Australian Banking Association

27 August 2020

Christopher Scope
Senior Legal officer Private International and Commercial Law Section
Australian Government Attorney-General's Department
By email: Christopher.scope@ag.gov.au; bankruptcy@ag.gov.au

Dear Sir

Review of the bankruptcy threshold

I refer to your recent correspondence providing the Attorney-General’s Department’s Discussion Paper on the Review of the bankruptcy threshold.

The Australian Banking Association (ABA) welcomes the opportunity to comment on this paper. The ABA has been active in working to protect vulnerable customers who may be subject to bankruptcy. Together with key consumer advocates, we called for a review of the bankruptcy threshold in 2019.

In November 2019, we also released new guidelines (see: https://www.ausbanking.org.au/greater-protections-for-customers-under-new-debt-collection-guidelines/) prescribing the process banks must follow before they sell any debt and also what happens once that debt is sold. This includes:

- Proactively contacting a customer to find other solutions before a debt is sold (this can include restructuring, consolidation and hardship support
- Not selling any debt that is in the process of being disputed by a customer
- Only contracting debt collectors that follow all regulatory codes and a bank’s own policies for supporting customers in hardship
- Regular auditing of all contracted debt collectors to ensure they meet the high standard set by the new guidelines
- The bank will require a debt collector to consult with a bank before bankruptcy is initiated, giving the bank an opportunity to repurchase the debt if a vulnerability is identified
- As an interim before a government review, each bank will assess the bankruptcy threshold and determine an appropriate level (for competition reasons the industry as a whole cannot set its own level)
- If a customer has an ongoing vulnerability and there is no reasonable prospect of the debt being repaid a bank will not sell this debt.

Consistent with our ongoing concern to protection vulnerable customers, we continue to believe that the bankruptcy threshold should be increased. We set out our observations and suggestions below.

The bankruptcy threshold should be increased

The bankruptcy process should not be open to be invoked for a debt as small as $5000 in 2020. We note in this regard that the threshold amount has not changed in 10 years and that inflation alone would warrant a significant rise.

As for the extent of the rise, we submit the time to determine an appropriate amount for permanent application is not while the economy is experiencing the impact of the COVID-19 pandemic. The fact that the pandemic warrants special circumstances is evident in the fact that the Government moved to temporarily extend the threshold to $20 000 as a reaction to the anticipated economic downturn caused by the pandemic.

The temporary increase should be extended for the duration of COVID-19

We note that the Discussion Paper refers to the temporary increase in the bankruptcy threshold from $5000 to $20 000, but does not canvass the possibility of a temporary extension of this measure beyond the initial 6 month period. In our view, the first step should be to extend the operation of this temporary change for an appropriate period to cover the potential increase in people suffering economic distress as a result.

At present, the economic support being offered by banks through deferrals of loan repayments will end on 31 March 2021. The temporary operation of the $20 000 threshold should extend a reasonable period beyond that, say 6 to 12 months, to account for effects felt by those unable to recover economically.

Experience gained through observation and analysis of the effects of the temporary increase in threshold could then be used to inform any decision about the level at which the threshold should be set post COVID-19.

The assessment of the effects of the temporary increase should have particular regard to any effect on unsecured creditors' ability to recover debts. This could be a particular problem for small businesses for example.

Answers to questions asked in the Discussion Paper

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

Yes. An increase is appropriate, having regard to the fact that inflation alone would warrant a significant increase.

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

The temporary increase should be retained until September 2021. Experience gained through observation and analysis of the effects of the temporary increase in threshold could then be used to inform any decision about the level at which the threshold should be set post COVID-19

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?

N/A

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

These should be addressed through analysis of the operation of the temporary increase in threshold.

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

See above.

Additional points

We note that the discussion paper also refers to the temporary measures of:

- increasing the time period for debtors to respond to a bankruptcy notice from 21 days to six months, and

Australian Banking Association

- extending the period of protection a debtor receives after making a declaration of intention to present a debtor's petition from 21 days to six months.

While these changes may be appropriate during COVID-19, we do not support these being made permanent.

Yours faithfully

Jerome Davidson
Director, Legal Affairs
0435510982
jerome.davidson@ausbanking.org.au