



## **Cost Recovery Impact Statement**

### **Submission to the Attorney-Generals Department: *Proposed Introduction of Fees for Debtors Petitions, Overseas Travel Requests and the Realisations Charge***

***February 2014***

**Financial Counselling Australia (FCA)** is the  
peak body for financial counsellors in  
Australia.

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## ABOUT FINANCIAL COUNSELLING

### Financial Counselling Australia

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. FCA's members are the financial counselling associations in each State and Territory. Each association elects one person to the FCA Board.

### Financial Counselling

Financial counsellors assist consumers in financial difficulty. They provide information, support and advocacy to help consumers deal with their immediate financial situation and minimise the risk of future financial problems. The majority of financial counsellors work in community organisations, although some are employed by government. Their services are free, confidential and independent.

Financial counsellors have extensive knowledge in a range of areas: consumer credit law, debt enforcement practices, the bankruptcy regime, industry hardship policies, and government concession frameworks.

Financial counsellors assist many clients for whom bankruptcy is an option. We are well placed to comment on the impact of these proposed fees.

### Contact Details for this Submission

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## 1. Overview

This submission is in response to the Attorney-General's Department Cost Recovery Impact Statement in relation to Personal Insolvency and Trustee Services 2013–14 and 2014–15.

FCA does not support the introduction of a fee for filing a debtors' petition. A fee for processing an overseas travel request should only be charged where an individual can afford to pay it.

We have not commented on the proposal to increase the realisations charge.

## 2. Public Policy

The introduction of both fees is being examined solely from the perspective of cost recovery, rather than the broader and more important question of whether it is good public policy. This should have been the starting point, with an examination of whether a filing fee in particular is consistent with the ethos and purpose of the bankruptcy regime.

The Cost Recovery Impact Statement notes that "Commonwealth entities should minimise cost recovery charges through the efficient implementation of cost recovered activities, while achieving policy objectives" (our underlining).<sup>1</sup> Instead, it appears there has been no public policy analysis at all. As the new fees will impact significantly, and detrimentally, on people considering bankruptcy, financial counsellors are disappointed that the public policy implications have not been addressed.

This type of analysis could have considered the purpose of the bankruptcy regime and the costs, benefits and impacts of the filing fee, including on the people it will affect: those considering bankruptcy and other stakeholders. Fundamentally, we believe that Australians who are affected by a change in government policy, including the imposition of a fee, should have the right to be heard about that fee.

We also note that the new charges are planned to take effect on 1<sup>st</sup> April 2014. Although the new fees were included in the MYEFO, their introduction was only drawn to the attention of stakeholders in February with the paper we are responding to now. It is not clear to what extent the current consultation will in fact make any difference. It seems as if the fees will be imposed regardless.

Finally, although there has been no public policy analysis to date, we urge the Government to monitor the impact the fee on the bankruptcy regime and those

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<sup>1</sup> Attorney General Department (2014), Cost Recovery Impact Statement – Personal Insolvency and Trustee Services 2013 – 14 and 2014 – 15 at paragraph 1.3.

who use it. As we note later, other stakeholders will, to some extent, end up bearing the cost of the filing fee.

### 3. Impact of the Filing Fee

#### 3.1 Australian Context

Every year, approximately 20,000 people apply for protection from their creditors under the bankruptcy regime.<sup>2</sup> Unemployment is the primary cause of bankruptcy, with the majority of debtors having incomes of less than \$30,000 in the year preceding their debtor's petition.<sup>3</sup> From a real world perspective, people considering bankruptcy are at the end of their tether. In the experience of financial counsellors, bankruptcy is not a decision that is taken lightly. Clients who enter bankruptcy have no other real choices.

A fee for bankruptcy, no matter how small, will act as a serious barrier. A \$120 fee is unattainable for most clients of financial counsellors. As one financial counsellor put it "it may as well be \$12,000". The imposition of a filing fee will lead to a number of related problems.

#### *People will remain trapped in debt*

People who cannot afford the fee will remain trapped in debt and sometimes poverty, fighting off calls from creditors and debt collectors. Many financial counselling clients for example are already too scared to answer their phones because of debt collection calls. The impact of ongoing financial stress on individuals and families is overwhelmingly negative. The costs can include physical and mental health issues and family violence. These costs are borne by individuals, families and the broader community.

People who cannot avail themselves of the "fresh start" of bankruptcy may not have the breathing space to re-order other parts of their lives, for example, it is hard to seek employment when you continue to feel out of control.

We are also concerned that some people, in an attempt to find the money for the fee, will go without food (perhaps approaching a charity) or medicine in order to afford the fee. Financial counsellors see clients now who do both these things in order to pay creditors.

#### *Charities may need to use their own funds to pay the fees*

It is likely that charities, faced with clients in the situation outlined above, will in some cases use their own funds to pay the filing fee. This will result in the bizarre situation of a charity subsidising the government. Where that charity

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<sup>2</sup> <https://www.afsa.gov.au/resources/statistics/selected-statistics/selected-statistics-2012-13>

<sup>3</sup> <https://www.afsa.gov.au/resources/statistics/profiles-of-debtors-documents/profiles-of-debtors-2011>

receives government funding, the government has simply shifted costs between entities. Charities as a result, will also have fewer funds to use for their other activities.

*The bankruptcy regime will not act as it was intended*

Bankruptcy is meant to provide debtors with a fresh start, allowing them to get back on their feet. For creditors, bankruptcy has a number of functions: it stops debtors incurring debts they cannot pay, it stops futile debt collection activity and it provides certainty about treatment of the debt. For the community, bankruptcy balances appropriate sanctions (which are serious), with rehabilitation. An effective bankruptcy regime is also important in fostering a dynamic economy, where entrepreneurs are not held back by a fear of punitive insolvency arrangements if their ventures fail.

By imposing a cost barrier that puts bankruptcy out of reach, the policy intent of Australia's bankruptcy regime will be undermined. Some people will be too poor to go bankrupt – a perverse and surely unintended outcome.

*Creditors may be disadvantaged*

Depending on an individual's financial situation, some debtors may use a credit card or payday loan to pay the filing fee. Whether the fee is a pre or post bankruptcy debt is probably irrelevant as practically creditors will not be able to recover it. Creditors who continue to chase debts that cannot be repaid will also be incurring ongoing costs.

### **3.2 Overseas Experience**

Overseas experience confirms the problems outlined above. For example, a number of UK charities now have applications for people to apply for a grant to cover the costs of bankruptcy. The British Gas Trust Fund<sup>4</sup> is one such example. Consumers are advised to contact their local Citizens Advice Bureau to locate a charity in their local area that may help.<sup>5</sup> Other websites include lists of charities that offer these grants.<sup>6</sup>

While the bankruptcy filing fees in the UK are higher than those proposed in Australia, we reiterate that for low income clients considering bankruptcy, a fee of \$120 is a very real barrier.

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<sup>4</sup> <http://www.britishgasenergytrust.org.uk/application-process/bankruptcy-and-dro-applications>

<sup>5</sup> <http://www.debtadvisorycentre.co.uk/bankruptcy/i-cant-afford-the-bankruptcy-fee-what-do-i-do-0-4004-0.html>

<sup>6</sup> For example - <http://forums.moneysavingexpert.com/showthread.php?t=1167839>

## 4. Overseas Travel Requests

Given the fresh start provided by bankruptcy, some debtors will be able to afford to pay for an overseas travel request. However, there will be other debtors for whom the fee of \$150 will be out of reach. We recommend that AFSA be allowed to waive the fee for low income debtors on compassionate grounds, for example, where a person is travelling overseas to see a sick relative.

## 5. Other Options for the Filing Fee

### *Option 1 - Levy the fee on a post-bankruptcy basis*

A better mechanism for recovering AFSA's costs would be to levy it on a post-bankruptcy basis and only where the debtor's assets were above an agreed threshold. We understand this is how the New Zealand insolvency administrator operates. This approach would overcome the serious problems outlined above.

### *Option 2 – Fee waiver*

The fee could be waived for debtors in receipt of Centrelink income or below an appropriate threshold, for example, \$30,000 per annum. While we appreciate that the task of the trustee in bankruptcy is to ascertain the debtor's income and asset levels *after* the debtor's petition has been accepted – the receipt of a Centrelink benefit or an individual's income level is something that will be evident during the application process. For example, AFSA is required to assess:

“ if it is appropriate to reject (a) petition based on legislation (e.g. it appears they can pay their debts within a reasonable time and either they appear to be unwilling to pay ...”).

This assessment necessarily requires AFSA to look at income levels prior to bankruptcy.

## 6. Conclusion

### *Why is this important?*

In colonial times, Australia imprisoned people for non-payment of debts, and it was only in 1928 that the first *Commonwealth Bankruptcy Act* was proclaimed. Real change only came with the *Bankruptcy Act 1966* (Cth) and the concept of automatic discharge, with an underlying notion of rehabilitation.

During the 1980s there was a huge increase in personal bankruptcies, coinciding with the growth in consumer credit. In this period, we heard of the Christopher

Skases and Bonds who still maintained high profile lifestyles despite their bankruptcies. However, both Australian and overseas research shows that the majority of the people going bankrupt are simply poor people with a low-income who have a larger proportion of debt than those on moderate or high incomes.<sup>7</sup> It is these people who will bear the impact of the proposed charge.

We therefore reiterate our strong opposition to the imposition of a filing fee for a debtor's petition.

If the fee is introduced it should be subject to a review after 12 months, undertaken by the Attorney-General's Department. The review needs to look beyond cost recovery and consider the impact of the fee on all affected stakeholders: individuals considering bankruptcy, community organisations assisting low income clients in financial difficulty, creditors and AFSA. FCA and financial counsellors would be happy to assist in providing information for the review. Ideally, the data to be collected and the mechanism for collecting it, should be determined as soon as possible.

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<sup>7</sup> Martin Ryan, (1995) *The Last Resort: A study of Consumer Bankrupts*, 43-47.