

06 October 2023

By email: bankruptcy@ag.gov.au

Bankruptcy Team
Commercial and Copyright Law Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

Dear Bankruptcy Team

Personal insolvency discussion paper 2023

Thank you for the opportunity to provide feedback on the Attorney-General Department's (AGD) personal insolvency discussion paper (Paper). This submission elaborates on, and further supports, the joint submission led by Financial Rights Legal Centre (Joint Consumer Submission), to which Consumer Action is also a signatory.

Consumer Action Law Centre provides financial counselling assistance and legal advice to people at all stages of the insolvency process. We regularly speak to people who end up in unnecessary and costly bankruptcies that could have been avoided if better protections and a safer system existed. With a worsening economic outlook and the cost of living crisis, we are concerned more people will be railroaded into bankruptcy when they have better options to fairly resolve their debts.

The main purpose of this submission is to provide additional case studies from our direct experience assisting people within the last 12 months who were referred to us by judicial registrars at the Bankruptcy List of the Federal Court. These cases demonstrate the need for the statutory minimum threshold for creditor's petitions to be increased to **\$50,000**, a threshold we believe should also be subject to **annual indexation at the rate of CPI**. In our view, the proposed increase to \$20,000 in the Paper (particularly without indexation) is far too low. As detailed in page 26-27 of the Joint Consumer Submission, financial counsellors from Consumer Action attend Bankruptcy List hearings in person in Melbourne to provide advice on the spot to unrepresented debtors about their options.

The case studies provided below are included to demonstrate the impact the personal insolvency laws have on people who have been served creditor's petitions for relatively small debts and why the threshold needs to increase to \$50,000. In all of these cases, the bankruptcy process left these people worse off than they would have been if this avenue was not open to their creditors, and the detriment they suffered was far greater than any arguable benefit lodging a creditor's petition provided the creditors. They also prevented the debtors from entering into arrangements that would allow them to explore options for repaying the debt.

About Consumer Action

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 marketplace for all Australians.

Case studies – examples of harm caused by recent low value creditor petitions

Rita's story – excessive legal fees create second risk of bankruptcy

Rita (name changed) told us she had received a judgment making her liable for an inherited debt of over \$50,000, and had then received a bankruptcy notice. Rita said she had paid the judgment debt in full and could provide evidence of the same. However, the lawyers for the debtor were now also chasing her for further costs of \$20,000.

Our financial counsellor recommended that Rita consider paying the costs as soon as possible if she could, explaining that they could increase with time. The financial counsellor explained further that the creditor could obtain a judgment in respect of the costs, exposing her again to the risk of bankruptcy.

Case Study – Maria's story – aggressive debt collection, excessive fees from a major company

Maria (name changed) is a pensioner who owns her own house. She told us she was a migrant and had little understanding of the legal system in Australia. In 2022, a major transport company served her with a bankruptcy notice over a debt just under \$20,000, over a third of which was for court costs.

When Maria spoke with a financial counsellor she wanted to pay the debt but didn't know how to or what the final amount was, as the legal costs kept changing. She also told us the lawyer acting for the transport company treated her poorly throughout the process.

A financial counsellor assisted Maria to confirm the final amount and how to discharge the debt. Within a week of appearing in court, the fees had increased by another \$900. Maria told us she paid this by re-drawing on her previously paid off mortgage.

Case Study – Michaela's story – Excessive legal fees for major company bring debt over \$20K

Michaela (name changed) is in her late 50s and has significant health issues that have led to hospital admissions. In 2022 she appeared unrepresented in the Federal Court after a multi-national company filed a creditor's petition to bankrupt her for an amount she believed was well under \$20,000, but may have been increased to over \$20,000 due to legal fees.

As Michaela had a mortgage, business assets and a car, she was seeking help to negotiate with the creditor. We didn't hear back from Michaela but a month later her daughter sought an adjournment on her behalf. This was refused and a sequestration order was issued.

These three case studies demonstrate the extent of legal fees that can accrue in matters where creditors obtain judgments for a debt and then seek to bankrupt an individual. For debts under \$50,000 it is not uncommon for legal fees and penalty interest to make up around a third of the debt owed. As can be seen from Maria's story in particular, a creditor's petition can generate fees very quickly and there is little scope for debtors to challenge them.

These case studies do not even include the additional trustee fees that someone who is made bankrupt will likely face, which can be huge. Debts of this value should not lead to the harsh consequences of bankruptcy. Allowing creditors to use this avenue for debts under \$50,000 leaves them with unfair bargaining power relative to their interests.

Case Study – George’s story – bankruptcy laws enable refusal of reasonable payment plan

George (name changed) was 82 years old when he was in the Federal Court facing bankruptcy earlier this year for an underlying debt of around \$23,000. George said he had been paid \$23,000 as part payment for a construction job he was working on, which he then couldn’t complete as he got sick. George told us he was in a payment arrangement to repay the funds but then missed payments when he was hospitalised.

George recounted that he had previously contacted the creditor’s lawyers to resolve the matter and provided them with evidence of his illness. However, he did not hear back from the lawyers until he was served with a bankruptcy notice. On the day we spoke with him, George received an adjournment of the petition to seek legal advice, but he was eventually made bankrupt. He told us he was frustrated with the outcome and required help completing and lodging the forms needed to start the bankruptcy.

Case Study – Nikolas’ story – unreasonable debt negotiation could cost family home

Nikolas (name changed) and his wife have owned and lived in their home for 33 years, along with their children. Nikolas was referred to a financial counsellor by a registrar of the Federal Court’s Bankruptcy List in September 2023. He appeared there in response to a creditor’s petition.

Nikolas had to liquidate his business in 2020 after it was impacted by the COVID pandemic. He told us that he had paid off all the debts from the business except for one, as the creditor refused to enter into a payment plan. The original debt was for \$38,000, but it was up to \$50,000 with interest and fees when it was heard by the Court.

Nikolas told the financial counsellor he had recently had a triple bypass, but he had a secure job to return to so he was confident he could pay off the debt. When he was informed by the financial counsellors that he would likely incur many more trustee fees if he was made bankrupt, he indicated that he may be able to find a way to pay \$20,000 to the creditor upfront and then pay the rest off over time.

Nikolas was granted an adjournment on the day. The creditor is under no obligation to enter into an arrangement with Nikolas, and could reject all reasonable repayment plans in favour of sequestration. If it is not accepted, Nikolas will probably have to sell the family home to avoid bankruptcy and the additional associated fees.

Case Study – Leda’s story – school fees can push people into bankruptcy

Leda (name changed) told us she jointly owns her family home with a number of family members. She cannot read English and it is her second language. In 2021, a creditor’s petition was filed against Leda by a private school in Victoria, for unpaid school fees of close to \$40,000.

It was not until 2023 that Leda was referred to a financial counsellor in person by a registrar of the Bankruptcy List at the Federal Court. Before then, Leda had struggled to understand or engage with any of the court documents related to the bankruptcy process. By 2023, the matter was largely beyond her control. A financial counsellor explained to Leda that her family home may be at risk if she is made bankrupt, and answered Leda’s questions about the impact on her ability to work. These issues caused Leda significant distress.

After speaking with the financial counsellor, Leda offered to commit to paying off the debt within 6 months, but this was refused by the school’s lawyers and she was made bankrupt. Leda felt that the system had let her down.

The three case studies on page 3 are examples of situations where we consider the low threshold for creditor's petitions to have emboldened creditors to act unreasonably in negotiating payment arrangements. Rita (whose story is on page 2) also told us that she tried to settle the matter sooner but had trouble engaging with the lawyers acting for the debtor.

Creditors chasing debts below the bankruptcy threshold also still have many alternative options at their disposal to forcibly recover their debt. Creditors seeking debts under court orders can use powerful collection powers like garnishee orders or warrants for seizure and sale of assets. Forcing someone into the bankruptcy process via creditor's petition is a disproportionate and heavyhanded method of enforcement for a debt under \$50,000.

For the people we assist via referrals from the Bankruptcy List, the experience is incredibly stressful, unknown and outcomes are often at the whim of the creditor or their lawyers. The impacts of being caught up in the bankruptcy system - such as losing the family home for a relatively small debt - can be long-lasting and ripple out to affect entire families in financial difficulty.

Make the threshold subject to indexation

The Paper briefly mentions the idea of annually indexing the threshold, but does not adopt it under the relevant proposal, and the Paper otherwise does not discuss the option in any detail. It seems to us that indexation is an obvious change to accompany any increase to the threshold. It would future proof the threshold and will avoid the need for the Government to go through the exact same process again in a few years, when the real world appropriateness of a set threshold inevitably becomes unsuitable again. With the current rate of inflation, not adopting indexation means the threshold will again not practically reflect what the Government considers to presently be a fair threshold within a few years.

It would not be difficult or without precedent to adopt indexation, either. Other thresholds that are specified in the *Bankruptcy Regulations 2021* are indexed.¹ For example it applies to the limits under which a person may enter a debt agreement, and to the maximum value of protected assets that a bankrupted person can retain. We strongly recommend that the AGD not only increase the threshold to \$50,000 but also ensure this figure is subject to indexation in future.

RECOMMENDATION 1. Increase the bankruptcy threshold to \$50,000 and make this amount subject to annual indexation.

Extend the response period to a bankruptcy notice to 60 days

Another theme in all of the case studies above and throughout all the referrals our financial counsellors receive from the Bankruptcy List of the Federal Court is that the current 21 day period for responding to bankruptcy notices is woefully inadequate. Debtors routinely appear before the Court without being able to obtain advice to fully understand their situation. The Joint Consumer Submission provides further detail on why the proposed increase of the period to 28 days would still be insufficient. We urge the AGD to heed this advice and increase the statutory timeframe for a debtor to respond to a bankruptcy notice to be extended to **60 days**.

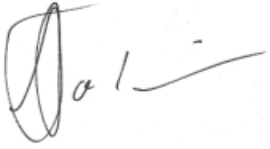
RECOMMENDATION 2. Extend the period for a debt to respond to a bankruptcy notice to 60 days.

¹ <https://www.afsa.gov.au/professionals/resource-hub/resource-hub/indexed-amounts>

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on 03 9670 5088 or at tom.a@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'Stephanie Tonkin', is positioned above the typed name.

Stephanie Tonkin | CEO

