

29 July 2024

Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: bankruptcy@ag.gov.au

Dear Sir or Madam

ATTORNEY-GENERAL'S DEPARTMENT DISCUSSION PAPER—MINIMAL ASSET PROCEDURE

Thank you for the opportunity to consult on the recently released Minimal Asset Procedure (**MAP**) discussion paper.

This submission concerning the MAP is made by the Insolvency and Restructuring Committee of the Business Law Section of the Law Council of Australia (the **IRC**). The IRC is made up of experienced senior legal practitioners working in the insolvency and restructuring field.

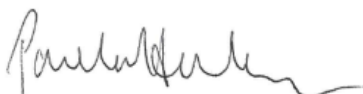
This response deals with IRC's feedback on the discussion questions contained in the MAP discussion paper

As a broad observation, the IRC welcomes the proposed introduction of a procedure to assist debtors who have no reasonable way to repay their debts, and believes that the MAP (subject to further detailed consideration) would work constructively and collaboratively with the existing personal insolvency regime (**PIR**).

If the MAP is to proceed, the IRC submits that, for the reasons listed in the discussion points below, it should be enacted in a standalone piece of legislation and not incorporated into the existing PIR. For the purposes of this submission, references to the PIR mean the options under the Bankruptcy Act listed in the discussion paper, namely:

- temporary debt protection;
- debt agreements;
- personal insolvency agreements; and
- bankruptcy.

Yours faithfully



Dr Pamela Hanrahan
Chair
Business Law Section, Law Council of Australia

Item	Discussion Questions	Feedback
Section 1: Scope of Minimal Asset Procedure		
1	Are you supportive of the Minimal Asset Procedure within Australia?	<p>Yes. The IRC is supportive of the general concept of the MAP as outlined in the discussion paper. This support reflects the IRC’s earlier submission dated 25 January 2022 in response to the January 2022 Options Paper to which we refer. In particular, in advocating against a “one year bankruptcy period” the IRC submitted:</p> <p>11. There is a need for a better balance between the demands for alleviating the burdens of bankruptcy on the majority of bankrupts considered “consumer” bankrupts as against maintaining the integrity of our bankruptcy laws which serve a fundamental role in Australia’s robust economy by encouraging debtors to think carefully before going bankrupt having regard to its consequences.</p> <p>12. By creating a “one system fits all”, uniform one-year bankruptcy the government would put at risk the positive role our current bankruptcy laws play while still failing to address the underlying problems of applying onerous, complex and expensive bankruptcy administration upon consumer bankrupts (albeit for one year).</p> <p>13. It is the Committee’s view that the answer to this dilemma is to create a separate debt forgiveness regime entirely outside of the existing Bankruptcy Act into which Part IX of the Act should also sit as a unified body of law for addressing consumer indebtedness.</p>

2	<p>Other jurisdictions have enacted a Minimal Asset Procedure to assist debtors who have no reasonable way to repay their debts. Where these debtors become bankrupt, it would result in non-commercial estates which do not return dividends to creditors. Do you believe a cohort exists for a Minimal Asset Procedure in Australia? Please expand on your response.</p>	<p>Yes, the IRC believes that a significant cohort of debtors with non-commercial estates already exists within the PIR. It also believes that there will be further debtors not yet formally engaged with the PIR.</p> <p>The most recent publication by the Australian Financial Security Authority (AFSA)—the State of Personal Insolvency System Report (the AFSA SPI Report 2023), which contains information current to 31 August 2023—highlighted significant stress on household incomes that are likely to increase the number of personal insolvency numbers in the coming years.</p> <p>Further, the AFSA SPI Report 2023 highlights the consistent demographic breakdown of debts and debtors involved in the PIR over a number of years. The report identified that 20.5% of all bankrupts between 2017 to 2023 had an asset to liability ratio of 10% or less.</p> <p>The IRC is not aware of any other statistical review of participants in the PIR that would suggest that the above figures are anything other than a conservative estimate and only include those debtors that have actively engaged with the PIR.</p>
3	<p>The department recommends a maximum debt threshold of \$50,000 for the Minimal Asset Procedure. Do you agree with this threshold? Please expand on your response. The department has included a table of other jurisdictions' thresholds below to assist.</p>	<p>The IRC agrees with the suggested \$50,000 debt threshold based upon the information contained in the AFSA SPI Report 2023.</p> <p>The IRC does raise for consideration how both the maximum debt threshold and the minimal asset threshold will be determined.</p> <p>Under the recently enacted Small Business Restructuring Process, debts are calculated on the basis of net value so that the value of any underlying asset which may be secured against the debt is taken into account when calculating a net debt.</p>

		<p>The IRC identifies that there is the possibility of debtors with the assistance or encouragement of third parties, manipulating balance sheets to ensure that they meet the threshold figures. This may include paying down selected debt in the lead up to implementing an MAP.</p> <p>The MAP should incorporate a verification process so that the administrator of the MAP can assess the prospective applicant to determine whether any manipulation or misuse of the MAP process may have occurred. This may include reviews of bank statements within a defined period to ensure that irregular payments or disposals have not occurred. This will require the prospective applicant to provide this information for review and may be considered a requirement for eligibility. Given the IRC's view in respect of item 15 below, this review may become an important safeguard for creditors.</p>
4	<p>The department proposes an asset threshold of \$10,000 with exceptions for tools of trade and a vehicle. Do you agree with this asset threshold? Please expand on your response.</p>	<p>The IRC believes that the current definitions of divisible assets contained within the <i>Bankruptcy Act 1966</i> (Cth) and the subsequent examination of non-divisible assets are both well known within the PIR, the professional credit sphere and the Courts. The IRC submits that the divisible and non-divisible asset regime be replicated in the MAP or at least heavily referenced as accepted benchmarks.</p> <p>Similarly with the verification suggested in respect of the debt threshold, the MAP should incorporate a verification process so that the administrator can determine whether assets have been disposed of to reduce the prospective applicant's asset level in order to fit within the eligibility threshold.</p>
5	<p>What should a person's maximum income be prior to accessing the Minimal Asset Procedure?</p>	<p>The IRC believes that the income assessment regime contained within the Bankruptcy Act, i.e. the Actual Income Threshold Amount (AITA) and any adjustments that are made pursuant to dependents, is an appropriate benchmark for assessing maximum income in relation to the MAP.</p>

		<p>Where the purpose of the MAP, as expressed in the discussion paper is that the targeted demographic has limited ability to repay or service debt, the AITA appears to be a logical starting point to assess a person's maximum income.</p> <p>The IRC submits that any debtor whose income exceeds the AITA as indexed should not be eligible for the MAP as this would indicate that there is an ability to make some contribution particularly in the absence of debt. This is the position adopted in the PIR.</p>
6	<p>How should a person's ability to repay be assessed for eligibility to access the Minimal Asset Procedure?</p>	<p>The IRC, in considering the discussion paper, has identified a possible conflict between the stated object of the MAP (i.e. releasing debtors without assets and the ability to pay), and a possible administrative impost in assessing the concept of "ability to pay".</p> <p>If eligibility for access to the MAP is based solely upon a level of assessed income such as via the AITA, this alleviates the need for the administrative process of having debtors complete a budget and the resources required to test and verify the accuracy of such a budget. It is the experience of members of the IRC that budgeting processes are, by their nature, very subjective and that given the level of commerciality engaged by the MAP, more prone to be inaccurate.</p> <p>Through the use of data matching via Services Australia with regards to welfare payments and the ATO via Single Touch Payroll, the IRC believes that it may be more efficient to base income eligibility by reference to an established benchmark whether that is the AITA or some other figure.</p>

7	<p>Should any debts be excluded from the Minimal Asset Procedure in Australia?</p> <p>Table 1 below compares other jurisdictions which exclude certain debts from being cleared, where they would otherwise be cleared by a bankruptcy.</p>	<p>The IRC examined the table provided in the discussion paper and considered the context of excluded debts under the existing PIR. We are generally supportive of the excluded debts particularly listed in the New Zealand process contained in table 1 of the discussion paper.</p> <p>The IRC does raise concerns regarding the treatment of debts related to such things as residential lease contracts and any protections that would be provided to debtors regarding ongoing access to essential services such as housing and telecommunication services provided by third parties.</p>
8	<p>What exceptions/exemptions do you believe should be applied for debtors when assessing someone's suitability for the Minimal Asset Procedure? For example, when assessing a debtor's income where someone is receiving welfare payments, should the debtor be exempt from the income test?</p>	<p>The IRC refers to the comments above in relation to the need to possibly assess financial position manipulation in a set period prior to the lodgement of an MAP application to ensure that the MAP is not abused.</p> <p>The IRC agrees with the general concept that welfare recipients would be eligible for access to the MAP with regards to the element of "ability to pay".</p> <p>The IRC does not believe receiving welfare should be an automatic exclusion from any examination of minimal asset thresholds.</p>
9	<p>To what extent would the Minimal Asset Procedure displace alternatives to bankruptcy currently available in the Australian personal insolvency system? Please explain.</p>	<p>The IRC believes the MAP would provide a cost-effective alternative to debtors whose only options are avoidance of their financial constraints or formal engagement in the PIR which ultimately may not be the most resource efficient utilisation of taxpayer funds.</p> <p>The IRC does not believe that displacing debtors who would be eligible for the MAP from the PIR would be detrimental to the existing PIR.</p>

10	<p>If the Minimal Asset Procedure was enacted in Australia, where would this best fit within the current personal insolvency options?</p>	<p>The IRC does not believe that the MAP should form part of the existing PIR and should stand alone from it in the form of a consumer debt relief enactment.</p> <p>The volume of non-commercial estates that are being dealt with by the PIR as identified in the AFSA SPI Report 2023 diverts scarce resources from dealing with estates that may potentially return capital into the Australian economy. This is the fundamental purpose of the PIR.</p> <p>It is the IRC's position that, even though the MAP will be designed to deal with insolvent members of the Australian community (giving rise to Constitutional power), their insolvencies realistically are not commercial in nature, nor do they represent a commercial return on the resources required to deal with these estates under the existing PIR.</p> <p>Once the eligibility for the MAP is assessed, these estates will not require the regulatory regime that currently exists in the PIR and it is submitted, would be best dealt with by sectors of the Australian public service or not-for-profit financial counselling community trained in the more holistic rehabilitative skills and who may be able to procure better support which would be required in these circumstances.</p> <p>By way of example, the PIR is designed as a regulatory and resources recovery mechanism with capital being recovered for the benefit of creditors by a strict monitoring and reporting regime. Trustees (both Private and Official) under the PIR act as Officers of the Court in enforcing the Bankruptcy Act and its associated subordinate legislation.</p> <p>Further the IRC believes that if it is determined that eligibility for the MAP will be via assessment of submitted budgets, any assessment of submitted budgets should be done via not-for-profit financial counsellors as opposed to opening the process to possible monetisation and commercialisation in the private sector.</p>
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¹ Services Australia, *Corporate Plan 2023-24*, III <<https://www.servicesaustralia.gov.au/corporate-plan?context=22>>.

² Attorney-General's Department, *Corporate Plan 2023-27*, 3 <<https://www.ag.gov.au/about-us/publications/attorney-generals-department-corporate-plan-2023-27>>.

11	Do you believe if there are any economic circumstances that signal a need for the Minimal Asset Procedure? Please expand on your response.	The IRC refers to the multiple issues outlined in the AFSA SPI Report 2023 that suggest there is likely to be an increasing requirement in personal insolvency engagements and if trend numbers remain as they have, then a significant majority of those insolvencies will be low asset and relatively low debt in nature.
Section 2: Impact on debtors and creditors		
12	Would there be any adverse impacts to creditors from the implementation of the Minimal Asset Procedure, noting that creditors would be unlikely to receive a dividend from such bankrupt estates? Please explain.	<p>The IRC does not have access to accurate statistics to identify particular classes of creditors or the quantity of debts owed to those creditors.</p> <p>The IRC cannot quantify the monetary value of the creditors likely to be affected by the implementation of the MAP. Given the way debts that are already uncommercial to recover are dealt with, there is very little that can be done to improve upon the commerciality of those debts or provide a commercial return to creditors of those debts.</p>
13	What restrictions do you believe should be imposed on debtors seeking to access a Minimal Asset Procedure? Please explain.	<p>The IRC agrees with the restrictions outlined in the discussion paper. Further, it may be appropriate to seek as a requirement, that prospective applicants respond to reasonable requests for information (such as the provision of bank statements) and that there have been no irregular or uncharacteristic payments which may suggest balance sheet manipulation (either by way of a reduction of debt or assets so that eligibility thresholds can be met) in the lead up to implementation of the MAP.</p> <p>The IRC restates the concerns in relation to the need for appropriately applied resources to ensure that any eligibility requirements for the MAP are not subject to abuse.</p>
14	What, if any, harms do you believe may be caused by implementing the Minimal Asset Procedure?	The IRC is not in a position to make any comments in relation to any potential social harm or moral hazard that may or may not arise from the implementation of the MAP.

15	What safeguards do you believe are required to mitigate misuse of the Minimal Asset Procedure?	<p>As stated above, the IRC raises concerns with the ability for individuals or commercially interested third parties to assist in the manipulation of balance sheets and financial positions prior to the implementation of an application for MAP.</p> <p>The discussion paper does not address the potential for creditors to recover funds from assets acquired by debtors after the commencement of an appointment under the PIR.</p> <p>Without actual statistical information, it is the anecdotal belief of the IRC that some estates under the PIR do return funds to creditors as a result of post-appointment asset windfalls such as distributions under Deceased Estates, increases in financial circumstances generally via changed employment or other windfall gains. These returns may not be predicable at the date of commencement.</p> <p>From the discussion paper the IRC believes that the MAP is a point in time assessment and any financial improvement after that assessment will be of no benefit to the creditors. This may need to be addressed in further consultation.</p>
16	How long should a debtor appear on the National Personal Insolvency Index for entering into a Minimal Asset Procedure?	<p>The IRC understands that if the purpose of the MAP is to allow for the rehabilitation of debtors, the utilisation of the MAP should be seen as no different than any other credit default and believe that having the NPII expunged after 7 years is appropriate.</p>