

# afccra

**Australian Financial Counselling and Credit Reform Association**

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Dear David,

AFCCRA welcomes the opportunity to comment on the Review of Debt Agreements under Part IX of the Bankruptcy Act 1966 (as amended) and accepts that the submission will be available on the ITSA website. We also appreciate the opportunity for Elizabeth Terry to represent AFCCRA on the Advisory Group for the Review, and ITSA facilitating the focus group in Sydney which enabled financial counsellor representatives to participate more effectively in the consultation.

As AFCCRA's representative on the Bankruptcy Reform Consultative Forum, I have discussed the Review with financial counsellors and consumer advocates across Australia and encouraged groups to make submissions. I have pleasure in making AFCCRA's submission to this timely Review.

While the Issues Paper provided an overview of Debt Agreements ("Agreements"), I do not think that the high rate of Agreements being terminated before completion was sufficiently disclosed or addressed. The high rate of failure of Agreements from their inception is clear evidence of significant problems with Part IX and confirms the problems that financial counsellors predicted prior to the introduction of Debt Agreements and subsequently. As ITSA is aware, financial counsellors have raised concerns about the operation of Part IX for almost a decade.

While we understand that ITSA has undertaken various strategies to address issues, financial counsellors have felt that their concerns have not been taken sufficiently seriously. In AFCCRA's view, the objective of some ITSA offices to make Part IX work at any price has led to a reliance on Debt Agreement Administrators ("Administrators") operating ethically when there was clear evidence that this was not the case.

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Exploitative practices by Administrators were often dealt with by friendly chats and some ITSA offices prided themselves on the good relationships and strong connections they had with certain Administrators. However, it is AFCCRA's experience that these practices which were providing large profits to commercial Administrators were not sufficiently addressed in the context of the relationships between Administrators and ITSA. Feedback from financial counsellors on these continuing exploitative practices was not sufficiently heeded, in our view.

Many of the concerns raised by financial counsellors have also been raised by creditors' groups and some individual Administrators. Financial counsellors across Australia hope that this review will bring reform to Part IX to ensure significant improvement in its operation.

AFCCRA has always and continues to support Part IX if it operates appropriately as a flexible, low cost alternative to bankruptcy for those debtors for whom it is the appropriate option. We do not believe that this is currently the case, and that an Agreement is not the appropriate option for more than half of those currently being sold to debtors as the solution to their debt problems.

AFCCRA believes that the implementation of Agreements under Part IX of the Bankruptcy Act has not developed as expected by most stakeholders due to the growth of commercial Administrators, particularly the large companies which advertise widely on television, radio and in the print media. This advertising engages desperate debtors with a representation of an Agreement as the solution to their problems without any real assessment of their overall financial situation and the range of options which may be available to address their debt problems.

AFCCRA believes that rather than these activities being driven by the needs of the debtors, it is in fact driven by the opportunity for profit for Administrators particularly where salespersons are used at first and subsequent contact on the telephone, and/or in follow up home visits. This is especially so where there are different entities undertaking sales and administration of the resultant Agreement and particularly where salespersons are paid on commission.

From our case work discussions with debtors, it seems that the approach taken by most commercial Administrators is emotive advertising to desperate debtors followed by a brief phone conversation, then a home visit utilising high pressure sales techniques where the debtor is signed up to an Agreement on that occasion. Alternatively brief phone conversations are followed by reams of paperwork being sent to debtors, many of whom have low literacy skills and the cross marks the spot where you sign up. The time taken by most Administrators to take a debtor through this process and make what is a significant financial and legal decision with important implications for future financial management is reported as being less than half an hour in many instances and rarely more than two hours.

Contrast this with the practices of financial counsellors who understand the significance of any arrangement under the Bankruptcy Act. Generally a financial counsellor will do an initial assessment of at least an hour and will then at that time or

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in a subsequent appointment, provide the debtor with an overview of all options which may be available to address the debt problems.

Where an arrangement under the Bankruptcy Act is to be considered, the ITSA prescribed information booklet “Bankruptcy and other insolvency options” will be provided for the debtor to take away, read and consider. Then the financial counsellor will go through the options answering any questions the debtor has. Because a full assessment of the debtor’s family and financial situation has been undertaken, the financial counsellor will be able to more fully explain the implications for the debtor’s individual situation of any option being considered including arrangements under the Bankruptcy Act.

If the debtor decides to proceed with an arrangement under the Bankruptcy Act, the financial counsellor will generally provide assistance appropriate to the debtor’s skills and knowledge. This may be to propose a Debt Agreement or to petition for voluntary bankruptcy. In most cases, financial counsellors will have been able to advocate with creditors or assist the debtor to do so, and repayment arrangements with creditors outside the bankruptcy regime will have been made. AFCCRA is strongly of the view that many more debtors are finding themselves within the bankruptcy regime due to the introduction of and aggressive marketing of Agreements.

If seeing a financial counsellor, the debtor is also likely to have been assessed for eligibility for Government and other entitlements, and provided with information and assistance with money and debt management, as well as referral to other services if appropriate.

The Issues Paper states that Agreements provide debtors

*“...with and opportunity to take greater control over their financial affairs. In this regard, they have the potential to provide rehabilitation for debtors in financial distress which is a key objective of the personal insolvency system.”*

The experience of financial counsellors sorting out the problems of debtors with Agreements that are not working is that their finances are in fact MORE out of control due to direct debits of fees of the salesperson from the outset, debtors ceasing any debt payments they may have been making, and then direct debits to the Administrator of the Agreement if it is accepted by creditors. Generally, any work which may have been done on a budget is minimal, and undertaken in the context of putting the best case forward to creditors in the proposal, including altering actual financial information provided by debtors of their real income and expenses.

A fundamental principle of financial counselling is empowerment of clients through providing a thorough assessment, information on all the options available and the implications of each option, encouragement to clients to undertake as much of the work as they can themselves and transfer of skills and knowledge to the client as part of this process to enable the client to better manage their finances in the future. It is AFCCRA’s view that generally Administrators provide no or little empowerment of debtors and little if any opportunity for rehabilitation in its real sense.

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Below, this submission addresses the specific questions asked at the end of the Issues Paper:

**ISSUES :**

**1. Are debt agreements accessible to debtors as a viable alternative to other forms of personal insolvency administration?**

- (a) What are the administrator's/agent's responsibilities to ensure the debtor is fully informed about all the available choices for dealing with their financial difficulties?

**The administrator/agent should be obliged to ensure that the debtor is fully informed about all available options for dealing with their financial difficulties.**

- (b) To what extent can/should these responsibilities be regulated under the Bankruptcy Act?

**These responsibilities should be regulated fully under the Bankruptcy Act and the Act should be amended accordingly.**

- (c) Should the administrator/agent be required to affirm that they have explained the matters set out in the prescribed information before the debtor can make the proposal?

**Yes, the agent/administrator should be required to affirm that the prescribed information has been fully explained before the debtor can make the proposal.**

- (d) Should the Official Trustee administer more debt agreements?

**The Official Trustee should not administer more Debt Agreements. Scarce resources should be utilised to properly regulate Part IX including the behaviour of commercial Administrators.**

- (e) Does the requirement to include information about debt agreements on the NPII act as a disincentive to debtors who might otherwise be attracted to such agreements?

**Yes, information on the NPII is a disincentive for debtors – if they are told by Administrators and understand the implications which often does not happen in our experience.**

- (f) Should debt agreements be recorded on the NPII?

**No, an incentive should be provided to debtors seeking to undertake an Agreement to avoid bankruptcy. It is especially iniquitous that Agreements are registered on the NPII at the time they are accepted by ITSA for processing and this then affects their credit record for 7 years even if the proposal is rejected by creditors or the debtor withdraws the proposal.**

- (g) Should completed debt agreements be removed from the NPII?

**Yes, they shouldn't be on there – see previous answers.**

- (h) Should the NPII show that a debt agreement has been completed by paying out the creditors in full?

**See answers to (f), (g) and (h).**

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- (i) Are the current income, debt and asset limits appropriate?  
**Yes, at present. Part IX should not be extended to more debtors until the current problems have been addressed.**
- (j) Should these limits be removed?  
**No, see answer above.**
- (k) Should debtors be able to make debt agreements more than once every 10 years?  
**No, alterations to extend Part IX should not be made until the current problems have been addressed.**
- (l) What increase in the threshold levels would give debtors who are unable to access personal insolvency agreements access to debt agreements?  
**See answer to (j), thresholds should not be increased until current problems are addressed.**
- (m) What increase in the thresholds would affect the number of debtors accessing personal insolvency agreements?  
**Thresholds should not be increased at present.**
- (n) Should the requirement for a special resolution be retained?  
**Yes, the special resolution should be retained.**
- (o) Should the Official Receiver decide whether to accept a proposal instead of asking creditors to vote? If so, should this be on the basis that the proposal meets certain minimum requirements (statutory or otherwise)?  
**No, the decision making should not change until current problems with Administrators are addressed.**
- (p) Should debtors be required to disclose to all creditors the debts owed to related parties, and to financial advisers involved in the establishment of the proposal?  
**Yes, full details of all debts owed to related parties and financial advisers should be disclosed including the relationships.**
- (q) Should these financial advisers be able to vote on the proposal, as a means of avoiding their conflict of interest?  
**No.**
- (r) Should the Official Receiver disclose voting behaviours to debtors and their advisors?  
**Yes, voting behaviour should be disclosed to debtors.**

**2. Do debt agreements improve the returns that would otherwise be available to creditors?**

- (a) Should administrators' fees be further regulated or limited by the Act?  
**Yes, administrator/agent fees should be further regulated by the Act. The issue of fees continues to be a major concern for debtors and financial counsellors.**

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- (b) Should administrators' fees be related to the debts covered by the agreement? Should they be based on outcomes under the agreement or a percentage of returns to creditors?  
**Fees for administrators should be based on the work actually undertaken.**
- (c) Should pre-agreement fees be limited in some way?  
**Pre-agreement fees should be limited and regulated by ITSA.**
- (d) Should the legislation provide for a minimum return to creditors?  
**No.**
- (e) Should the Official Receiver publish statistics on the level of fees?  
**Yes, the Official Receiver should make available information on the level of fees.**
- (f) Should administrators be obliged to establish the sustainability of an agreement before they agree to be appointed?  
**Yes, administrators/agents should be obliged to establish the sustainability of an Agreement before they agree to being appointed.**
- (g) Should creditors be able to propose a termination without giving a reason?  
**No, creditors should not be able to propose a termination without giving a reason. This is an arrangement under the Bankruptcy Act and should be treated accordingly.**
- (h) Should the Official Receiver be obliged to refuse to put a proposal to vary or terminate an agreement if the Official receiver thinks that the variation or termination is not in the creditors' interest?  
**Criteria on which the Official receiver would make decisions in regard to accepting, varying or terminating an Agreement should be discussed with stakeholders before any changes are made.**
- (i) Should there be a requirement that the debtor is in default before the agreement can be terminated? If so, how should default be defined and who should decide that the debtor is in default?  
**Yes, a debtor should be shown to be in default before the Agreement can be terminated. Default should be defined as not making the required payments to the administrator under the Agreement as originally proposed or varied.**
- (j) Should the law clarify the duties owed by a debt agreement administrator towards the debtor and creditors? If so, what would be the key duties?

**Yes, the duties of administrators/agents should be clarified under the Act or in the Regulations after discussion with stakeholders including these recommendations.**

- (k) Should there be a time limit on creditors proposing a termination following default by the debtor? If so, what should that be?

**Creditors should be able to propose a termination of an Agreement from when the debtor is 3 months in default to the debtor being 15 months in default.**

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- (l) Should the agreement be automatically terminated at some time, with the release from debts continuing, so that the agreement is brought to an end? If so, when should that time be?

**Yes, the Agreement should be terminated with the release from debts continuing either 3 years from commencement of the Agreement or 6 months after the scheduled completion date of the Agreement as originally proposed or varied, whichever is longer.**

### **3. Do debt agreements provide a mechanism for the fair and efficient distribution of a debtor's resources among creditors?**

- (a) Should Part IX mirror bankruptcy and provide for all creditors to be entitled to the same rate of return on a debt agreement?

**Yes.**

- (b) Should there be limits on the extent to which an agreement may offer different rates of return? If so, what should those limits be?

**See above, different rates of return should not be available.**

- (c) Should an agreement be able to give some creditors a priority in payment of their debts?

**No, all creditors should have the same priority for payment.**

- (d) Should administrators be obliged by the legislation to report regularly to debtors and/or creditors particularly in relation to payments received from debtors and distributions made to creditors? If so, how regularly should they report?

**Yes, administrators should be obliged to report quarterly to ITSA, creditors and debtors on the progress of the Agreement.**

- (e) Should administrators be obliged to respond to reasonable requests from debtors and/or creditors in relation to this type of information?

**Yes, administrators should be obliged to respond to reasonable requests for this information from ITSA, creditors and debtors.**

- (f) What responsibility should an administrator have to enforce compliance where the debtor defaults?  
**The administrator should have no responsibility to enforce compliance where the debtor defaults but should inform the debtor immediately, and ITSA and the creditors in the next quarterly report.**
- (g) Should administrators be obliged to advise creditors when the debtor defaults and provide information about options for termination? If so, when should this advice be given (that is, what should constitute default)?  
**See above, the administrator should inform ITSA and the creditors in the next scheduled quarterly report.**
- (h) Should administrators have the power to propose that an agreement be terminated in the event of default, or, alternatively be obliged to propose that the agreement be terminated?  
**No, requests for termination should continue to be with the debtor and the creditors.**

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- (i) Should an administrator be able to arrange for a debtor's wages or salary to be garnisheed to meet an obligation under the debt agreement?  
**No, the administrator should have no power of garnishee over wages or salary of the debtor.**
- (j) Should an administrator be required to advise creditors that the debtor's financial position has improved so that they can consider proposing a variation of the agreement increasing the debtor's obligations?  
**The debtor's request is what initiates a variation of payments proposal to creditors and this should be the case whether the variation is upwards or downwards.**

**4. Do the Inspector-General in Bankruptcy, Official Receiver and Official Trustee play an appropriate role in regulating, and promoting best practice, efficiency and competition, in relation to debt agreements?**

- (a) Should debt agreement administrators be licensed in a similar way to bankruptcy trustees?  
**Yes, commercial administrators should be licensed.**
- (b) Should debt agreement administrators be required to place money received from debtors in a trust account pending distribution to creditors?  
**Yes, commercial administrators should be obliged to place monies received from debtors in a trust account pending distribution to creditors.**
- (c) Should there be a requirement for the regular audit of money held by debt agreement administrators?

**Trust accounts of commercial administrators should be regularly audited.**

(d) Should debt agreement administrators be required to provide a fidelity bond?

**Commercial administrators should be required to provide a fidelity bond.**

(e) How should brokers be regulated?

**Administrators should be held fully responsible for the actions of any brokers/agents/salepersons referring debtors, debtors' proposals or administration of debtors' Agreements to them.**

Thank you for the opportunity to respond to the Debt Agreement Review. AFCCRA continues to be very interested in the operation of Part IX of the Bankruptcy Act and hopes that this Review will bring about necessary reform.

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