

6 January 2021

Kelsey Brewer
Legal Officer
Attorney-General's Department
4 National Circuit
BARTON ACT 2600

By email: Bankruptcy@ag.gov.au

Dear Ms Brewer,

Bankruptcy Regulations 2021 - Exposure Draft & Discussion Paper – Submission

1. This submission concerning the Discussion Paper and Exposure Draft of the Bankruptcy Regulations 2021 is made by the Insolvency & Restructuring Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

Key Points

2. The key matters raised in the Discussion Paper and arising from the Exposure Draft which the Committee wishes to raise specifically to the department's attention are as follows:
 - a. The Minor and Technical Amendments proposed in the Exposure Draft are uncontroversial and require little further consideration.
 - b. In considering the more substantive or other clarifying amendments proposed in the Exposure Draft we have considered each major item and any specific questions raised in the Discussion Paper in order of appearance and then considered any other matters which require submissions. Broadly speaking most of the proposed changes appear reasonable but some of the proposed clarifying amendments may have the effect of obfuscating or confusing issues or lengthening the proposed Regulations unnecessarily.

Submissions

3. In further explanation of the Key Points above we make the following submission in answer to the specific questions raised in the Discussion Paper.

Minor and Technical Amendments

4. We agree with the commentary by the department that there are a number of minor and technical amendments in the Exposure Draft which are proposed for practical or innocuous reasons are therefore broadly not contentious . However, the move away from calendar days to business days in our view creates less certainty and creates challenges where debtor and trustee may be located in different jurisdictions.
5. The move to the list identifier 'Section' as opposed to 'Regulation' is supported in that it simplifies and modernises the language of the proposed Regulations.

Substantive or Clarifying Amendments

6. In considering the more substantive or clarifying amendments proposed in the Exposure Draft we have considered each major item and any specific questions raised in the Discussion Paper in order of appearance and then considered any other matters which require submissions.

New Definition of Preliminary Remuneration and Expenses

7. From a practical perspective, although section 50 orders pursuant to the *Bankruptcy Act 1966* (Cth) (**Act**) are not common, they occur frequently enough to warrant clarification in the Exposure Draft.
8. Question 1: Is a definition needed in the new Regulations? Simply put, no definition is needed as it serves only to partially clarify a matter which is for practical reasons dealt with commonly by Court orders.
9. Question 2: Does the definition provide adequate guidance? It does, but it may otherwise be unnecessary but for its clarifying nature, particular given it is not linked to the direct drafting to section 50 of the Act but rather a procedural outcome arising from it.

Exchange Rates

10. Changes to exchange rate provisions are uncontroversial.

Proofs of Debt and Foreign Currency

11. This is a helpful and uncontroversial change.

Modernised List of Household Property

12. The new modernised list of household goods is practically irrelevant and does not provide meaningful guidance to Trustees, any more than the existing (now significantly outdated) list does. A more practical approach would be to rely solely on the proposed sections 27(1)(c) and 27(4) of the proposed Regulations and remove any list (whether expanded or otherwise).

Transfers exempt from Being Void Against a Trustee

13. The points raised in the Discussion Paper are practically effective and conform with current practice and views.

14. Question 3: Section 31 of the proposed Regulations is not necessary (and should not be included in the final version) particularly in light of section 19 of the Act.
15. Question 4: There are less undesirable consequences arising out of the omission of the Section 31 clarification as it broadens Trustee discretion rather than constricts it, making the proposed Regulations more flexible (and consequently more relevant) for a longer period of time (and accordingly will require less amendment from time to time).

Income of A Dependant

16. The move to annual indexations is a welcome change and minimises administrative costs and complexities for estates but indexation should occur at the time the income is earned rather than at the time of assessment – consideration should be given to circumstances where debtors are slow to attend to this process (whether with good reason or without).

Timing for Filing a Consent to Act Instrument

17. Question 5: We have some concerns about the timing of this process being moved to be concurrent with or prior to formal appointment as it creates additional expense for practitioners where a matter may resolve post filing of a CTA but prior to sequestration. It is the preference that any administrative burden be handled by the Official Receiver rather than transferred to private Trustees.

Amended Timeframe for Notification of Termination of a Personal Insolvency Agreement

18. Question 6: Yes, 2 days is a reasonable time frame for notification.
19. Question 7: Other than the use of business days and any matters specifically mentioned in this submission the proposed Regulations attend to clarifying most timeframes appropriately, particularly noting, they are not a substantive shift away from the existing regulations.

Information to be Entered in the NPII

20. Question 8: The proposed tables are a welcome change to the existing Schedule 8.

Changes to Bankruptcy Notice Form

21. Question 9: We agree with the proposed change to use the word 'accompanying' as it is more accurate and a technology neutral verb.
22. Question 10: We otherwise do not submit that any further changes to the Bankruptcy Notice form are required in the foreseeable future.

Changes to Calculation of FBT for Motor Vehicles

23. The proposed changes are appropriate and effectively harmonise the proposed Regulations with existing Federal legislation.

Clarification of Certain Offences and their application to the IG, OT or OR

24. This is a practical and necessary suite of amendments which ensures bankruptcy regulation and enforcement are not overburdened with internal disputes and conflict.

Monetary Figures Subject to Indexation

25. Updating baselines for indexation is uncontroversial and consistent with the drafting of the existing Regulations.

Conclusion and further contact

26. The Committee would be pleased to discuss any aspect of this submission.

27. Please contact the chair of the Committee, Scott Butler, on Scott.Butler@hallandwilcox.com.au or at 0448 939 439, if you would like to do so.

Yours faithfully



Greg Rodgers
Chair, Business Law Section