

Bankrupt individuals

This fact sheet provides information about the role of a trustee in bankruptcy when a bankrupt individual lodges a complaint.

Can a bankrupt individual lodge a complaint?

AFCA commonly receives complaints from individuals who are bankrupt, and in particular, complaints about:

- a financial firm's response to requests for financial difficulty assistance; and
- whether a financial firm complied with its obligations to lend responsibly when it granted the loan.

In many cases, whether AFCA can consider a complaint lodged by a bankrupt depends on the consent of their trustee in bankruptcy.

Seeking the consent of a trustee in bankruptcy

Claims of financial loss require the consent of the trustee in bankruptcy

A bankrupt individual's financial affairs have vested in their trustee in bankruptcy. This means the trustee in bankruptcy controls the bankrupt's right to bring a legal claim. This includes a bankrupt guarantor's claim that they should not be liable under their guarantee. AFCA can only consider a bankrupt's claim for financial loss if their trustee in bankruptcy consents.

The trustee in bankruptcy may deal with AFCA directly, appoint a member of its staff as its agent, or appoint the bankrupt as its agent. AFCA will direct the financial firm to pay any award of compensation for financial loss to the trustee in bankruptcy.

Other claims do not require the consent of the trustee in bankruptcy

AFCA does not require the consent of a trustee in bankruptcy where the complaint relates solely to the bankrupt's claim for non-financial loss (such as stress and inconvenience). Compensation for non-financial loss is limited to \$5,000 and can be paid directly to the bankrupt.

Part IX and Part X debt agreements are statutory alternatives to bankruptcy, so AFCA does not require the consent of the individual's administrator to consider their complaint.

A bankrupt individual's superannuation interests are generally excluded from property available to creditors. A bankrupt superannuation fund member can submit a complaint about a member benefit – that has not vested in the member's trustee in bankruptcy – without the consent of their trustee in bankruptcy.

Life insurance benefits (outside superannuation), such as death benefits, total and permanent disablement, trauma and income protection are similarly considered income and not property vesting in the trustee in bankruptcy. AFCA does not require the consent of the trustee in bankruptcy to consider a bankrupt's complaint about these types of benefits.

A bankrupt individual can no longer be a director of a company, so cannot lodge a complaint on behalf of that company. The trustee in bankruptcy does not step into the bankrupt's shoes as director and does not control the company. The company will need to appoint a new director in line with its constitution.

A separate fact sheet deals with companies under external administration – see **insolvent companies fact sheet**.

Financial difficulty

We may ask the trustee in bankruptcy to participate in settlement discussions

When a complaint is about a financial firm's response to an individual's request for financial difficulty assistance, potential outcomes may include the refinancing of a debt or a timeframe for the sale of a secured property. For example, a bankrupt and their spouse may seek to refinance their home loan into the name of the spouse only. Alternatively, they may seek time to sell the property.

We may seek the trustee in bankruptcy's participation in settlement discussions, as the claim being negotiated (and potentially compromised) is an asset of the insolvent estate. We will include the trustee in bankruptcy in a telephone conciliation conference if we think it will help.

If the trustee in bankruptcy is unwilling to participate, settlement options may be limited. Only the trustee in bankruptcy can form a binding agreement with the financial firm about the loan or the security property. This means that if a bankrupt reaches an in-principle agreement with the financial firm at the conciliation conference about how to repay the arrears, that agreement will only be binding on the financial firm if the trustee in bankruptcy agrees. Similarly, a bankrupt has no standing to sell the security property by themselves.

AFCA cannot compel the trustee in bankruptcy to participate in our process or agree to any in-principle agreement. If the trustee in bankruptcy's involvement is needed to determine the matter, AFCA may not be able to consider the bankrupt's complaint.

We may close a complaint where we cannot effectively investigate the issues raised without the involvement or consent of another person. See section C.2.2(i) of the AFCA Rules on our website for more information: afca.org.au/rules.

