

# Debt Agreement, Personal Insolvency Agreement and Bankruptcy



Report by Grand Capital Finance

## Disclaimer

Thank you for your interest in the [banksaidno.com.au](http://banksaidno.com.au) website. This document has been prepared as a guide to assist you understand some of the concepts and terminology that we are talking about through this website. It does not take into account your personal situation. Grand Capital Finance Group, the owners of the [banksaidno.com.au](http://banksaidno.com.au) website are not insolvency experts and are not offering you advice as to whether or not bankruptcy is suitable for your requirements. Our specialty is helping ex-bankrupts getting a home loan following their discharge from bankruptcy and re-structuring people's finances to prevent them entering bankruptcy where appropriate. While every effort has been taken to ensure the information in this report is accurate, we take no responsibility for anyone who uses this information independently without seeking independent professional advice from an appropriately licenced insolvency expert. The majority of the information in this publication was collected from Insolvency and Trustee Service Australia (ITSA). For more complete information regarding bankruptcy, we suggest you contact ITSA for more information on 1300 364 785, through their website at <http://www.itsa.gov.au/> or by email [info@itsa.gov.au](mailto:info@itsa.gov.au)

## Part IX Debt Agreement

A Part IX debt agreement is a legally binding agreement between a debtor and their creditors. Debt agreements are flexible alternative to bankruptcy.

### Who can enter into a Part IX Debt Agreement?

The debt agreement system is only to be used where the debtor is insolvent, i.e. unable to pay their debts as and when they fall due. It would undermine confidence of the system of credit and debt agreement system if the debtor was solvent.

### What are Part IX Debt Agreements?

An insolvent debtor's best offer to their creditors is determined based on an analysis of their expected income from all sources, household expenses and circumstances. The debtor must prepare an achievable and sustainable offer to their creditors.

ITSA ensures proposals comply with the wide range of requirements such as eligibility clarifying aspects proposals to ensure creditors are well informed to make a decision on their vote; conducting the voting process with creditors. ITSA maintains the National Personal Insolvency Index (NPII) to ensure it reflects the status of the agreement.

The debt agreement proposal is sent to creditors to vote upon. It may be accepted or rejected by creditors. A proposal is accepted if a majority of creditors in value vote in favour of the debtor's proposal.

Some examples of the kinds of proposals offered are:

- Periodic payments of amounts out of the debtor's income to creditors, equal to or less than the full amount of all of the debtors provable debts
- Lump sum payment of less than the full amount of all of the debtor's provable debts
- A moratorium on payment of debts
- Payment from the proceeds of sale of property owned by the debtor

All creditors with provable debts at the time the debtor's details are entered onto the NPII are bound by the agreement, even those who voted against the proposal. Creditor's debts are fixed at the date the proposal was entered on the NPII; interest does not accrue; and creditors cannot take or continue action against the debtor to collect their debts.

The debtor is liable for further debt incurred after ITSA accepts the proposal to send to creditors for voting.

## How to Set Up a Part IX

In order to prepare and carry out the terms of the proposal offered to creditors, debtors must gain consent from an administrator. Generally this is from a registered debt agreement administrator. This may also be an unregistered administrator, friend or associate of the debtor, however this person needs to satisfy ITSA's eligibility test. The service provided by an administrator usually requires payment of a fee.

Alternatively, debtors may wish to self-administer their own debt agreement. If required, assistance in putting together a proposal and completing the required forms can be obtained from a financial counsellor. ITSA can also provide limited assistance.

The role of the administrator starts with determining whether the debtor is insolvent and the extent of the debtor's unmanageable debt. In assisting the debtor to prepare a debt agreement proposal the administrator works with the debtor to establish their circumstances, their household expenses and income for the next year, and decide what the debtor can afford to pay creditors as their best offer.



When creditors accept a debt agreement, administrators must deal with the funds in the manner described in the debt agreement. Their duties extend to ensuring accurate accounts and reporting systems are maintained in order to inform creditors and ITSA of the progress of the agreement. ITSA's independent Bankruptcy Regulation Branch regulates the practices of registered debt agreement administrators.

A debt agreement proposal needs to be in the approved forms:

- Debt Agreement Proposal - identifies the debtor and outlines what the proposal offer is in dollar terms;
- Explanatory Statement - informs the creditors about their income, expenses, assets and debts, personal circumstances, household expenses and the reasons for financial difficulty;
- Statement of Affairs – sets out in detail their personal information and circumstances, reasons for financial difficulty, sources of income, assets and debts. The completed form is not sent to creditors and is not a public document.

A certificate signed by the administrator must accompany debt agreements lodged by an administrator. A debtor self-administering their own debt agreement does not have to supply a certificate, but must provide ITSA with a signed copy of the prescribed information when lodging their proposal.

## Lodgement of Proposals with ITSA

ITSA ensures that the debt agreement proposal satisfies the eligibility criteria and, if accepted for processing, records the proposal on the National Personal Insolvency Index (NPII).

Each creditor is sent an Official Receiver report, a copy of the Debt Agreement Proposal, Explanatory Statement, and a Statement of Claim and Voting. Creditors are asked to vote upon the debtor's proposal by returning the Statement of Claim and Voting form by the deadline date.

If accepted by a majority in value of creditors who vote, the proposal becomes an agreement. ITSA updates the NPII to show the debtor as being in a debt agreement. After a debt agreement has been accepted, the debtor must comply with the agreement and ensure it is completed by the completion date listed on the proposal.

If a majority of creditors in value vote to reject the proposal or no creditors vote, then the voting outcome is recorded on the NPII. If the debtor withdraws their proposal or the Official Receiver cancels it, ITSA also updates the NPII with this result. Creditors can commence or continue with action to recover their debts. A debtor can submit a new proposal to send to creditors for voting.

## Offence Provisions relating to Debt Agreements

From 1 December 2010, Section 269 applies to debtors who enter into debt agreements.

Section 269 provides that a debtor who is party to a debt agreement either jointly or with another person –

- Shall not obtain credit to the extent of \$3,000 or more without informing the person they are party to a debt agreement;
- Giving a bill of exchange or a cheque or a combination of both to the extent of \$3,000 or more without informing the person they are party to a debt agreement;
- Enter into hire purchase agreement or a contract to hire or lease equipment to the extent of \$3,000 or more without informing the person they are party to a debt agreement;
- Obtain goods or services from a person by promising to pay that person an amount or amounts aggregating to \$3,000 or more without informing the person they are party to a debt agreement;
- Obtain an amount of or amounts aggregating to \$3,000 or more from a person by promising to supply goods or a service without informing the person they are party to a debt agreement;
- Carry on a business under an assumed name, in the name of another person or, either alone or in partnership, under a firm name without disclosing to every person whom he or she or, if he or she is carrying on business in partnership under a firm name, the partnership deals, his or her true name and the fact that he or she is a party to a debt agreement.

Penalty under Section 269 is imprisonment for 3 years.

## Consequences of proposing a debt agreement

- A debtor who proposes a debt agreement commits an act of bankruptcy. A creditor can use this to apply to court to make the debtor bankrupt if the proposal is not accepted by creditors.
- The debtor's name and other details appear on the National Personal Insolvency Index (NPII), a public record, for the proposal and any debt agreement.
- The ability of the debtor to obtain further credit is affected. Details may also appear on a credit reporting organisation's records for up to seven years.
- During the voting period creditors cannot take debt recovery action or enforce a remedy against the debtor or the debtor's property; and must suspend deductions by garnishee on debtor's income.

## The consequences of a debt agreement

- The debtor is not bankrupt.
- All unsecured creditors are bound by the debt agreement and are paid in proportion to their debts.
- The debtor is released from most unsecured debts when they complete all their obligations and payments.
- Secured creditors may seize and sell any assets (e.g. a house) which the debtor has offered as security for credit if the debtor is in default.
- Creditors cannot take any action against the debtor or property of the debtor to collect their debts.
- The agreement does not release another person from a debt jointly owed with the debtor.
- A debtor must disclose that s/he is a party to a debt agreement if incurring debt or obtaining goods and services in excess of the threshold
- If trading under a business name or assumed name (whether alone or in partnership) the debt agreement must be disclosed to all people dealing with the business



## Part X – Personal Insolvency Agreements

A personal insolvency agreement (PIA) under Part X of the Bankruptcy Act 1966 (the Act) is a flexible way for a debtor to come to an agreement with their creditors to settle debts without becoming bankrupt. There are no income, asset or debt limits.

A debtor must be insolvent to propose a PIA. A debtor must be present in Australia or otherwise have an Australian connection (e.g. you ordinarily live in Australia or are involved with a business operating in Australia) for the proposal to be accepted.

A PIA may involve:

- A lump sum payment to creditors via the trustee either from the debtor's own money or money from third parties (e.g. family or friends) and/or
- An assignment of assets to the trustee to be sold and the net proceeds distributed to creditors or the payment of the sale proceeds of assets to the trustee for distribution to the creditors and/or
- Periodic payments to the trustee to be distributed to creditors

### How does it work?

The debtor appoints a controlling trustee to take control of their property and put forward a proposal to creditors. Only a registered trustee, the Official Trustee (ITSA) or a suitably qualified solicitor can act as a controlling trustee.

The controlling trustee examines the proposal, makes enquiries into the debtor's affairs and reports to creditors. The report will advise creditors of the amount they can expect from the proposal compared to the amount they could expect if the debtor became bankrupt, and make a recommendation whether it is in the creditors' interest to accept the proposal as opposed to the debtor becoming bankrupt. The creditors are entitled to ask questions of the controlling trustee and share information with them about the debtor's affairs.

A creditors' meeting is held within 25 working days of the controlling trustee's appointment (30 working days if appointed in December) at a time and location convenient to creditors. This meeting is advertised on ITSA's website ([www.itsa.gov.au](http://www.itsa.gov.au)). If unable to attend, a creditor can be represented by a proxy or attorney, or participate by telephone if facilities are available.

The debtor must attend the meeting unless excused by the trustee. The creditors may ask the debtor questions before deciding how to vote. At the creditors' meeting, creditors consider the proposal. Acceptance requires a 'yes' vote from a majority of creditors who represent at least 75% of the dollar value of the voting creditor's debts (referred to as a 'special resolution')

## If the proposal is accepted

If the proposal is accepted the creditors are bound by the terms of the agreement. Secured creditors' rights in relation to dealing with their security are not affected by a PIA.

A trustee (who may be different from the controlling trustee but must be either a registered trustee or the Official Trustee) is appointed to administer the agreement.

## If the proposal is rejected

If the proposal is rejected creditors will either:

- vote in favour of the debtor becoming bankrupt (the debtor does not have to accept this), or
- leave it up to the debtor to decide how to resolve their financial difficulties.



If the proposal is rejected or lapses, the debtor cannot appoint another controlling trustee for six months without leave of the court.

## Varying, terminating or setting aside a PIA

A debtor can make a written request to their trustee to vary the terms of the agreement. The trustee sends a notice of the proposed variation to the creditors and, if none object in writing, the terms will be varied. If a creditor objects, a creditors' meeting can be called to consider the proposed variation.

Creditors, with the debtor's written consent, can vary the terms of an agreement by passing a special resolution. An agreement can be terminated by the occurrence of an event specified in the agreement as causing termination. An agreement can also be terminated by a resolution of the creditors where the trustee is satisfied that the debtor is not complying with their obligations. The court can set aside or terminate an agreement in certain circumstances.

## The consequence of proposing and entering into a PIA

A debtor who appoints a controlling trustee commits an 'act of bankruptcy'. A creditor can use this to apply to court to make the debtor bankrupt if the attempt to set up a PIA fails. The appointment of a controlling trustee and the setting up of a PIA will be recorded on the National Personal Insolvency Index (NPII) forever. Details may also appear on a record held by a credit reporting organisation, such as Veda Advantage, for up to seven years.

Once a debtor has executed a PIA, the debtor is automatically disqualified from managing a corporation until the terms of the PIA have been complied with.

Once the debtor has appointed a controlling trustee, any existing creditor's petition to make a debtor bankrupt cannot proceed until the meeting of creditors is held to consider the debtor's proposal.

## Fees and charges

There is a fee payable to ITSA upon lodging a Controlling Trustee Authority form\*. A controlling trustee will charge a fee for examining the proposal, investigating the debtor's affairs, preparing a report to creditors and holding the creditors' meeting. The trustee of the PIA (who may be different to the controlling trustee) will also charge a fee for administering the PIA.

A debtor who has executed a Controlling Trustee Authority form or a PIA and who is dissatisfied with the amount of fees charged by the trustee may request an independent review of the trustee's remuneration (including fees and disbursements) be undertaken by the Inspector-General in Bankruptcy. The Inspector-General in Bankruptcy will undertake the review provided certain conditions are met. For further information please refer to Inspector-General Practice Direction 16 at [www.itsa.gov.au](http://www.itsa.gov.au).

Funds realised by a trustee in an administration are subject to a realisations charge\* (a government levy) which is paid by the trustee directly to the government. Any interest earned on funds realised by the trustee is payable to the government.

## Bankruptcy

Is a process where people, who cannot pay their debts become bankrupt to receive the protection of the Bankruptcy Act and their estate is administered by a trustee. It allows for the fair distribution of property among creditors and the prosecution of dishonest debtors.

If you are unable to pay your debts and cannot come to suitable repayment arrangements with your creditors, you may voluntarily petition to become bankrupt. At the time of petitioning, you must be present in Australia or otherwise have an Australian connection (e.g. you ordinarily live in Australia or are involved with a business operating in Australia). Creditors can also apply to the court to make you bankrupt if they can satisfy the court that you owe them money above a minimum amount.



## What happens when you become bankrupt?

Bankruptcy generally lasts for a period of three years but can be extended in certain circumstances. There is a permanent record of your bankruptcy on the National Personal Insolvency Index (an electronic public register which can be accessed by anyone for a fee).

Your creditors are notified of your bankruptcy and unsecured creditors should stop pursuing you for payment of your debts.

A trustee will be appointed to your case. In order to pay your creditors, this trustee will:

- sell your assets (although you will be able to keep certain types of assets)
- mandate contributions from your income once you earn over a certain amount
- investigate your financial affairs and may recover property or money that you have transferred to someone else for inadequate consideration

The duties of a trustee are specified in legislation and trustees have to adhere to certain standards while administering your estate. You can choose to appoint a registered trustee by obtaining and providing their consent when you lodge your petition to become bankrupt. If you do not choose a trustee, the Official Trustee (ITSA) is initially appointed to administer your estate. Your creditors may choose to change the trustee at any time.

## Becoming bankrupt

If you are choosing to become bankrupt voluntarily, you must complete a Debtor's Petition form. (If a creditor has successfully petitioned a Court to make you bankrupt, this is not required.)

You must complete a Statement of Affairs that truthfully discloses all relevant details of your current financial position. This includes all debts, as well as your current and recently owned assets.

## Obligations during the period of your bankruptcy

- Change of name or address  
You are required to notify your trustee of all changes of name and/or address.
- Overseas travel  
If you wish to travel overseas you must obtain the written permission of the trustee administering your estate who may impose conditions of travel. You may have to surrender your passport to your trustee.
- Change in income during bankruptcy  
You must notify your trustee of any change in your income especially if your new income is close to certain income threshold limits.

- Changes in assets during bankruptcy  
You must notify your trustee if you inherit any property, win money or otherwise receive any assets while you are bankrupt.
- Cooperating with your trustee  
You must cooperate with your trustee and provide information when requested. You may also be asked to attend meetings, or answer questions at an examination under oath. If you fail to cooperate with your trustee, your period of bankruptcy can be extended under certain circumstances.

If your bankruptcy is being managed by the Official Trustee (i.e. ITSA), you can access forms for change of address and overseas travel requests online.

If your case has been assigned to a Registered Trustee, you need to contact them directly when your circumstances change.

## Restrictions on your conduct during the period of your bankruptcy

- Borrowing money  
When you are borrowing money, purchasing goods on credit or incurring credit in any way over a set limit, you must inform the person you are dealing with that you are an undischarged bankrupt.
- Managing a corporation  
You cannot be a director of a company or be involved in its management without the permission of the Court.
- Conducting a business  
You may be able to continue to operate a business while bankrupt. However, if you trade under an assumed name or (whether alone or in partnership) a firm name, you must disclose that you are a bankrupt to everyone that you (or the partnership) deal with.
- Statutory positions  
You may be prevented from holding certain statutory positions.
- Restricted trades and professions  
While generally bankruptcy does not prevent you from earning a living, you may not be able to remain employed in particular trades and professions.
- Court actions  
You may be prevented from continuing any court action that you have started.
- Failure to comply with the above obligations and restrictions can lead to fines or a criminal prosecution, and potentially imprisonment.