



Australian Government

Australian Financial Security Authority

## OFFICIAL RECEIVER PRACTICE STATEMENT 11

# WHO IS ELIGIBLE TO MAKE A DEBT AGREEMENT?

**Date issued** July 2008  
**Date last updated** 23 February 2016

If you have any comments, suggestions or queries about an issue referred to in this practice statement, please contact the National Manager, Insolvency and Trustee Services, at [registry@afsa.gov.au](mailto:registry@afsa.gov.au).

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## 1. PURPOSE

- 1.1. This practice statement is designed to provide guidance as to how the Official Receiver can be satisfied, before sending a debt agreement proposal to creditors for their vote, that the debtor is eligible to make a debt agreement. See also [Official Receiver Practice Statement 12 – When a debt agreement proposal is acceptable](#), which outlines the correct forms to use, a proposal being in creditors' interests, and both conditional and resubmitted proposals.

## 2. BACKGROUND

- 2.1. Eligibility checks are applied to debt agreement proposals to ensure that the debtor satisfies the requirements in Part IX of the [Bankruptcy Act 1966](#) ("the Act"). The eligibility requirements are:
  - the debtor is insolvent (subsection 185C(1))
  - the debtor must not have been subject to an administration under the Act in the preceding 10 years (paragraph 185C(4)(a)), and
  - the debtor's unsecured debts, assets and income debts are below statutory limits (paragraphs 185C(4)(b), (c) and (d)).
- 2.2. The debt agreement administrator must give a certificate upon lodgment of a proposal confirming that he or she has reasonable grounds to believe that:
  - the debtor is likely to be able to discharge the obligations created by the debt agreement as and when they fall due
  - all information required to be set out in the debtor's statement of affairs, debt agreement proposal and explanatory statement has been set out, and
  - the debtor has disclosed all of his or her income, debts and assets.
- 2.3. A debtor who is ineligible to propose a debt agreement may instead be able to become bankrupt or enter into a personal insolvency agreement, subject to certain other requirements. In either case, the debtor's affairs will be investigated by a trustee.

## 3. INSOLVENCY

- 3.1. "Insolvency" refers to a debtor's inability to pay his or her debts as and when they fall due.
- 3.2. The debtor must ensure that there is sufficient supporting evidence in his or her explanatory statement and statement of affairs that he or she is insolvent. If there is no or insufficient evidence contained within the documents and/or if this is not obtained from the debtor in a compliance telephone call, the proposal will not be accepted.

- 3.3. The conclusion that the debtor is insolvent is drawn from the information on the statement of affairs and explanatory statement, including:
  - the circumstances that led to the debtor becoming unable to pay his or her 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)
  - the date the debtor was last able to pay his or her debts as and when they fell due, as shown by the debtor on the statement of affairs.
- 3.4. Where any of the information supplied does not support a conclusion of insolvency, a compliance telephone call is made to the debt agreement administrator or debtor to obtain clarification and information.
- 3.5. Factors that 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 debtor's income is sufficient to pay debts.
- 3.6. Debts having been incurred shortly before the proposal is lodged may not indicate insolvency.
- 3.7. Additional information supplied by the debtor or administrator that supports a conclusion as to the debtor's insolvency is included as a comment in the Official Receiver's report that is sent to creditors.
- 3.8. The considerations regarding insolvency outlined in this practice statement are not conclusive and, where there is any doubt about a debtor's insolvency, a compliance telephone call will be made to him or her.

## 4. PRIOR BANKRUPTCY ACT PROCEEDINGS

- 4.1. A debtor is ineligible to lodge a proposal where he or she has, in the preceding 10 years:
  - been bankrupt
  - been a party (as debtor) to a debt agreement, or
  - signed a controlling trustee authority.
- 4.2. When a debt agreement proposal is presented to the Official Receiver, a check of the National Personal Insolvency Index ("NPII") is conducted using the debtor's name, date of birth and any alias.
- 4.3. The relevant time periods in relation to administrations are:
  - in terms of a prior bankruptcy, the 10 years runs from the date the bankruptcy ends
  - for a section 188 authority under Part X (the precursor to a personal insolvency agreement), the 10 years runs from the date the authority was signed

- for a previous debt agreement, the 10 years runs from:
    - where all debt agreement obligations have been discharged, the date of completion
    - where the debt agreement was terminated by creditors' resolution, the date of termination (section 185P of the Act)
    - where the debt agreement was terminated by the Official Receiver due to designated six-month arrears default, the date of termination (section 185QA of the Act)
    - where the debtor becomes bankrupt, on the date of bankruptcy (section 185R).
- 4.4. If the entry on the NP11 relates to a bankruptcy that was annulled by the court under section 153B of the Act 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.
- 4.5. If the debtor lodged a debt agreement proposal within the previous 10 years and that proposal was cancelled by the Official Receiver, the debtor has not been a party to a debt agreement and is entitled to lodge a new proposal.

## 5. UNSECURED DEBTS

- 5.1. A debtor is ineligible to make a debt agreement if he or she has unsecured debts above a monetary limit. The limit is indexed in March and September each year and can be found on AFSA's [indexed amounts](#) internet page.
- 5.2. The Official Receiver does not have the discretion to accept a debt agreement proposal if the debtor's unsecured debts are above the limit, even if only by a small amount.
- 5.3. Unsecured debts include any shortfall between a secured debt and the value of the security.
- 5.4. Total unsecured debts are calculated at the time a debt agreement proposal is accepted for processing by the Official Receiver and recorded on the NP11.
- 5.5. Compliance checks are made where there are inconsistencies in the information provided by the debtor on his or her 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 statements of claim and voting are received from creditors, the amounts claimed are compared with the amount disclosed by the debtor.
- 5.6. Compliance checks regarding a debtor's total unsecured debts include confirming that:

- the debt details shown on the debt agreement proposal are consistent with those details on the explanatory statement for the purposes of the creditors
  - debts that are not provable, such as fines imposed by a court, are disclosed on the debt agreement proposal and explanatory statement
  - any shortfall for a secured debt shown in respect of a secured creditor on the explanatory statement is disclosed as an unsecured debt.
- 5.7. Where there is an inconsistency between the debt agreement proposal and the explanatory statement that may suggest a discrepancy, such as an understatement or non-disclosure of a debt, a compliance telephone call is made to the debtor and/or administrator.

## 6. DIVISIBLE ASSETS

- 6.1. A debtor is ineligible to make a debt agreement if he or she has net assets above a monetary limit. The limit is indexed in March and September each year and can be found on AFSA's [indexed amounts](#) internet page.
- 6.2. Net divisible assets are the net proceeds of those assets that, if the debtor became bankrupt, would be able to be sold for the benefit of creditors and does not include exempt or protected assets.
- 6.3. The Official Receiver does not have the discretion to accept a debt agreement proposal if the debtor's assets are worth more than the limit, even if only by a small amount.
- 6.4. Compliance checks regarding a debtor's divisible assets include:
- confirming that divisible assets shown on the statement of affairs are adequately disclosed on the explanatory statement for the purposes of the creditors
  - establishing whether the asset values disclosed appear to be reasonable and consistent with market values. This is to ensure that assets are shown at their true value. If asset values appear to be understated, a compliance telephone call is made
  - checking whether the amount owed to a secured creditor may be overstated, which would in turn make the net value of the secured asset understated, particularly where there is more than one property.
- 6.5. Where there is an inconsistency between the debt agreement proposal and the explanatory statement that may suggest a discrepancy, understatement or non-disclosure of an asset, a compliance telephone call is made to the debtor and/or administrator.

## 7. AFTER-TAX INCOME

- 7.1. A debtor is ineligible to make a debt agreement if he or she has after-tax income above a monetary limit. This limit is indexed in March and September each year and the current limit is available on AFSA's [indexed amounts](#) internet page.
- 7.2. The Official Receiver does not have the discretion to accept a debt agreement proposal if the debtor's after-tax income is above the limit, even if only by a small amount.
- 7.3. The debtor's after-tax income is defined as his or her after-tax income in the year beginning at the time the proposal is given to the Official Receiver. That is, it is the amount likely to be the income of the debtor for the next year less income tax and Medicare levy.
- 7.4. 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.
- 7.5. Administrators must give a certificate with each proposal that they have reasonable grounds to believe that all information required on the debtor's statement of affairs has been disclosed. This includes the debtor disclosing all sources and amounts of income.

### Misstated income

- 7.6. There may be a tendency to understate or not disclose income to:
  - disguise that the limit has been exceeded and the debtor is therefore ineligible to make a debt agreement
  - disguise from creditors the debtor's true ability to pay his or her debts.
- 7.7. Compliance checks to ensure all sources of income are disclosed include:
  - checking that the income shown on the explanatory statement does not exceed the limit
  - verifying that the income and occupation shown on the explanatory statement are consistent with information on the debtor's statement of affairs
  - checks to ensure that the income disclosed includes allowances, benefits, lump sum payments and other amounts which would normally be expected to be paid to the person in that occupation
  - reviewing the inclusion of interest, dividends and rent from assets after deducting the expenses of earning that income
  - reviewing the inclusion of income from a business owned by the debtor after deducting all expenses directly attributable to that business.



- 7.8. Where significant unexplained differences are apparent between past and expected income, a compliance telephone call is made to the administrator or debtor to obtain clarification and information about his or her income.
- 7.9. Where the debtor discloses income inconsistent with his or her occupation, a compliance telephone call is made to the administrator or debtor to obtain clarification and information about his or her income.