Chapter 8: What Happens Now? Part 1

Updated: 15 April 2025

- **Part 1: Life in Bankruptcy**
- Part 2: The light at the end of the tunnel – getting out of bankruptcy
- Part 3: Challenging Trustees' Fees

Summary

- Life as a bankrupt comes with obligations and restrictions. Clients must now:
  - co-operate with the Trustee;
  - notify the Trustee of all material changes of circumstances (eg income increases or decreases, property acquired, money inherited or won etc);
  - inform the Trustee in writing of any change of name;
  - complete paperwork and possibly attend creditors' meetings (rare for financial counselling clients);
  - provide the Trustee with access to records and information;
  - possibly pay income contributions; and
  - disclose their bankruptcy if they borrow money, enter lease or hire purchase agreements, offer to supply goods and services, or pass cheques worth more than the threshold amount.

Part 1: Life in Bankruptcy

This chapter includes information about:

- obligations and offences
- freezing of accounts
- income contributions – hardship and enforcement
- permission to travel
- provable debts (collection attempts)
- secured loans
- insurance claims
- External Dispute Resolution
- early release of super
- other issues.

Sample letters are included where applicable. A handout for your client to help them remember their obligations and where to go for help is also included.

Clients can find their mandatory disclosure confronting. Although bankruptcy can relieve stress and empower the client to move on with their lives, a poorly prepared undischarged bankrupt may be subjected to a whole new range of stresses.

The role of financial counsellor shouldn't necessarily end with the lodgement and acceptance of the bankruptcy. The client may continue to experience significant practical and emotional challenges as a consequence of the bankruptcy. They may need assistance to fill in any forms the Trustee may require, or to advocate in relation to what constitutes protected property. They may want help to develop strategies to minimise the likelihood they will become bankrupt again in the future. They may face difficulties paying income contributions, seeking permission to travel, or paying secured loans.

Once the bankruptcy has been accepted, the undischarged bankrupt's affairs fall under the control of the appointed trustee in bankruptcy (the Trustee). The job of the Trustee is to ensure that any income or assets not protected in bankruptcy are made available to the creditors. The Trustee may be someone from AFSA or a private registered trustee (any reference to 'the Trustee' includes AFSA where the Official Trustee is administering the estate). In some cases, the Official Trustee is the initial trustee before the estate is subsequently transferred to a private trustee. The client has no say in such a transfer.

The main role of the Trustee is to obtain funds for distribution to creditors from one or more of:

- the sale of assets that are not protected in bankruptcy
- the recovery of property that was transferred to third parties before bankruptcy
- income contributions.

For some financial counselling clients this will have no relevance because they have no assets and very limited income.

During the bankruptcy the Trustee may seek further information from the undischarged bankrupt including proof of income, financial statements, contracts and so forth. The undischarged bankrupt has a responsibility to supply this information to the Trustee and keep the Trustee informed of any change in their personal circumstances including income, relationship status or place of residence. Additionally, the Trustee may investigate transactions between the bankrupt and their relatives and friends which could involve those persons being required to appear in Court and give evidence about their dealings with the bankrupt.

During the period of bankruptcy, the bankrupt will be regarded as an undischarged bankrupt. The period of bankruptcy ends three years and one day from the date on which the statement of affairs is filed, unless the period is extended by the Trustee lodging an

objection. When the person is discharged from bankruptcy, they will become a discharged bankrupt.

The restrictions discussed in **Chapter 3** and **Chapter 6** will apply to undischarged bankrupts, who must comply with the bankruptcy laws and regulations and co-operate with the Trustee. Failure to do so can result in a breach of the Bankruptcy Act leading to potential extension of the period of bankruptcy for up to 8 years and the possibility of prosecution.

Clients need to understand that as long as they are completely honest and forthcoming with information for their Trustee, the process should run smoothly. If they withhold information, or attempt to hide assets or money, or otherwise deceive the Trustee in any way, they are likely to be in serious trouble.

Any decision of a Trustee is potentially reviewable, although repeated unsubstantiated complaints will not assist in influencing the Trustee to exercise their discretion in the bankrupt's favour. This Chapter contains information about seeking a review or making a complaint in two specific areas – hardship in relation to income contributions and seeking a review of the Trustee's remuneration and expenses. If you wish to assist your client to complain about, or seek a review of, these or any other aspects of the Trustee's conduct/decision-making, write to:

AFSA Regulation and Enforcement

- Phone – 1300 364 785
- Online – submit the relevant feedback form linked at paragraph 4 on the AFSA website.
- Post – GPO Box 2604, Adelaide SA 5001.

Reporting and other obligations of bankrupts

Obligations to the Trustee and the court

The undischarged bankrupt must give the Trustee all books and financial records of the bankrupt's examinable affairs, and the bankrupt's passport (if any), 'forthwith' (s 77(1)). Often the Trustee will not require the passport to be physically surrendered, so the client should wait to see if it is requested. Passports and financial records should NOT be lodged with the Debtor's Petition or statement of affairs.

Throughout the bankruptcy, and in accordance with s 77(1), the bankrupt must also:

- attend the Trustee whenever the Trustee reasonably requires
- give the Trustee any information about his or her conduct or examinable affairs that the Trustee requires
- notify the Trustee as soon as practicable after becoming a bankrupt of any material change in his or her position since the lodgement of the statement of affairs
- notify the Trustee of any further material change in position as soon as practicable

after that change occurs (for example, an increase in income)
- attend a meeting of the creditors whenever the Trustee requires and give such information at the meeting in relation to his or her conduct or examinable affairs that the Trustee requires
- execute such instruments and do whatever is required in relation to his or her property to give effect to the requirements of the Bankruptcy Act, the Trustee or any orders of the court
- disclose to the Trustee any property received or acquired that would be divisible among creditors as soon as practicable after it is received or acquired (for example, an interest in a deceased estate (such as an inheritance), major lottery prize etc)
- 'aid to the utmost of his or her power' in the administration of his or her estate.

If the bankrupt is prevented by illness or other reasonable cause from doing any of the above, they may have a defence (although such failure should be corrected as soon as it is practical to do so).

A person's **examinable affairs** are defined under s 5(1) as:

1. the person's dealings, transactions, property and affairs; and
2. the financial affairs of an associated entity of the person, in so far as they are, or appear to be, relevant to the person or to any of his or her conduct, dealings, transactions, property and affairs.

A **material change** is defined under s 77(2) as:

'a change in the particulars contained in the bankrupt's statement of affairs, where the change could reasonably be expected to be relevant to the administration of the bankrupt's estate.'

Case study

A bankrupt's only asset was a caravan. The Trustee had indicated her intention to sell the caravan. The bankrupt had been living in the caravan but had received an offer of rental accommodation in a share housing arrangement that suited his needs and income. The Trustee strongly suggested that the bankrupt should stay in the caravan until a buyer had been located. The bankrupt did not want to do this because a suitable rental opportunity might not be available at a later date. Although the bankrupt should aid the Trustee to the utmost of his or he power in the administration of the estate, this does not extend to being required to live in a particular place.

The bankrupt is free to take up the offer of rental accommodation.

The bankrupt must notify the Trustee immediately in writing of any change in the bankrupt's name, address (of the bankrupt's principal place of residence) or in their daytime telephone

number (s 80(1)). If the bankrupt in fact assumes or begins to use a different or additional name, this will be deemed to be a change of name and must be notified in writing (s 80(2)). Failure to comply with this section is a strict liability offence carrying a penalty of 6 months imprisonment (s 80(1)-(1A)). Prosecution is only likely in the context of a other offences having been committed, for example, trying to hide income or assets using the alternative name. Clients should nevertheless be told the seriousness of the obligation.

A bankrupt can be summonsed to court to be examined in relation to their affairs (including after they have been discharged from bankruptcy) upon the application of a relevant creditor, the Trustee or the Official Receiver (s 81(1)). A person who fails to appear in accordance with such a summons can be arrested.

Offences

A bankrupt, or a person subject to a Bankruptcy Notice or Creditor's Petition, can be arrested and brought before the court and in some cases imprisoned under s 78(1) if they:

- abscond (run away or hide) to avoid his or her debts or to delay bankruptcy proceedings
- remove or conceal their property to prevent or delay the Trustee from taking possession
- remove, conceal or destroy books or other financial records relevant to their examinable affairs.

In such cases the court can also order that books, records or property be seized and delivered into the custody of a particular person.

Only a bankrupt (not a person subject to a Bankruptcy Notice or Creditor's Petition) can be arrested and brought before the court and in some cases imprisoned under s 78(1) if they:

- conceal or remove any of their property without the permission of the trustee
- neglect or fail to comply with any order of the court or other obligation under the Bankruptcy Act without good cause.

Other offences include:

- failing to disclose property (s 265)
- disposing of or creating a charge over property with intent to defraud the creditors (s 266)
- making a false declaration (including but not limited to in the statement of affairs) (s 267)
- failing to keep proper books of account (or failure to preserve such books of account) in the 5 years prior to bankruptcy (except where such failure was honest and excusable) (s 270)
- gambling and hazardous speculation as covered in detail in **Chapter 6 Part 8** (s 271)

- leaving Australia prior to bankruptcy (in the 6 months before or after presentation of a Petition) with the intent to defeat or delay creditors (see **Note** below) (s 272)
- leaving Australia while bankrupt without the Trustee's written permission (s 272)
- failing to disclose the person's bankrupt status (s 269) when doing any of the following for an amount above the relevant threshold ($7,060 as at 15 April 2025 for current indexed amounts check the AFSA website):
    - obtaining credit
    - obtaining goods or services from a person:
        - by giving a bill of exchange or cheque drawn, or a promissory note
        - by giving 2 or more of the above which add up to more than the threshold.
    - entering into a hire-purchase agreement, or entering into a contract or agreement for the leasing or hiring of any goods
    - obtaining goods or services on credit
    - promising to supply goods or render services.
- running a business in a name other than the name used in the bankruptcy documentation (for example under an assumed name, in the name of another person or, either alone or in partnership, under a firm or business name) (s 269(1)(b))
- failing to keep books explaining income and other transactions during bankruptcy unless notified in writing that this is unnecessary (s 277A)
- having incurred a debt within the 2 years prior to becoming a bankrupt without having any reasonable or probable expectation of being able to pay (s 265(8)).

Minor technical breaches are unlikely to be prosecuted and in many cases the option of extending the bankruptcy (see below) will be preferred to the rigorousness of mounting a criminal prosecution. However, Trustees have an obligation to report any apparent offence to AFSA, who will then investigate and assess whether the matter is worthy of a report to the Commonwealth Director of Public Prosecutions (CDPP). The CDPP will then conduct its own analysis of whether there is sufficient evidence to proceed to prosecution. Ultimately, the court will decide the matter on the evidence.

> **Note:** Simply travelling overseas within the 6 months before bankruptcy is not an offence. It must be with the intent to defeat or delay creditors. There must be evidence that the client did not intend to return, did not return, or was in some way divesting him or herself of assets in the course of the journey.

Examples of successful prosecutions:

> **Case Study 1**
>
> A Victorian man was convicted in the Melbourne Magistrates Court, after pleading guilty to a breach of the Bankruptcy Act.

Mr Giuseppe (Joseph) Catalano was charged with obtaining services without disclosing his bankruptcy, after failing to tell a private school that he had an undischarged bankruptcy when enrolling his son and committing to the school's fees.

He was fined $2,500 and has been ordered to pay restitution to the school, an amount of just under $20,000.

Mr Catalano was first declared bankrupt in 1997 by an order of the court and has not yet submitted his Statement of Affairs. As a result of this failure to comply, Mr Catalano will remain bankrupt until his Statement of Affairs has been accepted by the Official Receiver.

In addition to the first bankruptcy in 1997, Mr Catalano declared bankruptcy for the second time in February 2015. As part of the bankruptcy declaration, he acknowledged the legal requirement to tell a supplier that he had an undischarged bankruptcy. At that point, he owed the private school almost $30,000.

Source: *Victorian man convicted after failing to disclose bankruptcy, AFSA media release,* 10 May 2021

Case Study 2

A Victorian woman was sentenced to 2 years imprisonment by the Victorian County Court after pleading guilty to 13 offences under the Bankruptcy Act.

Thao Thi Luong was prosecuted for disposing of property with the intent to defraud creditors, both in the 12 months prior to her bankruptcy and during her bankruptcy.

She will serve 5 months imprisonment and will also be subject to conditions upon release – including a three year good behaviour bond, with $4,000 as security.

Ms Luong was made bankrupt by a court order in January 2019, with accrued debts of more than $1.5 million.

After her initial bankruptcy notice was served in August 2018, Ms Luong withdrew and disposed of more than $50,000 from a range of bank accounts that she was a signatory to.

A creditor's petition was filed in November 2018, and Ms Luong withdrew and

disposed of a further $95,000 between December 2018 and January 2019. Of this amount, $45,000 was received from Crown Casino. Information about the bank accounts in her name was not provided to her bankruptcy trustee nor included in her Statement of Affairs.

Source: *Victorian woman jailed for serious bankruptcy offences*, AFSA media release, 6 October 2021

Case Study 3

A New South Wales man was fined after pleading guilty to 4 counts of disposing of property within 12 months of filing for bankruptcy and one count of making a false declaration following an investigation by AFSA.

Mr Mahfoud Assi was convicted in the Parramatta Local Court, sentenced to 18 months of community corrections orders and fined a total of $9,000 for his offending.

Mr Assi was declared bankrupt in July 2020. In administering Mr Assi's estate, the Official Trustee discovered that within 12 months prior to bankruptcy, Mr Assi withdrew $120,000 across 7 cash withdrawals from his bank accounts. Two days prior to filing for bankruptcy, Mr Assi also transferred ownership of a boat.

Mr Assi subsequently made a false declaration on his Statement of Affairs by not declaring the transfer of the boat.

The matter was prosecuted by the Commonwealth Director of Public Prosecutions on behalf of AFSA.

Suspected wrongdoing, criminal misconduct, dishonesty, or fraud in a personal insolvency can be reported to AFSA at Reporting a tip-off. Tip-offs can be made anonymously.

Mr Assi pleaded guilty to 5 counts under the Bankruptcy Act 1966.

- Counts 1 – 4: Dispose of property objectively valued at $20 or more and within a period of 12 months after the disposal of that property a petition for bankruptcy was presented, contrary to s 265(7) read with s 265(4)(a)
- Count 5: Knowingly make false declaration in statement of affairs contrary to s 267(2)

For counts 1- 4 he was convicted and sentenced to serve two 12-month community corrections orders concurrently and fined a total of $9,000. For count

5 he was convicted and sentenced to an 18-month community corrections order concurrent with counts 1-4, for making a false declaration.

Source: *NSW man sentenced following property disposal prior to bankruptcy*, AFSA media release, 29 September 2023

Freezing of accounts

If your client has an account with funds in it, the funds in the bank account vest in the Trustee at the date of bankruptcy. Bank accounts can be frozen if they contain funds but in practice the Trustee may allow an account to hold a threshold amount before freezing the account ($5,000 when the estate is administered by AFSA but potentially lower when handled by a registered trustee – about $2,500). Your client should make sure they have an account with less than this amount in it for general cost-of-living expenses. Direct debits, if any (such as for rent, secured loans, utilities etc), should be set up from this account only. This should be the same account into which the bankrupt's wages or Centrelink benefits are paid. It is prudent to get a balance of the account on the day Debtor's Petition is lodged.

Your client is allowed to accumulate money (savings) from earnings after the date of the bankruptcy (subject to any assessed income contributions) but should be able to trace the origin of the funds in the event of a dispute with the Trustee. If the money is directly deposited by their employer there should be a clear audit trail, provided these funds have not been mixed with others. Income should NOT, however, be used to purchase assets (including shares) until after discharge from bankruptcy, as such assets will vest in the Trustee as after acquired property.

Case Study

Marc Di Cioccio, during his bankruptcy, earned income below his 'actual income threshold amount'. He was able to save some of this income partly because he was in prison. With the money saved, he acquired shares in several companies. Later, after his release, Mr Di Cioccio informed the Official Trustee that he intended to buy a car. The Trustee asked where the money was going to come from for the purchase, and Mr Di Cioccio said that he intended to sell the shares.

The Trustee informed Mr Di Cioccio that those shares vested in Trustee,because s 58(1)(b) of the Bankruptcy Act states that 'after-acquired' property ofthe bankrupt (ie property that is acquired by the bankrupt on or after the date ofthe bankruptcy) vests in the Trustee. The Federal Court agreed with the Trustee.The Trustee sold the shares and put the money from the sale towards Mr DiCioccio's debts.

Source: *Di Cioccio v Official Trustee in Bankruptcy (as trustee of the Bankrupt Estate of Di Cioccio)* [2015] FCAFC 30 (11 March 2015)

Occasionally, an overzealous Trustee may freeze accounts with even small amounts in them. In the event that your client's cost-of-living account has been frozen, they should contact their Trustee in the first instance. If they are unable to resolve the matter directly with the Trustee, you may be able to advocate for them. You will need to show that either:

1. the client needs the funds to cover essential living expenses and are suffering genuine hardship as a result of their inability to access them
2. that the funds (or a portion of them) have been saved from income since the date of the bankruptcy (a balance of the account at the date of bankruptcy will assist in this process).

If the Trustee will not release the funds, you or your client can complain to AFSA.

Note: The Trustee may have a genuine claim against funds the bankrupt has wrongly retained, for example, proceeds of an insurance claim in relation to loss or damage in relation to property which has vested in the Trustee. In that case your client should seek legal advice.

Income contributions

If your client earns income above the applicable threshold as disclosed in the statement of affairs, they will usually receive an Assessment Notice within a week or two of lodging their statement of affairs, provided the required evidentiary information is attached. The Assessment Notice should contain:

- the basis of the calculations
- who the bankrupt should contact at the Trustee's office if they have questions
- their appeal rights and the applicable procedure
- their hardship rights and the applicable procedure.

Contribution Assessment Periods, or CAPs, each run for 12 months with the first commencing from the date of the bankruptcy. Prior to the completion of each CAP the bankrupt must complete an Income Statement and provide evidence of their actual income received in the current CAP, and the expected income for the subsequent CAP.

There are penalties for failure to supply this information. Further, the bankrupt risks the Trustee drawing his or her own conclusions. As already emphasised in **Chapter 6**, clients would be well advised to notify the Trustee of any significant change in their circumstances during a CAP or face the possibility of either paying too much, or accumulating significant arrears when the evidence of actual income is supplied at the conclusion of the CAP.

The Trustee is entitled to take into account a wide range of other sources of information if they are dissatisfied with the information supplied with the statement of affairs or Income Statement, or they have uncovered inconsistent information as a result of their investigations of the bankrupt's affairs. At the end of each CAP, the Trustee compares the bankrupt's actual after-tax income to the projected figure used in the income contribution assessment for the CAP. If there is a significant variation, a reassessment is done. If the bankrupt's income increases or decreases significantly during a CAP, a reassessment is done. A reassessment can be done at any time even after the bankrupt has been discharged from bankruptcy.

Bankrupts who have no apparent capacity to pay contributions at the outset of the bankruptcy may not always be sent Income Statement forms. They should nonetheless notify their Trustee if there is a significant increase in their income.

The bankrupt has a right to appeal the Trustee's assessment of contributions if they are dissatisfied with the assessment: see **Chapter 6 Part 4.**

Note: for more information on any aspect of income contributions see *Official Trustee Practice Statement 1 Income Contributions Issued I 7 February 2008 Updated 1 July 2021.*

Hardship

Section 139T(1) of the Bankruptcy Act provides that the bankrupt can apply to the Trustee to increase the applicable income threshold (effectively reducing their income contributions) if

payment of the assessed contributions would cause the bankrupt hardship for one or more of the reasons set out in s 139T(2), including where:

- the bankrupt, or a dependent of the bankrupt, has expenses for ongoing medical attention or the supply of medicines as a result of an illness or disability
- the bankrupt has childcare costs which enable the bankrupt to continue in employment
- the bankrupt lives in private rental accommodation and pays rent
- the bankrupt incurs substantial expense travelling to and from work (whether by public or private transport)
- another member of the bankrupt's household, who ordinarily contributes to the household expenses, cannot do so due to unemployment, illness or injury.

The Act provides for other reasons to be included in the regulations but to date none have been added.

The client must give the Trustee evidence of the reason for, and value of, the expenses. The client must be responsible for paying the expense from their *own income*, and must be able to show that this expense, when viewed in the context of the client's contributions and remaining living expenses will cause 'hardship'. High expenses alone will not justify a change if there is no hardship as a result.

Case study – hardship and contributions

Steve Phillips became bankrupt when a sequestration order was made against his estate. The bankruptcy was extended past the statutory 3-year period when the Trustee filed a notice of objection to discharge. During this period, Mr Phillips was diagnosed with cancer, which required him to undergo several surgeries and to miss some work. Mr Phillips claimed that he had incurred costs for his health treatment, and had his income diminish by taking a prolonged period off work.

Mr Phillips showed the Tribunal evidence of his ill health and evidence that the treatment and medication for his health condition was costly, mostly in the form of medical records. However, he failed to provide evidence that he would be required to pay for these costs himself, ie from his own income. Additionally, he failed to provide evidence that he had been unable to work for the period and thus could not support his claim that his lowered income was the result of his ill health. As a result, the Tribunal was not satisfied that Mr Phillips was suffering or going to suffer financial hardship and refused to increase his income threshold amount accordingly. This arguably harsh result underscores the importance of robust evidence in support of every element of the hardship application.

Source: *Phillips v Inspector-General in Bankruptcy* [2012] AATA 788 (13 November 2012)

A sample letter to apply to the Trustee for relief on hardship grounds is provided below.

Attach evidence of the expense(s) causing hardship and the reason for the expense, and an income and expenditure statement demonstrating the resultant hardship.

If your client's bankruptcy is being administered by the Official Trustee then the letter is addressed to the Official Trustee, care of AFSA. AFSA may assist the client to prepare this letter if you are not able to do so.

The Trustee will make a determination whether or not to raise the threshold for the relevant CAP. The Trustee must then make a new income contribution assessment for the relevant period and notify the bankrupt in writing.

If the Trustee is not satisfied that the bankrupt will suffer hardship, then the Trustee must refuse the application. In that case the Trustee must write to the bankrupt setting out the following:

1. the Trustee's decision
2. the evidence or other material on which the decision was based
3. the reasons for the decision
4. a statement to the effect that the bankrupt may request the Inspector-General to review the decision.

If the Trustee does not respond to the bankrupt's application within 30 days, the Trustee is taken to have refused the application and the bankrupt may apply to the Inspector-General for a review.

There is no time limit on making an application to the Trustee on grounds of hardship. Once the decision has been made (or the 30 days have passed), the bankrupt has 60 days to lodge a request for a review.

The Inspector-General has 60 days to make a decision on the Review. That decision may:

- uphold the Trustee's decision; or
- set aside the Trustee's decision and making a fresh assessment of the application.

The bankrupt must be notified of the decision, the reasons for the decision, and the right to appeal to the AAT. An appeal to the AAT must be lodged within 28 days of the bankrupt receiving written notice of the decision from the Inspector-General.

Sample letter: Application for variation of income threshold on grounds of hardship

To: [*insert Trustee's name and address*]

Dear Sir/Madam

Re: Income Contributions of *[insert client's name and bankruptcy number]*
– application for Hardship under Section 139T

I am assisting the individual named above. I attach my client's authority.

I refer to your income assessment dated *[insert date of assessment notice received by the client]*.

My client is suffering or will suffer hardship as a result of paying the income contributions required in your assessment as a result of:

[List the reasons, paying particular attention to the list at s 139T(2) of the Bankruptcy Act, but also including any additional factors you consider relevant, for example

1. My client pays private rent of $……. dollars
2. My client suffers from: *give details of disability or medical condition*
3. My client cares for his or her elderly parent including paying for……]

I have included an income and expenditure statement for my client which shows that after paying ordinary living expenses, the specific items above, and the assessed contributions, my client will have a deficit of $[*insert dollar amount*] per fortnight [*or month – choose the same period the contributions are payable*]. I submit that my client can afford contributions of no more than $[*insert dollar amount*]. [*Alternatively, if supported by the evidence, you could include* I submit that my client cannot afford to make any income contributions at this time.] I attach the following evidence:

[List the evidence you will attach, for example:

1. *Rental receipts*
2. *Medical reports/ certificate*
3. *Receipts/invoices for medications or consultations/operations*
4. *Partner's separation certificate and/or Centrelink details*
5. *Childcare invoices or receipts*
6. *Travel tickets or petrol/vehicle maintenance expenses*
7. *Evidence of address of place of work.*

Include any evidence that is relevant to the reasons you have given].

I look forward to your written response within 30 days in accordance with s 139T(4) of the *Bankruptcy Act 1966*.

Yours faithfully

[Insert signature, name, position and contact details]

This letter can also be written for the client to send on his or her own behalf.

The Trustee's decision will be affected by the severity of the client's hardship, the quality and relevance of the supporting evidence, and the relationship that the bankrupt has had with the Trustee to date including, among other things, whether the bankrupt has been communicative, complaint with requests for information and prompt in paying their contributions to date. If your client has been less than flawless on any of these counts but has a good reason – for example, a disability or mental health condition, or a personal trauma – which has made them exhibit problematic behaviour, or have difficulty communicating effectively, you should include this explanation in your letter (with your client's consent).

If the Trustee refuses, you may also need to assist your client to apply to the Inspector-General.

If the Trustee does not respond, follow up. If a response is still not forthcoming, you can use the alternative variation of the Sample Letter below.

Sample letter: Request review of the Trustee's decision to refuse hardship

The Inspector-General in Bankruptcy

Australian Financial Security Authority

Dear Sir/Madam

Re: Income Contributions of *[insert client's name and bankruptcy number]*
– application for Review of Hardship Decision under Section 139T

I am assisting the individual named above. I attach my client's authority.

On [*insert date of original letter to Trustee*] I assisted my client to apply/my client applied [*delete whichever is not applicable]* to his/her trustee in bankruptcy for a review of his/her bankruptcy threshold on grounds of hardship. I attach a copy of that application and the accompanying evidence.

On [*insert date you or client received Trustee's decision*] I/my client *[delete whichever is not applicable]* received a response from the trustee dated [*insert date on the response*] which I also enclose.

(Alternatively

I have not/my client has not *[delete whichever is not applicable]* received a response from the trustee and more than 30 days have passed since he/she *[delete whichever is not applicable]* would have received the application, being posted/e-mailed/faxed on *[delete whichever is not applicable] [insert date]*

. In accordance with s 137T(5) of the *Bankruptcy Act 1958*, the trustee is taken to have refused the application.)

I ask the Inspector-General to review the trustee's decision.

In conducting your review, I ask the Inspector General to take into account the following:

1. The evidence supplied by my client in the attached application
2. [*List any response you may have to the Trustee's reasoning – for example, why your client has to live in a particular area, or incur a particular expense the trustee finds excessive]*
3. The following additional evidence [*only include this if there is additional evidence that has come to light, or that is required to respond to the Trustee's reasons. List each document here and include in the attachments.]*

I look forward to your response within 60 days.

Yours faithfully

[Insert signature, name, position and contact details]

If you don't receive acknowledgement from AFSA, you should follow up to check the application has been received.

If the response is to uphold the Trustee's decision, or there is no decision within 60 days, you should refer your client for legal advice. In the latter case you may wish to follow up with AFSA first to see if the decision is likely to be forthcoming shortly.

Trustee's options for pursuing unpaid income contributions

If your client falls behind in their contributions the Trustee has several options for recovering the arrears. A notice will be sent to the bankrupt requiring rectification of the arrears. This notice will usually give the bankrupt 14 days to pay the arrears or enter into a repayment arrangement.

If the bankrupt does not pay, the Trustee has several options. They may:

- apply to the Official Receiver to issue a 139ZL Notice on:
  - the bankrupt's employer garnishing the bankrupt's wages, or
  - another third party, requiring the transfer of physical property or its value from the third party to the Trustee;
- lodge an objection to discharge;
- instruct a debt collection agency;
- register the arrears as a court order and using the usual court enforcement processes (including a further sequestration order if necessary); or

- require the bankrupt to set up a supervised account so that all of the bankrupt's income is paid into a particular designated account and the Trustee supervises any withdrawals from that account.

Most of the above will not be pursued where the arrears are less than $1,000 with the exception of objection to discharge. Moreover, the Official Trustee will not proceed with a s139ZL Noice unless they have already attempted to recover the arrears via phone call or letter, they have not been contacted by the bankrupt to make arrangements and there is no information available to indicate that the bankrupt has a reasonable excuse regarding their failure to comply with the payment schedule. Clients should be encouraged to contact their Trustee and make arrangements to pay arrears whenever possible.

Objection to discharge is a very common result of unpaid income contributions. Bankrupts need to understand that this will result in a fresh assessment for a new CAP for each additional year of bankruptcy (unless the entire debts and expenses of the bankrupt estate have been paid in full, including interest).

Trustees and debt collectors acting on their behalf must comply with the ASIC/ACCC Guidelines in relation to debtor harassment.

Subsequent hardship – the bankrupt could afford the contributions at the relevant time but did not pay and now can't afford the arrears

In some cases, the original assessment may have been valid, but the bankrupt did not pay and is now in genuine hardship. This is a difficult situation not envisaged by the Act.

As a first step the bankrupt should try writing to the Trustee setting out their financial position in detail. Try using the same hardship process and letter above. If there are significant arrears, there is also a good chance that the relationship with the Trustee in bankruptcy is not good and this may not work. Things can be further complicated if the Trustee has already commenced one or more of the enforcement options listed above.

The bankrupt can also write to the Inspector-General requesting a review, as set out above. Again, it is not clear that the Act has this particular scenario in mind, so the response may not be helpful. If there is a court judgment in place, only the court or the Trustee can reverse it (by for example, getting the judgment set aside by consent).

If all else fails, the bankrupt may have to file another Debtor's Petition in relation to the arrears (and the whole process starts again). This risks additional assessments of contributions during the subsequent bankruptcy should their financial position improve.

Seeking permission to travel during bankruptcy

As noted in earlier chapters, a bankrupt is not permitted to leave Australia (or even prepare to leave Australia) without the written permission of their Trustee (s 272(1)(c)). To do so is

an offence potentially punishable by imprisonment. It is also a reason to extend the bankruptcy.

Permission to travel will usually be given provided that:

- it is necessary to earning the bankrupt's income, or the bankrupt has compassionate reasons; and
- it will not interfere with the administration of the estate; and
- the bankrupt is not considered a 'flight risk' – that is, likely to never return.

If the bankrupt is required to make income contributions, the Trustee will usually expect any contributions payable during the trip, plus any arrears (if any), to be paid up prior to departure.

If the bankruptcy is being administered by the Official Trustee, there is an online Overseas Travel Request Form for completion on the AFSA website. AFSA charge a non-refundable fee of $150 (at 15 April 2025) for processing applications for permission to travel. Check the AFSA website for the latest fee details.

In other cases, the Trustee should be supplied with:

- a statement outlining the bankrupt's reasons for departing Australia
- the dates of departure and return
- details of the itinerary and any overseas contact details
- particulars about who will fund the travel costs, including a letter from that person if it's not the bankrupt
- any documentary evidence supporting the request, for example, confirmation by an employer of the need to travel, or for compassionate travel, evidence of the illness or death (in the case of a funeral) of a relevant person
- how any contributions due in the bankrupt's absence will be paid (the Trustee may require these to be paid prior to departure).

The Trustee may refuse consent where the bankrupt's presence is necessary for the proper and efficient administration of the bankruptcy.

The AFSA request form states it must be lodged at least two weeks prior to the planned departure date. In practice you should lodge the request with AFSA or the Trustee as early as possible, and preferably prior to paying for any travel arrangements. If consent is granted, the Trustee must provide this in writing before departure. The bankrupt should carry this letter with them in case they have been placed on an alert list with the immigration officials and the Federal Police.

The Trustee may impose conditions on travel (s 272(2)) – for example, for the bankrupt to deliver his or her passport to the Trustee within 7 days of returning to Australia. If for any reason the bankrupt will be unable to comply with a condition for reasons beyond his or her control (illness, disruption to transport services etc.), then the Trustee should be informed as

soon as possible.

If permission to travel is refused, the bankrupt should contact the Trustee to determine whether there is any room for negotiation. Perhaps permission would be approved for a different time or if certain prerequisites were met.

If this is unsuccessful the bankrupt can contact Regulation & Enforcement at AFSA by contacting 1300 364 785 and asking to be referred.

If the permission is still refused, then the bankrupt's only option for review is an application to the Federal Circuit Court of Australia or the Federal Court of Australia (ss 90-15 and 90-20 of Schedule 2 of the *Bankruptcy Act*). It is recommended that legal advice be obtained before an application is made to the court.

My client is being chased for a provable debt

If your client is being pursued for a provable debt, you or the client should inform the creditor that the client is bankrupt and give the creditor the date of the bankruptcy and the bankruptcy number. If the debt hasn't been included in the client's statement of affairs, the Trustee should be notified in writing.

A creditor cannot enforce any remedy against the person or property of a bankrupt in relation to a provable debt and can only commence proceedings in relation to a provable debt, or take a fresh step in proceedings in relation to a provable debt, with the leave of the court (s 58 (3)).

Some debt collectors contact clients during bankruptcy and offer discounted amounts to clear provable debts. Whilst an undischarged bankrupt is able to make voluntary contributions to their creditors, they should not be harassed or misled into doing so. Intentionally misrepresenting that a debt is legally enforceable against the debtor when this is not the case may amount to unconscionable conduct. Should this occur, the client should immediately contact their Trustee and should inform the debt collector that the debt was listed in the bankruptcy.

> **Remember:** An unsecured creditor with a provable debt should not be contacting an undischarged bankrupt directly – they should be contacting the Trustee.

Sometimes this contact will happen because the debt has been assigned (sold) but the original creditor has not informed the purchaser of the debt (the debt collector) about the bankruptcy. This can also happen when the client is no longer paying and is preparing to go bankrupt. This is why it is important where possible to indicate on the statement of affairs all the parties who may be pursuing the unsecured liability in addition to the original creditor (for example, debt collectors, insurance companies in the case of car accidents, other drivers etc.).

If inappropriate contact by a creditor or debt collector continues:

- contact the Trustee;
- consider lodging a complaint for harassment in an External Dispute Resolution scheme of which the creditor/debt collector is a member, such as AFCA; and/or

  Remember: The Telecommunications Industry Ombudsman and the Energy and Water Ombudsman schemes may also be relevant.

- consider complaining to the appropriate regulator about debtor harassment (ASIC for credit and financial services debts and the ACCC for debts arising from contracts for other goods and services).

If your client receives a Statement of Claim or Summons or other document initiating court proceedings, the Trustee must be notified and sent a copy of the relevant documents. The plaintiff should also be notified of the client's bankruptcy, including the date and bankruptcy number. If the Trustee indicates he or she has no intention to defend the proceedings and the plaintiff has indicated they will continue the action, then the client can notify the court of the bankruptcy and, in accordance with the restrictions imposed under s 58, request that the Court exercise its power under s 60 and stay the proceedings. Noting, the Court may respond directing your client to file a Notice of Motion or other Court process. We do not recommend taking this step, without seeking legal advice first.

Sample Letter: about legal proceedings in relation to a provable debt

[*Insert details of court*]

Dear Sir/Madam,

RE: [*insert details of court proceedings as per the Statement of Claim or other initiating document*]

I refer to the matter currently before the Court. On [*insert date*] I presented a Debtor's Petition and am currently bankrupt. My bankruptcy number is [*insert number*]. The debt currently being claimed by the plaintiff is listed as an unsecured debt in my bankruptcy.

The details of my bankruptcy trustee are as follows: [*insert details*]

By virtue of s 58(3)(b) of the *Bankruptcy Act*, leave of the Federal Circuit Court is required to proceed with this claim in the [insert name of court e.g. 'Local'] Court.

I have defended the action and denied the claims made against me, but due to my bankruptcy I can no longer continue with this defence. I respectfully submit that this action should be permanently stayed in accordance with s 60(1)(b).

Kind regards,

Client's signature

Client's name

[Insert contact details]

If the court proceedings are not in relation to a provable debt, or the client is unsure, refer the client for legal advice. **Chapter 6 Part 1** contains information about what is and is not a provable debt. If the entity who has issued the court proceedings (the plaintiff) is in an EDR scheme, your client may be able to lodge a complaint in EDR (see **section below in Chapter 8**).

Dealing with secured loans during bankruptcy

In some cases, a bankrupt may continue to pay off secured loans during bankruptcy. There is extensive information on this issue contained in **Chapter 6 Part 1**, and also specifically in relation to **Motor Vehicles in Chapter 6 Part 2** and **Houses/Real Estate** in **Chapter 6 Part 3**.

If your client is paying off a secured loan, then the fact of bankruptcy *alone* cannot be used by the creditor to repossess the car, house or other security for the loan. A provision in a bill of sale, mortgage, lien, charge or PPSA security agreement which purports to allow the agreement to be modified, or for any power or remedy to be exercised, just because the debtor under the agreement becomes bankrupt, or enters a PIA, is void (s 302). Similar restrictions exist for hire purchase or property leases (s 301). If your client receives a notice threatening to repossess a car or home for this reason, you can write to the lender quoting the appropriate section.

Of course, if the client is not meeting their repayments or is in default under the contract in some other way, enforcement action can happen as usual.

Sample letter

Dear Sir/Madam

RE: [*Insert client's name and a contract reference*]

I am assisting the individual named above. I enclose my client's written authority.

I note that in your letter/notice of [*insert date*] you have indicated your intention to repossess my client's [*insert description of security property*]. While my client is a bankrupt, they are completely up to date with their repayments and are not otherwise in default to the best of my knowledge.

Please be aware that the *Bankruptcy Act* renders void any provision of a contract, mortgage, lien, bill of sale, lease, hire purchase agreement, or PPSA security agreement, which purports to give the lender or lessor the power to enforce or otherwise vary a contract as a consequence of the borrower's bankruptcy.

Please confirm in writing that you will not be taking enforcement action in relation to this contract, or clarify the nature of my client's default.

Yours faithfully …

[Insert signature, name, position and contact details]

If the car or property has already been repossessed, you should refer your client for immediate legal advice.

If the lender is a member of the Australian Financial Complaint Authority, you may be able to lodge a complaint – see later section in this Chapter, **Lodging a complaint with the Australian Financial Complaints Authority during bankruptcy.**

In some cases, the lender may have taken security over the client's personal belongings, especially for small fringe loans. If those possessions are necessary household goods that would be protected in bankruptcy, then they are also prohibited securities under the National Credit Code. You can lodge a complaint in the Australian Financial Complaint Authority (if the lender is a member) and/or seek legal advice.

What if my client is having difficulty paying their secured loan during bankruptcy?

Your client should first revisit the decision about whether to continue with the contract or surrender the security. Any shortfall on the contract should be *provable* in the bankruptcy, provided the contract was entered prior to the date of the bankruptcy.

If the client wishes to try to continue paying the loan (and can reasonably afford to do so in the longer term), then the case can be dealt with like any other loan where the client is in financial difficulty. If the loan is consumer credit it is likely to be covered by the National Consumer Credit Protection Act and your client will be entitled to apply for a hardship variation (check the Fact Sheets about the National Credit Act and Financial Hardship onthis website). You should try negotiating with the lender. If that fails, your client may be ableto lodge a complaint with AFCA.

Insurance claims

Whether a client gets to keep the proceeds of an insurance claim depends on the nature of the insurance and the type of property or risk covered. Basically, claims fall into 4 categories:

- claims which are specifically protected by the *Bankruptcy Act*
- claims which are in relation to property which is security for a loan
- claims which are in relation to property that is/was itself protected under the *B ankruptcy Act*
- claims which are in relation to property which has vested in the Trustee.

Claims which are specifically protected by the *Bankruptcy Act*

The *Bankruptcy Act* specifically protects the proceeds of policies **of life assurance o r endowment assurance** in respect of the life of the bankrupt or the spouse or de facto partner of the bankrupt provided they are received **on or after the date of the bankruptcy**. If received **prior to the bankruptcy**, then the proceeds, and any property purchased with those proceeds, **will vest in the Trustee.** The date the claim is received is crucial and a claim may be interpreted as received on the day it is approved, as opposed to when the funds clear in the insured person's account. If there is a dispute on this point legal advice will be required.

What constitutes a policy of life assurance is not clear as it is not defined in the *Bankruptcy Ac*t. The *Life Insurance Act 1945* defines policies of life insurance to include term life, continuous disability, investment and annuity policies.

The types of policies offered by Australian life insurance companies include income protection, trauma, life, total and permanent disability (TPD), investment, endowment and whole of life policies. Many life insurance policies offer 'bundled' or multilevel benefits. Some are pure risk; some are investment only and others are risk policies with investment components.

Some life insurance policies are sold by life insurance companies to individuals and others are sold as group insurance policies to employers or entities on behalf of their employees or members. Many life insurance policies are sold as group insurance policies to trustees of superannuation funds on behalf of the members of the fund (TPD claims associated with

superannuation are covered specifically later in this section).

If the proceeds of a life assurance or endowment policy are paid by way of annuity or pension, then they do not vest in the Trustee, but they are counted as income for the purpose of assessing income contributions payable.

This is a complex area of law. When contemplating making a claim on a life insurance policy after the date of bankruptcy, the safest course of action is to contact the Trustee.

1. Ask the Trustee if they are of the view that the proceeds of the claim will be protected.
2. Ask for confirmation of this in writing.
3. Seek legal advice if the Trustee is of the view that the proceeds of a claim on a particular policy will not be protected.

Total and Permanent Disability Insurance

As a starting point, it is important to determine if the TPD insurance benefit is held within or outside of superannuation.

It is advisable when contemplating making (or continuing with) a TPD or lump sum income protection claim after the date of the bankruptcy is to contact the Trustee:

1. Ask the Trustee if they are of the view that the proceeds of the claim will be quarantined from creditors.
2. Ask for confirmation of this in writing.
3. If the Trustee is of the view that the proceeds may not be protected, your client should get legal advice.

TPD inside of Superannuation

The *Bankruptcy Act* specifically exempts from property divisible by creditors the interest of a bankrupt in a regulated superannuation fund or Retirement Savings Account. A payment to the bankrupt from such a fund received after the date of the bankruptcy (except a superannuation pension) (s 116(2)(d)(iii) and (iv)). This means TPD benefits held in a superannuation fund and those paid out of a fund after the bankruptcy starts are exempt from creditors.

AFSA has previously suggested that only TPD insurance benefits for personal injury (and not illness or non-trauma disability) are exempt. However, this appears to conflate superannuation payments and benefits with personal injury compensation payments (which are exempt under s 116(2)(g)).

Whilst the better view may be that TPD benefits in super are exempt from creditors, it would be important to get legal advice before making (or finalising) a TPD claim.

If the client can wait until after discharge to lodge a claim, this would put the issue beyond doubt, but clients may be in dire immediate need, or have a limited remaining lifespan. Another option may be to have the amount paid into the superannuation funds allocated pension fund (if it has one) and paid as income – this would then count towards the client's assessed income contribution liability but would not vest in the Trustee (income contributions are covered in **Chapter 6 Part 4**).

TPD outside of Superannuation

The treatment of TPD payments outside of super is more complicated.

The *Bankruptcy Act* exempts payments of life assurance and endowment policies from creditors when paid after the date of bankruptcy (s 116(2)(d)(i) & (ii)).

However, there is legal doubt whether a standalone TPD insurance payment is a payment from such a policy. Traditionally trustees-in-bankruptcy accept that they are, but it would be important to get their written acknowledgment of this as suggested above.

If not, it may be worthwhile considering delaying a TPD claim until the conclusion of the bankruptcy. It would be important to get legal advice before starting or concluding a claim.

Claims in relation to property which is security for a loan

If the property that has been lost or damaged is the subject of a mortgage or other form of security, then the proceeds must be paid to the lender up to the value of the amount payable under the contract. So, for instance, if your client's secured vehicle is written off in an accident, then the proceeds of the insurance claim must be paid towards the amount outstanding on the loan. If the car is only damaged, then the car will be repaired as per usual, in order to retain the value of the security.

Similarly, if your client has retained a mortgaged home into bankruptcy, and there is damage to the building as a result of fire or storm for example, the proceeds of the claim will need to be used to repair the security property. Usually, the lender will insist on being noted on the policy and the proceeds will usually be paid directly to the lender. The bankrupt will then need to convince the lender to release the funds for the requisite repairs.

Where the value of the insurance claim exceeds the amount owed to the lender, then what happens to the residual amount will depend on whether the property insured has vested in the Trustee or not (See **Claims in relation to property which has vested in the Trustee** below).

Claims in relation to property that is/was itself protected under the *Bankruptcy Act*

If an insurance claim is in relation to property which is protected under the *Bankruptcy Act*,

and there is no secured creditor, then the claim proceeds can be retained by the bankrupt in order to replace or repair the lost or damaged property. Common examples of protected property include:

- necessary household contents
- a car worth up to the threshold amount (currently $9,400 as at 15 April 2025)
- tools of trade worth up to the threshold amount (currently $4,350 as at 15 April 2025)
- a home bought substantially wholly with compensation for personal injury, or other protected money (for example superannuation funds withdrawn on or after the date of the bankruptcy.

For up to date indexed amounts check the AFSA website.

> **Example**
>
> A bankrupt has a car insured for $10,000. There is no loan secured over the vehicle. The car is written off in a car accident. It is the bankrupt's only vehicle. The bankrupt claims on her comprehensive insurance policy. The first $9,400 can be retained by the bankrupt to purchase another primary means of transport. The remaining $600 must be paid to the Trustee for the benefit of the *bankrupt estate*.

Claims in relation to property which has vested in the trustee

The proceeds of any claim for property which had already vested in the Trustee or would have done so had the property still existed at the date of the bankruptcy, also vest in the Trustee. This money cannot be retained by the bankrupt and the Trustee can take action to recover the money if the bankrupt has disposed of it.

For example, if the client's car was stolen prior to or during bankruptcy, then the client can only retain the threshold amount from the proceeds of the claim. Similarly, if the client's home burns to the ground prior to, or during the period of the bankruptcy, and there is no mortgage, then the proceeds of the claim must be paid to the Trustee unless there is some argument that the home is protected (or partially protected – see **Chapter 6 Part 2**). It is the Trustee's decision what to do with the proceeds, but it is highly likely that if the home has been completely destroyed or substantially damaged that the land will be sold without rebuilding/repairing and the proceeds of both the sale and the insurance policy paid directly into the *bankrupt estate.*

> **Remember:** Vested bankruptcy property does not re-vest in the bankrupt upon discharge. A claim paid post discharge will still vest in the Trustee if the property covered by the policy had already vested in the Trustee during bankruptcy.

***Example**: Official Receiver v Prince* [2006] FMCA 1917 (15 December 2006)

Ms Prince became a bankrupt on 23 May 2003. At some point after that and prior to discharge she received a payout on her home building and contents policies with Allianz after her home in Tasmania burnt down. In total she received $63,900 for contents and $63,000 for the building.

She did not pay any of this to the Trustee, being the Official Trustee in this case. She bought new contents to the value of $18,540 and she bought a car for her mother for $26,200. She repaid a vendor finance contract to the value of $43,500. On 15 December the Official Receiver obtained orders from the Federal Magistrate's Court for Ms Prince to pay the Trustee $45,700 plus interest at

6% and costs, this being made up of the $26,200 used to purchase the mother's car and $19,500, being the balance of the building claim less the amount used to repay the vendor finance contract.

The court ruled that the newly purchased household contents were protected under Section 116 of the Act as necessary household property. The mother's car could not be characterised as 'the primary means of transport' of the bankrupt and that amount was therefore not protected. The house and land had vested in the Trustee and the Official Receiver was therefore entitled to the proceeds of the building policy claim after payment of the vendor finance contract. There was an unaccounted for balance of the proceeds of the contents claim of $19,160. The Official Receiver did not pursue that amount.

Summary – Insurance claims while bankrupt

- **Category:** Claims which are specifically protected under the Act – for example, life assurance and endowment policies
- **Proceeds Paid to:** Bankrupt
- **Reason:** Section 116(2)

- **Category:** Claims for property that would itself have been protected under the Bankruptcy Act (for example, necessary household property under Contents Policy, or Building Insurance where the house was purchased substantially wholly with personal injury compensation funds)
- **Proceeds Paid to:** Bankrupt
- **Reason:** Section 116 and case law

- **Category:** Claims for property which is security for a loan (such as where there is a mortgage over a car or house and the secured property is destroyed by fire)

- **Proceeds Paid to:** The lender (up to the amount owing under the secured contract)
- **Reason:** Sections 58 & 117

- **Category:** Claims for property which had vested in the Trustee (or would have but for its destruction or loss)
- **Proceeds Paid to:** The trustee in bankruptcy
- **Reason:** Section 58

Lodging a complaint in external dispute resolution during bankruptcy

- The Australian Financial Complaints Authority (AFCA) will consider complaints from bankrupts where they are an 'eligible person', as defined in rule.1.1 of the Schemes Rules and as set out in the Operational Guidelines.

  If this is a superannuation complaint where the benefit has not vested (see above under insurance) AFCA will not require the trustee's permission or involvement in the proceedings.

  The trustee may give permission in the proceedings where:

  - The amount of compensation sought from the AFCA member (lender or insurer, for example) would exceed the total of debts owed in the bankruptcy. The trustee may insist on being a party to the complaint.
  - The bankrupt is the complainant seeking non-financial loss, such as for debtor harassment, because the right to obtain damages for personal injury or wrong does not vest in the Trustee.

Common examples of complaints which are unlikely to be objected to by the Trustee would include:

- a hardship complaint in relation to a loan that the borrower is paying out of their income during bankruptcy (this will often be a loan secured over a house or car that the bankrupt is trying to retain)
- a complaint about inappropriate or illegal threats of repossession, or actual illegal repossession of the loan security (prior to judgment being given in a court)
- a complaint about debtor harassment (including the client being pursued for provable debts) – in this case the Trustee's permission not required in any event
- an insurance dispute about a claim for protected property (or partially about protected property).

In relation to financial hardship complaints, the Trustee may object or wish to be actively involved if there is equity in a secured property that could potentially be eroded to the detriment of the unsecured creditors.

> **Note: As at May 2024 AFCA are currently pausing all complaints where the applicant is or was at the relevant time a bankrupt. If your client is or was a**

bankrupt at the relevant time you may want to seek legal advice

Case Note – *Official Trustee in Bankruptcy v Kent* [2023] FCA 1211

Chronology:

- April 2020:
  - Mr Kent was discharged from bankruptcy.
- June 2020:
  - Mr Kent made a complaint to AFCA about the conduct of the bank, as pre-bankruptcy lender, involving irresponsible lending
- January 2021:
  - The Official Trustee and the bank entered into a deed of settlement that purported to resolve Mr Kent's complaint without his involvement. The settlement amount was for over $450,000, representing over $430,000 financial loss and $20,000 non-financial loss for stress and inconvenience.
  - The Trustee wrote to Mr Kent that the Trustee had received the financial loss component from the bank as property of the bankrupt estate. It told him that amount would be sufficient to annul his bankruptcy by enabling payment of his creditors in full and that, after discharging the estate's liability to remunerate the trustee and pay statutory charges, Mr Kent would receive a small surplus from the financial loss component estimated at under $11,000.
- February 2021:
  - AFCA informed Mr Kent by email that it had closed his complaint.
- February and December 2021:
  - The Trustee received two conflicting opinions from counsel as to whether it was justified in treating the financial loss component as property of the bankrupt that had vested in it under s 58 of the Bankruptcy Act.
- April 2022:
  - In light of the conflicting opinions of its counsel, the trustee sought judicial advice. The Trustee commenced this proceeding against Mr Kent accordingly.

The primary issue was whether Mr Kent's right to make the complaint under the AFCA scheme was 'property' within the meaning of the Bankruptcy Act.

Under the Act, 'property' means personal property of every description (s 5(1)) and 'the property of the bankrupt' means, relevantly, his or her rights and powers in relation to property divisible amongst his or her creditors that would have been

exercisable by him or her had the bankruptcy not occurred (s 116(1)). By force of s 58(1), the property of the bankrupt vests in the Trustee on bankruptcy, and all after acquired property vests in the Trustee as soon as it is acquired by, or devolves upon, the bankrupt.

Mr Kent's complaint alleged that the bank engaged in irresponsible lending. Sections 178 and 179 of the *National Consumer Credit Protection Act* gives a court the power to order a defendant who has contravened a civil penalty provision or committed an offence under the Act to compensate a plaintiff for loss or damage suffered as a result.

The Court held that the right to apply for orders under ss 178 or 179 was not 'property' at all and was therefore incapable of vesting in the trustee. Alternatively, if it was wrong in this conclusion the Court held that the right created by ss 178 and 179 is conferred exclusively on the plaintiff to recover compensation. This right cannot vest in the trustee because its nature is inherently personal to the bankrupt and is incapable of assignment because no one but the plaintiff can satisfy the statutory criterion that only the plaintiff can apply for the compensation order.

The Court concluded that the Official Trustee was not entitled to execute the deed of settlement or to any of the settlement amount. The Court also concluded that, by closing the complaint, AFCA had breached the Complaint Resolution Scheme Rules by failing to determine Mr Kent's complaint.

This outcome challenges the usual approach taken by AFCA. Prior to this case, AFCA would:

1. only consider a bankrupt's complaint with the consent of the trustee;
2. usually require the trustee to participate in settlement discussions;
3. usually accept the trustee's agreement in determining the matter; and
4. only pay compensation for financial loss to the trustee.

This case directly challenges steps 3 and 4, and casts doubt on steps 1 and 2, in the context of orders sought under ss 178 and 179.

The Official Trustee made a public statement that they will not appeal the result. But, as things currently stand, it seems that a bankrupt's compensation for loss or damage suffered due to the lender's breach of a civil penalty provision will not vest in the trustee and will not depend on the trustee's co-operation in making the relevant complaint.

Disputing an Insurance Refusal in Court (Life Insurance, TPD etc)

Legal proceedings commenced by a person who is, or subsequently becomes, bankrupt against an insurer or a superannuation fund trustee would also be caught by the stay

provisions of s 60 of the *Bankruptcy Act* and would therefore be subject to the election of the Trustee to prosecute.

The only exception would be if the action was in respect of a personal injury or wrong done to the bankrupt.

In practice, many Trustees will elect to continue with proceedings, particularly if they are being conducted on a no win/no charge basis or if the adverse costs risks are being funded. If the proceeds of any claim are protected in bankruptcy, there may be an argument that the bankrupt can commence or continue proceedings without the election of the Trustee, but this is not entirely clear and would require legal advice. The bankrupt should get advice in relation to whether the proceeds of any proceedings would be protected or vest in the Trustee in any event in order to clarify their own expectations.

Applying for early release of superannuation while bankrupt

Releasing superannuation whilst an undischarged bankrupt is a viable option but the release is still determined by the rules of the individual superannuation funds. Simply being bankrupt will not be regarded as sufficient grounds.

> **Remember:** Superannuation accessed prior to bankruptcy is NOT protected. The trustee is likely to seek clarification of what was done with any funds released and spent prior to bankruptcy.

Where the money has been spent on a divisible asset belonging to the bankrupt, the asset will vest in the Trustee and the funds will be effectively lost to the bankrupt.

Where the money has been given to a relative (or someone else) to improve their asset, or assist in purchasing an asset, it may be deemed an undervalue transaction or a transfer to defeat creditors and may be claimed by the Trustee.

Where the money has been spent paying debts, the Trustee may consider these payments to be ‘preferential’ and consequently, take recovery action against the creditors.

Where the money has been spent on medical expenses (or something similar) this should be explained to the Trustee and a paper trail produced to support this if at all possible.

Where the money has been used to pay mortgage arrears it will not be protected (where withdrawn prior to bankruptcy), but whether the Trustee will take action to recover it will depend on the amount of equity in the home. The Trustee has many years in which to take action to sell the home. Once the bankrupt is discharged, they can negotiate with the Trustee to buy back any equity if the property has not already been sold.

The types of superannuation release available are:

- Financial hardship
- Compassionate grounds
- Over 55 and meeting Centrelink requirements

Financial hardship

An undischarged bankrupt will need to fulfil the criteria of their superannuation fund. Please note that some funds do not allow applications for release on hardship grounds.

To be eligible for early release the client needs to have received Commonwealth income-support payments continuously for 26 weeks and be unable to meet reasonable and immediate family living expenses. The bankrupt will need to prove a shortfall in their living expenses to get the release (**without** including the debts that have been accepted into the bankruptcy).

Only one lump-sum payment can be made in any 12-month period per fund. The minimum amount that can be released is $1,000 (unless your superannuation interest is less than this amount) and the maximum amount available is $10,000. Tax will be deducted at 21% from your payment.

Compassionate grounds

Application for release of superannuation funds on compassionate grounds is handled by the Australian Tax Office. An undischarged bankrupt will need to meet the relevant criteria and to complete the appropriate paperwork. The grounds for compassionate release are narrow and the paperwork is quite complex and requires cooperation from third parties, such as doctors or a lender. The final decision for release will still rest with the individual superannuation fund.

The grounds for compassionate grounds release are:

For palliative care or funeral expenses where:

- the client or a dependent has a terminal illness and needs palliative care, or
- the client needs assistance to meet the cost of a dependent's funeral expenses, and
- the client lacks the financial capacity to pay for the expenses without accessing superannuation.

If the client has a terminal illness, he or she may be eligible to access superannuation benefits without submitting this application. Contact should be made with the superannuation fund directly to discuss this option.

For modification to your home or vehicle and/or the purchase of disability aids where:

- the client or his or her dependent suffers from a severe disability, or
- the client needs assistance to meet the cost of modifying their home or vehicle to accommodate a severe disability, and
- the client lacks the financial capacity to pay for the expenses without accessing superannuation.

The final decision for release will still rest with the individual superannuation fund.

For medical expenses where:

- the client or his or her dependent suffer from a life-threatening illness or injury, acute or chronic pain or an acute or chronic mental illness, and
- the client needs assistance to meet the costs of treatment for the condition which is not readily available through the public health system or covered by insurance, and/or
- the client needs assistance to meet the costs of transport in order to receive treatment, and
- the client lacks the financial capacity to pay for the expenses without accessing superannuation.

The final decision for release will still rest with the individual superannuation fund.

Mortgage assistance

The amount that can be withdrawn is limited to 3 months repayments and 12 months interest. Tax of 21% will also be payable on the amount withdrawn.

Mortgage assistance is available to prevent the client's mortgage lender or Council taking action to sell the client's home for mortgage arrears or unpaid rates respectively. This is a complex and potentially difficult area if the client is bankrupt, and the home has vested in the Trustee. If the client wishes to try this, they will need to understand that:

- There is no guarantee they will succeed.
- Paying off the arrears may increase the equity in the home or create equity in the home, prompting the Trustee to take action to sell it. While superannuation withdrawn on or after the date of the bankruptcy is protected money, a direct link will need to be established between the protected money and the percentage of the equity attributable to this source. Any additional equity will vest in the Trustee.

Clients have succeeded in accessing superannuation on this ground while bankrupt, but this does not mean it is necessarily a good idea, or that another client will be successful. Clients should get independent advice on the implications before proceeding.

Over 55 and meeting Centrelink requirements

If you are over the preservation age and have received Centrelink payments for 39 cumulative weeks since turning 55 you can apply for the release of your super.

Link to forms/information

- Applications can be made via your MyGov account
- Early access to super: details on the Australian Taxation Office website

Forgotten debts

On rare occasions a client will have lodged their Debtor's Petition and then find themselves being pursued by a creditor who they had failed to list in their statement of affairs, even though the debt was incurred before the date of lodgement, through oversight or a memory lapse. These debts can still be referred to the Trustee to request that they be retrospectively included.

Other common issues

See Chapter 6 for more information on the following:

- **Joint debts –** In the overwhelming majority of cases, especially for consumer debts, any non-bankrupt joint debtor remains liable for the whole debt including interest as a result of joint and several liability **(see Chapter 6 Part 1)**
- **Secured loans –** The bankrupt can continue paying these if they so choose but the Trustee can opt to sell the asset at any time should there be sufficient equity to make it worthwhile doing so (**see Chapter 6 Part 1** and **Part 3**).
- **Income tax debts** and tax returns (**see Chapter 6 Part 1**)
- **Debts** you need or may want to keep paying (**see Chapter 6 Part 1**)
- **Income contributions** from wages, including salary sacrifice and other fringe benefits (**see Chapter 6 Part 4**)
- **Compensation for personal injury –** The bankrupt can take proceedings for personal injury and any compensation paid is protected (**see Chapter 6 Part 2 & Part 5**))
- **Conducting disputes/proceedings in Court –** It is up to the Trustee to initiate or continue such proceedings although there are exceptions **(see Chapter 6 Part 5**)
- **Loans taken out/debts incurred after bankruptcy –** These are the responsibility of the undischarged bankrupt. They must be paid unless a subsequent bankruptcy occurs and non-payment can lead to enforcement of the debt in the courts. It is important for undischarged bankrupts to understand the disclosure rules in relation to getting credit once bankrupt **(see Chapter 6 Part 5).**
- **Impact on being able to rent a property –** An undischarged bankrupt may have had no rental arrears or rental debts but finds that when they try to rent property they get knocked back. They check their tenancy database listing and find there is no reference to the bankruptcy on it. Real estate agents may also check the credit report, which will include the bankruptcy. Many rental agreements/ applications include a list of agencies that you authorise the real estate/landlord to check. This can seem very unfair when

the client has had no rent arrears issues, and it is very important to make sure that clients considering bankruptcy are made aware of this potential issue. This can be especially difficult if someone is moving from a country area where they are known and have good references to a major city in search of employment and a new life.

- **Action by the Trustee over preferential payments or undervalued transactions –** The bankrupt's affairs may be investigated, and money recovered from past transactions in some circumstances (**see Chapter 6 Part 3**)
- **Employment –** Some professional rules/association and licensing bodies may impose restrictions on bankrupts continuing in their current trade/occupation (**see Chapter 6 Part 5**)
- **Lump sum termination/redundancy payments –** These are treated as income and may affect the bankrupt's liability to pay income contributions **(see Chapter 6 Part 4).**
- **Acquiring assets during bankruptcy which are not protected** (after-acquired assets) – Where the undischarged bankrupt purchases or otherwise acquires assets while bankrupt (that are not otherwise protected under the Act) they will vest with the Trustee (for example, shares or real estate). This applies even if the items were bought from income after contributions have been paid. The income received after the date of the bankruptcy would be able to be retained while it remained in the bankrupt's transaction account but as soon as it is converted into an asset, it vests in the Trustee **(see Chapter 6 Part 3).**
- **Wills –** When an undischarged bankrupt inherits money from a deceased estate that money/property will vest in the Trustee. Where the inheritance is sufficient for the Trustee to pay out all debts and fees the bankruptcy will be annulled and the surplus inheritance will be returned to the bankrupt. There are no restrictions imposed by the *Bankruptcy Act* regarding a bankrupt being an executor of a Will. *Annulment* is covered later in this Chapter.
- **Gifts –** When an undischarged bankrupt wins money or is given money or property during the period of the bankruptcy, then that money/property will vest in the Trustee. Where the gift/winnings are sufficient for the Trustee to pay out all debts and fees the bankruptcy will be annulled and the surplus returned to the bankrupt. Annulment is covered later in this Chapter.
- **Savings –** Money can be saved from income while a person is bankrupt, but the bankrupt will need to prove that it came from income declared to the Trustee. This may require a clear paper trail to show the source of the income.
- **Impact on getting insurance –** Some insurance can be difficult to obtain while bankrupt (and even afterwards), or special conditions could be imposed **(see Chapter 6 Part 5).**
- **Connection to utilities –** This can be problematic, particularly where there is no other member of the household in whose name utilities can be put. A security bond may be required.

- **Difficulties obtaining credit –** The bankruptcy will be listed on the National Personal Insolvency Index forever and on the bankrupt's credit report for 5 years from the dateof the bankruptcy or 2 years from discharge or annulment. This will make it moredifficult to get credit, or to get credit on reasonable terms. Clients must also disclosetheir bankruptcy status if they apply for credit above a specified amount **(see Chapter 6 Part 5).**
- **Complaints about other services –** It is not uncommon for bankrupts to complain about information or advice they may have received (or not received) from other services prior going bankrupt. In some cases, these complaints may be justified. In others the client may have been told the correct information and simply misunderstood or refused to listen. They may have withheld important information from the adviser or given misleading instructions. The best course of action in such cases is to assist the client with their current questions and needs but refer him or her to the appropriate regulator or professional association to complain about other services. Your client may also need legal advice.