



# Hardship Applications Guidance

Published: April 2021



*Disclosure: This is **guidance only** and is intended to provide a list of general considerations for a trustee when dealing with a hardship application from a bankrupt. It is not an exhaustive list.*

*Following this guideline is not a guarantee that if the bankrupt goes to Inspector-General for a review of a trustee's decision, that it ensures that the Inspector-General will not vary a trustee decision. Each administration will need to be considered on its own merits.*

## Introduction

Where a bankrupt receives notice of an income contribution assessment, an application can be made by the bankrupt to the trustee if the bankrupt believes that financial hardship will be suffered if required to pay that contribution.

The trustee must decide if there is enough satisfactory evidence to show that the bankrupt will experience hardship if required to pay the contribution, based on one of the grounds set out in subsection 139T(2) of the *Bankruptcy Act 1966*. Hardship would be evidenced by a deficiency in income to meet necessary outgoings including the contribution required to be paid.

The trustee must make a decision within 30 days of receiving a hardship application, otherwise it is taken to have been refused. A bankrupt can apply to the Inspector-General to have this decision reviewed, within 60 days of receiving the decision.

**Note:** Insolvency Practice Rule 42-185(3) requires that a registered trustee must:

'42-185(3)

(a) act fairly and reasonably in determining the time for payment of any contribution (contributions liability) that a regulated debtor is liable to pay in respect of a contribution assessment period, calculated in accordance with section 139S of the Act; and

(b) if full payment within the contribution assessment period or before discharge would cause hardship to the regulated debtor, consider giving the regulated debtor an extension of the time for payment of contributions liability.'

By taking this approach hardship applications may be avoided

### Further guidance:

- [Official Trustee Practice Statement 1 – Income Contributions](#)
- [Inspector-General Practice Statement 12 - Statutory reviews of trustees' decisions](#)

## What to consider when a hardship application is received

	Commentary
Is the application made in writing?	<p><i>An application must be in writing <a href="#">[s1389T(1)]</a></i></p> <p><i>There is no requirement that it must be completed in a particular form.</i></p>
Is the hardship application based on a reason set out in section 139T(2)?	<p><i>There is no power for the Trustee or the Inspector-General in Bankruptcy to make an assessment based on discretionary factors, it must be a reason set out under section 139T in respect of hardship – <a href="#">Sheikhholeslami and Inspector- General in Bankruptcy [2011] AATA 670</a></i></p> <p><i>As at the date of publication, there are no other reasons prescribed by the Bankruptcy Regulations 1996.</i></p> <p><i>If the application is not based on a reason under 139T(2), a trustee can reject the application</i></p> <p><a href="#">[s139T(2)]</a></p>
Is there evidence to show that hardship is being experienced by the bankrupt?	<p><i>For definition of 'hardship' for the purposes of section 139T, see <a href="#">Hughes and Insolvency Trustee Service Australia [2003] AATA 511</a>, Senior Member Ettinger and Member Davis stated at paragraph 51-52:</i></p> <p><i>In Re Lumsden and SDSS (1986) 10 ALN N225 when discussing the meaning of "severe financial hardship", the Tribunal stated at 926:</i></p> <p><b>“Hardship’ includes severe suffering, extreme deprivation’</b></p> <p><i>The Macquarie Dictionary (2nd edition, 1995) defines hardship as "a condition that bears hard upon one: severe toil, trial, oppression or need".</i></p> <p><i>In <a href="#">Milsom and Official Receiver in Bankruptcy [2004] AATA 275</a>, the AAT looked at whether an assessment could cause a bankrupt to suffer hardship. The factors they took into consideration of <del>hardship</del> was of the bankrupt's illness, costs incurred to date, and the uncertainty of the future.</i></p> <p><i>In order to determine hardship, it is necessary to show that the bankrupt has expenditure that falls within the paragraphs in section 139T(2), <b>but the AAT also noted that the assessed income contribution amount will cause hardship because of that expenditure.</b></i></p> <p><i>Further, the AAT noted that there was a significant element of discretionary expenditure, leading to a conclusion that the bankrupt did not suffer financial hardship.</i></p> <p><i>Hardship should always be considered in the context of bankruptcy, as bankruptcy will always involve straitened circumstances.</i></p> <p><i>Although not a mandatory approach, a trustee might consider reviewing the bankrupt's budget. Is there a large element of discretionary expenditure that could suggest that the bankrupt is not suffering financial hardship? A trustee might also consider using ABS data to determine what average expenditure for households</i></p>

	Commentary
<p>Has the trustee made a decision within 30 days after the day on which you received the application?</p>	<p><i>The trustee must make a decision ‘as soon as practicable’.</i></p> <p><i>If no decision is made 30 calendar days after the day on which the application is received, then the trustee is taken to have refused the application <a href="#">[ss139T(4), 139T(5)]</a></i></p>
<p>If trustee determines hardship, did the trustee make a decision by giving written notice to the bankrupt:</p> <ul style="list-style-type: none"> <li>• Setting out the trustee’s decision on the application</li> <li>• Referring to evidence or material the decision was based on</li> <li>• Setting out the reasons for the decision</li> <li>• Include a statement that the bankrupt may request the Inspector-General in Bankruptcy for a review</li> </ul>	<p><i>A bankrupt’s right of review is reviewable in the same way as an income contribution assessment made by a trustee – see subdivision G of the Bankruptcy Act 1966 <a href="#">[ss139T(9),139T(10)]</a></i></p> <p><i>An application for review by the bankrupt must be in writing to the Inspector-General not later than 60 days after which the bankrupt is notified of the decision <a href="#">[s139ZG]</a></i></p>
<p>If hardship has been granted, did you issue an amended assessment by adjusting the AITA?</p>	<p><i>For example: A trustee determines that a bankrupt will suffer hardship. If the bankrupt has ongoing medical expenses of \$3,000 per year, then the contribution liability will be decreased by \$3,000. The trustee effects this by increasing the AITA by \$6,000 in an amended assessment</i></p> <p><i><a href="#">[s139T(6)]</a></i></p>

## Where the hardship application is based on section 139T(2)(a)

*(a) the bankrupt or a dependant of the bankrupt suffers from an illness or disability that requires on-going medical attention and the supply of medicines, and the bankrupt is required to meet a substantial proportion of the costs of that medical attention or those medicines from his or her income*

	Comments
If a dependant of the bankrupt is suffering the illness, is this dependant one that meets the definition under <u>section 139K</u> ?	<i>If it relates to a dependant, does the dependant meet the definition under <u>Section 139K</u>? [s139T(2)(a)]</i>
Is there documented evidence to support that the bankrupt is required to spend a <i>substantial</i> proportion of their income on ongoing medical attention and medicines?	<i>Obtain documentary evidence of medical outgoings being paid by the bankrupt during the CAP e.g. bank statements, prescriptions, doctor's certificates etc. Consider comparing medical costs to a budget of the bankrupt's outgoings.</i>

## Where the hardship application is based on section 139T(2)(b)

*(b) the bankrupt is required to make payments from his or her income to meet the cost of child day-care to enable the bankrupt to continue in employment or other work*

	Comments
Is there documented evidence to support that payments are being made from the bankrupt to meet the cost of day care in order to continue employment or other work?	<i>Obtain documentary evidence of outgoings being paid by the bankrupt during the CAP e.g. bank statements, invoices. Consider overall circumstances of the bankrupt and their employment situation, and whether they are not able to continue employment without paying those costs. Consider comparing costs to a budget of the bankrupt's outgoings.</i>

## Where the hardship application is based on section 139T(2)(c)

(c) the bankrupt is living in rented accommodation that is not provided by:

- (i) the Commonwealth, a State or a Territory; or
- (ii) an authority of the Commonwealth, a State or a Territory; or
- (iii) a local government authority;

and the bankrupt is required to pay the cost of that accommodation wholly or mainly from his or her income

	Comments
Is there documented evidence that the bankrupt is living in non-public housing accommodation?	<i>Obtain documentary evidence rental agreement.</i>
Is there documented evidence to support that payments are being made from the bankrupt to accommodation wholly or mainly from their income?	<i>Obtain documentary evidence of outgoings being paid by the bankrupt during the CAP e.g. bank statements, rental agreements</i>
Is the amount of rental payment considered a discretionary amount?	<p><i>Consider overall circumstances of the bankrupt – are there any special accommodation needs that requires the rental expenditure?</i></p> <p><i>The question is whether the payment of rent is a cause of financial hardship or is a discretionary amount which could have been reduced by choosing alternative accommodation initially or by moving to cheaper accommodation. In <u>Kenneth George Pearce v Official Receiver</u>, the applicant had moved from a house charging \$520 pf rent but evidence before the Tribunal showed that he since moved to a premise with rent at \$380 pf. Senior Member KL Beddow stated at paragraph 16-17:</i></p> <p><i>“16. The fact that the applicant pays \$520 per fortnight for rent is not a cause of financial hardship if that rental is a discretionary amount. The evidence is that the applicant has since removed his family to a less expensive house and is now paying \$380 per fortnight for rent. That rental does not suggest that the present house is less than adequate and appropriate for the family and except for the distance from schools that was not suggested to be the case. The distance from schools is a factor only because a decision was made not to change schools.</i></p> <p><i>17. I am left with a very clear overall impression, and I so find, that the applicant does not suffer financial hardship. His deficit in cash flow arises only because of two factors:</i></p> <p><i>(a) discretionary spending decisions such as excessive rental which can only be described as above the necessary amounts; and</i></p> <p><i>(b) a reluctance on the part of the applicant to make any contribution to his bankrupt estate.”</i></p> <p><i>Mortgage payments cannot be considered a ground for hardship. In <u>O’Connell and Insolvency and Trustee Service (Aust) [1993] AATA 170,</u></i></p>

	Comments
	<p><i>Deputy President Forrest and Members McLean and Elsum made this clear at paragraph 19:</i></p> <p><i>'19. It seems clear on any view of the applicant's circumstances the question of hardship is related to the mortgage payments to secured creditors. The considerations which can be taken into account in determining hardship are confined to the matters contained in s.139T(2). They are very limited considerations. Hardship related to payments to secured creditors is not one the Tribunal can take into account. There are, in our view, no grounds for decreasing the contribution payable by the applicant.'</i></p>

### Where the hardship application is based on section 139T(2)(d)

*(d) the bankrupt incurs substantial expense in travelling to and from the bankrupt's place of employment or other work, whether by public transport or otherwise*

	Comments
Are the expenses related to travelling to and from the bankrupt's place of employment?	<p><i>Check documentary evidence that it relates to travelling for work purposes</i></p> <p><i>Consider overall circumstances of the bankrupt – are there any special circumstances to take into account about the travel taken or the bankrupt's employment?</i></p>
Is there documented evidence to support that payments are being made from the bankrupt?	<p><i>Obtain documentary evidence of outgoings being paid by the bankrupt during the CAP e.g. bank statements, credit card statements, transport card statements</i></p>
Are the expenses <i>substantial</i> ?	<p><i>Consider comparing costs to a budget of the bankrupt's outgoings.</i></p>

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## Where the hardship application is based on section 139T(2)(e)

*(e) the spouse of the bankrupt, or another person residing with the bankrupt, who ordinarily contributes to the costs of maintaining the bankrupt's household has become unable to contribute to those costs because of unemployment, illness or injury*

	Comments
Is there documented evidence to support that there has been a loss of financial contribution from someone who lives with the bankrupt?  Is there documented evidence that this person had previously contributed to the cost of the household?	<i>Obtain documentary evidence of outgoings being paid by the spouse/person residing with the bankrupt and the bankrupt during the CAP e.g. bank statements, credit card statements. Consider comparing before and after the unemployment, illness or injury of the person living with the bankrupt.</i>  <i>Documentary evidence of unemployment, illness or injury of the person who lives with the bankrupt</i>