

Factsheet No. 10

Voluntary Bankruptcy – Is it for me?



This factsheet outlines some of the things to consider before deciding to become bankrupt

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- What are some of the advantages of declaring bankruptcy?
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- What do I have to put in a 'Statement of Affairs'? When do I have to lodge this?
- Can I borrow money when I am bankrupt?
- Is bankruptcy on the public record?

Ways you can become bankrupt

You can become bankrupt in one of two ways:

1. Creditor's Petition

A creditor can force you to become bankrupt if the debt is more than \$5,000 and they have a court judgment against you.

An application to the court to make you bankrupt is called a 'creditor's petition', and if successful, the court will issue a 'sequestration order', which will have the effect that you will become bankrupt.

2. Debtor's Petition.

You can choose to become bankrupt. To do this you file a 'debtor's petition' with the Australian Financial Security Authority (AFSA).

You should seek information and advice from an appropriately qualified person and carefully consider all the consequences of voluntary bankruptcy before deciding to take this step. You can get information from a financial counsellor, a lawyer and/or from AFSA. See the list of useful contacts at the end of this factsheet.

What is bankruptcy?

Bankruptcy is a temporary change in your legal status. Control of your financial affairs is taken over by a trustee. Bankruptcy usually lasts for 3 years, although this time can be extended.

During your bankruptcy the Trustee has a responsibility to use your assets and income to pay your debts. However, some assets and income are protected and cannot be used to pay your debts. You are permitted to retain possession and control of these protected assets.

There are also many restrictions put on the activities of a bankrupt person during the bankruptcy.

At the end of your bankruptcy most debts that are

still outstanding will be effectively cancelled.

What are some of the advantages of declaring bankruptcy?

You are discharged from most of your debts. This means that legal action by unsecured creditors is put on hold, offering you a reprieve from those pursuing you. Taking away the stress of being harassed by debtors can help to make resolving your debts more manageable.

There are significant protections for superannuation, life assurance payments and personal injury compensation. You can continue to earn an income (below a prescribed amount) that cannot be accessed by creditors, as well as retain certain assets.

However, everyone's situation is different. You should seek independent advice on your circumstances before taking any action.

What are some of the disadvantages of declaring bankruptcy?

Valuable assets that you own or have transferred to someone else may be seized. There are also some debts that you are not released from (see below).

It will be significantly more difficult to obtain credit after declaring bankruptcy. You are required by law to disclose your bankruptcy if you are seeking credit above a certain amount (currently \$5,496).

Your bankruptcy will be noted on a public record that, for a fee, anyone can access.

You may be restricted in your ability to leave the country, and also certain types of employment will not be open to you.

Finally, if you do not fully co-operate with your trustee, you may still face legal action.

Is there a difference between a creditor forcing you to be declared bankrupt, and voluntarily doing it?

The consequences of a voluntary and of an involuntary bankruptcy are largely the same. In both cases, you must file a 'Statement of Affairs', setting out anything you own, or recently owned, and any income you receive or may receive. In the case of an involuntary bankruptcy, you must file this within

14 days of being notified of the sequestration order making you bankrupt. For a voluntary bankruptcy, you have 28 days after signing the debtor's petition.

Will bankruptcy get rid of all my debts?

No, not all debts will be cancelled by bankruptcy. Debts that still have to be paid after bankruptcy ends include:

- fines issued by a court,
- Child Support and maintenance payments,
- some Commonwealth government debts such as student loans and HECS fees (Higher Education Contribution Scheme),
- debts incurred by fraud, and
- debts incurred after the date you became bankrupt.

What do I have to do to declare voluntary bankruptcy?

You need to complete and lodge a:

- Debtor's petition, which is an application to become bankrupt; and
- Statement of Affairs, including details of anything you own, or recently owned and any income you receive or may receive.

Once these are completed, you send them to AFSA (currently by email, registry@afsa.gov.au or by post, GPO Box 1550, Adelaide SA 5001).

If I decide to pursue voluntary bankruptcy, can I be prevented from doing this?

Yes, there are circumstances where this can happen. For example, if it appears that you are able to pay your debts and are either avoiding payment or have been bankrupt before, then your application for voluntary bankruptcy may be rejected.

Alternatively, if you have been bankrupt 3 or more times, or once in the last 5 years, your application may be rejected.

How long will I be bankrupt?

Under voluntary bankruptcy, you are made bankrupt for 3 years.

However, the bankruptcy can be extended for up to 8 years. This will only happen if the trustee lodges an objection to your bankruptcy ending. The trustee may do this if, for example, you do not co-operate with the trustee, you fail to disclose information, including information about all of your assets, or you fail to pay contributions.

Can I still be chased for a debt while I am bankrupt?

No - unless the debt was incurred after the date you became bankrupt, or unless there are arrangements for you to keep paying a secured debt eg a mortgage.

If a creditor continues to chase you, you should notify your trustee.

Do I have to pay anything towards my debts while I am bankrupt?

That depends on how much you earn and whether you have any dependants. If you earn more than the prescribed amount (currently \$54,081.30 per year after tax for a single person) you will have to make regular contributions towards payment of your debts.

If you earn less than the prescribed amount, you won't have to make any payments.

See the AFSA website for more information.

What happens to my assets when I am bankrupt?

Your assets will be taken by your trustee and sold to pay all or some of your debts. However, not all assets can be used to pay debts. You can keep these protected assets:

- a car or motorbike up to a prescribed value, (currently \$7,600),
- necessary household and personal items, such as clothes, beds and a refrigerator,
- some tools of trade up to a value of \$3,700,
- life insurance policies for you or your spouse, and proceeds from this unless payment was received before bankruptcy,
- compensation for a personal injury, such as workers' compensation or a car accident and

Is jointly owned property protected in my bankruptcy?

No, your share of the property can still be used to pay your debts.

What happens to joint debts or to the guarantor of my loan if I declare bankruptcy?

If you become bankrupt and you are a joint borrower with another person, the other person will have to pay the whole debt. If you become bankrupt and you have a guarantor for a loan, the guarantor will have to pay the loan. The guarantor can then lodge a claim as a creditor in your bankruptcy.

What happens to property transferred before my bankruptcy?

The trustee has the power to cancel property transfers made within 5 years of your bankruptcy in certain circumstances, especially if the transfers were made to avoid paying debts.

Do I need to tell my employer about my bankruptcy?

No, unless it is a particular requirement of the licensing authorities or professional associations of your trade or profession.

Is my credit record affected by my bankruptcy?

Yes, your bankruptcy is noted on your credit file for 7 years.

Will I have to attend court for bankruptcy?

If it is the creditor who has made the bankruptcy application (i.e. a creditor's petition), then yes.

For a debtor's petition, you most likely will not have to attend court.

It is possible you may have to attend court after you have been made bankrupt, if your trustee thinks you need to be questioned before the court.

What do I have to put in a 'Statement of Affairs'? When do I have to lodge this?

You must lodge the Statement of Affairs to AFSA within 28 days of signing the debtor's petition.

The Statement of Affairs is a very comprehensive form that can be found at www.afsa.gov.au. You fill out details, including:

- Your name, address, phone number, driver license number,
- Your family details (including child support or family law proceedings),
- Your employment status, income, superannuation, life insurance, bank accounts, and any businesses you are involved in,
- Any legal proceedings against you, and
- Any property you have transferred in the last 5 years, plus any property that you own but is in someone else's possession or that you have contributed money to help purchase.

Can I borrow money when I am bankrupt?

You can borrow money while you are bankrupt. However, if you want to borrow more than \$5,496.00, or buy goods and services on credit or by cheque that cost more than \$5,496.00, you must disclose your bankruptcy to the lender or the person you are giving a cheque.

Is bankruptcy on the public record?

Yes, bankruptcy is recorded on a public register (the National Personal Insolvency Index). This means that for a fee anyone can obtain information about you, such as your name, date of birth and address.

List of useful contacts

Financial Counsellors

To find a free financial counselling service that is close to you, contact the Financial Counsellors' Association of NSW on 1300 914 408 or visit <http://www.fcan.com.au>.

Legal Advice

To find a community legal centre that services your area, go to <http://www.naclc.org.au> or call (02) 9264 9595.

Australian Financial Security Authority (AFSA)

For more information about bankruptcy, visit www.afsa.gov.au or call 1300 364 785.

The prescribed amounts referred to in this Factsheet are current as at September 2016. For current prescribed amounts go to the Australian Financial Security Authority website: www.afsa.gov.au.

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This factsheet is a guide to the law in New South Wales, Australia. It is not a substitute for legal advice. If you have a legal problem seek legal advice from your local community legal centre.