Law Council
OF AUSTRALIA

Business Law Section

Reforms to the bankruptcy system

The Treasury

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Introduction

1. The Insolvency and Restructuring Committee of the Law Council of Australia's Business Law Section (the **Committee**) welcomes the opportunity to provide a submission in response to the exposure draft and explanatory materials released by the Treasury on proposed changes to Australia's personal insolvency system.

2. The submission sets out four proposed reforms to the *Bankruptcy Act 1966* (Cth) and the personal insolvency system more generally:

   (a) an increase to the bankruptcy threshold from $10,000 to $20,000 and index it over time (**Proposal 1**);

   (b) an increase to the timeframe a debtor has to respond to a Bankruptcy Notice from 21 days to 28 days (**Proposal 2**);

   (c) 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 (**Proposal 3**); and

   (d) a reduction in the period of time for which a discharged bankrupt is recorded on the National Personal Insolvency Index (**NPII**) (**Proposal 4**).

3. The call for submissions was released on Friday, 23 October 2026 with submissions to be provided by Tuesday, 3 November 2026.

4. The Committee requested an extension of time so that it could develop a consensus view among its stakeholders on each of the four proposals. However, Treasury did not agree to provide an extension of any kind citing a 'compressed timeframe'. Accordingly, the Committee has endeavoured to provide a majority view where possible in the limited time available.

Prior submission

5. The Committee refers to its prior submission to the personal insolvency consultation provided to the Attorney General's Department on 6 October 2023 (**2023 Submission**).[1] The Committee suggests that the Treasury review that submission in conjunction with this submission as the questions posited at that time are almost identical.

Proposal 1—Increasing the bankruptcy threshold from $10,000 to $20,000 (indexed)

6. The Committee refers to paragraphs [4] to [19] of the 2023 Submission.

7. At present, a creditor who seeks the issue of a Bankruptcy Notice or wishes to file a Petition seeking a sequestration order against the estate of one of its debtors, must establish that the debtor owes to it a debt of not less than $10,000 (**the threshold amount**). It has been proposed that the threshold amount, both for Bankruptcy

[1] Law Council of Australia *Personal Insolvency Consultation* (Submission, 6 October 2023).

Notices and the presentation to the Court of a Creditor's Petition, be increased to $20,000 and to be index annually commencing in the 2028-2029 financial year.

Change in value from $10,000 to $20,000

8. The vast majority of bankruptcies are the result of the filing by debtors themselves of a Debtor's Petition, which has no minimum debt threshold. For example, the Australian Financial Securities Authority reported[2] that in the financial year ending 30 June 2026, of the 13,465 personal insolvencies, 7,386 (54.85%) entered bankruptcy either by debtor's petition or sequestration order; of which, only 1,002 (13.57% of bankruptcies and 7.44% of all personal insolvencies) entered bankruptcy by sequestration order.

9. Therefore, the change contemplated:

   (a) is not expected to have any real impact on the entitlement of persons seeking the protection of bankruptcy on their own initiative;

   (b) is unlikely to have a real impact on the number of bankruptcies overall; and

   (c) if they are to have an impact, will impact unpaid creditors with debts between $10,000 and $20,000 which the Committee considers will be comprised of mostly small businesses.

10. The Committee supports the proposed increase but maintains the further comments it had raised in the 2023 Submission.

The limited availability and effectiveness of alternative pathways

11. The Committee is concerned that bankruptcy is perceived as fulfilling solely a debt recovery function; it does not. Rather, bankruptcy is also intended to protect society from recalcitrant and no doubt insolvent debtors who may, without a suitable mechanism, be free to incur additional debts which cannot be recovered, thereby transferring the harm from an individual to the community and the economy at large. Care must be taken that a culture is not created that small debts do not have to be paid as, in the Committee's view, that may only incentivise systemic abuse.

12. An increase in the threshold may lead to material difficulties in resolving unpaid debts and leave creditors, who may face their own cashflow or solvency risks, without any means to collect those debts. The Committee observes that this will likely inflict a greater impact to the small business community than larger institutional creditors.

13. The threshold was doubled in January 2021 from $5,000 to $10,000 (putting the temporary COVID threshold of $20,000 to one side). The 2023 Submission observed the basis for the figure chosen is not identified. Despite the passage of a further three years since the 2023 Submission, that figure remains unexplained.

14. Notwithstanding the suggestion at [1.10] of the explanatory materials that an increased threshold *"encourages the use of alternative personal insolvency*

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[2] Australian Financial Security Authority, *Quarterly personal insolvency statistics* (data taken from 'personal insolvency statistics time series').

measures for lower value debts" no such personal insolvency measures are identified, and none exist for creditors, with both Part IX and Part X alternative bankruptcy pathways being solely debtor initiated. This point was made in the 2023 Submission (at [13]) and no alternative personal insolvency measures have since been introduced.

15. The costs of, and processes involved in, bankrupting a debtor should also be acknowledged and are a major inhibitor for bankruptcy action for small debts. Unlike corporate winding up, the vast majority follow from the failure to comply with a Bankruptcy Notice. Therefore, as a Bankruptcy Notice requires a judgment debt to be procured, this process requires prior court proceedings, a judgment, a separate Bankruptcy Notice, and a separate creditor's petition each with their own significant filing and legal costs.

16. In the Committee's view, filing fees and Court costs (other than costs payable for legal representation) can be a significant part of the threshold amount such that a creditor seeking to pursue bankruptcy based upon a debt that is close to the threshold amount must accept paying a significant amount of that again to pursue the process. The Committee does not consider that commercially minded creditors would act in this manner.

17. Therefore, the Committee considers that there is little or no basis for suggesting that a creditor who has been forced down this path has done so without proper consideration or with reckless disregard to an unfortunate debtor.

Indexation

18. The prospect of indexing the threshold was not raised by the Attorney-General's Department as part of the 2023 Personal Insolvency Consultation. The Committee does not support the threshold amount being indexed for the following reasons.

19. First, the basis on which the Attorney-General's Department and now Treasury use to increase the threshold from $10,000 to $20,000 remains unexplained despite the passage of over three years. The proposal to then index compounds that absent explanation.

20. Second, the Committee is concerned that the precise manner of calculating the value of the bankruptcy threshold will create a further ground for dispute in the course of bankruptcy proceedings, thereby increasing the costs and delaying the outcome of those proceedings.

21. It should be noted that the threshold is relevant:

    (a) at the time a Bankruptcy Notice is issued;

    (b) during the period of any challenge to that notice (if any);

    (c) when a creditor's petition is filed;

    (d) during the period in which a creditors petition remains on foot;

(e) during the course of any review of the outcome of a creditor's petition (which involves a rehearing of any creditor's petition determined by a registrar in accordance with the constitutional imperative relating to delegated judicial authority); and

(f) in respect of any appeal against the making of a sequestration order, or indeed the dismissal of a creditors petition.

22. This process can often take a considerable period stretching over several years. A creditor's petition alone can remain on foot for up to 2 years. If the bankruptcy threshold is being indexed at all times during this process it creates a significant burden on debtors, creditors, and the Court system to both understand, apply and examine (and reexamine in the course of rehearing) the relevant threshold, and in an area where uncertainty should be avoided wherever possible for the benefit of all stakeholders. The Committee does not agree with the explanation proffered at paragraph [1.18] of the explanatory materials, that it will provide greater certainty for users of the personal insolvency system.

23. Third, judgment debts accrue interest at a rate that will likely exceed the rate of indexation. Accordingly, to the extent it is assumed that the indexation will restrain or limit creditors from commencing bankruptcy proceedings entirely, that assumption is untested and unproven. Rather, as judgments can remain in force for up to approximately 12 years, the Committee considers that some creditors may simply wait for the interest to accumulate on that judgment until it exceeds the indexed threshold amount.

24. In such circumstances, the Committee considers the proposal would simply delay, rather restrain bankruptcy proceedings, which in turn causes harm to:

(a) debtors who may believe a debt is not being pursued and pursue their affairs accordingly;

(b) creditors who will be delayed in pursuing their debts; and

(c) the community who engage with a debtor who would, but for the indexation, have become subject to bankruptcy proceedings.

25. Fourth, indexation is already taken into account in respect of matters arising out of bankruptcy, such as the value of 'protected property' and vehicles which a bankrupt can retain notwithstanding bankruptcy, credit which a bankruptcy can procure without disclosing their status, and income contributions which provide accommodation for a bankrupt's circumstances. It is unclear why a further indexation should be taken into account for determining the process itself.

26. Fifth, indexation will only enhance the concerns set out above in respect of the increase to the threshold amount.

Proposal 2—Increasing the period for a debtor to respond to a bankruptcy notice from 21 to 28 days

27. The Committee refers to paragraphs [26] to [34] of the 2023 Submission.

28. At present, a debtor has 21 days (**the response period**) from receipt of a Bankruptcy Notice in which to either pay the debt or come to an acceptable compromise with the creditor. If neither occurs, the debtor commits an act of bankruptcy and the creditor who issued the notice, or any other creditor holding a debt of not less than $10,000, is entitled to file a Creditor's Petition seeking a sequestration order. The 21-day period allowed for a response to a Bankruptcy Notice is in line with the same period allowed to a corporate debtor to respond to a demand pursuant to section 459E of the *Corporations Act 2001* (Cth) (a process which has similar consequences to the service of a Bankruptcy Notice on an individual).

29. The proposal, if adopted, would allow the debtor a further seven days in which to either attend to payment or reach a compromise with the creditor. The Committee does not support the proposal for the following reasons.

30. First, if the response period were extended, it would immediately create disunity between the process for personal insolvency and the process for corporate insolvency, making the process more complicated for small business creditors who may not be able to seek legal representation to pursue debts. That will only amplify the additional complexity which the Committee anticipates from increasing the threshold amount and applying indexation to that amount.

31. Second, unlike the position in corporate insolvency, a Bankruptcy Notice can only be issued by a creditor who has already obtained a Court judgment. Court proceedings, in the vast majority of cases, follow at least some level of informal pre-litigation recovery steps, such as the issue of a letter or letters of demand. Formal Court proceedings leading to a judgment always involves the filing of an initiating process, being served on the debtor who then has usually 28 days to lodge a defence. If the creditor's claim is not defended, then a default judgment can be obtained.

32. The 21-day period provided for by a Bankruptcy Notice arises only at the end of a process in which the debtor has had a number of opportunities to either pay the debt or come to an acceptable arrangement with the creditor.

33. The Committee observes that the process by which a Bankruptcy Notice is relied upon to procure a sequestration order also takes a considerable time. In the Committee's experience, that process can take two to three months where unopposed, and is frequently adjourned to accommodate the circumstances of the individual such as due to illness or to allow advice to be obtained (where unrepresented).

34. Therefore, the Committee considers that the 7-day extension sought by the proposal should be put into the context of a process that can take 4 to 6 months (or as identified in paragraph [22], even longer). It is difficult to see any basis for concluding that adding a further seven days to the response period will lead to any significant change of debtor behaviour (as noted in the 2023 Submission).

35. Third, the 2023 Submission proposed that if this proposal were to proceed, the Government should obtain and consider further information and data as to whether an additional seven days will make any real difference to debtors and what the effect of the delay is on creditors and their outcomes. This does not appear to have occurred.

Proposal 3 —Circumstances involving debt agreements which serve as an 'act of bankruptcy'

36. The Committee refers to paragraphs [49] to [54] of the 2023 Submission.

37. This proposal is to amend 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.

38. The Committee supports this proposal for the reasons set out in the 2023 Submission.

Proposal 4—Reducing the permanent record on the National Personal Insolvency Index to seven years

39. In the time available, the Committee has not seen where this proposal is to be implemented as part of the exposure draft and the exposure material. The Committee assumes that Treasury proposes to amend Part 13 of the *Bankruptcy Regulations 2021* (Cth) as that part regulates the National Personal Insolvency Index (**NPII**). It is difficult for the Committee to comment upon amendments which do not appear to be included in the exposure materials.

40. The Committee refers to paragraphs [39] to [48] of the 2023 Submission.

41. The NPII contains information concerning bankruptcies, personal insolvency agreements under Part X of the Bankruptcy Act, and debt agreements made under Part IX. The information includes personal details of the debtor, including the debtor's name, age, address and occupation. The NPII is searchable by members of the public. There is no requirement that access only be available to persons genuinely interested in a particular bankruptcy administration, in the sense of being a creditor of that estate. At present, the fact of an individual's bankruptcy, including these personal details, remains on the NPII permanently. Provided the information is historically accurate it cannot, except in very limited circumstances, be removed from the public register.

42. The value of an individual's entry into the NPII varies depending upon whether the individual is a business person or an ordinary consumer. It is less important to the community at large that an individual who does not operate a business may have become bankrupt because that individual may be less likely to conduct a business. Conversely, it may be more important to financiers or other commercial participants to determine whether a prospective debtor had previously operated a business which failed. The Committee does not consider that it is the Government's role to pre-determine the relevance of such matters.

43. The Committee had suggested as part of the 2023 Submission that a separate register of 'Business Bankrupts' could be maintained such that those competing needs could be better balanced. The Committee appreciates that such a broader reform package is not part of the current consultation despite it being raised previously.

44. Nevertheless, the Committee considers that if the permanency of the NPII were to be compromised, a record of prior bankruptcies should be available to the trustee

administering the relevant bankrupt estate (whether that be the Official Trustee in Bankruptcy or a registered trustee).

About the Business Law Section

The Business Law Section of the Law Council of Australia provides a forum through which lawyers and others interested in all matters pertaining to business law can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section:

- prepares more than half of the Law Council's submissions each year, putting the views of the business community and the legal profession directly to the Federal Government and its agencies, and Federal Parliamentary Committees;
- provides a forum for debate of current issues, and assists lawyers to develop and maintain their professional skills and knowledge, through a schedule of regular conferences, workshops and seminars;
- represents the Law Council on a number of bodies—for example, the National Taxation Liaison Group and its sub-committees, the Customs and Border Protection National Consultative Committee and its sub-committees and the ASX Corporate Governance Council; and
- gives its members the opportunity to develop a network of professional contacts in their fields of practice.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

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