



28 February 2014

By email: bankruptcy@ag.gov.au

Attorney-General's Department
Canberra, ACT 2600

Dear Sir/Madam

Submission on the proposal to introduce filing fees for Debtors' Petitions, Overseas Travel requests and an increase to the Realisations Charge

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Cost Recovery Impact Statement on Personal Insolvency and Trustee Services 2013-14 and 2014-15.

We do not support the proposal to introduce, for the first time in Australia, fees to lodge a debtors petition, on the basis that it will unfairly restrict the ability of the low income and vulnerable to take the path of declaring for bankruptcy, even though this may be the best option for them.

We do not oppose the proposal to introduce a fee for the processing of Overseas Travel Requests, but believe a waiver is appropriate in certain circumstances.

We do not oppose the proposal to increase the Realisations Charge, and submit that, as a cost recovery mechanism, this is a more appropriate way to continue to deliver the desired budgetary outcome.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

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Consumer Action's casework experience

As context for our submission, we provide a case study sourced from Consumer Action's casework where individuals select bankruptcy as a last resort, but legitimate, solution to intractable debt.

A scan of Consumer Action's casework records (including both our legal advice and financial counselling services) reveals that we have on record at least 1900 calls from low income and vulnerable clients relating to bankruptcy during the 2012-13 financial year, and since 1 July 2013, we have received a further 1300 calls.

Bankruptcy is not a first or preferred option for our clients. There is a strong stigma to bankruptcy in Australian society, even though for low-income debtors with no assets (the majority of our clients) the consequences may not be severe, and in fact can help debtors get a fresh start. We take care to advise debtors of the consequences of bankruptcy and only to present the option of lodging a Debtor's Petition where it is clear their financial situation has become unmanageable and this is the option that may assist them rehabilitate their financial position.

It is also the assessment of our financial counsellors that a fee, even a very low fee, will act as a significant disincentive. Many of the callers to our financial counselling service have only very low incomes and no ability to raise additional monies.

CASE STUDY

Amanda was working in a contract role on a project with an engineering company and earning \$1,200 a week for almost 12 months. It was a large, long-term project and Amanda believed she'd be in the role for the foreseeable future. She decided to purchase a home unit for \$260,000 and a good second-hand car for \$16,000.

The company put the project on hold because of financial uncertainty. Amanda's role was not required and she became unemployed. Because she worked on contract she was not entitled to a redundancy payment from the company. Amanda had thought she would find another job without too much trouble, and applied for a number of roles but without success.

Managing her mortgage, car loan and car insurance premiums soon became a challenge. She felt too intimidated to go to Centrelink and check her eligibility for benefits, and started relying on her credit card. She used it to pay her loans and insurance and got another card to pay for her everyday needs. Within three months she had run up debt of \$12,000 on her cards, and couldn't make the payments for her unit and her car.

Amanda became depressed about her situation and sought the help of a financial counsellor when both her home unit and car were repossessed.

The counsellor convinced Amanda of her right to register with Centrelink. This immediately gave her an income and a Health Care Card. The financial counsellor then did a thorough assessment of her financial situation (as well as the \$12,000 owing on her credit card, Amanda

had \$30,000 still owing on her home and car loans) and after careful consideration, provided bankruptcy as an option that might help Amanda get a fresh start.

While bankruptcy may seem like a drastic step, it provided Amanda with a way out of her debt crisis and her depression and left her to make a fresh financial start and gain some control over her life.

The purpose of bankruptcy

Bankruptcy can provide benefits not only for individuals experiencing unmanageable debt, but for the finance sector and society more generally. When an individual goes bankrupt, for creditors most debts will not be recoverable. But it also can provide certainty for creditors, so that they do not waste resources (i.e. use court processes) seeking payment of an unrecoverable debt. From society's perspective, a framework for bankruptcy acknowledges and encourages entrepreneurship and risk-taking, which is a value to all as it can result in economic activity and growth.

Given the broader benefits of bankruptcy, there is a strong case for the state to pay for its administration - at the very least the cost of processing debtor's petitions.

Who will be most affected by the new fee?

The most recent profile of debtors published by AFSA¹ reveals a typical non-business bankrupt is in a desperate financial situation, and may have little prospect of recovery other than to start again with a clean slate:

- Unemployment or loss of income has consistently been nominated as the most frequent primary cause of insolvency for non-business related bankruptcies since 2003;
- The majority of bankrupts earn less than \$30 000;
- The number of bankrupts dropped from 28,665 in 2009 to 23,125 in 2011; and
- The majority of bankrupts who owed less than \$5 000 in 2011 were not employed at the time of bankruptcy and had low level utility debts.

A fee to file for bankruptcy may dissuade people who would most benefit from taking this course. When this is seen in the context of the harm long term hardship can wreak on families and communities, the benefit of recovering administrative costs may be significantly less than the benefit of bankruptcy.

Bankruptcy offers vulnerable debtors protection for essential household goods, a family vehicle up to the value of \$7,350, and allows them to retain the full benefit of their income up to the applicable threshold amounts. These protections have been set as the minimum living standard for people who have been declared insolvent. People who cannot afford to go bankrupt will be left without these protections.

There is a view, expressed during Senate Estimates on 24 February 2014, that Australia is an anomaly in that it is one of the only major common law jurisdictions, if not the only one, that does not charge a fee for applications for bankruptcy. This seems a curious argument to put as

¹ <https://www.afsa.gov.au/resources/statistics/profiles-of-debtors-documents/profiles-of-debtors-2011>

a reason for change. Australia as a nation takes pride in many aspects of its history, culture and civil society that are unique. The concept of the fair go is one that is strongly embedded in the national psyche, and the proposed measure, to recover a small amount of cost in the context of the full budget, runs against this cultural preference.

However an assessment of the proposed cost recovery² in the context of the economy and the Budget tells an interesting story.

Australia is a \$1.5 trillion dollar economy, of which the Government receives income of approximately \$350 billion. The recovery of \$7 million represents 0.000002%, an almost negligible amount, but is a significant impost on those who have no money. A fee of \$120 could mean the difference between having food for their family and going hungry, or paying the rent and becoming homeless. It is unreasonable to expect charitable institutions to meet this shortfall when there has been, to date, an accepted public benefit of providing this as a free service in recognition of the nature of the individual's unfortunate circumstance.

What is the experience elsewhere?

In the UK, lodging a debtors petition costs £700 (\$1300); the official receiver's deposit £525 (\$975) and the court fee is £175 (\$325). Debtors may not have to pay the court fee if unemployed or on a very low income, leaving them with £525 to find. This can be sourced by application to a charitable trust.

There were 24,536 bankruptcies in the calendar year 2013 in England and Wales, a decrease of 22.8% from 2012. In the last quarter 2013, 4,179 bankruptcies were made on the petition of the debtor (representing 77.6% of total cases); the level of debtor petition bankruptcies has been following a generally decreasing trend since the beginning of 2009 when there were 17,606 (86% of the total). Creditor petition bankruptcy numbers have also been falling over a similar period, though less rapidly and less consistently.

A British newspaper article³ from early 2012 described the experience of people who were too poor to go bankrupt:

Research from Citizens Advice shows that almost half of people for whom bankruptcy is the only option simply do not have the cash to take it.

Peter Tutton, credit and debt policy officer at the charity, says: "We see thousands of people every year who are too poor to go bankrupt, even though this is the only realistic option for them to deal with their debt problems."

"It's got even worse since bankruptcy fees went up sharply recently. Debt relief orders (DRO) have helped, but they don't solve the problem for people with debts over the £15,000 DRO limit who can't afford the £700 it costs to apply to be declared bankrupt."

² http://www.budget.gov.au/2013-14/content/myefo/html/11_appendix_a_revenue.htm

³ <http://www.mirror.co.uk/money/personal-finance/the-people-who-are-too-poor-to-go-bankrupt-659992>

“Day in, day out, CAB advisers see people in desperate need of protection from creditors and a fresh start who are not eligible for a DRO.”

“... the Government also urgently needs to improve the system for waiving bankruptcy fees so that more people in the most dire need can be helped.”

Other options

We note it is Government policy for the Australian Financial Security Authority (**AFSA**) to operate on a cost-recovery basis. It is unfortunate that the Cost Recovery Impact Statement (**CRIS**) has not considered other options available in AFSA to achieve cost recovery. For example, it would appear to be possible for AFSA to increase the realisation charge further to recover the \$7 million per annum that the debtor's petition fee is set to recover. We understand that the fee for debtors' petitions in New Zealand is only recoverable from the income and assets that are contributed during the period of bankruptcy - this is a fairer approach than an upfront fee.

Alternatively, there could be some graduated fee whereby those with higher incomes in the year before bankruptcy are charged a higher fee compared to those with lower incomes, and those with very low incomes could be charged nothing. While such a system may not be perfect, it is disappointing that the CRIS has not at least considered other options. We submit that the CRIS should be re-written with a number of options provided, including an option that will not have such a negative effect on very low income and vulnerable debtors.

There is no evidence of any modelling of behavioural changes as a result of the new fee. By contrast, when the Victorian Government proposed to significantly raise the fees associated with applications to the Victorian Civil and Administrative Tribunal (VCAT), it prepared a detailed Regulatory Impact Statement (RIS)⁴. This RIS modelled the behavioural impact of reduced applications as a result of increased fees (in some cases more than 300%), and estimated a reduction in applications of between ten and twenty-five percent. Therefore the anticipated revenue described in MYEFO⁵ cannot be relied upon by Treasury in the balancing of the 2013-14 Budget, or in the preparation of the FY14-15 Budget and forward estimates.

Conclusions

Proposal to introduce Debtor's Petition Fee

A fee to go bankrupt means the most vulnerable people are stranded—they may not be able to bankrupt, and instead will have the stress of further contact from creditors and unmanageable debt inhibiting them from being able to improve their situation.

Other potential negative impacts include driving debtors to approach fringe lenders to fund their bankruptcy or debt repayments, or push them toward the wrong type of insolvency agreement for their situation. There is a sad irony in a debtor seeking additional credit (from a payday

⁴ <https://assets.justice.vic.gov.au/justice/resources/c43e5816-b5b2-403e-9ccc-588df66eb8a6/risvcatfeesregs2013.pdf>

⁵ http://www.budget.gov.au/2013-14/content/myefo/html/11_appendix_a_revenue.htm

lender or otherwise) to pay for a debtor's petition, only to add this to the debts upon which they will go bankrupt.

The proposed fee could result in charitable institutions being called on to fund the applications (as has been the experience in the UK), which would likely result in a decrease in service delivery elsewhere.

The proposed fee could also be funded from other government agencies as support for low income and vulnerable individuals who already receive income support, which would be an inefficient internal cycling of public funds.

Consumer Action submits that the CRIS is deficient in that:

- There is no data about the impact on existing service delivery on those institutions who may be called upon to provide this additional financial assistance as an emergency relief measure;
- It fails to explore the possibility that other government agencies may provide financial assistance to debtors through other assistance payments;
- It has given no consideration to the behavioural impacts of debtors deciding not applying for bankruptcy, or delaying their application, as a result of a fee; and
- It does not attempt to assess any possible reduction in debtor's petitions because of the new fee.

Proposal to introduce Overseas Travel Requests Fee

Consumer Action does not oppose the proposal to introduce a fee for overseas travel requests. However we submit that there should be a waiver process for low income bankrupts in extenuating circumstances, such as to attend the funeral of a close family member or to visit a close family member who is seriously ill. The applicant is likely struggling to find the funds to travel, and the \$150 processing fee is an unwelcome and unnecessary extra burden at a difficult time.

Proposal to increase Realisations Charge

Consumer Action submits no opposition to the proposed increase to the Realisations Charge, and recommends that as a cost recovery mechanism, this is a more appropriate way to continue to deliver the desired budgetary outcome.

Please contact Denise Boyd on 03 9670 5088 or at deniseb@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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