# Chapter 6: The consequences of bankruptcy: Part 5

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## Content



## Summary

There are many different consequences of bankruptcy. Some of the concepts are quite complicated. It is important to have a broad understanding of the principles and to be familiar with problems that might arise so that you know what questions to ask the client and when to seek more advice on their behalf.

This section is broken up into segments. Parts 1 – 5 covers:

1. What happens to debts?
2. What property is protected?
3. What property will be taken by the Trustee?
4. Whether the client has to pay income contributions and how much.
5. What other consequences there might be.

Financial counsellors should be aware of the content of all these parts at least in broad terms as they are relevant to all clients.

Parts 6 – 9 need only be referred to if they are relevant to your client's individual circumstances. They cover in order:

6. Small Business
7. Family Law
8. Gambling and hazardous speculation

9. Death

### Introduction

Your client must understand the following potential impacts of bankruptcy before making an informed decision whether to go bankrupt:

- **Debts** – will they go away?
- **Assets** (past, present and future) – will the trustee in bankruptcy ('the Trustee') take them? Can the Trustee undo past transactions and get at assets now owned by others? What about assets your client may acquire in the future?
- **Income** – will the client have to pay a portion of their income towards their debts ('income contributions') and if so, approximately how much?
- What other limitations might there be on the client's life as a result of the bankruptcy?

These are all covered in this Chapter.

> **Note:** The same consequences apply when the client has been made bankrupt on a Creditor's Petition, although in that case there is no decision for the client to make. You can refer to this Chapter to advise your client about what to expect during bankruptcy. You should also refer to the bankrupt's obligations in **Chapter 8**. If your client has very recently been made bankrupt and does not think this should have happened, refer to **Chapter 10** – A sequestration order has been made against my client – Is there anything he or she can do? Advise your client to seek urgent legal advice.

## Part 5: Other consequences of bankruptcy – how else will it affect my life?

### Summary

There are other consequences, and potential consequences, of bankruptcy. Whether these other consequences are relevant and how badly they affect a particular bankrupt will vary considerably from client to client.

All bankruptcies are included on the National Personal Insolvency Index (NPII – a register which can be searched by anyone for a fee) and on the person's credit report.

Other consequences which may potentially impact on bankrupts include:

- restrictions on employment in some roles, trades and professions

- prohibition on being a director of a company
- problems with getting credit, insurance, rental property, telecommunications connections and utilities
- restrictions on travelling outside Australia
- feelings of shame or personal failure.

The bankrupt cannot initiate or defend legal proceedings without the involvement of the Trustee (because the right to do so has vested in the Trustee along with other property) except in relation to personal injury or other civil wrongs done to the bankrupt, his or her spouse or de facto partner or a member of the bankrupt's family, or the death of his or her (the bankrupt's) spouse, de facto partner of member of his or her family.

## Employment

Generally speaking, bankruptcy does not prevent your client from working. However, if your client is engaged in particular trades or professions there may be certain restrictions imposed by the relevant professional association or licensing authority. Your client should contact their professional association or licensing authority to confirm whether there is any effect on their membership or ability to practice a particular trade.

In some cases, it is possible to apply for permission to continue (or to show cause to the relevant licensing authority) to continue to work in the particular trade or profession. It is better to take proactive action to seek permission where relevant rather than compound the problem with concealment or dishonesty. In some cases, the client may reassess their options as result of the potential impact on their employment.

A bankrupt's employer will not be notified of their bankruptcy in the usual course of events. However, bankruptcies are public information, and the employer may become aware of it by other means.

An employer may become aware of an employee's bankruptcy if the bankrupt fails to pay assessed income contributions and becomes subject to a garnishee order as a result (see **Chapter 6 Part 4**). The bankrupt's payroll team (and therefore their employer) will also become aware of the bankruptcy if there is a garnishee order in place that needs to be stopped upon the client becoming bankrupt.

## Prohibition on being a director of a company

A person is automatically disqualified from managing a corporation if they are an undischarged bankrupt or they have entered a Personal Insolvency Agreement under Part X of the *Bankruptcy Act* (*Corporations Act 2001* (Cth), s 206B(3)). This does not apply to a person proposing or entering a Debt Agreement. Managing a corporation includes not only being a director, alternate director or secretary (cessation of these roles is automatic upon bankruptcy) but also actively participating in the management of the corporation in any other way including (*Corporations Act*, s 206A sets out the kinds of conduct in relation to a

corporation for which an undischarged bankrupt cannot engage):

- participating in making decisions that affect the whole, or a substantial part of the business of the corporation
- exercising the capacity to significantly affect the corporation's financial standing
- communicating instructions or wishes to the directors of the corporation knowing that the directors are accustomed to act in accordance with those instructions or wishes or intending them to so act (there is an exception for advice given in the proper performance of functions attaching to the person's professional capacity, for example accountant or solicitor).

When a person ceases to be a director, alternate director or secretary of a corporation as a result of bankruptcy the following needs to occur:

- the bankrupt person must inform the fellow directors that he or she has ceased to be a director
- the bankrupt must lodge a Form 296 (Notice of disqualification from managing corporations – bankruptcy or personal insolvency agreement) with ASIC
- the remaining directors should change the company's details with ASIC to reflect the disqualification of the bankrupt director.

More information is available on the ASIC website.

A person who has been disqualified from managing a corporation as a result of their bankruptcy can apply to the Federal Court for permission to manage corporations (generally); a class of corporations; or a particular corporation (*Corporations Act* s 206G). ASIC must be notified by a prescribed form at least 21 days prior to the application being made to give the regulator the opportunity to file an appearance if it has an interest in the matter.

In making a decision the court will have regard to the following:

- the onus is on the applicant to convince the court to make the order
- the provision is intended to protect the public and not to punish a director who subsequently becomes bankrupt; however, hardship on the bankrupt caused by the prohibition is anticipated and will not by itself be a reason for granting leave
- the prohibition is supposed to have some deterrent effect
- the prohibition is supposed to deter others from abusing the corporate structure to the detriment of shareholders, investors and others dealing with the company
- the court will consider the reason the person has ended up disqualified, the role they will play in any relevant corporation, and any consequential risks to shareholders, creditors, employees and the public.

**Example: *Carey, in the matter of Carey* [2011] FCA 235 (17 March 2011)**

A woman who was bankrupt applied to the court for permission to be a director of a not-for-profit health advocacy organisation. She had become bankrupt after she had suffered severe complications from surgery and had unsuccessfully sued her surgeon, ending up with an enormous legal costs order against her that she could not possibly pay. She was successful in her application. In granting her permission to be a director of the organisation the court considered the reason she became bankrupt, the fact that she would not be paid for the role, the fact that she would have little involvement in the organisation's finances and that she had been sought because of her extensive experience as an advocate on health issues (as opposed to management or financial management skills).

However, this case is probably more the exception than the rule due to the somewhat unique circumstances. In most other cases, the courts have been reluctant to grant approval to an undischarged bankrupt to be a director, especially where the bankrupt owes a significant amount to their creditors.

A person can become a director again once they are discharged from bankruptcy. However, they will need to be reappointed by the company in accordance with its Constitution and a change to the company details will subsequently need to be lodged with ASIC.

ASIC receives data from AFSA about bankruptcy activity and will be alerted to your client's bankruptcy (or Personal Insolvency Agreement). They will also publish your client's cessation as a director, alternate director, or secretary on ASIC's publicly available database.

## Travel restrictions

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. Section 110 of the *Bankruptcy Regulations* 2021 and clause 2.11 of the Bankruptcy (Fees and Remuneration) Determination 2015 provide for a $150 fee (as at 15 April 2025) in relation to a request for the Official Trustee's consent to travel overseas. They are encouraged to complete the 'Request for consent to travel overseas whilst bankrupt Form' although it is not required. This fee and form do not apply to a bankrupt whose trustee is a registered trustee.

A bankrupt is required to hand over his or her passport 'forthwith' after becoming a bankrupt (s 77). In reality, the Trustee will often dispense with this requirement, depending on the circumstances of the bankrupt. If the client is considered a flight risk – that is someone who has both the means and the motivation to leave the country – they may be placed on a Ports Watch List regardless of whether the Trustee takes the person's passport. In order to ensure a conviction for leaving Australia without the Trustee's written permission, the bankrupt must have actually boarded the aircraft. This would be very unlikely for clients who have few

assets.

It is also an offence (in fact a more serious offence) to attempt to leave Australia with the intent to defeat or delay payment to creditors during bankruptcy and within the 6 months before the presentation of a petition (s 272(1)(a)). Simply having left Australia in the 6 months prior to bankruptcy will not be sufficient to be an offence – there must be some evidence of the intent to defeat or delay creditors.

Bankrupts will usually be given permission to travel provided that:

- it is necessary to earning their income; OR
- they have compassionate reasons; AND
- it will not interfere with the administration of the estate; AND
- he or she is not considered a flight risk – that is likely to never return.

Permission must be sought at least 14 days in advance of travel (it is advisable to apply for permission well before this to give adequate time to make travel arrangements after getting an answer). See **Chapter 8** for how to apply.

The Trustee may impose conditions when providing consent to travel. Conditions may include such things as:

- returning to Australia by a particular date; and/or
- paying up any income contributions due in the period of travel in advance.

The bankrupt should carry a copy of the Trustee's written consent with them when leaving the country just in case they have been placed on an alert list with immigration officials and the Australian Federal Police. While this is unlikely for consumer bankrupts with few assets, it is wise to carry a copy of the Trustee's consent just in case.

If the bankrupt fails to abide by any condition imposed by the Trustee, he or she can be charged with a breach of s 272(3). The following are also grounds for the Trustee to object to the bankrupt's discharge:

- leaving Australia without the Trustee's permission
- failure to abide by a trustee's condition(s)
- failure to return to Australia at the time specified in the request for permission
- failure to return to Australia upon the request of the Trustee.

This could result in the bankruptcy being extended from 3 years to 5 or 8 years depending on the circumstances.

By comparison, people who enter Debt Agreements or Personal Insolvency Agreements do not need to seek permission to travel.

The obligation to seek permission to travel ceases when the bankrupt is discharged, or the

bankruptcy annulled.

## Public record

All bankruptcies are recorded on the NPII permanently. This is a publicly available register of all insolvency proceedings in Australia including not only bankruptcies but also Creditor's Petitions, Debt Agreements and Personal Insolvency Agreements.

Information recorded on the NPII includes:

- name and other personal information that identifies a debtor or bankrupt (name, date of birth, aliases, address, occupation to the extent these are known)
- the type of administration or proceeding
- the Trustee, administrator or controlling trustee of the administration or proceeding
- the petitioning creditor and/or creditor's solicitor (where a Creditor's Petition is recorded)
- the date an administration or proceeding commenced; and
- the current status of the administration or proceeding – for example: whether a person has been discharged from bankruptcy.

**Tip: Clients who are concerned for their own physical safety**

If your client fears that his or her safety may be compromised by the inclusion of their address on the NPII they can apply in writing to the Inspector General to suppress the address only (the name, date of birth and details of the insolvency process will remain). Evidence such as a copy of any court orders or reports from police, a social worker, a medical practitioner or other relevant professional should be supplied along with the request. Where your client is lodging a Debtor's Petition, then the request should be lodged at the same time to avoid unnecessary publication.

A decision will usually be made within 1 day and the response supplied to the applicant in writing. Review by the Administrative Appeals Tribunal is available if the client believes the request has been unreasonably refused.

Records are only removed from the NPII in the following circumstances:

- when the record is ordered to be removed by the Federal Court or Federal Circuit and Family Court, for example, because a sequestration order has been set aside
- when it is has been established that the original process was a forgery (Debtor's Petition lodged by someone other than the named debtor for example)
- where was an administrative error in processing and the information should never have been recorded.

Where a bankruptcy has been annulled, the bankruptcy will not be removed from the record, but the record will be updated to show that it has been annulled.

The NPII can be searched by anyone for a fee. The search can be done via an information broker or with AFSA directly on its website under the Bankruptcy Register Searches. A standard search costs $15 (as at 15 April 2025).

## Obtaining credit/loans

It is an offence for a bankrupt person to obtain a loan or other form of credit (including hire purchase agreements and leases) of over a prescribed amount without disclosing that he or she is a bankrupt (currently $7,060 as at 15 April 2025, for current Indexed Amounts check the AFSA website). The same applies to procuring goods or services on credit or paying by cheque. This is an offence attracting a maximum 3 years' imprisonment and is also a potential reason for the Trustee to object to the person's discharge from bankruptcy. This does not mean that the person cannot obtain or request the credit, only that they must disclose their bankrupt status, which may in turn lead to credit being refused.

Extracts from the NPII are also given electronically to credit reporting agencies. Bankruptcies will remain on the person's credit report the longer of 5 years from the date of the bankruptcy, or 2 years from discharge or annulment. This would be 5 years in most cases but could also be 7 or even 10 years if the bankruptcy is extended by objection to discharge.

The credit report listing will make it more difficult to obtain credit. In some cases, clients may be able to obtain secured credit, especially at a higher price than the going rate, or expensive fringe credit such as pay day loans. Of course, repaying higher priced credit can be considerably more difficult than repaying mainstream credit and loans incurred after bankruptcy will not be provable, placing the client at risk of enforcement activity commencing all over again (and possibly a subsequent bankruptcy).

## Obtaining insurance

People who are or have been bankrupt may experience difficulties obtaining some types of insurance. An informal survey of members by the Insurance Council of Australia conducted in the last ten years revealed the following about current underwriting policies:

- generally, for home contents/building and motor vehicle policies, bankruptcy is not a consideration, although one insurer reported declining insurance cover where a person was or had been bankrupt within the 10 years prior to application (clients of financial counselling services also report such difficulties from time to time)
- bankruptcy may be a relevant consideration for deciding whether to provide consumer credit insurance
- for business lines of insurance, whether the customer is or has been bankrupt would generally be a significant underwriting factor
- as an undischarged bankrupt cannot be a director or officer of a corporation, he or she would of course be unable to obtain Director's & Officer's cover. Even after bankruptcy, the previous bankruptcy would remain an underwriting consideration for this type of insurance
- professional Indemnity and Management Liability Insurance may also be affected, although higher premiums and restrictive conditions would be more likely than an automatic decline of cover.

The decision of the insurer (whether to provide cover) will depend on the risk appetite of the individual insurer and would be decided on a case-by-case basis. It may be that insurance cover is declined altogether, but it is also possible that the person would get insurance but have to pay higher premiums or be subject more restrictive terms such as exclusions and special conditions. The consequences would vary depending on:

- the type of insurance sought (for example, there may be very little impact on obtaining public liability for a market stall holder)
- the occupation of the person seeking business insurance (for example, a hairdresser would possibly experience less difficulty than an accountant or financial planner); and
- the cause of bankruptcy (bankruptcy following a divorce may not be seen as significant as that which could be construed as due to business mismanagement).

Insurers will vary in the degree to which they will be willing to look into all the above factors and make a tailored decision.

**Case study**

Mr T was a builder. He found himself in financial difficulties and went bankrupt. Unable to continue as a licensed builder, he found employment in teaching the skills he had formerly used to make his living. When he was made redundant from that position, he decided to set up a small handyman service. Unfortunately, he was unable to get public liability insurance because of the bankruptcy, despite trying a number of insurers. One of the insurers told him they would not insure him until 5 years after discharge.

## Entering contracts (telecommunications, rental housing)

The bankruptcy listing on the client's credit report can also affect their access to other services. Clients report having trouble getting rental properties, getting mobile phone contracts and access to services such a pay TV. This is even more problematic for clients who live alone and cannot access services in the name of another member of the household. Sometimes relatives can assist, but this is not always the case. Many clients therefore prefer to keep their bankrupt status confidential.

Clients without any history of rent arrears may not foresee any impact on their ability to obtain a residential lease. It is important that you draw this possibility to their attention and get them to think about strategies to deal with this. References from previous landlords may be of assistance, but the degree of difficulty they will encounter will vary with the number of tenants competing for available properties.

## Immigration and sponsorship of migrants

Clients from outside Australia should check with the Home Affairs to determine whether bankruptcy will have any effect on their immigration status.

Sponsors of migrants have an obligation to notify the Department of Home Affairs within 10 working days if they become bankrupt. Sponsors should contact both the Home Affairs and AFSA to determine the implications of bankruptcy in their situation, including the impact on any funds held in an account by way of bond.

## Court proceedings

### Legal proceedings against your client

Generally speaking, a creditor cannot enforce any remedy against the person or property of a bankrupt in relation to a provable debt (s 58(3)). Further, a creditor 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 on such terms as the court thinks fit (s 58(3)).

This does not affect a secured creditor's right to enforce against property that is security fora loan. So, if a client defaults on their home mortgage, or car loan, the creditor can takeaction to repossess and sell the secured property or vehicle according to the usual rules.Note that a lease, mortgage, bill of sale, lien or charge cannot contain a clause which makesbecoming bankrupt (or committing an act of bankruptcy) alone sufficient to trigger a remedy,or modifications to the rights of the parties to the contract. Such clauses are void by virtue ofss 301 and 302 of the *Bankruptcy Act* (more on this is found in **Chapter 8***)*.

Enforcement action can also be taken in relation to a maintenance agreement or maintenance order under the *Family Law Act 1975* (Cth) or *Child Support (Assessment) Act 1989* (Cth). Proceeds of crime proceedings and orders are also unaffected by bankruptcy.

The court additionally has broad powers to stay proceedings or discharge orders relating to non-payment of provable debts, including releasing debtors from custody (s 60(2)).

When contacted by creditors, your bankrupt client should inform the creditor that he or she is bankrupt and give them the date of the bankruptcy and the bankruptcy number (this should be on correspondence received from AFSA). Should your client be sued, or a fresh step taken in proceedings, after the date of the bankruptcy, he or she should notify the plaintiff and the Trustee and provide copies of any court documents to the Trustee. Where the Trustee indicates that he or she does not intend to defend proceedings, the client should also notify the court in writing of the bankruptcy – providing documentary evidence of the date of the bankruptcy and the bankruptcy number.

**Example**

Ms Q was bankrupt. Despite this, her main creditor persisted in pursuing a Statement of Claim for $20,000 in the Local Court in her country town. The Statement of Claim was couched in very colourful language and the plaintiff argued that the debt was not provable in bankruptcy because it was due to fraud. An examination of the facts, however, revealed that the cause of action was really damages for breach of contract.

Her Trustee indicated that he would not be defending the action and could not advise Ms Q what she should do. She was worried about a judgment being entered against her based on the rather slanderous allegations in the Statement of Claim.

Ms Q was advised to write a letter to the Registry to put before the court on the next occasion, outlining s 58(3) of the Bankruptcy Act which requires the plaintiff to obtain leave from the Federal Court of Australia in order to take a further step in the proceedings. Ms Q was advised that the Local Court put a permanent stay

on the proceedings.

When your client is a joint debtor and the other co-borrower is not bankrupt, the client may be joined to proceedings against the other debtor (receive a Statement of Claim or Summons or other document initiating court proceedings). Again, the bankrupt should notify the Trustee and forward the relevant court documents.

Where your client is being subject to proceedings alleging fraud, he or she should seek legal advice.

Where your client is being sued in relation to a contract entered into after bankruptcy, this debt is not provable, and the client will need to seek legal advice about any possible defence. It is advisable to also discuss the matter with your Trustee.

**Legal proceedings by your client**

Any legal action commenced by a person who subsequently becomes a bankrupt is automatically stayed until the Trustee makes an election in writing about whether to continue the proceedings or not (s 60(2)). Your client generally cannot continue or commence court proceedings during bankruptcy without the involvement of the Trustee. This is because the right to recover any property or money owed to the bankrupt vests in the Trustee like any other property (s 116(1)(b)).

However, there are exceptions (see s 60(4)) for proceedings in relation to:

- any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family
- the death of the bankrupt's spouse or de facto partners or of a member of his or her family.

This means your client can commence or continue proceedings if it relates to one of the above exceptions.

Personal injury or wrong has been defined by the courts as including any case where the damages sought are for pain felt by the bankrupt in respect of 'his mind, body or character' or alternatively 'injury to the person or feelings' of the bankrupt. This means the bankrupt can continue legal proceedings in his or her own name, and without the approval of the Trustee, for not only physical injury, but injuries to reputation or character such as libel, slander or assault. Trespass has also been held to be an exception where the only damage is personal annoyance and inconvenience.

On the other hand, any action which is based upon 'direct pecuniary loss to property or the estate of the bankrupt', the right to sue passes to the Trustee. This would include any incidental impact on the feelings or health of the bankrupt if that claim is only incidental to a

claim related to money or property. In such cases the bankrupt cannot continue the proceedings in his or her own name – it is entirely the decision of the Trustee as to whether the proceedings are worth pursuing for the benefit of the creditors given the time, effort and expense involved and the likelihood of success.

The courts have also allowed bankrupts to continue with actions that have a direct impact on their ability to earn an income by personal exertion (consistent with the protection of tools of trade). This is not an exception under s 60(4) or s 116(2)(g) but instead a recognition that certain types of rights are not property and do not vest in the Trustee under s 116(1). The bankrupt would therefore be permitted to continue an unfair dismissal action or defend an action which threatened an occupational licence. A commercial pilot's licence, for example, was held by the Federal Court not to be a property right, because it was personal to the licensee, reflected the licensee's fitness and qualifications only, and could not be transferred. This meant that the bankrupt could continue with an appeal against conditions imposed upon his pilot's licence. On the other hand, a taxi licence or liquor license which could be sold for a market value, would be considered a property right and any relevant court action would likely vest in the Trustee. Similarly, any claim that related to earning an income from property rights (protecting an investment for example) would also pass to the Trustee.

The cases also distinguish between the right to sue to recover 'moneys which, by his personal effort, he [the bankrupt] had earned', which is protected, and the right to sue for damages for breach of employment contract (money he might have earned had the contract not been terminated). In the latter case, the action has been held to vest in the trustee, although in that case the damages claim related to the period prior to bankruptcy. Logically it could be argued that if the breach of contract occurred after the date of the bankruptcy, then the damages would form income and the income assessment regime would apply rather than the damages forming after-acquired property. There is no case law on this point and clients wishing to pursue a claim for damages for breach of contract while bankrupt should get legal advice.

Legal proceedings commenced by a person who is, or subsequently becomes, bankrupt against a life 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 consent 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 consent to proceedings being issued or continued, particularly if they are being conducted on a no win/no charge basis or if the adverse risks are being funded.

Accordingly, always seek the permission of the Trustee in bankruptcy in writing before issuing or continuing with a court action against an insurer or superannuation fund. Theclient will also need advice on whether the proceeds of such a claim will be protected inbankruptcy and the implications of this.

**Examples**

**Causes of action/loss and Effect of bankruptcy**

1. Physical injury as a result of car accident, industrial accident or other negligence
    - None – the bankrupt can start or continue proceedings without the consent or involvement of the Trustee
2. Defamation
    - None – The bankrupt can start or continue proceedings without the consent or involvement of the Trustee unless damages to business or property rights affected
3. Physical or mental injury as a result of an assault or other criminal act (including claims for victim's compensation)
    - None – The bankrupt can start or continue proceedings without the consent or involvement of the Trustee
4. Pain, suffering and inconvenience as a result of harassment or coercion under the Trade Practices Act, Australian Consumer Law or ASIC Act
    - Arguably protected – seek legal advice
5. Misleading or deceptive conduct or unconscionable conduct
    - Likely to involve damages for loss of money or property and therefore likely to vest in the Trustee – if in doubt, seek legal advice
6. Breach of contract
    - Will usually vest in the Trustee
7. Negligence in professional services such as financial or legal advice
    - Likely to involve damages for loss of money or property and therefore likely to vest in the Trustee
8. Employment related claims (for example, unfair dismissal)
    - Any claim to reinstatement does not vest in the Trustee as the bankrupt is entitled to earn an income. The client should get legal advice in relation to the status of any money received by way of settlement (as to whether such funds will vest in the Trustee or be counted as income for contribution assessment purposes).
9. Administrative appeal against cancellation or suspension of occupational licence
    - Probably none – the bankrupt can start or continue proceedings

without the consent or involvement of the Trustee. There could be doubt if the licence involves property rights (for example, can it be sold?) – get legal advice.

In any event it is preferable to inform the Trustee of any proceedings as any payout will need to be disclosed to the Trustee (along with the reasons why it should be protected in bankruptcy if that is the case).

Where the Trustee has been notified of the proceedings by another party (a party to the proceedings other than the bankrupt), then he or she has 28 days within which to elect in writing to continue the action on behalf of the bankrupt's estate. Where he or she fails to do so within this time period, then the Trustee is taken to have abandoned the action and the relevant party could apply to the court to have the matter discontinued. As the right of action has vested in the Trustee, the bankrupt personally cannot be subject of any cost orders in proceedings after the start of the bankruptcy.

The right to continue legal action (or commence legal action) in relation to property rights vests in the Trustee, like other property acquired before or during bankruptcy. It does not re-vest in the bankrupt upon discharge. This means that the bankrupt cannot take legal action upon discharge, even though the relevant limitation date for doing so may not have passed. This right remains with the Trustee unless it is assigned for valuable consideration (in the same way a discharged bankrupt can buy back the equity accumulated in their home or other property upon discharge if it has not been sold during the bankruptcy). Even if the former bankrupt were able to successfully take legal action (without objection by the Trustee or another party), any money or property recovered would vest in the Trustee regardless of the bankrupt's subsequent discharge. In some cases, the Trustee will assign the right of action to the discharged bankrupt for a nominal sum of, for example, $5,000, plus a percentage of any successful net verdict amount.

Whether the client can take a dispute to an external dispute resolution scheme while bankrupt is covered in **Chapter 8.**

## Cooperation with the Trustee

Bankrupts have wide-ranging obligations to co-operate with the Trustee. What this means in practice will vary greatly depending on the nature of the bankruptcy and whether the debtor has any assets or has disposed of (or is suspected of disposing of) assets in the period preceding the bankruptcy. These obligations are covered in more detail in **Chapter 8**, but a client considering bankruptcy should generally be aware that their Trustee will have considerable power to compel him or her to co-operate if such assistance would be useful in administering the bankrupt estate. Criminal penalties can sometimes apply. It is also advisable that the bankrupt co-operates to minimise the chances that the bankruptcy will be extended (see **Chapter 8** – **Objections to discharge**).

When the bankrupt (and possibly his or her family) are living in their own home, or a caravan

or other asset that may be sold for the benefit of their creditors, they are likely to be asked to leave at some point to allow a sale with vacant possession to take place. Bankrupts who have had business dealings or property ownership arrangements will be expected to answer questions and supply information and records to assist the Trustee to understand and deal with the estate for the benefit of the creditors.

## How long does it last?

Usually, bankruptcy lasts 3 years and 1 day from the filing of the debtor's statement of affairs, but it can be extended to 5 years or 8 years in certain circumstances. The reasons that a bankruptcy may be extended are covered in **Chapter 8**.

## How will I feel about it in the morning?

Bankruptcy is a big step that has the potential to have a big impact on the client's emotional well-being. Some clients have little compunction about not paying some or all their debts, but may find the restrictions on their life, or the perceived attitude of others, more difficult to deal with than they first anticipate. Others may experience no real practical consequence of bankruptcy but suffer terrible feelings of failure and shame. For many there are both practical and emotional consequences.

It is important that clients are given the space and time to consider the decision carefully. As this is a very complex area, part of the financial counsellor's task is trying to identify what consequences are relevant to a particular client's circumstances so that they are not too overwhelmed with information to comprehend the implications. At the same time, no consequence can be completely omitted, in case it has a relevance that the financial counsellor has not foreseen.

It is also important not to rely on the client to tell you everything that may be relevant, because the client will have no idea what this may be. In some cases, clients may deliberately conceal relevant information. Counsellors need to develop the skills to elicit the relevant information from the client and to make adequate file notes. It may also help for people to understand the reasons why we have bankruptcy laws and the important role they play in allowing people to move on from insurmountable debt.