



Australian Government

Australian Financial Security Authority

OFFICIAL TRUSTEE PRACTICE STATEMENT 8

Treatment of debts in bankruptcy

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Contact: practice@afsa.gov.au



**PERSONAL
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1. INTRODUCTION

- 1.1. One of the general intentions of bankruptcy is to free an insolvent person from his or her financial obligations arising from debts incurred prior to that person becoming bankrupt. However, while a debtor is released from the majority of categories of unsecured debts at the end of the bankruptcy, there are certain debts from which the bankrupt is not released, and there are other debts from which the bankrupt is released but that, if not paid, will cause the loss of service or supply.
- 1.2. Upon bankruptcy, creditors with certain types of debts are not permitted to take action to recover those debts and, instead, they have the right to lodge claims in the bankrupt estate and participate in a dividend, if one is paid. The rights of these creditors to claim in the estate extends only to those debts that were owed when bankruptcy occurred, and not debts incurred on or after the date of bankruptcy.
- 1.3. How certain debts are treated in bankruptcy is provided for in various provisions of the [Bankruptcy Act 1966](#). This means that debtors, bankrupts, creditors and trustees do not have the power or discretion to determine how debts will be treated.
- 1.4. Although this practice statement has been written with a view to outlining how certain debts are treated in bankruptcy, it can also be applied to debt agreements, personal insolvency agreements and Part XI administrations, as the provisions of the Bankruptcy Act in relation to provable debts apply equally to these administrations.

Terminology

- 1.5. A **debtor** is any person who owes money.
- 1.6. A **bankrupt** is a person who has either had a sequestration order made against his or her estate or has become bankrupt by virtue of the presentation of a debtor's petition.
- 1.7. A **discharged bankrupt** or **former bankrupt** is a person who was bankrupt but whose period of bankruptcy has ended.
- 1.8. A **creditor** is a person to whom or entity to which money is owed. The money may be owed for any of a number of reasons, such as the repayment of a loan, a court order requiring payment of damages for a car accident, outstanding school fees that are owed to a school etc.

Disclosing debts

- 1.9. When completing his or her statement of affairs,¹ the debtor or bankrupt must disclose **all** debts that he or she owes. This includes debts that are not covered by bankruptcy and debts to family members.

2. UNSECURED AND SECURED DEBTS

- 2.1. For the purposes of the Bankruptcy Act, an **unsecured debt** is a debt for which security is not held over the debtor's property.
- 2.2. A **secured debt** is tied to specific property. Examples include:
- a mortgage (where the house is security)
 - a car loan (where the car is security)
 - hire purchase or rent to buy (where items such as furniture or electronics are the security).
- 2.3. The secured creditor will have certain rights regarding taking possession of the property if the debt is not paid in accordance with the terms of the loan or agreement.
- 2.4. Whether a debt is secured or unsecured depends on the specific contract or agreement between the debtor and the creditor at the time the contract or agreement was entered into.
- 2.5. There are some debts that the law deems secured, such as water supply charges and rates/land charges in certain locations. Some taxation debts may also become secured in certain circumstances.
- 2.6. There may be circumstances in which a security interest can be set aside, for example where there were defects in the registration of the security. In such a situation, the creditor is not a secured creditor.
- 2.7. Following bankruptcy, a secured creditor can choose to surrender the security to the trustee of the bankrupt estate and be an unsecured creditor in the estate. Where a secured creditor petitioned the court to have a debtor made bankrupt and the court then made a sequestration order, the trustee can require the creditor to surrender the security.
- 2.8. A category of secured debts, called liens, exist where a creditor has a right to hold on to property until payment of a debt is made. For example, if a vehicle is delivered to a mechanic so that it can be serviced, the mechanic does not have to return the vehicle until the debtor has paid for the work done. State/

¹ 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

Territory legislation provides for the creditor's rights in relation to the property (e.g. selling it) if the debt remains unpaid.

3. PROVABLE AND NON-PROVABLE DEBTS

Provable debts

- 3.1. A **provable debt** is one that entitles the creditor to participate in dividends paid in the bankrupt estate. Section 82 of the Bankruptcy Act outlines which debts are provable and sections 83 to 107 provide further detailed information about provable debts.

Non-provable debt

- 3.2. A creditor with a **non-provable debt** is not entitled to participate in dividends (i.e. the creditor does not receive any payments from the bankrupt estate when other creditors with provable debts receive payments).
- 3.3. A creditor with a non-provable debt is entitled to take action to recover its debt both during and after bankruptcy (although they may not take action to deal with property that has vested in the trustee).
- 3.4. The bankrupt will remain liable for non-provable debts both during the term of the bankruptcy and after the bankruptcy has ended.

4. EXTINGUISHED AND NOT EXTINGUISHED

Debts extinguished after bankruptcy

- 4.1. Debts that are **extinguished** are those the bankrupt does not have a liability to pay after the bankruptcy ends.
- 4.2. Most unsecured debts and shortfalls on secured debts that were incurred before bankruptcy are extinguished. In effect, these debts end when the bankruptcy ends.

Debts not extinguished after bankruptcy

- 4.3. Debts that are **not extinguished** are those that the bankrupt will still have to pay after the bankruptcy has ended.
- 4.4. Some debts that are not extinguished after bankruptcy are provable, which means that the creditor can participate in dividends in the bankruptcy and collect the balance after the bankruptcy ends. Other debts that are not extinguished are not provable, which means that the creditor can still take action to recover the debts during and after the bankruptcy.

- 4.5. Debts that are not extinguished include:
- debts incurred by fraud (provable)
 - child support and maintenance debts (provable)
 - unliquidated damages arising otherwise than by reason of contract, promise or breach of trust (not provable)
 - debts incurred after the date of bankruptcy (not provable).

5. DEBTS RELATING TO ONGOING SERVICES

- 5.1. There are some debts that are provable and extinguished, meaning that they are covered by the bankruptcy, but that, if not paid, will cause the loss of service as a consequence of non-payment. This means that, although the creditor cannot take action to recover the amount owed at the date of bankruptcy, the Bankruptcy Act does not prevent the creditor from stopping service.
- 5.2. Some examples of debts that fall into this category are:
- telephone contracts/plans
 - internet
 - pay television
 - school fees
 - motor vehicle registration
 - electricity
 - child care.
- 5.3. There may be some State/Territory legislative requirements regarding the disconnection of essential services, but the Bankruptcy Act does not address these.

6. STATUTE-BARRED DEBTS

- 6.1. Each State and Territory has legislation regarding how long a creditor may take to recover a debt.
- 6.2. Generally, where a debt is more than six years old, and where the creditor has not obtained a judgment, that debt will not be provable in bankruptcy; however, there may be some exceptions to this. If bankruptcy occurs within the six-year period, the creditor (provided they have a provable debt) will be able to lodge a claim in the estate and participate in a dividend if one is paid, even if a dividend is not paid until after the six years.

7. JOINT AND SEVERAL DEBTS (DEBTS INCURRED WITH ANOTHER PERSON)

- 7.1. Where two or more people borrow money or incur a debt together, the terms of the arrangement often permit the creditor to recover the full debt from either party. This is called joint and several liability and can have implications where not all of the debtors become bankrupt.
- 7.2. For example, if a husband and wife have a joint bank loan and the wife becomes bankrupt, the financial institution will be able to pursue the husband for the full amount owed. If both parties go bankrupt, the financial institution will be a creditor in the bankrupt estates and will not be able to pursue either the husband or wife after they become bankrupt. If one party goes bankrupt and the debt is paid in full by the other debtor, that other debtor may be entitled to lodge a claim in the bankrupt estate.
- 7.3. A debtor may think that, if he or she has a joint debt and the other debtor goes bankrupt, they can only be pursued for half the amount owed. However, this is usually not the case as the terms of the credit arrangement will generally be that the parties are jointly and severally (also known as jointly and separately) liable for the debt, meaning that the creditor is able to recover the full amount from the non-bankrupt debtor.

8. COMPANY DEBTS

- 8.1. Where the director of a company has been issued with a director penalty notice (for example, for unpaid superannuation guarantee charge), the director is liable for the debt and not the company. A debt arising as a result of a director penalty notice is provable in bankruptcy and extinguished, including where the director penalty notice is issued after the date of bankruptcy in relation to a company liability that was due before the date of bankruptcy.
- 8.2. Where a bankrupt was involved in the operation of a company and the company obtained credit, that creditor will only be a creditor in the bankrupt estate if they hold a personal guarantee signed by the bankrupt. In the absence of a guarantee, the creditor will only be able to pursue the company for payment.

9. DEBTS INCURRED OVERSEAS

- 9.1. Where a debt has been incurred overseas, and where that debt would have been provable in the bankrupt estate if the debt had been incurred in Australia, it will be provable in the bankruptcy.

- 9.2. Whether or not a debt incurred overseas will be extinguished when the Australian bankruptcy ends can depend on legislation in the country in which the debt was incurred and the type of debt. The Official Trustee is not in a position to advise of the treatment of overseas debts after a bankruptcy has ended.

10. INTEREST

- 10.1. Where the original loan agreement in relation to a provable debt permitted the charging of interest, the interest accrued until the date of bankruptcy is provable in the estate.
- 10.2. Interest accruing after the date of bankruptcy is only provable in the event that the estate is annulled under section 153A of the Bankruptcy Act, which occurs when all costs, charges, remuneration and debts of the estate are paid in full and where, after those amounts have been paid, there are sufficient funds available to pay interest to creditors for the period from the date of bankruptcy to the date of the final dividend.
- 10.3. Where a secured creditor sells their property after the date of bankruptcy and a shortfall results and a proof of debt is lodged, interest from the date of bankruptcy to the date of the sale cannot be claimed (except in the case of a section 153A annulment).

11. CERTAIN NON-PROVABLE DEBTS

- 11.1. There are certain debts that the Bankruptcy Act states are not provable:
- unliquidated damages, which are damages claims from accidents where, before bankruptcy, the sum of damages was not fixed by a court judgment or where the debtor did not have a written agreement with the other party as to the quantum of damages (subsection 82(2))
 - penalties and fines imposed by a court in respect of an offence against a law (subsection 82(3))
 - an amount payable under an order made under section 1317G of the *Corporations Act 2001* (subsection 82(3AA)). Section 1317G relates to specific penalties under sections 962P and 1317G of the Corporations Act in relation to charging fees for financial services
 - certain student debts (subsection 82(3AB))
 - amounts payable under proceeds of crime laws (subsection 82(3A)).

12. CONTRACT LAW CONSIDERATIONS

12.1. There are elements of contract law, which have been decided by the courts, that must be taken into account in order to determine whether an arrangement gave rise to a debt that is provable in bankruptcy. The factors that the trustee must consider include:

- Was there an offer and acceptance?
- Was consideration given by both parties? Was this consideration given at the time the debt was incurred?
- Is there a debtor-creditor relationship? Was the provision of funds a gift and not a loan?
- Did the parties intend for the arrangement to give rise to a debt?

13. OFFSETTING DEBTS

13.1. Section 56 of the Bankruptcy Act permits a creditor to apply certain amounts they hold on behalf of a person who becomes bankrupt to repayment of the debt. For example, if a person becomes bankrupt and owes a financial institution \$10,000, and the bankrupt has an account with that same financial institution with a balance of \$7500, the financial institution is permitted to keep the \$7500 to reduce the debt owed.

13.2. Taxation legislation allows the Australian Taxation Office to use future refunds or credits due to a bankrupt to offset any tax debts. For example, if a person who becomes bankrupt on 10 January 2018 has an income tax debt, and where that person would otherwise have been entitled to a tax refund for the 2017-2018 financial year, the Australian Taxation Office can keep the tax refund to reduce the amount of the debt owed.

13.3. Note that amount held in bank accounts, amounts owed to a bankrupt and taxation refunds for pre-bankruptcy periods will all form assets of the bankrupt estate. This means that, if there isn't a right of offset (for example, where a bankrupt has a bank account with funds in it but the bank is not a creditor, or where a bankrupt is due to receive a tax refund and doesn't have a debt to the Australian Taxation Office), the funds will be claimed by the trustee.

14. ADMINISTRATIVE CONSIDERATIONS REGARDING DEBTS AFTER THE DATE OF BANKRUPTCY

Creditors may not continue to pursue unsecured provable debts after the date of bankruptcy

- 14.1. A creditor with an unsecured provable debt or shortfall from a secured debt (after the security has been sold) must cease taking action to recover that debt when notified of the bankruptcy. This is provided for in subsection 58(3) of the Bankruptcy Act.
- 14.2. Subsection 58(5) provides that the ceasing of action referenced above does not apply to secured creditors. This means that, where a debtor or bankrupt does not comply with the terms of the loan, the secured creditor can exercise their rights under the contract. These rights would generally extend to taking possession of and selling the secured property.

When ongoing contact by creditors is occurring

- 14.3. Where a bankrupt is contacted by a creditor after the date of bankruptcy, the bankrupt can consider the following in the first instance:
 - was the debt disclosed on the statement of affairs? If not, tell the trustee so that the trustee can notify the creditor of the bankruptcy
 - did the creditor receive notice of the bankruptcy? If not, there could have been a problem with the address provided or, if it is shortly after the date of bankruptcy, the notice may be in the process of being delivered
 - what sort of debt is it that the creditor is pursuing? During bankruptcy, if the debt is not provable, the creditor can continue to take action to recover it. If the bankruptcy has ended and the debt was not extinguished, the creditor can still take action to recover it
 - if the creditor did receive notification of the bankruptcy and the debt is one that cannot be pursued, advise the trustee.

Pursuing debts after the period of bankruptcy ends

- 14.4. After discharge from bankruptcy, a creditor whose debt was not extinguished may, subject to any other circumstances preventing this, continue to pursue the former bankrupt for the debt.
- 14.5. If a creditor whose debt is not extinguished received a dividend(s) from the bankrupt estate, the creditor must apply that dividend to reduce the debt and can only continue to pursue the balance.

15. PROVING DEBTS AND PRIORITIES

- 15.1. When a creditor wishes to lodge a claim in a bankrupt estate, the Bankruptcy Act uses the terminology “proving a debt”.
- 15.2. The Bankruptcy Act requires that a debt be proved on the approved form (which means that it has been approved by the Inspector-General in Bankruptcy). The approved form is the [Form 8 – Proof of debt](#). The form is available on AFSA’s website and it is used in all estates, including those where a registered trustee is the trustee of the estate.
- 15.3. When a trustee realises enough funds to pay a dividend to creditors, or expects to realise enough funds, the Bankruptcy Act requires the trustee to give written notice of the trustee’s intention to declare the dividend to anyone the trustee knows of who claims, or might claim, to be a creditor, where that party has not yet lodged a proof of debt.
- 15.4. The trustee will then consider the validity of each creditor’s proof of debt and will make a decision regarding whether to admit the claim, reject it or ask for more information. A claim can be admitted in part and rejected in part. The considerations regarding whether the amount claimed is provable are those outlined in this chapter.
- 15.5. The trustee can ask a creditor to provide further evidence in support of their claim. What constitutes sufficient evidence in relation to a proof of debt can vary from creditor to creditor and will depend on the arrangements that gave rise to the debt. The trustee has the power to require the creditor provide a statutory declaration in support of the proof of debt.
- 15.6. As well as asking the creditor for more information about a proof of debt, the trustee can ask the bankrupt. The bankrupt has an obligation to comply with all requests for information and/or documentation made by the trustee.
- 15.7. A debt is not considered proved in the estate until the trustee admits the claim.
- 15.8. Where a claim is rejected, the Bankruptcy Act requires the trustee to notify the creditor in writing. The creditor has 21 days to appeal the trustee’s decision in court.
- 15.9. The bankrupt can also appeal a decision of a trustee to accept or reject a claim.

EXAMPLE 1

A bank lodges a proof of debt in a bankrupt estate and expects to receive a dividend. However, on examination of the claim, the trustee confirms that the debt was incurred after the date of bankruptcy. As such, the trustee must reject the bank’s claim and will advise the bank that the claim has been rejected.

The effect of the rejection is that the bank cannot receive dividends in the estate but can pursue the bankrupt for payment both during and after the bankruptcy.

- 15.10. The Bankruptcy Act does permit the trustee to change its decision to admit or reject a proof of debt.
- 15.11. As the proof of debt form notes, a creditor can face a penalty of imprisonment for five years for lodgment of a false proof of debt.

Priority debts

- 15.12. The Bankruptcy Act provides for certain debts having priority over other debts when there are sufficient funds in a bankrupt estate to enable payment of a dividend(s) to creditors. This means that those debts get paid in full or up to a certain specified amount before other creditors receive any dividends.
- 15.13. The priorities are outlined in section 109 of the Bankruptcy Act as and are:
- certain child support debts, where the bankrupt is or was an employer who was required to withhold child support payments from an employee's pay and failed to do so (subsection 109(1A)). Note that this priority does not extend to child support debts where there was no employer garnishee notice in place, or where the payer was the employee and not the employer
 - payments to employees for work before bankruptcy, subject to certain conditions, including for superannuation but not for outstanding leave entitlements, up to a certain indexed amount (paragraph 109(1)(e) and regulation 6.02). The indexed amount is available on [AFSA's website](#)
 - payments due to government bodies for workers' compensation (subject to certain conditions) (paragraph 109(1)(f))
 - payments to employees for work before bankruptcy (subject to certain conditions) for outstanding leave entitlements (paragraph 109(1)(g))
 - payments of amounts that fall within section 113 (which relates to payments due to any apprentices or clerks of the bankrupt at date of bankruptcy) (paragraph 109(1)(h))
 - where approved by a special resolution at a meeting of creditors, payment of preferences, priorities or advantages in favour of a creditor or group of creditors as regards other creditors, and of costs, charges and expenses incurred in the interests of creditors prior to the date of bankruptcy (paragraph 109(1)(j)).
- 15.14. Both these priority payments and any normal (non-priority) dividends to creditors are paid after certain other amounts in an estate, including the statutory realisations charge, expenses incurred in the administration of the estate and the trustee's remuneration.

ANNEXURE A – TREATMENT OF CERTAIN DEBTS IN BANKRUPTCY

The following table lists certain debts and their treatment in bankruptcy. The table applies to debts that were incurred before the date of bankruptcy and that satisfy other conditions outlined in this document (for example, the debts are not statute-barred, are not company debts etc.). Note too that, where there are two parties to the debt (for example, a husband and wife with a joint credit card) and only one party goes bankrupt, the bank can still pursue the other party for payment.

	Category or type of debt	Provable / non-provable	Extinguished / not extinguished	Further information
1	Credit card	Provable	Extinguished	
2	Personal loan	Provable	Extinguished	
3	Car/vehicle loan	Provable	Extinguished	If the loan is secured, the creditor can take possession of the car/vehicle and sell it if repayment terms are not satisfied
4	Mortgage	Provable	Extinguished	The creditor can take possession of the property and sell it if repayment terms are not satisfied
5	Chattel mortgage	Provable	Extinguished	The creditor can take possession of the property and sell it if repayment terms are not satisfied
6	Council or local government property rates and/or charges	Not provable	Not extinguished	Rates and charges are generally secured, which means that the creditor can take action to sell the property to pay the debts or surrender the security to the trustee and prove for the full amount owed
7	Furniture, electronics etc. bought on a hire-purchase arrangement	Provable	Extinguished	The creditor can take possession of the property if repayment terms are not satisfied

OTPS8 – Treatment of debts in bankruptcy

	Category or type of debt	Provable / non-provable	Extinguished / not extinguished	Further information
8	Water	Provable	Extinguished	Provable but, if not paid, supply might be discontinued or restricted
9	Gas	Provable	Extinguished	Provable but, if not paid, supply might be discontinued
10	Electricity	Provable	Extinguished	Provable but, if not paid, supply might be discontinued
11	Telephone	Provable	Extinguished	Provable but, if not paid, supply might be discontinued
12	Pay television	Provable	Extinguished	Provable but, if not paid, supply might be discontinued
13	School fees	Provable	Extinguished	Provable but, if not paid, the student(s) may not be permitted to remain at the school
14	Doctor's fees	Provable	Extinguished	Provable but, if not paid, the doctor may choose to no longer treat the debtor/bankrupt
15	Pharmacy accounts	Provable	Extinguished	Provable but, if not paid, the pharmacy may choose to no longer allow the debtor/bankrupt to operate an account
16	Unpaid residential rent	Provable	Extinguished	Even though the debt is provable, the landlord/agent may be able to evict the bankrupt for non-payment. This will depend on relevant State/Territory laws
17	Mechanics' fees	Provable	Extinguished	If the car is still in the possession of the mechanic, he/she can refuse to return it until the fees are paid

OTPS8 – Treatment of debts in bankruptcy

	Category or type of debt	Provable / non-provable	Extinguished / not extinguished	Further information
18	Motor vehicle accident damages	It depends whether the amount has been liquidated	It depends whether the amount has been liquidated	Some damages are covered by bankruptcy but others are not
19	Traffic fines	It can depend on where the fine was incurred, as different States and Territories have different legislation	It depends on where the fine was incurred	If traffic fines are not paid, the State/Territory government may refuse to register the bankrupt's vehicles and may suspend or refuse to renew the bankrupt's licence
20	Fines imposed by a court	Not provable	Not extinguished	
21	Trade debts, incurred in the individual's (not company's) name	Provable	Extinguished	
22	Company debts	It depends whether the debtor/bankrupt guaranteed the debt	It depends whether the debtor/bankrupt guaranteed the debt	
23	Director penalty notices	Provable	Extinguished	
24	Personal guarantees (e.g. a parent guaranteed their child's mortgage)	Provable	Extinguished	
25	HECS/HELP/SFSS debts	Not provable	Not extinguished	

OTPS8 – Treatment of debts in bankruptcy

	Category or type of debt	Provable / non-provable	Extinguished / not extinguished	Further information
26	Income tax debts	Provable	Extinguished	Some tax debts can be secured debts under tax legislation. A debt for a year (or part-year) prior to the bankruptcy is provable, even if a tax return has not been lodged. The bankrupt may need to lodge a split return for the financial year in which the bankruptcy occurred
27	Veterans' Affairs debts	Provable	Extinguished	
28	Debts to the Department of Human Services (Centrelink), including family assistance debts	It can depend on the type of debt and/or when a reconciliation is conducted	It can depend on the type of debt and/or when a reconciliation is conducted	
29	Child support	Provable	Not extinguished	
30	Child maintenance	Provable	Not extinguished	
31	Spousal maintenance	Provable	Not extinguished	
32	Unexpired leases	Provable	Extinguished	The creditor (landlord) has a duty to mitigate their loss
33	Business GST debts	Provable	Extinguished	
34	Accountants' fees	Provable	Extinguished	If work has been done but not given to the bankrupt (e.g. financial statements have been prepared but yet not given to the bankrupt), the accountant can retain the work done until the fees are paid

OTPS8 – Treatment of debts in bankruptcy

	Category or type of debt	Provable / non-provable	Extinguished / not extinguished	Further information
35	Lawyers' fees	Provable	Extinguished	If work has been done but not given to the bankrupt (e.g. a contract has been prepared but not handed over), the lawyer can retain the work done until the fees are paid
36	Loans from family and/or friends	It depends on the terms of the agreement or arrangement	Extinguished	The trustee will need to investigate these debts in detail. If valid security was offered, the creditor may be able to take possession of and sell the security if the debt is not repaid
37	Debts incurred overseas	Some are provable	Most are not extinguished. This will depend on the legislation in the country where the debt was incurred	
38	Proceeds of crime legislation penalties	Not provable	Not extinguished	
39	Statute-barred debts	Not provable	The debts cannot be pursued for reasons other than the bankruptcy	
40	Restitution (court-ordered)	Provable	Extinguished	Although the debt is provable, if the bankrupt does not pay he or she may be imprisoned
41	Child care (e.g. debts to a child care centre)	Provable	Extinguished	Provable but, if not paid, service may be discontinued