

1. Your Options To Deal With Unmanageable Debt

Being unable to manage your debts can be caused by various reasons, some of which may be beyond your control.

There are various options available to deal with unmanageable debts. Some are formal arrangements governed by specific legislation and some are more informal and usually based on agreements between you and your creditor/s.

Informal Arrangements

Some creditors could give you more time to pay, agree to renegotiate repayments or accept a smaller payment to settle the debt. You can contact your creditors directly to negotiate any such terms.

Formal Arrangements

The Bankruptcy Act provides formal options for dealing with unmanageable debt. The legislation specifically sets out what you and your creditors can or cannot do under each of these arrangements.

Propose A Debt Agreement

A debt agreement is a legally binding arrangement between you and your creditors which must be accepted by the majority (in value) of your creditors. You can offer to pay your creditors in instalments or with a lump sum payment which may be less than the full amount of your debts. You can also propose a freeze on your debts for a set time to let you get back on your feet. Your unsecured debts, assets and after-tax income must be under certain limits* to propose a debt agreement.

Propose A Personal Insolvency Agreement

A personal insolvency agreement is also a legally binding arrangement between you and your creditors whereby you offer to pay them in full, or in part, by instalments or a lump sum. Your offer must be accepted by a special resolution of your creditors. Unlike a debt agreement, there are no debt, asset, or income limits to be eligible to propose a personal insolvency agreement.

You must appoint a controlling trustee who will investigate your affairs and report to your creditors. Should your creditors accept the proposal, a trustee must administer the agreement.

Voluntary Bankruptcy

Where you are unable to come to an arrangement with your creditors, you can consider petitioning for bankruptcy. Upon becoming bankrupt your trustee will realise those assets that you are not allowed to keep. The proceeds from those realisations will be paid to your bankrupt estate.

While you are a bankrupt, should you earn an after-tax income above a defined threshold* you will be required to pay half of the excess amount to your trustee for payment to creditors. The threshold is adjusted to accommodate factors such as those parties who are dependent upon you for support, ie. children.

You will remain an undischarged bankrupt for a minimum of three years. This period can be extended by the trustee under certain circumstances. Upon discharge from bankruptcy, you will no longer be subject to those provisions that apply to an undischarged bankrupt, and you will be released from your provable debts.

Involuntary Bankruptcy

If you are unable to pay your debts and you have not already declared yourself bankrupt, or sought to reach an agreement with your creditors under a debt agreement or personal insolvency agreement, a creditor may approach the Court and seek an Order of the Court that you be declared bankrupt.

2. Debt Agreements

A debt agreement is a binding agreement between a debtor and their creditors where creditors agree to accept a sum of money (in settlement of their claims) which the debtor can afford.

Payment by the debtor is based on their capacity to pay having regard to all their income and household expenses.

A debt agreement is an option to assist debtors with unmanageable debt. They are released from their provable debts when they complete all payments and obligations under the agreement. A debt agreement may provide for:

- weekly or monthly payments from the debtor's income;
- deferral of payments for an agreed period;
- the sale of an asset to pay creditors; and/or
- a lump sum payment to be divided among creditors.

WHO CAN PROPOSE A DEBT AGREEMENT?

Debtors can lodge a debt agreement proposal if they:

- are insolvent (unable to pay their debts as and when they fall due);
- have not been bankrupt, had a debt agreement or given an authority under Part X of the Bankruptcy Act in the last 10 years; and
- have unsecured debts, assets and after-tax income for the next 12 months all less than the prescribed threshold*.

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 the 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 period while the debt agreement is being considered, creditors cannot apply for enforcement, or enforce a remedy against the debtor or the debtor's property, and must suspend any deductions by garnishee on the 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 their provable debts when they complete all their obligations and payments.
- Secured creditors may seize and sell any assets (eg a house) which the debtor has offered as security for credit if the debtor is in default.
- Unsecured 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.

CAN A DEBT AGREEMENT BE VARIED OR TERMINATED?

A variation proposal may be lodged to vary the agreement. The process for considering and accepting any variation is similar to that which is implemented in seeking to enter into an agreement in the first instance.

A termination proposal may be lodged by the debtor or a creditor. The agreement will be terminated if the majority in value of replies received are in favour of terminating the agreement.

The agreement may also be terminated upon the Court declaring the agreement to be void, or the debtor becomes bankrupt.

3. Personal Insolvency Agreements

A personal insolvency agreement (PIA) is a formal flexible way for a debtor to come to an agreement with creditors to settle debts without going bankrupt.

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

A PIA may involve one or more of the following which will result in creditors being paid in part or in full:

- a lump sum payment to creditors either from the debtor's own money or money from third parties (eg family or friends); or
- transfer of assets to creditors or the payment of the sale proceeds of assets to creditors; or
- a payment arrangement with creditors (this could include deferral of repayments).

How Does It Work?

The debtor appoints a controlling trustee to take control of their property and put forward a proposal to creditors.

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.

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.

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 are present and voting, whose debts 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 can also pass a resolution that the debtor present their own debtor's petition. There is no requirement for the debtor to do so.

If the proposal is rejected or lapses, the debtor cannot appoint another controlling trustee for six months without leave of the court, and creditors can continue to pursue the debtor to enforce their debts as the protections which were in place for the tenure of the controlling trusteeship no longer apply.

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 no creditors 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 Consequences 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 the 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.

4. Voluntary Bankruptcy

If you are unable to pay your debts and cannot come to suitable repayment arrangements with your creditors, you may voluntarily lodge a petition to become bankrupt.

You can choose to appoint a registered trustee by obtaining and providing their consent when you lodge your petition to become bankrupt. If no consent to act has been provided by a registered trustee, your bankrupt estate will be administered by AFSA. AFSA may, at their discretion, seek to have the estate administered by a registered trustee at a later time.

The consequences of bankruptcy are serious.

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

A trustee is appointed to administer the bankruptcy. In order to pay creditors, your trustee will:

- realise your divisible assets (although you will be able to keep certain types of assets);
- recover funds from your revenue if your income exceeds certain thresholds*; and
- investigate your financial affairs and may recover property that you have transferred to someone else for inadequate consideration prior to your bankruptcy or which you may receive during the period of your bankruptcy.

A. ASSETS

Assets are anything of value you own when you become bankrupt plus anything you buy or receive before the end of your bankruptcy.

Some assets are exempt, which means you may keep them. Some assets are non-exempt or divisible, which means your trustee may sell them for the benefit of your creditors.

What assets may I keep?

- Most ordinary household or personal items.
- Tools used to earn an income, up to a set limit*.
- Vehicles (cars or motorbikes), where the total net value of the vehicles minus the sum owing under finance is less than a set limit*.
- Most funds held in registered superannuation funds.
- Life assurance policies in respect of yourself or your spouse.
- Compensation for a personal injury.
- An asset held by you in trust for another person (eg a child's bank account).

What assets will my trustee sell?

Apart from the assets you can keep, your trustee will be entitled to realise any other assets even if they are overseas or in someone else's possession.

What about assets I own with another person?

If you have a share in an asset, for example a house, your trustee can sell your share. If the co-owner is not also bankrupt, the trustee may agree to sell your share to them, but it would have to be for at least as much as the trustee could get from selling it on the open market.

B. YOUR EMPLOYMENT & INCOME

The Bankruptcy Act does not impose any restrictions on employment in any trade or profession. You can continue to earn an income and/or seek other employment opportunities. You should note however that particular industry associations or licensing authorities may impose certain restrictions or conditions should a member or licensee become bankrupt.

Under the Corporations Act you are prevented from managing a corporation whilst you remain an undischarged bankrupt.

What happens to my income while I am bankrupt?

If your after-tax income exceeds a certain threshold*, you will have to pay contributions from your income to your trustee.

If I have to pay contributions, how much?

You will be required to pay one half of the amount by which your after-tax income exceeds the prescribed threshold* amount ie 50 cents of every \$1 of the excess amount. (Note: 'income' for income-contribution purposes under the Bankruptcy Act has a wide meaning and includes certain amounts that are not included in taxable income)

C. DEBTS AND CREDITORS

What happens to them if I become bankrupt?

Once you are bankrupt, unsecured creditors should stop contacting you. To make sure this happens you must list all your debts in your Statement of Affairs when you apply to become bankrupt, including:

- debts you owe jointly with someone else;
- any loans to you from friends and relatives; and
- debts that you will still need to pay if you are bankrupt.

Your bankruptcy will not affect a creditor's right to pursue another person, such as:

- a person who is a guarantor for your debts; or
- debts in joint names with another person (eg your wife or husband).

Debts you still have to pay during bankruptcy

You will have to pay debts which are not provable in bankruptcy, eg:

- penalties and fines imposed by a court;
- demands in the nature of unliquidated damages;
- student assistance/supplement loans; and
- any new debts you incur after your bankruptcy commences.

D. OVERSEAS TRAVEL CAN I LEAVE AUSTRALIA IF I BECOME BANKRUPT?

You may only leave Australia if you obtain your trustee's written permission before you leave. Your trustee will need to be satisfied that you have legitimate reasons for the proposed travel.

E. DISCHARGE

What is discharge?

It means your bankruptcy has ended and you are no longer bankrupt.

When will I be discharged from bankruptcy?

If you became bankrupt because you presented your own petition, you will be discharged automatically three years and one day after the date of your bankruptcy.

If one of your creditors made you bankrupt, you will be discharged automatically three years and one day after your completed Statement of Affairs is filed with AFSA. It is important to lodge your Statement of Affairs with AFSA promptly as any delay can mean you will be bankrupt longer than three years.

In some cases, you can be bankrupt for longer than three years. This happens when your trustee lodges an objection to your discharge with AFSA.

What happens after discharge?

Your name will appear on the public record (NPII) forever as a discharged bankrupt. Credit reporting organisations also keep a record of bankruptcies. These records are kept for a limited period even after you have been discharged. You can contact them to:

- confirm that they have updated your credit file to show that you have been discharged from bankruptcy; and
- find out how long they will show the record of your bankruptcy on your credit file.

F. ANNULMENT

What is annulment?

Annulment is the cancellation of a bankruptcy. There are three ways a bankruptcy can be annulled:

- i. The creditors' debts including interest and trustee's fees and expenses are paid in full;
- ii. Your creditors accept a composition or arrangement which is an offer of something less than payment in full; or
- iii. Application to the court in some limited circumstances.

Effects of annulment

Your annulment is recorded on the public record, the National Personal Insolvency Index (NPII) database, forever.

- Assets not needed by your trustee to pay your creditors, expenses and fees will be returned to you.

* Details of the applicable thresholds (which are indexed twice per annum), may be obtained from the AFSA website at www.afsa.gov.au.