

# **PERSONAL INSOLVENCY INFORMATION FOR DEBTORS**

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### **Disclaimer:**

**This information booklet has been prepared by Bluestone Advisory. It provides a summary of the options for dealing with personal insolvency and the rules and regulations for each option. This information is intended as a guide and does not constitute legal advice. Please contact Bluestone Advisory for further information in relation to your personal circumstances.**

# GENERAL INFORMATION

This publication is designed for people who may be finding their level of debt unmanageable and are contemplating bankruptcy or any of the formal options available under the Bankruptcy Act.

All of the formal options to deal with unmanageable debt (e.g. bankruptcy) outlined in this publication have serious consequences. It is recommended that you investigate all options available to you, including negotiating directly with your creditors, prior to entering any formal arrangement such as bankruptcy.

Being unable to manage your debts can be caused by various reasons, some of which may be beyond your control. For instance, sudden unemployment, ill health or breakdowns in family relationships are often the causes that trigger financial hardship.

It is important to recognise financial difficulty early so that you can address the situation before it becomes unmanageable. If you are having trouble managing your debts there are actions you can consider before turning to the formal arrangements offered by the Bankruptcy Act.

The Bankruptcy Act provides four formal options to deal with unmanageable debt. The legislation sets out what you and your creditors can and cannot do under each of these arrangements. More detail regarding each formal option can be found in this booklet.

Every person's circumstances are different. An option that suits one person may not suit another. In making your decision, it is important to be realistic about your current situation as well as what you expect to happen in the future. For instance, if you are thinking about asking your creditors for more time to pay your debts, or to pay by instalments, then you should make sure that this is something you will definitely be able to afford. If not, you may want to think about other more formal options.

## BANKRUPTCY

### 1. BECOMING BANKRUPT

There are two ways you can become bankrupt:

1. presenting a Debtor's Petition, referred to as voluntary bankruptcy; or
2. a creditor (someone you owe money to) makes an application to court to make you bankrupt, referred to as involuntary bankruptcy.

#### 1.1. [Voluntary bankruptcy](#)

If you are unable to pay your debts and cannot come to a suitable repayment arrangement with your creditors, you may choose to voluntarily lodge a petition to become bankrupt (called a Debtor's Petition).

During and after your bankruptcy, you will face certain restrictions and have obligations placed upon you. You should read the information in this publication and contact us if anything is unclear.

If you decide to proceed, you will need to complete and lodge a Bankruptcy Form. We can assist you with this process. Generally, the Bankruptcy Form is processed within 2-5 business days. When the forms are accepted by AFSA you become bankrupt. You will receive a letter containing your bankruptcy number and outlining your duties and obligations whilst bankrupt.

The consequences of bankruptcy are serious, and your bankruptcy cannot be cancelled if you change your mind.

#### 1.2. [Involuntary bankruptcy](#)

If you are unable to pay your debts and have been unable to enter into an arrangement with your creditors and you haven't voluntarily made yourself bankrupt, a creditor to whom you owe \$10,000 or more, may apply to the court to have you made bankrupt.

Generally, the process for making you bankrupt begins when a creditor applies for a Bankruptcy Notice and serves it on you demanding that you pay the money owed to the creditor within 21 days.

A Bankruptcy Notice can only be issued if the creditor has obtained a court judgment against you within the last six years and the total amount owing under the judgment (or two judgments combined) is \$10,000 or more.

If you do not pay the creditor by the time given in the Bankruptcy Notice, you commit an 'act of bankruptcy'. A creditor can then apply to the court (called a Creditor's Petition) to have you made bankrupt. The court gives you the opportunity to be heard before making the order.

If after hearing the creditor's case and any submissions you make, the court is satisfied that you have not paid the creditor, the court makes an order, called a Sequestration Order, making you bankrupt.

A trustee is appointed to administer your bankrupt estate.

### **1.1. Requirement to file Statement of Affairs**

You are required to file a Statement of Affairs with AFSA within 14 days of being notified of the Sequestration Order.

Failure to lodge a Statement of Affairs is an offence under the Bankruptcy Act and you could be prosecuted.

## **2. ESSENTIAL BANKRUPTCY INFORMATION**

### **2.1. Assets**

#### **What will happen to my assets in bankruptcy?**

When you become bankrupt, a trustee is appointed to administer your bankrupt estate, and this may include selling certain assets for the benefit of your creditors (the people you owe money to). Assets are anything of value you own at the time of becoming bankrupt, and anything you buy, receive or become entitled to, during your bankruptcy.

#### **What assets may I keep?**

The Bankruptcy Act allows bankrupts to keep certain assets. These include:

- most ordinary household items
- tools used to earn an income up to a certain limit\*
- vehicles (eg cars or motorbikes) where the total value of the vehicles minus the sum owing under finance is no more than a certain limit\*
- most balances in regulated superannuation funds and payments from regulated superannuation funds received on or after your date of bankruptcy (superannuation payments received before you go bankrupt are not protected)
- life insurance policies for you or your spouse, and the proceeds from these policies received after your bankruptcy
- compensation for a personal injury, such as an injury to you from a car accident or workers' compensation (whether received before or after the date of bankruptcy), and assets bought wholly or substantially with such compensation
- assets held by you in trust for another person (for example, a child's bank account)
- if creditors agree, awards of a sporting, cultural, military or academic nature made to you, such as medals or trophies, and claimed as having sentimental value.

*\* We will provide details of the current limits, called Indexed Amounts, to you.*

#### **What assets will my trustee sell?**

Apart from the assets that you are allowed to keep, your trustee may recover any asset, even if they are overseas or in someone else's possession. Examples include:

- houses, apartments, land, farms and business premises (including leases)
- motor vehicles (other than exempt ones)
- shares and other investments (including shares held in your employer's business)
- tax refunds for income earned before you became bankrupt
- proceeds of a deceased estate where the person dies before or during your bankruptcy
- lottery winnings and other competition prizes

#### **Assets that vest in the trustee**

All of the assets that belonged to you at the start of your bankruptcy, or that you receive or are entitled to during the bankruptcy, 'vest' in the trustee (unless the property is specifically exempt). This means the trustee is given the power and authority to deal with the asset(s) and you no longer have any claim to them and no longer have any right to deal with them. The trustee has rights to take physical possession of, and control of the assets, including

the right to sell them. If bankrupt, you are not permitted to deal with property that belongs to the trustee, even if it's still registered in your name.

#### **What about assets I own with someone else?**

If you have a share in an asset, for example a house that you own with your partner, your share of the asset vests in the trustee, and the trustee can sell your share. If the co-owner is not bankrupt, the trustee may agree to sell your share to them for market value.

#### **What about assets I used to own?**

Your trustee has powers to investigate assets you owned before your bankruptcy. If you have given away or sold assets for less than their value prior to bankruptcy, the trustee may either recover these assets (that is, take possession of them and deal with them) or the difference between the true value of the asset and the amount you received for it. These types of asset transfers are called antecedent transactions.

#### **What about secured assets?**

Common examples of secured assets are:

- a house subject to a mortgage with a bank
- a motor vehicle subject to a bill of sale
- goods under hire purchase, chattel mortgage, lease or bill of sale with a finance company
- real estate subject to a charge by local councils for outstanding rates or water charges

A secured creditor cannot take possession of an asset just because you are bankrupt. However, if you fall behind in your payments, they can take and sell the assets (whether or not you are bankrupt) to offset the debt owed.

#### **Legal claims you may have against someone**

When you become bankrupt, most legal actions that you have commenced need to cease. Your trustee will determine whether to take any matter(s) further and in order to make this decision may seek from you documentary evidence regarding the legal proceedings.

Other actions you believe need to be pursued will need to be brought to the attention of, and discussed with, your trustee. Your trustee will make an assessment on the viability of the action or whether it is an action you may continue with.

If your claim relates to a personal injury or wrong done to you, your spouse or a member of your family, or it relates to the death of your spouse or a member of your family, you may be entitled to pursue that claim even after you have become bankrupt. It is important to discuss these issues with your trustee who can provide you with further information in relation to such actions or claims.

#### **Assets that haven't been dealt with before your bankruptcy ends**

Your discharge from bankruptcy does not automatically return assets to you which have not yet been dealt with by your trustee. The trustee may have been unable to sell all your assets straight away and may take several years to sell them.

If there are assets that vested in your trustee and your bankruptcy is annulled (that is, cancelled), the unsold assets will be returned to you, together with any surplus proceeds held.

#### **How will the trustee know what assets I have?**

The trustee can get information about your assets from a variety of sources including:

- your Bankruptcy Form/Statement of Affairs
- asking you for information
- from your creditors
- from searching the Personal Property Securities Register and State/Territory land title databases
- from third parties

There are penalties for failure to disclose your assets, whether owned prior to bankruptcy or acquired during your bankruptcy. These penalties can include extending your bankruptcy and imprisonment for up to 12 months upon conviction. Should you acquire or become entitled to assets during your bankruptcy, you must disclose all of these to the trustee, in writing, within 14 days or as soon as practicable.

## 2.2. Income And Employment

### **Your employment**

The Bankruptcy Act does not restrict you (the bankrupt) from being employed and earning an income during your bankruptcy.

The Bankruptcy Act does not require bankrupts to disclose their bankruptcy when applying for employment. However, a prospective employer might ask for this information or choose to search the NPII to find out.

Many professional associations and licensing authorities have their own conditions around the bankruptcy of their members. This is not regulated by the Bankruptcy Act and is at the discretion of each body. You should confirm directly with the organisation of which you are a member as to whether bankruptcy will affect your professional membership or your ability to practice a particular trade.

Under the Corporations Act, bankrupts are prevented from managing corporations unless they obtain approval from the court. The Corporations Act is administered by the Australian Securities and Investments Commission (ASIC) and enquiries about companies should be directed to ASIC.

### **Your Income**

#### **What happens to my income while I am bankrupt?**

If your after-tax income exceeds a certain amount you will have to pay contributions from your income to your trustee. You will be required to pay half of the amount you earn above the prescribed threshold to your trustee.

Your trustee will calculate the amount you are liable to pay for each year of your bankruptcy and will send you a notice of assessment that outlines the total amount due, instalments (if applicable) and how to make your payments.

#### **What is the prescribed threshold?**

The Bankruptcy Act sets out the criteria for calculating the threshold. The threshold, known as the Actual Income Threshold amount (AITA), that applies to you will depend on how many dependants you have. The Bankruptcy Act defines a dependent as a person who satisfies all three of these criteria:

- the person resides with you
- the person is wholly or partially dependent on you for economic support
- the person's income is less than a certain amount

*\* We will provide details of the current AITA to you.*

#### **If I have to pay contributions, how much will I have to pay?**

You will be required to pay one half of the amount by which your after-tax income exceeds the AITA i.e. 50 cents of every \$1 of the excess amount.

#### **How are contributions calculated?**

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.

At the start of your bankruptcy your trustee will calculate whether you will be required to pay any income contributions during the first year of your bankruptcy. The trustee will repeat that process at the start of each subsequent year of your bankruptcy. The calculation is done using the following formula:

$$(\text{Assessed Income} - \text{AITA}) \div 2 = \text{Contribution Payable}$$

#### **What is 'assessed income'?**

The Bankruptcy Act defines what the trustee should include when assessing the income of a bankrupt. It is important to note that this differs from the Australian Taxation Office's assessment of taxable income. The trustee's assessment will include (but is not limited to) a consideration of your:

- wages and salary from all jobs
- tax refunds
- taxable fringe benefits
- salary sacrifice arrangements

- superannuation receipts, annuities and pensions
- business profits
- loans from associated entities
- income you earn which is paid to someone else (including to a company or trust)
- superannuation contributions in excess of the Superannuation Guarantee amount set by the Government made by an employer that arise from an industrial agreement solely between you and your employer
- income earned overseas

**Note:** there is a range of factors that will have an impact on the calculation of your assessed income for contributions purposes. Contact us for an estimate based on your circumstances.

### **Expenses**

Expenses will be treated differently by your trustee compared to how the Australian Taxation Office treats them and will be determined based on the specific circumstances.

### **Information you must provide to your trustee**

You must disclose all of your income and benefits and any other information reasonably requested to your trustee. If you fail to do so penalties may apply. You must also advise your trustee immediately if your income or number of dependants changes, or if you think these details will change in the next 12 months.

### **Consequences of non-payment**

The obligation to pay your income contributions is contained in the Bankruptcy Act. If you do not comply with your trustee's payment schedule, the trustee may consider one or all of the following:

- automatically deducting funds from your income or bank account without your consent (garnisheeing)
- objecting to your discharge and extending your bankruptcy by five years and assessing additional contributions for this period
- obtaining a judgment for unpaid contributions and taking enforcement action against you after you are discharged
- requiring you to open a supervised bank account into which all your income must be paid and from which any withdrawals must be authorised by the trustee

### **What if my circumstances change?**

You must advise your trustee immediately if your income or number of dependants change, or you think these details will change in the next 12 months. If you fail to do so, your assessment may be incorrect, and you may pay too much or not enough. At the end of each 12-month period your trustee will re-assess your contribution liability based on your actual income and dependants for the period. If you have not paid enough because your income was greater than you estimated, then you will have to make up the shortfall. If you have paid too much the extra payments cannot be refunded but they will be credited to the next assessment.

### **Hardship variations**

There are specific hardship provisions in the Bankruptcy Act which are limited to exceptional circumstances that would impose an excessive financial burden on the bankrupt. The list of what constitutes 'hardship' for the purposes of the Bankruptcy Act is specific, and your trustee does not have discretion to grant hardship for expenses that aren't listed in the Bankruptcy Act. The exceptional circumstances are:

- ongoing medical expenses
- costs of child day care essential for work
- particularly high rent when there are no alternatives available
- substantial expenses of travelling to and from work
- loss of financial contribution, usually made by your spouse, to the costs of maintaining your household

Applications for hardship must be in writing, must explain why you will suffer hardship and must include documentary evidence of your income and expenses. Your trustee will make a decision on your application within 30 days after receiving your application and sufficient supporting evidence and will give you a written notice setting out the reasons for their decision.

### **Review of income and hardship assessments**

If your trustee completes an income assessment and you disagree with the outcome, you should contact your trustee in the first instance. The same applies if you are dissatisfied with a decision made by your trustee regarding a hardship request. If you still disagree, you may request a review of the trustee's decision by the Inspector-General

in Bankruptcy. The request for review needs to be in writing and must be lodged within 60 days of you being notified of the assessment. You must still make payments during the appeal period.

### **2.3. Debts and creditors**

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

- debts you owe jointly with someone else
- any loans to you from friends or relatives
- 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
- a person with who you owe debts jointly (e.g. your partner)

#### **Debts you still have to pay both during and after bankruptcy**

You still have to pay certain debts despite becoming bankrupt. These include debts which are not provable in bankruptcy, such as:

- court-imposed penalties and fines
- unliquidated damages you are liable to pay due to accidents, eg. a car accident, except under certain circumstances
- student assistance/supplement loans (HELP - Higher Education Loan Program/HECS - Higher Education Contribution Scheme/SFSS - Student Financial Supplement Scheme)
- debts you incur after your bankruptcy commences

The ATO may keep your tax refund and offset it against any debt you owe the Commonwealth, e.g. to the ATO or the Department of Human Services (Child Support or Family Assistance).

To avoid suspension of your driver's licence and/or your motor vehicle registration, you will need to pay your debts for parking, traffic and other infringements of state laws. Most states have the power to suspend your licence and/or your motor vehicle registration until payment is made.

If you fail to pay certain debts for essential services to your home (e.g. electricity, gas, telephone) it may result in the disconnection of these services.

#### **Debts you have to pay after your bankruptcy ends**

Although you are released from most debts at the end of your bankruptcy, there are some that you still have to pay.

These include:

- debts incurred by fraud
- maintenance debts, including child support
- accumulated HECS and HELP debts
- unliquidated damages other than those arising from a contract, promise or breach of trust

### **2.4. How will my creditors be affected?**

#### **Unsecured creditors**

Generally, lose the right to recover their debts e.g.:

- banks, finance companies and credit unions for personal loans, credit cards and store cards
- service providers, doctors, lawyers and trades people.

If you become bankrupt, any legal action taken against you in relation to unsecured debts must stop, e.g. a summons, a garnishee from your income or bank account or recovery action by a sheriff or bailiff. If creditors continue to demand that you pay their debt, you should immediately tell your trustee who will inform the creditor of your bankruptcy.

#### **Secured creditors**

Hold security over your asset(s) which entitles them to take and sell them if you fall behind in payments, e.g.:



- banks with a mortgage over a house
- finance companies with a chattel mortgage, lease or bill of sale over a car, furniture or electrical goods
- hire purchase arrangements where you have not paid the full amount
- creditors secured by government legislation over houses and land, such as council/shire rates and water rates

If you become bankrupt, secured creditors may contact you to find out what will happen to the assets. You may be able to make arrangements to keep a secured asset with no equity. However, you should talk to your trustee beforehand.

Some creditors may retain ownership of items purchased from them until their debt has been paid in full (e.g. sales subject to retention of title clauses, goods on consignment or commission). Creditors holding a security deposit or bond (e.g. a landlord) are entitled to keep it to reduce your debt. If you have difficulty determining whether your debts are secured, you should talk to your creditors and ask whether your debts are secured or unsecured. You can also talk to your trustee if you are unsure about what types of debts and creditors you have.

## 2.5. Overseas travel

### Can I leave Australia if I become bankrupt?

You can only leave Australia if you obtain your trustee's written permission before you commence making any preparations to leave. Your trustee will need to be satisfied that you have legitimate reasons for the proposed travel, for example as a condition of your employment or for compassionate reasons.

Your trustee may impose conditions when giving permission such as:

- the period of travel
- the date you are required to return to Australia, and/or
- that any income contributions (compulsory sums from your income to repay your creditors) that you have been assessed to pay are paid before you go.
- if you have a passport, you must surrender it to your trustee if directed to do so.

Your trustee may refuse permission if:

- you have not carried out all of your obligations under the Bankruptcy Act, for example if you have not filed your Statement of Affairs
- you are required to assist your trustee in the administration of your bankruptcy
- the trustee's investigations have not been completed

**Warning:** *If you leave Australia without your trustee's written permission or you leave with permission but fail to return when you said you would, your trustee may lodge an objection to your discharge extending your period of bankruptcy to five years from the date you return to Australia. If you are overseas and your trustee asks you to return to Australia and you do not, your trustee may lodge an objection to your discharge. If this happens, your bankruptcy will be extended for two years from the date you return to Australia.*

Leaving or trying to leave Australia without the written consent of your trustee is an offence under the Bankruptcy Act. The penalty for this, upon conviction, is up to three years' imprisonment. Breaching a travel condition imposed by your trustee is also an offence under the Bankruptcy Act. The penalty for this, upon conviction, is up to 12 months imprisonment.

### How do I apply for permission?

As soon as you become aware that you may need to leave Australia you should contact your trustee and discuss your situation. You should then write to your trustee giving:

- the reasons for the proposed trip
- the names of the countries you propose to visit
- the date you intend to leave Australia
- the date you intend to return to Australia
- if someone else is paying for the trip, the name of the person paying for the trip, the cost of the trip and a confirming letter from that person
- an email address, telephone number and overseas address where your trustee can readily contact you
- your current annual income
- your proposed arrangements for paying any contribution liability whilst overseas

Your trustee must have adequate time and information to consider your request. Your request should be in writing so that your trustee understands exactly what you are requesting. You will be advised promptly of the trustee's decision and any conditions placed on your travel.

If you are not satisfied with your trustee's decision, try to resolve your concerns with them directly. If you are still not satisfied with your trustee's decision, you may apply to the Federal Court or the Federal Circuit Court for review. You should seek legal advice before you do this.

## **2.6. The End of Bankruptcy**

### **Discharge From Bankruptcy**

#### **When will I be discharged from bankruptcy?**

If you became bankrupt by presenting your own petition (that is, by Debtor's Petition), you will be due for discharge three years and one day after you filed that petition and your Bankruptcy Form with AFSA.

If one of your creditors made you bankrupt by a Sequestration Order, you will be due for discharge three years and one day after AFSA accepted your completed Statement of Affairs. It is therefore important to lodge your Statement of Affairs promptly as any delay can mean you will be bankrupt for longer than three years.

In some cases, your bankruptcy can be extended to five or eight years. This happens when your trustee lodges an objection to your discharge. Your trustee may lodge an objection on a number of grounds, such as your failure to:

- provide information to, and assist your trustee
- disclose to your trustee all income
- explain how money was spent or
- reveal all assets to creditors

More than one objection can be lodged. You may request a review of an objection by the Inspector-General. A written request for review must be lodged within 60 days of you being notified of the objection. Contact AFSA for further information about reviews of objections.

#### **Do I have to apply for discharge?**

No. If you would like confirmation of your discharge, you can either ask your trustee or obtain a National Personal Insolvency Index (NPII) extract that will show your date of discharge.

#### **What happens after I am discharged?**

Your name will appear on the National Personal Insolvency Index (NPII) forever, and on a commercial credit record for up to five years - or longer in some circumstances. If there is property that vested in the trustee when you became bankrupt and it has not yet been dealt with, you don't automatically get it back. The administration of your bankruptcy may continue after you are discharged e.g. your trustee may not have finalised investigations or the sale of assets, or you may still have income contributions to pay.

The Bankruptcy Act says that a discharged bankrupt must still:

- assist their trustee to finalise the administration of the bankruptcy
- advise their trustee of any change of address
- provide information about their financial circumstances if requested to do so
- pay outstanding income contributions

You also have continuing obligations to:

- give up secured assets if required by the relevant secured creditors
- pay debts that are not released by bankruptcy

### **Annulment**

#### **What is annulment?**

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

1. *Annulment by payment in full* - you pay all your debts in full, including interest, the realisations charge and your trustee's expenses and fees. The realisations charge is a percentage of amounts received by a trustee from the sale of a bankrupt's assets or repayment of debts that must be paid to the government.

2. *Annulment by composition or arrangement* - your creditors accept a composition or arrangement, which is an offer of something less than payment in full.
3. *Annulment by court order* - you successfully apply to the court for an order annulling your bankruptcy.

### **What are the effects of an annulment?**

Your name will appear on the NPII forever, with the record showing that your bankruptcy was annulled. Credit reporting organisations also keep records of bankruptcies for up to five years - or longer in some circumstances. Other consequences of annulment are:

- assets not needed by your trustee to pay the trustee's fees and expenses and your creditors will be returned to you
- creditors to whom you have granted security over an asset (e.g. mortgages) will still have their rights in relation to those assets, which may include the power to seize and sell them if you default in repayments
- you are still liable for the payment of debts that are not provable in bankruptcy

### **Annulment by payment in full**

Your bankruptcy will be annulled providing:

- your creditors, and any interest payable on debts to creditors, and the realisations charge, and your trustee's expenses and fees have all been paid in full

Contact your trustee to find out how much you will be required to pay. The money required for payment in full usually comes from the sale of assets by your trustee or from a source not otherwise available to the trustee, such as money provided by a relative. Your bankruptcy will be annulled on the date of the final payment is made from your estate.

### **Annulment by composition or arrangement**

Compositions or arrangements are offers made by bankrupts through their trustees to finalise their debts. Usually, the trustee prepares a report about the proposal and advises creditors whether the proposal will benefit them. A meeting is then held whereby creditors can vote on whether or not to accept the offer. An offer:

- may involve assets already in the bankruptcy and/or,
- may include other money or assets that would not normally be available to creditors, such as money provided by a relative

These offers benefit creditors as they receive a dividend that would not otherwise be available, or earlier than they would if you were to remain bankrupt. All creditors will receive an equal rate of dividend unless your offer provides otherwise.

Your written and signed offer must be lodged with the trustee:

- setting out the terms
- providing for the payment of the trustee's fees and expenses
- providing for payment of the realisations charge

Before finalising your offer and asking your trustee to call a creditors meeting, you should discuss:

- the requirements for making an offer with your trustee
- what your creditors may be willing to accept.

This is in your interests and will save considerable time and resources which would be wasted if an offer is not accepted at the meeting of creditors

The initial fees payable to cover the costs of calling the creditors meeting will not be refunded regardless of the outcome of the meeting.

Your trustee may:

- require a deposit to cover the expenses and fees of the meeting
- refuse to call a meeting if the offer does not make adequate provision for the payment of trustee's fees that have been approved by creditors and cannot be taken out of the estate

You must attend the meeting if requested to do so by your trustee. You may amend the terms of your offer at the meeting but not in any way that would reduce the trustee's fees. Acceptance requires a 'yes' vote from a majority of creditors who represent at least 75% of the dollar value of the voting creditor's debts (referred to as a 'special resolution').

If your offer is **accepted** your bankruptcy will be annulled immediately and:

- your trustee's fees and charges will be paid
- your creditors will be paid

All creditors with provable debts that would have been extinguished upon discharge are bound by the terms of the offer. Some debts will still need to be repaid though (such as child support, HECS/HELP/SFSS debts, debts incurred by fraud and debts incurred after your date of bankruptcy) – these are the same debts that would still need to be repaid if you didn't offer a composition or if your composition offer is rejected.

If your offer is **rejected** your bankruptcy will continue. Your trustee will:

- keep funds covering the expenses and fees of calling the meeting from any deposit
- refund any money provided for the offer

### **Variation, setting aside or termination of a composition or arrangement**

Your creditors or the trustee can, with your consent, propose a variation of your composition or arrangement. The variation proposal is put to creditors for consideration and your trustee will notify you of the outcome.

The Inspector-General, your creditors or trustee can apply to the Federal Court or Federal Circuit Court to set aside your composition or arrangement if:

- it is unreasonable
- it does not comply with the Bankruptcy Act
- you have supplied misleading or false information
- you are in default of any of the terms

Your creditors can terminate the composition or arrangement by resolution at a meeting convened by the trustee for this purpose.

Your trustee can terminate a composition or arrangement if satisfied you are in default and a notice is sent to all creditors specifying when the termination is to occur and giving them an opportunity to object. If no objection is lodged with the trustee, termination occurs on the proposed date.

The court may also terminate a composition or arrangement on application by the trustee, a creditor or you in circumstances where you have not complied with a term of the composition or arrangement, and if the court considers there is a sufficient element of injustice or undue delay if the composition or arrangement was to proceed.

In addition, the court has broad discretion to terminate if it determines that there is sufficient reason to do so. Your creditors or trustee can petition to make you bankrupt again at the same time as applying to have your composition or arrangement set aside or terminated.

## **2.7. Fees and Charges**

A trustee is entitled to a fee for administering your bankruptcy.

Where AFSA is the trustee of the administration, the fee is set by legislation and is generally based on a percentage of the funds realised. The fee is not recoverable directly from you unless you are seeking an annulment of the bankruptcy.

Where a registered trustee is the trustee of the administration, the fee is generally based on an hourly rate. Where there are insufficient funds in an administration to pay these fees in full, these fees will remain unpaid. A registered trustee's fees are approved by the bankrupt's creditors, a Committee of Inspection, the Inspector-General or the court. A registered trustee can recover a statutory minimum fee without written approval.

If you are dissatisfied with the amount of fees charged by your trustee you may request that an independent review of the trustee's remuneration (including fees and disbursements) be undertaken by the Inspector-General in Bankruptcy. The Inspector-General in Bankruptcy will undertake the review provided certain conditions are met.

Funds realised by a trustee in an administration are subject to a realisations charge (a government levy) which is paid by the trustee directly to the government. Any interest earned on funds recovered by the trustee is payable to the government.

### **3. Frequently asked questions**

#### **Can my application to voluntarily become bankrupt be rejected?**

Yes. There are a number of circumstances which may result in your petition for bankruptcy being rejected. Your petition may not be accepted if it appears from the information that is lodged with the petition that you are likely to be able to pay the debts, AND you are either avoiding payment of a particular debt(s), OR have been bankrupt previously.

#### **Am I eligible to present a Debtor's Petition?**

A debtor is eligible to present a Debtor's Petition for bankruptcy if they are in Australia or have an Australian connection (e.g. the debtor usually lives in Australia or carries on business in Australia).

#### **Is there a minimum amount I need to owe before I can go bankrupt?**

No. you can become bankrupt voluntarily owing any amount. However, AFSA can reject your request to become bankrupt under certain circumstances.

#### **A creditor has made me bankrupt – what happens now?**

If a creditor has made you bankrupt, you should make contact with your trustee without delay. If you are unsure who your trustee is, contact AFSA and quote the court reference number that is on the Sequestration Order. Your trustee will be able to provide you with information and will be able to answer your questions about bankruptcy.

You must cooperate with your trustee and provide information upon request. Failure to cooperate with your trustee is an offence under the Bankruptcy Act. You must complete and file a Statement of Affairs Form within 14 days of being notified of your bankruptcy.

#### **Is there a difference between an involuntary and a voluntary bankruptcy?**

The outcome and consequences are the same for someone who voluntarily petitions for bankruptcy and someone who is made bankrupt by a creditor. The one exception is that a person made bankrupt by a court order must file a statement of affairs within 14 days of being notified of their bankruptcy – and they are not released from bankruptcy if they do not file their Statement of Affairs.

## **PERSONAL INSOLVENCY AGREEMENT**

A personal insolvency agreement (PIA) is a formal option available to help you deal with unmanageable debt. A PIA is a flexible way for you to come to an arrangement with creditors to settle your debts without being bankrupt.

#### **What is a PIA?**

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 your own money or money from third parties (e.g. family or friends) and/or
- transfer of assets to creditors or the payment of the sale proceeds of assets to creditors and/or
- a payment arrangement with creditors (this could include deferral of repayments)

#### **Who can propose a PIA?**

You can propose a PIA under the following circumstances:

- you must be insolvent (this means to be unable to pay your debts as and when they fall due)
- you must be in Australia or have an Australian connection (e.g. you usually live in Australia or carry on business in Australia)

#### **What are the effects of a PIA?**

- When you appoint a controlling trustee, you commit an 'act of bankruptcy'. A creditor can use this to apply to court to make you bankrupt

- Even if your attempt to set up a PIA fails, the appointment of a controlling trustee and the setting up of a PIA will still be recorded on the NPII forever
- Your details will also appear on a record held by a credit reporting organisation for up to five years - or longer in some circumstances
- Once you have executed a PIA, you are automatically disqualified from managing a corporation until the terms of the PIA have been complied with

### What is the procedure?

You appoint a controlling trustee to take control of your property and put forward a proposal to your creditors. Only a registered trustee, AFSA or a suitably qualified solicitor can act as a controlling trustee.

The controlling trustee examines the proposal, makes enquiries into your financial 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 you became bankrupt, and make a recommendation whether it is in creditors' interests to accept the proposal.

A creditors' meeting must be held. This creditors' meeting is advertised on AFSA's website. If unable to attend, a creditor can be represented by a proxy or attorney, or participate by electronic means if facilities are available.

You must attend the meeting unless excused by the controlling trustee. At the creditors' meeting, creditors consider and vote on the proposal. The creditors may ask you questions before deciding how to vote. Acceptance requires a 'yes' vote from a majority of creditors who represent at least 75% of the dollar value of the voting creditors' debts (referred to as a 'special resolution').

If the proposal is **accepted** the creditors are bound by the terms of the PIA. 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 AFSA) is appointed to administer the agreement.

If the proposal is **rejected** creditors will either:

- vote in favour of you becoming bankrupt (you do not have to follow the creditors' decision but a creditor may start bankruptcy proceedings if you do not voluntarily become bankrupt), or
- leave it up to you to decide how to resolve your financial difficulties

If the proposal is rejected or lapses, you cannot appoint another controlling trustee for six months without the permission of the court.

### Fees and charges

There is a fee payable to AFSA when lodging a controlling trustee authority form. In addition to this, a controlling trustee and PIA administrator will charge fees for examining your PIA proposal, investigating your financial affairs, preparing a report to creditors and holding the creditors' meeting.

All funds realised by a trustee in an administration are subject to a realisations charge which is paid by the trustee directly to the government. Any interest earned on funds realised by the trustee is also payable to the government.

If you have executed a controlling trustee authority or a PIA and think the fees claimed by the controlling or PIA trustee are too high or otherwise unreasonable, you may request that the Inspector-General in Bankruptcy reviews the trustee's fees. Note that certain conditions must be met before the Inspector-General will conduct a review.

### Frequently asked questions

#### Can I change or end my PIA if my circumstances change?

You can make a written request to your trustee to vary the terms of the PIA. The trustee sends a notice of the proposed variation to the creditors and, if none 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 a PIA by passing a special resolution.

A PIA can also be terminated by a resolution of the creditors where the trustee is satisfied that you are not complying with their obligations.

The court can set aside or terminate a PIA in certain circumstances.

#### When does a PIA come to an end?

Generally, a PIA will end when all the obligations that the PIA has created have been discharged. This will usually be when the trustee has paid the final dividend to creditors. You may request a certificate stating that all the obligations under the PIA have been discharged from your trustee.

## DEBT AGREEMENT

A debt agreement is a binding agreement between you and your creditors where creditors agree to accept a sum of money that you can afford. Your repayments are based on your capacity to pay having regard to your income and all of your household expenses.

### What is a debt agreement?

A debt agreement is a formal option to help you deal with unmanageable debt. You will be released from your debts when you complete all payments and obligations under the agreement. A debt agreement may provide for:

- weekly or monthly payments from your income
- deferral of payments for an agreed period
- the sale of an asset to pay creditors
- a lump sum payment to be divided among creditors

### Who can propose a debt agreement?

You can lodge a debt agreement proposal if you:

- are insolvent (this means you are unable to pay your debts as and when they fall due)
- have not been bankrupt, had a debt agreement or appointed a controlling trustee under the Bankruptcy Act in the last 10 years
- have unsecured debts, assets and after-tax income for the next 12 months all less than set limits

### What happens when you propose a debt agreement?

- your name and other details appear on the National Personal Insolvency Index (NPII), a public record, for the proposal and any debt agreement
- your ability to obtain further credit will be affected. Details of the debt agreement will also appear on a credit reporting organisation's records for up to five years - or longer in some circumstances
- during the voting period creditors cannot take debt recovery action or enforce action against you or your property; and must suspend deductions by garnishee on your income

### What are the effects of entering a debt agreement?

- all unsecured creditors are bound by the debt agreement and are paid in proportion to their debts
- you are released from most unsecured debts when you complete all your obligations and payments
- secured creditors may seize and sell any assets (eg a house) which you have offered as security for credit if you are in default
- creditors cannot take any action against you or your property to collect their debts
- the agreement does not release another person from a debt jointly owed with you

### What is the procedure?

#### Stage 1: Information

You must read and sign the prescribed information page regarding the consequences of bankruptcy, debt agreements and other alternatives.

#### Stage 2: Appointing an administrator

If, after considering all your options, you decide that a debt agreement is the best option, you must decide if you are going to appoint an administrator. Most administrators are registered debt agreement administrators or registered trustees, but non-registered administrators are also available.

The services provided by an administrator attract a fee. The administrator can initially help you by providing information about all of your available options, working out a budget and talking to your creditors.

Once you have appointed an administrator, they will determine if you are insolvent and the extent of your unmanageable debt. They will also help you to prepare a debt agreement proposal that takes into account what you can afford to pay creditors and will assist with the completion of the correct forms.



You and/or your administrator will need to complete and lodge three forms with AFSA:

- **A debt agreement proposal** - this outlines what your proposal is to your creditors
- **An explanatory statement** - informs the creditors about your income, expenses, assets and debts, personal circumstances, household expenses and the reasons behind your financial difficulty
- **A statement of affairs** - this outlines in detail your personal information and circumstances. The completed form is not sent to creditors and is not a public document.

### Stage 3: Proposal is lodged with AFSA

The debt agreement proposal must be completed and lodged with AFSA within 14 days of being signed by the debtor.

A certificate signed by the administrator must accompany all debt agreement proposals lodged by an administrator. The certificate states that the administrator:

- has given you the prescribed information about bankruptcy, debt agreements and other options
- believes you can afford to make the payments promised in your debt agreement proposal; and
- believes you have properly disclosed your affairs to creditors

If you are self-administering you do not have to supply a certificate but must provide AFSA with a signed copy of the prescribed information when lodging the proposal.

### Stage 4: AFSA sends proposal to creditors to assess and vote on

When the forms are lodged with AFSA, a number of checks are conducted to ensure that the debt agreement proposal satisfies the eligibility criteria. If the proposal is accepted by AFSA for processing, it is recorded on the National Personal Insolvency Index (NPII).

Each creditor is sent a report (completed by AFSA), copies of the debt agreement proposal and explanatory statement, a statement of claim and a voting form. Creditors are asked to vote on the proposal by returning the statement of claim and voting form by a nominated date. Any questions by creditors are referred to the debt agreement administrator, if applicable. Creditors may vote yes, no or may abstain and by lodging a completed voting form, provide details of the claim for dividend purposes. The voting period is generally five weeks.

### Stage 5: AFSA checks and counts the votes

After the votes are due, AFSA will review the creditors' votes. For a debt agreement proposal to be accepted, AFSA must receive "yes" votes from a majority in value of the creditors who vote.

If the proposal is **accepted** by a majority in value of creditors who vote:

- the proposal becomes a debt agreement
- AFSA updates the NPII to show that you have entered a debt agreement

If the proposal is **rejected** by a majority of creditors in value who vote or if no creditors vote:

- the voting outcome is recorded on the NPII
- creditors can commence or continue with action to recover their debts

If the proposal is **withdrawn** by you or cancelled by AFSA:

- AFSA updates the NPII with this result
- creditors can commence or continue with action to recover their debts in these cases

### Stage 6: If a debt agreement proposal is accepted

If the debt agreement proposal is **accepted** by creditors, you must comply with the agreement and ensure it is completed by the completion date listed on the proposal. If you have problems making payments during the debt agreement, you should talk to your administrator as soon as possible.

The debt agreement administrator is responsible for:

- collecting payments from the debtor
- keeping creditors and debtors informed
- paying dividends to creditors



- telling AFSA when the debt agreement is completed

### **Fees and charges**

A fee is payable to AFSA on lodgement of a debt agreement proposal.

Debt agreement administrators and other advisors may also charge a fee for providing information and preparing debt agreement forms.

Funds received by an administrator are subject to a realisations charge (a government levy) which is paid by the administrator directly to the government. Any interest earned on funds realised by a registered debt agreement administrator is payable to the government.

### **Frequently asked questions**

#### **Can I change my debt agreement if my circumstances change?**

You can request to change your debt agreement by lodging a variation proposal if your circumstances have changed.

A termination proposal may be lodged by you (as the debtor) or a creditor if the terms of the debt agreement are not being carried out. Creditors vote on a proposal to vary or terminate in the same way as they vote on the original proposal. If it is not accepted by creditors, the terms of the debt agreement remain in force. You (as the debtor), a creditor or AFSA may apply to the court for an order to terminate a debt agreement.

The agreement is automatically terminated if:

- you have not made any payments for six months after a payment is due, or
- you do not complete the payments within six months of the completion date of the agreement

The effects of terminating a debt agreement include:

- creditors can commence or recommence recovery action against you
- the termination of the debt agreement is registered on the NPII
- creditors may apply for an order that you be made bankrupt

#### **When does a debt agreement end?**

A debt agreement ends when:

- you have completed all your obligations and payments, or
- the court orders the debt agreement be terminated or declared void, or
- the debt agreement is terminated by creditors

## **DECLARATION OF INTENTION (DOI) TO PRESENT A DEBTOR'S PETITION**

If you have unmanageable debt and need time to consider your options, you may apply for temporary protection from enforcement action by your unsecured creditors by lodging a DOI.

This temporary relief allows you to negotiate payment arrangements with creditors or, alternatively, consider a formal insolvency administration (debt agreement, personal insolvency agreement or bankruptcy) that may be suited to your circumstances.

#### **What is a DOI?**

A DOI is an option under the Bankruptcy Act that provides temporary relief to allow you up to 21 days to decide whether to proceed with bankruptcy or another option. During the 21-day period, unsecured creditors cannot take any action to recover debts, including recovering money or seizing unsecured assets. In this time you can consider your financial circumstances, negotiate with your creditors and, where possible, make suitable arrangements to avoid entering a formal option under the Bankruptcy Act.

#### **What happens if I lodge a DOI?**

A DOI is not recorded on the National Personal Insolvency Index (public electronic register of all personal insolvencies). Your creditors are notified of the stay on enforcement action and provided with a copy of your

financial affairs. You do not automatically become bankrupt after the 21 day stay period, however, if you have not come to a suitable arrangement with your creditors and you do not voluntarily apply to become bankrupt, your creditors can choose to apply to the court to make you bankrupt.

### **Who can lodge a DOI?**

You may lodge a DOI if:

- you have not applied for a DOI in the last 12 months
- you have not signed a controlling trustee authority within the preceding six months (ie proposed a personal insolvency agreement to your creditors)
- you are not currently under a debt agreement, personal insolvency agreement or the subject of a current controlling trustee authority
- a creditor has not already petitioned for you to be made bankrupt
- you have a residential or business connection to Australia (i.e. you are living in Australia or conduct business in Australia)

### **What are the effects of a DOI?**

Generally, your unsecured creditors cannot continue with any enforcement action for 21 days. Some unsecured creditors are not bound by this stay period and they may continue recovery action (eg child support debts, court imposed fines/ penalties and HELP debts). Secured creditors are also not bound by this stay period (eg if your car or house mortgagee has initiated repossession proceedings, they may continue to do so).

The 21-day period can end earlier if:

- a creditor petitions the court to make you bankrupt and/or the court makes you bankrupt during this period
- you sign a controlling trustee authority (ie propose a personal insolvency agreement) during this period
- you voluntarily apply to become bankrupt during this period

### **Fees and charges**

There is no fee to submit a DOI application.

# COMPARISON OF FEATURES OF DIFFERENT TYPES OF PERSONAL INSOLVENCY ADMINISTRATIONS

|   | Bankruptcy  | Debt Agreement   | Personal Insolvency Agreement  |
|---|---|--|--|
| <b>ELIGIBILITY</b>  |   |  |  |
| Australian connection   | Must have a residential or business connection.   | No residential or business connection required.  | Must have a residential or business connection.  |
| Previous insolvency   | While previous insolvency does not by itself make a person ineligible, AFSA may not accept the petition if the debtor was previously bankrupt, and some other conditions are met.   | Must not have been a bankrupt, proposed a personal insolvency agreement or made a debt agreement in the previous 10 years.   | Must not have proposed another personal insolvency agreement in the previous six months. |
| Income threshold  | No.   | Yes. See the indexed amounts   | No.  |
| Asset threshold   | No.   | Yes. See the indexed amounts   | No.  |
| Debt threshold  | No.   | Yes. See the indexed amounts   | No.  |
| <b>INCOME, EMPLOYMENT AND TRADE</b>                             |   |  |  |
| Payments from income required?                                  | Yes, mandatory payments required if income exceeds a statutory threshold.   | Yes, if the terms of the agreement require payments from income – this occurs in most cases.   | Only if the terms of the agreement require payments from income.                         |
| Ability to continue to operate a business                       | May be possible depending on the nature of the business and whether business assets are to be sold by the trustee. If trading under a business name or assumed name (whether alone or in partnership) bankruptcy must be disclosed to all people dealing with the business. | Yes, unless terms of the agreement provide otherwise. If trading under a business name or assumed name (whether alone or in partnership) the debt agreement must be disclosed to all people dealing with the business. | Yes, if agreement allows for debtor to continue to operate the business.                 |
| Ability to be a director of, or otherwise manage, a corporation | No.   | Yes.   | Not until terms of agreement fully complied with.  |
| Other employment restrictions                                   | Professional bodies and/ or trade associations may have certain conditions of   | Professional bodies and/ or trade associations may have certain conditions of  | Professional bodies and/ or trade associations may have certain conditions               |

|  |   |   |  |
|--|---|---|--|
|  | membership for the duration of the bankruptcy. There may be restrictions on holding some statutory positions during the period of bankruptcy.   | membership for the duration of the agreement. There may be restrictions on holding some statutory positions during the period of the agreement. | of membership for the duration of the agreement. There may be restrictions on holding some statutory positions during the period   |
| <b>ASSETS</b>  |   |   |  |
| Ability to retain assets   | No, unless it is exempt property (for example, household furniture, tools of trade up to a certain value).  | Yes, unless terms of the agreement provide otherwise.   | Yes, subject to the terms of the agreement.  |
| Ability to retain assets acquired during the period of the agreement/ bankruptcy   | No, unless property being acquired is exempt property.  | Yes.  | Yes.   |
| Can assets previously sold or transferred for less than market value be recovered? | Yes, subject to certain statutory conditions being met.   | No.   | Not unless the agreement specifies that the antecedent transaction provisions of the Bankruptcy Act apply to the debtor.   |
| Can payments made to creditors prior to the agreement/ bankruptcy be recovered?    | Yes, subject to certain statutory conditions being met.   | No.   | Not unless the agreement specifies that the antecedent transaction provisions of the Bankruptcy Act apply to the debtor.   |
| <b>DEBTS</b>   |   |   |  |
| Unsecured debts  | Unsecured creditors receive pro rata payment from funds recovered by the trustee after fees and costs have been deducted. There are some statutory priority payments to particular classes of creditors like employees. | All unsecured creditors receive pro rata payments.  | Unsecured creditors can receive differential payment rates if the terms of the agreement provide for this. There are some statutory priority payments to particular classes of creditors like employees. |
| Secured debts  | Rights of secured creditors are not affected. They can repossess assets if there is default in payment.   | Rights of secured creditors are not affected. They can repossess assets if there is default in payment.   | Rights of secured creditors are not affected. They can repossess assets if there is default in payment.  |

|                                     |   |   |   |
|-------------------------------------|---|---|---|
| Release from debts                  | Upon discharge from bankruptcy, but not released from some types of debts.  | Upon completing terms of agreement, but not released from some types of debts.  | As per terms of the agreement, but not released from some types of debt.  |
| <b>RESTRICTIONS</b>                 |   |   |   |
| Ability to travel overseas          | Prior consent of trustee required. If trustee the Official Trustee, an application fee applies.                                       | No statutory restriction.   | No statutory restriction.   |
| Ability to travel within Australia  | No statutory restriction.   | No statutory restriction.   | No statutory restriction.   |
| Incurring further debt              | Must disclose insolvency if incurring debt or obtaining goods and services in excess of a threshold. See the indexed amounts.         | Must disclose insolvency if incurring debt or obtaining goods and services in excess of a threshold. Yes. See the indexed amounts.    | No statutory restriction.   |
| <b>FEES AND CHARGES</b>             |   |   |   |
| Statutory filing fee                | No.   | Yes. See the indexed amounts.   | Yes.  |
| Statutory levies                    | A government levy is imposed on all receipts in the administration. Any interest earned on these receipts is also paid to government. | A government levy is imposed on all receipts in the administration. Any interest earned on these receipts is also paid to government. | A government levy is imposed on all receipts in the administration. Any interest earned on these receipts is also paid to government. |
| Fees for administration of estate/s | Subject to creditor approval. Fees can be reviewed upon application to the Inspector-General.   |   |   |

# GLOSSARY

## A

### **Act of bankruptcy**

An action, event or declaration listed in section 40 of the Bankruptcy Act, which can be used by a creditor to apply to the court to make a person bankrupt. An act of bankruptcy must be established before the court may make a Sequestration Order against the estate of the debtor.

### **Australian Financial Security Authority (AFSA)**

Government Agency responsible for the application of bankruptcy and personal property securities.

### **Antecedent transaction**

A transaction that has taken place prior to a personal insolvency agreement or bankruptcy that is void against the trustee. They include transactions where less than market value has been paid for an asset, a transfer has been made to prevent the property becoming divisible among creditors, or preferential payments are made to a specific creditor. A trustee has the ability to recover the asset or the difference between the price paid and the value at the time of the transfer.

## B

### **Bankruptcy**

A process where people, who cannot pay their debts, become bankrupt to receive the protection of the Bankruptcy Act and their estate is administered by a trustee. It allows for the fair distribution of property among creditors and the prosecution of dishonest debtors.

### **Bankruptcy Act 1966 (“the Act”)**

The Commonwealth legislation which covers personal insolvency, including bankruptcy, Part IX (debt agreements) and Part X (personal insolvency agreements) arrangements. It deals with individuals. Corporate entities are covered by the Corporations Law administered by the Australian Securities and Investments Commission.

### **Bankruptcy Form**

Term used to describe the combined Statement of Affairs and Debtor’s Petition used when applying for bankruptcy.

### **Bankruptcy Notice**

A formal, final demand for payment of a debt by a creditor owed at least \$10,000 on one or more final judgments or final orders. This notice is issued by the Official Receiver at the request of creditor(s), who must have judgments (from a court of competent jurisdiction) to back up their claim that they are owed money. Failure to comply with a Bankruptcy Notice constitutes an act of bankruptcy.

## C

### **Charge**

A form of security that ensures the repayment of a debt (or the performance of an obligation) by providing that, should the debt not be repaid, the creditor has rights to be paid, usually out of the proceeds of the sale of an asset.

### **Consent to act**

A consent to act and trustee declaration form, completed by a trustee or two trustees who wish to act together, gives consent for the registered trustee to act as the trustee of an administration. A consent to act could be sourced by a creditor prior to a Sequestration Order being made, a debtor prior to lodging their Debtor’s Petition or a trustee wishing to transfer the administration to another trustee.

### **Contribution**

A sum of money calculated on the basis of a statutory formula applied to the bankrupt’s income which is required to be regularly paid to the trustee. It is also called a compulsory contribution.

### **Controlling trustee**

A person (a Registered Trustee, the Official Trustee or an eligible solicitor) who investigates a debtor’s financial affairs and calls a meeting of the debtor’s creditors under Part X of the Bankruptcy Act.

## **Court**

In the context of bankruptcy, the court usually refers to the Federal Court of Australia or the Federal Circuit Court of Australia. Both of these courts can hear matters associated with personal insolvency.

## **Credit file**

A file kept by a credit reporting agency that shows a person's credit history. Lenders access the information in the person's file to help them decide whether to lend money. They can also record a default on the person's file if loan repayments are made late, or a utility bill is not paid. Every time a person makes an application for finance an entry is recorded on the relevant file showing the lender applied to, the type of finance, the amount and the date.

## **Credit reference report**

A report that details a person's credit history, including every time a credit application is made or a default occurs on a repayment. It is held by a credit reporting agency and a lender must ask the person for permission to get this report.

## **Credit reporting agency**

An organisation that collects and sells credit information on individuals and companies.

## **Creditor**

A person or company to whom money is owed.

## **Creditor's Petition**

An application from a creditor to a court seeking to make a debtor involuntarily bankrupt (see Sequestration Order).

## **D**

## **Debt agreement**

An arrangement between a person who cannot pay their debts and their creditors. It is a formal arrangement under Part IX of the Bankruptcy Act. A debt agreement results from creditors voting to accept a proposal from a debtor to settle their debts. To be eligible to propose a debt agreement, a debtor must be insolvent and meet threshold levels relating to unsecured debts and assets and after-tax income.

## **Debtor**

A person who owes money to a creditor.

## **Debtor's Petition**

An application made to AFSA to become a bankrupt.

## **Debt purchaser**

An entity that buys debts from a creditor (for less than their face value) and tries to recover the full amount.

## **Declaration of intention to present a debtor's petition (DOI) / Temporary Debt Protection**

A device whereby a debtor may seek temporary relief from recovery action taken by a creditor. Once such a declaration is accepted by AFSA, it prevents unsecured creditors from enforcing their debts for a period of 21 days.

## **Discharge from bankruptcy**

The end of bankruptcy. The date of discharge is the day after bankruptcy ends. The statutory period of bankruptcy is three years and one day from when a person files their Statement of Affairs with the Official Receiver, but this period can be extended in certain circumstances (see objections to discharge from bankruptcy). A bankrupt will never be discharged if they have not filed their Statement of Affairs with the Official Receiver.

## **Discharged bankrupt**

A person whose period of bankruptcy has ended.

## **Divisible assets or divisible property**

Assets/property that can legally be sold in bankruptcy by the trustee.

## **E**

## **Exempt assets**

Assets/property which cannot be sold in bankruptcy by the trustee. These are identified in s116 of the

Bankruptcy Act.

### **Extension of bankruptcy**

See objection to discharge from bankruptcy.

## **F**

### **Final judgment**

A judgment which finally determines the issues between the parties in a proceeding. A Bankruptcy Notice must be founded on a 'final judgment order'.

### **Financial counsellor**

A person who gives confidential and independent assistance to people with financial problems. Financial counselling services are usually provided by community or welfare organisations and are provided free of charge.

## **G**

### **Garnishee**

An automatic deduction arranged without a person's consent (generally from their income or bank account) due to non-payment of a debt. A trustee in bankruptcy can garnishee income or monies held by third parties on behalf of a bankrupt, where the bankrupt has been assessed as liable to pay a sum of money from their income as a contribution to their bankrupt estate and fail to make payments.

## **H**

### **Household property**

Items that a bankrupt is able to retain when they become a bankrupt. A list of items can be found in Bankruptcy Regulation 27.

## **I**

### **Income for contributions purposes**

This is the income of the bankrupt that is used for assessing their contributions liability. It is not necessarily the same as the bankrupt's taxable income for taxation purposes, as certain amounts are specifically included in, or excluded from, income for bankruptcy purposes – see section 139L of the Bankruptcy Act.

### **Indexed amounts**

These are amounts that are periodically adjusted in accordance with the consumer price index. Some are adjusted every quarter, others every six months. E.g. they identify the value of assets that can be retained by a bankrupt or the income a bankrupt can earn before they are required by law to contribute towards their bankruptcy.

### **Infringement notice**

A statutory demand for payment of a fine issued due to contravention of legislation. This is a general term that can apply to various agencies/bodies (e.g. issued by police, the ACCC, courts). In relation to the Bankruptcy Act, infringement notices may be issued (by AFSA's Regulation & Enforcement business line on behalf of the Inspector-General) in respect of certain offences against the Act.

### **Insolvent**

A person is considered to be insolvent when they are unable to pay their debts as and when they fall due.

### **Inspector-General in Bankruptcy (IG)**

An office created under the *Bankruptcy Act 1966* to be responsible for the general administration of the Bankruptcy Act and to have the powers to regulate bankruptcy trustees and debt agreement administrators, review decisions of trustees and investigate allegations of offences under the Act.

### **Interest charge**

The interest earned on funds held by registered trustees and debt agreement administrators is paid to the Commonwealth and used to fund the cost of conducting enquiries in certain bankruptcies, investigating alleged offences, monitoring and regulating trustees and administrators and providing information to a range of clients.



## **L**

### **Liability**

An obligation or responsibility to do something (such as repay a debt).

### **Liquidated debts or liquidated damages**

These are debts or damages where the amount has been fixed. Admitting liability for an amount being claimed as a debt or damages does not, of itself, necessarily mean that debt or those damages are liquidated.

## **N**

### **National Personal Insolvency Index (NPII)**

The electronic record of all personal insolvency administrations in Australia which can be accessed by anyone for a fee. This computerised database contains information on proceedings and administrations under the *Bankruptcy Act 1966*.

## **O**

### **Official Receiver (OR)**

An office created under the Bankruptcy Act to carry out statutory functions under that Act, including maintaining the NPII, providing registry services in relation to personal insolvency, and assisting trustees to perform their functions through the issue of statutory notices. The Official Receiver is represented by staff from AFSA.

### **Official Receiver Notice**

A notice issued by the Official Receiver, upon application by a trustee, to bankrupts, debtors or third parties requiring them to provide information, attend to give information under oath, give access to premises, deliver assets or make contribution payments, to better assist in the administration of a bankrupt estate.

### **Official Trustee in Bankruptcy (OT)**

The Official Trustee in Bankruptcy, a body corporate, administers bankruptcies and other personal insolvency arrangements when a registered trustee or other administrator is not appointed. The Official Trustee also has responsibility under the *Proceeds of Crime Act 2002* and the *Customs Act 1901* to control and deal with property under court orders made under these statutes. The Official Trustee is represented by staff from or AFSA.

## **P**

### **Personal insolvency agreement (PIA)**

Under Part X of the Bankruptcy Act, a personal insolvency agreement results from creditors accepting a debtor's proposal to settle his or her debts. Unlike debt agreements, personal insolvency agreements are not subject to income, asset or debt thresholds.

### **Prescribed information**

This is information that **MUST** be read by a debtor before making an application for bankruptcy or submitting a proposal to AFSA for a debt agreement under the Bankruptcy Act.

### **Proof of Debt (POD)**

A trustee will request lodgement of a POD where there are funds in the estate to distribute to creditors.

A dividend will only be paid to those creditors whose Proof of Debt has been admitted by the trustee.

### **Provable debt**

A debt covered by bankruptcy. This is an amount that a creditor is entitled to claim for in a bankruptcy. If it is accepted by the trustee the creditor will participate in any distribution that may arise by way of a dividend.

### **Proxy**

A written appointment given by a creditor to another person, the proxy (not being the creditor). If this is provided to the trustee before or at a meeting the proxy may attend the meeting and vote in place of the creditor. Attendance can be in person or by electronic means.

## **R**

### **Real estate**

Realty including vacant land, houses, units or commercial properties in Australia and overseas. Time shares are excluded.

### **Realisation**

Any income raised in an administration under the Bankruptcy Act.

### **Realisations Charge**

A levy on the money received by trustees and administrators in bankruptcies, debt agreements, compositions and personal insolvency agreements, used to fund the cost of conducting enquiries in certain bankruptcies, investigating alleged offences, monitoring and regulating trustees and administrators and providing information to a range of clients.

### **Registered Debt Agreement Administrator (RDAA)**

A debt agreement administrator who is registered with AFSA by the Inspector-General. A person must not administer more than five debt agreements at any one time unless they are registered.

### **Registered Trustee**

A person registered with AFSA on the NPII and registered to administer bankruptcies, personal insolvency agreements and debt agreements under Part X of the Bankruptcy Act.

### **Related creditor**

A creditor who is a related entity.

### **Related entity**

A related entity includes:

- (a) a relative of the person;
- (b) a body corporate of which the person, or a relative of the person, is a director;
- (c) a body corporate that is related to the body corporate referred to in paragraph (b);
- (d) a director, or a relative of a director, of a body corporate referred to in paragraph (b) or (c);
- (e) a beneficiary under a trust of which the person, or a relative of the person, is a trustee;
- (f) a relative of such a beneficiary;
- (g) a relative of the spouse, or de facto partner, of such a beneficiary;
- (h) a trustee of a trust under which the person, or a relative of the person, is a beneficiary;
- (i) a member of a partnership of which the person, or a relative of the person, is a member;

A relative means:

- (a) the spouse of the person; or
- (b) a parent or remoter lineal ancestor of the person or of the person's spouse; or
- (c) a child or remoter lineal descendant of the person or of the person's spouse; or
- (d) a brother or sister of the person or of the person's spouse; or
- (e) an uncle, aunt, nephew or niece of the person or of the person's spouse; or
- (f) the spouse of a person specified in paragraph (b), (c), (d) or (e)

### **Released from debt**

At the date of discharge a bankrupt is released from most debts. This means the bankrupt is no longer responsible for or has to pay those debts. A debtor subject to a Part X agreement is also released from their debts when they meet certain conditions set down in their agreement with creditors.

### **Resolution**

A resolution passed by a majority in number and value of the creditors present personally, by telephone, by attorney or by proxy at a meeting of creditors and voting on the resolution.

### **Revesting**

After discharge from bankruptcy and the expiry of certain time periods specified in legislation (which can depend on when property was disclosed to the trustee and the type of property and whether the trustee has extended the period by notifying the discharged bankrupt), if the property has not been dealt with by the trustee it becomes the former bankrupt's property at law.

## **S**

### **Secured creditor**

A creditor, whose debt is secured. See secured debt.

### **Secured debt**

A debt that is secured by an interest in property to which the lender may have recourse if the debt is not repaid e.g. mortgage.

### **Sequestration order**

An order made by the Federal Court or the Federal Circuit Court making a person bankrupt based on a Creditor's Petition or other application as outlined under the Bankruptcy Act.

### **Special resolution**

A resolution passed by a majority in number and at least three-quarters in value of the creditors present personally, by telephone, by attorney or by proxy at a meeting of creditors and voting on the resolution.

### **Statement of affairs (SOA)**

When a debtor becomes bankrupt or enters into a debt agreement or personal insolvency agreement, he or she must complete a Statement of Affairs that truthfully discloses all relevant details about their current financial position. This includes details of all debts, as well as details about current and recently owned assets. A debt agreement proposal,

A Debtor's Petition, and a Controlling Trustee authority submitted to the Official Receiver must be accompanied by a Statement of Affairs. Where a Sequestration Order is made the bankrupt must file the statement with the Official Receiver and give a copy to the trustee within 14 days of the order being made.

## **T**

### **Trustee**

See registered trustee and Official Trustee.

## **U**

### **Undischarged bankrupt**

A person who is still within the designated period of their bankruptcy, generally a period of three years from the date they filed their Statement of Affairs. They have obligations to fulfil with their trustee and they have various restrictions upon their conduct. The three-year period can be extended (see objection to discharge from bankruptcy).

### **Unsecured creditor**

A creditor whose debt is unsecured. See unsecured debt.

### **Unsecured debt**

A debt that is not secured by an interest in property to which the lender may have recourse if the debt is not repaid.

## **V**

### **Vest**

When something vests in a person, that person becomes the owner at law. A person in whom the property is vested has the right to possess and control.

