

21 July 2020

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Attorney-General's Department (AGD)
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Dear Attorney-General's Department,

Covid-19 and bankruptcy: keep the increased the debt threshold

We understand the Department is currently monitoring the performance of the temporary increase to the forced bankruptcy threshold as part of the Government's economic response to the coronavirus.

Swift action by the Attorney-General and the Department saw the implementation of temporary changes to bankruptcy laws until 25 September 2020, including:

- an increase to the debt threshold at which a creditor can apply to make a person bankrupt, raising it from \$5,000 to \$20,000 (**bankruptcy threshold**);
- increasing the 'Temporary Debt Protection' period from 21 days to six months.

Consumer Action Law Centre (Consumer Action), Financial Counselling Australia (FCA) and Financial Rights Legal Centre (Financial Rights) write to emphasise our strong support for the current temporary increase to the bankruptcy threshold to remain until a comprehensive review is completed. This will ensure that rather than being made bankrupt, people in financial hardship would be given a fair go to make repayment arrangements to pay their debts.

Bankruptcy threshold

Bankruptcy should be the last resort, not the first. We strongly support changes which protect low-income debtors from the harsh consequences of creditors pursuing bankruptcy over small debts that cannot be paid, particularly when we expect increased financial hardship associated with Covid-19.

The existing threshold of \$5,000 is far too low. This means a \$5,000 debt from a credit card, small business supplier payment or overdue strata levy could lead to the loss of the family home. Being forced into bankruptcy by a debt collector, bank or other creditor, can have severe and unfair consequences, including relationship conflict and breakdown, deterioration of mental health and homelessness. It involves highly stressful court proceedings, with tens of thousands of dollars in legal and trustees' fees added to the debt in the process. Unnecessary bankruptcies over small debts do not benefit families, creditors or the broader community.

The serious issues with poor debt collection practices and bankruptcy were well documented in the report we released in mid-2019: *Who is making Australians bankrupt?* (attached). The report recommended a permanent increase to \$50,000.

The temporary increase to the bankruptcy threshold is an important protection for people during Covid-19. Therefore, we strongly recommend that the bankruptcy threshold remain at

\$20,000 until a comprehensive review of the threshold is completed, including appropriate indexation over time. This will provide a safety net for individuals and allow them to focus on the immediate impacts of this public health crisis on their lives.

Industry Support

There is widespread support from industry for a higher bankruptcy threshold:

- In September 2019 when we originally wrote to Attorney General about raising the threshold our calls were endorsed by the Australian Banking Association (ABA) (correspondence attached).
- In November 2019, the ABA released its new guidelines to improve controls over debt collectors which insist banks are consulted before debt buyers begin legal proceedings and are given the option to buy back the debt of vulnerable customers. It also encourages member banks to consider applying a higher threshold for bankruptcy proceedings in their internal processes and their contractual arrangements with debt collectors.
- Then, in late November 2019 Collection House/Lion Finance (the main user of the low \$5,000 threshold to bankrupt debtors) changed its internal threshold for when it would use bankruptcy against debtors to \$20,000.
- Finally, in June 2020, at the Personal Insolvency Stakeholder Forum (which was attended by AGD's personnel) several insolvency industry representatives including voiced their support for maintaining the higher threshold, including the Australian Restructuring and Turnaround Association (ARITA) and Chartered Accountants Australia & New Zealand (CAANZ).

While the above improvements to industry practices are important, they fall far short of covering all the potential types of debt that could lead to bankruptcy. In fact, owners corporations and education institutions, which are some of the most frequent users of the bankruptcy courts, are not affected at all by the ABA Industry Guideline.

Anticipated financial distress

Consumer advocates as well as insolvency practitioners are forecasting a surge in financial hardship when the Government support payments potentially conclude in late 2020. There have been over 2,000 COVID-19 related calls to six of the nine National Debt Helpline (NDH) services between mid-March and early-June. This total does not include NDH totals from Tasmania, NT or WA. The Financial Rights Legal Centre alone has taken over 700 COVID-19 related calls and 63% of those callers told us they were in financial hardship.

Those numbers should be taken in the context that there has been a fall in the number of calls to the NDH. Nationally calls to the NDH fell almost 20 per cent between the middle of March to mid-April. Our services believe this is because many of the people who we normally hear from – people who spend a lot of their lives dealing with financial hardship may be in an improved financial position temporarily. This is largely due to Government intervention, support payments, and temporary changes to the Bankruptcy Act. When those support measures cease, we expect the NDH to start getting a flood of calls again.

For some people in financial distress, filing for bankruptcy will be their best option. For everyone else, they should be given a fair opportunity to make repayment arrangements with their creditors. If the threshold reverts to its pre-pandemic level, there may be a tsunami of financially distressed people forced into bankruptcy at the end of this year for debts as small as

\$5,000. This would be a very poor outcome for those particular debtors and their families, but would also have flow on effects for the broader economic recovery.

Recommendations

1. We strongly urge the Attorney-General's Department to recommend to Government that the threshold remain at \$20,000 until the Bankruptcy Act can be comprehensively reviewed.
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Temporary debt protection initiative

We have some concerns about the Temporary Debt Protection initiative. In particular, we consider the name misleading as it offers very little protection. While it does stop the Sheriff from seizing goods under a court order and stops the garnisheeing of wages or money from a person's bank account, it is an 'act of bankruptcy'. Creditors can use this act of bankruptcy to make the person bankrupt without needing to obtain a court judgment or issue a bankruptcy notice. Creditors can also conduct debt collection activities, including demanding repayment and starting fresh legal proceedings in court (and get a court judgment) despite the temporary debt protection.

In many cases, debtors would be better off negotiating with their creditors directly and avoid taking this formal step, particularly at a time when creditors are offering forbearance. We recommend a review as to whether the name change to TDP from "Debtors Intent to file a debtors petition" has not caused unintended confusion, to ensure the name change has not led to inappropriate lodgements from those with assets and/or other less high risk options.

We note that for those few debtors for whom a TDP may be appropriate, 21 days is a very short timeframe in which to seek advice and take appropriate action. We therefore also recommend a review of the time period for the TDP to determine the most appropriate timeframe going forward. It is important to strike the right balance between the rights of the parties, and to ensure that debtors are not induced into entering a TDP when they have a better option, or simply to delay the inevitable when they could be serving our their bankruptcy period. A further extension of the 6 month timeframe may be appropriate to allow this review to take place, especially given the high likelihood that the effects of the pandemic will continue well beyond the end of September.

Recommendations

2. There should be a review as to whether the name change to Temporary Debt Protection from "Debtor's Intent to file a debtor's petition" has caused unintended confusion or led to inappropriate lodgements from those debtors with assets or less high risk options.
 3. There should be a review of the time period for the TDP to determine the most appropriate timeframe going forward.
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Case studies

Case study –Cameron’s story

Cameron lives in a strata title property. He has been on the Disability Support Pension for a number of years. Last year, due to medical expenses in particular, Cameron fell behind on his strata levies. In early 2020, his Strata got a judgment against him for around \$6,000 and, by the time Cameron contacted Financial Rights in late May, he was served paperwork to attend a Creditor’s Petition hearing. A Bankruptcy Notice had been issued and served on him in early March 2020.

In response to the pandemic, the Government made changes to the Bankruptcy Act and regulations which took effect from 25 March 2020, including raising the threshold of minimum amount to present a Creditor’s Petition against a debtor from \$5,000 to \$20,000.

Financial Rights disputed the filing of the creditor’s petition for an amount less than \$20,000 after 25 March 2020. The solicitors for the Strata maintained they were entitled to bankrupt Cameron as the bankruptcy notice was issued before 25 March 2020, and sought their cost in excess of a further \$6,000. In our view the bankruptcy notice was valid, but the subsequent creditor’s petition was not.

Cameron was able to access his superannuation under the COVID-19 early release rules, and pay the outstanding levies and associated legal fees of around \$10,000. Cameron’s Strata continued with the Creditors Petition hearing and continued to seek their costs of the petition of a further \$6,000. We appeared at the hearing and sought orders that the Court exercise its discretion not to award costs to the creditor. We were successful in arguing the petition should never have been presented and costs were not awarded.

Had the threshold not been temporarily raised, Cameron may have lost his home over a \$6000 Strata debt.

Source: Financial Rights Legal Centre (C104649)

Case Study –Sheree’s story

Sheree’s small business was hit hard by drought, a storm surge and then bushfires. While her business did not burn, it was hard hit by the evacuation of the town and then the sharp decrease in the tourist trade. One of her suppliers then tried to bankrupt her for a debt which she had already reduced from \$27,000 to \$4,000 by adding \$16,000 in legal fees.

In addition, her business interruption insurance paid the storm surge claim for the disruption, and says she needs a new claim for the fires. They told her that the monthly payments would be slow to come through due to the increase in insurance claim volumes.

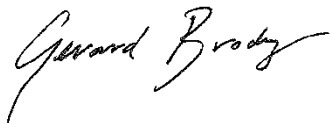
Financial Rights took on Sheree's case and was able to get her an adjournment on the bankruptcy proceedings so that negotiations could continue. She was eventually able to pay the creditor from a bushfire grant (which would not have been enough to annul the bankruptcy had the creditor's petition proceeded on the first occasion). Small business owners like Sheree are very vulnerable to aggressive enforcement action by their creditors, and have few rights or protections at law or under industry codes or guidelines. Raising the threshold would give small business owners affected by recent disasters and the fall-out from the corona virus restrictions a fighting chance. Creditors can still use other legal processes to pursue their debts.

Source: Financial Rights Legal Centre (C199922)

Thank you for the opportunity to express our concerns about the bankruptcy threshold. We would be happy to engage with your Department further as you continue your monitoring activities and targeted consultation regarding these aspects of the Government's economic response to the coronavirus.

The best person to contact for additional consultation is Julia Davis, the Policy & Communications Officer at the Financial Rights Legal Centre. She can be reached on julia.davis@financialrights.org.au or on 0478 504 634.

Yours faithfully,



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Consumer Action Law Centre



Karen Cox
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