



Distribution of bankrupt estates between the Official Trustee and registered trustees



Purpose

This paper outlines changes to the existing arrangements, under which the Official Trustee (OT) distributes some of its work to private sector registered trustees (RTs). We are working towards implementing the new arrangements on 1 July 2021 and will provide further information closer to that date.

Background

The role of the OT within AFSA is an important regulatory tool that helps ensure appropriate scrutiny is applied in insolvency administrations where an RT has not been appointed. In recognition that the OT does not have unlimited resources, AFSA's priority is on ensuring the OT's work is primarily geared towards activities that help to support overall confidence in the system. For that reason, where there are estates that an RT would be willing to administer, AFSA has decided to make that work available to the sector. AFSA will focus on investigating and administering estates that would deliver system wide benefits, as opposed to those where the benefits primarily accrue to creditors in particular bankrupt estates. AFSA consulted widely with stakeholders in February and March 2021 regarding the allocation principles and methodology to support this new arrangement.

Two overarching principles support decision-making regarding what estates AFSA will offer to RTs to administer and what residual estates the OT will retain for possible investigation and administration.:

Principle 1

The OT will generally not administer estates where it is apparent at the outset that a registered trustee may consent to act in the estate/administration.

Principle 2

The OT will investigate and administer estates where there is a public interest in doing so and to maintain stakeholder confidence in the insolvency system, even though the administration may not result in a financial return to creditors, nor cover the OT's costs of administration.

In practice, the above principles will be applied using standardised, objective criteria applied at the start of the bankruptcy and based solely on what is disclosed in the bankrupt person's statement of affairs.

OFFICIAL

AFSA recognises that some RTs remain concerned that relying solely on what is disclosed in the statement of affairs may result in a significant number of estates being distributed which ultimately offer no realisations.

This concern is offset to some extent by the expected overall increase in potential administrations being offered to the sector by AFSA, combined with the change in practice that ensures estates are distributed before any OT costs have been incurred.

AFSA will be closely monitoring the outcomes, both in estates in which RTs consent and those retained by the OT, to ensure the new process is working efficiently and effectively. We will be transparent about these outcomes and are committed to ongoing consultation with industry and open to considering changes to improve the system (including adjustments to the thresholds outlined below).

Criteria for offering estates to RTs

AFSA selects estates to RTs based on information disclosed on the statement of affairs using the following criteria:

Asset	Criteria
Contributions	Contribution is >\$5,000 per annum
Preference Payments	Date paid = < 6 months before DOB & = > \$25,000
Cash on hand and at bank	Combined value = >\$15,000
Shares	Market Value (inc. combined) >\$15,000
Vehicles	Equity = >\$20,000
Other assets	Equity = >\$30,000
Deceased Estates	Estimated value of benefit = >\$20,000
Real Estate	Equity = >\$40,000
Financial Assets	Market Value (combined value) >\$20,000
Money owed to the bankrupt (book debts)	Amount owed = >\$25,000
Interest in assets owed by others	Yes & What is it worth = >\$40,000
Sold or transferred assets	Date transferred = < 5 years & = >\$40,000
Lump sums paid to super	Lump sum to super in the last 5 years = >\$25,000
Trusts	Assets or distribution =>\$25,000

Investigations by the OT

The OT will continue to investigate estates which do not meet the criteria listed above, and which may not result in a return to creditors or cover the OT's costs of administration where there is a public interest in doing so. The considerations in assessing which bankruptcies ought to be investigated by the OT may include:

1. Significant unexplained deficiencies in an estate
2. Previous known misbehaviour or concerning conduct of the debtor, creditors pre-insolvency advisors
3. Complaint or tip off regarding a bankrupt person
4. Identified inconsistency between disclosures made by a debtor and the profile of the debtor (e.g. disclosed income/assets v occupation groupings)
5. Disclosed source of information/advice on the bankruptcy application is from known or suspected untrustworthy operators in the industry
6. The factual scenario provides opportunity to test a point of law that requires clarification
7. Where no RT has consented to accept an estate offered for administration (based on specified criteria) within a reasonable timeframe
8. Other indicators of concern.

RT transfers to the OT

There are occasions when it might be appropriate or desirable for an RT to transfer an estate to the OT. These requests will be dealt with on a case by case basis and decisions based on the two overarching principles outlined earlier in this paper.

Some of the considerations in assessing which RT bankruptcies ought to be accepted by the OT for further work would need to be done on a case by case basis, however the general criteria may include:

1. Estates with significant public interest which an incumbent RT is unable to progress due to capacity/capability constraints (financial, physical or scale)
2. Estates where the incumbent RT is exiting the industry and the RT cannot find a replacement RT.

Process for seeking RTs consent to act

AFSA's intention is to seek consent to act from RTs as quickly as possible after a bankruptcy application is accepted. We will continue to operate a national panel of trustees, which will be very similar to that which already exists.

RTs will be invited to join the panel and, as is currently the case, advise whether they wish to accept estates where the bankrupt person is in their local geographical area. Given the change in approach, the existing panel will be discontinued, and all RTs will be invited to join the new panel. The existing limits on RT remuneration in relation to estates where the RT consents to act, including with respect to transfers from the OT, will remain (that is, the remuneration cannot exceed the median industry rates which are reviewed annually). A list of the RTs on the national panel will be published on the AFSA website.

The transfer process has historically been based on section 181A of the *Bankruptcy Act 1966*. This presents some risks as we move to a system which is based on getting an RT appointed as quickly as possible once it is established that the specified criteria are met.

OFFICIAL

In particular, the OT will not be conducting any investigations in these estates so there is a risk that issues will not be properly addressed, and assets could be lost during the three-week consideration period required by s181A.

To address this, we will move to a new process which will involve the Official Receiver seeking a consent from an RT prior to accepting the bankruptcy application.

Estates will be selected solely based on what is disclosed in the bankrupt person's statement of affairs and the RT will be provided with the publicly available version of the statement of affairs and asked to provide a consent to act. This process will use the existing online services portal offered to RTs. As is currently the case, each estate selected will be offered to the next RT on the panel. The RT will be asked to confirm their capacity to take on the estate and that there are no conflicts of interest. If the RT is unable to take on the estate because of capacity or conflict issues, they will retain their place in the queue and be offered the next available estate. Where the RT declines for another reason, they will move to the end of the roster. The bankrupt person will also be notified of the proposed consent. Where it is not possible to identify an RT to take on the estate within 48 hours, the OT will generally administer the estate.

Debtors applying for bankruptcy will be advised on the application form that AFSA may seek consent from an RT prior to their application being accepted. They will be advised to contact AFSA prior to submitting their application if they have any concerns about this process.

There will be instances in which it is appropriate to transfer estates to RTs after the OT has commenced administration (for example, those transfers initiated by creditors). These transfers will continue to be effected using the s181A process.

Gender diversity

AFSA is committed to taking steps towards enhancing diversity in the insolvency profession. On that basis, and with a view to targeting gender diversity, we will direct a greater share of estates to female trustees under these new arrangements. Our initial target will be to distribute 20% of estates selected to female trustees. This will be reviewed regularly to determine whether to increase that rate over time. This approach is in line with arrangements already in place to direct Commonwealth legal work to female counsel. Overall, it is expected that the new arrangements will see an increase in the total number of estates distributed to RTs, so this initiative is unlikely to reduce the number of estates distributed to individual trustees.

Measuring effectiveness

The effectiveness of these revised arrangements will be measured against the outcomes achieved in estates which have been distributed (such as realisations, dividends and remuneration). The data required to make this assessment will ultimately be derived from Annual Administration Returns. Noting that this data will not be fully available until well over a year after the new process is implemented, we will be having regular dialogue with industry bodies to obtain more timely feedback on how the system is operating.