



Australian Government

Australian Financial Security Authority

# OFFICIAL TRUSTEE PRACTICE STATEMENT 4

## The end of a bankrupt's period of bankruptcy

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## 1. INTRODUCTION

- 1.1. A bankrupt’s period of bankruptcy can come to an end either by discharge or annulment.

**Although a bankruptcy may have ended by discharge, the trustee may continue investigations, realise assets and generally administer the bankrupt estate after discharge.**

- 1.2. **Discharge from bankruptcy** means that the period of bankruptcy has finished and the person is no longer an undischarged bankrupt. This usually occurs automatically, three years and one day after the bankrupt’s statement of affairs is accepted, although the period of bankruptcy can be extended. Discharge is outlined in section 149 of the [Bankruptcy Act 1966](#). After discharge, the bankrupt is no longer subject to many of the provisions of the Bankruptcy Act but does still have some ongoing obligations to assist the trustee.
- 1.3. **Annulment of bankruptcy** means that a bankruptcy comes to an end if a certain event occurs. An annulment can occur before three years and one day have passed or after discharge in certain limited circumstances. There are three ways that a bankruptcy can be annulled:
- under a formal composition or arrangement with creditors in accordance with sections 73 and 74 of the Bankruptcy Act (this option is not available to bankrupts after they have been discharged)
  - by payment of debts in full as set out in section 153A of the Bankruptcy Act
  - by the court as set out in section 153B of the Bankruptcy Act.

## 2. AUTOMATIC DISCHARGE

### When no objection has been lodged

- 2.1. Unless an objection to discharge has been lodged, a bankrupt will be automatically discharged from bankruptcy three years from the date that the bankrupt’s statement of affairs<sup>1</sup> was accepted for filing by the Official Receiver, exclusive of the day of filing (which equates to three years and one day).
- 2.2. For debtors’ petitions, this means that automatic discharge will occur three years and one day after the date the petition was accepted (that is, the date of bankruptcy), as a petition cannot be accepted by the Official Receiver unless it is accompanied by a statement of affairs.

<sup>1</sup> Note that, on 1 January 2020, the statement of affairs form was renamed the Bankruptcy Form. Reference in this chapter to a statement of affairs includes reference to the Bankruptcy Form

- 2.3. For sequestration orders, automatic discharge will occur three years and one day after the bankrupt’s statement of affairs is accepted for filing with the Official Receiver. Usually, when a sequestration order has been made (the date of which is the date of bankruptcy), the statement of affairs will not have been filed. This means that the longer a bankrupt delays filing his or her statement of affairs, the longer his or her period of bankruptcy will be. More information about sequestration order statements of affairs can be found in [Official Receiver Practice Statement 3 – Bankruptcy by sequestration order](#).

### When an objection has been lodged

- 2.4. An objection to discharge is a notice lodged by the trustee with the Official Receiver by a trustee to induce a bankrupt to comply with his or her obligations. An objection will extend the period of bankruptcy so automatic discharge will **not** occur three years and one day after the bankrupt filed a statement of affairs.
- 2.5. When an objection to discharge is lodged by the trustee, the period of bankruptcy will be extended to **either five or eight years from the date that the statement of affairs was filed**, depending on the ground(s) of the objection.
- 2.6. Where the bankrupt left Australia before, on or after the date of bankruptcy without permission or failed to return at the request of the trustee, the bankruptcy can be extended to **five years from the date on which he or she returns to Australia**. This means that, if the bankrupt does not return, he or she will not be discharged from the bankruptcy.
- 2.7. An objection to discharge may be withdrawn by the trustee if the reason(s) for its lodgment no longer exists (for example, if the objection was lodged because the bankrupt failed to pay income contributions, the trustee can withdraw the objection when the contributions have been paid).
- 2.8. The grounds on which a trustee can object to a bankrupt’s discharge are contained in section 149D of the Bankruptcy Act.
- 2.9. More information about objections can be found in [Official Trustee Practice Statement 5 – Objections to discharge from bankruptcy](#).

### After discharge

- 2.10. The administration of the bankrupt estate may continue until a time determined by the trustee. The administration may continue beyond discharge for various reasons, including:
- investigations are still being conducted
  - there are assets to be realised
  - there are income contributions to collect
  - distribution of funds in the estate has not been completed.

- 2.11. Any divisible property vested in the Official Trustee that was acquired by the bankrupt before or during his or her bankruptcy can still be sold up until a specified date. The property does **not** revert to the bankrupt after discharge. However, the trustee must conform to the time limits for realising property and the re-vesting provisions set out in sections 129AA and 127 of the Bankruptcy Act.
- 2.12. The Official Trustee will make reasonable endeavours to complete any outstanding investigations, sell unsold assets and collect outstanding income contributions as quickly as practicable.
- 2.13. Pursuant to section 152 of the Bankruptcy Act, a discharged bankrupt has a continuing obligation to assist the trustee to finalise any outstanding issues.
- 2.14. Section 139R of the Bankruptcy Act states that, after discharge, a bankrupt with an income contribution liability is still liable to pay the amount outstanding to the trustee.

### Obtaining confirmation of discharge

- 2.15. There is no requirement for a trustee to formally advise the bankrupt of automatic discharge. However, if the bankrupt does wish to obtain confirmation, he or she can obtain an extract of the National Personal Insolvency Index (“NPII”), which will show the date of discharge. An extract of the NPII can be obtained via AFSA’s Bankruptcy Register Search. There is a cost for obtaining an extract. More information about Bankruptcy Register Search can be found on [AFSA’s website](#).
- 2.16. Where the Official Trustee is the bankruptcy trustee and less-formal confirmation is required, a discharge letter can be requested from AFSA’s National Service Centre by phoning 1300 364 785 or by emailing [info@afsa.gov.au](mailto:info@afsa.gov.au).

### Effects of discharge

- 2.17. The bankrupt’s name will appear on the NPII **permanently**. After discharge, the NPII will be updated to show that the bankrupt has been discharged.
- 2.18. Credit reporting bodies are permitted under privacy legislation to keep a record of bankruptcies for up to five years from the date of bankruptcy, or two years from the date of discharge, whichever is longer. Any discharged bankrupt can independently contact these organisations to have his or her credit file updated to show the discharge date and to find out how long the bankruptcy record will remain on their credit file. Credit reporting is not regulated by AFSA.

### Debts not extinguished

- 2.19. Most (but not all) pre-bankruptcy debts are extinguished when the bankrupt is released from bankruptcy; however, there are some exceptions.

#### **PRE-BANKRUPTCY DEBTS THAT ARE NOT EXTINGUISHED**

- Penalties and fines imposed by a court in respect to an offence against a law.
- Damages claims from accidents (e.g. car accidents) unless, before bankruptcy, the sum of damages has been fixed by a court judgment or the debtor has a written agreement with the other party as the quantum of damages.
- Debts under maintenance agreements or orders (which includes child support debts).
- Certain student (HELP) debts.
- Debts incurred by fraud.

### **3. ANNULMENT BY FORMAL COMPOSITION OR SCHEME OF ARRANGEMENT WITH CREDITORS**

#### **The proposal**

- 3.1. A composition or arrangement is an offer made by a bankrupt through the trustee to finalise his or her debts. The trustee will prepare a report about the bankrupt’s proposal and advise creditors whether the proposal will benefit them. A meeting is then held where creditors can vote on whether or not to accept the offer.
- 3.2. A composition or scheme of arrangement can only be proposed by an undischarged bankrupt.
- 3.3. It is preferable that the funds or other arrangements proposed should be held by the bankruptcy trustee prior to the vote being considered at the meeting.
- 3.4. A proposal:
  - should make provision for payment of the bankruptcy trustee’s fees and expenses incurred during the administration of the bankruptcy
  - should include money or assets to be included in the offer that would not normally be available to creditors of the bankruptcy, such as money provided by a relative
  - if relevant, outline the assets vested in the trustee that will be realised to provide part of the funds to be distributed to creditors, as other assets that are vested in the bankruptcy trustee will be returned to the former bankrupt upon annulment or become vested in a person appointed by the court
  - explicitly state the grounds on which the money will be distributed, such as:
    - all creditors will receive an equal rate
    - bankruptcy priorities will apply as they would under the bankruptcy, or
    - an explanation as to how the funds will otherwise be distributed.

### If the proposal is accepted

- 3.5. If a bankrupt’s proposal for a formal composition or arrangement with creditors is accepted, the bankruptcy is annulled on the day of the passing of the special resolution accepting the bankrupt’s proposal.
- 3.6. The Official Trustee must notify the Official Receiver of the annulment (giving the name and bankruptcy number of the former bankrupt) within two days so that the NPII can be updated to reflect the annulment.

### Effects on property

- 3.7. Property that had vested in the trustee but that has not yet been dealt with during the administration of the bankrupt estate or under the composition vests in such person as the court appoints or, in default of such an appointment, reverts to the former bankrupt.

### Debts not extinguished

- 3.8. The composition binds all the bankrupt’s creditors in relation to provable debts.
- 3.9. Debts that are not provable (i.e. debts from which the bankrupt would not be released on his or her discharge from bankruptcy) are not extinguished, unless the creditor to whom the debt is owed consents. Such debts include those incurred by fraud, child support debts, and secured debts as per subsection 153(3). Further, the annulment does not release a guarantor from any liability from which he or she would not be released by discharge of the bankrupt from bankruptcy.

### Setting aside a composition

- 3.10. Following the acceptance of a composition proposal and the annulment of the bankruptcy, there are provisions of the Bankruptcy Act that allow for an application to be made to the court by the Inspector-General, the trustee or a creditor to have the composition or arrangement set aside. This may be availed for a number of reasons, such as where:
  - the former bankrupt has not complied with the terms of the composition
  - a creditor was not sent notice of the meeting and did not cast a vote
  - the terms are unreasonable.
- 3.11. When making the application to the court, the trustee or creditor may include an application for a sequestration order and, if the court does make such an order, this will result in the former bankrupt again becoming bankrupt.

### If the proposal is rejected

- 3.12. If creditors vote to reject the bankrupt’s composition proposal, the bankruptcy is not annulled. The Official Trustee will continue with its investigations and the bankrupt must still comply with his or her obligations under the Bankruptcy Act.

## 4. ANNULMENT ON PAYMENT OF DEBTS

- 4.1. If the trustee is satisfied that all of the fees and costs of the estate, the trustee’s remuneration and the bankrupt’s debts have been paid in full, including the payment of interest claims from creditors, the bankruptcy is annulled on the date on which the last such payment was made.
- 4.2. Subsection 153A(6) specifically states that the “bankrupt’s debts” means all debts that have been proved in the bankruptcy and includes interest payable on those debts where the creditor was entitled to charge interest in accordance with the terms of the credit agreement, together with all of the costs, charges and expenses of the administration of the bankruptcy, including the remuneration and expenses of the trustee.
- 4.3. In relation to interest payable to creditors for the period from the date of bankruptcy until the date of the payment of the final dividend, the Official Trustee will give those creditors a reasonable time period of not fewer than 14 days in which to lodge their interest claims.
- 4.4. Confirmation of the annulment date will be impacted by whether any creditor claims interest. This could mean that, if the final date for lodging interest claims passes and no claims are received, it may become known that the annulment occurred 14 days prior.
- 4.5. The Official Trustee will notify the Official Receiver of the annulment (giving the name and bankruptcy number of the former bankrupt) within two days of the annulment being confirmed.

### Effects of annulment<sup>2</sup>

- 4.6. If an annulment is effected, all sales or dispositions of property, payments made and all acts done by the trustee before the annulment are taken to have been validly made or done. Subject to subsections 154(3), (6) and (7) of the Bankruptcy Act, the remainder of property after payments duly made and recovery of costs, charges and expenses is to be returned to the former bankrupt.

### Debts not extinguished

- 4.7. An annulment does not release the bankrupt from debts from which he or she would not have been released on his or her discharge from bankruptcy (including but not limited to debts incurred through fraud, child support debts, or secured debts as per subsection 153(3)). Further, the annulment does not release a

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<sup>2</sup> The effects of annulment set out in section 154 of the Bankruptcy Act relate to annulments on payment of debts in full or by court order. However, similar provisions apply where annulment arises due to acceptance by creditors of a composition or scheme of arrangement (see section 74)

guarantor from any liability from which he or she would not be released by discharge of the bankrupt from bankruptcy.

## 5. ANNULMENT BY THE COURT

- 5.1. If the court is satisfied that a sequestration order should not to have been made or that a debtor’s petition should not have been presented by a debtor or accepted by the Official Receiver, the court may make an order annulling the bankruptcy. In the case of a debtor’s petition, the order may be made whether or not the bankrupt was insolvent when the petition was presented.
- 5.2. Where a bankrupt applies to the court for an annulment of his or her bankruptcy under section 153B of the Bankruptcy Act, the [Federal Court \(Bankruptcy\) Rules 2016](#) provide that:
  - the application should provide for payment of the bankruptcy trustee’s fees and expenses incurred during the administration
  - the application must be served on the trustee at least seven days before the hearing
  - at the first hearing of the application, the court will determine whether the trustee is required to provide a report on the bankrupt’s conduct, examinable affairs and the administration of the bankrupt estate. If required by the court, the trustee must file the report at least five days before the date fixed for the hearing of the application.
- 5.3. Where a bankrupt applies to the court for a review of a registrar’s decision to make a sequestration order, the [Federal Court \(Bankruptcy\) Rules 2016](#) provide that the application must be served on the trustee at least seven days before the date fixed for the hearing of the application.
- 5.4. Where the court annuls the bankruptcy, the Bankruptcy Act requires the trustee of the former bankrupt to give to the Official Receiver, within two days of becoming aware of the court order annulling the bankruptcy, a written certificate setting out the former bankrupt’s name and bankruptcy number and the date of the annulment.

### Effects of annulment<sup>3</sup>

- 5.5. If an annulment is ordered by the court, all sales or dispositions of property, payments made and all acts done by the trustee before the annulment are taken to have been validly made or done. The trustee may apply the property still vested in the trustee to payments of costs, charges (including remuneration) and expenses of the administration.

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<sup>3</sup> The effects of annulment set out in section 154 of the Bankruptcy Act relate to annulments on payment of debts in full or by court order. However, similar provisions apply where annulment arises due to acceptance by creditors of a composition or scheme of arrangement (see section 74)

- 5.6. Subject to subsections 154(3), (6) and (7) of the Bankruptcy Act, the remainder of property after payments duly made and recovery of costs, charges and expenses is to be returned to the former bankrupt.

