

# **Bankruptcy Amendment Regulations 2002 (No. 1) 2002 No. 255**

## **EXPLANATORY STATEMENT**

### **Statutory Rules 2002 No. 255**

Bankruptcy Amendment Regulations 2002 (No. 1)

Subsection 315(1) of the *Bankruptcy Act 1966* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subsection 315(2) describes particular matters in relation to which regulations may be made.

The principal purpose of the amendments is to clarify the distinction between fees received by the Official Trustee (OT) and expenses incurred in the discharge of the OT's responsibilities. The OT is the corporation sole that administers bankrupt estates and other administrations under the Act.

The amendments increase the base rate of fees payable to the OT by combining the existing base rate and the existing fee items in Schedule 10 of the Bankruptcy Regulations 1996. The OT will be entitled to be reimbursed for its expenses from the funds realised or out of an estate. In addition, under these amendments the OT will be entitled to charge fees on an interim basis. There are minor and machinery amendments including specifying when the OT's fees will be payable.

The Regulations also clarify existing requirements, including those related to:

- specifying the copy of creditor's petition which is to be provided to the Official Receiver;
- compliance with a trustee's request to provide information;
- registration of trustees;
- the definition of 'income' in s 139L of the Act including employer's superannuation contributions;
- the Official Receiver's role in searches of the National Personal Insolvency Index; and
- waiver or remission of fees by the Inspector-General in Bankruptcy.

The Office of Regulation Review advise that a Regulation Impact Statement is not mandatory.

Details of the Regulations are attached.

### **Regulation I-Name of Regulations**

1. This Regulation is a formal provision specifying the title of the *Bankruptcy Amendment Regulations 2002 (No. 1)* (the Amendment Regulations).

### **Regulation 2-Commencement**

2. This Regulation specifies that the Amendment Regulations will commence on gazettal.

### **Regulation 3-Amendment of *Bankruptcy Regulations 1996***

3. Schedule 1 of these Regulations amends the *Bankruptcy Regulations 1996* (the Bankruptcy Regulations).

### **Schedule 1-Amendments**

#### **Item 1-Subregulation 4.05 (1)**

4. Item 1 adds the words 'that is endorsed by the court' after the word 'the petition' in subregulation 4.05(1) to specify that it is the court-endorsed copy of the creditor's petition which is to be provided to the Official Receiver (OR).

5. Regulation 4.05 of the Bankruptcy Regulations provides that a copy of a creditor's petition is to be given to the OR by the petitioning creditor within 3 working days of the date on which it is presented to the court. The copy of the petition is relied on for some information which is entered by the OR on the National Personal Insolvency Index (NPII). If the copy given to the OR is not the court-endorsed copy, additional information needed for the NPII -such as the date the petition was presented - must be sought. For this reason, the OR needs a copy of the court-endorsed petition.

#### **Item 2-Subregulation 6.01(1)**

6. This item makes the language used in subregulation 6.01 (1) consistent with section 109 of the *Bankruptcy Act 1966* (the Bankruptcy Act). There is no change to existing law.

#### **Item 3-Part 6, Division 6, heading**

#### **Item 4-Regulation 6.12, heading**

#### **Item 5-Part 6, Division 6A, heading**

#### **Item 6-Regulation 6.12A, heading**

7. Items 3 to 6 do not make substantive changes to the law. The items address inconsistencies between the language used in the headings and the relevant regulations.

#### **Item 7-Regulation 6.12A**

8. This item makes the language used in regulation 6.12A consistent with the language used in other regulations in Part 6, Division 6 of the Bankruptcy Regulations that deal with the definition of income under section 139L of the Bankruptcy Act.

#### **Item 8-After regulation 6.12A**

9. This item inserts new regulation 6.12B which provides that certain contributions made by an employer for the purpose of providing superannuation benefits for a bankrupt employee will not fall within the definition of 'income' for the purposes of section 139L of the Bankruptcy Act.

10. Contributions made by, or on behalf of, each employer for the purpose of providing superannuation benefits for a bankrupt employee, is not income for the purposes of section 139L of the Bankruptcy Act where the bankrupt employee has no ability to control the amount of contributions made by her or his employer. Such situations arise where the levels of superannuation support an employer is expected to provide an employee are determined by an industrial award or determination, an industrial agreement or by law.

11. Section 5 of the *Superannuation Guarantee Charge Act 1992* imposes a charge on an employer where the employer provides superannuation support below a minimum level. Paragraph (a) of new subregulation 6.12B(1) provides that contributions and payments made by, or on behalf of, each employer of a bankrupt employee, to the extent that the contributions reduce the employer's potential liability for the superannuation guarantee charge, are not income of a bankrupt person.

12. Paragraph (b) of new subregulation 6.12B(1) provides that contributions made in accordance with the employer's obligation to make contributions under an industrial award, determination or agreement that exceed the level required to reduce the employer's potential liability for the superannuation guarantee charge, are not income of the bankrupt person.

13. For example, an employer is paying superannuation contributions for an employee of say, 15% of the employee's ordinary time earning, as required under an industrial award made under a law of the Commonwealth, but the required percentage level of employer support is only 9% of the employee's ordinary time earnings. Under paragraph (b) of new regulation 6.12B(1), the total amount of 15% of employer contributions will not be considered income of the bankrupt. This is because:

(a) under paragraph 6.12B(1)(a), the employer's contributions to meet the required 9% are made to reduce the employer's potential liability for the superannuation guarantee charge; and

(b) under paragraph 6.12B(1)(b), the additional 6% exceeds the level required.

14. Where an employer does not provide the minimum level of superannuation support, a charge will be imposed on the employer. That charge will be equal to the superannuation guarantee shortfall. The Commissioner of Taxation is required to make payments of shortfall components to, or for the benefit of, the person under sections 65 to 67 of the *Superannuation Guarantee (Administration) Act 1992*. Paragraph (c) of new subregulation 6.12B(1) provides that such payments are not income of the bankrupt person. The term 'shortfall component' is defined in new subregulation (3) to have the same meaning as it has in Part 8 of the *Superannuation Guarantee (Administration) Act*.

15. New subregulation 6.12B(2) provides that if the employer's obligation to make contributions arises under an industrial agreement made solely between the employer and the person, and the contributions are not contributions of the kind mentioned in subparagraph (1) (b) (iii), then contributions for a particular financial year that exceed 9% of the employee's ordinary time earnings are taken to be income of the bankrupt. The terms 'industrial agreement made solely between the employer and the person' and 'ordinary time earnings' are defined in new subregulation (3).

16. New subregulation 6.12B(2) reflects the Government's policy on the minimum level of superannuation support an employer is expected to provide an employee and which will not be considered 'income' in the event of bankruptcy of an employee.

### **Item 9-After regulation 7.01**

17. This item inserts new regulation 7.01A.

18. Paragraph 149D(1)(d) of the Bankruptcy Act provides that a trustee may object to a bankrupt's discharge if the bankrupt has failed to comply with a written request for information about his or her property, income or expected income. In *Wharton v Official Receiver in Bankruptcy (2001)* FCA 96 the Federal Court held that a request by the OT to a bankrupt to provide information about his income or expected income, within the meaning of s 149D(1)(d), had been satisfied even though the bankrupt provided information that was both incomplete and inaccurate.

19. New regulation 7.01 A overcomes the decision in *Wharton*. It provides that, for the purposes of paragraph 149D(1)(d), a bankrupt is taken to have failed to comply with a request to provide information if the information provided is incomplete or inaccurate.

#### **Item 10-Part 8, Division 1, heading, note**

20. The Amendment Regulations omit Part 15 of the Bankruptcy Regulations and incorporate it into Part 8 (see items 11, 15 and 18). This note is no longer required.

#### **Item 11-Part 8, Division 2**

21. This item substitutes Part 8, Division 2, dealing with the change or removal of conditions on practising as a registered trustee, with a new Part 8 Division 2. The new Part 8, Division 2 reproduces the regulations in Part 15 of the Bankruptcy Regulations (omitted by Item 18), dealing with the registration of registered trustees. Part 8 deals with registered trustees more generally. This amendment will allow greater ease of reference to provisions dealing with registered trustees. This item does not effect any substantive changes to the current law.

22. Existing regulation 8.05, and those parts of existing Part 15 dealing with variation and termination of registration of trustees, are reproduced in new Part 8, Division 6 (see Item 15).

#### **Item 12-Subregulation 8.09 (1)**

23. A person who considers the quantum of fees taken by a trustee to be excessive must apply to have the account taxed within 14 days. This item increases that time frame for taxation to 28 days.

#### **Item 13-After regulation 8.11**

24. This item inserts new regulation 8.11 A to provide that, if a request for taxation under regulation 8.09 results in a reduction of at least 15% in the trustee's fees, the trustee must meet the costs of the taxation. In every other case, the person requesting the taxation must meet the relevant costs. This is consistent with Order 62, rule 46(4A) of the Federal Court Rules in relation to the taxation of legal practitioners' bills of costs.

#### **Item 14-Regulation 8.12**

25. Regulation 8.12 will become redundant because Schedule 10 is omitted by item 40. The reason for its omission is explained at Items 22, 24 and 40.

#### **Item 15-Part 8, Division 6**

26. New Part 8, Division 6 substitutes regulation 8.15 with provisions dealing with the variation and termination of the registration of registered trustees (see Item 11).

27. Existing regulation 8.15 is a transitional provision dealing with applications under subsection 162(5) of the Bankruptcy Act. As it relates to transitional arrangements that applied in 1996, the regulation is no longer required.

#### **Item 16-Subregulation 10.18 (2)**

28. The Official Trustee (OT) can accept appointment as a controlling trustee (CT) for the purposes of an arrangement with creditors without sequestration (eg arrangements under Part X of the Bankruptcy Act). Regulation 10.18 requires CTs to provide certain information to the OR in order to ensure that the NPII is accurately maintained. However, subregulation 10.18(2)

provides that the OT, when acting as a CT, need not comply with this requirement. To facilitate the integrity of the NPPI, item 16 omits subregulation 10.18(2), thereby requiring the OT to provide information to the OR.

### **Item 17-Regulation 13.06**

29. This item substitutes regulation 13.06 with new regulation 13.06.

30. Regulation 13.06 provided that, upon payment of a fee, an applicant may inspect the NPPI and obtain an extract of information entered on the NPPI or apply to the OR to conduct a search of the NPPI. New regulation 13.06 reproduces the existing regulation 13.06 with some minor amendments:

- The reference to 'fee' is substituted with 'data fee' to clarify the nature of the fees payable for inspection of the NPPI.
- The OR may, as an alternative to conducting a search of the NPPI, give the applicant a list of 'Index search agents' who may be able to carry out the search for the applicant. An 'Index search agent' is a person or organisation with whom the Commonwealth (through ITSA) has contracted to provide searches to the public.

### **Item 18-Part 15**

31. This item omits Part 15. Part 15 is reproduced in new Part 8, Division 2 and Division 6 (see Items 11 and 15).

### **Item 19-Part 16, Division 2, Subdivision A, heading Item 20-Regulation 16.05 Item 21After regulation 1.6.06**

32. Items 19 to 21 reorganise Part 16 of the Regulations into appropriate subdivisions to clarify the distinction between fees payable to the OR and fees payable to the OT. They do not make substantive changes to existing law.

33. Items 19 and 21 substitute new headings to clarify the purpose of the respective Subdivisions.

34. Item 20 renumbers regulation 16.05 (which deals with documents filed by the Inspector-General or an OR) as regulation 16.03A and relocates it to Division 1 of Part 16 which deals with provisions concerning documents (including inventories) more generally.

### **Item 22-Regulation 16.07**

35. This item substitutes regulation 16.07 with new regulations 16.07 and 16.07A to 16.07E. The purpose of the amendments is to clarify the distinction between fees payable to the OT and expenses for which the OT is reimbursed from an estate.

36. New regulation 16.07A prescribes the OT's fees for acting as trustee, or for work performed, under the Bankruptcy Act. New subregulations 16.07A(1), (4), (6) and (7) do not effect substantive changes to the existing law. While new subregulation (5) uses new terminology, it makes no substantive changes to the existing law.

37. Under section 163 of the Bankruptcy Act, the OT is to be remunerated as prescribed by the Bankruptcy Regulations. Remuneration received by the OT is to be paid into Consolidated Revenue. Expenses incurred by the OT are met by ITSA from its budget and are entitled to be recovered through reimbursement of the OT.

38. The former scheme for the OT's remuneration included a schedule (Schedule 10) which is a mix of fees and expenses. Without a clear distinction between the items, some amounts incurred as expenses were being included as fees, which could not be recovered by ITSA.

39. New subregulation 16.07A (2)(a) increases the base rate of fees payable to the OT by \$500 to \$4,500 by including the existing fee items in Schedule 10 and a GST component in the base rate. The increase in percentage rates in paragraphs (b) and (c) of new subregulation 16.07A (2) correspondingly reflect the small increase in fees and the GST.

40. Rather than prescribing those expense items for which the OT is entitled to be reimbursed in Schedule 10, the amendments provide that the OT is entitled to be reimbursed for expenses incurred in performing its duties out of amounts realised in the administration of an estate or out of an estate.

41. It is not intended that paragraph (a) of new subregulation 16.07A (2) will entitle the OT to a minimum fee of \$4, 500. New subregulation 16.07A(2)(a) provides that, if the amount realised in an estate is less than \$4, 500, the OT's fee will be the amount realised. The fee payable to the OT where there has been nothing realised, or brought to credit, in an estate or administration, is calculated according to an hourly rate (see new subregulation 16.07C(2)(d)).

42. New subregulation 16.07A (3) provides that, subject to subregulation 16.07E (1), if a bankruptcy is annulled under section 153A or 153B of the Act, the fee payable to the OT for work performed is either \$4, 500 or the fee calculated under subregulation (2) , whichever is the greater. The amendment ensures that fees payable to the OT when a bankruptcy is annulled are a minimum of \$4,500.

43. New subregulation 16.07A (5) provides the formula for determining the 'realised balance' in subregulation (2) and regulation 16.07B. Except for the reference to the new term 'realised balance', the amendment does not change existing law.

44. New regulation 16.07B provides the OT's entitlement to interim fees. Under the Act, the OT has no right to a fee until the work is completed. Only then can fees be taken for the whole of the work, and as calculated on the basis of the prevailing fee scale. This rule was confirmed in *Re: Athanassopoulos* (1982) 61 FLR 294. It has attracted criticism in situations where the fee scale has increased during the term of the administration and the increased scale has been charged for work done before the increase came into operation.

45. The new subregulation enables the OT to charge interim fees. The OT's entitlement to a fee under regulation 16.07A arises when the OT first acts, or performs work, as mentioned in subregulation 16.07A (1). The fee will be payable from time to time as the funds are realised, based on the realised balance at the time, and at the rate applicable when the funds are realised.

46. New regulation 16.07C provides the OT's fees for work performed under sections 50, 185H or 188 of the Bankruptcy Act, in carrying on business, or in relation to a bankrupt estate from which no funds are realised.

47. New subregulation 16.07C (1) provides that the fee that the OT is entitled to receive for:

- carrying on the business of a bankrupt or deceased person; or
- having been directed to take control of the property of a debtor under section 50 of the Act, carrying on the business of the debtor; is 2.5% of the amount received by the OT in the course of carrying on the business. This new subregulation does not change existing law.

48. New subregulation 16.07C (2) provides the situations where the fee mentioned in subregulation (3) applies. Under new subregulation 16.07C (3) fees are charged on an hourly rate in respect of time spent by the OT. The amendment extends the prescribed fees in subregulation 16.07C (3) to situations where the OT acts as a controlling trustee under section 188 of the Act, or acts, or performs work of a kind mentioned in regulation 16.07A, in relation to a bankrupt estate from which no funds are realised.

49. New subregulation 16.07C (3) increases the fees payable to the OT on the basis of hourly rates of the position occupied by the person performing the functions. The rates were aligned to those charged by the Australian Government Solicitor (AGS) in 1996 and the amendment increases the fees to current AGS rates.

50. New regulation 16.07D provides when the OT is entitled to be paid interim fees for work performed under subregulation 16.07C(1) or 16.07C(3).

51. New regulation 16.07E sets out general provisions dealing with fees payable to the OT when an administration is transferred to a registered trustee or when the OT is replaced as controlling trustee, or as trustee under the deed or composition, by a registered trustee. In each case, the lesser of the following amounts is payable to the OT:

(1) the amount calculated under subregulation 16.07A (2), based on the total amount realised by the OT (unless that amount is \$0); or

(2) the amount payable under subregulation 16.07C (4).

52. This amendment facilitates the transfer of the administrations specified in new subregulations 16.07E (1) and (2) to registered trustees. The first of the above amounts refers to the calculation of the OT's fees on the basis of the realised balance in new subregulation 16.07A(5). The second of the above amounts refer to the OT's fee ascertained under new subregulations 16.07C (1) or (3) which are based on an hourly rate of time spent by the OT in performing the functions.

53. New subregulation 16.07E (3) provides that a fee payable under regulation 16.07C is in addition to any fee payable under regulation 16.07A. There is no change to existing law.

### **Item 23-Regulation 16.08**

54. This item substitutes regulation 16.08 with new regulation 16.08 which provides that, for the purposes of calculating the OT's fees under new subregulation 16.07A, the 'realised balance' is not to exceed the total of the amount of the debts of the estate or debtor and the costs of administration of the estate.

55. The definition of 'costs of administration' is unchanged. The definition of 'debts' used in subregulation (1) will include provable debts of the estate or debtor. In estates where there are some assets but no dividend is likely, the OT does not usually call for proofs of debt, as to do so would increase the expenses of the administration. This led to difficulties in applying the definition of 'debts' in subregulation 16.08(2) because it referred only to 'proved debts'. The inclusion of 'provable' debts in the definition will facilitate calculation of fees payable in estates where no proofs of debt have been or will be called. The amendment is not intended to enable the OT to claim excessive fees, in particular where to do so would deprive the bankrupt or debtor of a surplus or annulment.

### **Item 24-After regulation 16.08**

56. This item inserts new regulation 16.08A which deals with reimbursement of the OT for expenses incurred in performing work of a kind mentioned in subregulation 16.07A (1), or

16.07C (1) or (2), in relation to an estate or debtor. New regulation 16.08A is a restatement of the common law right of a trustee in bankruptcy to be fully indemnified out of the trust estate against all costs, charges and expenses properly incurred by the trustee, see *Re Noel Adsett And Harry Berlouis and Ors* (1992) 109 ALR 100.

#### **Item 25-Before regulation 16.09**

57. This item inserts a heading before regulation 16.09 'Subdivision 2.3 Other fees'. There is no substantive change to existing law.

#### **Item 26-Regulation 16.09**

58. This item substitutes regulation 16.09 with new regulation 16.09 which prescribes fees in relation to the NPII.

59. The new regulation provides for the charging of data fees in relation to searches of the NPII undertaken by 'Index search agents' (new subregulation 16.09(a)) and those undertaken by an OR (new subregulation 16.09(b)).

60. The amounts provided as fees by new subregulation 16.09(a) have not been increased. The effect of the amendment is to call those fees 'data fees'. The change in terminology is to ensure consistency with the reference to 'data fees' used by Index search agents who have been contracted to provide searches to the public.

61. New subregulation 16.09(b) increases the cost of a search of the NPII by an OR (including the provision of an extract) to \$2 1. This is to bring these data fees in line with those charged by Index search agents. The increase in fees for OR searches is to facilitate an insignificant cost difference with searches conducted by Index search agents so that ITSA is not seen to be undercutting them.

#### **Item 27-Regulations 16.10 and 16.11**

62. This item omits regulations 16.10 and 16.11 which deal with waiver or remission of fees by the Inspector-General and the review of that decision by the Administrative Appeals Tribunal, respectively. Those regulations are now new regulations 16.13A and 16.13B (see item 32).

#### **Item 28-Part 16, Division 2, Subdivision B, heading**

63. This item omits the heading of Division 2 of Part 16 of the Regulations. There is no substantive change to existing law.

#### **Item 29-Paragraph 16.12 (3) (a) Item 30-Paragraph 16.12 (3) (b) Item 31-Paragraph 16.12 (3) (c)**

64. Regulation 16.12 provides fees payable when the OR exercises any power under this Act and on taxation of costs. The fees are determined by an hourly rate of the position occupied by the person performing the function. Items 29 to 31 increase the hourly rates payable to those persons. The rates were aligned to those charged by the Australian Government Solicitor in 1996 and the amendment increases the fees to current rates.

65. These fees are exempt from the GST under the Treasurer's Determination (No 2) of June 2000.

#### **Item 32-After regulation 16.13**



66. This item inserts 'Subdivision 2.4 Waiver and remission'. This new subdivision contains regulations 16.13A and 16.13B dealing with waiver or remission of fees by the InspectorGeneral and for applications to the Administrative Appeals Tribunal, respectively. Regulations dealing with those matters are currently regulations 16.10 and 16.11 which have been omitted by item 27.

67. New subregulation 16.13A does not change the existing law except to provide a definition of 'undue hardship'.

68. Subregulation 16.13A(2A) provides that, for paragraph (2) (a) of regulation 16.13A, 'undue hardship' means hardship that is unusual and exceptional in comparison to the hardship arising in the normal course of bankruptcy. This amendment gives effect to the Administrative Appeals Tribunal's decision in *Stanley Faulkner and Inspector-General in Bankruptcy [1998] AATA 632*. The Tribunal found that 'undue hardship' in the context of regulation 16.10 is hardship that can be characterised as more 'unusual, uncommon or exceptional' than that of any other person who has been through bankruptcy.

69. New regulation 16.13B deals with appeals to the Administrative Appeals Tribunal and makes no substantive changes to existing law.

### **Item 33-Schedule 3, item 1**

70. This item omits the reference to regulation 16.15 in item 1 of Schedule 3. Schedule 3 sets out the order of payment of first priority debts under paragraph 109(1)(a) of the Bankruptcy Act. Item 1 of that Schedule refers to fees payable under regulations 16.14 and 16.15.

71. Regulation 16.14 provides that fees are payable by the trustee to the OR on payment of dividends. Regulation 16.15 does not deal with payment of fees; it provides for the application of regulation 16.14. Accordingly, the reference to regulation 16.15 is unnecessary.

### **Item 34-Schedule 3, after item 1**

72. Schedule 3 sets out the order of payment of first priority debts under paragraph 109(1)(a) of the Bankruptcy Act. This item inserts as second in that order of priority the remuneration and expenses payable to the OT under regulations 16.07 and 16.08A if the OT transfers the administration of the bankruptcy to a registered trustee.

### **Item 35-Schedule 4, paragraph 30.3 (a) Item 36-Schedule 4, subclause 30.3, at the foot**

73. Subparagraph 139L(a)(v) of the Bankruptcy Act defines 'income' to include the value of a benefit that is provided in any circumstances by any person to the bankrupt. 'Benefit' is defined by reference to the *Fringe Benefits Tax Assessment Act 1986* (the FBTA Act) (as in force at the beginning of 1 July 1992). The FBTA Act is modified for the purposes of the Bankruptcy Act by Schedule 4 of the Bankruptcy Regulations.

74. The effect of paragraphs 30.3(a) and (g) of Schedule 4 is to exclude benefits received by way of bona fide domestic arrangements between spouses, or from 'close relatives', from the definition of income in section 139L. A 'close relative' is defined in section 136 of the FBTA Act and includes the spouse of a person.

75. Paragraph 30.3 (a) has been utilised to artificially reduce a bankrupt's income. The paragraph is also considered to be an unnecessary duplication of paragraph 30.3 (g). Accordingly, amendments to simplify those provisions dealing with benefits received by way of bona fide domestic arrangements between spouses or from close relatives will be made by items 35 and 36.

76. Item 35 substitutes a new paragraph 30.3 (a) which has the effect of excluding a benefit provided to the bankrupt by his or her spouse because of a genuine maintenance agreement between the spouses, from the definition of income under section 139L. A bankrupt will still be able to retain benefits received by way of support from certain persons including a 'close relative' up to a value of \$250 under paragraph 30.3 (g).

**Item 37-Schedule 8, item 12**

**Item 38-Schedule 8, item 15**

**Item 39-Schedule 8, item 23**

77. Items 12, 15 and 23 of Schedule 8 contain a reference to 'Order 72A, the Federal Court Rules' which has been repealed. The correct reference is to 'Order 77, rule 45, Federal Court Rules'. Items 37 to 39 substitute items 12, 15 and 23 which contain the correct reference at items 12, 15 and 23 respectively, of Schedule 8.

**Item 40-Schedule 10**

78. This item omits Schedule 10 which is no longer required (see Items 22 and 24).