



**Australian Government**

**Insolvency and Trustee Service Australia**

## Official Receiver's Practice Statement

### Who is eligible to make a debt 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](#) or by mail addressed to:

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## 1. PURPOSE

1.1 To provide guidance on how the Official Receiver is satisfied that a debtor is eligible to make a debt agreement before the proposals are sent to creditors for their vote. See also practice statement about [when a debt agreement proposal is acceptable for sending to creditors for their vote](#) covering correct forms, creditor's interest, conditional proposals and resubmitted proposals.

## 2. BACKGROUND

2.1 Checks are applied to debt agreement proposals to ensure that the debtor is eligible to make a debt agreement under Part IX. The eligibility requirements are:

- the debtor must not have been subject to an administration under the Bankruptcy Act 1966 in the preceding 10 years;
- the debtor's income, assets and unsecured debts are below statutory limits; and
- the debtor is insolvent.

2.2 Debtors who are not eligible to propose a debt agreement have access to bankruptcy or Part X where their affairs will be investigated by a trustee.

## 3. PRACTICE

### Prior bankruptcy proceedings

3.1 Debtors are ineligible to lodge a proposal where they have been subject to any administration under the Bankruptcy Act at any time in the 10 years immediately before the proposal is lodged.

3.2 Prior to registering a debt agreement proposal, a check of the National Personal Insolvency Index (NPII) is conducted on the debtor's name, date of birth and any alias.

3.3 The relevant time periods in relation to administrations are –

- In terms of a prior bankruptcy, the 10 years runs from the date of discharge from bankruptcy;
- For a previous debt agreement, the 10 years runs from the date that the debtor completed their payments and obligations under the debt agreement;
- For a section 188 authority under Part X (personal insolvency agreements), the 10 years runs from the date the authority was signed.

3.4 If an entry in relation to the debtor is located on the NPII, the 10 year period is calculated from the date the proposal is given to the Official Receiver back to the relevant date for the administration recorded on the NPII.

3.5 If the entry on the NPII relates to a bankruptcy which has been annulled by

the court under section 153B because the sequestration order ought not to be made or a debtor's petition ought not to have been presented and accepted, the bankruptcy does not prevent the debtor from lodging a proposal.

3.6. If the debtor has lodged a debt agreement proposal within the previous 10 years which was withdrawn by the debtor or cancelled by the Official Receiver, the debtor has not been a party to a debt agreement and is entitled to lodge a new proposal.

### **After-tax income**

3.7. Debtors are ineligible to access the debt agreement system if they have after-tax income above a monetary limit which is indexed in March and September each year. The [current limit](#) is shown on the ITSA internet site.

3.8. The debtor's after-tax income is defined as after-tax income in the year beginning at the time the proposal is given to the Official Receiver ie the amount likely to be the income of the debtor for the next year less income tax and Medicare levy.

3.9. If the debtor earns business income, copies of the current and projected income and expenditure statements, balance sheet or statement of business assets are expected to be held by the administrator and may be accessed by the Official Receiver to confirm the debtor's eligibility or clarify aspects of the proposal for creditors.

3.10. Administrators must give a certificate with each proposal that they have reasonable grounds to believe that all information required in the debtor's Statement of Affairs has been disclosed. This includes the debtor disclosing all sources and amounts of income

3.11. There may be a tendency to understate or not disclose income to -

- ensure that the limit is not exceeded when the debtor would become ineligible to proposal a debt agreement; and
- not reveal to creditors their true ability to pay their debts.

3.12. Compliance checks to ensure all sources of income are disclosed include –

- Income shown on the Explanatory Statement does not exceed the limit;
- Income and occupation shown on the Explanatory Statement is consistent with information on the Statement of Affairs;
- Income includes allowances, benefits, lump sum payments and other amounts which would normally be expected to be paid to the person in their occupation;
- Interest, dividends and rent from assets after deducting all expenses of earning that income; and
- Income from a business owned by the debtor after deducting all expenses directly attributable to that business.

3.13. Where significant unexplained differences are apparent between past and expected income a compliance telephone call is made to the debtor to obtain clarification and information about their income.

3.14. Where the debtor discloses income inconsistent with their occupation, a compliance telephone call is made to the debtor to obtain clarification and information about their income.

## **Unsecured debts and assets**

3.15. The amounts of unsecured debt and net divisible assets are calculated at the time of giving the proposal to the Official Receiver.

3.16. Unsecured debts include any shortfall between a secured debt and the value of the security.

3.17. Net divisible assets are the net proceeds of those assets which, if the debtor became bankrupt, would be able to be sold for the benefit of creditors and does not include exempt or protected assets.

3.18. Compliance checks are made where there are inconsistencies in the information provided by the debtor in the proposal and Explanatory Statement to ensure that the debtor has disclosed all unsecured debts owed and divisible assets owned at the time of lodging the proposal. It is important to establish the amount of each debt at this time because, when the Statement of Claim and Voting is received from the creditor, the amount claimed is compared with the amount disclosed by the debtor.

3.19. Administrators must give a certificate upon lodgement of a proposal confirming that they have reasonable grounds to believe that all information required in the debtor's Statement of Affairs has been set out ie the debtor has disclosed all income, debts and assets.

3.20. Compliance checks on debts include -

- Details of debts are adequately shown on Explanatory Statement for the purpose of the creditors and are consistent with the Statement of Affairs;
- Provable debts on the Statement of Affairs are listed on the Explanatory Statement; eg fines imposed by a court required to be disclosed on the Statement of Affairs are not provable debts to be shown on the Explanatory Statement; and
- Any shortfall for a secured debt shown in respect of a secured creditor on the Explanatory Statement is disclosed as an unsecured debt.

3.21. Compliance checks on divisible assets include -

- Whether divisible assets shown on the Statement of Affairs are adequately disclosed on the Explanatory Statement for the purpose of the creditors;
- Whether asset values appear to be reasonable and consistent with market values to ensure that assets are shown at their true value. If asset values appear to be understated a compliance telephone call is made; and
- Whether the level of mortgage debt is overstated and value of secured assets is understated particularly where there is more than one property.

3.22. Where there is any inconsistency between the Statement of Affairs and the Explanatory Statement which may identify a discrepancy, understatement or non-disclosure of debt or assets a compliance telephone call is made to the debtor and/or administrator.

## **Insolvency of the debtor**

3.23. There has to be sufficient evidence in the Explanatory Statement and Statement of Affairs to support the debtor's statement on the Explanatory Statement that they are insolvent ie unable to pay debts as and when they fall due. If there is no evidence in the documents or obtained from the debtor in a compliance telephone call, the proposal will not be accepted.

3.24. The conclusion that the debtor is insolvent is drawn from the information in the Statement of Affairs and Explanatory Statement including –

- The circumstances that led to the debtor becoming unable to pay their debts (eg. loss of employment);
- The status of the unsecured debts (eg. arrears, repossession, judgment);
- The status of the secured creditors (eg. arrears, legal action); and
- The date the debtor was last able to pay their debts as they fell due shown by the debtor on the Statement of Affairs.

3.25. Where any of this information does not support a conclusion of insolvency, a compliance telephone call is made to the debtor to obtain clarification and information about their insolvency.

3.26. Factors which may indicate the debtor is insolvent include -

- the debtor's employment history including periods of unemployment;
- the debtor having obtained assistance from a financial counsellor;
- whether the income is sufficient to pay the debts.

Debts incurred shortly before the proposal is lodged may not indicate insolvency.

These factors are not conclusive as to insolvency, where there is any doubt about insolvency a compliance telephone call will be made to the debtor.

3.27. Additional information supplied by the debtor or administrator that supports a conclusion as to the debtor's insolvency is included as comment in the Official Receiver's report sent to creditors.

#### **4. REFERENCES**

Bankruptcy Act 1966 185C(1); 185C(4); 185E(2A)