

# Impact on mortgagees of a bankruptcy trustee's disclaimer of mortgaged land

A mortgagee may be faced with a situation where the mortgagor becomes bankrupt and the trustee, in which the property then vests, disclaims the mortgaged property. By force of a trustee's disclaimer, the bankrupt's fee simple estate escheats to the Crown in the right of the State. When the Registrar of Titles receives a notice of disclaimer from a trustee, a Registrar's caveat will be recorded over the property. The Registrar's caveat will prevent the mortgagee from effecting a sale of the property until the mortgagee has obtained a vesting order from the Court pursuant to s 133(9) of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**). This update outlines the process a mortgagee is required to follow to apply for a vesting order and summarises the key issues considered by the Court.

## The law

Pursuant to s 133(2) of the Bankruptcy Act, a trustee's disclaimer is taken to have terminated the bankrupt's rights, interests and liabilities in the property and to have discharged the trustee from personal liability in respect of same, but does not affect a mortgagee's rights under their mortgage, except so far as is necessary for the purpose of releasing the bankrupt, their property and the trustee from liability.

Section 133(9) of the Bankruptcy Act allows for a person claiming an interest in the land to apply for a vesting order. The section provides that, on application by a person either claiming an interest in, or being under a liability not discharged by the Bankruptcy Act in respect of, disclaimed property, the Court may grant an order for the vesting of the property in that person, if it seems to the Court to be just and equitable that it should be so vested.



## The process

1. File an application in the Federal Court of Australia for an order vesting the property in the mortgagee. The application should be supported by an affidavit proving the mortgagee's interest in the property.
2. Once a vesting order has been obtained, apply to Land Victoria to become the registered proprietor of the land pursuant to s 59 of the *Transfer of Land Act 1958* (Vic).
3. Sell the property as registered proprietor.



### Contact us

**Annette Gaber**  
Partner, Melbourne  
+61 3 9252 2522  
annette.gaber@gadens.com

**Sonia Apikian**  
Partner, Melbourne  
+61 3 9252 2508  
sonia.apikian@gadens.com

**Sarah Rogers**  
Associate, Melbourne  
+61 3 9252 7716  
sarah.rogers@gadens.com



## Key considerations

In any application under s 133(9) of the Bankruptcy Act, the Court will consider two main issues, namely whether the applicant holds the requisite interest in the property, and whether it is just and equitable to grant the vesting order.

### 1 Person claiming an interest

To be eligible to make application under s 133(9) of the Bankruptcy Act, you must either be a person claiming an interest in the property, or be under a liability not discharged by the Bankruptcy Act in respect of the property. It is well settled that a registered mortgagee has the requisite interest and is entitled to apply for a vesting order. See, for example, the recent Federal Court decision of his Honour Justice Anastassiou in *Commonwealth Bank of Australia ABN 48 123 123 134 v State of Victoria* [2021] FCA 705 in which Gadens was successful in obtaining vesting orders.

### 2 Just and equitable

The Court will also consider whether granting a vesting order is just and equitable in all the circumstances. When a property is disclaimed by a bankruptcy trustee when there is still a debt secured by a registered mortgage, it has been held that it would be just and equitable for the property to be vested in the mortgagee. In those circumstances, unless a vesting order is made, the mortgagee would be deprived of the benefit of its security. Apart from seeking vesting orders, there are no further steps a mortgagee can take to make good its security position.

## Practical tips

*If you are a mortgagee who has found themselves in a situation where the mortgaged property has been disclaimed and you are required to apply for vesting orders in order to realise the property, here's what to do:*

#### • Seek legal advice

If your lawyer considers it appropriate in the particular circumstances of your case to seek a vesting order, they will need to prepare a Federal Court application on your behalf. The form of orders sought will be dependent upon what stage of enforcement action you are at. For example, if you have not yet issued any power of sale notice, a set of orders will be required to deal with whether a notice is still required and, if so, to whom it should be served. It will be important not to simply copy orders made in other cases, but rather to tailor them to your specific situation.

#### • Serve all interested parties

Invite all interested parties, such as caveators, to provide their consent to the court application prior to the hearing.



#### • Contact the SRO

Once a vesting order has been obtained, a mortgagee applying to become the registered proprietor of land may be subject to pay stamp duty on the conveyance of the property. It is important you also contact the State Revenue Office and provide evidentiary documents as to the value of the property so an assessment can be made as to whether the transfer of the property to the mortgagee is a dutiable transaction. If the transfer is dutiable, the SRO will review the evidentiary documents, assess the transfer and issue a notice of assessment of stamp duty for payment.



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**Annette Gaber**  
Partner, Melbourne  
+61 3 9252 2522  
annette.gaber@gadens.com

**Sonia Apikian**  
Partner, Melbourne  
+61 3 9252 2508  
sonia.apikian@gadens.com

**Sarah Rogers**  
Associate, Melbourne  
+61 3 9252 7716  
sarah.rogers@gadens.com