



PART X PERSONAL INSOLVENCY AGREEMENT

WHAT IS A PART X PERSONAL INSOLVENCY AGREEMENT (PIA)?

A Part X Personal Insolvency Agreement is a formal legally binding arrangement that enables debtors to make an offer to their creditors in satisfaction of their debts. There are no income, asset or debt limits for Part X Personal Insolvency Agreements, as opposed to the limits for proposing a Part IX Debt Agreement.

Personal Insolvency Agreements are very flexible and can be structured according to the debtor's circumstances.

It is available to individuals, partnerships and joint debtors but not to corporations (which use the Voluntary Administration process).

OBJECTIVES OF A PART X

The main objectives of a Part X are to:

- To provide a flexible method for insolvent debtors to propose to creditors an arrangement under the regulation of the Bankruptcy Act, to deal with his/her financial difficulties.
- To protect insolvent debtors from the stigma and restrictions of bankruptcy as long as they remain amenable to the directions of their creditors.
- To hopefully provide a better outcome to all stakeholders (generally a higher dividend to creditors) than would be expected in a bankruptcy.

BENEFITS OF A PART X

Debtors

The benefits of a Part X for a debtor may include the following:

- prevent creditors from pursuing him/her in relation to unpaid debts and remove the concerns as to how monies owing are going to be repaid;
- allows the debtor to start life afresh;
- provides protection to the debtor and an orderly distribution amongst all creditors
- avoids the stigma and consequences/restrictions of bankruptcy;
- can be structured to allow a great deal of flexibility for all parties concerned;
- provides a formal agreement that is binding upon all parties.
- no monetary limits for entering into a Part X

Creditors

The benefits for creditors may include the following:

- often provides for a better return/dividend to creditors compared to the returns expected in a bankruptcy;
- can often receive a dividend quicker than in a bankruptcy;
- crystallisation of uncertainty;
- provide a formal agreement that is binding upon all parties;
- generally are cheaper to administer than a bankruptcy; and
- can be structured to allow a great deal of flexibility to all parties concerned.

THE PERSONAL INSOLVENCY AGREEMENT

The PIA proposal must:

- expressly state that it is entered into under Part X of the Bankruptcy Act 1966 ('the Act')
- identify what property and / or income is to be made available to pay creditors claims
- specify how that property and / or income is to be dealt with

- specify the extent to which the debtor is to be released from the provable debts
- specify whether or not the antecedent transaction provisions of the Act are to apply to the agreement
- detail any specific conditions for the agreement to come into force
- provide details of any circumstances where the agreement will terminate and the effect such termination will have on the release from provable debts
- specify the order in which the proceeds of realisation of property and / or income is to be distributed to creditors
- make provision for a person or persons to be appointed as Trustee(s)
- provide that the debtor will execute such instruments and generally do all such acts and things in relation to the property and income as is required by the agreement
- provide details of any other relevant matters

Antecedent transactions are transactions that fall into 3 categories:

1. Undervalued Transactions - where property has been sold or transferred at less than market value.
2. Transfers to Defeat Creditors - transfers made with the intention of preventing property being available to creditors.
3. Avoidance of Preferences - where some creditors have been paid in preference to other creditors.

It is possible to have a PIA that makes certain property available to certain creditors and other property available to other creditors. Obviously if a PIA gives some creditors an advantage to the detriment of other creditors, it would normally be more difficult to get creditors to accept the proposal.

As a PIA agreement has many and varied capabilities, the drafting of an agreement will be extremely important. As such it is suggested that a debtor obtain expert assistance in the drafting of a PIA agreement.

THE PART X PROCESS

To start the process, a debtor provides the following, to the proposed Controlling Trustee:

- An acknowledgement that he or she has received and read certain prescribed information about bankruptcy and other alternatives available to persons in financial difficulty.

- A Statement of Affairs (a Statutory Form in which he or she sets out all of his or her assets and creditors and certain personal and business details) **including noting if any of those creditors are a related entity**. (A related entity is a relative or any Body Corporate, Partnership or Trust in which a relative has a direct interest).
- A draft of the proposal (PIA) the debtor wishes to make to the creditors for consideration.
- A signed Authority under the Bankruptcy Act, called a section 188 Authority (the Authority), authorising either a registered Trustee, the Official Trustee or a solicitor to call a meeting of the debtor's creditors to vote on whether to accept the PIA or any amendment to it that may be agreed between the parties.

For the Authority to become effective, it must be signed by the registered Trustee, the Official Trustee or the solicitor. The registered Trustee, the Official Trustee or solicitor then becomes known as the Controlling Trustee.

Regulation 10.02 of the Bankruptcy Regulations provides that before the Controlling Trustee accepts appointment, he or she must have received a signed acknowledgment that the debtor has received and read certain prescribed information about bankruptcy and other alternatives available to persons in financial difficulty.

The Controlling Trustee is required to take control of the debtor's property and to conduct investigations of the debtor's affairs to determine whether the creditors' interests would be better served by accepting the proposal or by the bankruptcy of the debtor. This is conveyed to creditors by the Controlling Trustee issuing a report. The report to creditors also provides notice of a meeting that is held to consider the debtor's proposal.

The Controlling Trustee must call a meeting of creditors to consider the proposal within 25 working days (or 30 working days if the authority was signed in December) from the date when he/she signed the Authority the proposal. Creditors determine at the meeting whether the proposal is accepted or rejected. For a proposal to be accepted, a special resolution needs to be passed at the meeting, that is a majority of those voting and at least two-thirds (75%) of those voting for the proposal.

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If the proposal is accepted, a Trustee must be appointed to administer and monitor the PIA.

If the proposal is accepted, the parties to the Part X are bound by its terms. The debtor and Trustee will fulfil their respective responsibilities under the Part X. The debtor and the Trustee are required to execute the PIA in the form of a Deed within 21 days from the date on which creditors accepted the PIA.

If the Part X proposal is not accepted at the meeting of creditors, the Controlling Trustee period may continue for up to 4 months from the date that the Controlling Trustee signed the authority. The Controlling Trustee period may also be ended in other situations, such as upon the debtor's bankruptcy, if the debtor dies or if creditors' resolve for the period to end. The debtor's property will remain subject to the Controlling Trustee's control during this period.

ELIGIBILITY

A debtor is eligible to sign an authority pursuant to section 188 of the Act if he/she:

- is personally present or ordinarily resident in Australia;
- has a dwelling-house or place of business in Australia;
- is carrying on business in Australia, either personally or by means of an agent or manager;
or
- is a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager.

A debtor cannot give an authority within 6 months of giving another authority, unless permission of the Court is obtained.

WHO CAN ACT AS CONTROLLING TRUSTEE?

1. A registered Trustee, who is registered under the Act;
2. A solicitor (unless that solicitor has been disqualified from acting as a Controlling Trustee); or
3. The Official Trustee (ITSA).

WHO CAN ACT AS TRUSTEE?

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2. The Official Trustee (ITSA).

DUTIES & POWERS OF THE CONTROLLING TRUSTEE

The Controlling Trustee has the power to gather information from the debtor and other parties regarding the debtor's examinable affairs.

The Controlling Trustee has certain duties that he or she must perform, including:

- taking control of the debtor's property
- notifying the creditors of the signing of the 188 Authority;
- filing the Authority, Statement of Affairs and PIA with ITSA;
- completing and sending a report to the debtor, creditors and ITSA; creditors are to receive the report at least 10 days prior to the meeting of creditors taking place. The report will:

1. provide a summary of the debtor's assets and creditors;
 2. provide details of the results of any investigations made;
 3. comment on any relationships between the debtor and creditors;
 4. comment on any relationship between the debtor, any associated entity and the Controlling Trustee;
 5. disclose any relationship between the debtor, any associated entity and the proposed Trustee of the PIA;
 6. make a recommendation as to whether the PIA is in the best interests of creditors; and
 7. comment of the basis of remuneration for the Trustee of the PIA
- calling a meeting of creditors within 25 working days of the date the 188 Authority becomes effective (the period is extended to 30 working days for Authorities signed during the month of December)
 - advertising the meeting;
 - providing information about the administration to a creditor who reasonably requests it;
 - taking appropriate action to ensure the debtor discharges all of his/her duties under the Act;
 - considering whether the debtor has committed an offence under the Act and if so, report the alleged offence to the relevant authorities;
 - making appropriate enquiries and investigations in connection with the debtor's property and examinable affairs;
 - disclosing to creditors any material personal interest held by the Trustee that could conflict with the proper exercise of their powers or functions; and
 - exercising powers and performing functions in a commercially sound way and an impartial and independent manner.

The Controlling Trustee is empowered to:

- take immediate control of the debtor's property and affairs;
- make such inquiries and investigations in connection with the debtor's property and examinable affairs as the Controlling Trustee considers necessary;
- carry on a business of the debtor if, in the opinion of the Controlling Trustee, it will be in the interests of the creditors to do so; and
- deal with the debtor's property in any way that will, in the opinion of the Controlling Trustee, be in the interests of the creditors.

DUTIES & POWERS OF THE TRUSTEE OF A PIA

The duties and powers of a Trustee of a PIA may be detailed in the PIA, in addition to the Trustee's statutory duties and powers.

The Trustee's duties and powers are essentially to:

- perform any functions bestowed upon the Trustee under the PIA, such as realising property, collecting money and paying a dividend to creditors;
- monitor the terms of the Part X and take appropriate steps if the PIA is not complied with (such as recover property, terminate or vary the PIA or apply to bankrupt the debtor); and
- issue a certificate to the debtor once the provisions of the PIA have been carried (this is evidence of the finalisation of the Part X).

EFFECT OF A PART X ON A DEBTOR

Controlling Trustee Period

- The debtor's property is subject to the control of the Controlling Trustee.
- The debtor shall not remove, dispose of or deal with his/her property except with the written consent of the Controlling Trustee.
- a legal charge is created over the debtor's property in favour of the Controlling Trustee;
- The debtor must provide the Controlling Trustee with such information about his/her conduct and examinable affairs as required by the Controlling Trustee.
- The debtor must comply with any direction given by the Controlling Trustee with respect to his/her property or affairs.
- The debtor must attend the meeting of creditors held to consider his/her proposal, unless prevented by illness or other sufficient cause.
- The debtor shall, at the meeting, answer, to the best of his or her knowledge and ability, all questions put to him or her by the controlling trustee or by a creditor with respect to his or her conduct and examinable affairs.

While the PIA is in Operation

The debtor is required to comply with the terms of the agreement. Other effects on the debtor include:

- The debtor is released from his/her debts to the extent specified in the PIA.

- The debtor must provide the Trustee with such information about his/her conduct and examinable affairs as required by the Trustee and may be required to attend an examination pursuant to section 81 of the Act.
- Cannot act as a director and take part in the management of a company.
- Property that is not specified or dealt with in the PIA is not available to creditors and is therefore retained by the debtor.

EFFECT OF A PART X ON CREDITORS

Unsecured Creditors

The major effects that a Part X arrangement has on unsecured creditors are:

- They are no longer able to pursue the debtor for debts that would be provable in bankruptcy or enforce any remedies against property of the debtor unless the permission of the Court is obtained.
- They are bound by the terms of the PIA and their rights against the debtor lie in their ability to claim in the estate and participate in any dividend that may be paid from funds recovered by the Trustee.
- The debtor is released from his/her debts to the extent specified in the PIA
- Similar to bankruptcy, some debts are not provable in a Part X PIA and as a result will not be extinguished as a result of the PIA. The debtor does not obtain a release from debts incurred by means of fraud, penalties or fines imposed by a Court, sums payable under maintenance agreement or order and HECS debts.

Secured Creditors

- Secured creditors with valid security are able to enforce their rights pursuant to charges or securities that they hold over assets of the debtor.
- Secured creditors are entitled to claim as an unsecured creditor for the amount by which their debt exceeds the value of the property over which they hold security.
- A secured creditor may however forfeit its security and claim for the full amount of its debt.
- Where a secured creditor has realised its security, it may lodge a claim in the Part X PIA for any resultant deficiency.

DISTRIBUTIONS / DIVIDENDS TO CREDITORS

The proposed distributions/dividends to creditors may be set out in the PIA. Generally, the Trustee will collect the funds and/or property subject to the PIA and distribute it to creditors when the Trustee believes sufficient funds and/or property are available or when the PIA specifies distributions are to be made.

The Act provides that prior to the payment of a dividend, the Trustee must issue a notice to those creditors who have not lodged a formal claim (known as Proof of Debt), requiring them to lodge a claim by a certain date. If creditors do not lodge a formal claim by the required date, they may be excluded from receiving a dividend. The Trustee then must wait a further 21 days (after the date by which claims must be lodged) before the dividend is paid.

The Act provides for certain priorities to different classes of creditors when a dividend is paid. However the PIA may stipulate how monies or property are to be distributed.

The payment of a dividend may also be affected if there is joint property and joint creditors. In short, the Act requires joint assets of the debtors to be first applied to the joint debts incurred by the debtors and any surplus is then passed on to the separate estates of the debtors(s). Conversely, separate estates of the debtors must first be applied to separate debts of the debtors, that is, separate assets of each debtor must be first applied to debts incurred solely by the respective debtor. Any surplus from the respective separate estate(s) will then flow to the joint estate and will be paid to joint creditors.

If joint property and creditors are applicable, the Trustee is required to advise creditors of the implications on the payment of the dividend.

REMUNERATION & COSTS OF THE CONTROLLING TRUSTEE & TRUSTEE

The remuneration and the costs of the Controlling Trustee and Trustee may be paid by the debtor, a third party or from the funds/property available under the PIA. Generally, the remuneration and costs of the Trustee are paid from the assets/funds recovered under the PIA.

Pursuant to the provisions of the Act, remuneration/expenses/outlays of the Controlling Trustee and Trustee will be paid in priority to the claims of unsecured creditors (government charges are paid in priority to both).

The alternative methods available to approve the remuneration of a Controlling Trustees and Trustee are as follows:

1. a resolution passed by creditors at a meeting of creditors;
2. a resolution passed by creditors via a single resolution postal process;
3. a resolution passed by a committee of inspection (if appointed); or
4. the Bankruptcy regulations.

In most cases, the Controlling Trustee will provide details of the remuneration sought at the meeting of creditors to consider the debtor's proposal. Creditors will then determine the remuneration of the Controlling Trustee and Trustee (if appropriate). The Trustee may also seek approval of further remuneration at a later date if necessary.

Where either the debtor or a creditor are dissatisfied with the amount of remuneration taken by a Controlling Trustee or Trustee, that party may, by notice in writing lodged within 28 days of being notified in writing or becoming aware of the amount of the claim for remuneration, request a taxing officer to tax the remuneration.

If taxation results in a reduction of at least 15% in the amount of a claim for remuneration, the Controlling Trustee or Trustee must meet the costs of the taxation. Otherwise, the person who asks for the taxation must meet the costs. If any creditor wishes to have remuneration reviewed, you should contact the Insolvency and Trustee Service Australia, Level 13, 340 Adelaide Street, Brisbane, telephone (07) 3360 5444.

PUBLIC RECORD

Part X details are available to the public via a Government database known as the National Personal Insolvency Index ('NPII') and usually on databases of credit reference agencies. Access to the Government database can be obtained by contacting ITSA or information brokers such as Australian Business Research ('ABR'). Searches can be conducted by accessing our website at www.svpartners.com.au.

Details of the debtor's name, address, date of birth, occupation and the number of the Part X administration will remain on the NPII forever.

VARYING A PART X

A Part X PIA may be varied with the consent of the debtor and creditors in one of the following ways:

- The Trustee may issue a notice to all known creditors providing details of the proposed variation and its likely impact. If no creditor objects to the proposed variation by a specified date (deadline), the proposal takes effect on the specified date. If a creditor objects to the proposed variation in writing by the specified date, a formal meeting of creditors must be convened to consider the proposed variation to the PIA.
- A meeting of creditors may be convened to consider the proposed variation to the PIA. The Trustee will issue a notice to creditors detailing the proposed variation(s) and the time, date and place of the meeting. At the meeting, creditors will resolve by a vote whether the variations to the PIA are approved. The resolution is to be decided in accordance with majorities required for a special resolution (majority in number and 75% in value of those who vote at the meeting).

ENDING A PART X PIA

A PIA can be ended in the following ways:

- When all of the terms of the PIA have been fulfilled, that is, all parties have completed their obligations and responsibilities under the PIA. Once this has occurred, the Trustee will provide a certificate to the debtor as evidence that the terms of the PIA have been satisfied.
- The terms of the PIA itself may stipulate circumstances where the agreement will terminate.
- If the terms of the PIA are not complied with, the Trustee and/or creditors may terminate the PIA using the same procedure as a variation.
- By an order of the Court. This involves the Trustee, a creditor or the debtor making an application to the Court. There are a number of reasons why the Court may make an order to terminate the PIA. The main reasons include:
 - (a) The debtor provides false or misleading information at a meeting of creditors.
 - (b) The debtor has omitted a material particular from the Statement of Affairs or included an incorrect and material particular in the Statement of Affairs.
 - (c) The terms of the PIA cannot be fulfilled for some reason.
 - (d) The terms of the PIA are unreasonable, will not benefit the creditors generally or are unjust and cause undue delay to creditors.

Generally, the Court will take into consideration whether terminating the PIA is in the best interests of creditors.

The Court may also make an order declaring the debtor bankrupt.

*This paper is intended as an overview only. It is not a detailed advice.
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