



Distribution of bankrupt estates between the Official Trustee and registered trustees



Purpose

This paper proposes changes to the existing arrangements under which the Official Trustee (OT) distributes some of its work to private sector registered trustees (RTs).

Background

The role of the OT within AFSA is an important regulatory tool that helps ensure insolvency administrations have appropriate scrutiny where RTs have not been appointed. However, the OT does not have unlimited resources and AFSA needs to ensure that the OT's work is primarily geared towards delivering system wide benefits as opposed to benefits that only accrue to creditors in particular bankrupt estates.

The proposed changes relate to two key elements of the arrangements for the distribution of work between the OT and RTs:

- The principles for determining the type of work which should generally be undertaken by the OT and RTs, and
- Streamlining the method for distributing work to RTs.

As AFSA considers the appropriate work profile for the OT, we need to be guided by overarching principles that can be applied to determine whether a particular bankruptcy administration, or particular types of bankruptcy administrations, should be administered by the OT or by RTs.

These principles can then be used to divert new work that comes to the OT in its legislative capacity as the default bankruptcy trustee or decide whether proposed transfers of work in progress from RTs should be taken on by the OT.

Below are the two proposed principles that will govern both transactional level and practice level decision making as to which matters the OT should administer:

Principle 1

The OT will generally not administer matters where it is apparent at the onset that a registered trustee may consent to act in the matter/administration.

Principle 2

The OT will investigate and administer matters where there is a public interest in doing so and to maintain stakeholder confidence in the insolvency system although the administration may not result in a financial return to creditors.

In practice, the application of the above principles will be achieved through the application of standardised, objective criteria applied at the start of the bankruptcy and based solely on what is disclosed in the bankrupt's statement of affairs.

Criteria for transfers to RTs

AFSA proposed that the OT will select estates for transfer to RTs based on the following criteria:

Asset	Criteria
Contributions	Contribution is >\$5,000 per annum
Preference Payments	Date paid = < 6 months before DOB & = > \$25,000
Cash on hand and at bank	Combined value = >\$15,000
Shares	Market Value (inc. combined) >\$15,000
Vehicles	Equity = >\$20,000
Other assets	Equity = >\$30,000
Deceased Estates	Estimated value of benefit = >\$20,000
Real Estate	Equity = >\$40,000
Financial Assets	Market Value (combined value) >\$20,000
Money owed to the bankrupt (book debts)	Amount owed = >\$25,000
Interest in assets owned by others	Yes & What is it worth = >\$40,000
Sold or transferred assets	Date transferred = < 5 years & = >\$40,000
Lump sums paid to super	Lump sum to super in the last 5 years = >\$25,000
Trusts	Assets or distribution =>\$25,000

Investigations by the OT

The OT will continue to investigate estates which do not meet the criteria listed above and which may not result in a return to creditors where there is a public interest in doing so. The considerations in assessing which bankruptcies ought to be investigated by the OT may include:

1. Significant unexplained deficiencies in an estate
2. Previous known misbehaviour of the debtor
3. Complaint or tip off regarding a bankrupt
4. Identified inconsistency between disclosures made by a debtor and the profile of the debtor (eg disclosed income/assets v occupation groupings)
5. Disclosed source of information/advice on the bankruptcy application is from known untrustworthy operators in the industry
6. Factual scenario provides opportunity to test a point of law that requires clarification.

RT transfers to the OT

There are occasions when it might be appropriate or desirable for an RT to transfer an estate to the OT. These requests will be dealt with on a case by case basis and decisions based on the two overarching principles outline earlier in this paper.

Some of the considerations in assessing which RT bankruptcies should be accepted by the OT for further work would need to be done on a case by case basis, however the general criteria may include:

1. Matters with significant public interest which an incumbent RT is unable to progress due to capacity/capability constraints (financial, physical or scale)
2. Matters where the incumbent RT is exiting the industry and the RT cannot find a replacement RT

Process for transferring estates to RTs

AFSA's intention is to transfer estates to RTs as quickly as possible after a bankruptcy application is accepted. We will continue to operate a national panel of trustees which will be very similar to what already exists. RTs will be invited to join the panel and, as is currently the case, advise whether they wish to accept estates only where the bankrupt is in their local geographical area. Given the change in approach, the existing panel will be discontinued, and all RTs will be invited to join the new panel. It is proposed to maintain the existing limits on RT remuneration in relation to estates transferred from the OT (that is, the remuneration cannot exceed the median industry rates which are reviewed annually).

The transfer process will continue to be based on section 181A of the *Bankruptcy Act 1966*. Estates which meet the criteria outlined above will be identified as early as possible after the bankruptcy application is accepted. That selection process will be based solely on what is disclosed in the bankrupt's statement of affairs without any further investigation by the OT. As is currently the case, each estate selected will be offered to the next RT on the panel. The RT will be asked to confirm their capacity to take on the matter and confirm there are no conflicts of interest. If the RT is unable to take on the matter because of capacity or conflict issues, they will retain their place in the queue and be offered the next available estate. The bankrupt estate will also be notified of the proposed transfer.

Gender diversity

AFSA is committed to taking steps towards enhancing gender diversity in the insolvency profession. On that basis, we are proposing to direct a greater share of estates to female trustees under these new arrangements. Our initial target will be to transfer 20% of estates selected to female trustees. This will be reviewed regularly, and our aim is to increase that rate over time.

Measuring effectiveness

The effectiveness of these revised arrangements will be measured against the outcomes achieved in estates which have been transferred (such as realisations, dividends and remuneration). The data required to make this assessment will ultimately be derived from Annual Administration Returns. Noting that this data will not be fully available until well over a year after the new process is implemented, we will be having regular dialogue with industry bodies to obtain more timely feedback on how the system is operating.