to you when you talked to them?

Mr Bergman—We had no response.

Senator FEENEY—I would anticipate that on both sides.

CHAIR—Senator Barnett, are you nearly finished?

Senator BARNETT—We are literally out of time so let me be very quick. I refer to the up-front fees issue that was raised earlier. Have you got a response as to whether that is actually happening and, if so, to what extent that is happening?

Dr Popple—Sorry, Senator, but was that in relation to debt agreements?

Senator BARNETT—Yes, and the Consumer Credit Legal Centre and the Consumer Action Law Centre both put those views, being financial counselling witnesses.

Dr Popple—If I remember those, I think those were concerns they were expressing about the whole debt agreement process. None of the amendments that we are talking about here go to that.

Senator BARNETT—Do they have a valid concern? Are up-front fees being charged?

Dr Popple—They certainly are; yes.

Mr Bergman—Administrators are charging up-front fees. Whether that is a thing to be concerned about is something else. I think the question is about the level of the fees and what that is doing to returns to creditors. It is an issue that will inevitably come up when we do a proper full-scale review of debt agreements later in the year.

Senator BARNETT—Finally, I note that in their submissions the ABA and Westpac talk about other reforms that are required: improved financial literacy and a national debt counselling service. Have you given consideration to either of those two initiatives? What is the government's response to that? In particular, what is the merit of establishing a national debt counselling service?

Mr Bergman—I think we are aware of those suggestions—that is about as far as we could say that we have taken it at this stage.

Senator BARNETT—I think there is merit in some of those views and I draw them to your attention.

Dr Popple—In response to the point you made a moment ago, Senator Barnett, about some submissions saying that there was no evidence backing the government's proposal to move from $2,000 to $10,000, it is still of course the case that the government has said that it believes it is not appropriate that a person can be made bankrupt for a debt of merely $2,000. That is the fundamental driving policy threshold behind that, and the government has chosen $10,000. I understand there are arguments for and against $10,000 as opposed to $5,000 as opposed to something else more than $2,000, but it is not true to say, as you quoted there from one of those submissions, that there is no reason to move it from $2,000 and above. There is at least a stated policy reason that the government has given.

Senator BARNETT—I will make this my final question. The IPA have concerns about drafting errors, referred to on page 7 of their submission, and I think even the chairperson raised that issue with them earlier. Have you responded to those matters?

Mr Bergman—We are aware of those but we are not considering them in the context of this bill. That is all I can say.

Senator BARNETT—Do you agree with them?

Mr Bergman—I only recall the details of one of them, and it is an error; I will admit that. For the other two, I do not know that a flaw exposed by a High Court decision is actually a drafting error. I think that is probably in a different category.

CHAIR—It is something more complex to be considered at a later time.

Senator BARNETT—So you do not think they can be fixed in this bill.

Mr Bergman—I do not think they can be fixed in this bill, but we have them on record, as we do other technical suggestions to change in the future.

CHAIR—So you know about them. I thank the four of you for your evidence and your submissions and for giving us your time this afternoon. It is most helpful and we appreciate it.

Committee adjourned at 4.07 pm