

The most commonly asked questions about bankruptcy

1. What is bankruptcy?

Bankruptcy or arrangements under the Bankruptcy Act provides a method by which a person who is unable to pay their debts from their income or from property available to them, can have their affairs administered by a bankruptcy trustee.

Creditors lodge claims with the trustee, the trustee sells property of value and may collect contributions from a bankrupt's income, and after meeting the costs of the administration distributes the funds to the creditors in proportion with their debt.

The benefits of petitioning for bankruptcy are that you obtain some relief from your debts and you are able to make a fresh start.

The disadvantages include:

- the sale by your trustee of most of your property of value
- your financial affairs and all your property dealings are subject to rigorous investigation
- you are subject to certain restrictions which require you to disclose your bankruptcy
- you may not be able to obtain further credit even after you are released from your bankruptcy
- if your conduct is unsatisfactory your bankruptcy could be extended from 3 years to either 5 or 8 years

Bankruptcy is an act of last resort. It should not be taken without careful consideration and professional advice.

2. Do I need to become bankrupt?

GET PROPER ADVICE

If your debts have mounted up and your creditors want to be paid, then you might think that bankruptcy is your only option. It might seem inevitable and even attractive. But you should consider other legally available alternatives listed in this information sheet before taking that step. Once you have read this information sheet you might need further information or help in deciding if bankruptcy or one of the alternatives to it is best for your financial circumstances. If so, you can ask for help from

a registered bankruptcy trustee, a financial counsellor, a solicitor, accountant or the Insolvency and Trustee Service Australia (ITSA). Contact information about registered bankruptcy trustees, financial counsellors and ITSA offices is available on a separate sheet.

ALTERNATIVES TO BANKRUPTCY

An Informal Arrangement with Creditors

If you have not done so yet you should discuss your difficulties with your creditors. They might agree, especially if you have a regular income, that you can pay them off over time. There might be no publicity. But informal arrangements might not be binding on creditors. They can change their minds and start action to make you pay in full. This is likely to happen if you fall behind in your payments.

A Debt Agreement under Part IX (Nine) of the Bankruptcy Act

Debt agreements are a streamlined, lowcost process. To make a debt agreement you can make a formal proposal to your creditors to pay all or part of your debts. Creditors can accept or reject your proposal. You can only make a debt agreement proposal if you have:

- Not been bankrupt, used the debt agreement system or signed an authority under Part X (Ten) of the Bankruptcy Act in the last 10 years
- Unsecured debts of less than (in round figures) \$52,000
- After-tax income of no more than (in round figures) \$26,000 a year
- Property, not exempt under bankruptcy, of less than (in round figures) \$52,000

A registered bankruptcy trustee, a financial counsellor or ITSA can help you to make a debt agreement. A proposal for a debt agreement, and a debt agreement, are publicly recorded. There are no fees or administrative charges for setting up debt agreements.

Note: It is an 'act of bankruptcy' to give to the Official Trustee a written proposal for a debt agreement. An 'act of bankruptcy' is an action by you that will allow your creditors to commence proceedings against you.

A Formal Arrangement under Part X (Ten) of the Bankruptcy Act

There are three options under Part X and each is binding on you and your creditors. To take up one of these options, which avoid bankruptcy, you probably will need either a steady income, funds from a family member, or assets to offer your creditors.

A registered bankruptcy trustee can tell you whether a Part X arrangement is practical. Fees are charged. Part X arrangements are publicly recorded.

COOLING-OFF PERIOD

If you are thinking about becoming voluntarily bankrupt, you can lodge a signed statement with ITSA stating that you intend to do so. This is called presenting a declaration of intent to lodge a debtor's petition. The law then gives you a 7 day "cooling-off" period in which you must decide whether or not to go ahead and become bankrupt. During the 7 days, your creditors cannot take direct action to recover their debts. You can only make a declaration of intention once in each 12 months.

Note: It is an 'act of bankruptcy' to give an Official Receiver a declaration of intention to present a debtor's petition. An 'act of bankruptcy' is an action by you that will allow your creditors to commence proceedings against you.

3. How do I become bankrupt?

You become bankrupt voluntarily or by the actions of a creditor. To become bankrupt voluntarily you must fill out 2 forms: a debtor's petition and a statement of affairs. These forms are available from ITSA, a financial counsellor or a registered bankruptcy trustee. On the statement of affairs form, you must show all your debts. To do this you will need the name, address, and the amount you owe to each creditor. You must also show full details of your income and of your property which includes your house, car, bank accounts, shares, and any money owed to you. There are severe penalties, including imprisonment, if you do not disclose all of your property, or conceal it or unlawfully dispose of it. You become bankrupt when the 2 forms are accepted by ITSA.

4. How much must I owe before I can go bankrupt?

You can become bankrupt voluntarily owing any amount. A creditor cannot have you made bankrupt unless you owe the creditor \$2,000 or more.

5. Who would handle my bankruptcy.?

Your bankruptcy will be handled by a registered bankruptcy trustee chosen by you before bankruptcy and who has agreed to administer your bankruptcy or, if no registered trustee agrees to do so, by ITSA. A list of registered trustees is available from ITSA. Usually, the fees for administering a bankruptcy are taken out of monies received in your bankruptcy, generally from selling your property. ITSA's fees are the whole of your bankruptcy estate up to \$4,000. If your estate exceeds \$4,000 the fees are \$4,000 plus a percentage on a sliding scale of monies received in excess of \$4,000. Registered trustees are entitled to a minimum fee of \$1,109 (indexed) even if your bankrupt estate is less than \$1,109. In addition they charge fees on hourly rates.

6. How long would I be bankrupt?

The standard period of a bankruptcy is 3 years from the date a statement of affairs is filed. This period may be extended to either 5 or 8 years if you do not do what the law requires you to do so that the trustee can administer your bankruptcy. In some cases, you may apply for an early discharge after 6 months.

EARLY DISCHARGE

You can apply for, and will be eligible for, an early discharge 6 months after filing your statement of affairs, if your bankruptcy trustee agrees that all of the following tests are met:

- there is no money available to pay creditors
- compulsory contributions are not required
- [no transaction has been entered into that may be avoided by the trustee
- you have not been bankrupt or entered into a formal arrangement under Part X (Ten) of the Bankruptcy Act in the last 10 years
- unsecured debts do not exceed 150% of income received in the year prior to bankruptcy
- you disclosed all income and property you disclosed all debts and creditors you did not incur credit of \$3,358 (indexed) or more without disclosing the bankruptcy
- you did not continue to manage a company
- your passport was surrendered when requested

7. What happens to my debts after bankruptcy?

UNSECURED CREDITORS

Unsecured creditors cannot take further action to recover debts, but they may lodge claims in the bankruptcy. Important exceptions are fines for breaches of the law, fraud debts, maintenance payments and debts to the Department of Social

Security. Bankruptcy does not protect you from payment of these debts. The Australian Tax Office may also use tax refund credits to reduce tax debts during the bankruptcy. The other exceptions are secured creditors (details follow).

If you have unpaid accounts for essential services like electricity, telephone or gas the supplier might require you to pay a bond to keep the service connected.

SECURED CREDITORS, CONSUMER CREDIT CONTRACTS (HIRE PURCHASE), LEASES

Creditors who hold security over your assets (e.g., mortgages, bills of sale) and creditors for consumer credit contracts or lease agreement items, can recover the asset and sell it. They can then lodge a claim for any loss. If you wish to retain these assets, you must negotiate with the secured creditors and make regular payments. If the asset's value exceeds the amount payable to finalise the agreement, your bankruptcy trustee can sell the asset.

8. What happens if someone has guaranteed my debts?

Bankruptcy does not prevent a creditor from claiming under a guarantee and recovering payment from the guarantor.

9. Someone else also signed my loan agreement. Will they have to pay if I become bankrupt?

Generally, yes. They will still have a liability for the total amount outstanding on all debts incurred in joint names.

10. What about debts incurred just before my bankruptcy?

If you cannot pay your debts, you should not incur further debts. Doing so probably will be an offence under the Bankruptcy Act, and you might be prosecuted.

11. What happens to a debt I forgot to show on my Statement of Affairs?

If you remember it later, you must contact your bankruptcy trustee immediately so that it can be added to your list of debts. Not disclosing a debt might affect your eligibility for an early discharge, and could extend your bankruptcy to 5 years.

12. What about debts incurred after bankruptcy?

You are responsible for paying all debts you incur after your bankruptcy.

13. Can a creditor contact me and insist on payment once I am bankrupt?

No. The Bankruptcy Act stops creditors from recovering money from you. An exception is a secured creditor with whom you have made arrangements to retain secured property as per paragraph 7. If other creditors attempt to recover money from you, tell them about your bankruptcy. If they continue to insist on payment, tell your bankruptcy trustee. If physical harassment occurs, contact the police.

14. Can I continue to use my credit cards after bankruptcy?

The issuing bank or finance company will decide whether it is prepared to extend credit to you. It is an offence for you to obtain credit over \$3,358 (indexed) without disclosing to the person you are dealing with that you are an undischarged bankrupt.

15. I've had a car accident and the owner of the other car is pressing me for the cost of repairs. Will my bankruptcy protect me from the debt?

Only if, before your bankruptcy started, there has been a court judgement against you, or there is a written agreement between you and the other party that you will pay for the repairs.

16. Will I lose my property?

Once bankrupt, you cannot sell or deal with most of your property. Only your bankruptcy trustee, or a secured creditor can do so. Your bankruptcy trustee can dispose of your property for the benefit of creditors. See paragraph. 6.

Property includes anything of monetary value belonging to you at the date of your bankruptcy. It also includes assets acquired by you before

your discharge including lottery wins and other prizes. Your interest in the family home, land, money in bank accounts, vehicles exceeding \$5,000 in value, stocks and shares, antiques and other personal property of saleable value are all included. Any interest you have, or acquire during bankruptcy, as a beneficiary under a will belongs to your bankruptcy trustee.

Some assets are protected by the Bankruptcy Act which means they cannot be sold by your bankruptcy trustee to pay creditors. The property protected by the Bankruptcy Act includes necessary household furniture, personal effects, property you use to earn personal exertion income, life insurance and superannuation policies and your primary means of transport worth up to \$5,000 (e.g. car or motor bike).

17. Will I lose my house?

You might. Your bankruptcy trustee has a duty to turn into cash, for your creditors' benefit, almost all of your property, including any share you have in your house. This might mean that the house has to be sold. If it is jointly-owned, your bankruptcy trustee might consider selling your share in it to a non-bankrupt joint owner. A house property that is subject to a Defence Service Homes mortgage cannot be sold without the approval of the Secretary of the Department of Veterans' Affairs.

A secured creditor can sell your house if you default on mortgage loan repayments.

18. What if I have a car?

You can keep a vehicle which is used primarily as your means of transport (eg. car or motor bike), if your interest in it is worth no more than \$5,000 (indexed). If your interest in the vehicle is worth over \$5,000, your bankruptcy trustee must sell it, and give back to you the first \$5,000 of the proceeds of sale, so that you can buy a cheaper vehicle. If the vehicle is jointly owned by two bankrupts, the relevant value is \$10,000.

19. Can I have a bank/cheque account?

Generally, yes, with the agreement of the financial institution.

20. How does bankruptcy affect my job?

Your bankruptcy might prevent you from getting or keeping employment in certain occupations or from holding various licences. Your employer is not normally notified of your bankruptcy unless you owe him/her money or you have failed to pay compulsory contributions to your bankruptcy trustee (see paragraph 2 1). It is still your responsibility to lodge your taxation returns.

21. Do I have to make payments to my bankruptcy trustee from my income?

If you earn above a set amount, you must make regular compulsory payments (called "contributions") to your bankruptcy trustee for the benefit of your creditors. Contributions can be directly deducted from your income. It is an offence for an employer to dismiss a bankrupt because a bankruptcy trustee has requested the employer be issued with a notice to deduct, and send to that trustee, amounts from the employee's pay. To work out your contribution, your bankruptcy trustee will take into account money received from your employer and the value of any other benefit, e.g., the private use of a motor vehicle or subsidised housing. Other factors also considered are the amount of income tax payable, maintenance payable, and the number of your dependants.

22. What if I leave my job during bankruptcy?

Most lump sum termination payments will be included as part of your income for the purpose of calculating what your income contributions will be.

23. What happens to my assets that have not been sold by my bankruptcy trustee at the date of my discharge?

Your discharge from bankruptcy does not return those assets to you. Your bankruptcy trustee can still sell them after your discharge.

24. Can my bankruptcy be cancelled?

In some cases, your bankruptcy can be annulled (cancelled). Your bankruptcy trustee can issue a certificate of annulment when:

- your debts and your bankruptcy's administration costs have been paid in full; or
- you have met the terms of an offer of composition that you made to, and which was accepted by, your creditors. (A composition is

an offer of a sum of money in full and final payment of your debts.); or

- you have met the terms of an arrangement made through your bankruptcy trustee, under which you offered your creditors, and they accepted, payment of a sum of money over a period of time. you have succeeded in an application to the Court.

25. What are my rights and responsibilities once bankrupt?

BORROWING MONEY

When you are borrowing money, buying goods on credit or in any other way incurring credit exceeding \$3,3 58 (indexed), you commit an offence unless you inform the person giving you the money or credit that you are an undischarged bankrupt.

OPERATING A BUSINESS

You can still operate a business while bankrupt. If you trade under an assumed name or business name, either as a sole trader or in partnership, you have to disclose to all with whom you have business dealings your bankrupt status. Under the Corporations Law, you cannot be a director of a company or be involved in its management without the permission of the Court.

CHANGE OF NAME OR ADDRESS. APPROVAL OF OVERSEAS TRAVEL

You must, in writing, tell your bankruptcy trustee of all changes of name and/or address. If you wish to travel overseas, you must obtain the permission of the Court if you are required to make compulsory contributions. If you are not so required, you need the written approval of your bankruptcy trustee.

26. When are my creditors told about my bankruptcy?

The creditors are notified in writing as soon as possible by your bankruptcy trustee and informed of the assets and liabilities disclosed by you in your statement of affairs.

The trustee of your bankruptcy is required to notify your creditors of your bankruptcy and will provide creditors with details disclosed in your statement of affairs.

Your trustee may disclose any information contained in your statement of affairs for the purpose of the proper administration of your bankruptcy.

27. Is my bankruptcy a public record?

Yes. ITSA maintains a computerised database, the National Personal Insolvency Index (NPI), on which all personal bankruptcies and other arrangements under the Bankruptcy Act are recorded. The NPI is accessible to the public on payment of a fee. Your bankruptcy trustee can also advertise your bankruptcy in newspapers.

28. Will I have to appear in court?

Your bankruptcy trustee will decide if you will have to answer questions in front of either the Official Receiver or the Court. If investigations into your financial affairs are necessary, you might have to attend to answer those questions or for an interview.

29. Are there offences under bankruptcy law?

Yes. The most important are summarised below:

- disposing of property before bankruptcy with intent to defeat your creditors' claims
- failure to disclose assets the deliberate obtaining of credit when you know you cannot pay
- gambling and speculation which results in bankruptcy
- incurring debts during bankruptcy for over \$3,358 (indexed) without disclosing that you are bankrupt
- operating a business under an assumed name, without advising of your real name and your bankruptcy
- leaving Australia without your bankruptcy trustee's permission