

# Bankruptcy and the Family Home

## Fact Sheet



### This fact sheet covers:

---

- ✔ A brief explanation of what bankruptcy is
  - ✔ The circumstances in which a home will be sold in bankruptcy
  - ✔ The procedure for selling the home
  - ✔ Things to be aware of during the sale process
  - ✔ What happens after the sale process
  - ✔ What to do if you are a non-bankrupt co-owner
- 

## 1. What is bankruptcy?

---

Bankruptcy is a legal process through which you are declared unable to pay your debts when they fall due. You may file for bankruptcy (voluntary bankruptcy), or alternatively, creditors can apply to have you declared bankrupt. If you are declared bankrupt by either of the above means, you will be removed from managing your own finances, and a trustee will be appointed to manage your money and assets.

To understand the ways in which bankruptcy may affect you, please read our [factsheets](#) on the 'Consequences of Bankruptcy' and 'Bankruptcy and Joint Assets and Debts'.

The purpose of this fact sheet is to explain what will happen to your home when you or a co-owner become bankrupt.

## 2. In what circumstances will the home be sold?

---

The home is not always sold. Whether or not the home is sold depends on your individual circumstances. The trustee will consider factors such as:

- if there is **equity** in the home (see section 2.1);
- whether there are any debts over the home for example, a mortgage (see section 2.2);
- whether the home has been purchased with **protected money** (see section 2.3);
- who owns the home (see section 3); and
- who becomes bankrupt: the sole owner, one of the two co-owners or both co-owners (see section 3).

## 2.1 Equity

Usually the trustee will only take action to sell the home if there is **equity** in the home.

### DEFINITION

Having **equity** means that your home is currently worth more than the value of the debts secured against it. For example, if a home is valued at \$200,000 and the debts secured over it are \$100,000, the home will have \$100,000 equity.

If there is equity in the home, the trustee will apply to have their name replace your name on the **Certificate of Title**. As such, ownership of your share in the home will be transferred to the trustee.

If there is no equity in the home, the trustee may not sell the home. However, the trustee will usually lodge a **caveat** to prevent you or the non-bankrupt co-owner from attempting to sell or mortgage the home.

Even if there is no equity in the home at the time you are declared bankrupt, equity in the home may be created if the home increases in value or subsequent mortgage repayments are made during your bankruptcy period (usually 3 years). If this happens, the trustee may reconsider whether it should sell the home.

### DEFINITION

**Certificate of Title** is the official certificate of ownership of the home. It states who owns the home.

A **caveat** restricts any new interests from being created over a home without the permission of the caveat holder (which in these circumstances will be the trustee).

## 2.2 Mortgage

Most homes have a mortgage over them, meaning the mortgagee (a bank or lender) is able to take possession of the property in certain situations. The most common reason for banks to repossess homes is failure to meet the mortgage repayments. However, most mortgage contracts also allow the mortgagee to step in and sell the home if one or all the co-owners become bankrupt. Typically, mortgagees will leave the sale of the home to the trustee.

## 2.3 Protected Money

If your home was purchased with **protected money**, it cannot be sold by a trustee to pay off your debts.

### DEFINITION

**Protected money** includes certain superannuation funds, insurance policies and workers compensation payments.

## 3. What is the procedure for selling the home?

The process for selling the home will depend on whether your home is held in:

- sole ownership (see section 3.1); or
- co-ownership (see section 3.2).

### 3.1 Sole ownership

#### DEFINITIONS

**Sole ownership** means that only one person owns the home.

- If you are a sole owner who becomes bankrupt, the trustee's name is placed on the **Certificate of Title** in place of your name. This is to enable the trustee to sell your home (see the definitions under section 2.1).
- The trustee will then determine if the home is to be sold. The home will likely be sold if:
  - there is **equity** in the home (see section 2.1); and/or
  - it was not purchased with **protected money** (see section 2.3).
- Once the home has been sold, the proceeds from the sale will be used to repay your debts.

### 3.2 Co-ownership

Co-ownership is the term used to refer to two (or more) people owning a home together. There are two types of co-ownership: joint tenants and tenants in common.

For property owned in NSW, if you have a copy of the 'Transfer of Land Form 01T' (from Land and Property Information) it will state whether you own your home as joint tenants or tenants in common in the 'Tenancy' section.

(H) TRANSFEREE

(I) TENANCY: [Dropdown menu]

DATE [Text field]

(J) *From the [ ] by the TRANSFEROR*

- Standard
- Company with seal
- Company without seal
- Attorney
- Authorised officer of a company or of a government department or authority

Change Execution

EXAMPLE OF THE TRANSFER OF LAND FORM 01T

### 3.2.1 Joint tenants

You are a joint tenant if you:

- acquired your interest in the home at the same time and in the same transaction as your co-owner;
- have an identical interest in the home as your co-owner. This means that the nature, extent and duration of your interest is exactly the same as that of your co-owner; and
- have an equal right to possession of the entire home.

#### What happens if you are a joint tenant?

- If you are a joint tenant and you become bankrupt, the portion of your home that you own will be transferred to the trustee. The trustee's name will be placed on the **Certificate of Title** in place of your name. This is to enable the trustee to sell the home.
- The joint tenancy between you and the non-bankrupt co-owner will no longer exist. Instead, the co-owners of the home will be the trustee and the non-bankrupt co-owner. They will then own the home as 'tenants in common'. (For a further explanation of tenants in common, see section 3.2.2.)
- The trustee will give the non-bankrupt co-owner the option to buy the trustee's interest in the home. If the co-owner is able to do this, they will own the home in full. If not, they will need to cooperate with the trustee to market the home to be sold.
- If the co-owner is not cooperating with the trustee and they fail to reach an agreement, the trustee can ask the court to appoint a 'statutory trustee for sale'. Appointing a statutory trustee will force the sale of the home. This may occur even if the non-bankrupt co-owner is financially stable and has not contributed to the bankruptcy in any way.

### 3.2.2 Tenants in Common

You are a tenant in common if:

- the home is divided in unequal shares (as a fraction, decimal or percentage) for example, you own 60% of the home and your co-owner owns 40%; and
- you have an equal right to possession of the entire home.

#### What happens if you are a tenant in common?

- If you own the home as tenants in common and you become bankrupt, the trustee's name is placed on the **Certificate of Title** in place of your name. This is to enable the trustee to sell the home.
- The trustee will then give the non-bankrupt co-owner the option to buy the trustee's interest in the home. If the co-owner is able to do this, they will own the home in full. If not, they will need to cooperate with the trustee to market the home to be sold.
- If the co-owner is not cooperating with the trustee and they fail to reach an agreement, the trustee can ask the court to appoint a 'statutory trustee for sale'. Appointing a statutory trustee will force

the sale of the home. This may occur even if the non-bankrupt co-owner is financially stable and has not contributed to the bankruptcy in any way.

## 4. Things to be aware of during the sale process

---

### 4.1 How long will selling the home take?

Trustees will typically sell the home in a timely fashion. Generally, an individual remains bankrupt for 3 years. Trustees are required by law to sell a home within 6 years after an individual's bankruptcy ends. This allows 9 years to arrange the sale. If the trustee does not sell the home within this period, ownership of the home could be returned to the individual.

The 6 year rule only applies if the trustee is aware the home exists. If a home is not disclosed in the bankruptcy documents, the trustee will have 20 years to take possession and sell the home.

### 4.2 Can I stay in my home while it is being sold?

Usually, if you are bankrupt, you are not expected to immediately move out of your home. In normal circumstances, the trustee will give you a few weeks to make alternative arrangements.

In some cases, the trustee may allow you to stay in your home during the selling period, provided you assist with the sale process, contribute a fair rent and maintain the home.

## 5. What happens once the home is sold?

---

### 5.1 How are the proceeds of sale distributed?

If you are the only owner of your home, your secured debts (for example, a mortgage) are paid first out of the sale proceeds. The remainder of the sale proceeds are given to the trustee to pay your unsecured debts and trustee fees. Any remaining funds after this distribution will be given back to you.

If the home is owned by two people, your secured debt (for example, a mortgage) will still be repaid first. However, any remaining funds will then be divided in proportion between both co-owners. The trustee can then use your portion to pay off your unsecured debts.

#### EXAMPLE

Mary and Adam own a home valued at \$200,000. The home is held between Adam (the bankrupt) and Mary (the non-bankrupt co-owner) as joint tenants in equal shares (i.e. 50/50).

If there is a mortgage worth \$50,000 over the home, the remaining share of equity held between Adam and Mary is \$150,000. Adam's share of the equity is half of this, that is, \$75,000.

If the trustee sells the house, they can use that \$75,000 to pay Adam's unsecured creditors.



However, if the \$50,000 mortgage was only in Adam's name, the final share of the home would be:

Adam:  $\$100,000 - \$50,000 = \$50,000$

Mary:  $\$100,000$

Therefore, the trustee would only be able to use the \$50,000 from Adam's share to pay the unsecured creditors of his debts.

## 6. I am a non-bankrupt co-owner: what should I do?

---

If you are the non-bankrupt co-owner, you should consider the following:

1. you may wish to make an offer to the trustee to purchase the share in the home held by the bankrupt before he/she became bankrupt, however bear in mind that the trustee does not have to accept your offer;
2. if you have made unequal contributions to the mortgage or the purchase price of the home, you should seek legal advice regarding how to protect yourself and recover your portion from the sale proceeds; and
3. if the home was security for a debt which is not fully repaid from the sale proceedings, you may be liable to the secured creditor for the shortfall, and you should seek legal advice.

# Resources

---

## Related Resources

["Bankruptcy", Australia Securities & Investments Commission \(ASIC\)](#)

["Bankruptcy Guide", Federal Court of Australia](#)

["What is Tenancy", NSW Government, Land and Property Information \(LPI\)](#)

["What can be taken or sold in bankruptcy?" Australias Financial Security Authority \(AFSA\)](#)

## Legislation and Cases

*Bankruptcy Act 1966 (Cth)*

- Section 116
- Section 120
- Section 121
- Section 129AA

*Real Property Act 1900 (NSW)*

