

5 July 2016

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The Treasury  
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Dear Sir/Madam

**Response to proposals paper  
Improving bankruptcy and insolvency laws**

We refer to your National Innovation & Science Agenda proposals paper for improving bankruptcy and insolvency laws issued in April 2016. We apologise for this late submission but as a busy legal practitioner, I only recently became aware of the proposal paper and trust that this submission will be accepted.

As I only have limited time I am unable to make a detailed submission on the 3 proposed measures. As such this submission is limited to proposal 1, namely **the proposed reduction of the current default bankruptcy period from 3 years to 1 year.**

1. I do not support such a proposal and unequivocally reject the argument that reducing the current bankruptcy default period from 3 years to 1 year is going to encourage innovation and business start-ups.
2. Reducing the current bankruptcy default period from 3 years to 1 year will, I submit, merely encourage reckless consumers to increase overall consumer debt. This in turn will lead to increased levels of consumer debt default and a material rise in consumer bankruptcies.
3. AFSA bankruptcy statistics for June 2015 indicate that just over 20% of total bankruptcies were business related with the balance being non business. Whilst there were no statistics as to how many innovation based businesses were included in that 20% segment of business based bankruptcies, it is safe to assume that there are perhaps a mere handful.
4. As such it appears that the stated reasons for this proposal **are not supported by any arms-length empirical study or statistics.** At a more basic level, the first proposal fails the common sense "pub test".
5. The majority of failed business entrepreneurs fail (not just in the innovation and technology segment) because of a number of factors, including inter alia
  - (a) Insufficient or a total lack of working capital,
  - (b) Insufficient or a total lack of business acumen, training and temperament, and
  - (c) Overwhelming and excessive business compliance costs and regulations which they are not trained to understand and which saps their energy, enthusiasm, resources and capital.
6. Post discharge, the ability of an "innovation and technology" bankrupt to engage in any new successful business venture will continue to be severely hampered because
  - (a) any new business that a discharged bankrupt may commence is likely to be even less capitalised and exposed to increased risk as the discharged entrepreneurial bankrupt

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- (i) is unlikely to have rebuilt their asset base and will be denied any meaningful new external debt funding, and
  - (ii) is likely to have to discharge continuing income contribution obligations to their former trustee; and
- (b) is unlikely to have acquired enhanced business acumen, training and temperament during such 12 month period, and
  - (c) will continue to face the overwhelming business compliance costs and regulation that cripple emerging and small businesses in Australia.

Any renewed enthusiasm that a discharged bankrupt may have for undertaking a new venture (and the consequential new debt and a risk profile) will be based on the knowledge that should they fail again, then this further failure will also be rewarded with a reduced default bankruptcy period.

7. Finally, your first proposal is disrespectful of, if not totally ignores, the legitimate expectation by creditors that debtors will face balanced but meaningful consequences for incurring debts and obligations that they can't pay. Business creditors face financial jeopardy every time a debtor goes into bankruptcy (or on insolvency if it is a company) as the creditor is denied the cash-flow to pay their staff, their overheads and their taxation obligations. End of year tax write offs do nothing to create immediate cash flow. Bankrupts cause real financial harm and loss to others and such conduct should not be encouraged by reducing the default period so that after a mere 12 months, the pattern can be repeated.
8. Under the current regulatory regime, very few bankruptcy administrations result in any proof of debt dividend being paid to unsecured creditors. The current 3 year default bankruptcy period is one of the few leverage points that unpaid unsecured creditors have in persuading debtors "to pay their bills". The professional costs of bankruptcy administration and preference recoveries means that after the payout of any secured debt (if any), most of a bankrupt's estate is applied in meeting the trustee's legitimate remuneration and expenses.
9. Given my submissions above, there is no utility in dealing with your request for proposals regarding post-bankruptcy obligations, post-bankruptcy compliance or post-bankruptcy income contributions as these issues are prefaced on the assumption that the Government will ignore the validity of this, and I have no doubt, many similar submissions.
10. Given my level of opposition and astonishment with the first proposal, I can only speculate that the real design and purpose of your first proposal is not one of encouraging entrepreneurial innovation activity in a limping economy but rather, is an attempt to socially re-engineer the stigmata of bankruptcy by reducing the accountability of irresponsible insolvent consumers.
11. Your first proposal should be abandoned in its entirety.

Yours faithfully



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