Chapter 9: It’s all over, or is it? Part 2

Updated: 6 May 2024

Content

Summary

Part 1 of this Chapter covers what happens after discharge. While bankruptcy officially ends at discharge there are some ongoing ramifications:

- The client may experience ongoing difficulties getting credit and goods and services because of the listing on their credit report/NPII
- There may continue to be employment ramifications
- Any property that vested in the trustee as a result of the bankruptcy will remain so for a certain period unless the client has made arrangements with the Trustee to buy the property back – vested property may still be sold or otherwise dealt with by the Trustee
- Investigations into past transactions may be continued or re-opened if new information comes to light, potentially resulting in claims for money or property from third parties
- Undisclosed property could still be identified and vest in the Trustee
- Undisclosed income could result in a reassessment of contributions owed
- The Trustee could take enforcement action against the former bankrupt to recover unpaid contributions
- The discharged bankrupt has an ongoing obligation to cooperate with the Trustee in relation to any of the above.

The former bankrupt is released from most provable debts BUT:

- Debts incurred by fraud may still be enforced against the debtor (unless there is a judgment or repatriation order for the debt which predates the bankruptcy)
- The former bankrupt is not released from bail and recognisance debts, maintenance or child support, or debts incurred after the date of the bankruptcy.

Part 2 of this Chapter contains information on responding to recovery action by Centrelink in relation to allegedly fraudulently incurred debts.

Part 2: Debts allegedly incurred by fraud – dealing with Centrelink demands

Prior to November 2022, there was a legal case which established the principal that if a civil judgment had been made in relation to a debt prior to bankruptcy, the bankruptcy might extinguish that debt even if that initial debt was incurred by fraud (*Power v Kenny* [1977] WAR 87). For example, if a person was found to be lying to Centrelink about their income, they may have a civil judgment debt against them for the repayment of their benefits, but this would be extinguished upon discharge of the bankruptcy. In 2022, a Victorian Supreme Court decision changed this approach to the law (*Barodawala v Perinparajah* [2022] VSCA 198). Now, a judgment debt which was incurred by reason of fraudulent conduct will fall under the rule in s 153(2)(b). As a consequence, a client will be required to pay a judgment debt arising out of fraudulent conduct despite being discharged from bankruptcy. Please note this is a developing and complex area of the law and may be subject to change or re-interpretation.

As covered in **Chapter 6 Part 1**, Centrelink will sometimes seek to recover debts that would otherwise be extinguished by bankruptcy on the basis that the debt was incurred by fraud. It is important not to accept this demand at face value. Centrelink should only be demanding payment, or garnisheeing the client's income where:

1. the client has received a conviction specifically for a fraud offence; or
2. the client has admitted fraud (the validity of which depends on the client's legal capacity and the circumstances in which the admission was obtained – when in doubt, refer the client for legal advice).

If your client is a discharged bankrupt who is being pursued for a Centrelink debt that predates their bankruptcy and they have neither been found by a Court to have acted fraudulently nor admitted fraud, there is a Sample Letter on the following page that you can use to dispute Centrelink's decision to pursue the debt.

A note on Power v Kenny [1977] WAR 87

In September 2022, the Supreme Court of Victoria refused to follow Power v Kenny in the matter of Barodawala v Perinparajah [2022] VSCA 198. By a 2:1 majority, the Court held that a judgment debt is capable of falling within the exception found in s 153(2)(b) of the Bankruptcy Act if the judgment debt isbased on a finding of fraud. The effect of Barodawala is that a client who isdischarged from bankruptcy will no longer be released of a debt incurred by fraudby operation of the judgment order.

Power v Kenny was a decision of the Supreme Court of Western Australia. Barodawala is not, therefore, a subsequent decision by a superior court and is not necessarily binding on the Supreme Courts of other States. However, special leave to appeal Barodawala was refused by the High Court in March 2023 as the appeal had insufficient prospects of success. It is therefore uncertain whether Barodawala is binding in Victoria only, or in all States and Territories except Western Australia, or in all States and Territories including Western Australia.

In short, the law on this point is not settled. **If your client has had a judgment order made against them for fraud, refer the client for legal advice.**

Sample letter: to Centrelink

The following has been adapted from a letter prepared by Malcolm Buchanan, Financial Counsellor, Family Mediation Centre, Traralgon, Victoria

Insert date

Authorised Review Officer, Centrelink

Insert address

To whom it may concern,

Re: *[Insert Client's Name and CRN]*

I am assisting the above client and my client's authority is enclosed.

[Insert client's name] contacted this agency in reference to a decision by Centrelink to reinstate a debt of *[insert amount]* after discharged from bankruptcy. This debt predated the bankruptcy and was provable in the bankruptcy.

My client disputes your decision to reinstate this debt as my client argues it was extinguished by the bankruptcy.

I refer to the following cases:

- Civitareale v Department of Family & Community Services (1999) 57 ALD 451; [1999] AAT
- Department of Social Security v Southcott (1998) 82 FCR 100; (1998) 50 ALD 162; (1998) 27 AAR 106; [1998] FCA 323
- Department of Family & Community Services v Dobson [2000] AATA 41

Once a person has bankrupted, a debt due to the Commonwealth is replaced by the right to prove in bankruptcy under the Bankruptcy Act. The exception is, of course, if the debt is incurred by fraud.

In paragraph 95 of Civitareale, the AAT defined fraud from the Osborne Law Dictionary:

"*Fraud is proved when it is shown that a false misrepresentation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it is true or false. To obtain damages for deceit it must be proved that the defendant intended that the plaintiff should act on the fraudulent misrepresentation…"*

In my client's case, there is no indication that you applied any of these definitions.

Please outline the evidence on which you are relying to establish that my client has behaved fraudulently so that my client can properly make his or case to the review.

Please confirm that this debt has been extinguished and no further action will be taken.

Yours faithfully,

Financial Counsellor

The High Court case of *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20, found that the notices issued to the defendant by Centrelink asking for updated income details placed the defendant under a positive duty to disclose, which, if not complied with, could form the basis of the Criminal Code offence of obtaining a financial advantage from a Commonwealth entity. This case is likely to be quoted by Centrelink in response to this letter. If your client has not made any false statements but has completely failed to complete forms sent by Centrelink requiring income information, without reasonable excuse (such as perhaps mental illness, lack of intellectual capacity, or perhaps serious illness), then your client should get legal advice in relation to potential prosecution before pushing this issue any further.

If you (or your) client receive further correspondence from Centrelink indicating that the debt will continue to be pursued, you should refer the client for legal advice and assistance. Your client can seek a review by an Authorised Review Officer and then the Administrative Appeals Tribunal. If your client has not been charged with a criminal offence you should also refer them for criminal law advice prior to lodging an appeal, as there is a risk that if their

appeal is unsuccessful, they could be referred to criminal prosecution. Statements made by your client in the course of their appeal could potentially be used as evidence in a subsequent prosecution.

Your client may dispute the debt and lodge an appeal even if they have already commenced paying back the debt. If the appeal succeeds and the debt is set aside or waived, amounts which have been 'over-recovered' will be refunded to your client. There is no time limit to start an appeal with an Authorised Review Officer or the first tier of the Administrative Appeals Tribunal.

If your client concedes that they have engaged in fraud and yet is facing particular financial hardship as a result of the demand for repayment, you can make representations to this effect when seeking a write-off of the debt under s 1236 of the *Social Security Act 1991*.