

Chapter 11: Debt Agreements: Part 3

Updated: 17 December 2024

Content

- Part 1: The Debt Agreement proposal and acceptance process
- Part 2: Complaints about Debt Agreements and Debt Agreement Administrators
- **Part 3: Varying, terminating or otherwise ending a Debt Agreement**

Summary

This section covers the process for entering a Part IX Debt Agreement including:

- what must be included in the proposal
- the procedure for acceptance by AFSA
- the procedure for voting by creditors
- what happens next depending on whether it is accepted or not.

Information about who can enter a Debt Agreement, the consequences of entering Debt Agreement and comparative information about Debt Agreements and bankruptcy are included in **Chapter 5**.

This chapter provides information on assisting clients with common complaints about Debt Agreements, including what to do if a client has started the proposal process and does not want to proceed, or has pulled out and is now being chased for fees. Varying or terminating a Debt Agreement is also covered.

Note: This chapter is not intended to inform financial counsellors how to set up Debt Agreements for clients. It is intended to explain the process so that financial counsellors understand what is involved. It also provides information on what clients can (or can't) do if they decide they want to change their mind or experience problems along the way such as feeling misled or being unable to pay.

Part 3: Varying, terminating or otherwise ending a Debt Agreement

When the debtor has experienced a change in circumstances

A debtor may no longer be able to pay in accordance with a Debt Agreement for a number of reasons, for example:

- unemployment or reduction in income/employment
- increase in dependents (birth of a child, new dependent adult)
- unavoidable increase in essential expenditure (such as, medical bills, loss of free or supported housing).

Faced with an inability to meet the payments under a Debt Agreement a debtor has 3 options:

1. apply to vary the Debt Agreement
2. apply to terminate the Debt Agreement (and possibly present a Debtor's Petition)
3. wait and let the DAA trigger the termination of the Debt Agreement as a result of '6-month default'.

Varying a Debt Agreement

The debtor (or creditor who is a party to a Debt Agreement, in limited circumstances) can apply to vary the Debt Agreement by completing a proposal in the approved form accompanied by an Explanatory Statement, also in approved form (Section 185M). The form is very similar to the original proposal form in many respects but also requires particulars of the change of circumstances which has led to the need for the variation and the current status of the agreement (when was the last payment made/Is the agreement in arrears and by how much?). A proposal to vary a Debt Agreement must also include a certificate from the DAA stating that the debtor is likely to be able to discharge the obligations created by the Debt Agreement as varied. [The approved forms are available on the AFSA website: Debt Agreements Online.](#)

It is important that it is clear what the difference is between the original agreement and the varied proposal so that creditors can make an informed decision on whether to vote in favor of the proposal. The Explanatory Statement should also include both negative and positive changes to the debtor's financial position (for example, a reduction in income as a result of a birth of a child should also include information about any consequential increase in government support for the debtor and their family). Whilst there is no requirement to lodge a fresh statement of affairs, it may assist in demonstrating the change in the debtor's circumstances.

The variation should be submitted by the DAA on the client's behalf. If they refuse, a complaint can be made (see **Chapter 11, Part 2**). If it is submitted by the DAA and there may be an additional fee payable. Clients sometimes report difficulties in getting DAAs to put forward variation proposals. This may be because asking the creditor to accept less, or to accept the money over a longer period, will also involve a decrease in the amount that can be kept by the DAA for administration. If the debtor is dissatisfied with the DAA, they can approach another DAA to submit a variation proposal to the Official Receiver proposing the replacement of the current DAA with a new DAA or lodge a variation themselves.

There are no grounds for variation set out in the Act. Commonly the debtor may want to reduce the monthly repayments, reduce the payments and extend the period, or seek a temporary suspension in repayments.

Also, if a debtor's financial position has improved, they may wish to vary the agreement by increasing the regular payments or offering a lump sum so that the agreement can be ended earlier. Understandably, in the majority of cases creditors would readily accept such variation proposals. Creditors may also ask the debtor to increase the total amount payable under the agreement if there has been a significant improvement in the debtor's financial position.

If the Official Receiver receives a variation proposal that complies with the requirements of s 185M, then it must be processed in accordance with s 185MA, and the same voting process applies as for the original Debt Agreement. Whilst the Official Receiver has no discretion to reject the variation proposal on the basis that it is not in the interests of the creditors, the Official Receiver can withdraw the variation proposal if a material error or deficiency is detected in the proposal. This decision can be appealed to the AAT.

Creditors can also apply to vary a Debt Agreement

A creditor who is a party to a Debt Agreement can also apply to vary a Debt Agreement under s 185M(1). However, [*Official Receiver Practice Statement 11, Debt agreements*](#), provides that 'there are a limited number of instances where a creditor may propose a variation that does not affect the payments and obligations of the debtor' and gives the example of a change to the DAA.

The Practice Statement also clarifies that 'a variation proposal that is lodged by a creditor relating to payment or action by the debtor without documented agreement by the debtor will not be accepted to send to creditors for voting'. The Official Receiver may call the debtor and DAA to establish whether such agreement has been obtained.

If a creditor seeks to change the payments or action under the Debt Agreement, it may be more practical to attempting to persuade the debtor to lodge their own

variation proposal. Alternatively, or if the debtor declines to do so, the creditor can submit a proposal to the Official Receiver that the Debt Agreement be terminated.

Getting out of a Debt Agreement

Summary

Getting out of a Debt Agreement is almost impossible unless your client is happy to simply default and eventually go bankrupt.

A Debt Agreement can be terminated by:

- agreement of the creditors (after a proposal is put forward by the debtor or one of the creditors)
- default (it will be terminated automatically once the debtor has been in continuous default for six months or if the agreement has gone more than 6 months past its due date for completion without a variation having been agreed to)
- termination by the court (usually at the application of a creditor who was either not included in the agreement or who has evidence the debtor has substantially misled the creditors in the initial proposal)
- being declared void by the court (this section appears to have potential at least in theory to assist debtors but has not been used in this way to date).

Applying to terminate a Debt Agreement

A debtor may also apply to terminate a Debt Agreement. The process is the same as for setting up and varying the agreement – the proposal must be in the approved form and include an Explanatory Statement setting out the reasons for the termination (Section 185P). If the proposal appears to be in the approved form, it must be accepted for processing (s 185P) and the creditors will be asked to vote whether or not to accept the termination proposal in the same manner as the original proposal (s 185PA).

The Act does not specify any required grounds for termination. However, the [Official Receiver Practice Statement 11, Debt agreements](#) provides that ‘a proposal to terminate would generally only be appropriate where the debtor has failed to perform the terms of the debt agreement or failed to disclose material information that affected creditors’ original vote’ and gives the following examples of the types of situations that may prompt a proposal to terminate:

- the failure of the debtor to start or maintain payments with little likelihood of completing the debt agreement
- a change to the debtor’s circumstances where they can no longer afford payments and a variation to reduce payments is not feasible
- material non-disclosure of employment or income that would have affected the

- creditors' original decision to support a debt agreement
- a material reduction in the estimated dividend to creditors because of significant undisclosed debt
 - a material omission of divisible property that would have affected the creditors' original decision to accept the debt agreement.

The forms required by AFSA list a number of possibilities for termination at the instigation of the debtor or creditor:

- debtor has ceased payments and is unlikely to recommence
- significant undisclosed unsecured debts
- significant understatement of unsecured debts
- significant undisclosed income or assets
- unemployment or redundancy
- incurred significant post Debt Agreement debts
- loss of income
- unexpected medical expenses
- loss of supporting payments e.g. free board
- increase in number of dependents
- relationship breakdown and separation.

The termination proposal must also contain a detailed status report from the DAA, updated information about the debtor's outstanding debts and a statement by the debtor indicating that they understand that the debts are reinstated to their pre-Debt Agreement amounts plus interest, less any amounts paid to creditors under the Debt Agreement (not amounts paid to the DAA for set up administration), and that enforcement action may recommence.

Again, the Official Receiver may declare a termination proposal withdrawn if, before the deadline for acceptance and before acceptance, the Official Receiver becomes aware that the information contained in the proposal document is wrong or deficient in a material way, or that the circumstances of the debtor have changed in a significant and relevant way not envisaged by the proposal (s 185PD). This decision can be reviewed by the AAT.

Creditors have only 14 days to vote (from acceptance and recording on the NPII) on a termination proposal unless proposal was lodged in December in which case the voting period is 21 days (s 185).

Proposal to terminate by the debtor

If a Debtor wishes to propose to terminate a Debt Agreement, they must be warned that they will not be able to propose another Debt Agreement for 10 years (s 185C(4)).

The Official Receiver's Practice Statement only mentions one circumstance in which the debtor may wish to terminate the agreement – that is, that the debtor wishes to lodge a Debtor's Petition rather than continue with the Debt Agreement. However, the debtor may

submit a termination proposal on the grounds that there has been a significant decrease in their financial circumstances, and they can no longer make the payments required under the Debt Agreement. It would then be up to the creditors if they wished to pursue enforcement action (or effectively force the debtor into bankruptcy).

Proposal to terminate by a creditor

A proposal to terminate by a creditor must include a current status report by the DAA to ensure that up-to-date agreements are not generally terminated. The Official Receiver will not process a proposal to terminate if payments are up to date and no other reasons are provided. A failure to distribute a dividend by the DAA is not a reason to terminate if payments by the debtor are up to date. In order to terminate an up-to-date agreement, the creditor must be able to demonstrate a valid reason such as the 'non-disclosure of income, debts or assets which materially affect the dividend rate to creditors'.

Termination as a result of a 6-month arrears default

A DAA must notify all the creditors who are party to a Debt Agreement within 10 working days if the debtor is in arrears for a period of 3 consecutive months (s 185LB). If the debtor is in default for a period of 6 consecutive months, then the DAA must notify the Official Receiver within 10 working days (s 185LC). This may include a debtor making no payments at all for 6 calendar months past the due date for a payment, or 6 calendar months have passed since the date for completion of the agreement and the agreement has not been completed. It is not 6 months since the last payment, but 6 months after the next payment was due and unpaid.

In the case of passing the date for completion of the Debt Agreement, this will usually occur because the debtor has continued to make some payments (and has not therefore incurred a previous 6-month arrears default) but pays less than the required amount and/or misses some payments. In practice this means that a debtor must either get completely up to date within 6 months of the due date for completion, or get a variation approved within this time, in order to avoid a termination of the agreement at this late stage.

If the agreement is terminated, the debtor will lose any benefit the agreement offered in terms of savings on capital and interest (including interest accrued since the agreement was entered), while having all the disadvantages of a listing on the NPII and their credit report continue. They will also face potential enforcement action, including potentially a Creditor's Petition.

Once the Official Receiver has been notified of a 6-month arrears default, and the Official Receiver is satisfied that the alleged default has in fact occurred, then the Official Receiver must declare in writing that the Debt Agreement is terminated and record that fact on the NPII (s 185QA). The Debt Agreement is officially terminated on the date the termination is recorded on the NPII (s 185QA).

The Official Receiver may make compliance calls to the debtor and/or administrator to confirm the facts and seek evidence in the event of a dispute about the facts. However, there is no discretion for the Official Receiver to decide not to terminate a Debt Agreement provided the 6-month arrears default has occurred.

Termination as a result of the debtor's bankruptcy

A Debt Agreement is automatically terminated upon the bankruptcy of the debtor (s 185R). Although a debtor generally cannot present a Debtor's Petition while in a Debt Agreement (s 55(5A)) and can't be personally subjected to a Creditor's Petition (s 185K), he or she may become bankrupt as a result of, for example:

- Obtaining permission of the Court to present a Debtor's Petition while subject to a Debt Agreement
- a Creditor's Petition being presented against a partnership of which the debtor is a member.

Termination of a Debt Agreement by Court Order

The debtor or the executor/executrix of their estate, Official Receiver or a creditor of the debtor (but not necessarily a party to the

Debt Agreement) can apply to the court for an order terminating a Debt Agreement (s 185Q(1)). A court can make the order if it is satisfied that (s 185Q(4)):

- the debtor has failed to carry out a term of the agreement AND it is in the creditors' interests to terminate the agreement; or
- that carrying out the agreement would cause injustice or undue delay to the creditors or the debtor; or
- the DAA has contravened ss 185EC(6), 185MC(6) or 185PC(6); or
- that for any other reason the agreement should be terminated and that it is in the creditor's interest to do so.

As mentioned above, if the application is made by a creditor, then a simultaneous application for a sequestration order against the debtor may also be made (s 185Q(2)).

Applying to void a Debt Agreement

The debtor (or the executor/executrix of their estate), Official Receiver or a creditor of the debtor (but not necessarily a party to the Debt Agreement) can apply to the court for an order that all, or a specified part, of a Debt Agreement is void (s 185T(1)). The court can make the order if it is satisfied that (s 185T(2)):

- there is doubt on a specific ground that the Debt Agreement was not made in

- accordance with the relevant sections of the Act; or
- the statement of affairs lodged with the Debt Agreement was deficient because it omitted a material particular or because it was incorrect in a material particular; or
 - the DAA has committed a breach of duty in relation to the Debt Agreement; or
 - the DAA has breached a condition of registration (if they are a registered DAA) or a condition imposed under the Insolvency Practice Rules (if they are a registered trustee).

The court must not make a Debt Agreement void, or part of it void, on grounds of noncompliance with the Act if there is substantial compliance – that is minor technical noncompliance will be insufficient to have the agreement declared void (Section 185U(2)). Similarly, the court must not declare an agreement void on the grounds of a deficiency in the statement of affairs unless the court is satisfied that it is in the interests of the creditors to do so (s 185U(3)).

The court can make whatever other orders it sees fit in relation to the Debt Agreement, including ordering a person to pay another person compensation of a specified amount (s 185U(5)-(6)). In the case where the debtor considered that they had been misled by the DAA when proposing their Debt Agreement, an application by the debtor to have it declared void would appear preferable to applying to have it terminated because of the possibility of being awarded compensation if the application was successful. However, given the comprehensive nature of the prescribed information given to the debtor as part of the Debt Agreement proposal process (and signed by the debtor), the debtor would have to have fairly good evidence of the misleading statements/conduct, and/or have personal attributes that made it difficult for them to comprehend the prescribed information, in order to have a good case.

A debtor who was not insolvent at the time of making a Debt Agreement proposal could, in theory at least, apply to the court to have the Debt Agreement declared void. On the other hand, as AFSA usually relies on a statement signed by the client to the effect that they cannot meet their debts as they fall due, and DAA's are quite adept at dictating a form of words sufficient to satisfy AFSA, then the debtor may risk exposing him or herself to criticism by the court for signing a false statement or even prosecution under s 267 of the *Bankruptcy Act*.

An order cannot be made declaring the Debt Agreement void, or partly void, after all the obligations created by the agreement have been discharged (s 185T(3)). If a creditor is applying to make a Debt Agreement void, then the creditor may also apply for a sequestration order. Similar rules apply as in relation to terminating a Debt Agreement and applying for a sequestration order (see above).