



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

24 February 2022

Manager - Bankruptcy Team
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: Bankruptcy@ag.gov.au

Your ref:

Dear Sir/Madam,

Submission in response to possible reforms to the bankruptcy system

The Australian Collectors & Debt Buyers Association appreciates the opportunity to provide a response to the Attorney-General's consultation: *Bankruptcy system – options paper*.

Please do not hesitate to contact the writer to discuss any aspect of the attached Submission.

Yours sincerely

AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

A handwritten signature in black ink, appearing to read 'Alan Harries', written over a circular stamp or seal.

Alan Harries
CEO

Email: akh@acdba.com



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

***Submission to Attorney-General's Department
Possible reforms to the bankruptcy system***

February 2022

Introduction

Australian Collectors & Debt Buyers Association (ACDBA) welcomes this opportunity to comment on the *Bankruptcy system - options paper* released for consultation by the Attorney-General's Department on 27 January 2022.

ACDBA was established in 2009 for the benefit of companies who collect, buy and/or sell debt - our members (refer Appendix 1) represent the majority of the collection market in Australia.

Accounts handled by ACDBA members are either on the basis of contingent collections or debt purchase collections. The core business of our members within the financial services industry is in the credit impaired consumer segment, whether as collectors or debt purchasers, working with consumers in default of their credit obligations. Our members do not provide financial advice.

Contingent collections

Contingent collections refer to pursuing the recovery of accounts on behalf of a creditor under a "principal and agent" agreement for an agreed fee. At all times, the debt is owned by the creditor. Creditors issuing instructions for contingent collections include governments, statutory authorities, financiers, insurers, telcos, utility providers, other corporations, strata body corporates, small business and individuals.

Debt purchasing

The business functions of contingent collectors and debt purchasers are exactly the same. The only difference between them relates to the ownership of the debt.

Debt buyers are involved in purchasing charged off or non-performing accounts being debts where the credit provider has been unable to collect and where no further credit will be extended. The credit provider generally writes the debts off and assigns its rights to the debt buyer.

Accounts assigned to debt purchasers typically involve debts where an acceleration clause in the financial agreement has been triggered by the customer's default in making repayments.

Many customers with accelerated debts are in hardship giving rise to complex, contested and unresolved issues. Debt purchasers are specialists in dealing with and managing hardship as they almost exclusively interact with customers in some form of financial difficulty.

Perspectives

Maintaining the framework of the Bankruptcy Act 1966 and associated legislation regulating personal insolvency is critical to assist Australians in severe financial difficulty to resolve unmanageable debt while supporting affected creditors through a fair and orderly distribution of the bankrupt's available assets.

An essential element of this framework is the length of the default period for bankruptcy: too long a period being onerous and punitive; too short a period undermines other options available for consumers to work with creditors to resolve their financial difficulty.

Recognising bankruptcy proceedings can have a significant impact on vulnerable debtors, it is appropriate to also recognise not all debtors are vulnerable: there are some who have available and ready funds to pay their obligations but refuse to do so.

ACDBA does not support reducing the default bankruptcy period to one year. The existing three year period we submit strikes an appropriate balance by motivating individuals to take every reasonable available step to minimise the prospect of bankruptcy - the proposed reduction to only one year undermines this motivation.

ACDBA supports the proposed return to a 5 year term for debt agreements on the basis the existing 3 year default term has not always supported a commercially acceptable return being available to creditors and this appears to have contributed to the decline in the formation of new debt agreements.

ACDBA supports proposed requirements to provide and collect information about pre-insolvency advisors and advice as a sensible strategy in the interests of discouraging and ultimately eradicating the situation of untrustworthy advisors providing pre-insolvency advice intended to defeat the legitimate interests of creditors.

Responses

Rather than separately making a submission and completing the online survey tool, we respond below to both questions raised in the options paper and/or in the online survey tool to ensure the provision of a comprehensive commentary responding to the matters raised in the consultation:

Reduce bankruptcy to one year

Question: Please provide any views you have about reducing the default bankruptcy period from 3 years to one year.

ACDBA does not support the proposed reduction in the default bankruptcy period from three years to one year.

Over the past 25 years there have been many changes to the regulatory and financial landscape substantially impacting and re-balancing the rights of debtors and creditors. Changes have included:

- Enhancements to laws relating to the provision of financial services, utilities and telecommunication services such as the introduction of the *National Consumer Credit Protection Act* in 2009 and the *Australian Consumer Law* in 2011 including unfair contracts and unconscionable conduct
- Improvements in consumer access to internal dispute resolution and external dispute resolution processes, including:
 - Establishment of the Australian Financial Complaints Authority (AFCA) in November 2018 to consider and resolve complaints from consumers and small business against Australian financial services licensees and credit licensees
 - Establishment of industry specific EDR & ombudsman schemes such as the Telecommunications Ombudsman and state & territory energy ombudsmen
- Development of industry Codes of Practice including for banks & other financial service providers, utilities and telecommunication services – subscribers to many of the codes are required to consider initiating bankruptcy actions in only the most egregious of situations
- Publication and ongoing development of the joint ACCC/ASIC *Debt Collection Guideline: for collectors & creditors*, first published in 2005 and most recently updated in 2021 – the guideline being intended to assist creditors to ensure their in-house and contracted collection activities are compliant with consumer protection laws

- Extensive development of online government resources for consumers including:
 - ASIC's moneysmart.gov.au helping Australians of all ages, backgrounds and incomes to take control of their money with free tools, tips and guidance
 - ACCC's extensive online resources for consumers
 - Treasury's consumer.gov.au providing information and resources on the Australian Consumer Law

These developments substantially shifted the responsibility for individual financial difficulty to creditors.

Appropriate and fair enforceability of financial and other contracts is a critical element underpinning the infrastructure supporting Australia's market economy and entrepreneurship, facilitating ongoing viable investment of capital, labour and other inputs.

If the situation prevailed where increasingly more debtors were forgiven their obligations without consequence through bankruptcy for the very short period of one year, in order to preserve their margins, it is inevitable creditors will simply increase the cost of credit for those consumers who do repay their debts. This would be a perverse outcome of the proposed reduction in the bankruptcy period.

The longstanding rationale behind providing an avenue for consumers to discharge their debts after a limited period of bankruptcy is a balanced compromise between maintaining sufficient contractual certainty for creditors and recognising the economic and social importance of providing individuals with a pathway to redeem themselves after financial difficulty. Creditors recognise the initiation of bankruptcy proceedings is a serious last resort given the potential repercussions for an individual consumer.

The existing three year default bankruptcy period we submit strikes an appropriate balance by motivating individuals to take every reasonable available step to minimise the prospect of bankruptcy. We are concerned the proposed reduction in the default bankruptcy period to only one year undermines this motivation and ultimately will reduce the certainty of contracts.

We respectfully submit it is incongruous in light of the developments detailed above, that debtors would effectively be able to ignore offers of forbearance and flexibility made by creditors in accordance with the regulatory and legislative framework in favour of completely extinguishing all debts by entering a very brief period of bankruptcy.

By way of example we note financial services, utility and telecommunication providers are required in circumstances of financial hardship to agree to any reasonable forbearance plan.

If an individual consumer in financial difficulties is unable to reach agreement with their provider, the matter can be escalated by the consumer to a free EDR scheme, which will independently assess the financial situation of the individual and impose a legally binding forbearance plan on the provider.

EDR costs are entirely met by the provider who is precluded from taking any legal action, including bankruptcy enforcement proceedings, as long as the individual adheres to the forbearance plan.

We submit, consumer access to such alternatives obviates justification for reducing the default bankruptcy period from three years to only one year.

Ultimately the proposal to reduce the bankruptcy term will adversely impact and limit the ability of entrepreneurs to obtain capital, labour and other inputs – the outcome of this proposal if implemented, we submit is likely to inhibit the very entrepreneurship it seeks to encourage.

Question: If the default period for bankruptcy is reduced to one year, which of the following reasons should exclude someone from a one-year bankruptcy? Please list other reasons that should exclude someone from a one-year bankruptcy and why.

Noting we are opposed to the proposed reduction of the default bankruptcy period, if adopted ACDBA supports exclusions from a one year bankruptcy for a bankrupt, where the individual has:

- been bankrupt before
- been banned as a director
- had a bankruptcy extended through an objection to discharge, or
- been convicted of certain offences under the Act.

ACDBA submits a further reason for exclusion from a one year bankruptcy for a bankrupt should be if the individual has not meaningfully accessed the financial hardship and similar support procedures offered by the material creditors.

Question: If the default period for bankruptcy is reduced to one year and this proposed exclusion applies, the government seeks stakeholder views on whether a repeat bankrupt that meets certain eligibility criteria (e.g. has satisfied all their tax obligations, has not engaged in voidable transactions, has been cooperative throughout the bankruptcy process etc.) should be able to apply for early discharge from a 2-year or 3-year bankruptcy after the first year.

No. Where a bankrupt was excluded from a one year bankruptcy, it seems incongruous to then provide for a situation where a release would be considered after one year, notwithstanding their conduct during that period.

Question: The government seeks stakeholder views on what offence provisions should exclude a bankrupt from one-year bankruptcy.

No response.

Question: The government seeks stakeholder views on what current Bankruptcy Act offences could have penalties strengthened to target abuse of one-year bankruptcy.

No response.

Promote debt agreements

Question: The government seeks stakeholder views on whether the default term limit for debt agreements should be extended to 5 years.

Notwithstanding the effect of responses during the pandemic which included temporary government measures and financier deferrals to assist with the impact on individuals, a return to a 5 year default term limit for debt agreements is warranted and supported by ACDBA as the existing 3 year default term has not always supported a commercially acceptable return being available to creditors contributing to the decline in the formation of new debt agreements and personal insolvency agreements.

Question: The government also seeks stakeholder views on whether the home ownership exception should remain to allow a debtor with a real interest in property to propose a longer debt agreement beyond a 5-year default term.

ACDBA supports removal of the home ownership exception so that all individuals proposing a debt agreement have a maximum cap of 5 years for the term of the agreement, providing creditors with a defined timeframe for consideration of the commercial merits of any proposed debt agreement. Members report the majority of debt agreements they encounter are not varied from the current 3 year term under the home ownership exception.

Question: Section 185M of the Bankruptcy Act gives debtors the flexibility to vary their debt agreement to up to 5 years if they suffer a substantial and unforeseen change in circumstances. The government seeks stakeholder views on what form this variation exception should take if the default term for debt agreements is extended to 5 years.

We understand this variation exception was introduced in conjunction with the reduction of the default term to 3 years, to accommodate individuals who due to unforeseen circumstances were unlikely to complete the debt agreement as proposed. The need for retention of a similar variation exception appears unwarranted for the proposed longer default term of 5 years.

Question: The government seeks stakeholder views on reducing the exclusion period for lodging a debt agreement proposal from 10 years to 7 years.

Our members report their experience is that consumers rarely enter into a second debt agreement - in the absence of an imperative or data supporting this change, it appears unnecessary to reduce the exclusion period.

Question: For debtors who have previously been party to a debt agreement only, the government also seeks views on providing a specific exclusion period of 5 years (rather than the proposed 7 years which would still apply to the other insolvency options (bankruptcy and PIA)).

No response.

Question: The lodgement of a debt agreement should no longer be considered an 'act of bankruptcy'.

ACDBA supports the proposed amendment to subsection 40(1) of the Bankruptcy Act so that the lodgement of a debt agreement with the Official Receiver cannot be relied upon as precondition for a creditor to commence involuntary bankruptcy proceedings as an 'act of bankruptcy'.

Target untrustworthy advisors

Question: Please provide any views you have about the proposed requirements to provide and collect information about pre-insolvency advisors and advice, as detailed below and in the options paper.

In the interests of discouraging with a view to ultimately eradicating the provision by untrustworthy advisors of pre-insolvency advice aimed at defeating the legitimate interests of creditors, ACDBA supports the proposed requirements to provide and collect information about pre-insolvency advisors and advice as a sensible strategy.

Question: In an effort to target untrustworthy advisor activity, which of the following Bankruptcy Act offences should include an offence to advise, instruct, assist or counsel any person to commit, or attempt to commit, that offence?

ACDBA supports the inclusion of an offence to advise, instruct, assist or counsel any person to commit, or attempt to commit that offence in respect to all the following Bankruptcy Act offences:

- subsection 263(1) – concealing a bankrupt's property with the intent to defraud creditors
- subsection 267(2) – making a false declaration or statement which the person knows to be false
- subsection 268(3) – making a false representation or committing any fraud when executing a personal insolvency agreement with the intention of obtaining the consent of creditors

Question: The government seeks stakeholder views on what other existing Bankruptcy Act offences should include an offence to advise, instruct, assist or counsel any person to commit or attempt to commit those offences.

ACDBA is unaware of any other existing Bankruptcy Act offences which warrant inclusion of a similar provision.

However, we submit consideration be given to creating an appropriate offence to prohibit an advisor from charging a fee where the advice provided ultimately leaves a consumer and/or their creditors in an inferior position.

Contact

For any enquiry in relation to this Submission, please contact:

Mr Alan Harries
CEO
Australian Collectors & Debt Buyers Association
PO Box 295
WARATAH NSW 2298

Telephone: 02 4925 2099

Email: akh@acdba.com

Appendix 1 - Members of Australian Collectors & Debt Buyers Association

- Axxess Australia Pty Ltd
- CCC Financial Solutions Pty Ltd
- CFMG Pty Ltd
- Charter Mercantile Pty Ltd
- CollectAU Pty Ltd
- Collection House Limited (ASX: CLH)
- Complete Credit Solutions Pty Ltd
- Credit Collection Services Group Pty Ltd
- Credit Corp Group Limited (ASX: CCP)
- Lyndon Peak Pty Ltd t/as Access Mercantile Services
- PF Australia Pty Ltd
- Prushka Fast Debt Recovery Pty Ltd
- Shield Mercantile Pty Ltd