



Financial Rights

LEGAL CENTRE



Submission by the Financial Rights Legal Centre

Attorney General's Department

Minimal Asset Procedure Discussion Paper

August 2024

Financial Rights Legal Centre
PO BOX 538, Surry Hills
Tel (02) 9212 4216
Fax (02) 9212 4711

info@financialrights.org.au

www.financialrights.org.au

@Fin_Rights_CLC

ABN: 40 506 635 273

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers 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 part of the National Debt Helpline, helping 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, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

Introduction

Consumer advocates warmly support the proposal to introduce a Minimal Asset Procedure (**MAP**) into Australia's personal insolvency system. We recommend that the debt threshold be higher and seek clarification that the assets are in addition to existing allowances for tools or trade and a vehicle. Overall, we feel the proposal is largely appropriate for the clients we assist who are struggling with debt they will, for one reason or another, never be able to repay.

The discussion paper is largely silent on the role of the Australian Financial Security Authority (AFSA) in administering this new procedure. In our view this will require significant resourcing for AFSA. Clear pathways will need to be established to access the MAP. Entry into the MAP will need to be accessible and streamlined, but not frictionless. We see that AFSA should play a critical role in diverting people to the insolvency solution that best meets their needs. Without that role, there is a risk that untrustworthy advisers will gain a foothold.

It will be important that for-profit providers are not able to charge fees to debtors to access the MAP, and we would like to see a ban on the charging of any fees for bankruptcy advice from unregulated service providers.

A Minimal Asset Procedure is not a *no* consequence insolvency option. It is however an *appropriate* one, that allows people to re-set their financial position, and return to being a productive member of society and the economy.

List of Recommendations

1. Legislate a Minimal Asset Procedure in Australia as a matter of urgency.
2. The maximum debt threshold for the Minimal Asset Procedure should be \$100,000 and should be indexed.
3. The maximum threshold of assets to enter a Minimal Asset Procedure should be \$10,000, in addition to the protected assets stipulated in Section 116 of the Bankruptcy Act. This amount should be indexed.
4. The income threshold for eligibility to enter a Minimal Asset Procedure should be the AITA as informed by the BITA.
5. There should not be a separate assessment for a person's ability to repay their debts beyond the income and asset thresholds.
6. The same debts that are excluded from Bankruptcy should be excluded from the Minimal Asset Procedure.

7. If a person's income is made up of Centrelink payments, then the person meets the income threshold.
8. If a person is currently in prison, about to enter prison or having been recently released from prison then the person meets the income threshold.
9. Finalise the legislative instrument to set the 'payment-to-income ratio' such that the effective minimum annual income threshold to enter a Debt Agreement is the Base Income Threshold Amount or, alternatively, the National Minimum Wage.
10. Protections should be put in place through industry Codes restricting banks from closing transaction bank accounts because a customer has entered any form of personal insolvency.
11. Debtors should not be restricted from entering a Minimal Asset Procedure because they have previously been bankrupt.
12. If a debtor meets the eligibility thresholds, they should be able to enter a Minimal Asset Procedure after they have been served with a Creditor's Petition to avoid being made bankrupt.
13. A record of a debtor's Minimal Asset Procedure should only be listed on the NPII and their credit report for two years post discharge.
14. The legislation enacting the Minimal Asset Procedure explicitly ban fees being charged in relation to entering a MAP.
15. Amend the *Family Law Act 1975* (Cth) to allow a bankrupt spouse or de facto to have standing to seek an adjustment of interest with respect to property, in circumstances of financial abuse.
16. Ensure that a spouse or de facto in a Minimal Asset Procedure retain standing to seek an adjustment of interest with respect to property.

Section 1: Scope of Minimal Asset Procedure – Discussion Questions

Question 1: Are you supportive of the Minimal Asset Procedure within Australia?

Consumer advocates are very supportive of the proposal to introduce a Minimal Asset Procedure in Australia.

Bankruptcy can and does help people reconcile and move on from unmanageable debt. Empirical research into bankruptcy has shown that “for many Australian debtors, bankruptcy results in genuine improvements to financial stability, health, relationships and general well-being”.¹

In their major Australian survey in 2017, Ali, O’Brien and Ramsay found that 77% of debtors reported that, since bankruptcy, their ability to manage their finances had improved, 74% reported that their ability to manage their day to day expenses improved, 61% reported that their mental health improved and 55% reported their physical health had improved.² Relevant to the duration of insolvency is the fact that, in this study, discharged bankrupts reported more positive outcomes than those debtors who had not yet been discharged from bankruptcy. This suggests that reducing the period of insolvency is likely to bring forward to an earlier time the positive impacts that bankruptcy has for many debtors.³

Academic research by Nicola Howell notes that, “these improvements will also usually have flow-on effects for the debtor’s family and the community generally, where there is reduced need to access community and social welfare services.”⁴

This research reflects the experiences of the clients our service assists. We regularly talk to people in terrible financial stress who are being chased for debts they have no ability to pay. Financial stress and mental health are closely related and can directly affect one another. Financial stress can have a negative impact on a person’s mental health, and at the same time, poor mental health can exacerbate financial stress by impairing the person’s ability to take restorative action or to make logical decisions. For those debtors that have no meaningful capacity to repay their debts, the fresh start offered by an insolvency procedure is life changing.

Respondents to the Ali, O’Brien and Ramsay survey were emphatic in describing the benefit of bankruptcy to them.

‘I believe that bankruptcy saved my life,’ stated one. Others stated: ‘It was a god sen[d]’; ‘I feel I have been given my life back’; ‘It really helped me get out of a bad situation and improved my life’.

¹ Paul Ali, Lucinda O’Brien & Ian Ramsay, *Bankruptcy And Debtor Rehabilitation: An Australian Empirical Study*, Melbourne University Law Review, Vol 40:688 ; pp688-737. https://law.unimelb.edu.au/__data/assets/pdf_file/0009/2494269/01-Ali,-OBrien-and-Ramsay.pdf

² Id.

³ Id. Pg 711

⁴ Howell, Nicola J. (2019) Reducing the duration of bankruptcy: Relying on an entrepreneurship and innovation lens to achieve consumer bankruptcy reform. *Insolvency Intelligence*, 32(3), pp. 109-115.

One described bankruptcy as 'the best way to financial freedom and independence', while another called it 'life changing'.

Many respondents said that the process of declaring bankruptcy compared favourably with their previous experiences of struggling with unsustainable debt. 'I found it easy and [it] has made my life so much better', one observed. Another said, '[a]fter all the stress regarding the decision to file for bankruptcy, the process was actually pain free, which enabled me to move on with my life.' 'It was a good process overall,' another stated.

Some said that going bankrupt had prompted them to make permanent, positive changes in their financial lives. 'It was a good lesson for us on how to better manage our money,' one wrote. Another wrote that 'since becoming bankrupt I have not had or tried to get any store or credit cards. I am now ... very careful with my money.' 'The pressure left,' one recounted, 'I could answer the phone again without breaking out in a sweat. I could start living my life again. Show my kids the right way to live and budget.'

*Quotes from Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study, 2017*⁵

Bankruptcy is of course a significant and consequential action that requires a weighing of the benefits and negatives. One significant deterrent is the punitive effect of a three-year bankruptcy. This is disproportionately harsh for debtors with small debts, and we believe causes more harm than it solves. It is simple unnecessary to protect the interests of creditors in instances when the debtor has no capacity to pay.

Consumer advocates believe a Minimal Asset Procedure strikes an appropriate balance between the interests of creditors and ensuring that bankruptcy enables a fresh start for debtors, whilst not being needlessly punitive. Reducing the discharge period to 12 months is likely to have a 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.

We know from other jurisdictions that offering a procedure for this low-debt, low-asset, low-income cohort has been effective at achieving just this. An evaluation of New Zealand's no asset procedure indicates that it has been 'beneficial in assisting in genuine situations of indebtedness and providing a fresh start' and 'should remain as an available option for people in difficult, unmanageable debt situations, especially 'no fault' insolvency situations'⁶

⁵ Paul Ali, Lucinda O'Brien & Ian Ramsay, *Bankruptcy And Debtor Rehabilitation: An Australian Empirical Study*, Melbourne University Law Review, Vol 40:688 ; pp688-737.

⁶ Ministry of Economic Development (2011), *Evaluation of the No Asset Procedure Final Report*, pg 2

A Minimal Asset Procedure would be a cheaper, faster option for people becoming insolvent with no prospect of repaying their debts. It would benefit not only this cohort of debtors, but also registered trustees and taxpayers who would not be wasting time and money seeking money that simply does not exist. Similar insolvency options exist in several other jurisdictions and have significant uptake; in New Zealand for the last 6 years the No Asset Procedure accounted for over 40 percent of insolvencies.

Consumer advocates strongly support legislating a Minimal Asset Procedure in Australia and giving debtors and their families an opportunity to climb out from under unmanageable debts and compounded financial insecurity.

Recommendation

1. **Legislate a Minimal Asset Procedure in Australia as a matter of urgency.**

Question 2: Do you believe a cohort exists for a Minimal Asset Procedure in Australia? Please expand on your response.

Yes. Many of the clients we assist are in a cohort of Australians that would benefit from a Minimal Asset Procedure.

We have long advocated for the introduction of a bankruptcy process that meets the needs of people who have unmanageable debt and who are simply unable to ever pay that debt. We certainly see space for an option between bankruptcy and debt agreements for a particular cohort of people who have no capacity to make repayments while meeting the ongoing needs of themselves and their family.

As a community legal centre specialising in credit and debt, Financial Rights is contacted by many people who have insurmountable debts they are struggling to pay. This can include unregulated credit, debts arising from accidents and other misfortune, regulated credit, financial abuse and more.

Unregulated credit

There are many types of debt that arise from credit facilities that are not covered by consumer protection laws. This includes both credit for small business and emerging consumer products like Buy Now Pay Later and wage advance. Many people are caught out when either their business does not succeed or suffers from a downturn (or event like COVID

19), or they experience a change in personal circumstances like declining health or a family breakdown. In these circumstances there are few options to challenge the debts or to seek hardship relief and bankruptcy can be there only option.

Debts arising from accidents and other misfortune:

Many callers to the National Debt Helpline and community legal centres are calling about debts which arise from a wide range of incidents which arise from unfortunate incidents. The most common of these are car accidents, where through inattention or affordability issues the person is uninsured. However, there are many others, from vet bills to liability for accidental fires, to extreme weather events that have destroyed an asset that was security for a debt. While it is appropriate for people with assets or sufficient income to contribute to the cost of the damage caused to other innocent parties in such circumstances, it is completely pointless to try to get blood from a stone, or to subject them to a three-year bankruptcy period which serves no-one.

Regulated Credit

While people who enter regulated credit contract have rights to challenge irresponsible lending and to seek hardship relief when they cannot pay, there are circumstances where there has been no breach of responsible lending provisions, and hardship relief is insufficient to assist the borrower to get back on track. In these circumstances, an insolvency option is appropriate. There are also circumstances where borrowers may have rights, but due to circumstances, such a very poor physical or mental health where they do not have the fortitude to pursue those rights and they have other completely understandable priorities,

Financial abuse

We frequently assist people who have accrued debt due to financial abuse. Often they have tried to pay off debts accrued by an ex-partner, but with the assistance of a lawyer or financial counsellor are able to obtain debt waivers, significant reductions in the amount payable, or a combination of the above and long term payment plans. We frequently hear from women who have made a director of a business without their knowledge, by an ex-partner, which has resulted in their financial ruin despite having nothing to do with the business. While in some circumstances resolution of these matters is available in the form of various legal defences and/or family violence policies of the lenders, there are many cases where such options are not available or will not bring sufficient relief for the victim survivor to move on. In other cases, resolution may be possible, but the victim survivor has been through enough and simply does not have the mental resources left to see the process through.

People who can no longer meet their financial obligations.

When people lose employment or suffer another kind of financial shock (like an accident, in Chris's story below), their situation can become very precarious very quickly. Whilst many have benefited from increased value of housing, many people have struggled to keep up with the rising costs of interest rates and we are increasingly seeing more people present with very limited equity in their homes. Whilst many credit products require lenders to offer financial hardship supports not all do- for example strata schemes, who are very quick to issue legal proceedings (which incur additional costs quickly) and worsen a person's ability to pay their levy arrears.

The cohort of Australians that would benefit from a Minimal Asset Procedure

Our lawyers and financial counsellors often play a role to assist people to avoid bankruptcy, for example by negotiating long term debt repayment; negotiating waivers, or debt forgiveness, initiating external dispute resolution proceedings, or temporary hardship arrangements. Many people try to do this themselves but find creditors unwilling to make suitable arrangements. Without doubt, the intervention of professional advocates significantly reduces the likelihood of people being forced into bankruptcy.

For many of the people we assist, there is simply no realistic way they can repay the debts they have incurred, and there must be a better way to reconcile their circumstances with the debts owed. Sometimes they are not even at fault for the debt. For the clients outlined in the case studies below, a Minimal Asset Procedure would provide a quick procedure that removes significant stress and debt that there is no chance of them ever repaying.

Case study – Chloe's story – C210098

Chloe is a sole trader and works as a caterer for small events. Because of COVID-19 her income has dropped and she has a number of debts totalling about \$35,000 that she cannot service. None of her creditors have taken legal action against her yet but her accountant believes bankruptcy is her best option. Chloe wants to keep trading because she thinks events will pick back up next year and she has two young children. She is not sure what her turnover is and she is currently receiving JobKeeper. She doesn't have any assets above the threshold amounts or any savings. She understands that she can keep trading while she is in bankruptcy but she will need to disclose to her suppliers and customers that she is an undischarged bankrupt when purchasing goods or promising services above the disclosure thresholds and she is worried that will hurt her events business.

Case Study - Chris's Story – S312386

Chris was driving a rental car when a tree fell onto the car. He later got a letter of demand claiming \$26,000 which he has no capacity to pay. Chris is a sole trader who earns a small infrequent income when he trades but he is unable to work at the moment or in the near future. He is struggling with some physical and mental health issues and is in the process of applying for the Disability Support Pension. Chris does not own any property or a car. Chris is considering going bankrupt to resolve the insurance debt, but he is worried it will make it hard for him to go back to being a sole trader if his health improves.

Case Study – Karen's Story - C245924

Karen is in her late 60s and is currently in severe financial hardship. She was homeless for a period, and she is now living in a caravan. She is medically retired, has no assets and suffers from debilitating health conditions. Her mental health has deteriorated due to the immense financial and emotional strain she is under, and she currently undergoes regular sessions with a psychiatrist to manage her mental health conditions.

Her financial situation has significantly worsened as she has taken out a number of small payday loans with a half dozen different lenders totalling \$28,000 in order to pay for medical treatments.

A Financial Rights worker painstakingly negotiated with each lender to reduce the amounts owing and to seek some compassionate waivers. Some of the lenders were open to waiving the debts considering Karen's inability to make repayments, but others insisted on receiving small \$20 and \$40 payments ongoing until the debts are repaid which will take her over 6 years if she can stick to the payments.

Question 3: Do you agree with a \$50,000 debt threshold?

Consumer advocates recommend that the debt threshold should be \$100,000 and indexed going forward. A \$50,000 threshold would not adequately capture the clients we assist, who otherwise meet the criteria of income and assets. Below, we outline case studies of clients with debts over \$50,000.

Given that the purpose of the MAP is provide a faster discharge option for people who can't repay their debts through informal or formal debt arrangements due to their low assets and incomes, it makes little sense to put a low cap on the debt amount.

In instances where financial abuse has played a role in accrual of the debt, that person has not had the ability to control the accrual of debt, nor the total amount incurred in their name. The lower \$50,000 threshold would preclude someone with a debt larger than that from accessing the less punitive MAP process – meaning they are left to deal with the more punitive 3-year process, despite having already suffered significant consequences for something beyond their control. If Maria's (case study below) debts were higher, she would not be eligible which seems comparatively unfair.

Similarly, where people have incurred debts through accident or misfortune, they have no control over the size of the debt incurred and it is just as pointless to keep a person with no assets and little income in bankruptcy for a larger debt than a smaller one.

Some in the consumer sector are of the view that there should be no threshold, given that the debtors income and assets should be the key consideration. Supporters of this submission, however, agree that for manageability of the procedure, a threshold is needed – but at a higher amount than that originally proposed.

Case Study - Maria's Story - C234993

Maria is a survivor of domestic and family violence perpetrated by her ex-partner. Maria has two dependent children, including one newborn. Maria has recently fled Australia to stay with family overseas to keep herself and her children safe.

Maria has approximately \$50,000 in debts from a credit card and other loans, although she is not sure of the exact amount. It could be more. Maria's ex-partner coerced her into taking responsibility for several gambling debts. These debts caused Maria a lot of trouble, which compelled her to take out personal loans to manage the coerced debts. When Maria reached out for help, she owed money to at least four different lenders. Maria's ex-partner also coerced her into taking out a credit card to pay for a forced wedding.

The debt repayments are seriously hindering Maria's ability to build back her life, and she wants to be able to stop making any repayments and to "wipe the slate clean". Maria wants the option of returning to Australia with her children when she is safe from her ex-partner, but these debts will prevent that. She is still on maternity leave and has a very limited income.

After speaking to a financial counsellor Maria reached out to her various lenders to seek a compassionate waiver taking the financial abuse into account. None of the lenders agreed to waive her debts, instead offering to put interest on hold for 6 or 12 months. These arrangements will make it difficult for Maria to move on with her life.

It should also be noted that a \$100,000 threshold is still lower than that of debt agreements (\$140,000). As such it remains a complimentary bankruptcy option.

Importantly, a \$100,000 MAP threshold would also not impact the ability of creditors who may choose to pursue bankruptcy proceedings against a debtor themselves, which will be a \$20,000 threshold when the reforms announced by the Attorney General in early July are legislated (see Frank's story later).

Case Study – Janine's Story - S302721

Janine is in her 80s and has been struggling with three bank credit cards totalling \$62,000. She has been paying these cards for years but when she retired in 2016 it became a problem. She has no assets, and her sole source of income is the age pension. She was very stressed. She lives in a rental property with her daughter and her situation had got to the point where her entire Centrelink age pension was going to the repayments for the three cards, and she couldn't contribute to any household expenses. Janine is reliant on a wheelchair and getting to a financial counselling agency in her regional community is very difficult. It took a financial counsellor 6 months to secure a waiver of the debt.

Case Study – Julie's Story - S312732

Julie is an Aboriginal single mum. She has debts from her business totalling \$80,000. Julie is separated from her partner and is in a legal dispute with him about the business, and her lawyer representing her has suggested bankruptcy. She is currently on maternity leave. She has scaled down her business and all her income now is from some small-scale online sales, Centrelink parental pay and a bit of income from selling some of her own artwork. Julie does not own any assets except for her car which is only worth \$3500.

Recommendation

2. The maximum debt threshold for the Minimal Asset Procedure should be \$100,000 and should be indexed.
-

Question 4: Do you agree with an asset threshold of \$10,000 with exceptions for tools and trade and a

Consumer advocates support a \$10,000 asset threshold for the Minimal Asset Procedure, if the protected assets under this procedure align with the protected assets in Bankruptcy. If the same categories of assets are not included in the Minimal Asset Procedure, then the threshold needs to be higher than \$10,000.

Need to align with Bankruptcy Act on exclusions from assets

We are concerned that the discussion paper does not make any reference to Section 116 of the Bankruptcy Act. This section recognises that some assets will not be liquidated as part of bankruptcy and are specified in the regulations. This includes general household items and goods of sentimental value. AFSA notes that the following protected property is provided for in subsection 116(2):

- those ordinary household items specified in section 27 of the Bankruptcy Regulations. These items include kitchen equipment, certain furniture and certain electronic appliances
- property held in trust for someone else
- property of the bankrupt that has sentimental value, where creditors vote to let the bankrupt keep the specific property
- property of the bankrupt used by the bankrupt in earning income, up to the limit prescribed in the Bankruptcy Regulations
- property of the bankrupt used primarily as means of transport, up to the limit prescribed in the Bankruptcy Regulations
- life insurance policies
- any balance the bankrupt has in a regulated superannuation fund
- certain payments received pursuant to the Family Law Act 1975
- in certain circumstances, the right of a bankrupt to recover damages or compensation and some types of compensation received
- amounts paid under certain government schemes

Our support for a \$10,000 asset threshold is contingent on quarantining these items from the asset maximum amount in addition to the tools of trade and personal vehicle amounts.

In sum total, a person using a MAP would be entitled to

- keep the assets outlined in the regulations reference in section 116 of the Bankruptcy Act, and
- a vehicle under the indexed amount, and
- tools of trade under the indexed amount, and
- others assets up to \$10,000 value.

If the section 116 items are excluded, our view is the asset threshold would need to be set as much at \$20,000 with exceptions for tools of trade and a vehicle, to account for very basic household items. We understand other stakeholders consider this alignment to also be important and ask that AGD consult specifically on this again if it was deliberately excluded (we are assuming it was inadvertent).

In the case below, the \$10,000 asset limit in addition to the indexed amount for her vehicle would allow Caroline to enter a Minimal Asset Procedure, even though her car is valued slightly over the statutory amount.

Case Study - Caroline's Story – S308080

Caroline went through a separation a couple of years ago and she was left with about \$43,000 in debts she cannot pay back. She lives in social housing as a lifetime tenant and has mental health issues. Caroline's income is less than \$42,000 per year after tax and she has no assets except her car which is worth about \$13,000. Caroline has tried everything to manage her repayments including hardship arrangements, but she is in a debt spiral.

Caroline wants to go bankrupt because she cannot afford her debts, but she does not want to lose her car. She needs the car for work and for family commitments. Caroline has already made an appointment with a for profit debt management firm to avoid losing her car.

Secured Assets

We have worked on the assumption that the asset threshold includes both secured and unsecured assets.

Case Study - Corrin's Story - S291421

Corrin is a young mother who works full-time and her husband is the care-giver of their 5 children. They would like to buy their own home one day, but they are struggling with unmanageable debts. A few years back she borrowed money to pay off other debts and now it has gotten on top of them. Corrin has about \$35,000 in unsecured debt with several payday lenders and a secured car loan. She was approved for a car loan despite at the time of the loan she was only receiving a parenting payment and had many other debts. The car was a lemon and quickly failed and has been in the back yard ever since – she owes the first car company \$6,000 and they say it is uneconomic for them to collect the car. Corrin applied for a second car loan for a car worth \$8000 and she still owes them \$18,000, however Corrin wants to keep this car for her family even though it is an expensive loan. Corrin was interested in applying for bankruptcy and retaining the car that worked, as without her other debts she could afford it.

Recommendation

3. The maximum threshold of assets to enter a Minimal Asset Procedure should be \$10,000, in addition to the protected assets stipulated in Section 116 of the Bankruptcy Act. This amount should be indexed.
-

Question 5: What should a person's maximum income be prior to accessing the Minimal Asset Procedure?

Consumer advocates strongly support using the Annual Income Threshold Amount (AITA), which is informed by the Base Income Threshold Amount (BITA) as the income threshold for entering a Minimal Asset Procedure. This would align with the current bankruptcy practice to ensure adequate living standards and it is indexed biannually. Aligning the income threshold for the Minimal Asset Procedure with the contribution threshold in bankruptcy will make administration of these two insolvency options much easier.

The AITA increases based on the number of dependants, recognising that those with dependants have a higher cost of living and require more money to pay for essentials. Currently set at between roughly \$70,000 and \$95,000 depending on the number of dependents, this amount is well below the income threshold for Part IX Debt Agreements (roughly \$105,000) ensuring that the Minimal Asset Procedure is reserved for a cohort of debtors who have no meaningful capacity to return dividends to their creditors. People with assets over the \$10,000 limit will still be able to enter debt agreements where appropriate. We note that these are the people (those with assets to protect) that were the key target for Debt Agreements in the first place.

We acknowledge that some insolvency practitioners and creditor stakeholders would prefer the maximum income threshold to be a granular assessment of a debtor's discretionary income after essential expenses. Other jurisdictions such as the United Kingdom and Ireland, specify a threshold for discretionary funding instead of a bright line income amount. We acknowledge that using the AITA as the income threshold for a MAP may result in a cash surplus for some debtors after essential living expenses are deducted, even if that surplus is not enough to meet their full debt repayments. Nevertheless, for administrative and equity reasons we don't think this is the right policy setting for Australia.

Consumer advocates would not support assessing each debtor's income and expenses individually. Calculating the discretionary income of each debtor would be very resource-intensive. Such a requirement would create a barrier for people who are incarcerated, have

low financial literacy or don't have access to a support worker. It would also make it difficult for financial counsellors and other community workers to give people information or legal advice about whether they would be eligible for a Minimal Asset Procedure.

"Completing money plans to understand the client spending habits can be very arbitrary. A money plan or a budget isn't always consistent. It can change from week to week depending on what bills and other financial responsibilities the client has. When clients are under pressure to provide their financial information, they can get overwhelmed and forget to provide all the information to paint a picture of the income and expenses. Clients can plan to stick their budget and then out of the blue they have an additional expense which they didn't expect for example the car breaks down or a medical expense. Ultimately the unexpected expense makes the existing budget obsolete."

"Doing it right, the Money plan is time consuming depending on the level of client's understanding of their spending, and what their objectives are. Regardless of a client's income, you will find a lot of cases where discretionary spending is minimised or underestimated and/or converted into essential spending resulting from cost-of-living eg. BNPL to help pay utility bills, wage advances for rent, food etc."

"The average person can generally speak to their essential living expenses however can struggle to accurately identify all their living expenses and the amount they are spending, often under estimating expenses. So, working with a Financial Counsellor can streamline completing a money plan however it is time consuming with clients being asked to prepare prior to completing a money plan coupled with the Financial Counsellor reaching out to service providers/ creditors in order to confirm debt balances, arrears, and repayments amounts. This can be a 2+ week process in some cases to complete a money plan and also highly dependent on the capacity of the client who at this point is more than likely experiencing significant levels of stress and anxiety. So, applying the contribution threshold in the Bankruptcy Act would remove the challenges of the above for a significant portion of the community."

Quotes from three financial counsellors at Financial Rights

Having a bright line income threshold would align the Minimal Asset Procedure with the Bankruptcy Act and make administration of this new procedure easier and cost-effective. Additionally, assessing income eligibility in any form that is not from simple indexed amounts creates uncertainty for the debtors who are already dealing with severe financial hardship.

Recommendation

4. The income threshold for eligibility to enter a Minimal Asset Procedure should be the AITA as informed by the BITA.

Question 6: How should a person's ability to repay be assessed for eligibility to access the Minimal Asset Procedure?

Consumer advocates do not support there being a specific assessment with regards to a person's ability to repay their debts before someone is eligible to access the Minimal Asset Procedure. If a debtor is below the income and asset thresholds it should be presumed that they have no meaningful ability to repay their debts. When entering the MAP a debtor can assert that they have no ability to repay their debts as part of the application process.

In response to the question about safeguards below consumer advocates support the Official Receiver having the power to restrict a person's eligibility or terminate a MAP where there is evidence that the debtor has concealed assets. We believe these safeguards are sufficient to protect against misuse and no additional assessment regarding a person's ability to repay is needed.

The important point for debtors is that they will only be able to do this once and they need to understand whether they have other options before entering the process.

Recommendation

5. There should not be a separate assessment for a person's ability to repay their debts beyond the income and asset thresholds.

Question 7: Should any debts be excluded from the Minimal Asset Procedure in Australia?

Consumer advocates support alignment between debts excluded from the MAP, and debts excluded from Bankruptcy. Consistency will be an important safeguard against misuse of the procedure. We do not support excluding some debts from a MAP that would otherwise be cleared in Bankruptcy.

Bankruptcy does not extinguish all debts, including:

- court imposed penalties and fines
- child support and maintenance
- HECS and HELP debts
- debts incurred after bankruptcy begins, and
- unliquidated debts.

Given that the purpose of the MAP is to give debtors a fresh start and use less trustee resources, it would make little sense to maintain debts where the capacity to repay remains the same.

Nevertheless, consumer advocates have some ongoing concerns about the exclusion of fines and penalties from bankruptcies, noting that they can be significant and can be incurred by people experiencing vulnerabilities including poor mental health or financial abuse. This should be reviewed in a broader review of the bankruptcy regime. We believe general fines such as traffic or parking fines should not be excluded from bankruptcy and in the interests of aligning these two insolvency regimes, they would not be excluded from the MAP either.

Recommendation

6. The same debts that are excluded from Bankruptcy should be excluded from the Minimal Asset Procedure.

Question 8: What exceptions/exemptions do you believe should be applied for debtors when assessing someone's suitability for the Minimal Asset Procedure?

Consumer advocates support a person's reliance on Centrelink benefits to be used as an eligibility factor for the Minimal Asset Procedure. If a person's income is made up of Centrelink payments, then the person meets the income threshold.

Reflecting on the experience of the No Asset Procedure in New Zealand we know one cohort of debtors who will benefit from this new procedure will be prisoners. Thus, we also support a person currently being in prison, about to enter prison or having been recently released from prison being an eligibility factor for the MAP. While often a person in these circumstances might otherwise be below the income, asset or debt thresholds for the MAP, filling out insolvency forms or providing evidence of income while incarcerated can be nearly impossible. Being able to provide evidence of incarceration in lieu of income statements will make the MAP much more accessible to this very vulnerable population.

Case Study – Dargay’s Story - C213558

Dargay obtained two personal loans from major banks while he was the sole income earner for his family. A few years later Dargay lost his job and was incarcerated. While Dargay was in prison he discovered that both debts had been sold to a debt collector totalling about \$57,000. When Dargay got out of prison he had no income and was unable to get government assistance because his visa was cancelled while he was in prison. Dargay is getting legal aid assistance with regards to his visa but he has no capacity to pay his debts.

Recommendation

7. If a person’s income is made up of Centrelink payments, then the person meets the income threshold.
8. If a person is currently in prison, about to enter prison or having been recently released from prison then the person meets the income threshold.

Question 9: To what extent would the Minimal Asset Procedure displace alternatives to bankruptcy currently available in the Australian personal insolvency system?

Temporary debt protection

The Minimal Asset Procedure would not displace the temporary debt protection (TDP). A TDP could still go into place when AFSA accepts a debtor’s application to enter a MAP.

Debt agreements

Some reasonable percentage of debtors that would currently enter into debt agreements would instead enter a Minimal Asset Procedure. Consumer advocates would support this displacement as we strongly believe that debt agreements are generally unsuitable for debtors with low income and minimal assets.

There is only a very narrow band of people for whom a debt agreement is a suitable option, and even fewer for whom it is their best option. Generally, competent advisors only recommend a debt agreement when the debtor is facing bankruptcy and has a substantial asset, such as the family home, that would be seized in bankruptcy, or where bankruptcy would impact their job. Otherwise, debtors generally have better options to resolve a situation of unmanageable debt.

Despite this, we frequently saw people who had entered debt agreements pre-2019 reforms on the advice of an administrator (or an aligned broker) when a hardship variation from a creditor, debt waiver or bankruptcy clearly would have been a better option for the debtor. We see less examples of this since the reforms have now been in place for a few years, but people still frequently report that they misunderstood or were misled about the cost and consequences of a debt agreement, or were not advised of other options. Debt agreements have significant implications for a person's credit report, even for years after they are completed. A 2017 survey of people in Part IX debt agreements commissioned by AFSA found:⁷

However, one in five debtors (20%) said they only discussed the option they ended up taking – people in casual or sporadic work were more likely to say this. 17% said they only discussed debt consolidation – respondents aged over 50 years were more likely to say this.

The higher rates of Part IXs pre-reform was not a vote of confidence in the debt agreement regime. It was largely due to rampant mis-selling of Part IXs by administrators (and their aligned brokers) that stood to earn upwards of \$20,000 in fees over the life of the agreement, not because a Part IX was the consumer's best option. By their very design Debt Agreements only work for a small number of debtors – people with a home or asset to protect and people whose employment would be affected by another form of insolvency.

Making Part IX Debt Agreements safer

The Attorney-General should finalise the legislative instrument in relation to the "payment-to-income ratio," which remains outstanding at the time of writing. We strongly recommend setting the prescribed figures so that the payment-to-income ratio creates an effective minimum annual income threshold to enter a Debt Agreement based on:

- the Base Income Threshold Amount to align Part IX repayments with income contributions in bankruptcy; or
- alternatively, the National Minimum Wage, which is formulated with the living standards and the needs of the low paid in mind and is intended to guarantee a modest but adequate standard of living.⁸

⁷ Where To, *Assessing the experiences of debtors and creditors with practitioners during the personal insolvency process – a market research report for the Australian Financial Security Authority*, 25 May 2017.

⁸ For our views on the payment-to-income ratio, please see our joint submission to the Attorney-General's Department, Legislative Instruments Consultation: Bankruptcy Amendment (Debt Agreement Reform) Act 2018, 23 October 2018, available at: <https://consumeraction.org.au/debt-agreement-reform-proposed-legislative-instruments/>.

Personal insolvency agreements

Debtors who will be eligible for a Minimal Asset Procedure would not have the income or assets available to enter a Part X personal insolvency agreement. This personal insolvency option requires debtors to be able to pay their creditors an agreed amount in instalments or a lump sum.

Bankruptcy (via debtor's or creditor's petition)

As with debt agreements, some percentage of debtors that would currently enter into bankruptcy would instead enter a Minimal Asset Procedure. Consumer advocates would support this displacement for those estates where creditors would not receive a dividend.

Consumer advocates support the objectives of a Minimal Asset Procedure in Australia as set out in the Discussion Paper. There are a certain portion of bankruptcies which do not provide returns to creditors as there are no available assets for realisation. For these people the consequences of bankruptcy are disproportionate to the debtor's circumstances. A Minimal Asset Procedure would allow a debtor to achieve a fresh start, while also having minimal impact on creditors who would likely not have received any return had the debtor become bankrupt.

Recommendation

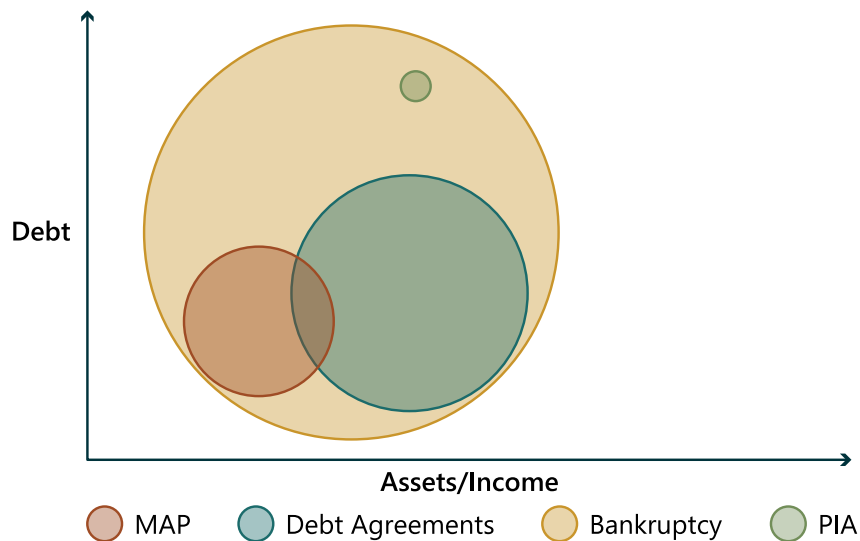
9. Finalise the legislative instrument to set the 'payment-to-income ratio' such that the effective minimum annual income threshold to enter a Debt Agreement is the Base Income Threshold Amount or, alternatively, the National Minimum Wage.

Question 10: Where would a Minimal Asset Procedure best fit within the current personal insolvency options?

The Minimal Asset Procedure will fit well alongside Australia's current personal insolvency options. It will be for a cohort of debtors whose income and realisable assets are lower than those who might seek to enter a Part IX Debt Agreement but whose debts are less than those who will need to pursue bankruptcy.

Below we have created a diagram which helps to demonstrate where we think the MAP will fit within the current personal insolvency options. It will be for the group of debtors with relatively low debts and low income and assets. It will overlap with both bankruptcy and debt agreements for some cohorts of debtors making it a viable option for a subset of people currently using those insolvency procedures.

Visualisation of how a Minimal Asset Procedure fits within the current personal insolvency options



Consumer advocates also presume the Minimal Asset Procedure should be brought into the Bankruptcy Act (as opposed to the Insolvency Practice Rules). It could be an amendment to Part IV as it would be a form of bankruptcy and would align with many of the rules. Otherwise it could be its own new Part of the Act.

Question 11: Do you believe there are any economic circumstances that signal a need for the Minimal Asset Procedure?

While Australia is currently dealing with a highly inflationary environment and many are struggling with the high cost of living, we do not believe that the Minimal Asset Procedure is needed in direct response to those circumstances.

It has long been our view that a Minimal Asset Procedure is a missing piece of our current suite of personal insolvency options. There have always been, and always will be, debtors with minimal assets that have no reasonable ability to repay their debts. The existing insolvency options are not well suited to this cohort of debtors and are less effective at giving them a fresh start.

In short, it is the debtors - not the economic circumstances - that drive a need for this procedure.

AFSA's modelling has already indicated that there will be an increase in the numbers of bankruptcies in the years ahead. Some of this is a result of the unpausing of debt collection activity that occurred during the Covid pandemic.

Calls to the National Debt Helpline suggest that the Australian Tax Office in particular has begun to aggressively collect historic tax debts, offering maximum repayment timeframe of 3 years irrespective of what the debtor can realistically afford to pay. A minimal asset procedure might offer an incentive for inflexible creditors to reconsider what repayments they are willing to accept.

Section 2: Impact on Debtors and Creditors – Discussion Questions

Question 12: Would there be any adverse impacts to creditors from the implementation of the Minimal Asset Procedure?

The objectives of Australia's personal insolvency system, and the eligibility thresholds for the MAP, are designed to allow debtors in severe financial stress to be discharged from unmanageable debts. Those that are eligible for the MAP will provide little to no returns for creditors as they have no available assets for realisation. They also have low incomes which mean their ability to make meaningful payments in a debt agreement is extremely limited. People who would prefer to enter a debt agreement will still have that option.

AFSA has indicated to us that of 8,019 bankrupt estates finalised in 2022–23, unsecured creditors received an average of 2.19 cents for every dollar they were owed. We think this indicates that MAP bankruptcy procedure will not have a significant impact on returns to creditors, if any at all.

Our understanding of these statistics is that they refer to all bankruptcy estates. Presumably a majority of the negligible returns to creditors are from those bankrupt estates that had some assets or were paying income contributions. This would mean that the debtors who would be eligible for a MAP would return next to nothing for creditors.

We would anticipate that some estates entering a Minimal Asset Procedure may have returned some funds to creditors through a debt agreement. It is likely that those debtors would be forced to live in great financial stress in order to achieve those returns. Clear guidance from AFSA on the appropriate insolvency option should play a role in ensuring people use the procedure best for their circumstances.

Our hope is that the MAP offering may incentivise creditors to provide suitable debt reduction and repayment arrangements for people in debt, rather than simply refusing to negotiate on repayments – a very common issue we deal with, as mentioned earlier in this submission.

Question 13: What restrictions do you believe should be imposed on debtors seeking to access a Minimal Asset Procedure?

Consumer advocates support the same restrictions being in place for debtors in a Minimal Asset Procedure as for debtors in bankruptcy. The primary objective of the MAP is to allow debtors to access a 'fresh start' earlier than a full bankruptcy, but not necessarily to have fewer overall restrictions.

Nevertheless, we do note that some of the restrictions in bankruptcy are designed to prevent debtors from fleeing the country with assets or accessing assets they might have overseas. These restrictions are less meaningful for a cohort of debtors who have no assets. The flight risk is much lower.

Question 14: What, if any, harms do you believe may be caused by implementing the Minimal Asset Procedure?

Overall consumer advocates believe the benefits to enacting a Minimal Asset Procedure in Australia far outweigh any potential harms.

However, consumer advocates are a bit concerned that some debtors, especially those in extreme financial stress might enter a Minimal Asset Procedure without careful consideration. While the application process should be streamlined and accessible it should not be completely frictionless. We have already seen examples where debtors file for bankruptcy out of desperation without understanding the full consequences or what their other debt solutions might have been.

Case Study - Felicity's Story - S308937

Felicity was in her early 70s and was being pressured by a bank for repayment of a \$35k debt, which was the negative equity she was left with after the sale of an investment property. She had no assets, her sole source of income was the Age Pension, and she shared a private rental with her daughter and grandson. She contacted the National Debt Helpline to get guidance about bankruptcy. A financial counsellor on the NDH offered to help her negotiate with the lender for a compassionate outcome. Unfortunately, out of fear that the financial counsellor would not succeed Felicity one night lodged a Debtor's Petition thinking she could withdraw it if her lender agreed to the proposed outcome. She was shocked to find that her Debtor's Petition was accepted in less than 48 hours after which there was not much more the financial counsellor could do to help her.

Consumer advocates are also concerned that debtors who enter a MAP might experience unfair or disproportional financial consequences like de-banking or rental market blacklisting. These are harms that consumer advocates in New Zealand have warned us about. We would hope these harms could be mitigated through sensible commitments by industry associations.

It is also possible that debtors with minimal assets might face more aggressive debt collection if the Minimal Asset Procedure became an available option for them. This is a harm that could be mitigated through appropriate enforcement of the ACCC/ASIC Debt Collection Guidelines.

Finally, some consumer advocates have expressed concerns that creditors might become more reticent to lend to low-income consumers or those with limited assets. We would hope this problem could be overcome with proper responsible lending assessments and financial inclusion initiatives. Lenders have access to enormous amounts of consumer spending data through comprehensive credit report regimes and open banking data. Lenders should be able to identify when a person who may have limited income is still a reliable borrower and should be able to extend suitable amounts of credit to those customers. Ultimately, any loan can go bad due to unforeseen circumstances and lenders already waive many loans, or have to write them off due to being unrecoverable. This relatively incremental change to insolvency options is unlikely to have a significant impact on those volumes.

Recommendation

10. Protections should be put in place through industry Codes restricting banks from closing transaction bank accounts because a customer has entered any form of personal insolvency.

Question 15: What safeguards do you believe are required to mitigate misuse of the MAP?

Mitigating against misuse of insolvency procedures

Consumer advocates do not believe that there is a systemic problem in Australia with rogue, reckless or repeat bankrupts which would abuse a Minimal Asset Procedure. The vast majority of debtors that we speak to have ended up in financial hardship for reasons outside of their control. They have not been reckless, and they are not proud to be in the dire

financial situations they find themselves in. Bankruptcy still holds a great deal of stigma as well as consequences.⁹

Consumer advocates have consulted with insolvency practitioners in New Zealand in preparation for this submission and the consistent feedback is that their No Asset Procedure is used appropriately.

“Not sure how you could misuse it - if you have no money and no assets then you can't pay. It is only allowed once. If they have been lent money in the three months prior to NAP and nothing has changed then it would be up to the creditor to suggest it was fraudulent, however they would need to ensure they did thorough affordability checks. It is the official assignee who would check registers and claims. Never known them to question a spending spree. Again, it would be up to the creditor to object and find evidence.”

Christine Liggins, CEO of Debtfix Foundation, a debt solution charity

We recognise that the Department will need to address stakeholder concerns that a one-year insolvency option might be exploited by some debtors. As the case studies in this submission suggestion, most clients continue to pay for some time, before they eventually seek assistance. Nicola Howell makes strong arguments in her research with regards to these moral hazard concerns:

“The concern is that a shorter bankruptcy period may encourage reckless or strategic behaviour by debtors, where debtors incur new debt knowing or being careless that they be unable to repay, with a view to having the debts discharged after only 12 months of bankruptcy and its restrictions. While this is a risk, there is little evidence to support that this is a significant one.¹⁰ For most debtors, the decision to enter bankruptcy is not taken quickly or lightly. Instead, for many, it is seen as a last resort, and only considered after several years trying to repay debts and to find other solutions to avoid bankruptcy.¹¹ Thus, the risk of

⁹ Note the work by the University of Melbourne personal insolvency project: <https://law.unimelb.edu.au/centres/ccl/research/major-research-projects/personal-insolvency-project>; This project entails an in-depth academic study of the relationship between financial stress and Australian personal insolvency laws in order to evaluate the effectiveness of these laws in practice.

¹⁰ World Bank, “Report on the Treatment of the Insolvency of Natural Persons”, (2013), p. 42.

¹¹ For example, Bourova et al describe the wide range of strategies that survey respondents used to cope with debt problems: Evgenia Bourova, Ian Ramsay and Paul Ali, “The experience of financial hardship in Australia: Causes, impacts and coping strategies”, (2018) Journal of Consumer Policy (first online 25 October 2018). See also Ryan, “The last resort: a study of consumer bankrupts”.

moral hazard seems to be minimal.¹² It is therefore possible to reduce the duration of bankruptcy without adversely affecting the other goals of bankruptcy.”

*Nicola Howell (2019) Reducing the duration of bankruptcy*¹³

Safeguards proposed in Discussion Paper

Many of the safeguards proposed by the department in the Discussion Paper are appropriate to mitigate against misuse of the Minimal Asset Procedure. Consumer advocates support ensuring that a person is only able to enter a MAP once in his or her lifetime. We also support the Official Receiver being able to assess whether a person has concealed assets or incurred debts with no intention to pay. We also support the Official Receiver having the power to restrict a person’s eligibility for or terminate their MAP, where they are suspected of misusing the procedure.

However, consumer advocates do not support the restriction that a person cannot have been bankrupt prior to entering a MAP. This is an arbitrary blanket rule and is not necessary to prevent misuse. There is no reason a debtor should be able to enter bankruptcy more than once but not be able to go bankrupt and later enter a MAP. If a debtor meets the eligibility thresholds for a MAP it should not matter if they have already been bankrupt. There are many reasons which can cause a person to bankrupt more than once – including for example, debt incurred as a result of financial abuse or fraud, traffic accidents, injury or illness, or business failure. There is no guarantee that a person will only encounter one of these in their lifetime.

We also do not support any restrictions on a debtor’s ability to enter a MAP after a Creditor’s Petition has been filed. If a debtor has minimal assets and is below the income and debt thresholds, they should be able to enter a MAP to avoid being forced into bankruptcy by a creditor. Under current bankruptcy procedures a Debtor’s Petition can be filed after a Creditor’s Petition has been served but before the hearing. A Debtor’s Petition will usually be accepted by AFSA as long as it is lodged at least a full working day before the Creditor’s Petition hearing.

‘We’ve had quite a few Federal Court clients that have gone bankrupt voluntarily but usually they’ve told the court during a creditors petition hearing that they don’t oppose the

¹² See, for example, King, “Moving beyond the ‘hard’- ‘easy’ tug of war: A historical, empirical and theoretical assessment of bankruptcy discharge”, 671-3.

¹³ Howell, Nicola J. (2019) Reducing the duration of bankruptcy: Relying on an entrepreneurship and innovation lens to achieve consumer bankruptcy reform. *Insolvency Intelligence*, 32(3), pp. 109-115.

sequestration order. Costs are a big concern, not those awarded by the court but by those racked up by the creditor's solicitors who then add that amount in negotiations.

I think a minimal assets procedure would be great. We see so many clients dragging their feet avoiding bankruptcy when in fact it's their best option, and I'd assume that if there was a shorter/easier form of bankruptcy they would be less resistant to it. Means less adjournments and court hearings so would save everyone time and money"

Quote from Senior Solicitor at Financial Rights who regularly assists unrepresented debtors in the Federal Circuit Court

Case Study – Frank's Story - S284738

Frank had a judgment debt of less than \$20,000 and he was being made bankrupt in the Federal Circuit Court. The creditor's solicitor added legal costs, making Frank's debt \$40,000 before they would agree to settle if he wanted to avoid being made bankrupt. Frank had tried to negotiate as he could access sufficient funds to cover the judgment debt via some associates, but there was no way he could access what was being now asked of him. The Court said it couldn't comment on, or interfere in, negotiations and Frank was unrepresented. Frank had no money or assets, failing health and in the face of such steep costs he just accepted the bankruptcy. Frank would have been far better off being able to enter a Minimal Asset Procedure.

Recommendation

11. Debtors should not be restricted from entering a Minimal Asset Procedure because they have previously been bankrupt.
12. If a debtor meets the eligibility thresholds, they should be able to enter a Minimal Asset Procedure after they have been served with a Creditor's Petition to avoid being made bankrupt.

Question 16: How long should a debtor appear on the NPII for entering into a Minimal Asset Procedure?

While the Discussion Paper mentions the NPII, it fails to comment on the deletion of information from credit files under section 20X, Part IIIA of the Privacy Act 1988 (Cth) (individual credit reports).

Consumer advocates do not support the proposed NPII listing for four years post discharge of the Minimal Asset Procedure. Instead, we believe a record of the MAP should be listed both on the NPII and on the individual credit report for two years post discharge. This timeframe would better align with the primary objective of giving debtors a fresh start.

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 insolvency is reduced by 2 years then, logically, the period that a Minimal Asset Procedure 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.

A shorter period of the Minimal Asset Procedure appearing on the NPII or an individual's credit report is likely to mean a reduction in the potential for discrimination in areas such as access to utilities, telecommunications, housing, and employment, again leading to improved welfare for former bankrupts and their families, and ultimately to the broader community. If we want this cohort of debtors to have a fresh start they will need to be able to access essential services.

Recommendation

13. A record of a debtor's Minimal Asset Procedure should only be listed on the NPII and their credit report for two years post discharge.

Other Issues

Minimal Asset Procedure application process

While the Discussion Paper does not address the Minimal Asset Procedure application process, we wanted to make a few comments about how debtors might enter this procedure.

In order to streamline and make the application process more efficient, AFSA could engage with and develop open banking applications using the Consumer Data right. Obtaining the necessary information regarding income and whether the debtor has recently incurred debts with no intention of paying can be conducted speedily, with consent, by examining financial data via the Consumer Data Right. Debtors would be free to choose whether to share their financial data in this form or fill out the MAP application by providing their own hard copy evidence.

Applying for a MAP should be accessible and streamlined, but not frictionless. It is important that debtors do not enter a MAP without due consideration of the consequences and what their other options might be for dealing with unmanageable debts. Other forms of insolvency might be more suited to their needs even if they do meet the thresholds for entering a MAP. Debtors might also be able to negotiate with their creditors outside of the insolvency system, and they might be entitled to a debt waiver if the loans were extended in situations that were fraudulent or in breach of the lender's responsible lending obligations.

We believe debtors should have every opportunity to speak to a free and independent financial counsellor before applying for a MAP, but speaking to a financial counsellor or other third-party advocate should not be a requirement of entry. Such a requirement would have major resourcing implications for the financial counselling sector and could be a barrier for some debtors that live in regional areas where financial counsellors are not readily available. Major agencies are reporting extensive waitlists for client appointments, delays of many months to get an appointment, particularly in Victoria and Queensland.

"In the community we understand that the average wait time for a financial counselling appointment is 1-2 weeks [in NSW] however we have seen this wait time routinely increase to +4 weeks. And this is assuming that a person lives in an area where there is a local financial counselling service to assist them, it is common for those living in regional and remote areas to struggle to access financial counselling services."

Quote from a financial counsellor at Financial Rights

We believe AFSA will have a key role as the administrator of the MAP to create useful friction in the application process and refer debtors to free and independent support services when appropriate. The application process can help debtors identify if some (or all) of their debts are the result of financial abuse or irresponsible lending. For example, there could be questions in the application, that have been consumer tested and reviewed, like "Do any of your debts belong to someone else?" or "Were you able to afford repayments when you first took out these loans?". If debtors answer in a certain way, they could be prevented from completing the application temporarily and advised to speak to a free financial counsellor.

Ban on fees charged for assistance with MAP

Having seen first-hand the financial harm caused by debt management firms, who worsen someone's financial situation by charging fees for free insolvency procedures, we urge the Department to pre-emptively ensure fees cannot be charged for assisting people with a MAP. This should be specified in the legislation.

People who need advice on understanding their personal insolvency options can access free financial counselling services. People who would be eligible for the MAP are the client base of financial counsellors.

Applying for bankruptcy should be a fee-free service. There should be no profit to be made where people are using a service of last resort. We understand that in other jurisdictions with similar regimes, for-profit services have emerged to take advantage of people's inexperience navigating the insolvency system.

We see firms – even entities regulated by AFSA – charge exorbitant fees to people for assistance to enter voluntary bankruptcy, rather than refer them to the free assistance available. A financial counsellor at the National Debt Helpline reported speaking with a person charged \$2,200 to go bankrupt over a \$4000 debt, where the person owned no assets and whose sole income was the disability support pension – circumstances where a financial counsellor likely could have obtained a debt waiver for free, and bankruptcy could have been avoided.¹⁴

Noting that it is free to apply for bankruptcy in Australia and the experience of international jurisdictions, we recommend that the legislations specify that fees cannot be charged in relation to getting advice about, or entering, a minimal asset procedure.

Recommendation

14. The legislation enacting the Minimal Asset Procedure explicitly ban fees being charged in relation to entering a MAP.

¹⁴ RN Law Report, Call for regulation of debt repair or credit management companies, 15 December 2020: <https://www.abc.net.au/radionational/programs/lawreport/elder-abuse-and-covid19/12939054> at25:00

Interaction with family law proceedings

Consumer advocates support the submission from Redfern Legal Centre regarding the interaction of financial abuse victim survivors and the Minimal Asset Procedure. We want to ensure that victim survivors retain standing to seek an adjustment of interest with respect to property in family court proceedings. This is an ongoing problem under the *Family Law Act 1975* (Cth), when a party to family law proceedings becomes bankrupt, the bankrupt's assets vest in the trustee. Not only do we support Redfern's calls to fix this issue with regards to bankruptcy, but we also want to ensure a similar issue does not manifest under the Minimal Asset Procedure.

Recommendation

15. Amend the *Family Law Act 1975* (Cth) to allow a bankrupt spouse or de facto to have standing to seek an adjustment of interest with respect to property, in circumstances of financial abuse.
 16. Ensure that a spouse or de facto in a Minimal Asset Procedure retain standing to seek an adjustment of interest with respect to property.
-

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 Financial Rights on (02) 9212 4216.

Kind Regards,

Karen Cox

Chief Executive Officer

Financial Rights Legal Centre

Direct: (02) 8204 1340

E-mail: Karen.Cox@financialrights.org.au