



Australian Debt Counsellors - newsletter

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Punished for 10 years or for life?

AFSA - Australian Financial Security Authority
the Act - Bankruptcy Act 1966

Disclaimer:

The information contained in this article is of a general nature only and should not be taken or relied upon as advice regarding your financial position. Obtain advice that is relevant to your financial circumstances before proceeding with any type of administration under the Bankruptcy Act 1966.

Debt Agreement Eligibility

One of the requirements when entering into a personal insolvency administration in Australia is that it be recorded on a register maintained by the Australian Financial

Security Authority (AFSA), the National Personal Insolvency Index (NPII). Presently, listing requirements on the NPII for insolvency administrations are as follows:

- Bankruptcy - Listing is permanently recorded on the NPII
- Personal Insolvency Agreement - Listing is permanently recorded on the NPII
 - Debt Agreement (completed) - listing on the NPII is 5 years from the date the debt agreement was made; or the date it is completed, whichever is later
 - Debt Agreement (terminated) - listing on the NPII is 5 years from the date the debt agreement starts; or 2 years from the date of termination whichever is later

The NPII is also a mechanism for determining the eligibility of an individual who is looking to enter into a formal administration to deal with their debt. However in the case of someone needing to revisit a further formal arrangement to deal with financial difficulty, the timeframe for entering into a subsequent formal arrangement is particularly inconsistent.

Bankruptcy

The Official Receiver may not accept the registration of a subsequent bankruptcy if the proposed bankrupt was previously bankrupt and some other conditions are met.

Personal Insolvency Agreement

The individual must not have proposed another personal insolvency agreement in the previous six months.

Debt Agreement:

Must not have been bankrupt, proposed a personal insolvency agreement or made a debt agreement in the previous 10 years.

(Source: afsa.gov.au)

The question could be asked;

why prevent an individual from entering into a second debt agreement for 10 years when there are no such restrictions in bankruptcy and personal insolvency agreements for multiple administrations within that timeframe?

It is understandable that there needs to be a system in place to deter the small percentage of individuals who may look to exploit the system to avoid paying their creditors in full. However there may be many valid reasons as to why an individual may experience financial difficulty more than once in 10 years, and legislation that limits those options could be seen as further punishment seemingly for no valid reason to those who fall on hard times.

Presently, it would appear that the Act already contains adequate safeguards that could be used to filter out debt agreement proposals that are not genuine, without the need for the 10 year exclusion:

Section 185E(3) of the Bankruptcy Act 1966 (the Act) states that

"The Official Receiver must not accept a debt agreement proposal for processing if the Official Receiver thinks that the creditors' interests would be better served by not accepting the proposal for processing."

At the initial stage when the debt agreement proposal is being reviewed by AFSA to see if it can be accepted for processing, this section of the Act allows AFSA to use discretion as to whether the proposal will be accepted for processing and forwarded to the individual's creditors. Furthermore, once the proposal has been accepted for processing by AFSA, the individual's creditors are then asked to vote to accept or reject the debt agreement proposal.

This two stage process could be used to recognize proposals that are not genuine and to then allow creditors to determine whether or not they wish to participate in the debt agreement.

In the current system, an individual can only consider a debt agreement proposal as an option once per decade (10 years after the debt agreement is completed, terminated or voided by the Court), and the decision by the individual's creditors to consider a debt agreement as a viable option to recover their debt is limited to the same timeframe.

This 10 year exclusion appears to adopt the principle that the very people (creditors) who would be affected by another debt agreement proposal in less than 10 years are being denied the opportunity to even consider such proposal and perhaps the opportunity to recover some or all of their debt.

With the last round of major changes to the debt agreement system in 2007 and the latest amendments due to come into place in June 2019, it seems reasonable to query, why this matter has not been acted upon, and why this issue is only limited to debt agreements and not bankruptcy or personal insolvency agreements?

Perhaps a similar system to bankruptcy wherein AFSA can reject an individual's bankruptcy petition under Section 57(3AA) of the Act may be a step in the right direction.

"The Official Receiver may reject a debtor's petition (the current petition) if the following conditions are satisfied for at least one of the petitioning debtors:

(a) it appears from the information in the statement of affairs (and any additional information supplied by the debtor) that, if the debtor did not become a bankrupt, the debtor would be likely (either immediately or within a reasonable time) to be able to pay all of the debts specified in the debtor's statement of affairs;

(b) at least one of the following applies

(i) it appears from the information in the statement of affairs (and any additional information supplied by the debtor) that the debtor is unwilling to pay one or more debts to a particular creditor or creditors; or is unwilling to pay creditors in general;

(ii) before the current petition was presented, the debtor previously became a bankrupt on a debtor's petition at least 3 times, or at least once in the period of 5 years before presentation of the current petition.

Or a similar system under Section 189A of the Act in relation to a Personal Insolvency Agreement wherein the controlling trustee states to the individual's creditors whether it would be in creditor's interests to accept the agreement, or for the individual to become bankrupt.

In either of these scenarios, there is scope for the individuals circumstances to be taken into account which seems a more equitable outcome for all parties rather than the arbitrary 10 year rule imposed in the case of debt agreements.

Another aspect of the NPII that is long overdue for review is for debt agreements entered into prior to the 2007 amendments that remain active due to the obligations not being discharged and affected creditors not proposing to terminate the administration. This is a particularly messy situation in that the debt agreement remains active until it is completed, terminated, or voided by the Court.

For individuals in this scenario, they can be potentially stuck in limbo until their debt agreement is finalized (which may be indefinitely), preventing them from filing for bankruptcy or entering into a personal insolvency agreement, as stated in Section 185C(4) (a) (ii) of the Act

"A debtor cannot give the Official Receiver a debt agreement proposal at a particular time (the proposal time) if:

(a) at any time in the 10 years immediately before the proposal time the debtor:

(ii) has been party (as a debtor) to a debt agreement"

It is regrettable that these matters were not addressed in the upcoming debt agreement amendments and that individuals experiencing financial difficulty will only be able to access a debt agreement as an option once every decade or in some cases be effectively permanently locked out of the personal insolvency system as a way of dealing with their unmanageable debt, further limiting their options.