



Australian Government

Insolvency and Trustee Service Australia

Official Receiver's Practice Statement Setting up a Personal Insolvency Agreement

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If you have any comments, suggestions or queries on a matter referred to in this Practice Statement, please contact us at any time by [email](mailto:Jerry.White@itsa.gov.au) (Jerry.White@itsa.gov.au) or by mail addressed to:

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INTRODUCTION

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. A debtor must be insolvent to propose a PIA. There are no income, asset or debt limits.

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

Generally the cost of setting up a PIA is much more than that of setting up a Debt Agreement. This is due to the extensive nature of enquiries/investigations and actions that have to be undertaken in a very short period of time in order to report to creditors on the proposed agreement. A PIA is often considered by debtors who do not meet the debt, asset and income eligibility requirements of Debt Agreements, but still want to avoid bankruptcy.

Debtors who wish to continue trading their business also prefer PIAs to bankruptcy. However, a debtor who enters into a PIA is precluded from managing a corporation until all the terms of the agreement have been fully complied with, except with the leave of the Court. So to limit the period of ineligibility, debtors who want to manage a corporation usually propose a lump sum settlement to creditors in the PIA.

This Practice Statement sets out the process followed by the Official Receiver in registering the initiating documents for a PIA and updating its status on the National Personal Insolvency Index (NPII) as the administration progresses.

The statement is set out in four sections. The first three sections set out the three basic stages of a PIA and the fourth section deals with various exceptions/problems that may arise during the life of a PIA, as well as variation or termination of a PIA. An annexure summarising the filing requirements is at the end of the statement. The documents required to be filed during the various stages are sequentially numbered (a) through to (m) within the document.

ITSA's Bankruptcy Regulation is likely to monitor the progress of a PIA proposal and may attend creditors' meetings. Relevant information on the role of Bankruptcy Regulation in relation to various types of administrations (including PIAs) has been published in [Inspector General Practice Statement No. 11](#).

STAGE ONE: DEBTOR APPOINTS A CONTROLLING TRUSTEE AND GIVES A PROPOSAL

The PIA process commences when the debtor appoints a controlling trustee by signing a [Controlling Trustee Authority form](#) and provides the controlling trustee with a Statement of Affairs and a draft PIA which details the proposal for settling his/her debts. By appointing a controlling trustee the debtor effectively hands over control over his/her property to the trustee.

The control over the debtor's property becomes effective once the controlling trustee accepts the appointment by signing the [Controlling Trustee Authority form](#)

FORMS AND DOCUMENTS THAT MUST BE FILED WITH THE OFFICIAL RECEIVER AT STAGE 1

Subsection 188(5) of the Act prescribes that within two working days of consenting to an appointment, the controlling trustee must file with the Official Receiver for the district in which the debtor resides:

- a) The completed [Controlling Trustee Authority form](#), and
- b) The debtor's [Statement of Affairs form](#)

Note. Whilst the Act prescribes that the draft PIA is to be filed with the Official Receiver no later than 10 working days before the creditors meeting to consider the debtor's proposal, it is good practice to have it filed with the above documents so that it can be given a cursory inspection to verify that the proposed PIA contains all the "essential elements" prescribed in section 188A of the Act.

Likewise the [PIA Proposal Checklist](#) which is designed as an aid to the debtor and the controlling trustee in ensuring that the proposed PIA contains all the elements that are prescribed by legislation.

A [fee is payable](#) to the Official Receiver upon lodgement of the above forms/documents.

It is recommended that a debtor talk to a controlling trustee before completing any of the documents. A controlling trustee can provide guidance on completing the forms and drafting a PIA.

OFFICIAL RECEIVER'S ROLE IN REGISTERING A PIA PROPOSAL

The Official Receiver may refuse to register the above forms/documents if:

- the required forms are incomplete and/or incorrect form/s have been used
- the debtor is ineligible to propose a PIA
- the person appointed as controlling trustee is ineligible or
- the registration [fee](#) has not been paid.

CHECKING ELIGIBILITY OF DEBTOR

PREVIOUS PROPOSALS

A debtor cannot give a Controlling Trustee Authority within six months of giving an effective Controlling Trustee Authority (see s 188(4) of the Act). The six months is counted from the date the debtor signed the Authority (Date of Authority).

The Official Receiver will advise the debtor by letter that they are unable to present a Controlling Trustee Authority. The trustee that consented to the Authority should also be advised.

An administrative record of the presentation of the documents and the reason for the debtor's inability to present an Authority is created. The Authority is ineffective and no record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

AUSTRALIAN CONNECTION

Similar to a debtor presenting a debtor's petition, a debtor may only give a Controlling Trustee Authority if they are personally or ordinarily resident in Australia, have a house or business in Australia, carry on business in Australia (can be through an agent or manager) or they are a member of a partnership carrying on business in Australia (can be through an agent or manager) (s 188(1)). ([See discussion on Australian connection.](#))

An administrative record of the presentation of the documents and the reason for the debtor's inability to present an Authority is created. The Authority is ineffective and no record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

CHECKING ELIGIBILITY OF CONTROLLING TRUSTEES

The controlling trustee can be a registered trustee, an eligible solicitor, or the Official Trustee.

REGISTERED TRUSTEES

Any [registered trustee](#) can be appointed as a controlling trustee.

SOLICITOR CONTROLLING TRUSTEES

A solicitor controlling trustee will have to be a full member of the Insolvency Practitioners Association or have satisfactorily completed a [course in insolvency approved by the Inspector-General](#) (see r 8.35(1)(f) of the Bankruptcy Regulations).

If the proposed solicitor controlling trustee is unknown to the Official Receiver, a statement of eligibility and evidence is required from the proposed appointee before the proposal can be registered.

OFFICIAL TRUSTEE

The Official Receiver (or delegate) is required to sign the Controlling Trustee Authority form where the Official Trustee is to be appointed as the controlling trustee. However, the Official

Receiver does not normally consent to such an appointment and debtors are requested to seek the consent of a registered trustee. Note: The Official Trustee is automatically appointed as controlling trustee in certain limited circumstances (previous trustee dies, becomes ineligible, etc - see s192(1)).

If the controlling trustee is ineligible, the debtor and trustee will be advised in writing. An administrative record of the presentation of the documents is created. The Authority is ineffective and no record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

PENDING CREDITOR'S PETITION

Where there is a creditor's petition on foot in the Federal Court or Federal Magistrate's Court and a Controlling Trustee Authority given by the debtor becomes effective, all proceedings in respect of the creditor's petition are stayed (s 189AAA) until a meeting of creditors called under the Authority is concluded or adjourned, whichever is sooner.

The Official Receiver will write to the Court advising it of the lodgement of an effective Controlling Trustee Authority. Note: The 12 months life of a creditor's petition (see s.52(4)) is not affected by section 189AAA of the Act. Therefore, if the 12 month period expires whilst the stay under section 189AAA is in operation, the creditor's petition still lapses. Furthermore, section 189AAA precludes the petitioning creditor from applying to the Court for an extension of the life of the creditor's petition whilst the stay is in place.

The Official Receiver will also write to the petitioning creditor advising them of the lodgement of the Controlling Trustee Authority.

STAGE TWO: CONTROLLING TRUSTEE MAKES ENQUIRIES AND CALLS A CREDITORS' MEETING

The controlling trustee makes extensive enquiries into the debtor's affairs and then compiles a comprehensive report to creditors (see schedule 4A Part 5 of the Bankruptcy Regulations). The report includes a comparison between the return that creditors can expect from the proposed PIA and the return they could expect to receive if the debtor became bankrupt. The controlling trustee is required to inform creditors whether the trustee believes that creditors' interests would be better served by accepting the debtor's proposed PIA or by the bankruptcy of the debtor. The Courts have held that the report should specify an approximate rate of return to creditors e.g. sixty cents in the dollar. The controlling trustee normally makes a recommendation to creditors in the report concerning the merits or otherwise of the proposed PIA

A creditors meeting must be held within 25 working days from the date the controlling trustee accepted the appointment or 30 working days if the Controlling Trustee Authority became effective in December (s 194) and creditors must receive the controlling trustee's report at least 10 days before the meeting to vote on whether the debtor's proposal should be accepted (r 10.04). For the proposal to be accepted, it must be passed by a special resolution i.e., a majority in number and at least 75% in debt value of the voting creditors must vote in favour (s 204(1)).

If the creditors decide to accept the proposal, they must appoint a trustee to administer the terms of the agreement. This trustee is usually the same person who was appointed as the controlling trustee by the debtor but creditors may appoint another trustee. (Note: only a Registered Trustee or the Official Trustee can be a trustee of a PIA).

If the creditors decide not to accept the PIA proposal, they can by special resolution decide to either hand back control over the debtor's property to the debtor or require him/her to present a debtor's petition within seven days from the date the special resolution is passed (see s 204(1)).

Important note: unless the creditors resolve to hand back control of the property to the debtor, the property of the debtor remains under the control of the controlling trustee until the expiry of four months from the date the Controlling Trustee Authority became effective or until the debtor becomes bankrupt or dies, or the Court releases the property from control, whichever event happens sooner.

FORMS AND DOCUMENTS THAT MUST BE FILED WITH THE OFFICIAL RECEIVER AT STAGE 2

BEFORE THE CREDITORS' MEETING:

At least 10 days before the first meeting of creditors is held, the controlling trustee must give to the debtor, each creditor and the Official Receiver for the district in which the debtor resides the following (r 10.04):

- c) Notice in writing of the date, time and place of the meeting
- d) Copy of the debtor's draft PIA

- e) Copy of the controlling trustee's report prepared under section 189A
- f) Copy of the controlling trustee's statement under section 189B in relation to special resolutions expected to be passed at the meeting.
- g) Notice of the basis and method on which the controlling trustee seeks to be remunerated, and if appropriate, an estimate of the amount of that remuneration.

FOLLOWING THE CREDITORS' MEETING:

If a special resolution is passed at the meeting, the controlling trustee must lodge with the Official Receiver, within seven days after the date on which the resolution was passed:

- h) Notice of special resolution/s passed at a meeting of creditors (with copies of the resolution/s)
- i) Consent of the PIA trustee (only applicable if creditors resolve to accept the proposal)

Note: If a special resolution is passed requiring the debtor to execute a PIA, the resolution must specify the provisions to be included in the agreement (s 204(2)). Creditors must also resolve to nominate a trustee or trustees to be trustee(s) of the agreement (s 204(3)).

If the creditors' meeting is adjourned, the controlling trustee should notify the Official Receiver of the date of the subsequent meeting.

It is also recommended practice to inform the Official Receiver if there was no outcome from the meeting.

UPON ENDING OF THE CONTROL PERIOD

- j) Within seven days of a trustee becoming aware of an event that causes the control period to end, the trustee must file with the Official Receiver a written notification that the control has ended.

STAGE THREE: A TRUSTEE ADMINISTERS THE TERMS OF THE AGREEMENT

The newly appointed trustee has the responsibility to ensure that the debtor complies with the terms of the PIA. The trustee receives moneys from the sale of property and/or payments from the debtor or third parties and makes a distribution(s) to creditors. The administration of the agreement can be short or can span several years, depending on the terms of the agreement. For example, a PIA may provide for monthly payments to be made by the debtor over a three year period.

The PIA must be in the form of a deed and be executed, (ie signed by the debtor and trustee, and witnessed) within 21 days from the day the special resolution requiring the debtor to execute a PIA was passed. Only a registered trustee or the Official Trustee can be the trustee of a PIA.

If the trustee is satisfied that all of the obligations under the PIA have been discharged, the trustee must, on written request by the debtor, give the debtor a certificate signed by trustee to that effect.

If the debtor defaults under the agreement, or fails to execute the agreement, there are legislative provisions for bringing the administration to an end. See [Problems, terminations and variations](#).

FORMS AND DOCUMENTS THAT MUST BE FILED WITH THE OFFICIAL RECEIVER AT STAGE 3

Within 21 days from the execution of the PIA the trustee must lodge:

- k) a copy of the executed PIA

Upon completion of the terms of the PIA and/or finalisation of the administration the trustee must lodge:

- l) certificate relating to realisation of divisible property & non availability of dividend (r 10.14)
- m) certificate relating to discharge of obligations (Form 19)
- n) a notice of completion/finalisation – Form 19 (r 8.14)

PROBLEMS, VARIATIONS & TERMINATIONS

FAILURE OF TRUSTEE TO EXECUTE PIA

If the PIA is not executed by the nominated registered trustee, a meeting of creditors can be called by any creditor or the debtor to nominate a replacement registered trustee. The meeting must be called for that purpose and a resolution passed (s 217 & r 10.09).

FILLING OF VACANCY IN OFFICE

Where a vacancy occurs in the office of the trustee of a PIA, the Official Trustee becomes trustee (s 231(5), s 160 & Schedule 6 Part 3 of the regulations). In such instances, the Official Trustee will normally transfer the matter to another registered trustee under section 181A.

DEBTOR FAILS TO ATTEND MEETING, EXECUTE PIA , ETC

The Inspector-General, a creditor or the controlling trustee may apply to the Court to make a sequestration order against the debtor (s 221) in the following instances:

- debtor has failed, without sufficient cause, to attend meeting of creditors
- debtor contravenes subsection 189(2) ie. removes, disposes or deals with property without trustee consent; does not give trustee info that trustee requires; does not comply with a trustee direction
- debtor has failed without sufficient cause to execute the PIA within the specified time
- the meeting has not passed one of the special resolutions under subsection 204(1) within four months from date the meeting was called

If the Court makes a sequestration order, the applicant must file the order with the Official Receiver within two days of the order being made. (r 10.11(2) & (4)).

VARIATION OF PIA BY RESOLUTION OF CREDITORS

The terms of a PIA can be varied during the life of the PIA by a special resolution at a meeting of creditors called for that purpose. Normally the debtor contacts the trustee seeking a variation of the terms and if the trustee considers the variation to be reasonable, the trustee seeks the approval of creditors. As an alternative to a formal meeting of creditors to consider the variation, the trustee can notify the creditors that the proposed variation to the PIA will take effect on a specified date and inform them that if they wish to object to the variation they are required to do so in writing, at least two days before the specified date. If there are no objections by creditors, the variation takes effect on the specified date. .If a creditor objects the trustee may hold a

meeting for creditors to consider the proposed variation.

SETTING ASIDE OF PIA BY THE COURT

There are various situations under which the Court may set aside a PIA on the application of the Inspector General, the trustee, a creditor or the debtor. These situations include:

- the terms of the agreement are unreasonable or are not calculated to benefit the creditors generally
- the agreement does not comply with the requirements of the legislation
- the agreement is based on false or misleading information.

The application for an order to set aside a PIA can only be made before all the obligations that the PIA created have been discharged.

The application to set aside the PIA may also include an application for a sequestration order.

TERMINATIONS

TERMINATION BY THE TRUSTEE

The trustee may terminate a PIA by written notice to the creditors if the trustee is satisfied that the debtor is in default. The notice must include a statement of the reasons for the termination and its impact on creditors and specify a date on which the termination is to take effect (not less than 14 days after the notice is given).

The PIA is terminated if the debtor is in default and creditors have not lodged a written notice of objection to the termination at least 2 days before the proposed termination takes effect.

TERMINATION BY CREDITORS

The creditors may terminate a PIA by resolution at a meeting called for that purpose, if the debtor is in default and the trustee tabled, before the resolution, a written declaration that the trustee is satisfied the debtor is in default.

TERMINATION BY THE COURT

The trustee, a creditor, the debtor or, if the debtor has died, the person administering the estate of the debtor, may apply to the Court to terminate a PIA. The Court may make an order terminating the PIA if it is satisfied that:

- the debtor or, where the debtor had died, the person administering the estate, has failed to carry out or comply with a term of the PIA; or
- the PIA cannot be proceeded with without injustice or undue delay; or

- for any other reason the PIA ought to be terminated.

The application to terminate the PIA may include an application for a sequestration order against the debtor.

Note: Should a sequestration order be made, it is required to be filed with the Official Receiver.

The making of an application for a sequestration order is taken to be equivalent to the presentation of a creditor's petition (but the requirements relating to creditor's petitions in ss 43(1), 44, 47, 52(1) & (2) of the Act do not apply).

TERMINATION BY OCCURRENCE OF A TERMINATING EVENT

A PIA is 'automatically' terminated if it includes a provision for termination on the happening of a specified event (eg. loss of employment for a period exceeding 3 months; death of the debtor etc) and the event occurs.

FORMS AND DOCUMENTS THAT MUST BE FILED WITH THE OFFICIAL RECEIVER

Upon variation, termination or setting aside of a PIA the trustee must lodge:

- o) Form 19 notifying the Official Receiver of the variation/termination/setting aside of the PIA.

This notification is required immediately in the case of variation/termination of the PIA by creditors; termination by the trustee; or termination by the occurrence of a termination event in the PIA.

Where a PIA is terminated or set aside by the Court, the Official Receiver must be given a copy of the Court order by the person who applied to the Court within 2 days of the making of the order (this notification requirement does not apply where the applicant to the Court was the Official Trustee or Inspector-General in Bankruptcy). The notification is used to update the status of the administration on the NPIL.

TABLE OF DOCUMENTS FILED WITH THE OFFICIAL RECEIVER

| Document name | Filed By | When | Information entered on NPII | Reference |
|---|---------------------------------|--|--|--|
| Controlling Trustee Authority (Form 13) Statement of Affairs (Form 3) | Registered Trustee or Solicitor | Within 2 days of Consenting | Date of Authority, date of filing of statement of affairs, name of controlling trustee, particulars of debtor | s188(5), Reg 10.03 |
| Notice of Meeting Draft PIA Deed/ Proposal Controlling Trustee Report Declaration of Relationships s.189B Statement Notice of Remuneration | Controlling Trustee | At least 10 days before meeting held | | S189A(2)(a), Reg 10.04 s.189A(4) s.189B(2)(a) Reg.10.04 |
| Notification of ceasing control | Controlling Trustee | Within 7 days of becoming aware that control has ceased | Date of ceasing control | s189(1B) |
| Certificate of Resolution (Form 18) | Controlling Trustee | Within 7 days of the resolution | Date of resolution, particulars of debtor (if different from Controlling Trustee Authority), name of each nominated trustee (if resolution requires debtor to execute a PIA) | s204(2), Reg.10.06 |
| Copy of PIA | Trustee | Within 21 days after execution by the debtor and the trustee | Date of execution, particulars of debtor (if different from Controlling Trustee Authority), name of each nominated trustee | s204(3), s218(1)(b), Sch. 9, . . |
| Consent to Act (Form 12) | Trustee | As soon as possible after the resolution nominating trustee | | s215A(1A) |
| Certificate of Resolution declaring PIA terminated; written notice of termination by occurrence of circumstance (Form 19) | Trustee | Immediately following resolution/termination | Date of termination | s222B, s224A |

| | | | | |
|--|--------------------|---|--|--|
| Certificate of resolution varying PIA (Form 19) | Trustee | Immediately following resolution | | s.224A(1)s221A |
| Notification of variation by trustee under s221A(2) (Form 19) | Trustee | Immediately once variation takes effect | | s224A(2), s221A(2) |
| Court Order setting aside or terminating Personal Insolvency Agreement (Form 19) | Trustee | Within 2 days after the order is made | date set aside or terminated | Reg. 10.11, Fed Court Rule 10.05, s224A(4) |
| Sequestration Order | Applicant | Within 2 days after the order is made | Date of Order, Particulars of bankrupt | Reg 10.11, ss 221, 222, 222C |
| Certificate relating to realisation of divisible property & non availability of dividend | Trustee | Within 7 days of giving debtor certificate | | Reg 10.14 |
| Certificate relating to discharge of obligations (Form 19) | Trustee | Within 7 days of giving debtor certificate | Result | s232, Reg 10.14 |
| Notice of finalisation of administration | Registered Trustee | Within 7 days of finalising an administration | | Reg 8.14 |

FLOW CHART SHOWING PIA PROCESS AND FILING REQUIREMENTS

