Joint submission by the

Financial Rights Legal Centre

Consumer Action Law Centre

Financial Counselling Australia

Attorney-General's Department

Bankruptcy Regulations 2021: Exposure Draft & Discussion Paper

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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 the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took over 22,000 calls for advice or assistance during the 2019/2020 financial year.

About the Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

About Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors. Financial counsellors assist people experiencing financial difficulty by providing information, support, advice and advocacy. Working in not-for-profit community organisations, financial counselling services are free, independent and confidential.

Introduction

Thank you for the opportunity to comment on the Bankruptcy Regulations 2021 Exposure Draft and Discussion Paper. This is a joint submission from the Financial Rights Legal Centre, Consumer Action Law Centre and Financial Counselling Australia. This submission will address the:

- Modernised list of exempt household property;
- Process and duration of NPII listings; and
- Regulation of informal debt agreements.

Responses to clarifying amendments and specific questions

Our organisations do not have any specific responses to the questions in the Discussion Paper. The clarifying amendments proposed by the Attorney General's Department don't raise any particular concerns for us with the exception of the "modernised" list of equipment which we will discuss below.

Modernised list of household property

The Discussion Paper states that the list of household property that is not available for the payment of debts under regulation 6.03 of the existing Regulations has been updated to ensure it accords with modern standards of living. Consumer groups disagree that this list has been adequately modernised. In fact, this review provides our organisations with an opportunity to raises broader concerns about the use of household items for paying debts.

Consumer groups submit the trustee should not be taking household items from debtors and their families at all unless those items are uniquely valuable (antiques, rare collectors' items, luxury goods etc.). Taking a debtor's household items is needlessly invasive, disruptive, punitive and humiliating. It is also very unlikely creditors will receive any significant payment after the sale of second-hand goods, given the low value of goods and that the administrative costs of the sale are deducted. The practice of taking household items reflects an outdated view of bankruptcy as a form of punishment. We recommend that the Regulations be amended to state that all household property is prescribed for the purposes of subparagraph 116(2)(b)(i) of the Act unless the property holds unique monetary value as a collector's item, luxury good or antique.

Alternatively, if the Department maintains section 27 of the Regulations as an itemised list which prescribes household property that is not available for the payment of debts, consumer groups strongly submit that this list has not been adequately 'modernised'.

Specifically, DVD technology (developed in 1995) is already on its way to being obsolete. While DVD and Blu-ray players are not outdated just yet, future demise is inevitable The use of streaming and video-on-demand services through smart TVs or video game consoles have been outstripping DVD and Blu-ray sales for several years. The Bankruptcy Regulations need to use broader language that will adapt with changing entertainment technology. Instead of "one DVD player or similar appliance" the Regulations could say "one appliance or console used for the delivery of home entertainment."

Another example of the inadequacy of the modernised section 27 is the prescribed "one personal computer". This restriction is counterproductive to people's basic participation in society in a digital age. Children even in their primary years can be required to have a laptop or tablets for school, and these are not always provided by the school. Similarly, after a year where most of the Australian workforce was required to work from home at some stage because of the pandemic, it should be clear that at least each member of the household needs access to a personal computer. Not all workplaces provide work laptops, and this restriction could severely restrict debtors from effectively participating in the workforce, including any part-time work of dependents. And if a member of the household is not currently in the workforce, computers are still necessary for accessing government services, health services and job searches. The Regulations should be changed to "sufficient computing devices for the members of the household."

A similar amendment should be made to the household restriction of "one telephone". In 2021 every adult or young person should have access to a mobile phone in addition to a landline telephone for the household.

Finally we strongly recommend that the asset thresholds for tools and motor vehicles be increased. Financial counsellors and community workers have provided consistent feedback that the current asset thresholds are inadequate. The purpose of these thresholds is to allow people to continue to work in a trade and earn an income (the tool threshold), while the motor vehicle threshold is to allow people to continue to have access to transport. We note pressure on car prices, including second-hand cars, are particularly apparent with the pandemic as their value increases[1] prices should be realistic to market conditions.

Tradesmen and women cannot participate in the workforce effectively with only $3,800 worth of tools. Similarly, people cannot buy reliable vehicles for only $8,100. The asset thresholds should be realistic and a principles based solution is needed. Instead of indexed asset thresholds the Regulations should prescribe all tools being used by the bankrupt in earning income that are of a reasonable value based on the requirements of the work or profession. This principles based solution should be extended to motor vehicles as well, especially if that vehicle is being used for earning income.

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[1] https://www.smh.com.au/business/companies/consumer-splurge-on-used-cars-gives-carsales-a-covid-boost-20201122-p56gt2.html

In the alternative, if a principles based solution is not possible, the asset threshold for tools should be raised to $5,000 and the asset threshold for a motor vehicle should be raised to $15,000. These amounts should be indexed going forward. These amounts have been determined based on our collective engagement with financial counsellors over the last several weeks.

Recommendations

1. **The Bankruptcy Regulations should be amended to state that all household property is prescribed for the purposes of subparagraph 116(2)(b)(i) of the Act unless the property holds unique monetary value as a collector's item, luxury good or is an antique.**
2. **Alternatively, if all household property is not protected then section 27 needs to be changed to include:**
   a) **one appliance or console used for the delivery of home entertainment;**
   b) **sufficient computing devices for the members of the household; and**
   c) **one landline telephone for the household along with one mobile phone for each member of the household**
3. **The Regulations should prescribe all tools being used by the bankrupt in earning income that are of a reasonable value based on the requirements of the work or profession. This principles based solution should be extended to motor vehicles as well, especially if that vehicle is being used for earning income.**
4. **Alternatively, asset thresholds should be increased to $5000 for tools and $15000 for motor vehicles and indexed annually.**

Process and duration of NPII listings

The process and timeframes for listings on the National Personal Insolvency Index (**NPII**) can cause unfairness and should be amended. Below are several issues that should also be addressed as part of this review.

Creditor's petitions dismissed by the Court

Many creditor's petitions are ultimately dismissed by the Federal Court. Despite this, a permanent listing will remain on the publicly available National Personal Insolvency Index (**NPII**). This is because, unfortunately, Regulation 13.03(1)(a) of the Bankruptcy Regulations makes clear that a creditor's petition is to be listed on the NPII, even if a sequestration order is not made.

For example, Consumer Action has been contacted by a person who reported that he found out he was on the NPII after applying for finance. He told us that he paid a $17,000 credit card debt in full and the creditor's petition was dismissed.

For people in this circumstance, the creditor's petition will remain on the NPII for life. , This impairs their credit report, and hence their ability to obtain credit, rental properties, and phone plans in the short term and long term may impact their ability if creditors access the NPII for information. – This is despite the listing relating to a debt that was ultimately paid or may not have been indicative of insolvency. This provision operates harshly particularly where the delay in repayment was due to mental health issues, family breakdown, or other difficult circumstances, or where there was a defence to the underlying debt such as a breach of responsible lending obligations, or there was no basis for the creditor's petition. Many unrepresented consumers will not know or understand what orders are required through the Court to achieve the result of listing not being listed on the NPII.

The ability for the Official Receiver to have discretion to remove NPII listings in circumstances of unfairness should be expanded. Currently the Official Receiver can suppress information, with appeals heard to the Administrative Appeals Tribunal. We would recommend that power be extended to include the Official Receiver having greater power to suppress and/or remove in appropriate circumstances.

AFCA determinations on misconduct by Administrators

A current limitation of the Bankruptcy Regulations is that they do not appear to give effect to certain determinations of the Australian Financial Complaints Authority (**AFCA**) on misconduct and breaches of the law by registered Debt Agreement Administrators (**RDAAs**).

As a result of the Government's 2018 reforms to Part IX Debt Agreements,[2] registered Debt Agreement Administrators were required to join AFCA, effective from 1 January 2021.[3] This is a critical reform to ensure the people have access to free, fair and accessible dispute resolution when their Administrator breaches the law, and to restore trust and confidence in the RDAA sector. Some RDAAs are already members. AFCA is able to hear disputes about RDAAs under its terms of reference.

A common problem we encounter in our casework is where RDAAs (and others) make misleading representations on the impacts and suitability of Part IXs. This can include advice on the impact of proposing or entering a Part IX on the debtor's ability to obtain credit in future, and the impact of listings on the NPII and credit reports. RDAAs are subject to the general consumer law, including prohibitions on misleading and deceptive conduct, unconscionable conduct, and requirements to provide services that are fit-for-purpose and with due care and skill – claims that may be available based on the pre-agreement conduct of the RDAA.

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[2] *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* (Cth).

[3] https://www.legislation.gov.au/Details/F2020L01098 and https://www.afca.org.au/news/latest-news/debt-agreement-administrators-daas-to-be-afca-members-by-1-january-2021

While a debtor could pursue these remedies through the courts, the reality is that such litigation is complex, inaccessible, expensive and risky for most people, and entirely inaccessible without legal representation. The Government has acknowledged the benefits of external dispute resolution over courts and tribunals with the establishment of AFCA, and acknowledged the need for additional consumer protections in relation to Part IX Debt Agreements with the 2018 reforms.

A recent determination of AFCA details this problem.[4] AFCA found, among other breaches of the law,[5] that:

> *The financial firm misled the complainant about the effect of the agreement on her credit file and her employment prospects when it told her that:*
>
> - *there would be no further impact on her credit file if she entered into the agreement because she had an existing default listing her credit file and*
> - *a National Personal Insolvency Index listing would not affect her employment prospects.*[6]

AFCA determined that the financial firm (which is a RDAA) must 'do all things necessary to remove the listing of the complainant's name and listing from the National Personal Insolvency Index'.[7] However, we understand that the Official Receiver takes the view that it is not empowered under the Bankruptcy Regulations to remove listings to give effect to AFCA determinations to amend NPII listings.

Where a firm engages in misleading conduct, the general principle underlying the remedy is that the consumer should be put back in the position they would have been, but for the misleading representation. Thus, the NPII listing should be removed, where the person would not have entered the Part IX if not for the misleading representation. The inability to amend NPII listings perpetuates injustice for people who have been misled by an RDAA and entered a Part IX as a result.

On one view, the Official Receiver could amend the NPII under Reg 13.04(1)(c) as being inaccurate. However, to put this beyond doubt, we recommend that the Bankruptcy Regulations be amended to specifically require the Official Receiver to give effect to determinations of

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[4] Case Number 661320, 9 June 2020, accessed 21 August 2020, available at https://service02.afca.org.au/CaseFiles/FOSSIC/661320.pdf.

[5] AFCA also found that (at pages 1-2): 'The financial firm misled the complainant about her options for dealing with her debts when it told her that: she could only stop interest accruing on her debts by declaring bankruptcy or entering the agreement; she had two options to deal with her debts: to declare bankruptcy or enter the agreement; if she applied for hardship assistance, her creditors would not grant her repayment moratoria but would instead require her to continue making some repayments and; hardship assistance from her main creditor was unlikely to last longer than a fortnight. … The financial firm failed to ensure that the complainant understood the fees payable under the agreement. The financial firm also misled the complainant when it said that she would only pay back 61 cents in the dollar on her debts, when her total payments under the agreement were approximately 96 cents in the dollar.'

[6] Ibid p 1.

[7] Ibid p 2.

AFCA. Until such reform, the intent of the Government's reforms to Part IXs will be undermined. This reform would also incentivise RDAAs to provide accurate advice to debtors in the first place.

With the COVID-19 crisis expanding the market for RDAAs, it is more important than even that people receive accurate, good quality advice on their options for managing debt, and are fully aware of the negative consequences of Part IX debt agreements.

Permanent NPII listings

Consumer groups submit that in some cases, it is unfair for people to carry a lifelong NPII listing. This is especially the case if a debtor ends up being listed on the NPII because of hardship caused by the COVID-19 crisis or poor creditor support during our economic recovery.

Lifetime listing is punitive and denies bankrupts a fresh start. These listings are longer than criminal records for many serious criminal offences. NPII listing can impact a debtor's credit report, and hence their ability to obtain credit, rental properties, and phone plans. . The consequences of a lifelong NPII listing are particularly unfair for victim-survivors of family violence (see further below). We recommend the duration of most NPII listings for first bankruptcies should be drastically reduced, while the Official Receiver could be empowered to recommend longer listings for repeat bankruptcies or egregious behaviour. Further consultation with financial counsellors should be undertaken to determine an appropriate listing period.

Family violence

Permanent NPII listings extend the impacts of family violence *permanently*. Through our casework, we see forced bankruptcy being used as a tool of family violence (through procedural abuse) and ultimately enabling private trustees to collude with perpetrators (for example, enabling contact from the abusive partner). We also see victim-survivors of family violence bankrupting on bad debts where they should have (with better upfront advice and advocacy) been released from liability for debts that were, in reality, their partner's.

Recommendations

5. **Amend the Bankruptcy Regulations to empower the Official Receiver to amend the NPII:**
    a) **to give effect to AFCA determinations; and**
    b) **in other circumstances causing unfairness, such as dismissed creditor's petitions.**
6. **The duration of most NPII listings for first bankruptcies should be drastically reduced, while the Official Receiver could be empowered to recommend longer listings for repeat bankruptcies or egregious behaviour. Further consultation with financial counsellors should be undertaken to determine an appropriate listing period.**

Regulation of informal debt agreements

While some businesses stepped up to help Australians to recover from the COVID-19 crisis, there are others that have simply sought to profit from people's desperate financial circumstances. Debt management firms are among the worst – promising a life free from debt but instead charging large fees, providing bad quality advice and leaving people in even worse financial strife. These businesses can charge exorbitant fees –thousands of dollars - to 'help' people go bankrupt.

Debt management firms exploit the gaps between the financial services and personal insolvency laws. The Federal Government has proposed to license some but not all debt management firms through changes to the credit regulations. Without changes to the proposed reform, gaps will remain that can be exploited by unscrupulous providers.

New research commissioned by Consumer Action and prepared by Quantum Market Research[8] demonstrates that to meet community expectations, and stop the harm caused by debt management firms, the Federal Government must commit to a second tranche of reforms that would introduce tailored conduct obligations that prevent harm and cover all types of debts and credit report listings – not just regulated credit products. Without a robust, industry-wide regulatory framework, we will continue to see debt management firms undermining COVID-19 recovery in 2021.

Key findings of the research include:

- **People are struggling to pay bills – and not just their credit products**: Two in five Australians are struggling to pay their bills, including energy bills (22%), groceries (19%) and council rates (11%). A third of Australians (33%) are interested in assistance or support in relation to their finances.
- **The market for debt management is booming**: 8% of Australians indicated that they paid for debt management or credit repair services in the past year – this represents approximately 1.4 to 1.9 million Australians. Over 27% of Australians have used a debt management firm. Being debt free is now the top sign of success and accomplishment in 2020.
- **People overwhelmingly support reform of debt management firms**: Unsurprisingly, people are shocked when they discover the lack of rules and obligations on firms providing debt management services. The research found that 92% of people thought it was *important* or *extremely important* that the Australian Government introduce similar consumer protections to the UK requirement that a company must ensure its debt advice and services are the consumer's best interests, appropriate to their individual circumstances, and based on a full assessment of their financial position.

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[8] *Report: Debt Management Firm Research, December 2020*, available at: https://consumeraction.org.au/debt-management-quantum-market-research/.

- There is strong support for a ban on advance fees before delivering useful services, which exacerbate (rather than help) financial hardship.

We know from our casework experience that people struggling to make ends meet usually have a range of debts and bills: mortgage and credit cards but also buy now pay later debts, energy , telephone and internet bills, council rates, school fees, body corporate fees, and judgment debts. Too often we see debt management firms cherry pick a "solution" that earns the firm fees, but does not provide a holistic, realistic solution to the overall financial difficulty. For example, the family home won't be saved from repossession even where an arrangement is negotiated with the bank if the energy company, private school or body corporate start bankruptcy proceedings.

Our concern is that the proposed patchwork of bare-bones licensing between credit and insolvency regimes will fail to ensure Australians receive high quality, trustworthy, holistic advice on all of their realistic options to manage debt, thereby undermining COVID-recovery. This will be a missed opportunity to work towards a UK-style system, with industry-wide licensing for all firms, conduct obligations tailored to the type of debt management or insolvency service, and an empowered regulator to undertake reviews on the quality of advice.[9] Consumer groups recommend an extended licensing scheme along with tailored conduct obligations including a best interests' duty, a ban on advance fees and a ban on the use of caveats to secure debt management firms' own fees.

Finally, Consumer Action's research confirms the need to keep the debt threshold for forced bankruptcy at an absolute minimum of $20,000. The temporary increase has worked, keeping bankruptcies down and families in their homes during COVID-19. But with 2 in 5 people concerned about their ability to pay everyday bills in the next three months, and the temporary measures expiring at the end of the month, many creditors will pounce in the new year. While the permanent increase to $10,000 is an improvement, it does not go nearly far enough and will see many people facing bankruptcy, undermining COVID-recovery in 2021.

Recommendations

7. **The Federal Government implement a second tranche of reforms to ensure an industry-wide, robust regulatory framework for all debt management firms and all types of services, including:**
    a) **an extension of the proposed licensing regime beyond regulated credit products to cover all types of debt advice and credit report listings, including energy and telco debts; which may require changes to privacy laws or standalone legislation**
    b) **tailored conduct obligations including a best interests' duty, a ban on advance fees and a ban on the use of caveats to secure debt management firms' own fees.**
8. **The forced bankruptcy threshold should be raised permanently to $20,000.**

[9] For example, see https://www.fca.org.uk/news/press-releases/fca-puts-spotlight-debt-management-firms).

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 Julia Davis at the Financial Rights on 0478504634.

Kind Regards,

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