

29 July 2024

Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: bankruptcy@ag.gov.au

Dear Sir/Madam

Personal Insolvency Consultation – Minimal Asset Procedure

We refer to the current Personal Insolvency Consultation in relation to the proposed Minimal Asset Procedure (**MAP**) discussion paper issued by the Attorney-General's Department in July 2024 (**Discussion Paper**).

The Australian Restructuring Insolvency and Turnaround Association (**ARITA**) is Australia's largest professional representative body of insolvency practitioners representing over 80% of Australia's registered bankruptcy trustees.

Consistent with our historical support for a simplified bankruptcy process, ARITA supports the implementation of a MAP as a once-off mechanism for eligible debtors to deal with their debts, however our attached detailed responses to the questions in the Discussion Paper make a number of recommendations we believe are vital to achieving the overall objectives of the proposed reforms.

Recommendation 1: ARITA supports the introduction of a MAP in Australia, subject to the recommendations set out in our response to the consultation discussion questions, to improve its operation and balance the interests of debtors and creditors, including, but not limited to, the following:

- The MAP must include a mandatory education component.
- The MAP should not be available to debtors who own (or partly own) a home, land or buildings, regardless of the amount of equity (or lack thereof) in the property.
- Given the well-established basis of the base income threshold amount in bankruptcy, the same basis should be used to determine the maximum income for accessing the MAP and a person's ability to repay their debts.

- Individuals employing people who have employee entitlements outstanding, including superannuation guarantee amounts, and individuals who have previously been bankrupt or subject to another personal insolvency procedure should not be eligible for the MAP.

Recommendation 2: Specific anti-avoidance and penalty provisions must be incorporated into the MAP to maintain confidence in the personal insolvency system and balance the interests of debtors and creditors and safeguard it from abuse, including, but not limited to, the following:

- Before accessing the MAP (or any personal insolvency mechanism) the debtor must be provided with a summary sheet outlining personal insolvency options, so they are fully informed of their alternatives. A copy of the summary sheet should be signed by the debtor and provided to AFSA acknowledging that they have read the information.
- A debtor must declare that they are not aware of any voidable transactions or misconduct that may otherwise disqualify them from accessing the MAP and a false declaration is a strict liability offence which also triggers the conversion of the MAP to traditional bankruptcy.
- A debtor be subject to restrictions and obligations regarding honest disclosure, cooperation, credit disclosure and business operations, including a prohibition on being a director at the time of entering the MAP or acting as a director or being involved in the management of a company for the period of the MAP.
- In addition to the proposed safeguards set out in the Discussion Paper, further safeguards be applied which trigger the automatic transition to a traditional bankruptcy.

Target untrustworthy advisors

In addition to the specific matters raised in the Discussion Paper, ARITA continues to advocate for all providers of insolvency/solvency advice to be licensed and subject to the same legal duties as insolvency practitioners or lawyers. We believe that such a reform will reduce the prevalence and harm caused by dodgy pre-insolvency and phoenix advisors.

We also maintain that all offences under the *Corporations Act 2001* (Cth) and the *Bankruptcy Act 1966* (Cth), including any new legislation regarding a MAP, should include an offence to advise, instruct, assist or counsel any person to commit or attempt those offences.

As always, we look forward to continuing to work closely with the Attorney-General's Department and should you wish to discuss any aspect of our submission, please contact Ms Narelle Ferrier, ARITA's Technical & Standards Director, on 02 8004 4350.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Winter', with a long horizontal flourish extending to the right.

John Winter
Chief Executive Officer

Table of contents

1	ARITA’s advocacy for a simplified bankruptcy process	4
2	Scope of Minimal Asset Procedure	5
3	Impact on debtors and creditors.....	11

1 ARITA's advocacy for a simplified bankruptcy process

In response to the 'Bankruptcy system – options paper' issued by the Attorney-General's Department in January 2022, ARITA noted 'a groundswell of support in the profession for a 'simplified bankruptcy' option as a preferred alternative to a reduced default period'.

We submitted that 'simplified bankruptcy could be specifically targeted towards proactive debtors who are genuinely and honestly wishing to deal with their financial distress and provide full, frank, and transparent disclosure to their trustee' which 'could also help mitigate mental health issues associated with dealing with these issues on a long-term basis, while preserving integrity in the personal insolvency framework.'¹

This position was maintained in ARITA's November 2022 recommendation to the Parliamentary Joint Committee on Corporations and Financial Services Corporate Insolvency in Australia Inquiry that Australia's insolvency law should have as one of its objectives that individuals who become insolvent and have committed no offences, be discharged from bankruptcy as soon as practicable. We note that the Productivity Commission took a similar in principle view in its 2015 *Business Setup, Transfer and Closure* Inquiry Report.

Noting our historical support for a simplified bankruptcy process, ARITA supports the implementation of a Minimal Asset Procedure (**MAP**).

Such a regime must be simple for debtors and creditors to understand, and we strongly encourage particular care be taken to ensure that the Government does not unintentionally replicate the failings of the small business restructuring and simplified liquidation regimes for corporate insolvency, which are overly complicated and not necessarily fit for purpose.

¹ ARITA Submission, Bankruptcy System – Options Paper, Attorney-General's Department, 25 February 2022, pp 8-9

2 Scope of Minimal Asset Procedure

Recommendation 1: ARITA supports the introduction of the MAP in Australia, subject to the recommendations set out in this response to the consultation discussion questions, to improve its operation and balance the interests of debtors and creditors. This includes a mandatory education aspect.

Discussion Question	ARITA Response
<p>1. Are you supportive of the MAP within Australia?</p>	<p>ARITA supports the introduction of the MAP in Australia, subject to the recommendations in this response that will improve its operation and better balance the interests of debtors and creditors.</p> <p>Noting the primary objective of the MAP to allow ‘debtors in genuine situations of indebtedness, with unmanageable debt,’ to access a ‘fresh start’ we strongly recommend that the MAP must include a mandatory education component.</p> <p>This submission is prepared on the understanding that the MAP is being considered as an alternative to the Government’s previous consultation in relation to a one-year default bankruptcy period or early discharge provisions.</p> <p>In 2002 the one-year early discharge provisions in bankruptcy were abolished because, inter alia, they provided little opportunity for debtors to become better financial managers.² Without a mandatory education component this criticism could equally apply to the MAP.</p> <p>The Canadian bankruptcy law³ requires individuals to attend two credit counselling sessions. The Insolvency Counselling Program⁴ consists of four online modules and two in-person counselling sessions aimed at providing the debtor with the right tools and knowledge to help them move beyond their insolvency.</p>
<p>2. Other jurisdictions have enacted a MAP to assist debtors who have no reasonable way to repay their debts. Where these debtors become bankrupt, it would result in non-</p>	<p>ARITA believes that a cohort exists for a MAP in Australia. In circumstances where a debtor genuinely has no reasonable way to repay debts up to a threshold amount, and subject to other recommendations made in this submission, we believe that there is no utility in a debtor being burdened with a traditional bankruptcy or other personal insolvency process. We also believe that leaving</p>

² Bills Digest No. 8 2001-02, Bankruptcy Legislation Amendment Bill 2001, www.aph.gov.au

³ Sections 157.1 and 66.13 *Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)*, Canada

⁴ Insolvency Counselling Program introduction <https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/insolvency-counselling-program-introduction>

Discussion Question	ARITA Response
<p>commercial estates which do not return dividends to creditors. Do you believe a cohort exists for a MAP in Australia? Please expand on your response.</p>	<p>such debtors “in bankruptcy” under the current regime adds to potential mental health issues.</p> <p>There is also a significant administrative burden placed on the Australia Financial Securities Authority (AFSA) who administers⁵ most current bankruptcies who meet the MAP criteria.</p> <p>We note that a lower administrative burden for AFSA should lead to lower overall costs for the personal insolvency regulator, resulting in an adjustment to realisations charge. A lower realisation charge would benefit multiple personal insolvency stakeholders, particularly creditors and private trustees.</p>
<p>3. The department recommends a maximum debt threshold of \$50,000 for the MAP. Do you agree with this threshold? Please expand on your response. The department has included a table of other jurisdictions’ thresholds below to assist.</p>	<p>Noting the jurisdictional thresholds and 2021-2022 personal insolvency data included in the Discussion Paper, ARITA agrees with the proposed \$50,000 maximum debt threshold.</p> <p>That said, we recommend that the threshold should either be indexed on an annual basis or based on accumulated inflation over a 3 or 5-year period.</p>
<p>4. The department proposes an asset threshold of \$10,000 with exceptions for tools of trade and a vehicle. Do you agree with this asset threshold? Please expand on your response.</p>	<p>ARITA agrees with the proposed \$10,000 asset threshold but recommends that:</p> <ul style="list-style-type: none"> • appropriate and adequate documentation be provided by the debtor to establish that proper disclosure of their assets has been made (including documentation for at least 12 months prior to the application for the MAP) to ensure that no transfers have been made to defeat creditors⁶ • the threshold be indexed in the same manner as the maximum debt threshold mentioned above, and • consistent with existing bankruptcy provisions, the exceptions be extended to include property held by the debtor in trust for another person, household property and sentimental personal property.⁷ <p>We also recommend that, consistent with Scottish law, the MAP should not be available to debtors who own (or partly own) a home, land or buildings, regardless of the amount of equity (or lack thereof) in the property at a point in time.</p>

⁵ On behalf of the Official Trustee

⁶ As set out in section 121 of the *Bankruptcy Act 1966* (Cth)

⁷ *Bankruptcy Act 1966* (Cth) sections 116(2)(a), (b) and (ba)

Discussion Question	ARITA Response
	<p>This recognises that the value of a home, land and buildings is very fluid, and a bankruptcy trustee retains a legal interest in real estate after a bankruptcy ends.⁸</p> <p>Allowing a MAP by a debtor who owns a home, land or buildings may unfairly prejudice creditors who may obtain a future benefit from the asset in a bankruptcy.</p> <p>We recognise that many debtors likely to be eligible for the MAP may:</p> <ul style="list-style-type: none"> • have limited financial capabilities or be financially illiterate, making it difficult for them to complete their tax return unassisted; and • have little to no ability to afford professional assistance with their tax return. <p>However, some ARITA members believe that, in line with the simplified liquidation process under the <i>Corporations Act 2001</i> (Cth) (Corporations Act)⁹, debtors should be required to lodge all their tax returns and statutory lodgements to qualify for a MAP.</p> <p>Additionally, it should be clarified whether assets below the threshold for entering a MAP would remain with the debtor and not be included in the MAP and the treatment of after-acquired property, which, in bankruptcy, typically vests in the estate for the benefit of creditors.¹⁰</p> <p>Another consideration is the ability of the debtor to annul the MAP should sufficient assets be acquired to discharge their debts in full (e.g. from an inheritance, unexpected windfall or third-party). Given it is possible to annul a bankruptcy and restore a bankrupt's legal and financial status as if the bankruptcy never occurred, it should also be possible to annul a MAP.</p> <p>This would be in the best interest of the debtor and creditors, as well as enabling the debtor's credit file to reflect full payment of their creditors</p>

⁸ *Bankruptcy Act 1966* (Cth) section 58(1)(b)

⁹ Refer section 500AA(1)(g) of the *Corporations Act 2001* (Cth)

¹⁰ *Bankruptcy Act 1966* (Cth) section 58(1)(b)

Discussion Question	ARITA Response
<p>5. What should a person's maximum income be prior to accessing the MAP?</p> <p>6. How should a person's ability to repay be assessed for eligibility to access the MAP?</p>	<p>The <i>Bankruptcy Act 1966</i> (Cth) (Bankruptcy Act) already provides for a base income threshold amount (BITA) which refers to the amount of income a bankrupt individual can earn before they are required to make contributions to their estate. The BITA is designed to ensure that individuals undergoing bankruptcy can maintain a reasonable standard of living while making contributions to their creditors based on their income levels.</p> <p>The BITA is regularly adjusted to reflect changes in the cost of living and an additional adjustment is made to account for the increased cost of living associated with having dependents.</p> <p>Given the well-established basis of the BITA, we recommend that the same basis should be used to determine the maximum income for accessing the MAP.</p> <p>Using the BITA as a maximum income for the MAP would also provide a mechanism for assessing a person's eligibility to repay. A bankrupt whose income exceeds the BITA is required to make contributions to their estate, which are then distributed to their creditors.</p> <p>This establishes a benchmark for determining when a bankrupt has an ability to make repayments while still maintaining a basic standard of living.</p> <p>ARITA recommends that assessable income for the MAP be calculated in the same way as bankruptcy (including the treatment of welfare payments).</p>
<p>7. Should any debts be excluded from the MAP in Australia? Table 1 below compares other jurisdictions which exclude certain debts from being cleared, where they would otherwise be cleared by a bankruptcy.</p>	<p>Having reviewed the comparative list of excluded debts from other jurisdictions, we note that many of the debts listed are not discharged by Australia's bankruptcy relief.</p> <p>As such, we do not believe that there are any debts that should be excluded from the MAP where they would be otherwise cleared by a bankruptcy.</p> <p>That said, should our recommendation regarding the exclusion of debtors who own (or partly own) home, land or buildings not be accepted, we believe that where the debtor retains the property, any debts directly attributable to the property should be excluded from the MAP.</p>

Discussion Question	ARITA Response
<p>8. What exceptions /exemptions do you believe should be applied for debtors when assessing someone's suitability for the MAP? For example, when assessing a debtor's income where someone is receiving welfare payments, should the debtor be exempt from the income test?</p>	<p>ARITA recommends that the following circumstances should exclude a person from being able use the MAP:</p> <ul style="list-style-type: none"> • individuals employing people who have employee entitlements outstanding, including superannuation guarantee amounts, and • individuals who have previously been bankrupt or subject to another personal insolvency procedure. <p>In addition, where bankruptcy proceedings have been commenced by a creditor, the creditor should be able to apply to the court for the MAP to be converted to bankruptcy. The court may then determine the most appropriate regime.</p>
<p>9. To what extent would the MAP displace alternatives to bankruptcy currently available in the Australian personal insolvency system? Please explain.</p>	<p>We do not believe that the implementation of a MAP would make any aspects of the existing personal insolvency regime redundant, however, we do anticipate that the MAP would reduce the usage of some alternatives to bankruptcy currently available in the Australian personal insolvency system, including formal and informal alternatives.</p> <p>There may be circumstances where this is an appropriate outcome and in the best interest of the debtor and creditors as a whole.</p> <p>However, there may be situations where a debtor enters a MAP without fully understanding the far-reaching and possible long-term consequences of a formal personal insolvency appointment (notwithstanding the reduced consequences of the MAP).</p> <p>Given this, we recommend that it be mandatory to provide all individuals seeking to access a MAP (or any personal insolvency mechanism) with a summary sheet outlining personal insolvency options, so they are fully informed of their alternatives. It would be appropriate to have the individual sign the information sheet and provide a copy to AFSA acknowledging that they have read the information.</p>
<p>10. If the MAP was enacted in Australia, where would this best fit within the current personal insolvency options?</p>	<p>The MAP is effectively a simplified bankruptcy option and should fit within the bankruptcy regime. This also aligns with the proposed exceptions for tools of trade and motor vehicle and ARITA's proposed reference to the BITA. As part of the bankruptcy regime, it would also enable a MAP to convert to bankruptcy in certain circumstances.</p> <p>It would not be appropriate for the MAP to fit within the debt agreement or personal insolvency agreement options, as both options are subject to creditor agreement. There is no such engagement with creditors proposed for the MAP, nor should there be.</p>

Discussion Question	ARITA Response
<p>11. Do you believe if there are any economic circumstances that signal a need for the MAP? Please expand on your response.</p>	<p>The following economic conditions could signal the need for a simplified and less costly personal insolvency process such as the MAP for individuals in Australia:</p> <ol style="list-style-type: none"> 1. High levels of personal/consumer debt: where there has been a disproportionate growth in personal debt levels, particularly unsecured debt like credit cards, personal loans, interest-free purchase arrangements and buy-now-pay-later impacting individuals' ability to meet their financial obligations. This situation can lead to a rise in bankruptcies and the need for a streamlined insolvency process for those with minimal assets. 2. Economic downturn: economic downturns often result in increased unemployment, reduced income, and financial hardship for many individuals. These conditions can lead to a surge in insolvency cases, prompting the need for a procedure that can efficiently handle cases where debtors have little to no assets. 3. Increased cost of living: rising costs of living, including housing, utilities, and essential goods, can strain household budgets, leading to increased debt accumulation and financial distress. A MAP can offer relief to individuals who are unable to meet their financial obligations but have limited assets. 4. Lack of access to affordable credit: if access to affordable credit becomes restricted, individuals may turn to high cost borrowing options, leading to unsustainable debt levels. A MAP can help those with minimal assets manage and discharge their debts in a controlled manner. <p>In summary, a MAP in Australia would be particularly useful in addressing the needs of individuals with low incomes and few assets who are experiencing financial hardship due to economic and social factors. This procedure could provide a simpler, more accessible path to debt relief, reducing the burden on both the individuals involved and the insolvency system as a whole.</p>

3 Impact on debtors and creditors

Recommendation 2: Specific anti-avoidance and penalty provisions must be incorporated into the MAP to maintain confidence in the personal insolvency system and balance the interests of debtors and creditors and safe guard it from abuse, including the automatic transition to a traditional bankruptcy in the circumstances set out in this response to the consultation discussion questions.

Discussion Question	ARITA Response
<p>12. Would there be any adverse impacts to creditors from the implementation of the MAP, noting that creditors would be unlikely to receive a dividend from such bankrupt estates? Please explain.</p>	<p>While creditors are unlikely to suffer an adverse financial impact from the implementation of the MAP, there may be other consequences.</p> <p>Creditors may have trouble reconciling a debtor’s ability to ‘walk away’ from the amount owed, without being held accountable and this may diminish public confidence in the bankruptcy system.</p> <p>To mitigate against this concern, ARITA recommends that a person wishing to avail themselves of the MAP should have to declare that they are not aware of any voidable transactions or misconduct that may otherwise disqualify them from accessing this option.</p> <p>The making of a false declaration (whether deliberate or inadvertent) should be a strict liability offence and also trigger the conversion of the MAP to traditional bankruptcy.</p>
<p>13. What restrictions do you believe should be imposed on debtors seeking to access a MAP? Please explain.</p>	<p>While the MAP is designed to provide a pathway for individuals with minimal assets and unmanageable debts to achieve debt relief without the more severe consequences of bankruptcy, ARITA recommends that the following restrictions/obligations be imposed to balance the interests of creditors and ensure the proper administration of the debtor's financial situation:</p> <ul style="list-style-type: none"> • Honest Disclosure: Debtors must honestly disclose all relevant information about their financial situation. Providing false or misleading information should result in very significant penalties or the cancellation of the MAP. If significant penalties (i.e. multiples of the benefit of the failed disclosure) are not in place for a lack of honest disclosure, we are likely to see exploitation of the regime at the expense of creditors and the wider community. Indeed, we recommend this should be strict liability offence. It is our belief that dodgy pre-insolvency advisors will ruthlessly exploit a lack of penalties and enforcement if this is not in place. • Cooperation: Debtors must cooperate fully throughout the MAP period, including providing requested

Discussion Question	ARITA Response
	<p>information and complying with any reasonable requests.</p> <ul style="list-style-type: none"> • Credit Disclosure: Like bankruptcy, individuals in the MAP must inform any credit provider of their MAP status if seeking credit over a certain amount (currently \$3,000). Failure to disclose this information should lead to penalties. • Travel: No restriction on travel but debtors must keep their contact details updated to ensure they can be contacted if necessary • Business Operations: Individuals in the MAP can continue trade under a business name or assumed name (whether alone or in partnership), but they must disclose their MAP status to anyone they deal with in a business capacity if they intend to incur debts. <p>Consistent with bankruptcy, the debtor should be prohibited from managing a corporation without permission from the court, including acting as a director or being involved in the management of a company for the period of the MAP. To ensure compliance with this requirement, a debtor should not be able to apply for a MAP should they be a company director at the time they make the application.</p> <p>As with bankruptcy, certain professional bodies may impose their own restrictions or disqualifications on individuals in the MAP, particularly in fields requiring high levels of trust and financial responsibility.</p>
<p>14. What, if any, harms do you believe may be caused by implementing the MAP?</p>	<p>Unfortunately, we continue to see untrustworthy pre-insolvency advisors take advantage of individuals in financial distress and believe that the MAP could be utilised by them for their own financial gain.</p> <p>Addressing the challenges posed to individuals and the economy by untrustworthy advisors is not a simple process. The response to the scourge of untrustworthy advisor activity needs to be coordinated, comprehensive and multi-faceted.</p> <p>We maintain that all offences under the Corporations Act and the Bankruptcy Act, including any new legislation regarding the MAP, should include an offence to advise, instruct, assist or counsel any person to commit or attempt those offences.</p> <p>To mitigate against some possible harms, we recommend that MAPs only be overseen by AFSA on behalf of the Official Trustee.</p>

Discussion Question	ARITA Response
<p>15. What safeguards do you believe are required to mitigate misuse of the MAP?</p>	<p>ARITA agrees that appropriate safeguards must be in place to ensure a debtor's access to a fresh start sooner does not allow for misuse of the MAP and note the following proposed safeguards:</p> <ul style="list-style-type: none"> • ensuring that a person is only able to enter into a MAP once; • a person cannot have been bankrupt prior to entering into a MAP; • allowing the Official Receiver to assess whether a person has: <ul style="list-style-type: none"> ○ concealed assets, ○ incurred debts with no intention to pay, or ○ bankruptcy proceedings have begun; and • allowing the Official Receiver powers to restrict a person's eligibility for, or terminate their MAP, where they are suspected of misusing the procedure. <p>ARITA recommends the following additional safeguards:</p> <ul style="list-style-type: none"> • entering a MAP should be an act of bankruptcy, • extending the exclusion to the MAP not being available if the debtor has previously been bankrupt, to include an exclusion where the debtor has previously been subject to another personal insolvency process • MAP not available if the debtor has been charged or convicted of certain offences, including illegal phoenixing or related corporations law offences, • termination of the MAP and automatic conversion to a traditional bankruptcy under the control of the Official Trustee where there has been: <ul style="list-style-type: none"> ○ misuse, including accessing the regime when not eligible ○ concealed or transferred assets to defeat creditors ○ incurred debt with no intention to pay (e.g. running up debts prior to entering a MAP) ○ a false declaration made regarding voidable transactions or misconduct (as noted above). <p>Where such circumstances exist, the Official Trustee should also have the power to transfer the estate to a private trustee in accordance with existing bankruptcy provisions¹¹. Should this recommendation be accepted, AFSA's guidance and criteria regarding the distribution of bankrupt estates between the official trustee and registered trustees would need to be updated to reflect transfers in these circumstances.</p>

¹¹ See section 181A of the *Bankruptcy Act 1966* (Cth)

Discussion Question	ARITA Response
16. How long should a debtor appear on the National Personal Insolvency Index for entering into a MAP?	ARITA agrees with the proposal that a MAP should be listed on the National Personal Insolvency Index for four years post-discharge.