

30 January 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By Email Transmission: legcon.sen@aph.gov.au

Dear Sir/Madam

Bankruptcy Amendment (Enterprise Incentives) Bill 2017

We appreciate the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee in relation to the *Bankruptcy Amendment (Enterprise Incentives) Bill 2017* ("Bankruptcy Amendment Bill").

SellersMuldoonBenton is a boutique Chartered Accounting Firm, specialising in Insolvency and Corporate Recovery. We have three Registered Trustees in Bankruptcy and six Liquidators that work within the practice across Victoria, Queensland and Tasmania.

Whilst we can understand why it might seem desirable to certain stakeholders to introduce the proposed one-year bankruptcy period, we see many issues with the Bankruptcy Amendment Bill in its current form, and question the necessity of same. Some of our concerns are outlined below.

Individuals will not have to disclose that they are bankrupt after the one -year discharge period

We fail to see how this will have an effective impact given:-

- Most applications for finance, leases etc will note or ask whether the individual has been bankrupt or subject to another form of insolvency within the past 7-10 years. It is unclear how the responses to this question will be dealt with any differently due to the change;
- The credit reporting requirements also in place; and
- With respect to professional licences, whilst a bankrupt cannot manage a corporation (and we note the comments in ASIC's submission in relation to same), in other situations, in our experience, often a bankrupt who is a "professional" and subject to some form of licensing, may be given a "show cause" notice (or similar) from the licensing body. In many occasions, there are allowances that can be made so that the individual can continue, for the bankruptcy period, in some form of service. Understandably the bankrupt may not be able to operate a trust account, for example, however in many other situations the restrictions applied to the bankrupt may not be overly severe.

Extending the income period to three years notwithstanding the one- year bankruptcy

A Contribution Assessment Period (or CAP) is defined in section 139K of the *Bankruptcy Act* 1966 ("Act"), in relation to a bankrupt as :-

a period that:

(a) begins on the day the bankrupt becomes a bankrupt or an anniversary of that day during the bankruptcy; and

(b) ends one year after that day or anniversary, as the case requires, or if the bankrupt is discharged or the bankruptcy is annulled within that year, ends upon the discharge or annulment.

Section 139W of the Act provides that a trustee is required to undertake an assessment of the estimated income that a bankrupt is likely to receive in the CAP as soon as practicable after the commencement of same and of the contribution, if any, that the bankrupt will be liable to pay. This is based on estimates, generally provided by the bankrupt. Any actual liability amount cannot be calculated until the end of the CAP where the bankrupt has 21 days **after** the CAP to provide the relevant information pursuant to Section 139U of the Act. Given a bankrupt is required to submit their Statement of Affairs within 14 days of notification of the bankruptcy (section 54 of the Act), if the bankrupt is compliant, they will be discharged before the 21 day period after the conclusion of the CAP. If they do not provide the information after they have been discharged there is no ability for the Trustee in Bankruptcy to then object to their discharge. The Objection to Discharge threat is a significant encouragement tool used by Trustees in Bankruptcy to obtain compliance from bankrupts. This especially applies to those who are high-income earners as an extended discharge may lead to further contributions payable to the estate. If this tool is taken away from Trustees in Bankruptcy, it would be difficult to not only receive the information on which to do the assessments but also to collect the amounts potentially owing. This would undoubtedly reduce the dividends available to creditors.

Fostering entrepreneurial behaviour and reducing the stigma associated with bankruptcy

Some of the reasons behind reducing the automatic discharge period to one year is to reduce the stigma associated with bankruptcy, encourage entrepreneurs to re-engage in business sooner and encourage people, who have previously been deterred by the punitive bankruptcy laws, to pursue their own business ventures.

On our calculations, less than 20% of personal insolvency administrations are business related.

Accordingly, at the first instance it seems to be quite a drastic measure to change the entire bankruptcy discharge regime for the impact on less than 20% of the pool.

Secondly, we would be interested to see any research undertaken which shows that of this 20%, the percentage of bankrupts that were entrepreneurs, and who were or would have been dissuaded from re-entering business as a result of the "stigma" of bankruptcy. It is difficult to identify the benefit associated with the changes proposed given the minimal number of administrations that may be affected.

Notification in change in contact details

It is proposed that there will be a requirement for a bankrupt to notify the trustee within 10 business days of changes to their name, address, and telephone number during the “prescribed period” (which includes any circumstances when a bankrupt is required to make income contributions payments). Failure to do so will still involve a penalty of imprisonment for 6 months.

Any breach of the existing section is almost impossible to enforce as, in order for an offence referral to be accepted by AFSA’s enforcement arm, Trustees in Bankruptcy need to prove that the individual’s contact details have in fact changed. If a trustee is unaware of the current contact details (which is usually the trigger for seeking assistance), they are told that they cannot prove that the relevant details have changed and therefore that a notification should have been made by the bankrupt. Given that this provision is supposed to assist with discharged bankrupts, if trustees are unable to refer these matters for prosecution (for the reasons outlined above), and they can't lodge an Objection to Discharge (as the bankrupt will already be discharged) it is difficult to see how this is an effective change.

It would be interesting to compare the number of prosecutions/referrals undertaken for breaches of this nature with the amount of estates in which the bankrupt's whereabouts are unknown.

Acting as a Deterrent

It is proposed that the income assessment regime will last for three years (or until discharge if an objection is lodged) rather than the one-year of bankruptcy in order to *“ensure that high income earners do not abuse bankruptcy laws by reducing their income for one year, hiding their assets, accruing excessive debt and only being subject to contributions for a one year period”*.

It is difficult to see at all how this amendment can achieve its objective as outlined in our comments with respect to CAPs above.

Further, there do not appear to be any anti-abuse provisions contained within the proposals which would prevent repeat offenders incurring unmanageable levels of debt and then filing for bankruptcy for a one-year period.

It is difficult to be in favour of a one year bankruptcy regime as it is currently proposed, as we believe that the process will lead to significant issues in the administration of files and reduced recoveries in the bankrupt estates. However, if a one-year bankruptcy program is to be introduced, we think that there could be benefit in imposing restrictions or a waterfall timeline on the bankruptcy period, in the case of repeat offenders. We understand that the Canadian system, for example, offers a nine-month period for first-time bankrupts (unless there is surplus income), a 24-month period for a second bankruptcy and if an individual becomes bankrupt three times they have to have their discharged determined by the Court.

Should you have any queries in relation to the above, or require anything further, please do not hesitate to contact me.

Yours faithfully
SellersMuldoonBenton

A handwritten signature in black ink, appearing to be 'AR' with a large loop and a long tail.

Alice Ruhe
Partner