



Australian Government

Insolvency and Trustee Service Australia

**INSPECTOR-GENERAL
PRACTICE DIRECTION No 11**

**Trustees
Guidelines in issuing an
Objection to Discharge where
Statement of Affairs not yet filed**

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Introduction

1. The purpose of this document is to outline the Inspector-General in Bankruptcy's expectations, when a Trustee considers lodging an objection to discharge from bankruptcy based solely on the grounds of where a bankrupt has failed to complete and lodge a Statement of Affairs. It is based on the view that, the *Bankruptcy Act 1966* ("the Act") provides no justification, or mandate, for a trustee to object to the discharge of a bankrupt before a statement of affairs has been filed. This direction includes practical examples and outlines alternate courses of action, which it is expected trustees will implement in furtherance of the objects of the Act.

Legislative Framework

2. The objection to discharge provisions¹ of the Bankruptcy Act 1966 ("the Act") allow bankruptcy trustees to lodge an objection to a bankrupt's automatic discharge to extend the standard three (3) year period of bankruptcy. The Act provides that, depending on the grounds of objection, the period of bankruptcy can be extended by two (2) years or, in more serious cases, by five (5) years. Of course, until a statement of affairs is filed a bankruptcy will continue indefinitely and logically there can be no 'extension'. Hence, the filing of a statement of affairs is a condition precedent to the operation and efficacy of the objection to discharge scheme.
3. The mere existence of an available ground for objection does not automatically give rise to an extension of a bankruptcy. Notice must be given, setting out the ground relied upon, the evidence which establishes the ground, and, subject to s.149C(1A) of the Act, the reasons given for objecting to the discharge on the specified ground.
4. It is a fundamental principle of bankruptcy law that bankrupts have a presumption of automatic discharge by operation of the law. When a Trustee exercises the discretion whether or not to object, "*this presumption in favour of the bankrupt is uppermost in the mind of the decision maker to be carefully weighed against any reasons for objecting to discharge*"²
5. Therefore, a Trustee (and, where relevant on a review, the Inspector-General) must give due consideration to the purpose, utility and relevance an objection has in the bankruptcy context.
6. The 2002 Amendments were introduced to strengthen the objection to discharge provisions of the Act, making it easier for Trustees to lodge objections to a person's discharge from bankruptcy and harder for bankrupts to sustain challenges to objections.

Explanatory Memorandum 2002 Amendments

7. The Explanatory Memorandum to the 2002 Amendments states³

¹ Sections 149B to 149Q of the Bankruptcy Act 1966

² As stated in Michael John Fuller and Hugh Jenner Wily AAT No 13144 [1998] AATA 577 (per Burns B.H., Dep. Pres.).

³ At paragraph 51.

Special grounds are directed to deliberate actions by the bankrupt to defeat creditors or hinder the trustee's administration (special emphasis added). The bankrupt's pre-objection conduct, rather than the Trustee's capacity to show that an objection will advance the conduct of an administration, will determine whether any notice of objection will have to state the reasons(s) why it has been lodged.

8. The phrases, "deliberate actions by the bankrupt" and "the bankrupts pre-objection conduct, rather than the Trustee's capacity to show that an objection will advance the conduct of an administration" emphasise that the conduct must be "deliberate" and that it is this conduct and not the Trustee's ability to show that an objection might rectify that conduct, which are critical elements of such objections being appropriate.
9. In the situation where a statement of affairs is not filed, the bankruptcy will continue indefinitely. The filing of a statement of affairs identifies an actual date on which a bankrupt will be discharged by operation of law. Therefore, until this occurs, the bankrupt will remain bankrupt and accordingly there is no purpose, utility or relevance in a Trustee filing a notice of objection until a potential date of discharge has been identified.
10. Instead, the Act provides for alternative actions to be taken by the Trustee in order to encourage a bankrupt to carry out this obligation, which are relevant to the trustee considering the filing of a notice of objection.

Inspector-General's Expectation

11. In short, the Inspector-General's view is that the Bankruptcy Act does not contemplate the filing of a notice of objection⁴ in a bankruptcy prior to the filing of a statement of affairs by the bankrupt.

Bankrupt's deliberate or intentional conduct not to file Statement of Affairs

12. Some Trustees have referred to the special ground in s.149D(1)(d) as the basis for lodging an objection to discharge where a bankrupt refuses or repeatedly fails to file a statement of affairs. In order for this to form the valid basis for lodging an objection, the Trustee must go to some length to establish that the conduct of the bankrupt is deliberate – rather than resulting from a lack of knowledge, or a lack of awareness of their bankrupt status, etc..., - refer *Broadley v Inspector-General in Bankruptcy [2007] FMCA 1714*. However, even where these conditions are satisfied, the scheme of the Act, as noted above in paragraph 2, does not require the use of an objection prior to the filing of a statement of affairs.
13. Following the introduction of the 2002 Amendments, it is now a bankrupt's pre-objection conduct that is determinative as to whether a Trustee should file a notice of objection. A Trustee would need to be satisfied by way of evidence in support of (but not the reasons behind) the degree of deliberate attempt by a bankrupt to defeat creditors or hinder the Trustee's administration by failing or refusing to file a statement of affairs.

⁴ Typically using the ground in section 149D(1)(d) of the Bankruptcy Act 1966

14. A bankrupt is obliged by statute to aid to the utmost of his or her power in the Trustee's administration of the bankrupt's estate⁵. This statutory obligation imposes an ongoing responsibility on bankrupts to cooperate with their Trustee – cooperation which is ultimately enforced by the law should allegations of non-compliance be made, criminal investigations conducted and prosecution actions be initiated resulting in Court-imposed sanctions being applied.
15. A bankrupt has an opportunity to convince the Inspector-General on review that, despite the apparent evidence to the contrary, there *was* a reasonable excuse for the failure constituting the special ground.⁶

Trustee's alternate courses of action

Section 54 Fraud Investigation referrals

16. The Act provides a mechanism by way of penalty to enforce compliance (see section 54 of the Act – penalty \$550.00⁷).
17. In practical terms, this is initiated by a Trustee pursuant to the duty in section 19(1)(i) of the Act.
18. The Inspector-General expects that trustees will refer all cases alleging the non-filing of a statement of affairs by a bankrupt to ITSA's Enforcement Unit – via: fraud.enquiries@itsa.gov.au pursuant to a trustee's duties as prescribed within section 19(1) of the Act.

Section 305 Applications for funding

19. Trustees who are unable to locate a bankrupt (in order to obtain a completed statement of affairs) may consider applying to the Commonwealth for funding. See paragraph 9 of [IGPS 5 Funding for Trustees under Section 305](#).

Section 77C or Section 81

20. Apart from prosecuting a bankrupt or applying for section 305 funding, a Trustee may utilise sections 77C or 81 of the Act to achieve the outcome of a completed statement of affairs.
21. The Inspector-General acknowledges that these two provisions create an extra cost and require the trustee to exercise their discretionary powers and experience in the most efficient and effective manner.

⁵ Section 77(1)(g) *Bankruptcy Act 1966*

⁶ Section 149N(1A)(c) *Bankruptcy Act 1966*

⁷ This penalty is currently the subject of a legislative review and is expected to increase significantly. Of itself, this ought to deter non-compliance.

Practical Examples

Inappropriate use of issuing an objection to discharge

22. A bankrupt cannot be located and may not be aware of his/her bankrupt status. In accordance with section 54 of the Act, the trustee issued a letter to the bankrupt's last known address requesting a completed statement of affairs within 14 days. On the 15th day after the date of the trustee's letter the trustee, having received no response, files an objection to discharge with the Official Receiver.
23. In this example the trustee has not considered alternate courses of action in order to obtain a completed statement of affairs such as those outlined in paragraphs 16 to 21 above.
24. The trustee has not acted in accordance with the Scheme and ascertained purpose of the Act as outlined above.

Bankrupt deliberately does not file statement of affairs

25. The bankrupt's location is known. The trustee has evidence that the letter requesting a statement of affairs has been received by the bankrupt, or the trustee (or relevant case officer) has had communication with the bankrupt, which confirms the bankrupt's knowledge of their bankrupt status. The bankrupt continually ignores the trustee's requests to file a statement of affairs. The trustee considers the bankrupt is deliberate in his action by ignoring the trustee's requests for a completed statement of affairs.
26. The trustee has considered alternate courses of action such as those outlined in paragraphs 16 to 21 above – and these have proven unsuccessful.
27. After having undertaken the above steps the trustee files and objection to discharge. The trustee has acted in accordance with the Scheme and ascertained purpose of the Act as outlined above.
28. This example also gives rise to the expectation that the trustee would additionally refer any such non-compliance to ITSA's Enforcement Unit, alleging a breach of section 54 of the Act.
29. Regulation would regard any non-referral of the alleged offence to ITSA's Enforcement Unit as a failure, on the part of the trustee, to comply with their duties pursuant to Section 19(1) of the Act and could regard this non-referral of an alleged offence as a category C error in any subsequent inspection.

Conclusion

30. This Practice Direction outlines the Inspector-General's position on the issue of filing an objection to discharge where no statement of affairs has been lodged. It is expected that trustees will follow this Practice Direction.

31. It is accepted that exceptional circumstances will exist from time to time. Where trustees are faced with a matter that they believe necessitates a deviation from the principles in this Practice Direction, Trustees are strongly encouraged to discuss the matter with their Regional Regulation Business Manager or Practice Manager. Each matter will be assessed on a case by case basis.