

28 September 2023

Submission to the Attorney-General's Department Personal Insolvency Discussion Paper

Financial Counselling Victoria (FCVic) welcomes the opportunity to make a submission to the Attorney-General's Department Personal Insolvency Discussion Paper.

About Financial Counselling Victoria

FCVic is the peak body and professional association for financial counsellors in Victoria. Financial counselling is a regulated profession providing free, confidential, and independent advice and advocacy for people experiencing, or at risk of, financial hardship. FCVic advocates on behalf of financial counsellors and their clients on systemic issues that cause and exacerbate poverty and hardship.

Victorian financial counsellors support many debtors through all stages on the bankruptcy and debt agreement process. They have experience and knowledge of both the advantages and issues with the system, particularly from the perspective of vulnerable debtors who have sought financial counselling assistance at a very stressful time.

In preparing this submission, FCVic has consulted with the members of its Bankruptcy Working Group, which comprises practitioners with a high level of experience in the subject matters raised in the discussion paper. FCVic believes that there is a place for bankruptcies and debt agreements that are reasonable, fair and equitable to debtors. However, we see many cases where the processes are used by some creditors or debt administration businesses to either unfairly pressure debtors or as a source of fees for administrators.

This submission will focus primarily on the questions raised, but we have provided further comments for consideration under 'Other Comments'.

We wish to acknowledge and support the joint submission made by Financial Rights Legal Centre, Financial Counselling Australia, and other parties ("joint submission") recently that contains useful data and case studies that support some of the recommendations in this submission.

Increasing the bankruptcy threshold from \$10,000 to \$20,000

Discussion questions

Question 1: Do you believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to \$20,000? Please expand on your response.

Question 2: If you do believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to \$20,000, should there be a transition period before any reforms take effect?

Question 3: If you do not believe that any of the current economic circumstances have the capacity to inform the policy setting for increasing the default bankruptcy threshold to \$20,000, please explain whether an alternative amount should be considered for the threshold and why.

We support the argument from the joint submission to increase the creditor's petition threshold to \$50,000; however, we understand that in the present economic conditions this increase may be considered too large for some market participants. We recommend that \$35,000 be considered as a position that may achieve the objectives of more stakeholders.

The default bankruptcy threshold, at its current low level, is often used by creditors, such as schools, body corporates and councils, to force the sale of property to recover outstanding costs. This results in the loss of housing and in the present economic conditions creditors should be encouraged to enter into reasonable and affordable payment arrangements rather than bankruptcy and forced home sales.

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

Discussion questions

Question 4: Do you believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days? Please expand on your answer and consider any potential impacts.

Question 5: If you do believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days, should there be a transition period before any reform takes effect? Please expand on your answer.

Question 6: If you do not believe that the period for a debtor to respond to a bankruptcy notice should be increased from 21 days to 28 days, please explain whether an alternative duration should be considered and why.

The proposed increase of time to respond to a bankruptcy notice to 28 days would continue to be insufficient. Many vulnerable people delay seeking any advice as they try to “avoid” the issue. In addition, wait times to seek financial counselling or other no cost support are currently up to 10 weeks. We recommend that the timeframe to respond to a bankruptcy notice should be extended from 21 days to 60 days.

During COVID, the extended period of 6 months created an opportunity for more people to seek financial counselling support, and through their negotiation with creditors bankruptcy levels were reduced. We often observe significant stress experienced by debtors who have a low understanding of what they are facing and do not have the capacity to address their issues in a short timeframe.

In addition, there should be the option for a financial counsellor, at any time in the agreed notice period, to easily seek an extension of 21 days to the expiry date of a bankruptcy notice, in order to explain documentation and available options to the debtor once they are engaged. We believe this would lead to better outcomes in terms of settlement, communication and debtor understanding.

Financial counsellors have reported that a major barrier for debtors responding to creditors is a lack of understanding of the bankruptcy process. This could be overcome by ensuring all correspondence sent to debtors is in plain English that anyone can understand. Documents should be aimed at a person with a year 10 reading comprehension. Where a person does not use English as a first language, they should be able to request the information be provided in a culturally sensitive manner in their preferred language. All documentation should include a pictorial representation of timelines which can be easily understood.

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

Discussion questions

Question 7: Do you believe that any of the current economic circumstances have the capacity to inform the policy setting for a reduced record period of seven years on the NPII for bankruptcies? Please expand on your response.

Question 8: Would a reduced record period of seven years on the NPII for bankruptcies benefit debtors? Please expand on your response.

Question 9: Do you believe that there may be any adverse impacts from reducing the permanent record period on the NPII to seven years for bankruptcies? Please expand on your response and consider any mitigating factors.

Question 10: Do you believe that any circumstances should be exempt from a reduced record period on the NPII for bankruptcies? Please expand on your response.

Question 11: If you support the proposed reform to reduce the NPII permanent record to seven years for bankruptcies, should there be a transition period before any reforms take effect?

Question 12: If you do not support reducing the permanent record on the NPII to seven years for bankruptcies, please explain why.

Part 13 of the Bankruptcy Regulations 2021 should be comprehensively updated and modernised to ensure the National Personal Insolvency Index (NPII) operates in a fair way with a proper purpose, and in alignment with Australia's credit reporting framework.

A person's listing/s on the NPII should be completely removed five years from the commencement of the bankruptcy. This will enable those with a bankruptcy early in life to avail themselves of the fresh start that bankruptcy is intended to provide.

A person's listing/s should be completely removed from the NPII within 28 days of the date their bankruptcy is annulled.

A creditor's petition, dismissed by the Court, should not appear on the NPII.

The Official Receiver should be empowered to give effect to NPII changes required by Australian Financial Complaints Authority determinations and settled complaints.

Circumstances involving debt agreements which serve as an ‘act of bankruptcy’

Discussion questions

Question 13: Do you believe that any current economic circumstances may have the capacity to inform the policy setting for repealing paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act? Please expand on your response.

Question 14: Do you believe that there may be any adverse impacts from repealing paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act? Please expand on your response and consider any mitigating factors.

Question 15: Do you believe that any circumstances should be exempt from repealing the acts of bankruptcy provided for under paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act? Please expand on your response and identify the circumstances you consider should be exempt and explain why.

Question 16: If you support a reform to repeal paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act, should there be a transition period before any reforms take effect? Please expand on your response.

Question 17: If you do not support a reform to repeal paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act, please expand on your response.

We are of the view that a debt agreement should not be considered an act of bankruptcy. At their best, an appropriate debt agreement is a genuine attempt by a debtor and their creditors to settle debts in a mutually agreed manner. This is to be encouraged, rather than be “punished” by burdening already troubled debtors with a label.

Other matters

In addition to our responses to the above questions we wish to submit the following recommendations, some of which are also included in the joint submission.

Protected Amounts

- Amend s 116 of the Act to explicitly state that property bought wholly or partly with payments from the National Redress Scheme for Institutional Child Sexual Abuse and Territories Stolen Generations Redress Scheme are not divisible in bankruptcy.
- Amend s 116(2) of the Act to protect total and permanent disability insurance payments in the same comprehensive manner as compensation for personal injury.

Part IX debt agreements

We recommend that an overhaul of Part 9 of the Act should be addressed as a matter of urgency. There are a number of inconsistencies between the bankruptcy provisions and those impacting Part 9 debt agreements.

These changes will encourage debt agreements in appropriate circumstances, but also protect debts from failing due to unviable agreements being put in place. Financial counsellors have reported that some unviable agreements are sold to debtors by debt administration businesses for reasons other than those in the best interests of the debtor. In particular, these relate to the thresholds and asset limits applicable to these agreements.

Financial counsellors have seen an increased targeting of low-income earners being sold debt agreements to avoid bankruptcy, when debtors would have been able to enter into affordable arrangements had they been referred to a financial counsellor.

The increase in house prices has severely impacted many debtors who find themselves well in excess of the current threshold amounts for income, unsecured debts or assets, including housing equity.

We recommend the following changes to the debt agreements thresholds:

- The Attorney-General should make a legislative instrument setting the 'payment-to-income ratio' such that the effective minimum annual income threshold to enter a Debt Agreement is linked to the Base Income Threshold Amount (\$66,639) or, alternatively, the National Minimum Wage (\$45,905). This will reduce instances of unviable (and costly) debt agreements being arranged, sometimes by debt administration businesses who may not fully appreciate the real financial circumstances of a debtor.
- Maximum Income – 1.5 times the average weekly earnings AITA.
- Asset limit increased to \$500,000 and then indexed.
- Unsecured debt limit raised to- \$200,000 and then indexed.

Thank you for the opportunity to make a submission on Personal Insolvency issues. Please contact Carmel Vivian at 0499 570 878 or c.vivian@connecthealth.org.au if you would like to discuss the submission further.