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Attorney-General's Department
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Via email: Bankruptcy@ag.gov.au

Discussion Paper: The bankruptcy system and the impacts of the coronavirus

CPA Australia represent the diverse interests of more than 168,000 members in over 100 countries supported by 19 offices globally. We make this submission on behalf of our members and in the broader public interest.

CPA Australia generally supports amendments to the Personal Insolvency System that will enable Australian businesses to remain viable. Amendments to existing legislation are encouraged and should be viewed in wholistic terms and not as a reaction to current economic conditions. We recommend measures for greater financial literacy amongst average Australians, along with the availability of credits (via a voucher system) to obtain independent financial advice, should a person be experiencing financial difficulty.

Default Period of Bankruptcy

1. How do current economic circumstances impact the policy setting for a default period of one year bankruptcy?

It is apparent that the current economic situation resulting from the global coronavirus pandemic will remain fluid and subject to sudden movements.

The Bankruptcy Act 1966 does not prohibit an individual from carrying on a business as a sole trader in their own name using an ABN. Further, the ability to incur credit as an undischarged bankrupt and trade with other businesses is not restricted. Section 269 of the Bankruptcy Act 1966 provides an offence should an undischarged bankrupt incur credit above $5,934 (indexed) without disclosing that he/she is an undischarged bankrupt.

Changing the default period of bankruptcy to one year will not provide an increase in or sudden stimulus to the Australian economy. Nor will it reduce the impediment to continue to trade a business if an individual is an undischarged bankrupt.

2. Have stakeholder views about the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 changed due to the impacts of coronavirus?

Generally, feedback from stakeholders has been that there is a softening towards the spirit of the 2017 Bill in relation to the reduction of the bankruptcy period from three years to one year. There are, however, still reservations surrounding the bankruptcy period being reduced without an accompanying form of review. For example, it may:

- lead to recidivism of bankruptcies by individuals,

- increase the prevalence of untrustworthy advisors in the insolvency system, and
- lead to instances of individuals, rather than attempting to repay a debt through negotiation, use the bankruptcy system as a means of not paying debts due and payable to otherwise sustainable entities.

CPA supports an 'opt out' system whereby the period of bankruptcy can be reduced upon application by the Regulated Debtor to the Official Receiver and/or Official Trustee/Registered Trustee for a fee. This should theoretically lead to greater communication between a Regulated Debtor and the Trustee, and greater efficiency in the administration of the Bankrupt Estate if there was utility in an early discharge.

Other factors which may be considered include:

- whether the Regulated Debtor has been bankrupt or subject to an administration under the Bankruptcy Act 1966 previously; and
- the amount of liabilities owing to unsecured creditors.

3. How might a default period of one year benefit debtors with business related debts such as sole traders?

According to statistics released by the Australian Financial Security Authority (AFSA), bankruptcy administrations have consistently decreased over the last few financial years. Of those bankruptcies, those that are business related still represent significantly less than 50%.

As previously mentioned, there is no inhibitor to a Regulated Debtor trading as a sole trader as an undischarged bankrupt. There is no evidence to suggest that decreasing the bankruptcy period will lead to an increase of stimulus in the Australian economy. Accordingly, the benefit to debtors with business related debts is minimal. This is a view we had previously expressed in relation to the lapsed 2017 Bill.

4. Do Stakeholders have views on how the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 could be amended to respond to concerns about the one-year default period being made available to bankrupts for whom such a concession is not a desirable or justifiable outcome?

Amending the period of bankruptcy to one year may have unintended consequences with respect to individuals using bankruptcy as a means of incurring debts without the intention of repaying the creditor. Accordingly, our position is that if introduced without an 'opt out' system, (i.e. application of early discharge), any proposed Bill introducing a one-year default period of bankruptcy should:

- be limited to those individuals who have not been subject to an administration under the Bankruptcy Act previously; and
- that there be a threshold on the amount of creditor debt of less than, say for example, $350,000.

Recommended amendments to the 2017 Bill for consideration, include the following.

- Clarification or rewording of Section 59 regarding the vesting of assets in the second bankruptcy. Presently there is confusion about the application of Section 59 of the Act as to which Trustee has the ability to realise assets.
- Removal of the income contributions proposal amendments after the expiration of the proposed one-year bankruptcy period. The ability of a Trustee to obtain information on income from a discharged bankrupt will be hampered as there is no incentive for the provision of that information by the discharged bankrupt (i.e., no threat of an objection to discharge being lodged to ensure that the Regulated Debtor complies with the request for the provision of information). A Trustee can deem income pursuant to Section 139Y of the Bankruptcy Act 1966 due to a lack of information. The person who has had an assessment under this Section of the Bankruptcy Act may have the income assessment reviewed by the Inspector General in Bankruptcy. An

increase in reviews by the Inspector General in Bankruptcy may lead to an increase of costs for the Attorney General's Department due to an influx of potential reviews of decisions of the Trustee.

Additionally, we generally support that there should be a central database (the National Personal Insolvency Index) that enables creditors dealing with any individual to make informed decisions on whether they should provide credit or trade with that individual. CPA Australia supports that a limit of five years' financial history pertaining to personal financial information be available to the public via credit agencies.

We also point out that changes to the default period of bankruptcy from three years to one year will need associated amendments to the Corporations Act 2001 with respect to the period a bankrupted person cannot manage corporations (Corporations Act 2001 section 206B).

Debt Agreements

We do not believe the current system needs amending and accordingly do not support any changes to Part IX of the Bankruptcy Act 1966.

Personal Insolvency Agreements

1***. Could personal insolvency agreements play a greater role – either on a temporary basis or more permanently – in settling debts for individuals, including those who have business-related debt (e.g. sole traders), who are in financial distress due to the impacts of coronavirus?***

This is presently an under-utilised area of the Bankruptcy Act and is designed more for directors of a failed entity, than for sole traders. However, it could be utilised by sole traders, such as professional service providers who run Trust accounts or builders who require solvency to keep their licence to continue to trade.

Obtaining greater access to Part X of the Bankruptcy Act 1966 would provide the insolvent individuals access to the means to "start over" and continue their financial contribution to the Australian economy.

2. Are there barriers to the uptake of personal insolvency agreements?

Yes.

Presently there are large statutory creditors (e.g., the Deputy Commissioner of Taxation) who in principle do not accept these types of arrangements under Part X of the Bankruptcy Act 1966 and seemingly, whilst offered as an option to an insolvent individual, are not recommended by professionals due to the known reluctance to consider the commercial merits of such a proposal.

Further, the Queensland Building and Construction Commission (QBCC) currently prohibits a person from holding a license with the QBCC for a period of up to three years (post 1 July 2015) if they have utilised Parts IX and X of the Bankruptcy Act 1966.

CPA Australia's view is that a commercial outlook be taken by all creditors to these types of proposals to enable businesses to continue to trade in the spirit of the current insolvency reforms in the Australian legislative framework.

3. Could the processes for establishing personal insolvency agreements be streamlined to make them more attractive or more accessible, particularly for individuals with business-related debt?

We recommend consideration be given to changes to the voting requirements in such a proposal pursuant to Part X of the Bankruptcy Act 1966. Currently, Section 204 of the Bankruptcy Act 1966 provides for a "Special Resolution" to be passed by creditors to accept a Personal Insolvency Agreement. Section 75-132 of the Insolvency Practice Rules (Bankruptcy) 2016 notes that for a Special Resolution to pass at a meeting, there needs to be a majority voting in favour of the resolution and at least 75% in value of the creditors voting in favour of the resolution.

For this type of Insolvency Administration under Part X of the Act and for those proposed under Part IV, Division 6 of the Bankruptcy Act, it is recommended that the voting provisions be amended to reflect those of Section 75-110 and 75-115 of the Insolvency Practice Rules (Corporations) 2016.

Amendments such as the above would provide a fairer outcome to all creditors and provide insolvent individuals with greater access to Part X of the Act.

Offences

1. What new or expanded provisions could respond to concerns about the abuse of a one year default period of bankruptcy?

One concern is that a one-year default bankruptcy period leads to recidivism and/or incurring business debts with a view of going bankrupt to avoid repayment of those debts. One way in which this type of behaviour could be addressed is to insert duties and associated offences into the Bankruptcy Act 1966 analogous to those in corporate law dealing with behaviour of an individual in terms of acting in the best interests of a business.

Further, Part XIV of the Bankruptcy Act 1966 pertaining to offences could include at Section 267B reference to Section 77 of Bankruptcy Act 1966. This will allow better operation of Section 77 of the Act and should lead to a more efficient administration of a bankrupt estate. Should the one-year bankruptcy default period be adopted, this would enable Trustees to consider, early in the administration of the Bankrupt Estate, whether an offence has been committed and whether an objection to discharge is warranted.

CPA Australia urges the better operation of the existing offence provisions within Bankruptcy Regulation and Enforcement powers and that AFSA takes a more active approach in prosecution of offences under the Bankruptcy Act 1966.

2. What new or expanded offence provisions could respond to concerns about the behaviour of untrustworthy advisors, including pre-insolvency advisors?

CPA Australia strongly supports the removal of untrustworthy advisors from the insolvency industry, who provide advice to insolvent individuals that is illegal or prohibits the ability for creditors to obtain a greater return on their debts from an insolvent individual or entity.

It is apparent from the current behaviour of these advisors, that they attempt to either conceal assets of the Regulated Debtor or create creditors who may not necessarily have debts that are due and payable.

Presently Section 263 of the Bankruptcy Act deals with a “person” who conceals property of a bankrupt and/or makes a false declaration as to the quantum owed to them by creditors with the intent to defraud creditors of the insolvent individual. Section 263 carries a penalty of five years imprisonment. The inhibiting factor in the operation of this section is that it is difficult to prove “intent” in the contravention of this section.

Accordingly, consideration may be given to a similar section to that of Section 263 of the Bankruptcy Act 1966 that removes the burden of proving “intent” to defraud and covers the provision of an individual and/or corporation providing verbal or written advice that seeks to conceal property or make a false declaration in the Bankruptcy Form or any other document in connection to the Regulated Debtor’s examinable affairs. This section could also encompass advice provided around the transfer of assets pursuant to Sections 120 and 121 of the Bankruptcy Act 1966 and the transfer of assets to Superannuation funds pursuant to Sections 128B and 128C of the Bankruptcy Act 1966 This new Section could keep the penalty of five years imprisonment and/or significant penalty units as a deterrent to untrustworthy advisors.

We hope our comments contribute to the ongoing conversation around the future of Australia's bankruptcy system and we look forward to continuing engagement in developments that seek to improve outcomes for the individuals affected and the wider economy.

If you require further information on the views expressed in this submission, please contact Kristen Beadle, Manager – Public Practice & SME on 0413 883 581/Kristen.beadle@cpaaustralia.com.au or Dr John Purcell, Policy Advisor – Environmental, Social and Governance on 03 9606 9826/john.purcell@cpaaustralia.com.au .

Your sincerely

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