



Financial Rights Legal Centre & Consumer Action

Legal and Constitutional Affairs Legislation
Committee

Bankruptcy Amendment (Enterprise Incentives)
Bill 2017

January 2018

About the Financial Rights Legal Centre

The Financial Rights Legal Centre (*formerly known as the Consumer Credit Legal Centre (NSW)*) is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps 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. Financial Rights took close to 25,000 calls for advice or assistance during the 2016/2017 financial year.

About the Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for-profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Introduction

Thank you for the opportunity to comment on the *Bankruptcy Amendment (Enterprise Incentives) Bill 2017 (Bill)*.

1. Reducing the default period

We support reducing the default period for bankruptcy from 3 years to 1 year under Section 149 of the *Bankruptcy Act 1966 (Cth) (Act)*. This strikes an appropriate balance between the interests of creditors, and ensuring that bankruptcy enables a fresh start for debtors, and is not needlessly punitive. Reducing the bankruptcy period as described in the bill is likely to have a fairly minimal effect on the amounts recouped by creditors from bankrupt estates, but significantly improves the bankrupt's opportunities for early financial rehabilitation and participation in economic activity.

2. Ongoing obligations for bankrupts

We support requiring bankrupts who are assessed as eligible to make payments during a contribution assessment period to continue to make income contribution payments to a bankrupt estate. This will ensure that those high-income earners who can afford to pay do not avoid paying due to the one-year automatic discharge.

However, we note that there has been no change to the rules surrounding situations of financial hardship. Bankrupts who are behind in their contribution obligations and have subsequently suffered from a change of circumstances such as unemployment, illness, or accident, have no options under the Act. Section 139T provides for the situations where the income contribution assessed produce an immediately harsh result for the reasons listed. It does not cover the situation where the assessment is valid at the time it is made but can no longer be met because of a subsequent change of circumstances.

Section 139ZH provides that there is no refund payable in relation to overpaid contributions, only set-off against a subsequent contribution assessment period. This is harsh, particularly if the overpayment is not due to any act or omission of the bankrupt (for example, miscalculation by the trustee). If anything, this section provides an incentive for bankrupts to under-estimate rather than over-estimate income (better to have to pay extra later than to pay too much and not be able to recover it). There should be a capacity to account to the bankrupt where an overpayment occurs in the final contribution assessment period.

In keeping with the intention of promoting financial rehabilitation and learning from mistakes, bankrupts should be able to keep their income earned after the date of bankruptcy. Arguably they should also be able to invest in assets, provided they have paid their assessed income contributions if applicable. Until recently it was assumed that bankrupts could retain savings from income earned after the date of their bankruptcy but could not convert those savings into an asset. A recent case *Di Cioccio v Official Trustee in Bankruptcy (as Trustee of the Bankrupt*

Estate of Di Cioccio) [2015] FCAFC 30 not only confirmed that a bankrupt cannot convert income to an asset (in this case shares) without the asset immediately vesting in the trustee, but also cast doubt over whether savings in a bank account were safe from vesting in the trustee.

In short this means that whether a bankrupt gets to retain any savings they accumulate is *at the discretion* of the trustee. Anything they purchase with it, whether it be shares, paying off a home, or buying supplies for a small business venture *will vest* in the trustee.

While we appreciate the logic behind these provisions – that is, bankrupts being allowed what they need to live from day to day and nothing further until discharge – this does not sit well with the Government’s policy agenda. Further, it encourages people to spend all that they earn even if they have the capacity to save.

We submit that the appropriate balance between creditors’ rights and encouraging financial rehabilitation would be to legislate to enshrine the bankrupt’s right to retain any accumulated savings, even during the period of being an undischarged bankrupt. A logical extension of this would be to allow them to also invest this money without the asset vesting in the trustee, provided they could show that the asset was purchased with income generated after the date of bankruptcy and after payment of assessed contributions. Inheritances, winnings and other after-acquired assets would continue to vest in the trustee if received prior to discharge; it would be unfair for the bankrupt to benefit from such windfalls to the detriment of their creditors.

3. Certain restrictions lifted

We support the lifting on restrictions on overseas travel, obtaining credit and company board eligibility. Any potential disadvantage to creditors could be dealt with under the existing offences and objections to discharge.

4. Impact on credit report

The bill does not change the rules with respect to the deletion of information from credit information files under section 20X, Part IIIA of the *Privacy Act 1988* (Cth) (**credit reports**).

At present, bankruptcy is retained on a person’s credit report for the longer of 2 years from discharge or 5 years from the date of bankruptcy – effectively a minimum of 5 years. If the period of bankruptcy is reduced by 2 years then, logically, the period that bankruptcy remains on credit reports should also be reduced by 2 years, creating an effective minimum of 3 years.

Australians are very concerned about their perceived creditworthiness and the impact of any potential decision, such as bankruptcy or applying for a hardship variation, on their credit report. Financial counsellors report that, when advising on the consequences of a potential insolvency, people are far more concerned about the impact on future borrowing than the stigma of disclosing that they are an undischarged bankrupt for the period of bankruptcy. This

is particularly so for younger people, who are concerned that the bankruptcy will prevent them from buying a family home in future.

Reducing the period of bankruptcy will have little effect on entrepreneurial activity if the prospect of insolvency, should the venture fail, adversely impact their perceived creditworthiness. Similarly, entrepreneurs will struggle to 'reengage in business sooner' as envisaged by the Explanatory Memorandum if the impact on their credit report remains the same – effectively 4 years from discharge.

If the retention period for bankruptcy information is reduced, then the retention period for default information should also be reduced. A single credit default is a less significant event than a bankruptcy (and equally likely to result from “necessary risk-taking or misfortune rather than misdeed”). It would be anomalous for bankruptcy to be retained for a shorter period. We submit that in order to further the Government’s policy objectives, default listings should be reduced to 2 years to delineate them from insolvency (or 3 years at the most).

Recommendation:

Amend the *Privacy Act 1988* to:

- reduce the retention period for bankruptcy information to the longer of two years from discharge or three years from the date of bankruptcy; and
- reduce the retention period for default information to two years.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Drew MacRae, Policy & Advocacy Officer at Financial Rights on (02) 8204 1386.

Kind Regards,



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