



Australian Government

Australian Financial Security Authority

2 November, 2020

# Financial Counsellor Technical Information Sharing Forum

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Offences

Superannuation and Bankruptcy

Equitable Interests and Jointly Owned Property

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Ensuring confidence in Australia's  
**personal insolvency** and  
**personal property securities** systems

[afsa.gov.au](https://afsa.gov.au)



# Today's Agenda

## Offences

John Maloney – Assistant Director, AFSA Enforcement

Peter Alderson – Acting Director, AFSA Enforcement

## Superannuation & Bankruptcy

Eleanor Osborne – Assistant Director, Insolvency & Trustee Services

## Equitable Interests & Jointly Owned Property

Emma Todd – Acting Assistant Director, Insolvency & Trustee Services

Avtar Singh – Acting Team Leader, Insolvency & Trustee Services

## Q&A

- Please use the Q&A function on the Zoom Webinar to ask any questions. We will do our best to answer in the forum, otherwise they will be taken on notice and sent to you later.

# Offences

**Presented by John Maloney and Peter Alderson - AFSA Enforcement**

**Contact number: 1300 364 785**

**Email: [fraud.enquiries@afsa.gov.au](mailto:fraud.enquiries@afsa.gov.au)**

# Aim of this session

**The aim is to promote an awareness of the following:**

- AFSA role and jurisdiction
- Relevant offences and issues
- What is an untrustworthy advisor (UA)
- Impact of UAs
- Strategies to address UA activity
- What can I do

# AFSA Role & Jurisdiction

- Identify & investigate cases of material offences under the Bankruptcy Act 1966, the Personal Property Securities Act 2009 and certain offences under the Criminal Code Act 1995 (Cth)
- Prepare briefs of evidence for prosecution by the Commonwealth Director of Public Prosecutions (CDPP)
- Pursue other enforcement strategies to ensure compliance with the Bankruptcy Act 1966
- Provide advice and assistance to our stakeholders with regard to relevant parties' rights and obligations under the Bankruptcy Act 1966
- Offences outside of AFSA's jurisdiction are referred to the appropriate investigative agency – AFP, State Police, Centrelink, ASIC, ATO, Office of Fair Trading etc

# Offences

## *Bankruptcy Act 1966*

### Section 267- False declaration by debtor or bankrupt

- Debtors typically omit information such as bank accounts, assets or include false information such as party related creditors.
- Very important to ensure debtor completes the SOA accurately and isn't influenced by UA as can lead to criminal charges/prosecution.

### Section 265(8) – Person contracts a debt without any reasonable prospect of being able to pay it

- Debtors are insolvent and continue to use credit cards or obtain loans knowing they will not be able to make repayments.
- It has been seen in the past debtors have made credit card payments with newly acquired credit card.

# Offences

## ***Bankruptcy Act 1966***

### **S.265(4)(a) – Conceal, remove, dispose of or deal with any part of his or her property to the value of \$20 or more**

- From 18 August 2015, as a result of the Civil Law & Justice Amendment Bill this section can be applied to electronic funds transfers (EFT).

### **Section 269(1) - Debtor obtains credit/goods/services/amounts, enters into hire purchase agreement, operates a business without disclosing that they are bankrupt or party to a debt agreement**

Debt fees and charges not to be included when considering the indexable amount

- If some goods or services are provided, this must be accounted for in the calculations

# Offences

## ***Bankruptcy Act 1966***

**S.271 - Within 2 years prior to bankruptcy materially contributed to or increased the extent of, his or her insolvency by gambling, that having regard to their financial position was rash and hazardous**



# What is an Untrustworthy Advisor (UA)?

**‘An entity or person that provides advice which is incorrect because it is misleading and/or false and may lead to fraud.’**

**UA’s may include a person from:**

- A law firm
- An accounting firm
- Financial Planners
- A PPS registration service provider or advisor
- A pre-insolvency advisor (PREIA), either an individual or firm or “specialist strategic consultancy firm”
  - These third tier firms fall under the unregulated and unlicensed group of advisors.

# UA Advice and Services

- Asset protection (Transfers/concealment)
- Bankruptcy advice
- Liquidation advice
- Income advice
- Trusts
- Property valuations
- Security interests over property
- Personal guarantees
- PPS advice and registrations

# Impact of UA's

## UA activity can result in the following:

- False PIA and S73 proposals successfully passed
- Reduced return to legitimate creditors
- Facilitation of unlawful activity
- Manipulation of the bankruptcy system
- Misuse of the PPSR
- Vulnerable people are exploited

# Impact of UA's

**Fraud can undermine the integrity of and public confidence in:**

- Bankruptcy/ personal insolvency system
- PPSR
- AFSA
- Government
- Financial Sector/Economy
- Bankrupts/Debtors

**The losses to real creditors or victims of fraud are not only financial, but there are social, emotional and psychological impacts for all involved.**

# Strategies

**AFSA are using a range of strategies to address, analyse and disrupt UA related fraud by:**

- UA focus compliance program 2019/20
- Gathering, reporting, analysing information/data
- Looking for patterns of suspicious unlawful behaviour and who is involved at all levels
- Investigate and engage with each person involved in the fraud – debtors, trustees, solicitors, accountants
- Prosecuting low, middle and principal offenders
- Issuing show cause notices to trustees – regulation
- Liaising with AFP, ATO and ASIC

## What can I do?

- **If in doubt contact AFSA Enforcement via [fraud.enquiries@AFSA.gov.au](mailto:fraud.enquiries@AFSA.gov.au) or anonymously via <https://www.afsa.gov.au/about-us/complaints-and-reviews/tip-offs>**
- **Advise clients of the dangers in dealing with persons providing suspect unlawful advice and point them to the AFSA website for information relating to untrustworthy advisors**
- **Report any suspicious activity to the NSC or Enforcement . It can be anonymous and with full confidentiality**

# Superannuation & Bankruptcy

**Presented by Eleanor Osborne - AFSA Insolvency & Trustee Services**

# Treatment of superannuation in bankruptcy

## Superannuation received prior to bankruptcy

- Lump sum payments are claimable by the trustee
- Assets purchased with those funds are claimable by the trustee

## Superannuation received during bankruptcy

- Lump sum payments are not claimable by the trustee
- Assets purchased with those funds are not claimable by the trustee
- Superannuation received as an income stream forms part of the bankrupt's assessable income
- Exception – super that isn't held in a regulated fund, approved deposit fund or an exempt public sector scheme can be claimed by the trustee



# Treatment of superannuation in bankruptcy

## Self managed super funds

- A bankrupt cannot continue to act as a trustee for a self managed super fund

## Transfers to superannuation funds

- The trustee may investigate transfers of money or assets to a superannuation fund prior to bankruptcy
- Assets transferred may be recoverable where,
  - had the transfers not been made, the money or asset would have been available to pay to the bankrupt's creditors, and
  - where the purpose of the transfers was either to prevent, hinder or delay the assets or money being available to creditors.

# Early release superannuation

## Bankruptcy

- Early access to superannuation for individuals financially affected by COVID-19
- This scheme does not change the way that superannuation payments are treated in bankruptcy

## Debt agreements

- Debt agreement completions increased significantly in May, June and July 2020
- Information indicates that debtors may be using early release superannuation to pay out their agreements

# Joint Property and Equitable Interests

**Presented by Emma Todd and Avtar Singh – Insolvency & Trustee Services**

# Vesting of Property

**A bankrupt's property vests in bankruptcy under s 58 (1) of the Bankruptcy Act 1966.**

Section 58(2) of the *Bankruptcy Act 1966* provides:

*(2) Where a law of the Commonwealth or of a State or Territory of the Commonwealth requires the transmission of property to be registered and enables the trustee of the estate of a bankrupt to be registered as the owner of any such property that is part of the property of the bankrupt, that property, notwithstanding that it vests in equity in the trustee by virtue of this section, does not so vest at law until the requirements of that law have been complied with.*

Property which the bankrupt is holding on trust for another person does not vest in the trustee (see s 116(2) of the *Bankruptcy Act 1966*).

## Effect of Bankruptcy on Property

When a person becomes a bankrupt, a trustee is appointed to administer their bankruptcy. The trustee can sell certain assets for the benefit of the creditors. House properties and other real estate vest in the trustee as assets of the bankrupt estate and will be sold (where commercially viable to do so).

# Determine Ownership

**Ownership of a property can be determined if the bankrupt:**

- A. The bankrupt is the registered owner of a property
- B. The bankrupt has an equitable interest in a property.

## Joint Ownership

Upon bankruptcy, the non-bankrupt joint owner and the trustee will become co-owners as tenants in common.

The bankrupt is no longer an owner of the house and has no legal capacity to deal with the house. The solvent joint owner cannot deal with the property without the trustee's consent.

## House Property - Options

If there is equity in the house, the trustee is likely to consider selling it. The solvent partner will be provided with the following options:

- to purchase the trustee's interest in the property for its market value, or -
- to join the trustee in the sale of the property on the open market.



## Purchasing Trustee's Interest

- A solvent co-owner may put forward an offer to purchase the bankrupt's interest
- A 3rd party introduced by the co-owner (e.g. family member) may also put forward an offer.

An offer to purchase is generally the preferable option in cases where the solvent co-owner wishes to remain in the property.

# Purchasing Trustee's Interest (cont.)

## Simple Equity example:

House Property value – liabilities / 2 = trustee's interest

e.g. \$500,000 (value) - \$300,000 (mortgage) / 2 = \$100,000

## Considerations:

- Mortgagee consent/refinancing
- Stamp duty implications

**Independent legal/financial advice recommended**

## Joint Sale

- After costs of sale, discharge of mortgage etc. surplus proceeds split 50/50
- Decisions concerning sale made jointly (e.g. choice of agent, sale method, sale price)
- Each party bears their own legal costs

## Forced Sale

- If unable to reach a suitable outcome with co-owner, legal proceedings may be considered
- Not preferred option – consideration costs/delays for both parties
- Proceedings ruled in the trustee's favour may require costs to recovered from the solvent co-owner's interest
- Reaching early agreement between the parties is the optimal outcome of all involved

## Equitable Interest

### Factors considered when assessing equitable claims (of either party):

- Financial contributions to the purchase
- Financial contributions to the mortgage
- Financial contributions to other joint expenses
- when the owner purchased the property
- when their relationship/cohabitation started and the intentions of the parties over time.

The above considerations will need to be supported with evidence

**It may be the case that the trustee can establish that the bankrupt did have an interest in the house, even if they are not on the title or vice versa.**

## Equitable Interest (cont.)

Once done it can be determined whether: the bankrupt's legal interest in a property is correct; or the bankrupt is holding property on trust for someone else; or if someone else is holding property on trust for the bankrupt.

The equitable interest differs from matter to matter and usually legal guidance is required. The Trustee recommends the party to seek their own independent advice.

As an example, the most straightforward equitable interest is an express trust. An express trust is a clear agreement (usually by written document) creating a trust with specified trustees and specified beneficiaries.

# Questions?

Please submit your questions via the Q&A function

**Thank you for your attendance!**