

UNTRUSTWORTHY ADVISORS

A hidden scourge
in Australia's personal
insolvency system



Australian Government

Australian Financial Security Authority

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The Australian Financial Security Authority (AFSA) is the Australian Government regulator and service provider for matters relating to personal insolvency and personal property securities.

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Foreword



AFSA continues to observe a range of factors that may create the perfect storm for increased financial insecurity now and into the future. Fire, drought, flood and the pandemic have created a tough few years for many Australians, with some people only staying afloat financially due to government subsidies and creditors offering payment deferrals.

While most safety nets have been removed, not everyone is back on their feet. At the same time, rising interest rates mean more Australians may struggle to pay their mortgages. Data from the Australian Prudential Regulation Authority (APRA) shows that of one million new home loans written over the past 2 years, about 280,000 have borrowed 6 or more times their income and/or have loan-to-value ratios of more than 90%¹. These are the borrowers considered most vulnerable to further consecutive rate rises as well as rapidly rising inflation.

Furthermore, as people bring their tax affairs up to date, some may face insolvency.

We are concerned that this environment will make Australians increasingly vulnerable to untrustworthy insolvency advice, leaving them further out of pocket and at risk of becoming bankrupt, and even facing criminal prosecution.

The potentially catastrophic personal consequences for those who fall prey to untrustworthy advice, and the difficulty of rooting out perpetrators, make this one of the greatest emerging harms to a strong and well-functioning personal insolvency system.

This report assesses the extent of the issue and examines how every stakeholder in the personal insolvency system can disrupt untrustworthy advisors and their business model – and protect vulnerable people.

We hope this information gives the public the confidence to spot and report dodgy advisors and encourages everyone involved in the personal insolvency system to step up and play their part in defending the system against the hidden scourge of untrustworthy advice.

Tim Beresford

AFSA Chief Executive,
Inspector-General in Bankruptcy
and Registrar of Personal Property Securities.

¹ APRA (Australian Prudential Regulation Authority) 2022 [Quarterly authorised deposit-taking institution statistics](#), APRA website, accessed 27 June 2022.

The problem of untrustworthy advice

What is it?

When people are in financial distress, they can be targeted by unregulated and untrustworthy advisors who provide unethical advice that can result in individuals unwittingly committing criminal actions.

For example, untrustworthy advisors may suggest underhand ways to protect property from becoming available to creditors. This might include hiding assets or using the Personal Property Securities Register (PPSR) to make false registrations. Another illegal tactic is recording a high number of friendly creditors as holding unsecured debts. This use of fictitious creditors stacks the voting numbers in a creditors' meeting in favour of accepting a proposal that disadvantages genuine creditors.

Sometimes, untrustworthy advisors push people to enter the insolvency system unnecessarily when they could have simply negotiated a payment plan with their creditors.

Untrustworthy advisors undertake these activities seeking to gain their own financial benefit.

People at risk of bankruptcy, and especially those concerned about losing their homes, can be prime targets for untrustworthy advisors, whose adverts often appear in social media feeds. These unscrupulous advisors can have slick and convincing websites that promise people a quick and painless way out of their financial difficulties. Their websites may include fake evidence to gain the public's confidence, such as case studies and testimonials from happy customers.

This is especially concerning given Australians are becoming increasingly prone to scams. The Australian Competition and Consumer Commission's Scamwatch reported that Australians lost a record \$323.7 million to scams in 2021² – an increase of 84% from 2020.

Like all successful scammers, untrustworthy advisors are persuasive and their solutions seem highly plausible. But the public needs to be aware that following untrustworthy advice can result in prosecution and possible imprisonment for both the individual and their untrustworthy advisor. Individuals who engage with untrustworthy advisors may find their financial position further damaged by paying additional fees. For people who are bankrupt, consequences can also include their period of bankruptcy being almost tripled from 3 to 8 years.

'Untrustworthy advisors counsel their clients on how to avoid paying their debts and meet their legal obligations. They are ambulance chasers who prey on people and businesses in financial distress. They claim to be able to remove the worry of a dire financial situation, but they simply encourage and foster unlawful conduct such as hiding or stripping assets and illegal phoenixing. By trying to move assets beyond the reach of a liquidator or trustee, what they actually do is steal from creditors who rightfully should be paid from these recoveries.'

*John Winter, Chief Executive Officer,
Australian Restructuring Insolvency and
Turnaround Association (ARITA)*

² ACCC (Australian Competition and Consumer Commission) 2022, Scam statistics, [Scamwatch website](#), accessed 27 June 2022.

Why is it a problem?

Precipitates fraud

The fraudulent actions that result from untrustworthy advice make the Australian insolvency system less fair, leaving us all worse off. The actions of untrustworthy advisors directly harm the interests of legitimate creditors by:

- keeping assets in the hands of debtors to the detriment of all creditors
- ensuring only certain creditors receive the benefit of the debtor's assets.

Either way, this compromises the Australian personal insolvency system and harms creditors. For a small business or individual creditor, the harm caused may result in significant financial distress.

For major creditors, like banks, who may be able to absorb the losses more easily, the consequences are not immediately apparent. However, if confidence declines in the insolvency system's ability to protect the interests of creditors, providing credit becomes a riskier proposition. The increased risk may be passed from credit providers to borrowers in the form of higher credit costs. This can have a long-term, negative impact on Australians and our economy.

For one of the major creditors in bankruptcy, the Australian Taxation Office, the actions of untrustworthy advisors can reduce the amount of money government can spend on critical areas like health, education and welfare.

Preys on vulnerable people

AFSA has come across instances where debtors are complicit in defrauding the insolvency system and actively seek out untrustworthy advice with the intention of avoiding payment to their creditors.

However, in many situations, we see debtors, often in a very vulnerable and stressful position, embroiled in untrustworthy advice when they thought what they were doing was acceptable. These people believed the scam adverts and websites, and followed the advice provided to try and protect themselves and their property. Unfortunately, they now find themselves not only in bankruptcy, but also potentially liable to criminal prosecution.

Difficult to identify and stamp out

Untrustworthy advice is hard to address through the courts because prosecution typically relies on the testimony of victims who may fear incriminating themselves. As untrustworthy advisors operate outside our direct regulatory reach, they can hide behind debtors and often leave little, if any, paper trail.

A recent example of this issue occurred in a matter prosecuted by the Commonwealth Director of Public Prosecutions (CDPP) on behalf of AFSA. Investigations confirmed that several debtors had concealed money shortly before their bankruptcies and we suspected the involvement of an untrustworthy advisor. The debtors were invited to provide information on the involvement of the untrustworthy advisor but declined to do so based on their circumstances. Following ongoing court action by the CDPP, the debtors have indicated they will enter guilty pleas to the charges.

To encourage people to provide evidence against untrustworthy advisors, we have a [Regulatory Actions Cooperation Assistance and Support Policy](#). The policy gives people an incentive to cooperate, noting potential reduced enforcement measures in exchange for information or evidence that can be used to prosecute untrustworthy advisors and remove them from the system.

How pervasive is it in Australia?

It can be difficult for agencies like AFSA and our co-regulators to have clear visibility of the prevalence and impact of untrustworthy advisors. However, the following snapshots of data from across the insolvency system suggest the problem may be troublingly widespread. Untrustworthy advisors are also prevalent in corporate insolvency, and this is indicated by findings and investigations from members of the Phoenix Taskforce, including the Australian Securities and Investments Commission³ and the Australian Taxation Office⁴.

Data from the Official Trustee

Our Official Trustee (OT) function has the power to investigate bankrupt estates where no registered trustee has been appointed. The OT periodically audits the accuracy of information in the forms that debtors complete before bankruptcy.

An audit of bankruptcies received in the 2020-21 financial year indicated that 68% of those sampled, who paid for bankruptcy information or advice, did not correctly answer the questions on their bankruptcy forms. Although not all incorrect disclosures would have changed the outcome of the estate's administration, the finding increases our concern that untrustworthy advisors are active within the personal insolvency system.

Data from offence referrals

People who believe an offence has been committed against the Bankruptcy Act can submit an offence referral to AFSA, which we then investigate. In 2020-21 and 2021-22, our investigators found that untrustworthy advisors were involved in 6-8% of all the referrals received. While this does not demonstrate that untrustworthy advice was directly linked to the offence alleged in those referrals, it does indicate the prevalence of the activity.

We can also see potential indications of untrustworthy advice at work in offences being reported. We categorise offences into two categories:

1. complex offences such as making false declarations on bankruptcy forms
2. compliance-based offences such as not filing bankruptcy forms or not complying with a trustee's directions.

Offence referrals typically sit at a ratio of 1:3, complex to compliance offences. But when untrustworthy advisors are involved, that ratio inverts: complex to compliance offences sit at 3:1. Also, we have noted that offending becomes more sophisticated when an untrustworthy advisor is involved. The most common offences in these cases include false declarations and hiding property to keep it away from the trustee so it cannot be divided among creditors.

³ ASIC (Australian Securities and Investments Commission) 2022 [Illegal phoenix activity](#), ASIC website, accessed 15 June 2022

⁴ ATO (Australian Taxation Office) 2022 [Phoenix Taskforce](#), ATO website, accessed 15 June 2022

How can we tackle this issue?

Given the difficulties of prosecuting untrustworthy advisors, we are keen to see their scope for targeting vulnerable Australians diminished by mobilising every stakeholder in the personal insolvency system to combat the issue and to disrupt their business model.

Members of the public

Engage early with creditors to stay out of the system

During the COVID-19 pandemic, Australians developed different relationships with creditors as banks and utilities offered payment holidays. We are hopeful that greater levels of trust will encourage people to talk to their bank or creditor early and negotiate a repayment plan. The earlier people engage with creditors, the more likely they are to find a workable solution that keeps them out of the insolvency system. We also recommend people use the tools, tips and other resources available through the Australian Securities and Investments Commission's [Moneysmart](#) site.

Use free financial counselling

Financial counsellors are qualified professionals who offer free, independent and confidential services to help people in financial difficulty get back on track and discuss options for dealing with unmanageable debt. Financial counselling is available from the [National Debt Helpline](#) on 1800 007 007.

Avoid scams

We advise people to ignore slick ads on social and other media promising a way out of bankruptcy. Be aware that searching 'can't pay my debts' or similar phrases on the internet can cause fake advice ads to appear in social media feeds. These ads are likely scams and should be treated as such. If it doesn't seem right, people are advised to rely on their instincts. Trustworthy advice is available from a trusted advisor, such as a registered insolvency practitioner (a Registered Trustee or a Registered Debt Agreement Administrator) or the financial counsellors at the [National Debt Helpline](#).

Report untrustworthy advisors to AFSA

Warning signs and behaviours of dodgy advisors include charging high fees that are often payable in advance, trying to rush decision making, and promising the debtor that they won't lose their house. Suspicions about a potential untrustworthy advisor can be reported to us via the [online tip-off service](#).

Cooperate with AFSA in regulatory actions

If a person believes they have inadvertently taken untrustworthy advice and may have been tricked into criminal activity, the best course of action is to contact us and cooperate in giving evidence against the advisor.

Note: people who know they are doing the wrong thing should be aware that we work with the Australian Federal Police to investigate and prosecute these cases, with penalties including jail.

How to spot an untrustworthy advisor

These are some common tell-tale signs that an untrustworthy advisor may be at work:

- creating an unnecessary sense of urgency
- encouraging false or misleading statements in bankruptcy paperwork
- encouraging false or misleading registrations on the PPSR
- suggesting that a bankruptcy or debt agreement won't affect a credit rating
- claiming they've done this many times before and won't get caught
- using jargon and not being able to back up claims.

Creditors

Creditors have an important role in the personal insolvency system and should be alert to the risk and harm of untrustworthy advisors. Creditors can support debtors in the pre-insolvency period to help encourage dialogue directly between the debtor and creditor to resolve outstanding debts, and to influence debtors to seek only trustworthy advice. If creditors believe vote stacking is taking place during a formal insolvency process, or notice other signs of untrustworthy advisors subverting the insolvency system, they should notify both the trustee and AFSA. Through reducing the impact and harm of untrustworthy advisors, creditors will also benefit.

Financial counsellors and consumer groups

Financial counsellors and consumer groups are often an early touch point in the personal insolvency system. This means financial counsellors, community lawyers and consumer advocacy groups may hear if debtors have had contact with untrustworthy advisors. They are also some of the best people to warn debtors not to approach untrustworthy advisors.

We are also mindful that in providing quality and independent services, the good work of financial counsellors means there will be less scope for debtors to receive untrustworthy advice.

As with other stakeholders in the personal insolvency system, we ask that financial counsellors and consumer groups contact us to raise or report any concerns about:

- information provided to debtors previously
- those falsely claiming to be financial counsellors⁵ or potential untrustworthy advisors.

Concerns can be raised by contacting us directly or via the [online tip-off service](#).

⁵ Financial Counselling Australia 2022 [Fact Sheet 3 Restriction on the Term Financial Counsellor](#) Financial Counselling Australia's website, accessed 15 June 2022

Practitioners

The integrity of the system and its trusted reputation depend on insolvency practitioners being aware of red flags that may indicate a debtor is receiving untrustworthy advice. This may include:

- an advisor giving a trustee their own contact address as the contact address for both the person who is bankrupt and creditors
- an advisor insisting all enquiries by AFSA or a trustees' staff be done through them instead of the person who is bankrupt or their creditors
- mortgages being taken out on property just before a person declares bankruptcy
- false companies being used to claim manufactured debts
- a high number of friendly creditors recorded as unsecured debts
- a lack of supporting documents of debts owed
- late inclusion/submission of proofs of debt in compositions or personal insolvency arrangements
- potential misuse of the PPSR.

If an insolvency practitioner notices any of these red flags or has any other reason to suspect an untrustworthy advisor is undermining the integrity of the administration, we expect them to conduct appropriate investigations. In particular, insolvency practitioners must be vigilant when reviewing proofs of debt and adjudicating creditor claims. This is particularly important when related parties are involved, debtors are submitting proposals, or other situations affecting creditor voting rights. Insolvency practitioners should be wary of vote stacking and prepared to ask hard questions during creditors' meetings.

We also remind insolvency practitioners of the tools they can use to investigate untrustworthy advice. A practitioner concerned that untrustworthy advice may be involved in an administration may consider one of the actions below.

- **Engage the Official Receivers Notices team** – The Official Receiver has powers to help trustees administer bankrupt estates, including issuing notices to direct the production of books or information, or gain access to premises. Trustees can apply for Official Receiver Notices via [AFSA Online Services](#).
- **Consider seeking Section 305 funding** – Trustees can [apply for Commonwealth funding assistance](#) under s 305 of the *Bankruptcy Act 1966* to cover out of pocket expenses and legal costs involved in, for example, pursuing assets suspected of being hidden on the advice of an untrustworthy advisor.

AFSA

AFSA has zero tolerance for untrustworthy advisors. Working with an untrustworthy advisor, even unwittingly, will attract our attention and lead to ongoing scrutiny, and potentially investigation and prosecution.

We use our legislated powers to disrupt the activity of untrustworthy advisors, including:

- disrupting and investigating suspicious activity, conducting investigations under the powers of the Inspector-General and undertaking enforcement action
- taking action against insolvency practitioners who engage with untrustworthy advisors
- actively engaging with other regulators and law enforcement agencies to disrupt bad behaviour and refer suspicious cases.

We work collaboratively with other Commonwealth government agencies, including the Australian Federal Police, to execute search warrants and collect evidence to support prosecution action.

Case studies

How untrustworthy advice can impact a practitioner

The following examples from AFSA's historical disciplinary actions outline situations where practitioners have lost their registration, partly because of their involvement and susceptibility to be influenced by untrustworthy advisors.

A trustee relied on numerous referrals from untrustworthy advisors. Matters were referred to them on the understanding that they would convene a meeting of creditors to accept a proposal to annul the bankruptcy. The trustee would convene meetings of creditors before they had adequately investigated the affairs of those who were bankrupt. This meant creditors were not properly informed before being asked to vote. In one case, the report to creditors failed to disclose that the person who was bankrupt had acquired several aircraft during his bankruptcy. The trustee's registration was cancelled. Creditors were left with unpaid debts totalling \$2.4 million.

Another trustee, who had a strong referral relationship with an untrustworthy advisor, failed to properly investigate transactions between the debtors and the untrustworthy advisor. One example includes the advisor taking the debtor's property in lieu of outstanding fees. The trustee's registration was cancelled.

How AFSA's proactive monitoring can disrupt untrustworthy advice

A person who was bankrupt lodged a proposal offering \$5,000 in relation to \$3 million in unsecured debt. The expected return to creditors was only .12c (so, about 1/10 of one cent) in the dollar and would avoid the large debt owed to the petitioning creditor. In the Bankruptcy Form, the bankrupt individual disclosed several related creditors who were her business associates. An AFSA investigation revealed that many of these debts were included because of untrustworthy advice to secure a bankruptcy annulment.

As a result of AFSA's involvement, creditors did not accept the proposal and the bankruptcy continued according to law.

How AFSA's enforcement work can disrupt untrustworthy advisors

During a regulatory review of a trustee, some discrepancies were noted in the administration of a bankrupt estate that had been annulled through the acceptance a section 73 composition. It was identified that most creditors were 'family and friends' to the bankrupt individual and provided proof of debts (PODs) to become the collective majority creditor. This was suspected to be done to manipulate the creditors' meeting and subsequently accept the section 73 composition. An investigation concluded that the PODs were false and had been orchestrated by an untrustworthy advisor. The investigation undertaken included executing search warrants on the bankrupt individual, creditors, the untrustworthy advisor and the trustee. Evidence was seized and substantiated criminal wrongdoing. The conduct of the untrustworthy advisor, the creditors and the bankrupt individual are all the subject of potential criminal prosecution, with parties facing up to 5 years imprisonment for their part in defrauding the bankrupt estate. The matters currently sit with the Commonwealth Director of Public Prosecutions for assessment.

Further resources

For more information about **untrustworthy advisors**, including how to identify the signs of untrustworthy advice, watch this [video](#) or visit the [AFSA website](#).

For more information about **unmanageable debt**, see [Dealing with debt](#) or for **formal insolvency options** see [What are my options?](#)

Concerns about **potential untrustworthy behaviour or suspicious activities** can be reported to AFSA via the [online tip-off service](#).

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