BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL: STAGE 1

SUBMISSION FROM MAX RECOVERY LIMITED

This letter is sent in response to the call for evidence concerning the above Bill and sets out the views and comments of Max Recovery Limited.

Max Recovery Limited
Max Recovery Limited (“Max”) is a subsidiary of JP Morgan which has operated since the early 1990s in the United States and since 2001 in the UK. It also operates in Canada and Australia. Max purchases post-insolvent personal unsecured debt from mainstream lenders. Max uses Eversheds LLP and Drydensfairfax LLP as its servicing partners in the UK, which includes direct liaison with insolvency practitioners to file Max Recovery’s claims and collect any distributions. Max has no direct contact with debtors.

As far as Scotland is concerned, Max is one of the largest single creditors in both bankruptcies and protected trust deeds (“PTD”). Since June 2003 we have purchased about 140,000 claims in some 70,000 PTD cases with a face value of over £450 million and since 2001 we have purchased about 75,000 claims in about 50,000 sequestration cases with a face value of about £200 million.

General
We fully support the key principles of the Bill that seek to address the constantly evolving debt landscape in Scotland. As a significant stakeholder in Scottish personal insolvency we would like to commend the Accountant in Bankruptcy (“AiB”) on its wide-ranging consultation process on the proposals.

We now set out our views on specific sections of the Bill. Where we do not reference a section we have no specific comment on that section beyond our support for it.

Section 1
The provision and availability of high-quality, accessible advice is clearly central to any regime. We think that the AiB has a central role to play in the signposting of debtors to effective advice.

Section 2
The consultation on which these provisions are based refers to the INSOL (International Association of Restructuring, Insolvency & Bankruptcy Professionals) recommendations on pre/post bankruptcy counselling. That report also makes the point that such counselling processes are equally valid if they are offered on a voluntary basis and suggests that special attention should be given to targeting vulnerable groups. New section 43B(1) effectively makes the decision the trustee’s since there will always be one of the circumstances in (2) and therefore it comes down to whether the trustee sees it as appropriate. There should be no financial inducement to the trustee in making any such determination.
There are examples of countries that have adopted counselling as part of their regime, it is fair to say that it has met with mixed reviews. In the US, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 introduced compulsory counselling pre and post-bankruptcy. It is instructive to read the various reviews by US academics about how it works, particularly Karen Gross. She sat as a “debtor advocate” on the committees set up to draft the new law and was not in favour of compulsory counseling. The setting of a maximum fee of $50 for each debtor is in effect the setting of a de facto “rate for the job”. In addition, there is no effective guidance on the form it should take and in most instances it now involves a generic online course which the debtor completes on their own with no guidance. This should serve as a cautionary tale in drafting the Regulations referred to at 43(B)(4).

The most important criteria should be debtor choice. If the debtor wants to receive financial education then it should be available. Coming up with other criteria is very difficult as they are all so subjective. Recidivism is an obvious choice and whilst not ideal, probably makes sense. Some analysis of liabilities may work also, if there has been a quick build up of debt, use of high-cost lenders, existence of tax debt or debt accumulated just prior to insolvency may all indicate a need for education.

We note that the power to set Regulations is subject to the negative procedure only. In our view, it gives very wide powers – i.e. can prescribe content, format and delivery – if “method of delivery” includes the “deliverer”, then this could preclude the private sector. Consequently, we feel that the affirmative process is more appropriate.

**Section 4**

We strongly support the concept of the Debtor Contribution Order. As drafted it appears to include all of the necessary components to increase returns to creditors and provide flexibility to the debtor/trustee. Such components include a common term and provisions for dealing with variations and changes in circumstances. We are particularly pleased to see a facility for the debtor to ask for a 3rd party to pay direct to the trustee and for payment breaks (these work well in England and Wales in Individual Voluntary Arrangements).

**Section 5**

We can understand the sentiment behind the “minimal asset” proposals, but as drafted they seem very complicated and will likely require significant oversight by the AiB – which is surely the opposite of what is intended.

**Section 8**

In our view, this will only work if creditors are able to access the information, which seems to be intended –by subsection(4) of new section 4A. Generally, we are of the view that it will help to prevent a “race to the assets” by creditors, prevent abuse by debtors and provide a fairer return to all creditors. However, we do feel that it will be testing to put into place. It is more likely that large institutional creditors will find this easier to cope with than small “one-off” creditors. We say this as there will be data
privacy issues around undetermined cases that they could be unaware of. We assume that “appropriate information” (see new 4B(3)(b)) will be set out in regulations.

**Section 13**
The Policy Memorandum suggests that this provision will help ensure best returns to creditors, we are not sure how this would be achieved, although it will potentially assist with the administration of a case. We should clarify that debt purchasers are not DCAs. They own the debt in their own right. DCAs are agents of a principal. We do not follow the logic of paragraph 120 of the Policy Memorandum. It is only relevant if dividends are being paid earlier. It makes no difference on any decision to sell assets or not, that should be a commercial decision by the trustee to which the level of debt is largely irrelevant.

We support the provision of discretion to accept claims out of time where there is good reason. This provision only becomes a positive if regular and early dividends are going to be paid. If the trustee does not agree claims until the end of a case, then in our mind it is irrelevant.

If a creditor does not submit a claim then we do not think we should be using the language of “penalties”. In our view, exclusion from the dividend with an ability to “catch up” is most appropriate. In addition, we need to be completely clear that if a creditor lodges a claim on (for example) day 10, but on day 110 the trustee requires evidence to support the claim it is completely unreasonable to only give the creditor 10 days to provide that evidence when the request could have been made 100 days earlier.

We would also make the point that the same period should be given to all creditors, including Crown creditors. The argument that they are a bulk creditor and so should be given more leeway is erroneous as in reality they are a creditor in fewer personal insolvencies than most banks, and indeed Max Recovery.

**Section 15**
We support this in principle because seems to keep a reasonable balance between interests of debtors and creditors. We are interested about how it would work in practice. How will a trustee find out?

**Section 18**
We strongly feel that there should be no discharge until co-operation has been secured. We see no issue with indefinite suspension in these circumstances. However, we can see no justification for the 8 month period before application, if the trustee can show reasonable efforts have been made then should be able to apply at any time.

**Section 19**
We fully support the reform of the consignation process, however, there is a need to guard against abuse and trustees should be made to do their job in full. We look forward to the opportunity to provide further information at the oral evidence session.