

### This fact sheet covers:

- ✔ Assets of a bankrupt
- ✔ Employment, contributions and income
- ✔ Obligations when bankrupt
- ✔ End of bankruptcy

## 1. Assets of a Bankrupt

If you become bankrupt, a trustee is appointed to administer your bankruptcy and this may include selling certain assets for the benefit of creditors (people you owe money to). The trustee is usually the Australian Financial Security Authority (AFSA), but can be a private trustee. The trustee has a duty to act in a commercially sound manner for the benefit of creditors. Assets are anything of value owned by you at the time of becoming bankrupt, and anything you buy or receive or become entitled to during your bankruptcy.

The *Bankruptcy Act 1966* (Cth) allows people who become bankrupt to keep certain assets. These include:

- most ordinary household and personal items;
- tools used to earn an income up to an [indexed amount](#) (currently \$3,700);
- vehicles where the total value of the vehicles minus the sum owing under finance is no more than an [indexed amount](#) (currently \$7,800);
- most funds in regulated superannuation funds and any withdrawals from regulated superannuation funds made *on or after* the date of bankruptcy (superannuation withdrawals made *before* the date of bankruptcy are not protected);
- life insurance policies for you or your spouse and the proceeds from these policies received after bankruptcy;
- compensation for a personal injury or workers' compensation (whether received before or after the date of bankruptcy);
- assets held by you in trust for another person (for example, a child's bank account); and
- if creditors agree, awards of a sporting, cultural, military or academic nature, such as medals or trophies, and claimed as having sentimental value.

The trustee will recover any assets other than the above, even if they are overseas or in someone else's possession. The trustee will generally permit you to retain a reasonable amount of cash and money in bank accounts so you can meet your ongoing living expenses. Besides the assets listed above, all of the assets that belong to you at the start of bankruptcy, or that you receive during bankruptcy, "vest" in the trustee (unless the property is specifically exempt). This means that the trustee is given the power and authority to deal with the assets and you no longer have any claim to them or any right to deal with them. The trustee has rights to take physical possession of and control of the assets, including the right to sell them. If you own a share in an asset, for example a house that is jointly owned with a partner, your share of the asset vests in the trustee, and the trustee can sell that share to pay your debts.

## The House

In relation to your house, a trustee will conduct investigations to establish the value of the property, the amount owed to mortgagees, the number of co-owners and the intentions of co-owners. The trustee will ask the mortgagees if they plan to take any action to sell the property and may lodge a caveat. If the trustee does decide to sell the property, the mortgagees will be advised and a real estate agent may be appointed.

Either the mortgagee or trustee can sell the house when they so choose. The trustee will probably assess whether it is commercially viable to sell the house, which means establishing the equity position and working out whether there will be any money left over after paying out the mortgage and paying the costs of sale. There is no legal requirement that it be sold at a time you prefer. The mortgagee or trustee also has the option of waiting to see if the value of the property increases and selling at a later date.

## Trustee's powers to recover assets transferred prior to bankruptcy

The trustee also has powers to investigate assets you owned before bankruptcy. If you gave away or sold any assets for less than their value prior to bankruptcy, or in order to stop the creditor getting the assets, the trustee may either recover these assets (that is, take possession of them and deal with them) or the difference between the true value of the asset and the amount you received for it.

## Trustee's power to recover assets obtained during bankruptcy

The trustee has the power to make a claim for assets obtained during bankruptcy.

If a person obtains an asset during the period of their bankruptcy and tells the trustee they have obtained the asset within 14 days of doing so, the trustee has 6 years from the date that the bankruptcy ends or from being told about the asset (whichever is the later) to claim it. The trustee can

### ! CAUTION

The trustee can recover property transferred **within five years prior to bankruptcy** if the property was undervalued when transferred (except if the transfer was made more than four years prior to bankruptcy to a relative or other "related entity" and the bankrupt was solvent at the time). If the transfer was made with the intention to "defeat creditors", there is **no time limit** – the trustee can recover this property any time prior to bankruptcy.

extend this time period for an extra 3 years and there is no limit to the number of extensions that can be made.

If the trustee is not told about the asset, they have 20 years from the date of bankruptcy in which to make a claim for the asset.

## Trustee's powers to recover assets after bankruptcy has ended

Where a transfer is said to have been made for less than market value, the trustee has **6 years** from the date of bankruptcy to make a claim to recover the property. Where a transfer is said to have been made to defeat creditors there is **no time limitation** applying to the trustee's right to seek to recover the property. Accordingly, a trustee may seek to recover property after your bankruptcy has ended.

## 2. Employment, Income and Contributions

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Being bankrupt does not restrict you from being employed and earning an income during your bankruptcy. However, if your after-tax income exceeds a certain amount you will have to pay contributions to the trustee, of half the amount earned above the threshold. The threshold that applies depends on how many dependants you have. The trustee will calculate the amount of the liability for each year of bankruptcy and will send a notice of assessment that outlines the total amount due, instalments (if applicable) and how to make payments.

The *Bankruptcy Act 1966* (Cth) defines what the trustee should include when assessing your income. It is important to note that this differs from the Australian Taxation Office's assessment of taxable income. The trustee's assessment will include (but is not limited to):

- a) wages and salary from all jobs;
- b) tax refunds;
- c) taxable fringe benefits;
- d) salary sacrifice arrangements;
- e) superannuation receipts, annuities and pensions;
- f) business profits;
- g) loans from associated entities;
- h) income earned which is paid to someone else (including to a company or trust);
- i) superannuation contributions in excess of 9.5% made by an employer that arise from an industrial agreement solely between you and your employer; and
- j) income earned overseas.

### ! CAUTION

You must disclose all income and benefits and any other information reasonably requested to the trustee, otherwise penalties may apply. You must also advise the trustee immediately if your income or number of dependants changes.

## 2.1 Hardship provisions

### NOTE

Applications for hardship must be in writing, must explain why you will suffer hardship and must include documentary evidence of income and expenses. The trustee will make a decision on the application within 30 days after receiving the application and sufficient supporting evidence and will give a written notice setting out the reasons for their decision. If the trustee does not reply they are taken to have refused the application.

There are specific hardship provisions in the *Bankruptcy Act 1966* (Cth) which are limited to exceptional circumstances that would impose an excessive financial burden. The list of what constitutes “hardship” is specific, and the trustee does not have discretion to grant hardship for expenses that aren't specifically listed. The exceptional circumstances are:

- a) ongoing medical expenses;
- b) costs of child care essential for work;
- c) particularly high rent when there are no alternatives available;
- d) substantial expenses of travelling to and from work;
- e) loss of financial contribution, usually made by your spouse, to the costs of maintaining your household.

## 2.2 Disclosing your bankruptcy

The *Bankruptcy Act 1966* (Cth) does not require you to disclose your bankruptcy when applying for employment. However, a prospective employer might ask for this information or choose to conduct a search to find out. Many professional associations and licensing authorities have their own conditions around bankruptcy of their members which is not regulated by the *Bankruptcy Act 1966* (Cth) and is at the discretion of the each body, for example lawyers may not be allowed to continue practising if they are made bankrupt. Under the *Corporations Act 2001* (Cth), bankrupts are prevented from managing corporations unless they obtain approval from the Court.

## 3. Obligations when Bankrupt

Obligations of a bankrupt include:

- compliance with all requests made by the trustee;
- if made bankrupt by a sequestration order, filing a statement of affairs within 14 days of being notified of the order (Form 3, can be found on the AFSA website);
- supplying all books, bank statements and other documents that the trustee asks for;
- if you move house, telling the trustee in writing immediately;
- telling the trustee if income increases from that disclosed previously;
- not going overseas without obtaining the trustee's written permission in advance and having a legitimate reason;

- disclosing bankruptcy if asking for any form of credit more than the indexed amount (currently \$5,360);
- telling the trustee immediately if you win any money or other prizes;
- telling the trustee immediately if you get any new assets (e.g. a house or car);
- telling the trustee immediately if you become the beneficiary of a deceased estate;
- not administering any trust account (e.g. as a solicitor or accountant); and
- fully and truthfully disclosing to the trustee all property and its value.

## 4. End of Bankruptcy

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Bankruptcy generally comes to an end as a result of either discharge or annulment.

### Discharge

A bankrupt is due for discharge three years and one day after either:

- a) you filed a debtor's petition and statement of affairs with AFSA; or
- b) AFSA accepted your completed statement of affairs (if made bankrupt by a sequestration order).

Bankruptcy can be extended to five or eight years. This happens when the trustee lodges an objection to discharge because, for example you failed to provide information to the trustee, to disclose to the trustee all income or to pay assessed income contributions.

After discharge, your name will appear on the National Personal Insolvency Index (NPII) forever as a discharged bankrupt and on credit reporting agencies' records for 2 years from the date of discharge, or up to 5 years from the date you became bankrupt, whichever is later. This may make it more difficult for you to get credit in the future.

### Annulment

Annulment is effectively the cancellation of a bankruptcy. There are three ways a bankruptcy may be annulled:

1. you pay your debts in full, including interest, the realisations charge and the trustee's expenses and fees. The realisations charge is a percentage of amounts received by a trustee from the sale of your assets or repayment of debts that must be paid to the government;
2. the creditors accept a composition or arrangement (which is an offer made by you through your trustee of something less than payment in full, to finalise your debts); or
3. you successfully apply to the court for an order annulling the bankruptcy.

### USEFUL INFORMATION

For further information on the consequences of bankruptcy see AFSA's website at <https://www.afsa.gov.au/insolvency/i-cant-pay-my-debts/what-are-consequences-bankruptcy>

