

Debt Agreement Reform

Fiona Reynolds | March 2018 | Commercial Disputes & Transactions

Summary

The Government recently released an exposure draft of the *Bankruptcy Amendment (Debt Agreement Reform) Bill 2018* (Bill). The Bill proposes a comprehensive reform of Australia's debt agreement system. Reform is timely having regard to the increased popularity of debt agreements as an alternative to bankruptcy. Between 2007 and 2016 new debt agreements increased from 6,560 to 12,640 per year.¹ Over the same period new bankruptcies declined from 25,754 to 16,842.²

What is a Debt Agreement?

A debt agreement is an alternative to bankruptcy available under the *Bankruptcy Act 1966* (Cth) (the 'Act') that permits insolvent debtors to enter an agreement with creditors to pay, over time, a compromised sum in settlement of outstanding debt. It is currently only available to individuals who have unsecured debt and unsecured divisible³ property of less than \$111,675.20⁴ respectively; an after-tax income below \$83,756.40⁵ and have not been bankrupt or had a debt agreement or personal insolvency agreement in the last 10 years.⁶

Purpose of the reform

The objective of the reforms is to boost confidence in the professionalism of debt agreement administrators; deter unscrupulous practices; enhance transparency between debt agreement administrators and stakeholders, and ensure that the debt agreement system is more accessible to debtors.⁷

Date of Effect

The majority of the amendments will commence six months after the Bill receives Royal Assent⁸ and will apply to debt agreement proposals given to the Official Receiver on or after commencement.⁹

Key Amendments Proposed

Debt agreement administrators must be registered

Currently anyone can administer a debt agreement including the debtor. It will be a requirement that only a registered debt agreement administrator, registered trustee or the Official Trustee can administer a debt agreement.¹⁰

Debt agreement administrators must be adequately insured

Presently there is no obligation on debt agreement administrators to hold adequate professional indemnity and fidelity insurance. It will be a condition of registration and renewal of registration that debt agreement administrators hold adequate and appropriate insurance. Any failure to do so will constitute an offence¹¹ and grounds for the Inspector General to cancel registration.¹²

The asset threshold for eligibility to apply for a debt agreement will double

The asset threshold for the value of debtor's divisible property will double.¹³ Divisible property is property that would be divisible among creditors if the debtor were bankrupt.¹⁴

Changes to debt agreement requirements to improve sustainability; avoid undue hardship to debtors and accountability of debt agreement administrators

Improve Sustainability

Total payments under a proposal for a debt agreement (or variation to an existing debt agreement) will not be able to exceed the debtor's income by a certain percentage.¹⁵ The Minister will determine the percentage.¹⁶

The maximum term for payment under a debt agreement proposal (including a proposal to vary any existing debt agreement¹⁷) will be 3 years from the date the agreement was made.¹⁸

Avoid Undue Hardship

The Official Receiver will be able to refuse to accept for processing a debt agreement proposal (or proposal to vary an existing debt agreement¹⁹) if the Official Receiver reasonably believes that the debtor will be unable to comply with the debt agreement²⁰ or the obligations under the agreement could cause undue hardship to the debtor.²¹ Affected debtors and creditors will be able to seek a review of that decision through the Administrative Appeals Tribunal.²²

Debt agreement administrators will need to certify that the debtor is likely to be able to discharge the obligations created by any proposal to vary an existing debt agreement.²³

Changes to enhance transparency between debt agreement administrators and stakeholders

Improved disclose of broker or referrer information

In the certificate required by section 185C(2D) of the Act²⁴ debt agreement administrators will be required to disclose the details of any broker or referrer involved and whether an affected creditor is a related entity of the debt agreement administrator. All affected creditors will receive a copy of that certificate.²⁵

Improving disclosure of expenses and reimbursement requirements

Debt agreement proposals will need to detail the types of expenses the debt agreement administrator can recover.²⁶ Debt agreement administrators will also not be able to reimburse themselves for expenses that were not disclosed in the debt agreement proposal.²⁷

Excluding the vote of debt agreement administrators and related entities who are creditors

Debt agreement administrators who are creditors of the debtor and any related entities of the administrator that are creditors of the debtor will be excluded from voting on debt agreement proposals²⁸ including proposals to vary or terminate existing debt agreements. The Official Receiver will also be able to disregard votes received from these parties.²⁹ The exclusions will not apply if the debt agreement administrator is self-administering his or her own debt agreement.³⁰

Broadening the Inspector General's Powers of Investigation and Inquiry

Trust Accounts

The Inspector General will be given a new power to obtain information from banks if the Inspector General reasonably suspects that a practitioner is misusing trust money or breaching their obligations under the Act.³¹

Power to investigate pre-appointment conduct

The Inspector General will be given the power to investigate the conduct of debt agreement administrators from the time of engagement with the debtor, regardless of whether a debt agreement is entered into. The investigation period is currently limited to the period of the debt agreement.³²

Introducing Penalties for fraudulent conduct

It will be an offence for proposed or existing debt agreement administrators to give, agree or offer to give an affected creditor an incentive to vote a certain way on a debt agreement and proposals to vary or terminate existing debt agreements.³³

Expanding the powers of the Court to terminate and void debt agreements

The Court will have the power to terminate a debt agreement in circumstances where a debt agreement administrator engages in fraudulent conduct or breaches any statutory duties.³⁴

Conclusion

The proposed amendments provide for much needed reform of the debt agreement regime. Increased regulation and supervision of debt agreement administrators is long overdue and absolutely critical to ensuring that debt agreements continue to be an accessible and effective alternative to bankruptcy.

¹ Explanatory Memorandum, Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 at [2]

² Ibid.

³ Divisible among creditors if the debtor were bankrupt

⁴ 185C(4)(b),(c) & 5 of the *Bankruptcy Act 1966 (Cth) (the Act)*

⁵ 185C(4)(d) & 5 of the Act

⁶ 185C(4)(a) of the Act

⁷ Explanatory Memorandum, Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 at [4]

⁸ Ibid at [5]

⁹ Bankruptcy Amendment (Debt Agreement Reform) Bill 2018, 'Frequently Asked Questions', Australian Government, Attorney General's Department, 16 January 2018

¹⁰ This amends 185C(2) of the Act.

¹¹ Introduce new s186HA of the Act

¹² Amend ss186K(3) & 186L(3) of the Act

¹³ Amend s 185C(4)(c) of the Act

¹⁴ S185C(4)(c) of the Act

¹⁵ Introduce new s185C(4)(e) of the Act

¹⁶ Introduce new s185C(4B) of the Act

¹⁷ Amend s185M to introduce subsection new (1D)

¹⁸ Amend s185C(2) of the Act

¹⁹ Amend s185M(2) of the Act

²⁰ Ibid

²¹ Amend s185E to introduce new subsection (2B) & amend 185M to introduce ss(2A)(variation)

²² Amend s185M to introduce new subsection (2C)

²³ Amend s185LA to introduce subsection (3)

²⁴ Amend 185C(2D) of the Act to introduce subsection (f)

²⁵ Amends 185EA(2)(a)(iii) of the Act

²⁶ Amend s185C of the Act to introduce subsection (3B)

²⁷ Amend s185LA of the Act

²⁸ Amendment s185EA of the Act to introduce subsection (4)(b) (Debt Agreement proposals) & amend s185PA of the Act to introduce subsection (4)(b) (proposals to terminate)

²⁹ Amend s185EC to introduce subsection (1A); amend s185PC of the Act to introduce subsection (1A) (termination)

³⁰ Amend s185EC of the Act to introduce ss(1B)

³¹ Amend s 186LA to introduce new subsection (1A)

³² Amend s12(1) of the Act to introduce new subsection (bd)

³³ Introduce new subsection (6) to s185EC of the Act (proposals); s185MC of the Act (variation proposal) and s185PC of the Act (termination)

³⁴ Amend s 185Q of the Act

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