



Bankruptcy Prosecutions

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Table of Contents

Introduction	2
Agency responsible for administering the <i>Bankruptcy Act 1966</i> (Cth).....	2
Application of <i>Criminal Code</i> (Cth).....	2
Bankruptcy Scheme	2
Charging practice in relation to bankruptcy offences	2
Informants.....	2
Choice of charge – failure to file Statement of Affairs.....	2
Charge dates for failure to comply offences.....	3
Public Interest Factors.....	4
Drafting section 265(7) charges	4
Service of initiating proceeding on defendant	4
Arrest Warrants	4
Proceeding ex-parte.....	5
Sentence options	5
Recognisance.....	5

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Introduction

1. This Practice Group Instruction (PGI) sets out guiding principles for the prosecution of bankruptcy matters.
2. Reference should also be made to [IASA PGI No. 4](#), which deals with the CDPP's agreement with the Australian Financial Security Authority (AFSA), with respect to the receipt of short form briefs.

Agency responsible for administering the *Bankruptcy Act 1966* (Cth)

3. The Australian Financial Security Authority (AFSA), which forms part of the Attorney-General's portfolio, has primary responsibility for administering the *Bankruptcy Act 1966* (Cth) ('the Act'). As part of this obligation, AFSA investigates breaches of the Act using either members of their own investigation team, or by referring the case to the Australian Federal Police (AFP).

Application of *Criminal Code* (Cth)

4. The *Criminal Code* (Cth) was applied to offences in the *Bankruptcy Act 1966* (Cth) on 24 May 2001.¹

Bankruptcy Scheme

5. The [AFSA Bankruptcy Process Map](#) provides an overview of the bankruptcy scheme.
6. The Act contains numerous offence provisions in respect of acts or omissions at different stages of a bankruptcy administration under the Act. The more commonly prosecuted offences under the Act are:
 - failing to make out and file a statement of affairs (section 54(1));
 - disposing of property (section 266);
 - failing to disclose property (section 265); and
 - obtaining credit without disclosing bankruptcy (section 269).

Charging practice in relation to bankruptcy offences

Informants

7. Officers of AFSA act as informants in criminal proceedings against bankrupts or debtors in connection with estates administered by AFSA or by Registered Trustees where AFSA has investigated the matter. The AFP act as the informant in respect of matters investigated by them.
8. Registered Trustees who administer an estate should not be the informant against the bankrupt or debtor. Where a Registered Trustee considers that an offence under the Act may have been committed, he or she should refer the matter to AFSA which may refer the matter to the CDPP.

Choice of charge – failure to file Statement of Affairs

9. Where a defendant has failed to file a Statement of Affairs, the brief of evidence may disclose an offence against both section 54 and section 267B of the Act (Cth). Whilst the

¹ See *Bankruptcy Act 1966* section 7A

Issued: 6 March 2015

criminal conduct in both cases is the same, an offence under section 267B carries a term of imprisonment whilst section 54 is a fine only offence.

10. Ordinarily, the CDPP will adopt a tiered approach and prosecute a first offender for the section 54 offence. Where there has been a previous section 54 conviction, the section 267B offence will be used. If there are circumstances that warrant a change in this approach, this should be discussed with the relevant Work Group Coordinator. Relevant circumstances may include the adequacy of available penalties and the desirability of a speedy resolution to such matters.

Charge dates for failure to comply offences

11. In bankruptcy, several failure to comply offences may be considered 'continuing offences' within the meaning of section 4K of the *Crimes Act 1914* (Cth).² In these matters, the offence is complete each day that the defendant continues to fail to comply and can therefore be charged on any of those days, or between dates.

12. The CDPP has adopted a uniform approach to charge dates in continuing bankruptcy offences using the following principles:

- **Single date** - charges should be drafted with a single date, and not with between dates. This single date does not preclude the Case Officer from preparing facts that include the number of times the defendant has been contacted or the opportunities they have had for compliance. A single date also provides clarity to the court about the appropriate penalty in circumstances where different penalties and penalty units would have applied to a between dates charge.
- **Clearest evidence** - the date that is best supported by the available evidence should be selected in order to minimise any confusion to the defendant, the Court or the appearing officer. In determining the single date in Statement of Affairs matters, use the *National Personal Insolvency Index* (NPI) extract or request AFSA to provide an updated extract if the one on file is getting old.
- **Most recent** - preference should be given to the most recent date where the offence can be proven (at the time of laying the charges), subject to the available evidence, and consideration of any limitation periods.

Example:

D is informed on 1 January that they must provide information by 15 January. On 16 January the offence is complete.

In March the case officer assessed the brief and inquires whether the information is still outstanding. The informant provides evidence that as at 10 March the information is still outstanding. Charges are issued a week later on 17 March.

The charge date will be 10 March - being the most recent date that is supported by the evidence at the time the charge is laid.

13. Some bankruptcy offences that are not continuing offences will continue to be charged with between dates.³

² Refer to the *National Offence Guides* for further advice as to whether the offence is a 'continuing offence'.

³ Examples where the CDPP will continue to charge between dates includes section 270(1)(a) and section 139U of the *Bankruptcy Act 1966* (Cth).

Issued: 6 March 2015

Public Interest Factors

14. Where a bankrupt files his or her Statement of Affairs after a brief has been forwarded to the CDPP for assessment but before a charge is laid and served upon the defendant, or even after the charge has been laid and served but before it comes before the court, the CDPP will, pursuant to the *Prosecution Policy of the Commonwealth*, consider whether the public interest requires the prosecution to continue. The general approach is that:

- if the Statement of Affairs has been filed prior to service of the charge upon the defendant, the matter will not proceed, however the CDPP will liaise with AFSA on a case by case basis as to any public interest factors that might warrant the matter proceeding notwithstanding that the Statement of Affairs has been filed;
- if the Statement of Affairs has been filed post service of the charge, the matter will proceed, however the CDPP will liaise with AFSA on a case by case basis as to any public interest factors that might warrant the matter not proceeding.

15. If a bankrupt claims to have provided to his or her Trustee the information required in the Statement of Affairs, but has not filed a Statement of Affairs as required by section 54(1), the bankrupt will not have complied with section 54(1) and therefore the offence continues.

Drafting section 265(7) charges

16. In relation to offences under section 265(7) of the Act that arise from the bankrupt having done, prior to the filing of a petition, one of the 'things' that are specified in sections 265(4)(a)-265(4)(f), section 265(5)(a) or section 265(5)(b), the CDPP's view is that:

- it is preferable to identify in the charge the legislative basis of the prohibition against doing the particular 'thing' specified in the charge;
- the phrase 's265(7), read with s265(4)(a)' is the most appropriate means of identifying the legislative basis of the relevant prohibition.

Service of initiating proceeding on defendant

17. In all states and territories, the CDPP will arrange for a process server to effect service of the initiating process on the defendant.

18. In accordance with the arrangement between the CDPP and the process server, several attempts will be made to serve the defendant. If those attempts are unsuccessful, the CDPP will request that AFSA obtain an updated address for service.

19. If AFSA are unable to find another address and cannot provide assistance as to the defendant's location, the CDPP will consider the most appropriate course, depending on the jurisdiction. Some of the options may include: proceeding ex-parte, applying for a warrant or sending the brief back to AFSA.

Arrest Warrants

20. The CDPP has determined that in bankruptcy matters, arrest warrants should be sought where the circumstances of the case or the defendant's antecedents mean that a term of imprisonment is an appropriate sentence. In determining whether a term of imprisonment is the appropriate penalty, the case officers should consult with their Work Group Coordinator.

21. In all other cases, the Prosecutor should seek to proceed ex-parte. This can occur at the first mention, provided that the relevant jurisdictional requirements have been met.

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Proceeding ex-parte

22. The specific procedural requirements applying to proceeding ex-parte vary between jurisdictions.⁴ Where a matter is to proceed ex-parte in Victoria, the Australian Capital Territory or Tasmania:
- for complexity 1 matters – the originating officer should contact the appearing officer to discuss the matter at least 7 days prior to the hearing. It is expected that the appearing officer should appear on this application.
 - for complexity 2 and 3 matters – due to the potential complex nature of these proceedings, the expectation is that a decision will be made as to which office appears. To facilitate this, the originating officer should consult with the Work Group Coordinator as to whether they should conduct the hearing.

Sentence options

Recognisance

23. Where a person is convicted of a failure to comply offence, and has not complied by the time they are sentenced, and a recognisance is imposed, the CDPP will not seek a condition that the person comply.
24. If the person continues to fail to comply after conviction, they may be prosecuted for the same conduct, rather than for a breach of recognisance. This further prosecution will take place in accordance with paragraph 10 of this PGI. This approach will ensure that ongoing non-compliance will be made apparent in the offender's criminal history and in sentencing submissions made by the CDPP.



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⁴ See further the [Federal Prosecutions Manual](#).