AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

20 August 2020

Manager - Bankruptcy Team
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: Bankruptcy@ag.gov.au
Your ref: Christopher Scope

Dear Sir/Madam,

Submission in response to Review of the bankruptcy threshold

The Australian Collectors & Debt Buyers Association appreciates the invitation to provide a response to the Attorney-General's Discussion Paper: *Review of the bankruptcy threshold.*

Please do not hesitate to contact the writer to discuss any aspect of the attached Submission.

Yours sincerely
AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

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Submission to Attorney-General's Department

Review of the bankruptcy threshold

August 2020

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Introduction

Australian Collectors & Debt Buyers Association (ACDBA) welcomes this opportunity to comment on the Discussion Paper "*Review of the bankruptcy threshold"* released for consultation by the Attorney-General's Department on 6 August 2020.

ACDBA was established in 2009 for the benefit of companies who collect, buy and/or sell debt - our members (refer Appendix 1) represent the majority of the collection market in Australia.

Accounts handled by ACDBA members are either on the basis of contingent collections or debt purchase collections. The core business of our members within the financial services industry is in the credit impaired consumer segment, whether as collectors or debt purchasers, working with consumers in default of their credit obligations. Our members do not provide financial advice.

Contingent collections

Contingent collections refer to pursuing the recovery of accounts on behalf of a creditor under a "principal and agent" agreement for an agreed fee. At all times, the debt is owned by the creditor. Creditors issuing instructions for contingent collections include governments, statutory authorities, financiers, insurers, telcos, utility providers, other corporations, strata body corporates, small business and individuals.

Debt purchasing

The business functions of contingent collectors and debt purchasers are exactly the same. The only difference between them relates to the ownership of the debt.

Debt buyers are involved in purchasing charged off or non-performing accounts being debts where the credit provider has been unable to collect and where no further credit will be extended. The credit provider generally writes the debts off and assigns its rights to the debt buyer.

Accounts assigned to debt purchasers typically involve debts where an acceleration clause in the financial agreement has been triggered by the customer's default in making repayments.

Many customers with accelerated debts are in hardship giving rise to complex, contested and unresolved issues. Debt purchasers are specialists in dealing with and managing hardship as they almost exclusively interact with customers in some form of financial difficulty.

Perspectives

Maintaining the framework provided by the Bankruptcy Act 1966 and associated legislation regulating the personal insolvency system is critical to firstly assist Australians in severe financial stress in resolving their unmanageable debts and to support all affected creditors through a fair and orderly distribution of a debtor's available assets. An important element of the framework proving the solvency of a judgment debtor is for the bankruptcy threshold to remain consistent with changing money values and this is reflected in our responses below.

Legislative and regulatory developments over the past ten years have encouraged both creditors and collectors to instigate and adopt programs to identify, work with and assist Australians in financial stress including hardship programs for vulnerable consumers. The success of these programs is evident in the bankruptcy data detailed in the Discussion Paper (refer Attachment B, Table 1).

The use of bankruptcy proceedings in relation to small debts is not evidenced in the data accompanying the Discussion Paper (refer Attachment B, Table 1). The data details over the past 12 years, the total number of Bankruptcies by Sequestration Order has fallen progressively from 2,403 in 2007-08 to 1,461 in 2018-19.

Although not responsible for all those bankruptcies, assuming for a moment collectors and debt buyers were and comparing total involuntary bankruptcies in 2018-19 of 1,461 to the 7.7 million accounts handled by ACDBA members in the same period[1], this would mean less than 0.02% of debts handled result in bankruptcy by sequestration order. The figure of course is much lower as collectors and debt buyers are not responsible for all such actions.

The same data table (refer Attachment B, Table 1) records a significant fall in the number of Bankruptcies by Debtor's Petition over the same years from a high of 25,593 in 2008-09 to 14,255 in 2018-19. Proceedings initiated by debtor's petitions have remained reasonably static over the past 12 years, currently being 91% of all bankruptcies.

ACDBA members regard the commencement of bankruptcy actions in both contingent and debt purchase collections as a last resort to be taken only after having regard to a range of considerations, including but not limited to:

- The quantum of the account relative to the bankruptcy threshold and thresholds and directives mandated by the creditor and/or the policies of the member;
- The debtor's financial circumstances, specifically their:
  - statement of financial position (detailing all assets and liabilities, all sources of income and the full extent of all financial obligations)
  - cooperation (including verification of their financial circumstances)
  - conduct (including any genuine and reasonable efforts to manage the debt or any attempts to avoid the debt);
- The outcome of attempts to enforce by other remedies the judgment debt;
- Facilitation for a fair distribution of available funds to all creditors; and
- The need to act before expiry of the time allowed for issue of a bankruptcy notice in relation to the judgment debt.

Bankruptcy data for 2019-20 will be interesting to review - ACDBA and its members expect the total number of bankruptcies by sequestration order will continue to fall following a change implemented in November 2019 by the banking sector when the Australian Banking Association (ABA) issued an industry guideline to its member banks to protect vulnerable customers.

[1] ACDBA Data Snapshot FY2019, www.acdba.com

This guideline included a requirement that where a debt buyer regarded bankruptcy proceedings as necessary to recover an unsecured debt, it must on each occasion first consult with the member bank before bankruptcy action is initiated.

ACDBA members have reported that subsequent to the ABA guideline those banks selling debt have not only required referral to the bank for approval prior to commencing bankruptcy proceedings, but also stipulated minimum debt levels appropriate before those proceedings are commenced by debt buyers.

Recognising bankruptcy proceedings can have a significant impact on vulnerable debtors, it is appropriate to also recognise not all debtors are vulnerable: there are some who have available and ready funds to pay their obligations but they refuse to do so. When other enforcement actions to recover a judgment debt are unsuccessful in those cases, a final recourse to bankruptcy proceedings to prove solvency is required.

It is also a relevant consideration that regardless of the threshold limit set (under the Bankruptcy Act or by industry guidelines) bankruptcy proceedings are the only option available to address the situation of a transfer of assets by a debtor to defeat a creditor's claim.

Sometimes debtors will attempt to protect their assets by transferring them to a spouse or family member to avoid inclusion in the asset pool if the debtor later becomes bankrupt. A bankruptcy trustee in certain circumstances may be able to claw back the asset for example where the value of the transfer was less than the market value of the property – this is important for all creditors but particularly for SMEs and individuals.

Legislation defines what Australia as a society expects and requires. On the question of the quantum for the bankruptcy threshold there will always be a range of views but ultimately for all creditors, legislation will define the minimum framework.

As noted above, our industry and its clients in the banking sector have set policies and issued guidelines to appropriately determine minimum thresholds (exceeding the threshold under the Bankruptcy Act) for the commencement of proceedings for their transactions.

Such a response whilst appropriate for such banking transactions should not be seen as a basis for implementing a legislative threshold at anything other than a fair and reasonable value, as to do so would be to the detriment of other creditors with their unique issues and circumstances and with different capacities to assume losses arising from unpaid debts and other judgments.

Responses

Our responses to the specific questions outlined in the Discussion Paper appear below:

Question 1: Should the bankruptcy threshold of $5000 be increased?

Yes - the bankruptcy threshold should remain consistent with changing money values.

Question 2: If the bankruptcy threshold is increased, to what amount should it be increased and why?

Our members agree it is appropriate to increase the bankruptcy threshold so as to adjust for the changing value of money since the threshold was last raised.

ACDBA submits:

i. The bankruptcy threshold should be set at $7,000 to adjust for the changing value of money since the threshold was last raised in 2010; and
ii. The bankruptcy threshold thereafter should be indexed on an ongoing annual basis, similar to the thresholds applying for Part IX and Part X debt agreements under the Bankruptcy Act.

Question 3: Are there other approaches (e.g. administrative or legislative) to address concerns that the threshold enables the excessive use of bankruptcy proceedings to recover relatively small debts?

Despite scant evidence of bankruptcy proceedings being excessively used in relation to small debts, in order to address any such concern, one approach would be to introduce a prerequisite requirement where the judgment debt is over the bankruptcy threshold but less than say $20,000. Adopting a process similar to the "Genuine Steps Statement" (used when proceedings issued in the Federal Court such as at the time of filing the Creditor's Petition) a judgment creditor would be required to file an affidavit in support of the issue of the bankruptcy petition detailing the steps to enforce the judgment taken without success and if no prior steps have been taken, the reasons why.

An effective deterrent to the commencement of bankruptcy proceedings in relation to small debts is the existing filing fee to commence proceedings.

A possible administrative improvement for all bankruptcy proceedings would be to amend the advice on a bankruptcy notice to bring to the judgment debtor's immediate attention the need to take genuine action to urgently address the petition by such steps as contacting AFSA or talking with a not-for-profit financial counsellor or a solicitor. Currently, such advice may be overwhelmed by the other information appearing on the notice. We submit this advice information should be so prominent it cannot be missed and will be an effective assistance to the judgment debtor in resolving the proceedings.

Question 4: What are the possible consequences (unintended or adverse) of increasing the bankruptcy threshold?

An immediate concern is that if too high a bankruptcy threshold is introduced justice will be denied to judgment creditors in the absence of any viable enforcement option being available.

We submit keeping the threshold at a fair and reasonable value maintains Australia mid-range to comparable international jurisdictions (refer Attachment C of Discussion Paper) as opposed to the August 2019 proposition of the consumer advocate organisations which would position Australia as an extreme jurisdiction for creditors and other plaintiffs seeking to legally and equitably access justice in the enforcement of judgments.

As detailed earlier in this submission, ABA late last year issued guidance to its member banks in relation to unsecured debts and the use of bankruptcy proceedings. Whilst banking corporations are well positioned to absorb losses arising from unrecovered debts as evidenced by the industry guideline provisions, not every creditor is able to sustain such losses.

ACDBA members as contingent collectors act for many creditors unable to absorb such losses including sole traders, body corporates, SMEs and individuals. These creditors collectively are a significant part of Australia's economic powerhouse.

Some relevant examples of adverse consequences from significantly increasing the bankruptcy threshold as proposed by consumer advocate organisations include:

- Subcontractors

  Consider the long history of property developers using subcontractors to provide construction activities (plumbing, electrical, roofing, air-conditioning, concreting, painting, brick laying, carpentry etc). If the developer does not pay although cumulatively the quantum owed to the subcontractors may be significant, each individual subcontractor may be owed only an amount below the bankruptcy threshold – allowing the developer to avoid the individual judgments if bankruptcy action was unavailable due to threshold restrictions.

  For a sole trader the inability to enforce a judgment imposes significant financial difficulties which in turn will have consequences for their own obligations.

- Strata body corporates

  Consider as an example, a small strata development of 4 townhouses where three owners regularly pay their strata fees on time but one owner refuses to pay despite commencement of proceedings and thwarting enforcement options - if the bankruptcy threshold is set too high the three other owners will be financially impacted and to protect their investment in the strata property may be called upon by the body corporate to contribute additional funds to meet rates and other statutory charges as well as for any necessary maintenance/repair costs for the property.

Question 5: If the bankruptcy threshold is increased, should this occur immediately or should there be a delay before it takes effect?

Any increase to the bankruptcy threshold should be introduced upon the conclusion of the temporary increase of the threshold in response to the coronavirus pandemic currently in place until 24 September 2020.

Concluding comments

ACDBA submits the current bankruptcy threshold set in 2010 should be increased to $7,000 to reflect the current value of money but not further increased so as to ensure bankruptcy remains an available remedy for all judgment creditors.

In response to the contention bankruptcy might be excessively used in relation to small debts, an effective restraint where a debt is over the threshold but less than say $20,000, would be a requirement that an affidavit in support of issue of a bankruptcy petition details the steps taken to enforce the judgment without success and if no prior steps have been taken, the reasons why.

Contact

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Appendix 1 - Members of Australian Collectors & Debt Buyers Association

- Axess Australia Pty Ltd
- CCC Financial Solutions Pty Ltd
- CFMG Pty Ltd
- Charter Mercantile Pty Ltd
- CollectAU Pty Ltd
- Collection House Limited (ASX: CLH)
- Complete Credit Solutions Pty Ltd
- Credit Collection Services Group Pty Ltd
- Credit Corp Group Limited (ASX: CCP)
- Lyndon Peak Pty Ltd t/as Access Mercantile Services
- PF Australia Pty Ltd
- Prushka Fast Debt Recovery Pty Ltd
- Shield Mercantile Pty Ltd