



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
Mode of Trial.....	2
Charging practice in relation to bankruptcy offences	3
Informants.....	3
Choice of charge – failure to file Statement of Affairs.....	3
Charge dates for failure to comply offences.....	3
Public Interest Factors.....	4
Warning letters.....	4
Drafting section 265(7) charges	4
Short Form Briefs	5
Content of Brief.....	5
Circumstances where short form briefs are not appropriate	5
Bank Records	5
Service of initiating proceeding on defendant	5
Arrest Warrants	6
Proceeding ex-parte.....	6
Trustee Witnesses.....	6
Sentence options	6
Recognisance.....	6
Reparation Orders.....	7

Date of issue: 6 March 2015

Introduction

1. This Practice Group Instruction (PGI) sets out guiding principles for the prosecution of bankruptcy matters.

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

2. 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)

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

Bankruptcy Scheme

4. The [AFSA Bankruptcy Process Map](#) provides an overview of the bankruptcy scheme.
5. 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 263);
 - failing to disclose property (section 265); and
 - obtaining credit without disclosing bankruptcy (section 269).

Mode of Trial

6. For offences in relation to sections 266(1) and (3) of the *Bankruptcy Act 1966*, in accordance with the *Prosecution Policy of the Commonwealth*, more serious offending should proceed on indictment.
7. The decision as to whether a matter proceeds on indictment or is dealt with summarily should be made in accordance with paragraphs 6.11, 6.12 and 6.13 of the *Prosecution Policy of the Commonwealth*.
8. In addition to the mode of trial factors in the *Prosecution Policy*, specific indicia relevant to these offences include:
 - a. where the actual or potential loss to creditors is significant (e.g. \$100,000+);
 - b. the amount disposed of compared to the amount owed to creditors indicates the bankrupt was capable of paying their debts but has deliberately misused the bankruptcy system in order to avoid payment;
 - c. the impact and the consequences of the conduct and in particular the harm suffered by creditors and the wider impact on the personal insolvency system;
 - d. the planning, sophistication and the nature of the deceit involved;
 - e. the duration of the alleged offending; and
 - f. whether the defendant has previous convictions, particularly for similar offences.
9. None of these factors is necessarily determinative or more important than another in the overall mode of trial determination nor does it exclude the decision being made based on other factors.

¹ See *Bankruptcy Act 1966* section 7A

Date of issue: 6 March 2015

Charging practice in relation to bankruptcy offences

Informants

10. 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.
11. 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

12. 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. Whilst the 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.
13. 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 Prosecution Team Leader. 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

14. 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.
15. 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.

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

Date of issue: 6 March 2015

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.

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

Public Interest Factors

17. 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.

18. 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.

Warning letters

19. CDPP policy is that a warning letter may be sent where there are reasonable prospects of conviction but a prosecution is not in the public interest. Each matter should be individually considered on its merits, to determine if a warning letter should be sent.
20. In circumstances where the CDPP has assessed a Statement of Affairs (SOA) matter, and the defendant has filed a SOA in circumstances referred to above at paragraph 13 and it has been determined that the public interest does not require the prosecution to continue, the CDPP will consider the availability and suitability of issuing a warning letter, by reference to CDPP guidance.
21. In SOA matters where the CDPP has determined it may be appropriate to send a warning letter, the CDPP will liaise with AFSA regarding the suitability of doing so in relation to that specific matter.

Drafting section 265(7) charges

22. 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;

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).

Date of issue: 6 March 2015

- the phrase 's265(7), read with s265(4)(a)' is the most appropriate means of identifying the legislative basis of the relevant prohibition.

Short Form Briefs

- 23.** The CDPP has reached an agreement with the Australian Financial Security Authority (AFSA) to accept short form briefs with respect to matters arising under section 54(1) of the *Bankruptcy Act 1966*. This procedure has been agreed on the proviso that a full brief of evidence in admissible form is provided to the CDPP within two weeks if a plea of not guilty is entered, or if a brief is ordered by the Court.
- 24.** In some circumstances, short form briefs may also be accepted for straightforward matters pursuant to section 139U, section 267B, section 265(1)(c), section 265(1)(ca) and section 265(1)(e) of the *Bankruptcy Act 1966*, especially where those matters are substantially document-based. Short form briefs for these matters will only be accepted on the basis that a full disclosure brief (including witness statements from all necessary witnesses) will be provided for any defended matters within the required time frame for submission of the brief to the defence (in accordance with the relevant local criminal procedure legislation).

Content of Brief

- 25.** A short-form brief should consist of:
- Summary of Facts
 - Signed statement/affidavit from the informant
 - Relevant documents
 - Summary of evidence or draft statement for other witnesses

The CDPP also requires a completed disclosure certificate to be included in all short form briefs.

Circumstances where short form briefs are not appropriate

- 26.** The CDPP's view is that a short form brief will not be appropriate for offences against section 265A of the *Bankruptcy Act 1966* that are based upon a failure to comply with a section 77A notice. This is because the validity of the section 77A notice will depend upon the fact that the trustee was conducting an investigation and that the trustee's opinion that it was appropriate to issue the notice, both of which issues will have to be addressed by the trustee in a witness statement.

Bank Records

- 27.** The CDPP has agreed to accept briefs containing bank records obtained by AFSA pursuant to a notice without a statement/affidavit provided by a bank employee. A copy of the relevant notice should be included in the brief to enable the CDPP to ascertain how the bank records were obtained.
- 28.** If a matter is contested however, the CDPP will require AFSA to obtain a statement / affidavit. AFSA have agreed to treat this request as a priority. Any cost orders arising from a failure to obtain this evidence in the timeframes required will be met by AFSA.

Service of initiating proceeding on defendant

- 29.** In all states and territories, the CDPP will arrange for a process server to effect service of the initiating process on the defendant.
- 30.** 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.

Date of issue: 6 March 2015

31. 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

32. 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 Prosecution Team Leader.

33. 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.

Proceeding ex-parte

34. 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 Prosecution Team Leader as to whether they should conduct the hearing.

Trustee Witnesses

35. Trustee witnesses will be entitled to witness expenses in accordance with the Witness Expenses National Legal Direction (NLD) on the basis that they are not considered expert witnesses.

36. In particular, the NLD provides that the maximum amount payable in relation to payment for loss of income is based on the seasonally adjusted average weekly full-time adult ordinary time earnings, published by the Australian Bureau of Statistics. All claims must be fully substantiated.

37. Where a Trustee is called as a witness the CDPP case officer will seek, wherever possible, to minimise the inconvenience caused to the Trustee, including considering the possibility of the witness giving evidence via AVL or being called first.

Sentence options

Recognisance

38. 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.

39. 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 9 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.

⁴ See further the *Federal Prosecutions Manual*.

Date of issue: 6 March 2015

Reparation Orders

40. The CDPP's view is that the making of a reparation order pursuant to section 21B of the *Crimes Act 1914* is open in certain bankruptcy matters and can be made at the discretion of the Court to the benefit of the registered trustee, where the circumstances enliven the power in section 21B, and in particular section 21B(1)(d).
41. Any reparation order in a bankruptcy matter would need to be made in favour of a registered trustee pursuant to section 21B(1)(d), where it can be established that a loss was suffered or expense incurred by the trustee 'by reason of the offence'. This will usually arise where the criminal conduct involves the concealment or dissipation/disposal of assets from the trustee or estate, and therefore the trustee has suffered a loss by reason of the value of the asset not being able to be realised for the benefit of creditors.
42. Note that where a reparation order is to be sought in favour of a victim, Branch Head approval is required in line with the DMM. This would apply to any reparation orders proposed to be sought in favour of the trustee.
43. The utility of seeking such an order needs to be considered on a case by case basis in consultation with the Prosecution Team Leader and Branch Head, having regard to matters including the personal circumstances of the defendant and the availability and efficacy of other options potentially open to the trustee under the *Bankruptcy Act 1966* (e.g. 'claw back' powers in sections 120, 121 and 121A).



James Carter
Deputy Director
International Assistance and Specialist Agencies
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