September 2023

Personal insolvency discussion paper

Background

On 2 March 2023, the Attorney-General, the Hon Mark Dreyfus KC MP, convened a national Roundtable (Roundtable)[1] with key stakeholders across all sectors of the personal insolvency system to better understand the pressure points and potential key areas for reform.

The Roundtable brought together 23 organisations from a wide range of sectors with an interest in personal insolvency, including credit, finance, accounting, legal sectors and consumer groups. The Roundtable provided an opportunity for practitioners and groups representing both creditor and debtor interests to engage directly with Government to provide an opportunity for dialogue between key stakeholders on personal insolvency priorities and emerging issues, and to increase effective collaboration between Government and key stakeholders in the development of personal insolvency law reform.

The following five key issues were discussed at the Roundtable:

- increasing the bankruptcy threshold value from $10,000;
- increasing the period for a debtor to respond to a bankruptcy notice from 21 days;
- options for a shorter discharge period from bankruptcy for some bankrupts;
- options for easier annulment for inappropriate bankruptcies; and
- options to identify and scope measures to mitigate harms caused by unlicensed or untrustworthy advisers.

Of these five key issues, the Attorney-General's Department (the department) considers that the first two issues listed above to be priority reforms to progress in the short-term. This discussion paper seeks views on the proposals relating to these issues, and several other short-term, critical reforms to the *Bankruptcy Act 1966* (Bankruptcy Act). The remaining issues identified at the Roundtable will require further analysis and do not form part of this discussion paper, but will be considered in consultation with stakeholders at a later stage. Of these five key issues, the department has identified short-term and long-term reform priorities.

In developing this paper, the department took into consideration views expressed by stakeholders at the Roundtable, previous submissions made to the department on these issues, and data provided by the Australian Financial Security Authority (AFSA).

The department also notes the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Insolvency in Australia released its report on 12 July 2023, and that this report contained recommendations relevant to personal insolvency. The department is considering its response to this report.

Why we are consulting

The Bankruptcy Act regulates Australia's personal insolvency system. It creates a framework to allow people in severe financial stress to discharge unmanageable debts while providing for the realisation of a debtor's available assets for distribution to affected creditors.

The department is seeking stakeholder submissions on targeted short-term reform opportunities to inform its ongoing efforts to improve the personal insolvency system. These opportunities include issues identified as priorities through the Roundtable, and other proposals the department considers require short-term action. These matters are:

- an increase to the bankruptcy threshold from $10,000 to $20,000;
- an increase to the timeframe a debtor has to respond to a bankruptcy notice from 21 days to 28 days;
- a reduction in the period of time for which a discharged bankrupt is recorded on the National Personal Insolvency Index (NPII); and
- amending the Bankruptcy Act so that an 'act of bankruptcy' is not taken to have occurred where a debtor submits a debt agreement proposal to the Official Receiver, or where a debt agreement proposal is accepted by creditors.[2]

Who we want to hear from

The department is seeking submissions from stakeholders on the issues raised in this discussion paper. The discussion paper includes questions to guide feedback. However, stakeholders are welcome to provide further information and suggestions relevant to each topic presented in this paper.

While the consultation is open to all members of the public, the department would particularly like to hear from small business and consumer advocates, insolvency practitioners and peak industry organisations.

Submissions can be made through Citizen Space. Please note that the department will not publish your submission if you asked for it to remain confidential, or if the department considers (for any reason) that it should not be made public. We may redact parts of published submissions, as appropriate. Read our privacy policy to find out more.

If you have any questions about the consultation process, please email bankruptcy@ag.gov.au.

Increasing the bankruptcy threshold from $10,000 to $20,000

Discussion questions

1. **Question 1:** Do you believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to $20,000? Please expand on your response.
2. **Question 2:** If you do believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to $20,000, should there be a transition period before any reforms take effect?
3. **Question 3:** If you do not believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to $20,000, please explain whether an alternative amount should be considered for the threshold and why.

Overview

During the COVID-19 pandemic significant temporary amendments were made to the Bankruptcy Act and *Bankruptcy Regulations 2021* (Bankruptcy Regulations) as part of the *Coronavirus Economic Response Package Omnibus Bill 2020* including increasing the minimum amount of debt that can trigger bankruptcy ('the bankruptcy threshold') from $5,000 to $20,000. The temporary measures ended on 31 December 2020.

On 1 January 2021, the bankruptcy threshold permanently changed to $10,000. The policy reasons for raising the bankruptcy threshold to $10,000 were the changing value of money, the increase in levels of personal debt, to discourage bankruptcy action over small debts and to respond to the COVID-19 pandemic.

The department has considered the same economic factors with respect to raising the bankruptcy threshold to $20,000 as part of the department's proposed reforms.

The increase of the threshold to $20,000 as part of the *Coronavirus Economic Response Package Omnibus Bill 2020* considered the economic impacts of COVID-19, specifically the numerous individuals at risk of bankruptcy and Australian businesses at risk of insolvency. The raising of the threshold was enacted as a safety net to assist individuals with managing debt and as a means to avoid unnecessary bankruptcies and insolvencies.

The department notes that there may be longer term impacts on the Australian economy as it and the global economies recover from the impact of the COVID-19 pandemic. The $20,000 threshold will account for macroeconomic factors such as the cost of living, wage and economic growth, the unemployment rate and inflation generally. The increase of the threshold to $20,000 also aims to address concerns about the use of bankruptcy proceedings to pursue small debts, without reducing the general availability of credit in the economy.

Stakeholder consultation

Participants at the Roundtable discussed what an appropriate value for the bankruptcy threshold would be, with a range of views expressed including proposals to increase the threshold from $20,000 to $50,000 or to

annually index the threshold. There was a general support for the threshold to be lifted, however there were contested views on what the threshold should be.

Participants discussed the need for the bankruptcy threshold to balance the competing needs of different system users including consumer debtors with few assets, more sophisticated debtors with more complex asset holdings and creditors (including small business owners and larger financial institutions) and the impact of a higher threshold on lending confidence.

Similarly, during previous consultations, stakeholders put forward submissions in relation to the bankruptcy threshold with some stakeholders of the view that the temporary threshold in response to COVID-19 showed that setting the threshold at $20,000 worked to prevent unscrupulous operators pursuing unnecessary and unfair insolvencies over small debts, and others putting forth $50,000 as an appropriate threshold.

Proposal

The department considers that an appropriate bankruptcy threshold value should ensure bankruptcy remains an option of last resort, while minimising the opportunities for debtors to continue to incur additional unmanageable debt.

In considering an appropriate threshold, the department has reviewed data from AFSA as to the average level of bankruptcies and notes the following:[3]

- New bankruptcies increased to 579 in March 2023 from 511 in February 2023 and these volumes are higher than the same period in 2022.
- New bankruptcies which related to a business represented 33% of all new bankruptcies. This proportion is consistent with the 2022 average.
- Most people (52.7%) had less than $50,000 in liabilities, 43.1% of debtors in bankruptcy had debt greater than $50,000.

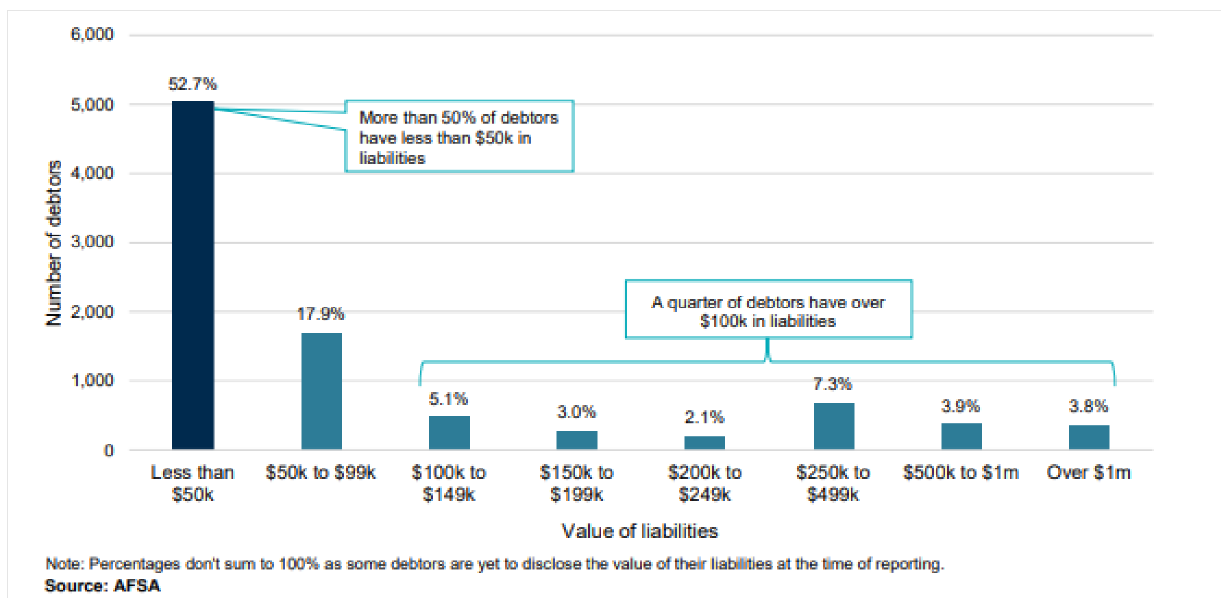

Figure 1: Debt concentration by liabilities in 2021-22.[4]

Noting that most bankruptcies had less than $50,000 in liabilities, AFSA data was used to gain a more granular understanding of bankruptcies falling within this category – to understand the potential impacts on both debtors and creditors should the threshold be raised to an interval between $10,000 and $50,000. This was done by reviewing the data from AFSA showing the numbers of new bankruptcies between the $0-$50,000 thresholds in $10,000 brackets over the past five financial years (noting the influence the temporary COVID-19 measures would have had on the data for the past two to three years).

The data showed that, of the total dollar amount of bankruptcies over the past 5 years, the median debt ranged between $41,397 to $56,361. Over the past five years, the mean debt of those entering bankruptcy increased from $289,084 in the 2017-18 to $521,071 in 2021-22.

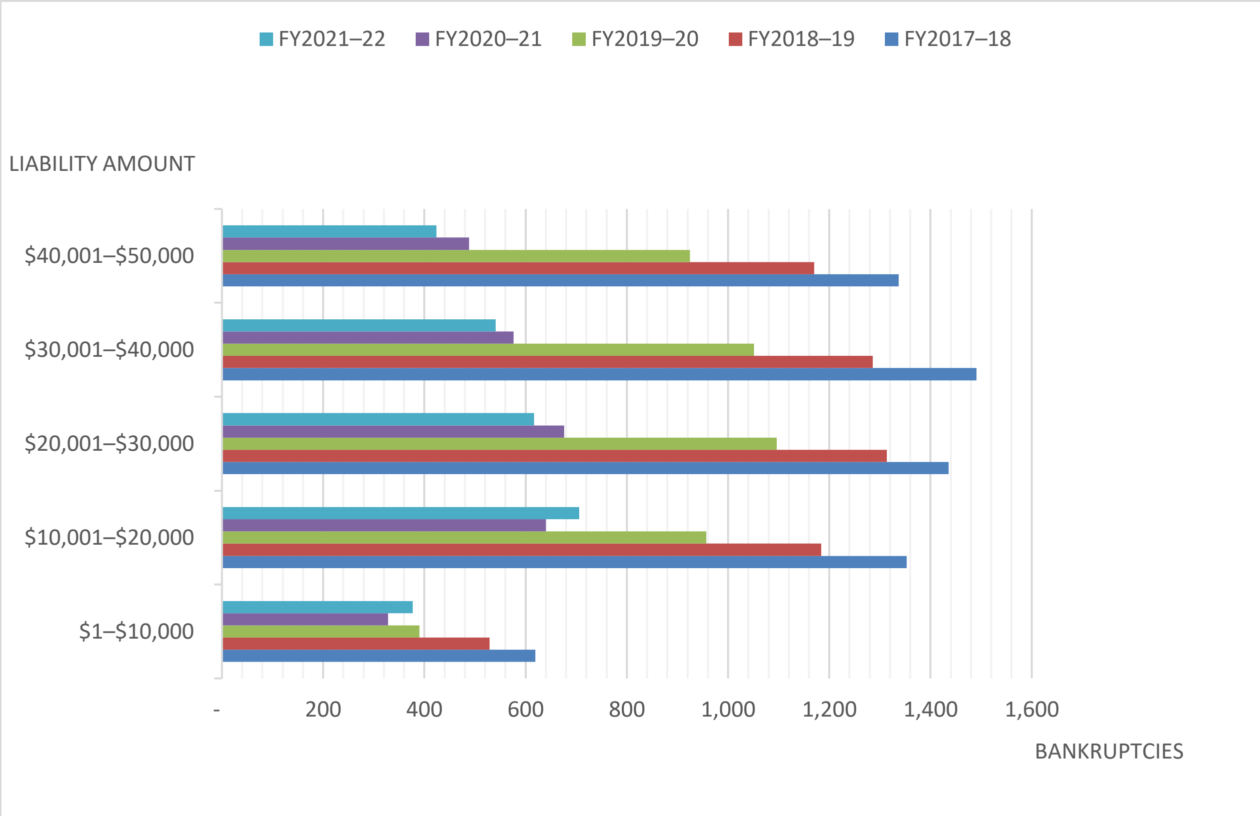

Figure 2: Total number of bankruptcies in the most recent reporting periods.[5]

Of the 5,995 bankruptcies in the financial year ending 30 June 2022, 706 debtors (representing 11.8% of the total bankrupt population) had debts greater than $10,000 but less than $20,000, 18.1% of bankruptcies in this period had a debt less than $20,000. Based on this data, should the bankruptcy threshold be increased to $20,000, 81.9% of new bankruptcies would still meet the new threshold.

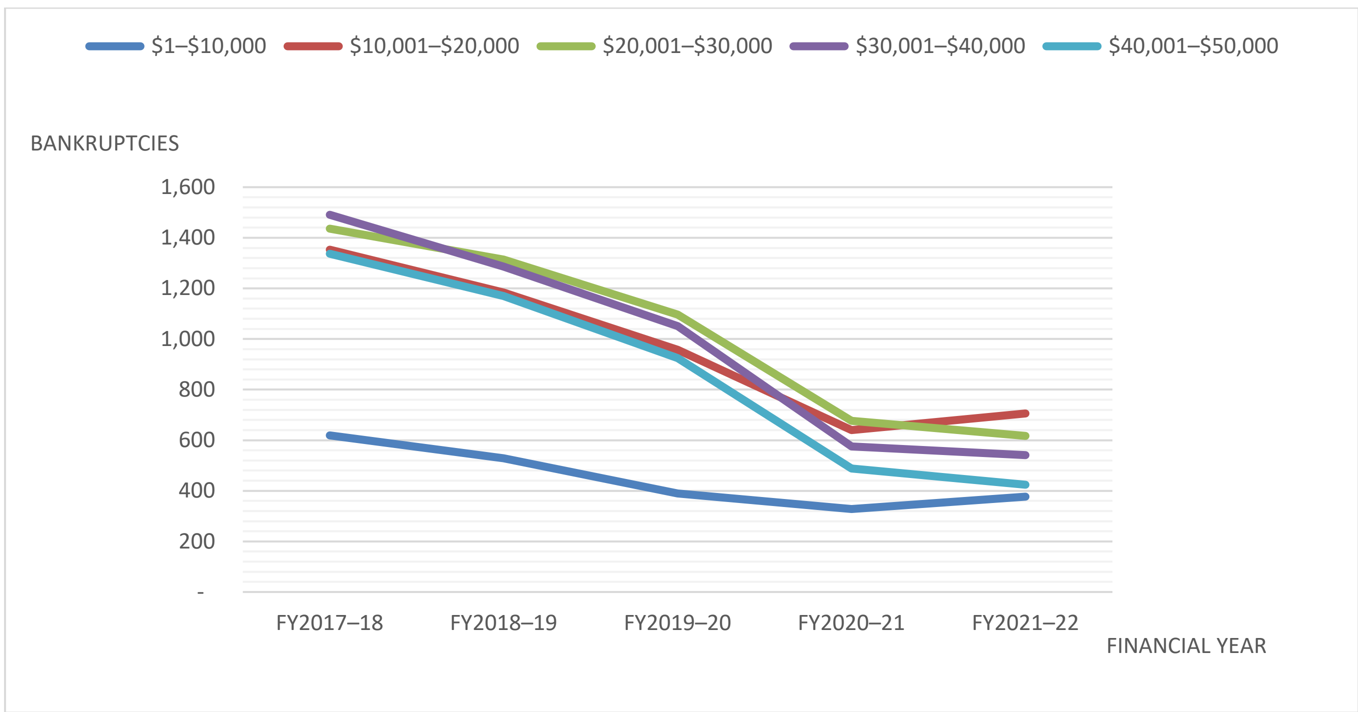

Figure 3: Total number of bankruptcies over the past 5 reporting periods.[6]

Finally, to understand the potential impact of raising the threshold on debtors and creditors, the department analysed AFSA data to understand how bankruptcies are being initiated. In 2021-22, 91% of new bankruptcies were initiated by debtors' petition (voluntary bankruptcies). This proportion decreased from 95% in the 2020-21 financial year. In 2021-22, 9% of new bankruptcies were initiated by creditors petition, and 5% in 2020-21.[7]

Based on the above, public submissions previously made to the department, and the current economic circumstances, the department proposes to raise the bankruptcy threshold to $20,000. In making this proposal, the department seeks to appropriately and responsibly:

- ensure bankruptcy remains an option for higher value debts, while balancing the interests of debtors, creditors, and Small to Medium Enterprises, particularly noting that debts between $10,000 and $20,000 make a relatively small proportion of recent bankruptcies; and
- encourage the use of alternative personal insolvency options for lower value debts, noting the significant and potentially lifelong impacts of bankruptcy and the relatively small amount returned to creditors through bankruptcy processes. In 2021-22, unsecured creditors received an average of 2.23 cents for every dollar they were owed.

Increasing the period for a debtor to respond to a bankruptcy notice from 21 to 28 days

Discussion questions

4. **Question 4:** Do you believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days? Please expand on your answer and consider any potential impacts.
5. **Question 5:** If you do believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days, should there be a transition period before any reform takes effect? Please expand on your answer.
6. **Question 6:** If you do not believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days, please explain whether an alternative duration should be considered and why.

Overview

A bankruptcy notice is a formal document issued by the Official Receiver requiring a debtor to pay a debt. The Official Receiver may issue a bankruptcy notice on the application of a creditor if the creditor has obtained a final judgment or order against the debtor for at least $10,000 (being the current bankruptcy threshold) that has not been stayed and is no more than six years old.

A bankruptcy notice is given effect by serving the document on the debtor. A creditor must serve the bankruptcy notice within six months of the date it was issued, unless AFSA has extended the life of the notice.

Once served, the terms of a bankruptcy notice require the debtor to comply with the notice within 21 days. Relevantly, the debtor may:

- pay the creditor the amount of the debt claimed;
- make arrangements to the creditor's satisfaction for settlement of the debt; or
- apply to the Court to set aside the bankruptcy notice and/or extend time for compliance with the notice.

If the debtor does not comply within 21 days of service of a bankruptcy notice, the debtor will commit an act of bankruptcy (paragraph 40(1)(g) of the Bankruptcy Act). The creditor who served the notice may then present a creditor's petition based on the act of bankruptcy seeking an order that the debtor be made a bankrupt.

As discussed above, significant temporary amendments were made to the Bankruptcy Act and Bankruptcy Regulations during the COVID-19 pandemic including increasing the amount of time to respond to a bankruptcy notice from 21 days to six months.

There have since been calls from stakeholders to permanently increase the period to respond to a bankruptcy notice.

Stakeholder consultation

Participants at the Roundtable canvassed a range of options, including that the notice period be increased to 60 days. Some participants noted it can be difficult for debtors to obtain appropriate and timely advice about bankruptcy and a debtor's options in response to the bankruptcy notice under the current 21-day period.

Other participants noted that a bankruptcy notice is often the final step in the process and usually follows a court judgement and demands for payment. In this regard, they noted a debtor ought to have been on notice of the issue for longer than the 21 days from the service of the bankruptcy notice.

An alternative option of an extension to the 21-day period was also canvassed where a debtor is able to produce evidence of financial or legal advice obtained which necessitates a further period for consideration.

Alternative suggestions to varying the notice period discussed by participants included increasing funding for financial counselling and legal assistance services and better information being included with the bankruptcy notice provided to debtors.

Proposal

Considering other timeframes in the Bankruptcy Act and Bankruptcy Regulations, the department is proposing to amend the timeframe for response from 21 days to 28 days. This is consistent with a range of other provisions in the Bankruptcy Act which allow for 28 days' notice, including:

- section 60 relating to the stay of legal proceedings;
- subsection 82(5) relating to debts provable in bankruptcy;
- subsection 109(8) relating to priority payments;
- paragraphs 133(4)(a), 133(4)(b) and 133(6)(b) relating to a disclaimer of onerous property;
- subsection 185ZA(1) relating to the notification of the death of an administrator;
- subsection 186K(4)(a) relating to the cancellation of an individual's registration as a debt agreement administrator;
- subsection 186L(a) relating to the cancellation of a company's registration as a debt agreement administrator; and
- subsection 246(1) relating to a statement of a deceased debtor's affairs by a legal personal representative.

The department notes stakeholders' views previously put forth in relation to debt agreements, which considered a five-week response period for creditors to be too long in that context and where business liability is in the balance. The department considers that the same issues may be applicable in these circumstances and in considering the appropriate balance of creditors and debtors' interests, proposes 28 days as a reasonable compromise.

The department notes that the six-month period in force during the temporary COVID-19 measures may not effectively balance the interests of creditors and debtors as it may extend the administration of a bankruptcy for longer than is necessary for all parties involved. The department also notes that representations were made at the Roundtable by some participants that did not support an increase to the timeframe for response as providing extra time does not necessarily correlate to timely action by the bankruptcy notice recipient.

The department notes the general consensus amongst stakeholders for improved efficiency in the personal insolvency system and considers that a 28-day notice period is appropriate for all parties involved.

Additionally, the department has also taken into consideration AFSA's intention to update the information sheet which attaches to a bankruptcy notice. This updated information sheet intends to remove any unnecessary complexities and simplify the information presented to make it easier for debtors to understand what a bankruptcy notice is.

The department's proposal is further informed by the civil procedure rules in Federal and State legislation which usually allows for 28 days in which to respond to a statement of claim.[8] The department notes that some jurisdictions, namely Victoria, allow for 30 days.[9]

Reducing the permanent record on the National Personal Insolvency Index to seven years

Discussion questions

7. **Question 7:** Do you believe that any of the current economic circumstances have the capacity to inform the policy setting for a reduced record period of seven years on the NPII for bankruptcies? Please expand on your response.
8. **Question 8:** Would a reduced record period of seven years on the NPII for bankruptcies benefit debtors? Please expand on your response.
9. **Question 9:** Do you believe that there may be any adverse impacts from reducing the permanent record period on the NPII to seven years for bankruptcies? Please expand on your response and consider any mitigating factors.
10. **Question 10:** Do you believe that any circumstances should be exempt from a reduced record period on the NPII for bankruptcies? Please expand on your response.
11. **Question 11:** If you support the proposed reform to reduce the NPII permanent record to seven years for bankruptcies, should there be a transition period before any reforms take effect?
12. **Question 12:** If you do not support reducing the permanent record on the NPII to seven years for bankruptcies, please explain why.

Overview

The NPII is a publicly available electronic record of most personal insolvency proceedings in Australia. Its creation and maintenance are provided for in Part XIII of the Bankruptcy Regulations.

The NPII provides the following information about individuals who have been subject to proceedings under the Bankruptcy Act from August 1928:

- personal information including a person's:
  - name (family and given names);
  - date of birth (if known);
  - aliases (if known);
  - residential address at the date of lodgement (if known); and/or
  - occupation (if known);
- the type of administration or proceeding;
- the trustee, administrator or controlling trustee of the administration or proceeding;
- the petitioning creditor and/or petitioning creditor's solicitor (where a creditor's petition is registered);
- the date an administration or proceeding started; and
- the current status of the administration or proceeding, for example whether a person has been discharged from a bankruptcy.

The Bankruptcy Regulations currently provide that a person's name will be listed permanently on the NPII and can only be removed in the following circumstances:

- where a bankruptcy is set aside by the Court;
- information regarding debt agreements and debt agreement proposals under Part IX of the Bankruptcy Act are removed from the NPII after the prescribed lengths of time, pursuant to sections 82 and 83 of the Bankruptcy Regulations;
- where the Official Receiver is satisfied that the entry resulted from fraudulent conduct, for example where the bankruptcy form was falsely lodged by a person claiming to be the debtor;
- where an administrative oversight has occurred when processing a document (for example, where a duplicate record has been created); and
- the Court directs removal of a particular entry from the NPII.

If a debtor or bankrupt believes that publishing their address and/or occupation on the NPII may put their safety at risk, they may apply to have the address and/or occupation suppressed pursuant to section 80 of the Bankruptcy Regulations. An application to have information suppressed must be made in writing to the Inspector-General in Bankruptcy.

Stakeholder consultation

Some stakeholders consider that a permanent record on the NPII stigmatises a bankrupt person even after they have been discharged from the bankruptcy, with many stakeholders viewing a permanent record as punitive and raising privacy concerns with specific reference to issues of safety. Having considered these representations, the department notes that most stakeholders appear to support the position that a name should not appear on the register any longer than is necessary. Further, the department has also considered the policy intent of the Bankruptcy Act to provide an effective bankruptcy system that is fit for purpose and offers debtors the opportunity for a fresh start, while protecting the rights of creditors.

Stakeholders have put forward various suggestions for possible reform including reducing the time a person remains on the NPII:

- to correlate with the status of the bankruptcy so that the record is extinguished when a bankrupt is discharged;
- to coincide with the removal of records in accordance with credit reporting standards; or
- by any number of years that appropriately balances the interests of debtors and creditors.

Proposal

The department has considered the above issues and, with consideration given to maintaining the balance between debtor and creditor interests, proposes removing the NPII record **seven years** after a person has been **discharged from their bankruptcy** so that it is no longer appears publicly (noting that the period for bankruptcy is currently three years, this reform would mean a public record period totalling 10 years, unless the bankruptcy was extended). For clarity, the record will not be extinguished from the NPII after the seven-year period. The proposed reform would ensure that the records remain available by certain Commonwealth agencies with information gathering powers for administrative purposes. The department recognises that AFSA holds agreements with a number of Government agencies who access NPII records for a number of different reasons including to investigate allegations of criminal activity. Additionally, the department considers that this access may aid trustees in identifying serial bankrupts or patterns of behaviour and may assist in linking criminal behaviour (for example in fraud cases involving the transfer of assets).

In reaching this proposal, the department has considered timeframes stipulated in the Bankruptcy Act and Bankruptcy Regulations, specifically:

- **Section 184** of the Bankruptcy Act which relates to the release of a registered trustee of a bankrupt estate. A trustee who has not been released by operation of section 183 of the Bankruptcy Act is taken to be released by operation of law at the end of **seven years** from the date on which the Official Receiver entered in the NPII that the administration of the estate was finalised.
- **Subsection 184A(2)** of the Bankruptcy Act which states that where the Official Trustee becomes trustee of a bankrupt estate upon the release of a registered trustee under section 183 or 184, the Official Trustee is released from being trustee at the end of **seven years** from the date on which the Official Receiver entered in the NPII that the administration of the estate was finalised.
- **Section 70-35** of the Bankruptcy Act which states that the last trustee to administer a regulated debtor's estate must retain all books that relate to the administration and are in the last trustees' possession or control at the end of the administration for a period of **seven years** from the end of the administration.[10]

The department also considered an analogous five-year period with reference to:

- **Sections 82-83** of the Bankruptcy Regulations which states that if a debt agreement ends or is terminated the Official Receiver must remove all information relating to the debt agreement from the NPII within one month after the later of: (i) **five years** after the day on which the debt agreement was made; or (ii) the day on which the debt agreement ends.
- **Section 270** of the Bankruptcy Act which creates an offence for any person who has become a bankrupt and has not kept such books, accounts and records as are usual and proper in any business carried on by him or her and as sufficiently disclose his or her business transactions and financial position during any period while the business was being carried on within the period of **five years** immediately preceding the date on which he or she became a bankrupt.
- **Section 262A** of the *Income Assessment Act 1936* which requires any person carrying on a business to keep records that record and explain all transactions and other acts engaged in by the person that are relevant to a company's income and expenditure for at least **five years**.
- **Section 20X** of the *Privacy Act 1988* which relates to the retention period of credit information, specifically personal insolvency information, requires the retention of information for a period ranging from two to **five years**.[11]

In comparison with debt agreements, declaring bankruptcy is the most serious of all the insolvency measures in the personal insolvency system. A seven-year period is appropriate and commensurate with the gravity of entering into bankruptcy while also balancing the interests of a discharged bankrupt.

In forming this view, the department has also had regard to other regimes. The department notes the following provisions in other legislation:

- **Section 20W** of the *Privacy Act 1988* which relates to credit information, requires retention of records for a period ranging from two to seven years. The department notes item 9 of section 20W which requires information, where the individual has committed a serious credit infringement in relation to consumer credit provided by a credit provider to an individual, to be retained for a period of **seven years** starting on the day on which the credit reporting body collects the information.[12]
- **Section 286(2)** of the *Corporations Act 2001* requires financial records to be kept for at least **seven years** after the transactions covered by the records are completed that correctly record and explain the

company's financial position and performance, and its transactions; and would enable true and fair financial statements to be prepared and audited.

- **Section 535(1)** of the *Fair Work Act 2009* requires that an employer must make, and keep for **seven years**, employee records of the kind prescribed by the regulations in relation to each of its employees.
- The Australian Financial Security Authority's Practice Direction 5 explains trustee's guidelines relating to handling funds and keeping records. This practice direction provides guidance to registered trustees and recommends that the last trustee to administer a regulated debtor's estate must, unless they have a reasonable excuse, retain all books for a period of **seven years** from the end of the administration that relate to the estate which they possess or control.

Circumstances involving debt agreements which serve as an ‘act of bankruptcy’

Discussion questions

13.	**Question 13:** Do you believe that any current economic circumstances may have the capacity to inform the policy setting for repealing paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act? Please expand on your response.
14.	**Question 14:** Do you believe that there may be any adverse impacts from repealing paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act? Please expand on your response and consider any mitigating factors.
15.	**Question 15:** Do you believe that any circumstances should be exempt from repealing the acts of bankruptcy provided for under paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act? Please expand on your response and identify the circumstances you consider should be exempt and explain why.
16.	**Question 16:** If you support a reform to repeal paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act, should there be a transition period before any reforms take effect? Please expand on your response.
17.	**Question 17:** If you do not support a reform to repeal paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act, please expand on your response.

Overview

Debt agreements are a voluntary and legally binding arrangement between a debtor and their creditors, provided for in Part IX of the Bankruptcy Act. Debt agreements were introduced in 1996 as a statutory alternative to bankruptcy for debtors with relatively low levels of debt, assets and income. A debtor with debts, assets and income level below the prescribed amounts in the Bankruptcy Act can make a debt agreement proposal to their creditors using a registered debt agreement administrator.

The debt agreement regime was introduced to the Bankruptcy Act to allow debtors to avoid bankruptcy by settling debts in an alternative and more flexible way to bankruptcy. A debtor with a debt under $10,000 can develop a debt agreement proposal in consultation with a registered debt agreement administrator and/or financial counsellor to pay a percentage of their combined provable debts,[13] which they can afford, to each creditor owed a debt over a specified period of time (up to five years). By having carriage over the terms of the proposal, the regime creates an opportunity for debtors to maintain control over their financial affairs, realise the value in any assets they might own to help repay their debts and/or retain some of their assets in the process.

Paragraphs 40(1)(ha)-(hc) of the Bankruptcy Act provide that entering into a debt agreement, having an agreement accepted by a creditor or defaulting on a debt agreement is considered to be an ‘act of bankruptcy’. The occurrence of an ‘act of bankruptcy’ allows a creditor to present a petition against a debtor within six months of that ‘act of bankruptcy’ occurring.[14]

Noting that the debt agreement regime was introduced to the Bankruptcy Act as an alternative measure to bankruptcy, the department’s proposal to amend the Bankruptcy Act aims to encourage the uptake of debt agreements with the entering into of a debt agreement within the personal insolvency system by:

- improving access to debt agreements and minimising the consequences under subsection 40(1) of the Bankruptcy Act; and

- maintaining the debt agreement regime as additional safeguard mechanism for vulnerable debtors in the prevention and/or avoidance of bankruptcy.

Stakeholder consultation

Many stakeholders support the position that entering into a debt agreement or having that debt agreement accepted by creditors should no longer be considered an 'act of bankruptcy' under paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act.

In support of this position, stakeholders have raised that debtors may:

- be hesitant to enter in debt agreements because they may not be accepted by creditors;
- instead of entering into a debt agreement, opt to enter into more informal agreements with creditors; and/or
- not apply for a debt agreement because they can be made involuntarily bankrupt if creditors reject the application. [15]

The department agrees that reform of subsection 40(1) of the Bankruptcy Act as it relates to debt agreements would better align this provision with the intended purpose of debt agreements, encourage the use of debt agreements as an alternative to bankruptcy in appropriate circumstances and ensure that the debt agreement system is accessible and equitable.

The matter was also raised by stakeholders during the Roundtable, where it was noted that amending subsection 40(1) of the Bankruptcy Act in so far as it relates to debt agreements may assist in removing any stigma associated with entering into a debt agreement and ensure that the measures available for the prevention of bankruptcy under the Bankruptcy Act, namely debt agreements, remain accessible to vulnerable users as an alternative to bankruptcy.

Proposal

The department has reviewed the above and, with consideration given to ensuring the Bankruptcy Act supports the intent of the debt agreement system, encourage the use of debt agreements in appropriate circumstances and removing any stigma associated with entering into debt agreements, the department proposes to repeal paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act so that entering into a debt agreement or having that debt agreement accepted by creditors is no longer considered an 'act of bankruptcy'.

The department considers the proposed reform will mitigate reluctance felt by debtors who may not enter into a debt agreement because submitting a proposal is considered an act of bankruptcy.

The proposal to repeal paragraphs 40(1)(ha) and 40(1)(hb) recognises the debt agreement system as a vital part of Australia's consumer finance framework. For many debtors, a debt agreement is the final option to avoid bankruptcy and a viable solution for managing personal debt. The debt agreement system is intended to give those in financial difficulty an opportunity to protect their family home and take control of their financial affairs and the proposed reform intends to reflect this.

Endnotes

[1] Ministerial Roundtable on Personal Insolvency: summary
[2] Paragraphs 40(1)(ha) and 40(1)(hb) of the *Bankruptcy Act 1966* (Cth).
[3] AFSA monthly Statistics Highlights, March 2023; AFSA state of the Personal Insolvency System Report, January 2023.
[4] AFSA Summary Statistics on Liability of Debtors, May 2023 as requested by the Attorney-General's department.
[5] AFSA Summary Statistics on Liability of Debtors, May 2023 as requested by the Attorney-General's department.
[6] AFSA Summary Statistics on Liability of Debtors, May 2023 as requested by the Attorney-General's department.
[7] Bankruptcies and temporary debt protections | Australian Financial Security Authority (afsa.gov.au).
[8] Subsection 25.07.01 of the *High Court Rules 2004* (Cth); Section 16.32 of the *Federal Court Rules 2011* (Cth); Paragraph 102(1)(a) of the *Court Procedure Rules 2006* (ACT); Subsection 14(1) of the *Uniform Civil Procedure Rules 2005* (NSW); Subsection 129(3) of the *Uniform Civil Procedure Rules 1999* (QLD); Subsection 65.1 of the *Uniform Civil Rules 2020* (SA).
[9] Subsections 14.04(a) and 14.04(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (VIC).
[10] Section 5-15 of the *Bankruptcy Act 1966* (Cth) defines a "regulated debtor" to mean a person who is: (a) bankrupt; (b) a person whose property is subject to control under Division 2 of Part X; (c) a debtor under a personal insolvency agreement; or (d) a deceased person whose estate is being administered under Part XI. Section 5-16 of the *Bankruptcy Act 1966* (Cth) defines a "*regulated debtor's estate*" to mean: (a) in relation to a bankrupt—the estate of the bankrupt, other than any estate of the bankrupt administered under Part XI because the bankrupt is a deceased person; (b) in relation to a person whose property is subject to control under Division 2 of Part X—the estate of the person; (c) in relation to a debtor under a personal insolvency agreement—the estate of the debtor; and (d) in relation to a deceased person whose estate is being administered under Part XI—the estate of the person being administered under that Part.
[11]The department notes that a review into the *Privacy Act 1988* (Cth) (Privacy Act) was completed in 2022 (Review). The Attorney-General released the Privacy Act Review report in February 2023 (Report) and the Government is developing the response to the Report, which will set out the pathway for reforms.
[12] The department notes that a review into the *Privacy Act 1988* (Cth) (Privacy Act) is currently underway was completed in 2022 (Review). The Attorney-General released the Privacy Act Review report in February 2023 (Report) and the Government is developing the response to the Report, which will set out the pathway for reforms.
[13] A provable debt is one that entitles the creditor to vote on a debt agreement proposal and to participate in dividends paid. Section 82 of the *Bankruptcy Act 1966* (Cth) outlines which debts are provable and sections 83 to 107 provide further detailed information about provable debts.
[14] Paragraph 44(1)(c) of the *Bankruptcy Act 1966* (Cth).
[15] Paragraph 44(1)(c) of the *Bankruptcy Act 1966* (Cth).