



Australian Government

Australian Financial Security Authority

OFFICIAL TRUSTEE PRACTICE STATEMENT 6

Choses in action

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**PERSONAL
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1. INTRODUCTION

What is a chose?

- 1.1. A chose is a thing or a right. Choses are of two kinds – choses in possession and choses in action:
 - a **chose in possession** is a thing of which the owner has actual enjoyment
 - a **chose in action** is a thing of which a person has not the present enjoyment, but merely a right to sue to recover it (if withheld) by commencing an action, and protected by the law.
- 1.2. Examples of choses in action include money due on a bond, the right to recover money by legal action, the right of a beneficiary under a will to “due administration” with respect to the executor, the right to enforce a contract or recover damages for its breach and rights arising by reason of the commission of a tort (civil wrong) or other wrong.
- 1.3. A common situation in bankrupt estates is where a person sells goods to another and then becomes bankrupt. If, at the date of bankruptcy, the purchaser has not paid for the goods, the right to collect payment is an asset that vests in the trustee of the bankrupt estate.
- 1.4. A chose in action may be assigned by written instrument signed by the assignor that is absolute in terms and by notice in writing being given to the debtor (see section 100-5 of the Insolvency Practice Schedule). The courts have confirmed the right of a trustee to sell a chose in action, including to a discharged bankrupt. This is not possible in the case of an undischarged bankrupt as the “asset” would immediately revert in the trustee under paragraph 58(1)(b) of the [Bankruptcy Act 1966](#) – see also the decision in [Meriton Apartments Pty Limited v Industrial Court of New South Wales \[2008\] FCAFC 172 \(13 October 2008\)](#).

2. ACTIONS WHERE THE OFFICIAL TRUSTEE COMMENCES PROCEEDINGS

- 2.1. Where a cause of action exists and the bankrupt has not commenced recovery as at the date of bankruptcy, if the cause of action has vested it is open to the Official Trustee to commence proceedings to enforce its rights – for example, to sue for a debt that was previously owed to the bankrupt.
- 2.2. Before commencing such proceedings, the Official Trustee may assess:
 - the probability of succeeding in the action
 - the costs of pursuing the matter
 - the attitude of the bankrupt’s creditors and whether they want to contribute towards any cost of recovery

- the ability of the other party to pay the amount awarded if the trustee is successful, and
 - the possibility that the trustee could become liable for the defendant's costs in the event the action is unsuccessful.
- 2.3. Paragraph 19(1)(k) of the Bankruptcy Act affords a trustee protection in circumstances where such actions may be considered not cost-effective to recover.

3. ASSIGNMENT OF A CAUSE OF ACTION

- 3.1. A bankrupt who no longer has the ability to pursue a claim against another party may request that the trustee either pursue the action or sell that right back to the bankrupt (after discharge) or to an associated (third) party. The trustee has a duty to the bankrupt as well as to the creditors in the estate and may consider either possibility.
- 3.2. The potential defendants in the action may challenge any proposed assignment of the cause of action to the bankrupt or his or her associates. The potential defendants may make a competing offer to purchase the cause of action from the trustee in order to ensure it does not proceed. In any event, either party may challenge the trustee's decision.

4. SECTION 60 OF THE BANKRUPTCY ACT

- 4.1. Where an action is on foot when bankruptcy occurs, the trustee is required to make an election under subsection 60(2) of the Bankruptcy Act to either abandon the proceedings or continue the action. Subsection 60(3) provides the trustee with 28 days following service of notice of the action to make the election, otherwise it is deemed abandoned.
- 4.2. However, under section 60, there are some types of action in which a trustee is not required to make an election. Pursuant to subsection 60(4), any action involving a "personal injury or wrong" done to a bankrupt, to his or her spouse or de facto partner or to a member of his or her family is an action that can be continued by a bankrupt in his or her own name. Likewise, an action in respect of the death of the bankrupt's spouse or de facto partner or a member of his or her family may be continued by the bankrupt. The fruits of any such action are not property a trustee would be entitled to recover as divisible property due to the exemption in paragraph 116(2)(g) of the Bankruptcy Act.
- 4.3. The basic test to determine whether an action relates to a "personal injury or wrong" was set out in *Cox v Journaux (No.2)* [1935] HCA 48 and has been referred to in many subsequent cases, including *Faulkner v Bluett* [1981] FCA 3.

The test is that an action will be one for personal injury or wrong where the relief sought is to be assessed by immediate reference to the pain felt by the bankrupt in respect of his or her mind, body or character and without any reference to his or her rights to property.

- 4.4. In some situations, it may not be immediately clear whether an action commenced by the bankrupt relates to a personal injury or wrong or is referable to his or her property rights, and it is possible that an action may contain both elements.

5. CONSIDERATIONS

- 5.1. A decisions as to whether to pursue an action depends on several factors, including the potential amount to be realised in the estate and evidence of liability.
- 5.2. The Official Trustee may consider the following funding options when deciding whether to pursue an action:
 - advances and indemnities from creditors
 - funding under section 305 of the Bankruptcy Act, and/or
 - applying funds in the estate.
- 5.3. Where there are funds in the estate that would in the normal course be available to creditors as a dividend, creditors' views will be sought to ascertain whether they agree that the funds be used to pursue the proceeding. Creditors are presented with information to assist in making the decision.

6. ASSIGNMENT OF ACTIONS

- 6.1. The Official Trustee may elect to assign a chose in action where a recovery is not a viable proposition within the administration of an estate. There may be instances where the Official Trustee forms the view that prosecution of the action would not benefit the estate notwithstanding a bankrupt's opposing opinion.
- 6.2. The Official Trustee has several options for determining the value of the consideration that will depend on the action, the potential cost and benefit to the estate. Creditors will consulted during the process.
- 6.3. The assignment of the action may be finalised by the Official Trustee and the assignee entering into a deed. Usually, the assignee bears legal costs incurred in preparing the deed, with the trustee's solicitor vetting the deed.