



Attorney-General's Department
Personal Insolvency Consultation

By email: bankruptcy@ag.gov.au

To whom it may concern

Thank you for the opportunity to provide feedback on behalf of small business in NSW to the consultation: *Personal Insolvency Consultation*.

The NSW Small Business Commission (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services across NSW.

The Commission notes that sole proprietors account for 30 per cent of all active businesses (large and small) actively operating in Australia.¹ While the factors initially warranting the increase in the threshold to \$20,000 during COVID-19 have dissipated, there are a range of risk factors for small business operating in the current economic climate.

COVID-19 relief measures, in some cases, have resulted in more debts for businesses. For example, deferring of rent during COVID-19 lockdowns have increased debt, adding additional expenses for businesses that are now experiencing higher inflation and interest rates. It is likely that COVID-19 relief measures contributed, to some extent, in the reduced number of insolvencies in 2020-21 and 2021-22 and it is unsurprising that business-related insolvencies have increased since this time.

Anecdotally, the Commission has also heard of incidents of businesses becoming insolvent due to cash flow constraints related to delays in delivering goods and services, or supply chain challenges. Although businesses have been contractually guaranteed to receive income from delivering goods or services at a later date, they have been unable to meet their debts and have become insolvent before that date. For these firms, existing financial buffers have been insufficient and alternative financing options have been inaccessible or otherwise unsuited to their circumstances.

The Commission welcomes consideration as to whether a higher threshold could provide additional buffers to accommodate good outcomes for creditors while ensuring bankruptcy remains an option of last resort.

Current economic conditions and insolvency risks

Current economic conditions represent a challenging environment for many small businesses. The Commission regularly engages with small business through the monthly [Momentum Survey](#) (survey) and through customer enquiries and engagement. This intelligence suggests many small businesses are

¹ Sole proprietorship count is 674,725 out of a total 2,283,961 businesses. Source: ABS 8165.0 Quarterly Counts of Australian Businesses, Entries and Exits, Experimental estimates June 2020 to June 2023 available at [Counts of Australian Businesses, including Entries and Exits, July 2019 - June 2023 | Australian Bureau of Statistics \(abs.gov.au\)](#)

facing new challenges, many of which have compounded the winding back of support made available during COVID-19.

The survey indicates early signs that the stabilisation of the cash rate, following successive interest rate increases, may have contributed to an improved outlook. However, business conditions remain subdued, coinciding with challenging trading conditions, higher interest rates and elevated costs.

Small business confidence levels rose for a second consecutive month, increasing by 2 percentage points to 30 percent between July and August. In the August survey, a minority of businesses (30 per cent) indicated they were confident about their individual business prospects, and a minority of businesses (20 per cent) indicated they were confident about their local economy.

Impact of raising the bankruptcy threshold on creditors

Small businesses are particularly vulnerable, as in some sectors they are often the last within a long chain of payment. For example, the risks of non-payment for small businesses and sole traders within the construction industry have been well publicised. As larger construction businesses become insolvent, small businesses are often owed income, and do not get paid, which in turn increases the risk of insolvency for these small businesses.

Creditors can obtain judgement debts for claims up to \$20,000 in the small claims division of the Local Court in NSW which can be enforced for up to 12 years after the judgment date. A creditor may decide to wait until a debtor has traded out of financial hardship before commencing enforcement by applying for a garnishee order or a writ for levy of property.

Small business creditors also have other options to pursue debt such as engaging debt collection agents or the civil small claims processes which include preliminary mediation facilitated by the Community Justice Centres or the state small business commissions.

While the Commission welcomes a comprehensive assessment of the impacts of a permanent increase in the threshold to \$20,000 and additional measures to mitigate any identified risks, there appears to be some merit in moving to a higher threshold. The Commission notes it may be uncommercial to pursue bankruptcies for amounts under \$20,000. As noted in the discussion paper, in the financial year ending 2022, 11.8 per cent of the bankrupt population had debts between \$10,000 and \$20,000.

Increasing the period for a debtor to respond to a bankruptcy notice from 21 to 28 days

The Commission supports increasing the period for a debtor to respond to a bankruptcy notice from 21 to 28 days. The extension provides additional time needed to get advice, consider options, restructure finances, and recoup money owing in late payments from other businesses which may be significantly impacting cash flow and viability.

The benefits to a creditor of increasing the period for a debtor to respond to a bankruptcy notice include increased opportunity for the settlement of debts and averting bankruptcy litigation time and costs including potential delays from administration and distribution of a debtor's personal assets.

Late payments to small business

Late payments continue to be a risk factor for small business insolvencies. Late or slow payments can hinder a small business' ability to run their business, manage cashflow and meet financial obligations.

The Commission's September 2022 Small Business Survey revealed one in three (37 per cent) businesses have noticed changes in payment times practices. Of those businesses that noticed

changes, one in two (46 per cent) indicated that customers are paying invoices one month or more past the nominated due date. In response to late payments, typical actions taken include sending a reminder notice (indicated by 79 per cent of respondents), sending an overdue invoice (55 per cent) and/or cutting off products and services until outstanding invoices are paid (34 per cent).

The Commission has advocated for and supported government initiatives that encourage fairer payment practices that meet the needs of both buyers and suppliers. This includes the Payment Times Reporting Scheme (PTRS) which came into effect on 1 January 2021 and provides greater transparency of the payment practices of large businesses and government enterprises.

Circumstances involving debt agreements which serve as an ‘act of bankruptcy’

The Commission notes and supports the original policy rationale for the introduction of debt agreements as an *alternative* measure to bankruptcy and a final option to avoid bankruptcy and protect personal assets such as the family home which is not a beneficial outcome for the community.

In the Commission’s experience with facilitating a statutory commercial mediation scheme under the *Retail Leases Act 1994*, a debtor is less likely to default on a commercial settlement agreement entered into voluntarily (than an agreement that is imposed) on the basis that parties have control over negotiating the terms of the agreement and are able to incorporate a degree of flexibility that accommodates their interests.

Thank you for the opportunity to make a submission. If you require further information, please contact Megan Bennett at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

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Commissioner
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