Law Council
OF AUSTRALIA

Office of the President

6 October 2023

Bankruptcy Team
Commercial and Copyright Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: bankruptcy@ag.gov.au

Dear Bankruptcy Team

Personal Insolvency Consultation

The Law Council of Australia welcomes the opportunity to make a submission in response to the Attorney-General's Department's Personal Insolvency Consultation.

The Law Council's submission is attached. It has been prepared with the assistance of the Insolvency and Restructuring Committee of the Law Council's Business Law Section, the Australian Consumer Law Committee of the Legal Practice Section, the New South Wales Bar Association; and the Law Society of New South Wales.

The Law Council would welcome the opportunity to answer any questions or to provide further comment on this submission. In the first instance, please contact John Farrell, Senior Policy Lawyer, on [redacted] or at [redacted].

Yours sincerely

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President

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Personal Insolvency Consultation

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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.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council of Australia thanks the following Committees and Constituent Bodies for their contributions to this submission:

- the Insolvency and Restructuring Committee of its Business Law Section (the **Insolvency and Restructuring Committee**);
- the Australian Consumer Law Committee of its Legal Practice Section (the **ACL Committee**);
- the New South Wales Bar Association; and
- the Law Society of New South Wales (**LSNSW**).

Introduction

1. The Law Council welcomes the opportunity to provide a submission in response to the Discussion Paper released as part of the Attorney-General's Department's *Personal Insolvency Consultation*.

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

   - an increase to the bankruptcy threshold from $10,000 to $20,000 (Proposal 1);
   - an increase to the timeframe a debtor has to respond to a bankruptcy notice from 21 days to 28 days (Proposal 2);
   - a reduction in the period of time for which a discharged bankrupt is recorded on the National Personal Insolvency Index (NPII) (Proposal 3); 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 (Proposal 4).

3. In the limited consultation time provided, the Law Council has not been able to develop a consensus view among its stakeholders on each of the four proposals. However, the Law Council has endeavoured to provide a majority view where possible with additional comments also provided for consideration by the Department.

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

4. 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 Notices and the presentation to the Court of a Creditors Petition, be increased to $20,000.

5. It is worth remembering, when considering the proposal, that it will only affect creditor-initiated bankruptcies. The Law Council understands that these represent only a small proportion of new bankruptcies each year—as little as 5–10 per cent. The vast majority of bankruptcies are the result of the filing by debtors themselves of a Debtor's Petition. There is no minimum debt threshold for the purposes of a Debtor's Petition. The proposed increase will have no impact on the entitlement of persons seeking the protection of bankruptcy on their own initiative.

6. The Law Council supports the proposed increase. However, in doing so, the Law Council expressly acknowledges the additional comments of the Insolvency and Restructuring Committee, and separately, the ACL Committee, which are set out later in this submission.

7. The existence of a statutory threshold amount gives effect to a policy that recognises that the imposition of a 'forced' bankruptcy at the suit of a creditor ought to be a last resort rather than a routine step in the debt recovery process, particularly where the debts are small.

8. Whilst it is entirely appropriate that an unpaid creditor with a substantial debt has access to a mechanism for bringing an insolvent debtor's affairs under the control of an independent third party, there are other means by which the creditor, and in particular commercial creditors, can obtain repayment of small debts without bankruptcy.[1] A sequestration order can have a devastating effect on a debtor and these are not limited to its financial consequences. Such consequences should be reserved for serious cases of financial default. Bankruptcy is a disproportionate response where the creditor is owed a small debt and there exist other means by which that debt can be recovered.

9. Some contributors add that the proposed increase is justified given the current economic climate, including substantial increases in cost of living and other macroeconomic factors together with the persistent, longer-term impacts on the Australian and global economies from the COVID-19 pandemic.

10. Additionally, it should be noted that the impact of a $20,000 threshold has been subject to some testing—due to its introduction on a temporary basis during the pandemic—and this provides an understanding of the potential impact of the proposal. The Discussion Paper cites 2022 data that suggests an increase in the threshold will translate to a reduction in bankruptcies of just under 12 per cent.[2] Law reform to discourage bankruptcy action over small debts, and to avoid the serious consequences of a bankruptcy declaration, accords with the principle that bankruptcy should be an option of last resort.

11. A transition period is not considered necessary. Moreover, it could have adverse consequences, by triggering an influx of notices prior to the changeover.

Additional comments—Insolvency and Restructuring Committee

12. The Committee wishes to add the following additional comments for consideration, to counter any suggestions that the proposed increase may not go far enough.

The limited availability and effectiveness of alternative pathways

13. In considering a proposal to raise the threshold, the question arises as to availability of alternative personal insolvency options for creditors. A creditor alone cannot force a debtor into Part IX or Part X. The threshold does not impact the debt required for a debtor to file a debtor's petition.

14. For the reasons set out below small debt recoveries are often difficult to achieve.[3]

    (a) Where there are multiple creditors, court rules usually stipulate that enforcement warrants are actioned according to 'first in time'—see, for example, rule 823 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR (Qld)**)—which contradicts key canons of insolvency law (that creditors should be treated *pari passu*).

    (b) Applications for enforcement warrants need to identify what property or debts or earnings to which the debtor is entitled so that the bailiff can execute the warrant. This often requires that the creditor has already gone through the

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[1] Cf the additional comments of members of the Insolvency and Restructuring Committee at paragraphs [12]-[13].
[2] Attorney-General's Department, *Personal insolvency discussion paper* (September 2023) 5 ('Discussion Paper').
[3] The *Uniform Civil Procedure Rules 1999* (Qld) have been referenced as examples. However, similar issues arise in other jurisdictions.

additional expensive process of obtaining information from the debtor through court examination processes.

(c) The effectiveness of warrants for redirection of debts and warrants for redirection of earnings is limited by the court having an overriding discretion as to how much the bailiff can access. To take an example, under UCPR (Qld) rule 840:

In deciding whether to issue an enforcement warrant authorising redirection … the court must have regard to the following—

a. whether the enforcement debtor has adequate means of satisfying the order after deducting—

i. the necessary living expenses of the enforcement debtor and the enforcement debtor's dependants; and

ii. any other known liabilities of the enforcement debtor …

(d) While a warrant for redirection of earnings is in force, no other enforcement warrant can be obtained (rule 861, UCPR (Qld)). This can result in a small creditor having to engage in several processes in series, rather than in parallel, to recover a debt.

(e) Where assets of a debtor are held in more than one jurisdiction, the creditor may have to resort to expensive, multiple enforcement processes in different jurisdictions to recover the one debt.

(f) Members of the Insolvency and Restructuring Committee have encountered material difficulties with the effectiveness of recovery processes attributable to budgeting and staff in state sheriff offices.

(g) There is also a common difficulty in recovering debts when assets of a debtor are jointly held (for example, when the matrimonial home is held jointly by spouses, yet the bailiff is only dealing with a debt owed by one of the spouses).

15. Having regard to the above, an increase in the threshold may lead to material difficulties in resolving unpaid debts. Alternative means of civil recovery are expensive and can be difficult and bankruptcy as the means of bringing finality and certainty ought not be taken off the table too readily. Bankruptcy is not debt collection, but it is about protecting society from recalcitrant and no doubt insolvent debtors. In the view of the Insolvency and Restructuring Committee, unless there is evidence of systemic abuse then any further increases in the threshold should be considered only after detailed investigation. Care must be taken that a culture is not created that small debts do not have to be paid.

Query the evidence to support an increase

16. The data provided in the Discussion Paper supports the view that the total debt owed to creditors in most bankruptcies over the last five years is significantly in excess of $10,000, and even more in excess of the previous threshold of $5,000. However, debtors made bankrupt in this way may actually have a significantly higher level of total debt, despite having been bankrupted over a single debt worth $5,000 or $10,000. It should not be assumed that one creditor is the only creditor.

17. The threshold was doubled under three years ago on in January 2021 from $5,000 to $10,000 (putting the temporary COVID threshold of $20,000 to one side). However, the basis for the figure chosen is not identified in the discussion paper, other than by reference to Australian Financial Security Authority (**AFSA**) statistics regarding all bankruptcies, and reference to the COVID relief measures which were specifically designed to (and which did) severely forestall bankruptcy action in the middle of a global pandemic.

18. There is no statistical or analytical data in respect of creditor's petitions provided to support the need for this threshold to be raised, much less to support a contrary proposition, that bankruptcy is being abused or used unnecessarily in respect of 'small' debts.

19. 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, there must be prior court proceedings, a judgment, a separate bankruptcy notice, and a separate creditor's petition with significant filing and legal costs. In the view of the Insolvency and Restructuring Committee, 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.

Additional comments—Australian Consumer Law Committee

20. The ACL Committee welcomes the proposal to increase the bankruptcy threshold. However, it suggests that consideration be given to further increasing the threshold.

21. The ACL Committee agrees with the Discussion Paper that bankruptcy is an option of last resort and that this needs to be balanced with minimising opportunities for debtors to incur additional unmanageable debts.

22. The Discussion Paper relies on data about bankruptcies including forced and voluntary bankruptcies.[4] Given the threshold only relates to involuntary bankruptcy, the ACL Committee is concerned that the data conflates issues. Many consumers experiencing financial difficulties may apply for voluntary bankruptcy for any amount as they have no or few assets and no or low incomes, or after the sale of assets when still not able to meet their debts as and when they fall due.

23. However, the increase of the threshold impacts only those subject to involuntary bankruptcy. In data provided by AFSA on bankruptcies in the financial year 2022–23, only 9.2 per cent of new bankruptcies were initiated by creditors petition with 3.3 per cent of bankruptcies involving total debts below $50,000, representing only 87 bankruptcies in the 22/23 financial year.

24. The ACL Committee considers that an analysis should be taken as to the profile of those who are subject to involuntary bankruptcy as the profile may disproportionately include consumers with assets who are being pursued for debts such as strata debts.[5] This is important to consider as it would demonstrate that bankruptcy notices and creditors petitions are potentially being used as a debt

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[4] Discussion Paper, 4.

[5] See, eg, Emily Stewart, 'Bankruptcies from debts linked to strata levies are on the rise, causing pain for apartment owners', *ABC News* (online, 31 August 2023) <https://www.abc.net.au/news/2023-08-30/strata-levy-bankruptcies-are-on-the-rise/102761594>.

collection tool as opposed to a genuine belief held by a creditor that a debtor cannot pay their debts as and when they fall due and are insolvent.

25. Given the costs of pursuing a creditors petition is upward of $5,000,[6] the consequence to a consumer is that a relatively small debt of $10,000 can quickly increase and compound to a significantly high amount due to the fees and costs imposed. Consequently, in the view of the ACL Committee, the threshold should rise to be more proportionate to the costs of the pursuit of an involuntary bankruptcy.

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

26. 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 Creditors 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).

27. 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.

28. The majority of contributors to this submission do not support this proposal.[7]

29. The Discussion Paper points out that such an increase would be consistent with the period provided for under the Bankruptcy Act for various other steps undertaken in connection with bankruptcy administrations. In addition, the Discussion Paper notes concerns by some stakeholders that it can be difficult for debtors to obtain 'appropriate and timely advice about bankruptcy and a debtor's options' within the 21-day period.[8]

30. As for the former, there are many provisions in the Bankruptcy Act that provide for the taking of action by debtors, creditors, trustees and others in which periods longer, or shorter, than 28 days are allowed. Examples include the period in which to complain about an act or omission of a trustee (60 days),[9] the period in which to lodge an appeal against a decision by a trustee in respect of a creditor's claim (21 days),[10] the period in which a creditor has to file a Creditors Petition on the basis of an available act of bankruptcy (6 months),[11] the period in which a Creditors

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[6] $2,990 plus filing fee of $1,845. Under item 112 of the *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth) sch 1, the court filing fee payable to the Federal Court varies from $1,845 for individual applicants to $4,425 for corporate applicants and $6,630 for publicly listed corporate applicants. Professional Costs for a creditors petition proceeding can be fixed at $2,990 under rule 14.1 of the *Federal Court Rules 2011* (Cth) sch 3 and under rule 13.03(1) of the *Federal Circuit and Family Court of Australia (Division 2) (Bankruptcy) Rules 2021* (Cth). In some circumstances there may be additional costs, for example, for substituted service, service fees and short form costs for dismissal of proceedings, which can further increase the amount.

[7] In relation to Proposal 2, the majority of contributors includes the New South Wales Bar Association, the Law Society of New South Wales, and the majority of members of the Insolvency and Restructuring Committee.

[8] Discussion Paper, 8.

[9] *Insolvency Practice Rules (Bankruptcy) 2016* (Cth), s 90-80.

[10] *Bankruptcy Act 1966* (Cth) s 104(3).

[11] Ibid s 44 (1)(c).

Petition remains valid (12 months, unless extended by Court order),[12] the notice period for service of an intention on behalf of the Inspector to suspend or cancel a practitioner's registration (10 business days,[13] as is the period of time allowed to a bankruptcy trustee to deliver books and records to a replacement trustee).[14] Other examples abound. The reason for this, is that the period of time prescribed for a particular step ought to be determined by reference to the requirements of the particular act involved, including as to its complexity and significance, not by the application of a standardised rule of thumb.

31. The Discussion Paper does not refer to any evidence that suggests that a seven-day increase in the response period is likely to bring about any change of debtor behaviour.

32. 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. 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. 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.

33. Whilst it can be accepted that it is unlikely that an increase in the response period by seven days will cause any real prejudice to any creditor, a divergence between the period allowed to a small business that is being conducted by a single director company in which to respond to a statutory demand and the period allowed to a small business conducted by an individual personally to respond to a Bankruptcy Notice is apt to cause confusion and lead to mistakes—particularly among small business owners, or commercially unsophisticated debtors who operate without the benefit of readily available legal advice and are likely to infer that they have the same amount of time in both scenarios. Such a divergence is also contrary to moves elsewhere in the corporate and personal insolvency spheres to align the two regimes.

34. Before the Government proceeds with this proposal, further information and data should be obtained and considered to determine whether the concern is truly justified, 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.

Additional comments—Australian Consumer Law Committee

35. Conversely, the ACL Committee supports extending the period for a debtor to respond to a bankruptcy notice and suggests that the Government consider further extending the period beyond the proposed 28 days.

36. The ACL Committee considers it important the debtor profile of those subject to a bankruptcy notice be examined. For many, they will be consumers where the creditor knows or is aware they hold assets—invariably real property. In the ACL Committee's view, it is unrealistic for a person to realise an asset and liquidate it to

[12] Ibid s 52(4).
[13] Ibid sch 2 (Insolvency Practice Schedule (Bankruptcy)), s 40-35(2)
[14] Ibid sch 2 (Insolvency Practice Schedule (Bankruptcy)), s 70-30(3).

meet their debts in a 21- or 28-day period and accordingly a further increase is proposed. Further, members of the ACL Committee have seen examples of consumers being unaware of the original proceedings, particularly vulnerable consumers. The consequences of a failure to pay within 21 days is serious—it is an act of bankruptcy and given that seriousness the ACL Committee considers consumers should be provided additional time to respond.

37. The ACL Committee also note that it may be difficult for many consumers to secure legal representation to either make a counter claim or set off or take reasonable steps to set aside a default judgment or appeal the original debt. The ACL Committee considers the argument that they may dispose of assets in light of the significant powers of trustees to be unconvincing.

38. Once settled, the ACL Committee supports the efficient and effective implementation of changes. The recent experience with the COVID pandemic provides support that implementation can be so. Nonetheless, it will be important for clear information to be made available for creditors and debtors about the impact of the changes so as to minimise waste. Providing a long changeover may only encourage creditors to potentially commence bankruptcy proceedings hastily and without due regard to the insolvency of the debtor.

Proposal 3—Reducing the permanent record on the National Personal Insolvency Index to seven years

39. The National Personal Insolvency Index (**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 Index 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 Index permanently. Provided the information is historically accurate it cannot, except in very limited circumstances, be removed from the public register.

40. The proposal is to alter the period during which such information will remain publicly available so that it is limited to seven years from the date of discharge from bankruptcy. The information will remain permanently available for prescribed purposes including law enforcement activities.

41. The existence of a publicly searchable register that contains up to date information about bankrupts and bankruptcy administrations is justified. There is a public interest in such information being available including to potential lenders, suppliers and ordinary consumers who are able, by search, to ascertain the bankruptcy status and financial record of a person with whom they either have or are intending to have financial dealings. Such access can be one means by which persons can protect themselves against fraud. The register maintained by ASIC in respect of corporations contains similar information.

42. However, the majority of contributors to this submission[15] consider that public interest wanes with the passage of time. That an employee or contractor or a

[15] In relation to Proposal 3, the majority of contributors includes the New South Wales Bar Association, the Australian Consumer Law Committee and the majority of members of the Insolvency and Restructuring Committee.

potential counterparty in a commercial transaction is, or recently was, an undischarged bankrupt may well be very relevant to a decision whether to deal with them or not. The fact that such a party might have been a bankrupt 10 or 20 years in the past is likely to be much less so.

43. Further, and consistent with the 'fresh start' imperative, which is one of the goals of the Bankruptcy Act, bankruptcy should not be a permanent stain on an individual's public record. A debtor's ability to 'get back on their feet' by, for instance, accessing credit after their discharge from bankruptcy is likely to be seriously impaired by a record that could be decades old and has no rational bearing on their current circumstances. It also needs to be remembered that bankruptcy has personal, as well as commercial, consequences for the debtor and it remains the case that there is a stigma attached to bankruptcy. It is still seen, by some in the community, as a sign of failure and as a matter for which a person should be ashamed. In the absence of compelling reasons to do otherwise, there should be a time when the slate is wiped clean.

44. It is notable that 'spent conviction' laws in Australia's (state-based) criminal rehabilitation schemes are more generous to those with recorded convictions than the NPII is to bankrupts. Compared to a person who has spent time in gaol for a crime, who may be able some 10 years later to declare to, for example, a potential employer, that they have no criminal conviction, a bankrupt (who has committed no crime) presently has an NPII record for life.

45. In the United Kingdom (**UK**), debtors are removed from the equivalent public index, the Individual Insolvency Register (**IIR**), three months from discharge. Indeed, the UK reformed the IIR in 2004 to reduce the timeframe from two years-post discharge to three months, with the aim of reducing the stigma of bankruptcy. The Law Council is not aware of any significant detrimental impacts for the UK economy from this reform and understands that this reform has not been sought to be reviewed.

46. In the view of the majority of contributors to this submission, the proposal to remove the 'permanency' of the NPII public record strikes a sensible balance between the benefits of transparency in financial dealings between parties and the personal interests of the debtor in their financial rehabilitation.

Additional comment—LSNSW

47. Conversely, the LSNSW is of the view that there is no clear evidence of the benefits of such a change and therefore considers the status quo should be maintained. In the LSNSW's view, further clarification is required to determine whether there may be any adverse impacts from reducing the permanent record period on the NPII to seven years. While the Discussion Paper indicates that the proposal does not extend to extinguishing the record after the seven-year period, and that the records would remain available in certain circumstances that may assist in identifying serial bankrupts, or patterns of relevant behaviour, the mechanism for making that information available is unclear.

Additional comment—Insolvency and Restructuring Committee

48. Some members of the Insolvency and Restructuring Committee have also suggested that so-called 'business bankrupts' might be kept on some form of public register as distinct from 'consumer bankrupts'. This distinction is not yet provided for in the regime and would need to form part of a broader reform package consistent with the Business Law Section's submission to the 2022 consultation on

bankruptcy reform, where it advocated for broader reform to consumer-level personal insolvency solutions.[16] The Committee appreciates that such a broader reform package is not part of the current consultation.

Proposal 4—Circumstances involving debt agreements which serve as an 'act of bankruptcy'

49. The fourth proposal set out in the Consultation Paper 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.

50. The Law Council supports this proposal.

51. Part IX of the Bankruptcy Act provides an opportunity for a debtor with modest total liabilities to reach, and implement, an agreement with their creditors to satisfy those debts by way of a compromise. It is a statutory alternative to bankruptcy, or to the negotiation of a personal insolvency agreement pursuant to Part X of the Act, and is only available for debtors whose total debts and total assets are low. The regime is intended to encourage the debtor to interact with his or her creditors in an open way with a view to reaching an acceptable compromise and thereby avoid more serious consequences, including bankruptcy, if such matters are ignored. In this way, it advances the 'fresh start' imperative.

52. At present, the formulation of a debt agreement proposal and/or its subsequent acceptance by creditors constitutes an act of bankruptcy for the purposes of section 40 of the Bankruptcy Act. Thus, a debtor who seeks to take advantage of this informal, proactive means of reaching agreement with his or her creditors will, by the very act of doing so, expose themselves to the more formal bankruptcy processes, such as the filing of a Creditors Petition, because they will have committed an act of bankruptcy in the attempt. That outcome is anomalous. It tends to undermine the statutory intention that underpins Part IX—namely, encouraging debtors to face up to financial issues rather than ignore them. The risk of a consumer being involuntarily made bankrupt by applying for a debt agreement is both a deterrent from consumers accessing debt agreements but also a risk for consumers who have been poorly advised to enter a debt agreement.

53. Given that debt agreements are only available for persons whose assets and debts are small, it is difficult to see how making this change (which does no more than remove one potential ground for presentation of a Creditors Petition) will produce any serious prejudice to creditors.

54. In implementing this proposal, a transitional period may be appropriate in order to address any creditor's petition that may be live at the time of enactment.

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[16] Law Council of Australia, Submission to the Attorney-General's Department, *Bankruptcy system – Options Paper January 2022* (25 February 2022) [2](b) <https://lawcouncil.au/publicassets/bd32cb09-739f-ec11-944b-005056be13b5/4179%20-%20Bankruptcy%20system%20Options%20Paper%20January%202022.pdf>.