Chapter 8: What Happens Now? Part 2

Updated: 15 April 2025

Content

Summary

- Life as a bankrupt comes with obligations and restrictions. Clients must now:
  - co-operate with the Trustee;
  - notify the Trustee of all material changes of circumstances (eg income increases or decreases, property acquired, money inherited or won etc);
  - inform the Trustee in writing of any change of name;
  - complete paperwork and possibly attend creditors' meetings (rare for financial counselling clients);
  - provide the Trustee with access to records and information;
  - possibly pay income contributions; and
  - disclose their bankruptcy if they borrow money, enter lease or hire purchase agreements, offer to supply goods and services, or pass cheques worth more than the threshold amount.

Part 2: The light at the end of the tunnel – getting out of bankruptcy

Calculating the 3 years

The period of a bankruptcy is 3 years and one day from the date the bankrupt's statement of affairs is accepted.

In most cases, the presentation and acceptance date are the same. In some instances, the acceptance date can be later then then the presentation or filing date. AFSA must now accept a bankruptcy or reject it within a prescribed period of no longer than 90 days.

Prior to 17 November 2023, AFSA had calculated the bankruptcy from acceptance, however, it ought to have been calculated from the filing date. A challenge to AFSA's

approach resulted in the legislative change. There may be some bankruptcies which were otherwise longer than they ought to have been.

Where a bankrupt has been disadvantaged by AFSA starting the 3 years and 1 day from acceptance rather than filing, AFSA will have a complaints process to determine what if any loss was suffered.

Examples, of potential loss, may be that a person had a delay of time between presentation and acceptance, meaning their start date was later than it ought to be and so their discharge was later. If they received an inheritance after the 3 years and 1 day anniversary of filing but before their discharge which resulted in the trustee being entitled to the proceeds where it ordinarily would not have been, they may have a claim in damages.

Can it go on longer than 3 years?

Yes, this period may be extended by an objection lodged by the Trustee (ss 149A and 149D).

Objections may potentially extend the bankruptcy to 5 or 8 years in duration.

The bankruptcy may be extended to 5 years from the date of filing the statement of affairs if a bankrupt:

- made a void transfer against the Trustee because of ss 120/122 of the *Bankruptcy Act* (undervalued transactions and preference payments)
- montinued to manage a corporation
- engaged in misleading conduct and the amount exceeds the prescribed threshold (**$7,173 as at August 2025**). Check updated indexed amounts on the AFSA website.
- fails to disclose to the Trustee, a liability that existed at the date of bankruptcy
- fails to notify a change of address or daytime telephone number
- fails to advise the Trustee of any material change to the information disclosed on their statement of affairs
- fails to attend a creditors' meeting without written approval from the Trustee
- fails to attend an interview or examination
- fails to disclose any beneficial interest in any property.

To **5 years** from the date of returning to Australia if a bankrupt:

- leaves Australia without the written permission of the trustee and has not returned.

To **8 years** from the date of filing a statement of affairs if a bankrupt:

- made a void transfer against the trustee because of ss 121,128B and 128C of the *Bankruptcy Act* (transfers to defeat creditors)
- fails to provide details of property and income when requested
- after the date of bankruptcy, the bankrupt deliberately provided false or misleading information to the Trustee

- fails to disclose details of income or expected income
- fails to pay contributions as assessed
- fails to adequately explain how money was spent, or assets were disposed of
- fails to disclose to the Trustee, a liability that existed at the date of bankruptcy
- fails or refuses to sign a document when required
- intentionally fails to disclose a beneficial interest in a property to the Trustee.

To **8 years** from the date of returning to Australia:

- fails to return to Australia when requested to do so by the trustee

The bankrupt will be notified of the objection. The bankrupt is encouraged to use the online review of objection form (but is not required to). The objection must be in writing and applied for no later than 60 days from when the bankrupt is notified of the trustee's objection. AFSA has a Practice Document on its website, outlining the Inspector-General in Bankruptcy expectations of trustees and approach to applications for review.

The Inspector-General can also review a Trustee's decision to lodge a Notice of Objection on the Inspector-General's own motion.

If the Inspector-General upholds the objection, the bankrupt can seek a review by the Administrative Appeals Tribunal within 28 days of receipt of the AFSA Practitioner Surveillance decision. Legal advice should be obtained before doing so.

Can I get out earlier than 3 years?

Once a person has been made bankrupt there are only four ways to get out:

1. Pay out the debts, interest and costs of administering the estate and have the bankruptcy annulled
2. Complete the bankruptcy term (complying with the rules, cooperating with the Trustee and paying any assessed income contributions) and get discharged
3. Challenge the bankruptcy in Court (either by way of review or appeal in the case of a sequestration order – or by application for annulment by the court – see **Chapter 10**)
4. Have your creditors pass a special resolution to accept your offer of Composition or Arrangement under s 73 of the Act, which will annul your bankruptcy.

Annulment as a result of payment of debts and costs

Section 153A of the *Bankruptcy Act* provides that if the Trustee is satisfied that all the bankrupt's debts have been paid in full, then the bankruptcy is annulled on the date on which the final payment was made. 'Paid in full' includes interest payable until the date of final payment. 'All the bankrupt's debts' means all debts that have been proved in the bankruptcy, including interest where applicable, plus the costs, charges and expenses of the administration of the bankruptcy, including the remuneration and expenses of the Trustee.

The costs, charges and expenses of the estate can add up to tens of thousands of dollars. A detailed section on what the Trustee can charge by way of remuneration, and applying for a review of those charges is found at the end of this Chapter.

Common scenarios where annulment is sought include:

- the bankrupt inherits property or money during the period of bankruptcy which is sufficient to pay the debts in full
- the bankrupt wins money or property during the period of the bankruptcy which is sufficient to pay the debts in full
- the bankrupt was made bankrupt by creditors in his or her absence and can afford to pay the debts and costs to date (note that if the sequestration order is relatively recent the bankrupt should get legal advice in relation to a potential set aside application also – see **Chapter 10** and below).

Annulment by the Court

If the court is satisfied that a sequestration order ought not to have been made or, in the case of a Debtor's Petition, that the petition ought not to have been presented or ought not to have been accepted by the Official Receiver, the court may make an order annulling the bankruptcy (s 153B).

Where the bankruptcy was initiated by a Debtor's Petition possible grounds might be that the debtor did not have the mental capacity to file a Debtor's Petition, or that the debtor did not in fact file the Debtor's Petition (fraud by another party).

The reasons for establishing that a sequestration order should not have been made are the same as for seeking to have the order set aside as covered in **Chapter 10** (solvency, for example). Usually, if the bankrupt has any hope at all in such proceedings the primary aim would be to have the sequestration order set aside, with annulment being sought in the alternative. In cases where a fair amount of time has passed since the sequestration order (months or even years) and the Trustee can demonstrate a considerable amount of work has already gone into administering the estate, then the Court will usually prefer to annul the bankruptcy rather than set aside the sequestration order – this will have the benefit to the Trustee of securing his or her fees and of validating anything properly done in the administration of the estate to date.

Where your client is in a position to annul the bankruptcy by payment of the debts and costs, they should obtain legal advice prior to applying to the court, particularly if the time for appeal or review of the sequestration order has already passed (see **Chapter 10**). If the case is not strong it may be cheaper to simply negotiate with the Trustee for an annulment under section 153A above.

> **Example**: Nguyen v Lion Finance Pty Ltd & Anor [2012] FMCA 880 (31August 2012)
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> Mr Nguyen sought to set aside a *sequestration order* some 4 months after it was made, or in the alternative, have the bankruptcy annulled under s 153B. His reasons for seeking these orders were in summary:
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> - he had not been served with the original *Statement of Claim* which led to the judgment debt on which the *Bankruptcy Notice* was based
> - he had been served with the *Creditor's Petition* (including a copy of the judgment) but thought it was a mistake because he had never heard of Lion Finance (his original debt being to GE)
> - he had a home and was solvent.
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> The Federal Magistrate refused to make either order on the basis that:
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> - the applicant had not adequately explained the several months delay after being informed of the *sequestration order*
> - the applicant did not dispute that he had been served with the *Creditor's Petition*
> - the applicant had not taken any steps upon finding out about the Local Court judgment to have it set aside and did not appear to dispute his indebtedness as claimed
> - the applicant had **not fully disclosed** his debts on his *statement of affairs*. His solicitor had found an additional overdue debt on his credit report and the Trustee had been contacted by yet another creditor who lodged a proof of debt but had not been included in the *statement of affairs*. As a result the Federal Magistrate did not think the court could make a finding of solvency with any confidence.
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> Mr Nguyen would still have been able to approach the Trustee to seek annulment under s 153A, but only once the Trustee was confident that all debts had been disclosed and that the property was sufficient to pay out the debts, interest, legal fees and costs of administration of the estate. Unfortunately, those costs would now be higher as a result of the proceedings.

Effect of annulment

Where a bankruptcy is annulled (s 154):

- all acts done (sales made, distributions of dividends, payments made etc) by the Trustee prior to the annulment remain valid
- the Trustee can retain the costs, charges and expenses of the administration of the bankruptcy, including the remuneration and expenses of the Trustee (if not already paid) from the vested property
- any remainder must be repaid to the former bankrupt (unless there is an application by a person claiming a better interest in the property or a claim is pending under a proceeds of crime law and an application is made by an appropriate authority under that law)
- any surplus divisible property remaining re-vests with the former bankrupt.

Where there is insufficient property in the estate to pay the Trustee's expenses etc (such as where the bankruptcy has been annulled by the court rather than by payment of debts, remuneration and costs), then the amount of the deficiency is a debt due by the former bankrupt to the Trustee and is only recoverable by the Trustee by court action against the former bankrupt.

> **Note:** Where there is clearly going to be sufficient funds to annul a bankruptcy (because of an inheritance perhaps) but the undischarged bankrupt urgently needs money (for example, for medical expenses or housing) they can apply to their Trustee to have a portion released. A financial counsellor can advocate to the Trustee in these circumstances to assist in establishing both the need for the money and that there is likely to be a surplus in the estate.

Compositions or arrangements

A bankrupt may not have sufficient funds to pay their debts in full, including interest and the costs of administering the estate, but still wish to propose an arrangement which will benefit creditors and bring the bankruptcy to an end. Section 73 provides for the bankrupt to make such a proposal in writing to the Trustee. The Trustee must then call a meeting of creditors and provide a report to the creditors indicating whether the proposal would benefit creditors generally. The Trustee does not have to call a meeting if the proposal does not make adequate provision for payment to the Trustee of accrued fees that are owing to the Trustee to date. The proposal can be amended by the bankrupt at the creditors' meeting provided the provision for the Trustee's fees is not amended.

The Trustee of the bankrupt estate is usually also appointed the trustee of the composition or arrangement. However, another trustee may be appointed if creditors so desire. Creditors can indicate their agreement or otherwise to the proposal to the Trustee prior to the meeting

in writing. In that case they are deemed to have been present and to have voted as indicated.

The composition or arrangement must be accepted by **special resolution** (at least 75% in value of the creditors present or deemed present who voted on the proposal and those creditors must represent at least 51% in number of the creditors who voted). If the special resolution is passed, then the bankruptcy is annulled on the date the resolution is passed (s 74).

The Trustee can later propose a variation to creditors with the consent of the bankrupt. In practical terms, it is usually the bankrupt who seeks the variation (for example, an extension of time in which to make the requisite payments) and the Trustee who conveys the variation proposal to the creditors for their consent.

A composition or arrangement can be set aside by the court for a variety of reasons (for example, omission of material particulars), and terminated by the Trustee or creditors for non-payment. The same rules apply as for setting aside Personal Insolvency Agreements.