Australian Government
Australian Financial Security Authority

# AUSTRALIAN FINANCIAL SECURITY AUTHORITY
# PERSONAL INSOLVENCY REGULATOR

July 2016, Volume 14, Issue 2

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This client newsletter is provided by AFSA's independent Regulation and Enforcement division and is published each quarter to registered trustees, registered debt agreement administrators, controlling trustees, major creditors and financial counsellors.

In keeping with AFSA's fourth corporate goal: quality information, this newsletter aims to inform practitioners of relevant changes to personal insolvency laws, both legislative and case law, and discusses areas of practice and Inspector-General requirements. For more information about AFSA's vision, purpose and goals, see our Corporate Plan 2015–16.

Articles are welcome and can be forwarded by email to neil.unantenne@afsa.gov.au.

AFSA actively seeks contributions from outside parties and the views expressed therein are not necessarily endorsed by, or reflect the views of, the Inspector-General in Bankruptcy, Official Trustee or the Official Receiver.

This issue of the Personal Insolvency Regulator may be cited as (2016)14(2) Personal Insolvency Regulator.

# INSPECTOR-GENERAL'S COLUMN

July 2016, Volume 14, Issue 2

## 50th anniversary of the Bankruptcy Act

July 2016 will mark the 50th anniversary of the *Bankruptcy Act 1966.* A lot has happened in the last 50 years, including ongoing review and amendments to the legislation to ensure our personal insolvency system is reasonable, relevant and responsive to the government and community's expectations.

## National Innovation and Science Agenda—improving bankruptcy and insolvency laws

In April 2016, as part of the National Innovation and Science Agenda, the Government released a proposals paper on measures to improve Australia's bankruptcy and insolvency laws—by making changes to the default bankruptcy period, introducing a safe harbour for directors, and changing the operation of 'ipso facto' clauses. Submissions on the paper closed on 27 May 2016.

## AFSA presents to the IACA

AFSA recently presented at the 39th International Association of Commercial Administrators (IACA) conference and met with representatives of the World Bank to share information on Australia's experience of developing and operating the Personal Property Securities system.

I'm very pleased to announce that AFSA received a Merit Award from the IACA, for our PPSR data integrity and tailored communication. The award was presented at the IACA conference.

## Help us improve the AFSA website

In the last issue of the PIR, I mentioned we are working to improve the AFSA website. As part of the redevelopment, we would like to invite interested people to assist with user feedback on the new website before it's finalised. This may take the form of a one-on-one session, or it could be as simple as viewing a link of the website prototype and providing online feedback.

If you're interested in being involved, please complete the form at this link: www.research.net/r/AFSAtesting.

## Recent statistical releases

On 13 April 2016, we released the personal insolvency activity statistics for the March quarter 2016.

Total personal insolvencies increased 2.0% in the March quarter 2016, compared to the March quarter 2015. This is the fourth consecutive rise when compared to the same quarter in the previous year. This is the first time four consecutive rises occurred since 2009.

By type of personal insolvency:

- bankruptcies fell by 5.8%
- debt agreements increased by 15.6%
- personal insolvency agreements fell by 9.5%.

Queensland and Western Australia accounted for most of the national rise in personal insolvencies in the March quarter 2016 compared to the March quarter 2015. The number of debtors who entered a personal insolvency in Queensland in the March quarter 2016 rose 5.1% compared to the December quarter 2015. The number of debtors in Western Australia in the March quarter 2016 rose 10.9% compared to the December quarter 2015.

Debt agreements in Western Australia in the March quarter 2016 are the highest on record.

On 27 April 2016, we released the regional personal insolvency and business related personal insolvency statistics for the March quarter 2016.

In the March quarter 2016, 16.1% of debtors entered a business related personal insolvency. This is a decrease from 17.7% in the December quarter 2015.

Economic conditions (410 debtors) was the most common business related cause and unemployment or loss of income (1,970 debtors) and excessive use of credit (1,908 debtors) were the most common non-business related causes of personal insolvency.

## PPSR statistics

On 10 May 2016, we released the personal property security statistics for the March 2016 quarter.

There were 1,968,953 searches conducted on the PPSR in the March quarter 2016, an increase of 6.4% compared to the March quarter 2015. The number of searches conducted on the PPSR in the March quarter 2016 are up 0.6% compared to the December quarter 2015.

There were 507,895 new registrations listed on the PPSR in the March quarter 2016.

There were 183,268 registrations amended on the PPSR in the March quarter 2016.

In the March quarter 2016, 323,013 registrations were discharged or removed from the PPSR.

Motor vehicles are the most common collateral class listed as registrations on the PPSR. As at 31 March 2016, there were 4,524,763 current registrations for motor vehicles, which represents 50.3% of 8,988,969 total registrations on the PPSR.

Commercial property is the most common type of collateral. As at 31 March 2016, 6,555,654 current registrations on the PPSR were of this collateral type.

Veronique Ingram PSM
Chief Executive and Inspector-General, AFSA

## 2015–16 annual estate return process

During the 2014–15 financial year, AFSA introduced the annual estate return online (AER Online) service, where practitioners can lodge their AER data through an improved process and facilitate the payment of realisations and interest charge.

We want to remind practitioners of their obligation to lodge a completed AER for the 2015–16 period by 4 August 2016.

Although some practitioners experienced challenges in changing to the online system, the majority of feedback that we received was that AER Online is an improved way to submit the AER and to pay the realisation and interest charge.

As with the last AER lodgement, the AER Online site is the central contact point, for not only accessing your AER online and facilitating payment, but also to access relevant information about the AER online process.

Remember, AER Online includes the following features:

- AER Online is available to all registered and controlling trustees, and debt agreement administrators to update and lodge AER data at any time during the year.
- Practitioners can view the running total of all their realisations and interest charge receipts and liabilities at any point in time:
  - » AER Online reports realisations and interest charge payments at the practitioner level, not against each individual administration.
  - » Practitioners remain responsible for conducting an overall reconciliation and ensuring the accuracy of data provided to AFSA. This will continue to be included in our regulatory oversight.
- AER Online offers streamlined payment options. The available payment options are the same as those last year, with no changes to payment mechanisms occurring this year. Specifically, the AFSA payment advice from AER Online is unique to each practitioner. Therefore, for EFT payments you must use the account details as detailed on your AFSA payment advice, as BSB and account numbers are unique to each practitioner. Failure to do so may mean that the associated payment will not be attributed to your practitioner account. You can still make payments by cheque, but similarly, send these to the address detailed on your AFSA payment advice.

If you have any queries or need assistance in completing your AER and making payments, we recommend that you firstly refer to the following guides:

- The AER Online Services Guide – AUSKey Account Users
- the AER Online Services Guide – User Management Username and Password Account Users
- the AER Online Services Guide – Obtain Lodge and View

In addition, we have designed the following Inspector-General Practice Statement and Direction to assist you with your queries:

- Inspector-General Practice Statement 7 - annual estate returns
- Inspector-General Practice Direction 2 - collection of realisations and interest charges

If after consulting these reference materials you are unable to resolve an issue, you can contact us for assistance. Please see the Practitioner AER Online support page on our website for more details.

Charles Smith, Director
Regulation and Enforcement

## Official trustee practice statement on contributions

AFSA would like to remind practitioners of Official Trustee Practice Statement 1 (OTPS1) on contributions. OTPS1 is a helpful resource on the income contributions regime under Division 4B of the *Bankruptcy Act 1966* and covers issues such as:

- calculating a bankrupt's liability
- the definition of 'income' for the purposes of the *Bankruptcy Act 1966*
- the income contribution assessment process
- the collection of liabilities
- review rights of bankrupts.

OTPS1 can be found on our website along with a detailed case study on assessing income contributions. To access the case study, please visit www.afsa.gov.au/practitioner.

Paul Devellerez, Assistant Director Inspections and
Jody Leong, Senior Inspector
Regulation and Enforcement

## ATO update

Australian Government
Australian Taxation Office

We continue to undertake extensive consultation to gain an understanding of the interactions people have with the tax and super systems and other government services. Through this work, we are looking for opportunities to improve our services to the community, including insolvency practitioners.

### Superannuation Guarantee Charge obligations

If an employer hasn't paid the minimum amount of super guarantee (SG) for an employee into the correct fund by the relevant due date, they may be liable for the super guarantee charge (SGC).

The charge is made up of:

- SG shortfall amounts (including any 'choice liability') calculated on your employee's salary or wages
- interest on those amounts (currently 10 per cent)
- an administration fee ($20 per employee, per quarter).

Practitioners can report this information by lodging an SGC statement to the ATO. You can use the SGC statement and calculator tool available on our website to help you calculate the total SGC liability for any applicable employees.

In order for the ATO to raise the correct SGC assessments, we require the following information for each employee:

- Full Name
- DOB
- Address
- TFN
- Super Guarantee (separate for each quarter: Jan-Mar, Apr-Jun, Jul-Sep and Oct-Dec)
- Excluded/Capped employees clearly identified

The information can be submitted in a digital format via the business portal mail function. Alternatively, details may be provided in writing.

### SGC breakdown for each employee

We are reviewing the format we use to provide practitioners with a breakdown of SGC amounts for each employee. We currently provide a simple breakdown with two categories for each administration—'priority' and 'non-priority' amounts. The changes aim to improve the standard format and provide further information to assist in an administration.

We will continue to consult with the industry as we work through any potential future design.

### Trustees—applying for an ABN

Representatives who are appointed under the *Bankruptcy Act 1966* as trustees of bankrupt estates, PIAs (under Part X) or compositions or schemes of arrangement (under Division 6 of Part IV) and who require an ABN, are required to apply for a separate ABN in respect of each appointment as trustee. That is, they cannot use the ABN of the insolvent individual.

You can apply for an ABN online via www.abr.gov.au using the following information as a guide to assist you.

**Applicant information**

- the entity type selected must be fixed trust.

**Business activity details**

- the business start date must be the date of appointment of the trustee.

**Address details and contact details**

- trustee's details.

**Financial account details**

- the bank account details are as provided by the trustee.

**GST (only if the applicant requires a GST registration)**

- all questions must be answered
- other roles (if applicable)
- if the trustee intends to register for any other roles—provide all relevant information.

For further information, head to www.ato.gov.au or contact the Industry Engagement team at InsolvencyPractitionerServices@ato.gov.au if you would like to find out more about using the portal within your firm.

Bronwyn du Mont,
Director Debt—Significant Debt Management
Australian Taxation Office

## AFSA's regulatory performance framework

AFSA's regulatory performance framework (RPF) has been in place for 12 months at the end of June 2016 and represents the end of our first self-assessment period under the RPF.

We will prepare our first report against the RPF over the next few months for external validation by our stakeholder group, the Bankruptcy Reform Consultative Forum.

Once validated, the report will be provided to the Attorney-General's Department for certification and clearance by the Attorney-General. The final report (with evidence against performance measures) will be published on our website.

Paul Shaw, National Manager
Regulation and Enforcement

## AFSA's Insolvency practitioner compliance program 2016-17

AFSA's planned 2016-17 insolvency practitioner compliance program has been drafted and circulated to key stakeholders for comment.

We expect the program to be finalised by the end of July 2016 after relevant feedback has been received and reviewed.

A finalised copy of the program will be published on the AFSA website and an email will be issued to practitioners when it is released, along with an article in the next PIR newsletter.

Paul Shaw, National Manager
Regulation and Enforcement

## AFSA's Personal insolvency practitioner compliance report guidance video

A video podcast has been produced to provide AFSA stakeholders with information about our personal insolvency practitioner compliance report for 2014-2015 and update on regulatory issues that have come to attention in the current financial year.

In this online presentation, Paul Shaw, National Manager, Regulation and Enforcement, covers three key areas:

- an overview of the compliance report
- highlights from the report
- recently observed compliance trends and themes.

AFSA Guidance video 5: AFSA Personal Insolvency Practitioner Compliance Report [YouTube].

Please visit the guidance video series on the AFSA website for more information.

Tim Cole, Director Operations and Strategy
Regulation and Enforcement

## Personal Insolvency Conference, Brisbane, September 2016

From 7–9 September 2016, the Queensland University of Technology's Commercial and Property Research Centre will host their first international Personal Insolvency Conference at Rydges South Bank Hotel, Brisbane, Australia.

While the current focus in insolvency scholarship is on the economic salvaging of large businesses facing collapse, the reality is that many more people experience financial stress as over-indebted consumers or owners of micro, small, and medium-sized enterprises.

This conference will provide a forum for scholars and policy-makers to discuss and present on the human experience of bankruptcy.

Keynote addresses will be delivered by:

- Professor Jay L Westbrook, Benno C Schmidt Chair of Business Law, The University of Texas at Austin.
- Professor Iain Ramsay, Professor of Law, University of Kent.
- Fiona Guthrie, Executive Director of Financial Counselling Australia.
- David Bergman, National Manager Insolvency and Trustee Services, Australian Financial Security Authority.

Registrations are now open. For more information, see the conference website personalinsolvencyconference.com.

## Bankruptcy and employment restrictions —the need for a new approach

Entering into bankruptcy has significant personal impacts—with the loss of divisible assets being the most immediate and well-understood impact. However, there is also the potential for bankruptcy (and often also other personal insolvency administrations) to have an adverse impact on a person's ability to engage in employment and business. Where such impacts eventuate, it is likely that the 'fresh start'—one of the main objects of bankruptcy[1]— will be difficult to achieve.

This potential for employment and business restrictions to derail the fresh start of bankruptcy is not one that has been explored in any depth, and so we have undertaken some initial research to identify the ways in which bankruptcy impacts on employment and business opportunities, and the policy rationale for facilitating such restrictions.[2]

Although we have not undertaken a comprehensive survey, we have found that employment and business restrictions on persons who are, or have been bankrupt, apply across many fields of endeavour and lack consistency. Further, it is often difficult to identify a detailed policy rationale for the existence of restrictions. For the most part, these restrictions are found, not in the *Bankruptcy Act 1966* (Cth), but in industry specific legislation, regulation and professional rules at Commonwealth, state or territory level. There is not, to our knowledge, a single source or document that identifies all of the occupational restrictions imposed on persons who are, or have been, bankrupt, and this can make it difficult for people facing insolvency to make decisions about their options.

We have identified employment and business restrictions as falling into two main categories:

- The first type of restriction is one that provides that bankruptcy is a mandatory bar to participation in that occupation. That is, if a person is, or has been bankrupt within the relevant time frame, they cannot participate in that occupation. Some examples here include bankruptcy trustees, Members of Parliament (Cth), and, in at least one jurisdiction, Justices of the Peace, second-hand vehicle dealers, and security agents.
- The second type of restriction provides that bankruptcy may be a ground for restriction on participation. In some examples, bankruptcy is a bar unless the person is able to convince a decision maker that the bar should be relaxed in their individual case. Builders in Queensland and conveyancers in NSW are two examples of this approach. In other examples, bankruptcy is one of a number of matters that can be taken into account in determining whether the person is eligible to participate, for example, where a 'fit and proper person' test is used. The regulation of taxation agents is one example of this approach.

There is considerable inconsistency across different occupations as to the length of time a bankruptcy is relevant, and as to whether any other insolvency administrations (e.g. debt agreements or personal insolvency agreements) are also equally relevant, and the scope of the grounds for any discretion in the decision maker. There is also a lack of consistency even within a particular occupation. For example, for some building occupations, the time period for which a previous bankruptcy is relevant is three years in NSW, five years in Qld, and two years in SA.

In our research, we also found other ways that bankruptcy can have an adverse effect on employment and business opportunities. First, some occupations have notification requirements, where a person is obliged to tell their employer of a bankruptcy; the consequences of such disclosure are not known. Second, under the Bankruptcy Act, persons who are bankrupt are also required to disclose their bankruptcy status in certain circumstances; this is likely to have an adverse impact on the carrying on of, or setting up of, business. Third, through the National Personal Insolvency Index (NPII), anyone—including a current or prospective employer or business partner—can discover whether someone has ever been in an insolvency administration, and there is no restriction on the use of that information. Fourth, individual employer policies can impose restrictions on entry to persons who are, or have been bankrupt. Finally, there is no prohibition of using bankruptcy status to discriminate against a current or potential employee or business partner.

It might be argued that these restrictions and impacts are appropriate; that bankruptcy *should* be a permitted ground for restrictions and discrimination because a person who has entered bankruptcy is less likely to be responsible or reliable, or is more likely to engage in fraud or theft. However, the empirical evidence that we have examined does not support the attribution of such negative characteristics to all persons who are or have been bankrupt. It might be that there is a stronger policy argument for restrictions in the context of particular high trust occupations, or where licensing is required. However, even then, we argue that attention needs to be given to developing a sound, evidence-based, and consistent policy rationale for any employment and business restrictions on persons who are, or have been bankrupt, rather than relying on public perceptions of the characteristics of persons who have become bankrupt.

The Commonwealth Government has recently announced an intention to decrease the minimum bankruptcy period from three years to one year, and is currently consulting on how that could be implemented[3]. Given that many employment and business restrictions apply only when the person is an undischarged bankrupt, such a change would be a significant improvement[4]. However, other changes also need to be considered. An Australia-wide policy review should be implemented to determine the circumstances in which there is a genuine policy justification for imposing employment or business restrictions on bankrupts or former bankrupts; with the occupational laws then amended in light of those

findings. Further, consideration should be given to the merits of amending the permanent, public nature of the NPII and to prohibition discrimination (at least in employment) on the grounds of bankruptcy or other personal insolvency administrations. Attention to these issues would better promote the fresh start objective of the bankruptcy system, as well as its wider rehabilitative effect.

However, consideration of these issues needs to take place as part of a broader review of personal and corporate insolvency laws. The piecemeal approach to amending insolvency laws of late is insufficient, and a Harmer-like review is needed to ensure that our insolvency laws are, in all respects, fit for the future.

Nicola Howell and Rosalind Mason*
Faculty of Law, Queensland University of Technology

(*This article reflects the views of the authors and does not necessarily reflect the position of AFSA or the Inspector-General in Bankruptcy).

1. Howell, Nicola (2014) The fresh start goal of the Bankruptcy Act: giving a temporary reprieve or facilitating debtor rehabilitation? QUT Law Review, 14(3), pp. 29-52.
2. Howell, Nicola & Mason, Rosalind F (2015) Reinforcing stigma or delivering a fresh start: Bankruptcy and future engagement in the workforce. University of New South Wales Law Journal, 38(4), pp 1529-1574.
3. Australian Government, 'Improving bankruptcy and insolvency laws' (Proposals Paper, Apr 2016).
4. The Proposals Paper notes that reducing the default bankruptcy period will automatically have an impact on some restrictions, and that the Government intends to consult with relevant industry and licensing associations to, where appropriate, align restrictions with the reduced period of bankruptcy (ibid 9).

## TAS (English) - Former bankrupt convicted for concealing financial gain during bankruptcy

Centrelink employee Karen Narelle English, previously a bankrupt, was prosecuted in the Devonport Magistrates Court on 19 May 2016, for concealing property obtained during the period of her bankruptcy.

Ms English became bankrupt on 22 March 2012.

On 14 July 2014 and 3 September 2014, Ms English received $50,000 and $87,581.83 respectively into her bank account, paid from the estate of her late father.

Ms English subsequently deposited the inheritance into two term deposit accounts.

Ms English concealed the two deposits, totalling $137,581.83, from her trustee.

On 6 February 2015, Ms English's bankruptcy was annulled as all debts had been paid in full.

Ms English pleaded guilty and was convicted on both counts. She was ordered to pay a fine of $1,000 and court costs of $78.

Magistrate Jago found that Ms English had committed the offences during a time of emotional crisis and that there were strong personal mitigating factors to be taken into account.

She acknowledged Ms English's argument that while she was aware of her obligation to notify her trustee, she was in a state of uncertainty about what she would eventually do with the inheritance money.

Magistrate Jago found that Ms English's actions were not sophisticated. Ms English had not spent the money and creditors were eventually paid in full.

She also noted that while this type of offence was difficult to detect, general deterrence was important and the system relied on bankrupt's honesty to protect creditor's interests.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecutions.

## QLD (Topley) - Bankrupt pleads guilty to two offences under the Bankruptcy Act

On 29 April 2016, Mr Rohan Miles Topley pleaded guilty in the Brisbane Magistrates Court to failing to file his statement of affairs (SOA) and leaving Australia without the consent of the trustee.

Mr Topley was made bankrupt on 27 August 2014, due to a sequestration order against his estate by the Commonwealth Bank, trading as Bankwest.

Mr Topley's trustee advised him to submit a SOA within 14 days of his bankruptcy and to obtain permission before travelling overseas.

Mr Topley failed to file a SOA and on 22 April 2015, departed Australia without his trustee's permission.

Mr Topley was convicted on both counts and incurred a fine of $500 for each offence.

In passing sentence, the Magistrate noted the chronology of events and Mr Topley's extensive failure to comply over a long period.

The Magistrate further noted that there was no evidence that the offences were committed under extenuating circumstances—and that the personal hardships experienced by Mr Topley in late 2012, occurred well before he returned to work and before he failed to file the SOA.

The Magistrate concluded that there was nothing in Mr Topley's character or prior behaviour that required consideration of a nominal punishment.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecutions.

## QLD (Van Tilburg) – Fourth time bankrupt faces court after failing to disclose funds to trustee

On 26 February 2016, Mr John Peter Van Tilburg pleaded guilty in the Brisbane Magistrates Court to failing to disclose to his trustee, a sum of $110,000 received while bankrupt.

Mr Van Tilburg became bankrupt on 16 September 2010 as a result of a court order.

On 17 January 2013, Mr Van Tilburg and his ex-wife entered a Family Law Consent Order, which required his ex-wife to pay Mr Van Tilburg $120,000.

On 4 April 2013, the sum of $110,000 was deposited into Mr Van Tilburg's bank account.

Mr Van Tilburg's bankruptcy trustee contacted him on several occasions, to access the $110,000 for the benefit of creditors.

Mr Van Tilburg did not respond to efforts by his trustee to contact him.

Magistrate Gett sentenced Mr Van Tilburg to five months imprisonment, but he was released on a $2,000 four-year good behaviour bond.

In sentencing, Magistrate Gett took into account Mr Van Tilburg's guilty plea. He noted that Mr Van Tilburg would remain bankrupt until 2019.

He also noted Mr Van Tilburg's previous bankruptcies and the significant reparation outstanding from those.

Magistrate Gett commented that given Mr Van Tilburg's past experience, he would have a good understanding of bankruptcy, compared to others without that background.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecutions.

Paul Shaw, National Manager
Regulation and Enforcement

## Sampson (Trustee) in the matter of Condon (Bankrupt) [2016] FCA 312 (30 March 2016) (Perry J)

### Summary

The decision of Perry J in Sampson in the matter of Condon [2016] FCA 312 (30 March 2016) emphasises that the powers of a court to order a distribution of dividends where a bankrupt has failed to file a statement of affairs (SOA) is an exercise of a discretionary decision. As such, a court is prepared to make such an order where it is satisfied that, amongst other things, creditors have been informed of the application and have had an opportunity to be heard.

### Background

On 10 June 2015, Justin Condon became bankrupt. The bankrupt failed to file a SOA under section 54(1) of the *Bankruptcy Act 1966* (Cth) (the Act).

On 22 December 2015, David Sampson (the bankrupt's trustee) applied to the Federal Court of Australia for orders under section 146 of the Act allowing the trustee to:

- distribute dividends among creditors who had proved their debts in the bankrupt estate as if the SOA had been filed
- pay any surplus to the bankrupt, conditional upon the filing of his SOA.

In support of his application, the trustee relied on the following evidence concerning his communications with and notices to the bankrupt about the obligation to file a SOA and the bankrupt's ultimate failure to file:

a. The trustee sent a letter dated 11 June 2015 to the bankrupt's residence notifying him of his appointment as trustee and of the bankrupt's obligations regarding his SOA. The trustee sent a further letter dated 29 June 2015 to the bankrupt under section 77 of the Act so that the bankrupt could be interviewed as to his examinable affairs.

b. The trustee also attempted to contact the bankrupt to request a SOA from him by engaging process servers to serve him with the document on four separate occasions between 22 and 30 June 2015 and also provided a copy to the bankrupt through a creditor.

c. A telephone conversation between a member of the trustee's office and the bankrupt on 20 January 2016 where he was advised to fill out the SOA.

d. The trustee arranged for a notice, which was published in the 'Illawarra Mercury' on 22 January 2016 advising of the section 146 application and inviting the bankrupt to contact the trustee's solicitors.

e. The trustee also deposed that he attended the business premises of one of the unsecured creditors in the bankrupt estate on 27 January 2016 to assist the bankrupt to complete his SOA as arranged between the bankrupt and the manager. However, the bankrupt did not appear.

f. The trustee further relied on the National Personal Insolvency Index (NPII) printout dated 23 March 2016, which disclosed that no SOA had been filed by the bankrupt with the Official Receiver.

### Issues

Perry J determined that two questions arose on the application under section 146 of the Act:

a. Has the bankrupt failed to file a SOA as required by the Act?

b. If yes, should the Court in the exercise of its discretion order that the distribution of dividends among the creditors who have proved their debts in the bankrupt's estate proceed in accordance with Division 5 of Part VI of the Act as if the bankrupt had filed a SOA and those creditors had been stated in it?

### Decision

Perry J was satisfied based on the evidence that the bankrupt had been aware of his bankruptcy and obligation to file a SOA under the Act but failed to do so. Further, having regards to all of the circumstances presented, Her Honour accepted the trustee's submission that it was appropriate to make the first order sought under section 146 of the Act.

Her Honour relevantly made the following orders:

1. That the trustee publish another notice of intention to declare a first and final dividend in the bankrupt estate.
2. Pursuant to section 146 of the Act, the trustee distribute a dividend to those creditors who had proved their debts in the bankrupt estate as if the bankrupt had filed a SOA and those creditors had been stated to be creditors in it.
3. The trustee refrain from paying a dividend to any creditor until 14 days after publication of the notice to declare a dividend.

Her Honour stated that the further notice to be filed by the trustee was necessary to sufficiently protect against the possibility that there were other creditors who might otherwise have come to light if a SOA had been filed. Her Honour was not prepared to make an order that any surplus to be paid to the bankrupt should be conditional on the filing of a SOA, as doing so would potentially defer finalisation of the bankrupt's estate indefinitely.

### Legal principles

This decision illustrates the following points about section 146 of the Act:

- a trustee bears an onus to establish that a bankrupt is aware of their bankruptcy and obligation to file a SOA under the Act and has failed to do so
- a court will consider several factors before it exercises its discretion, including: whether the bankrupt is likely to assist their trustee (to settle a list of their creditors or otherwise file a SOA) and relevant steps taken by the trustee to notify the bankrupt of the application and ascertain the existence of any other creditors.

The provision is designed to overcome difficulties in the efficient and effective administration of an estate where the bankrupt has not filed a SOA, so that other sections of the Act dealing with finalisation (e.g. by timely payment of dividends) can be achieved.

It is also clear that section 146 can apply where a bankrupt refuses to complete and file their SOA: Scott (Trustee) in the matter of Heinrich (Bankrupt) [2005] FCA 1826 (14 December 2005) and where they cannot (for reasons beyond their control): Re Sturt; ex parte Official Trustee in Bankruptcy [2001] FCA 1649.

Jin Lai, Acting Inspector
Regulation and Enforcement

## Bendigo and Adelaide Bank Ltd v Clout (no. 1) [2016] FCA 119 **(18 February 2016) (White J)**

## Bendigo and Adelaide Bank Ltd v Clout (no. 2) [2016] FCA 561 **(20 May 2016) (White J)**

### Summary

These two cases relate to a composition made under section 73 of the *Bankruptcy Act 1966* (the Act).

The first covers the factors taken into account by the court before a composition is set aside under sections 76B and 222 of the Act, while the second covers the orders made once it was set aside.

### Background

Mr and Mrs Mouglalis were made bankrupt on 16 May 2012 by sequestration order after the liquidation of their companies. David Clout was appointed as trustee to administer their joint and several bankrupt estates.

The bankrupts filed their respective statements of affairs on 12 December 2012, which disclosed total debts of $10.7 million for Mr Mouglalis and $8 million for Mrs Mouglalis.

The bankrupts subsequently proposed a composition, which was considered at a meeting of creditors held on 3 December 2013. The proposal offered $50,000 with several creditors forgoing their right to a dividend to increase the available funds to remaining unsecured creditors. The proposal was accepted by special resolution with 83 per cent of eligible creditors holding 78 per cent of the value voting for the composition.

One creditor in the bankrupt estates, Bendigo Bank, was unaware of the bankruptcies or compositions until 24 September 2014 and did not attend or vote at the meeting.

### Issues in the case one

In the first proceeding, Bendigo Bank applied to have the composition set aside.

Under the Act, a court may set aside a composition if it is shown that the terms of the agreement are unreasonable, are not calculated to benefit creditors generally or ought to be set aside for any other reason.

White J reviewed the relevant factors discussed in Re Mills; Ex parte Lloyds [1997] FCA 223 and Moran v Robertson [2012] FCA 371 and found that they all fell under three categories: composition related, investigation related and process related factors.

His Honour considered the facts and determined that:

- the composition would only provide unsecured creditors who participated in a dividend around 0.1 cents in the dollar (composition factor)
- investigations into the bankrupts' examinable affairs were incomplete due to difficulties obtaining books and records (investigation factor)
- there were no apparent problems with the trustee's systems or other reasons to explain why Bendigo Bank did not receive notice of the bankruptcies (process issue)
- separate ongoing litigation by Bendigo Bank to confirm the debt owed by the bankrupts did not mean their claim could only be admitted for one dollar and could be assessed by the trustee (process factor).

Mr Clout would have instead reduced it for a portion instead. Calculations show that even if it were reduced by 50 per cent, Bendigo bank would have had sufficient voting power to change the outcome of the meeting. Weighing up all three factors, his honour allowed the composition to be set aside.

His Honour also looked at whether the outcome would have changed if Bendigo Bank had attended the meeting of creditors.

### Decision in case one

White J ordered that the composition be aside on the basis that:

- the 0.1 cents in the dollar return was grossly inadequate and not calculated to benefit creditors generally.
- the trustee's investigations into the bankrupt's estates were incomplete
- Bendigo Bank would have had enough voting power to change the result of the creditor's meeting (even if their claim was reduced by 50 per cent).

### Issues in the case two

In the second proceeding, Bendigo Bank applied for further orders under section 222 of the Act to have new sequestration orders made against the Mr and Mrs Mouglalis.

Mr and Mrs Mouglalis submitted that this was unnecessary on the grounds that the trustee still held power under the Act to continue investigations into their estates, and that a new sequestration order would prejudice them. In making this argument, they referred to Hingston v Westpac Banking Corporation [2012] FCAFC 41, where a composition was set aside under very similar circumstances, but a new sequestration order was not made.

### Decision in case two

After considering that case, White J distinguished it from the present case where the composition:

- was not reasonable or calculated to the benefit of creditors generally
- was set aside at a point in time before the bankrupts would be discharged.

His Honour recognised the importance of the trustee's right to object to discharge, being a tool to aid in the administration of the estate, and while Mr and Mrs Mouglalis would no doubt be bankrupt for a longer period, it was partially their fault for proposing the composition in the first instance.

White J stressed the importance of orders being made to put all parties back in a position they would have been in if the composition was not accepted, which in this instance required a new sequestration order. Accordingly, his Honour granted the orders sought by Bendigo Bank to make Mr and Mrs Mouglalis bankrupt.

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# CONTACTS AND ACRONYMS

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## Regulation and Enforcement

For Regulation and Enforcement locations and contacts, please view the Regulation and Enforcement web page on AFSA's website.

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## Citing the PIR

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## Acronyms

| | |
|---|---|
| AAT | Administrative Appeals Tribunal |
| ACMA | Australian Communications Media Authority |
| AER | annual estate return |
| AFSA | Australian Financial Security Authority |
| APESB | Accounting Professional and Ethical Standards Board |
| ARITA | Australian Restructuring Insolvency and Turnaround Association |
| ASIC | Australian Securities and Investments Commission |
| ATM | automatic teller machine |
| ATO | Australian Taxation Office |
| B2G | business-to-government |
| CA | chartered accountant |
| CAP | contribution assessment period |
| CBA | Commonwealth Bank of Australia |
| CBI | cross-border insolvency |
| CDPP | Commonwealth Director of Public Prosecutions |
| CDRA | *Civil Dispute Resolution Act 2011* |
| CDRR | Civil Dispute Resolution Regulations 2011 |
| CPA | certified practising accountant |
| DAPA | Debt Agreement Practitioners Association |
| DAT | Debt Agreement team |
| FCA | Financial Counselling Australia |
| IAIR | International Association of Insolvency Regulators |
| IC | interest charge |
| IGPD | Inspector-General Practice Direction |
| IGPG | Inspector-General Practice Guideline |
| IGPS | Inspector-General Practice Statement |
| IPA | Insolvency Practitioners Association |
| IQ | income questionnaire |
| IR | Information and Registry |
| ITSA | Insolvency and Trustee Service Australia |
| IVR | interactive voice response |
| LSMUL | legal services multi-use list |
| NPII | National Personal Insolvency Index |
| NSC | National Service Centre |
| OR | Official Receiver |
| PIA | personal insolvency agreement |
| PIR | Personal Insolvency Regulator |
| PIPA | Personal Insolvency Professionals Association |
| PPSA | *Personal Property Securities Act 2009* |
| PPSR | Personal Property Securities Register |
| R&E | Regulation and Enforcement |
| RC | realisations charge |
| RDAA | registered debt agreement administrator |
| RT | registered trustee |
| TS | Trustee Services |