



Consumer Credit
Legal Centre NSW

February 2014

Submission in relation to AFSA's Cost Recovery Impact Statement on New and Revised Fees for Personal Insolvency and Trustee Services

by the

Consumer Credit Legal Centre (NSW) & Lismore and District Financial Counselling

About Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 20,000 calls for advice or assistance during the 2012/2013 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

About Lismore and District Financial Counselling

Lismore and District Financial Counselling Service Inc. (LDFCS) is a not-for-profit, incorporated community organisation formed in 1990 and incorporated on 12th June 2002 to provide financial counselling to people in Lismore and the Northern Rivers to alleviate poverty.

LDFCS operates as a financial counselling service to support and empower client's to take control of their finances and alleviate their poverty. We provide high quality, professional, accredited, free and confidential financial counselling, both by face-to-face interviews and telephone counselling to over 500 families a year throughout the Far North Coast (NSW) who are experiencing financial difficulties.

Thank you for the opportunity to comment on AFSA's Cost Recovery Impact Statement on new and revised fees for Debtors Petitions, Overseas Travel Requests and Realisation Charges.

General Comments

The Consumer Credit Legal Centre and Lismore & District Financial Counselling Service strongly oppose the introduction of Debtor's Petition fee. This new \$120 fee will have very serious consequences for our clients, their creditors, and the wellbeing of their families and the health of the communities they live in. The majority of clients that we advise about filing for bankruptcy are on very low incomes, and by the time they are contemplating bankruptcy they are in severe financial hardship.

Demographics of debtors filing for bankruptcy

Over the last 3 years CCLC's Credit and Debt Hotline has received an average of over 900 callers per year in relation to Bankruptcy. Excluding those calls about creditor initiated bankruptcies (Bankruptcy Notices and Creditor's Petitions) and Debt Agreements, there is an average of over 700 calls per year from people either in the process of, or contemplating, lodging a Debtor's Petition. Of those callers 62% report they are living on an income of less than \$26,000 per annum (with some reporting no income at all).

By the stage these clients are contemplating filing for bankruptcy they are in severe financial hardship, living day-to-day and are having trouble meeting basic living expenses. Such clients have likely been operating on very low incomes for a long time, have little if any funds available to them and have no capacity to save.

Lismore & District Financial Counselling, a co-author of this submission has clients with similar demographics:

As a regional service we see over 500 new clients a year and of these 40% have an income of under \$20,000pa (under 385pw), 3% had no income at all and 9% are homeless or in danger of homelessness. The fee represents over 30% of the weekly income of this group. This group have no access to extra funds to meet extra costs and the fee can only be raised by cutting back on food, medication or risking getting into rent arrears. This will have impact on themselves and their families.

Our client group includes 21% of clients who are experiencing diagnosed mental health issues. For this group bankruptcy is already a very hard decision as it acknowledges their failure to manage. The fee further emphasises their "failure" and risks them not taking medication or eating to raise the funds.

Even those clients that have a moderately higher income are often operating at a considerable deficit each fortnight because of their high levels of personal debt.

For this group of debtors a \$120 fee to file for bankruptcy will be a significant financial burden.

Bankruptcy is not something that debtors enter into lightly. We always advise clients of the consequences that come with being bankrupt, and it is still regarded by most people as carrying a significant stigma. We only advise clients to lodge a Debtor's Petition as a last resort when their financial situation has become unmanageable.

Fewer debtors will file for bankruptcy

One of the inevitable consequences of the new fee for lodging a Debtors Petition is that fewer debtors will file for bankruptcy. People who are already struggling with the stress of indebtedness may see the fee as a barrier to bankruptcy. This will be a terrible result for everyone from creditors, to the debtor's family to the community at large.

Many callers to CCLC are already making tough decisions about expenditure and fielding stressful calls from creditors and debt collectors. In a significant percentage of cases, one or more creditors have obtained a judgment against the caller and have commenced enforcement action. This will often mean that either:

- The sheriff has paid a visit to the debtor's home and tagged their household items for potential seizure and sale under a writ for levy of property¹; or
- There has been a garnishee issued over the person's salary, wage or bank account which will (or has) left them with insufficient income for essential payments such as rent or utilities.²

For people in these circumstances who cannot pay the debt and have no other resources to fall back on, bankruptcy offers an alternative whereby essential household goods are protected, and income is protected up to a certain amount (depending on the person's number of dependents). While a successful application to pay by instalments can serve to stop enforcement action, many debtors cannot afford to pay off the debt within a reasonable time leading to their application being rejected. With a fee imposed for entering bankruptcy voluntarily, these people may be literally *too poor to go bankrupt*, with disastrous results for themselves and their children (or other dependents). These debtors can be at risk of losing essential services, or of being left without basic furniture and appliances, or being left without a vehicle to go to work, or transport ill or disabled family members, or even homelessness (in the case of garnishees). In extreme cases people have been subject to multiple writs and may already have replaced their household goods with help from family and charities, only to have them seized again.

The loss of the vehicle in the Lismore area, for example, (where there is no viable public transport network) could mean no access to medical care, groceries, support services or future job opportunities.

¹ In NSW a writ for levy of property can be issued against certain items that would be protected if the debtor were bankrupt. Specifically, furniture in any part of the house except the bedroom and kitchen can be seized under a writ for levy of property, as can a vehicle of any value.

² There is a minimum amount that must be left in a person's salary when acting on a garnishee order. However, that amount is linked to the standard workers compensation weekly benefit (s 122 *Civil Procedure Act 2005*) which is currently \$452.60 (Effective from 1 October 2013) adjusted April and October each year and has no relationship to the debtor's actual living expenses. There is currently no minimum amount that must be left in a bank account on a one-off garnishee, although there are some (often ineffective) rules for accounts into which social security is paid.

Bankruptcy protects essential household goods, a modest family vehicle (currently up to the value of \$7,350.) and allows people to retain the full benefit of their income up to the applicable threshold amounts. People who cannot afford to go bankrupt will be left without these protections that have been set by the legislature as the minimum living standard for people who have been declared insolvent.

Even for debtors with assets, bankruptcy is a critical legal institution in society because it solves a collective action problem among creditors in dealing with an insolvent debtor. Outside bankruptcy, debt collection is essentially a race to the finish. When a debtor is insolvent and there are not enough assets to satisfy all creditors it is well understood that creditors as a group are better off working together to distribute the debtor's assets in an orderly fashion than allowing individual creditors to race to grab their share. Creditors incur greater costs (legal fees, court costs, sheriff expenses) when they escalate their debt recovery practices. Bankruptcy allows for the orderly distribution of the debtor's assets through a collective proceeding that jointly involves anyone with a claim against the debtor.

Bankruptcy is also an invaluable institution for insolvent debtors because it allows them to deal with their untenable financial situation in a dignified manner, with the future hope of a "fresh start."

Debtors that are in severe financial hardship will be forced to delay lodging a Debtor's Petition because they cannot come up with the \$120 fee. Not only will those debtors be unable to deal with their debts in a dignified way, but their creditors as a whole will be worse off. What little assets that debtor has will quickly be depleted by the creditors with the fastest or most intimidating collection tactics. This new fee will lead to a terrible outcome for not only the debtors that are denied a "fresh start" but potentially for their creditors as well.

Debtors will incur more debt in order to file for bankruptcy

Another consequence of introducing a fee for lodging a Debtor's Petition is that debtors will be forced to incur more debt in order to come up with the \$120 fee. Debtors that are determined to commence bankruptcy proceedings will be forced to borrow money to pay the fee, even though incurring additional debt in these circumstances could constitute a clear breach of section 265(8) of the *Bankruptcy Act 1966*³.

Jeffrey Davis, a professor from the University of Florida who specialises in Bankruptcy law in the United States says debtors may get deeper into debt when they need to pay a fee in order to go bankrupt:

While some debtors are undoubtedly permanently discouraged from filing, it is hard to isolate the people that don't file, because one can't collect data on what doesn't happen. However, it is my understanding, based on anecdotal conversations with bankruptcy lawyers, that bankruptcy filings in the US are often delayed while debtors

³ A person who has become a bankrupt and, within 2 years before he or she became a bankrupt and after the commencement of this Act, has contracted a debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation, after taking into consideration his or her other liabilities (if any), of being able to pay the debt, is guilty of an offence and is punishable, upon conviction, by imprisonment for a period not exceeding 1 year.

find a source of the needed funds. Although it may not be self-evident, delayed filing is often harmful to creditors. Debtors tend to get deeper in debt, not only because they often borrow the needed money from a credit card or payday lender, but because they are often using credit or dissipating assets to pay living expenses. Many creditors are happy to see debtors file bankruptcy sooner rather than later because the debtor can no longer dissipate assets. Time is money, and for a debtor that needs to file bankruptcy, delay helps nobody.⁴

We note that the fee is significantly larger in the US than the fee proposed in Australia but \$120 is a significant amount for the majority of our clients and no fee waiver provision (as operates in the US) is currently proposed.

Charitable organisations will carry the burden

Many of our clients that are contemplating bankruptcy are already reliant on welfare and charitable agencies for emergency relief for food assistance and medical treatment. If a debtor is forced to come up with \$120 in order to lodge a Debtor's Petition he or she will become even more reliant on charitable organisations to meet basic living expenses.

These services are already overstretched, and it will be completely inappropriate for AFSA to indirectly recover costs from this sector of the community.

If a fee is introduced for lodging a Debtor's Petition, there should be a waiver for low income debtors

In the United States, where there has been a fee for filing for bankruptcy for quite some time, there is a waiver procedure for debtors that are in poverty. In the United States, standard eligibility for the fee waiver is when the debtor has income less than 150 percent of poverty guidelines and is unable to pay the fee in instalments. Poverty guidelines in the US are based on size of family/household. For a family of 4, for example, poverty guideline is USD\$23,550 annually. A family of 4 with an income of less than about USD\$35,000 would be eligible for the waiver.⁵

The Melbourne Institute of Applied Economic and Social Research has updated the poverty line for Australia to the September quarter 2013 Inclusive of housing costs, the poverty line is \$947.36 per week for a family comprising two adults, one of whom is working, and two dependent children. That is \$49,263 annually. According to the American model, a debtor in a family of 4 that earns under \$73,895 per year should be eligible for a fee waiver. A single debtor that earns under \$39,342 annually should similarly be eligible for a fee waiver.⁶

According to the Debtor's Profile statistics released by AFSA in 2011, 52% of bankrupts in the previous 2 years earned less than \$30,000 per annum, with 10% overall earning less than \$10,000 per annum. A further 26% earned between \$30,000 and \$50,000. This

⁴ Email response received from Professor Jeffrey Davis, LL.M after explaining AFSA's proposed introduction of a fee for lodging Debtor's Petition in Australia.

⁵ Fee waiver application rule is at 28 USC 1930(f)(1-3). The poverty guidelines are published in the Federal Register by the Department of Health and Human Services. Available at: www.hhs.gov

⁶ <http://melbourneinstitute.com/downloads/publications/Poverty%20Lines/Poverty-lines-Australia-Sept-2013.pdf>

means that in Australia almost 78% of debtors⁷ would meet the criteria for a fee waiver under the American model.

At the very least, the situation where debtors can be too poor to go bankrupt should be mitigated by offering a fee waiver process. This would go some way towards alleviating the damaging potential impacts of this new fee. We would consider this an absolute minimum requirement, but we question whether the costs of administering the fee waiver process would outweigh any benefit in imposing the fee given the low incomes of many bankrupts and their likelihood of qualifying for a fee waiver. Rather than forcing an application for a fee waiver, the filing fee, if it must be imposed at all, should be graduated so that it only applies to debtors with incomes in excess of a set amount as indicated in their Statement of Affairs (for example \$40,000).

Assessment via the existing income contribution system

The bankruptcy regime already imposes an income contribution requirement that is tied to income and number of dependents, and is recovered from post bankruptcy income rather than set up as a barrier to entering bankruptcy in the first place. It also includes a mechanism whereby debtor can apply for hardship in certain circumstances. Preferably, if a fee is to be imposed, it should be imposed only on those debtors who earn sufficient income to be required to make contributions under that scheme, and there should be opportunities to pay the fee off over time (once bankrupt) as part of contributions and to apply for exemption or reduction on grounds of hardship.

The Realisation Charge is a more appropriate way for AFSA to recover its personal insolvency costs

We do not oppose these increases. CCLC submits that the Realisation Charge is an appropriate way for AFSA to continue to recover costs.

Fee for Overseas Travel Requests

We do not oppose this fee; however we submit that *Bankruptcy Legislation Amendment (Fees and Charges) Bill 2006* should include a waiver process for bankrupts in extenuating circumstances. If a bankrupt for example needed to scrape together the funds to fly overseas (for the funeral of a close family member, for example, or to visit a close family member who is gravely ill), they should be able to apply for a waiver of the \$150 processing fee.

Conclusion

Given the impacts outlined above we strongly oppose the introduction of a fee for lodging a Debtor's Petition. The financial and social cost that will be incurred by our clients, the community welfare sector, the wider community and even creditors far outweighs the value of the revenue raised by this proposal.

⁷ We cannot get a closer estimate because the 30,000-\$50,000 category is not broken down to reveal the percentage that earn less than \$40,000. Further, some other debtors would qualify because of their dependents.

Thank you again for the opportunity to comment on AFSA's Cost Recovery Impact Statement on new and revised fees for Debtors Petitions, Overseas Travel Requests and Realisation Charges. If you have any questions or concerns regarding this submission please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216.



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