Australian Government
Australian Financial Security Authority

AUSTRALIAN FINANCIAL SECURITY AUTHORITY
PERSONAL INSOLVENCY REGULATOR

July 2017, Volume 15, Issue 2

Supporting better outcomes for consumers, business and the community.

www.afsa.gov.au

CONTENTS

July 2017, Volume 15, Issue 2

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, lawyers, 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 2016–17.

Articles are welcome and can be forwarded by email to lukas.krajewski@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 (2017)15(2) Personal Insolvency Regulator.

INSPECTOR-GENERAL'S COLUMN

July 2017, Volume 15, Issue 2

New AFSA video warns of untrustworthy debt advice

AFSA recently released a video on our YouTube channel that reiterates the importance of obtaining bankruptcy and debt management advice from reputable sources.

The video, entitled 'Bankruptcy Advice: Untrustworthy Advisors', is narrated by Money Magazine editor Effie Zahos. It explains in simple terms how easy it is for consumers to be tricked into taking untrustworthy advice from unregulated, unlicensed advisers who may target vulnerable people in times of financial crisis and pressure.

This video is a result of collaboration between AFSA, the Australian Securities and Investments Commission (ASIC) and the Australian Restructuring Insolvency and Turnaround Association (ARITA). Financial Counselling Australia also previewed the video and provided us with feedback prior to its release.

New AFSA videos on doing a PPSR search before buying a used vehicle

AFSA's latest quick motor vehicle search videos have been released on YouTube, as part of a new PPSR cars video series aimed at consumers considering buying a used car privately.

Both videos depict the same scenario: buying a car through private sale, and checking the PPSR on the spot via smartphone. One video is entitled 'Good to go' and shows a positive result, and the second, 'It's OK to walk away', shows that the PPSR can give an immediate alert if the car has a security interest or has been reported as stolen or written-off.

These videos follow on from the release of the quick motor vehicle search brochure and other videos—all available on the PPSR website.

PPS Leases Amendment Act commencement

The Personal Property Securities Amendment (PPS Leases) Act commenced on 20 May 2017. The minimum duration of a PPS lease has been extended from more than one year, to more than two years. Leases of an indefinite term will not be deemed to be PPS leases unless and until they run for a period of more than two years.

Leases and bailments that were entered into on or after 20 May 2017 will be subject to the new PPS lease definition, however the change does not affect agreements entered into prior to 20 May 2017.

This change may affect businesses that hire, rent or lease out goods.

More information is available on the PPSR website (www.ppsr.gov.au).

Payments for Official Trustee remuneration and expenses

AFSA recently upgraded our internal systems. We introduced a new internal 'dividends, expenses and payments' module that helps us better manage receipting, proofs of debts, expenditure commitments and payments, asset reconciliation (gross up) and calculations for Official Trustee fees and dividends.

This initiative delivers quicker dividend payments, an end-to-end case management system, removal of manual processes and increased trust accounting compliance.

You may have noticed that the bank account and reference number currently listed on our invoices, raised to reimburse the Official Trustee remuneration and expenses, have changed. Please use the replacement invoices from AFSA payable to the Official Trustee. The Payment Advice attached to the invoice will include the new reference numbers and bank details. Each estate will have a unique Payment Advice so it can be reconciled against the estate and invoice.

These new details will relate to that invoice type only.

If you need more information, please email us at stakeholders@afsa.gov.au.

New client phone survey

AFSA is focused on making it as easy as possible for our clients to interact with AFSA across all of our service delivery channels. To help us to achieve this, we need feedback from our clients.

On 1 July 2017, AFSA launched a new phone survey to better understand what our clients think of our services. When clients call, they will be asked to answer three short questions via an automated telephone service:

- How satisfied they are with our service.
- If we answered their questions in the first instance.
- How much effort is required to engage with us and our processes?

Feedback on AFSA's new website

AFSA's new website, launched in November last year, provides users with the opportunity to provide feedback on the content that they view. In the last six months, AFSA has received more than 6,000 pieces of feedback from the website—which equates to about 29 users selecting 'Yes' or 'No' to the question 'Was this information helpful?' every day.

Out of all the feedback we have received, 82% said 'Yes' (the information was helpful). This is a great result, but one we want to continue to strengthen. We're focusing on the website content that users have said wasn't helpful and we're reviewing that to improve it to better meet user needs.

GovHack 2017

AFSA is pleased to once again be a National Government agency sponsor for GovHack 2017—an event that draws people together to innovate with Open Government Data.

Governments collect and publish enormous amounts of data, and GovHack is an event to draw together people from government, industry, academia and the general public to mashup, reuse, and remix this data in new and interesting ways.

Participants—consisting of entrepreneurs, developers, designers, digital media creators, artists, storytellers, researchers and open data enthusiasts—trove through official data sets to find new ideas or ways to reuse the data to win prizes in various categories.

AFSA will again be providing PPSR data on used cars and we help out by having staff volunteers participate in local events.

Recent statistical releases

On 3 May 2017, AFSA released the personal insolvency activity statistics for the March quarter 2017. There were 7,900 new personal insolvencies in the March quarter 2017. This is an increase of 10.8% compared to the March quarter 2016. All states and territories shared in this rise.

Western Australia led the increase, reaching a record high of 928 personal insolvencies in the March 2017 quarter, after a year-on-year increase of 197 personal insolvencies (26.9%).

By type of personal insolvency:

- bankruptcies increased by 2.5%
- debt agreements increased by 20.8%
- personal insolvency agreements increased by 139.5%.

Debt agreements continue to increase by number and proportion of total insolvencies. This type reached a record high of 3,584 in the March quarter 2017 and increased to 45.4% of total personal insolvencies from 41.6% the previous year. Debt agreements reached record highs in Victoria, Queensland, South Australia and Western Australia in the March quarter 2017, and increased in all other states and territories.

In the March quarter 2017, 16.5% of debtors entered a business related personal insolvency. This is an increase from 16.1% in the March quarter 2016.

In the March quarter 2017:

- economic conditions (392 debtors) was the most common business related cause
- excessive use of credit (2,387 debtors) was the most common non-business related cause.

On 24 May 2017, AFSA released the regional personal insolvency statistics for the March quarter 2017 and on 30 May 2017, AFSA released the Personal Property Securities Register statistics for the March quarter 2017. Full details are available on our website.

Peter Edwards
Acting Chief Executive and Inspector-General in Bankruptcy
Acting Registrar, Personal Property Securities

ILRA update

AFSA's *Insolvency Law Reform Act 2016* (ILRA) webpage has added the following article to assist with identifying provisions that have commenced in the 1 March 2017 tranche and those that will commence on 1 September 2017:

Commencement of the ILRA provisions

The ILRA makes a number of amendments to the *Bankruptcy Act 1966* (the Act), including the insertion of a new Schedule 2 to the Act, known as the Insolvency Practice Schedule (Bankruptcy). The ILRA also makes consequential amendments to other provisions of the Act, including repeal of some provisions. The amendments contained in the ILRA commence in two tranches:

Tranche 1 commenced on 1 March 2017 and includes arts 1, 2 and 4 of the Insolvency Practice Schedule (Bankruptcy), comprising:

- Division 10—Introduction
- Division 15—Register of trustees
- Division 20—Registering trustees
- Division 25—Insurance
- Division 30—Annual trustee returns
- Division 35—Notice requirements
- Division 40—Disciplinary and other action
- Division 45—Court oversight of registered trustees
- Division 50—Committees (registration and disciplinary)
- Division 95—Introduction (to Part 4)
- Division 96—Administrative review
- Division 100—Other matters
- Division 105—The Insolvency Practice Rules.

Tranche 2 commences on 1 September 2017 and includes Part 3 of the Insolvency Practice Schedule (Bankruptcy), comprising:

- Division 55—Introduction (to Part 3)
- Division 60—Remuneration and other benefits received by the trustee
- Division 65—Funds handling
- Division 70—Information
- Division 75—Meetings of creditors
- Division 80—Committees of inspection
- Division 85—Directions by creditors
- Division 90—Review of the administration of a regulated debtor's estate

The Insolvency Law Reform (Transitional Provisions) Regulation 2016 is the legislative instrument that delays—until 1 September 2017—the commencement of the provisions of the Insolvency Practice Schedule (Bankruptcy) in tranche 2. It also delays the commencement of a number of consequential amendments to the Bankruptcy Act.

The consolidated versions of the Bankruptcy Act available on websites such as the Federal Register of Legislation and the Australasian Legal Information Institute (AustLII), are presented as if all of the amendments made by the ILRA took effect on 1 March 2017. This is because the delayed commencement was effected by way of Regulation, rather than an amendment to the ILRA itself. Despite the consolidated versions of the Bankruptcy Act, the commencement of the ILRA amendments is as set out above.

The Insolvency Practice Rules (Bankruptcy) 2016 (the Rules) underpin the provisions of the Insolvency Practice Schedule (Bankruptcy). Those Rules that relate to Divisions of the Insolvency Practice Schedule (Bankruptcy) in tranche 2 do not commence until 1 September 2017.

Dave Maher, Senior Legal Officer
Legal and Governance

ILRA: notice requirements

The *Insolvency Law Reform Act 2016* (ILRA) imposes a range of new notification requirements for both personal and corporate insolvency practitioners. This post considers the scope of Div 35 of the Insolvency Practice Schedule and notes its retrospective operation.

The Insolvency Practice Schedules (IPS) inserted into the *Bankruptcy Act 1966* (the BA) and the *Corporations Act 2001* (the CA) impose a range of new disclosure obligations on insolvency practitioners. Some of these requirements, such as the obligation to respond to creditor requests for information under Division 70, do not commence until 1 September 2017.

Division 70 (in both personal and corporate) also creates a new periodic reporting obligation in the form of the 'annual administration return' for particular appointments, although these provisions do not commence until 1 September 2017. These are in addition to the annual trustee return and annual liquidator return that are required under IPS Div 30, which commenced on 1 March 2017.

This note is concerned with the new notice requirements under IPS Div 35.

IPS Div 35 has a two-year retrospective operation

Division 35 sits in Part 2 of the IPS and so it commenced on 1 March 2017. However, practitioners need to be aware that the transitional provisions in both the BA and the CA state that the notification requirements under IPS s35-1 apply to events that occurred ***within two-years before 1 March 2017*** that would have fallen within the list in s35-1, and that the practitioner has not yet notified the Australian Securities and Investments Commission (ASIC) (for corporate matters) or the Inspector-General in Bankruptcy (I-G) (for personal appointments). This is set out in CA s1562 and (for bankruptcy) in the ILRA Sch 1 item 114 (this sits in Part 3 Div 2 of Sch 1, which is outside of the IPS contained in Sch 1 Part 1).

Where a practitioner was not aware (and could not have been reasonably aware) of the matters within IPS s35-1 that arose up to two-years before 1 March 2017, then they have one month to lodge notice once they ought reasonably to have been aware of the matter. It is an offence to recklessly or intentionally fail to lodge notice in respect of s35-1 matters.

Scope of IPS Div 35

IPS s35-1 is similar in both personal and corporate insolvency. The bankruptcy provision applies to all registered trustees and the corporate provision applies to all registered liquidators. Note that this is broader than the concept of a 'trustee of a regulated debtor's estate' in bankruptcy (see IPS (Bankruptcy) s5-20) and an 'external administrator' in corporate insolvency (see IPS (Corporations) s5-20). An intentional or reckless failure to comply with s35-1 is an offence (s35-1(2)). IPS s35-1(1) requires notice to either ASIC or the Inspector-General in Bankruptcy (I-G) where the practitioner:

- becomes an insolvent under administration
- is served a bankruptcy notice as a debtor, including under a corresponding law of an external territory or foreign country
- is convicted of an offence involving fraud or dishonesty
- is disqualified from managing corporations under either the Corporations Act or under the corresponding law of an external territory or foreign country
- ceases to have adequate professional indemnity or fidelity insurance or
- a show cause notice under IPS s40-40 has been issued to a registered trustee in their capacity as a liquidator or to a liquidator in their capacity as a registered trustee or their registration in cancelled in that capacity.

ASIC states in its recently released RG 258, that the requirement to notify under s35-1 cannot be complied with merely by including the information in your annual return even though both notices may contain similar information: RG258.104.

IPS s35-5 also requires a registered trustee or registered liquidator to give notice of anything in their annual returns (there are annual returns both for the practitioner and in respect of each particular matter) becomes inaccurate in a material particular. There are also several categories of 'prescribed events' that also require notice under IPS s35-5 and Insolvency Practice Rules s35-5, where the practitioner:

- ceases to practice
- changes their name or their firm changes their name or
- the address where they practice changes.

Practitioners have five business days to lodge notice for the s35-1 matters and 10 business days for the s35-10 matters. These time frames start once the registered trustee or registered liquidator 'could reasonably be expected to be aware that the event has occurred'.

Both ASIC and the I-G can direct a liquidator (or trustee in the I-G's case) to comply with their obligations under Div 35 (IPS ss40-5, 40-10). A failure to comply with such a direction can then lead to a direction from ASIC or the I-G not to accept further appointments and, ultimately, to a show cause notice under IPS s40-40 and a disciplinary committee being convened under IPS Part 2 Div 40.

While the new information request provisions (IPS Div 70) don't start until 1 September 2017, insolvency practitioners need to be aware of the extent of their notification obligations under IPS Div 35 now.

Jason Harris, Associate Professor
Faculty of Law UTS

[Article adapted from a blogpost at https://australianinsolvencylaw.com published by the author on 10 March 2017]

Official Trustee transfer notification period

The Official Trustee (OT) transfers administration of bankrupt estates to registered trustees using the procedure set out in s181A of the *Bankruptcy Act 1966*. Subsection 181A(2) requires notice to be sent to creditors by the current trustee nominating another trustee to become the trustee of the estate.

Pursuant to s181A(3), the notice must specify a date (the 'specified date') at least 10 days after the notice is given from when it is proposed the new trustee will be appointed.

Creditors wishing to object to the appointment—without a meeting being held—must do so at least two days before the specified date. To accommodate changes to Australia Post delivery times and to ensure appropriate notice is given, the OT has commenced allowing 21 days from the date of the notification as standard practice and 15 days in circumstances with some urgency, wherein all creditors have been notified electronically and/or via express post.

Jason Ball, Assistant Director
Insolvency and Trustee Services

New AFSA process for Official Receiver notices

In September 2016, AFSA rolled out functionality for bankruptcy trustees to apply for the Official Receiver notices (ORN) through the AFSA online services portal. These changes were communicated to trustees by AFSA's communications team, and published in the December PIR.

To date, the uptake and the feedback from the trustees has been positive, with users benefitting from:

- a simple and intuitive interface that is accessible from our website
- quicker turnaround times
- eliminating the need to maintain the latest notice templates for each notice type (except the section 139ZL notice template).

From 1 July 2017 we will only accept ORN applications via the online services portal

To assist in organising access for your staff to the portal, see the 'AFSA online services guide—authorise an employee user to lodge and manage Official Receiver forms [PDF]'.

Our next enhancement of the online ORN functionality will be to integrate this with our payment gateway so that you are able to complete the entire process through the single interface. We will advise once that program of work is scheduled. In the meantime, if you have a credit account with AFSA you can include an authority to charge your account with each application that you make.

For further information, please contact our Official Receiver Notices team at OR.Notices@afsa.gov.au.

Joyce Fu, Acting Assistant Director
Insolvency and Trustee Services

2016–17 annual estate return

The next annual estate return (AER) deadline for 2016-17 is approaching and practitioners are reminded of their obligation to lodge a completed AER and pay the applicable realisation and interest charge by 4 August 2017.

Based on feedback received by AFSA last year, work has been undertaken to improve the material available on the AFSA website, in particular the frequently asked questions (FAQs), so that practitioners can more readily access the information and solutions needed in order to fulfil their obligation to file AERs.

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

As a reminder, AER online includes the following features:

- AER online is available to all registered and controlling trustees and debt agreement administrators, with AER data able to be updated and lodged at any time during the year.
- Practitioners are able to 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 additional, streamlined payment options. The AFSA payment advice from AER online is unique to each practitioner. You can still make payments by cheque, but they must be sent to the new address as detailed on your AFSA payment advice. EFT payments must use the new account details as detailed on your AFSA payment advice (BSB and account numbers have changed and are unique to each practitioner)

If you have any queries or need assistance in completing your AER and making payments, we strongly recommend that you start by referencing:

- 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
- the AER frequently asked questions (FAQ) page – AER FAQs.

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 realisation and interest charges.

If after consulting these reference materials, you are unable to resolve an issue, you can contact us for assistance by lodging an AER support form or an incident report form. Please submit your queries through these online forms rather than calling or emailing us, as this will allow us to properly manage and monitor your enquiry. We will contact you within two days from the receipt of your online form.

A practitioner has an obligation to lodge AERs and pay realisations and interest charge by 4 August, even where enquiries have been made with AFSA, and a response is yet to be provided. Consequently, practitioners should commence the process of lodging AERs, and payment of, as soon as possible to ensure there is adequate time to comply with these obligations.

Charles Smith, Director
Regulation and Enforcement

AFSA Regulation introduces national operating model

AFSA introduced a new national operating model to replace its regional approach to regulating personal insolvency practitioners.

Up to 30 June 2017, AFSA regulated practitioners based on their location with:

- Qld/WA/NT (North-West region) practitioners regulated by AFSA Brisbane and Perth staff
- NSW/ACT (Central region) practitioners regulated by AFSA Sydney staff
- Vic/Tas/SA (Southern region) practitioners regulated by AFSA Melbourne staff.

As of 1 July 2017, AFSA no longer regulates practitioners according to operating region, but is nationally focussed.

The majority of regulatory work will be funnelled through a national work group and allocated to a member of AFSA's regulatory staff. Such work will then be monitored from a national perspective with a particular focus on consistent regulatory action. In practice, this will mean that in the course of, say, a complaint matter or Inspector-General review work, you may be dealing with an AFSA Regulation staff member that you have not dealt with before.

AFSA will continue to operate as a risk-based regulator and, to this end, where possible we will inspect practitioners by remote desktop or e-Inspection to avoid the cost of travel and the regulatory burden of an on-site visit. Where inspections take place at a practitioner's office, these will continue to be done by AFSA staff usually located in the same city or region as the practitioner.

We are confident that introducing this new model will provide greater consistency in decision making in all aspects of regulatory work.

AFSA welcomes any feedback you may have about the model.

Paul Shaw, National Manager
Regulation and Enforcement

New guide for people in business

In April 2017, AFSA, the Australian Securities and Investments Commission (ASIC) and the Australian Restructuring and Insolvency Turnaround Association (ARITA) jointly released a guide for people in business.

The new guide explains some of the common pitfalls when individuals are running businesses that may be financially vulnerable, and where that may have an impact on them personally.

This guide will assist people who may be both a director of a company and individually liable, and provides a clear path for people to understand their rights and responsibilities in the event of a bankruptcy and or liquidation.

AFSA, ASIC and ARITA worked together to develop the new guide. ASIC is responsible for Australia's corporate insolvency system and AFSA is responsible for the oversight of Australia's insolvency systems for individuals. Together with ARITA, the peak professional body for insolvency practitioners in Australia, the guide has drawn on the expertise of each organisation.

The guide is titled 'Personal bankruptcy and liquidation of a company' and is available on our website.

Paul Shaw, National Manager
Regulation and Enforcement

AFSA releases new video podcast on debt agreement advertising

We have released a new video podcast to provide guidance for insolvency practitioners and AFSA stakeholders in relation to advertising of debt agreements.

In this podcast, we provide a comprehensive overview of the revised Inspector-General Practice Guideline (IGPG) 1: Guidelines relating to advertising and marketing of debt agreements.

The changes made to IGPG 1 in 2016 were in response to AFSA's concerns about regular monitoring, investigation of complaints and tip-offs from stakeholders.

Having reviewed and considered the feedback received, we have made several changes to broaden, reorder and simplify the content within the guideline, to ensure that it is more accessible to readers.

We trust you find this new video resource helpful.

Tim Cole, Director Operations and Strategy
Regulation and Enforcement

Australian Government
Australian Taxation Office

ATO update

Request for documents and self-service

Insolvency practitioners can request copies of documents that we hold for their appointments via the Business Portal, to help them administer an insolvent estate. The Business Portal is your gateway to our online services for business. It is easy and convenient to access and allows practitioners to conduct transactions with us in a secure online environment.

You can send a message using the secure messaging function via the 'mail' option of the Business Portal. Ensure that you select the 'request for documents' subject heading. We will reply via the portal and attach any documents as a PDF file.

It should be noted that while making a request under the *Freedom of Information Act 1982* (FOI Act) might also yield similar information; the FOI process involves a number of additional requirements, which makes it cumbersome for the purposes of efficient administration of an insolvent estate.

Unfair preference claims

Please ensure you complete the Bankruptcy preference payment claim form if you are a trustee making a claim against the Commissioner of Taxation for payments believed to be preference payments in accordance with section 122 of the *Bankruptcy Act 1966*.

You can send the form and all attachments using the secure messaging function via the 'mail' option of the Business Portal. Ensure that you select the 'preferences and indemnities; subject heading.

Education visits at insolvency firms

We offer a tailored service and regularly meet with practitioners (via telephone and in person) to support the transition to our online products. We present information on AUSKey, Access Manager, Business Portal, and secure messaging. These self-service tools provide insolvency practitioners with greater control over their appointments.

Our education visits have proven to be very effective. Practitioners have found these sessions to be very informative in conjunction with our ongoing support.

More information

If you would like to find out more about using the Business Portal, education visits, electronic payments or the SGC form, please send a request with your contact details to InsolvencyPractitionerServices@ato.gov.au

For general information, refer to the insolvency practitioners section on ato.gov.au/insolvency.

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

BISSON (NSW): 18 month good behaviour bond for offences against the Criminal Code

Mr Jeffrey Bisson of Thornton, New South Wales, was sentenced on 1 June 2017 after pleading guilty to two offences of producing false or misleading documents to his bankruptcy trustee.

Mr Bisson filed for voluntary bankruptcy in September 2012.

On 9 June 2014, Mr Bisson received an early termination payout of over $140,000 from his former employer.

Mr Bisson provided a PAYG Payment Summary for the financial year ending 30 June 2014 to his trustee knowing that it was false or misleading as it hid the payout.

He also provided a bank statement in a format that he knew was misleading, in that it did not show the deposit of the payout into his bank account.

Mr Bisson entered a plea of guilty at the Maitland Local Court.

The Court found the offences proven and convicted Mr Bisson before releasing him on a $1,500 good behaviour bond for eighteen months.

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

BENSON (Vic): Two years good behaviour bond for offences against the Bankruptcy Act

Ms Alison Jane Benson of Upper Ferntree Gully, Victoria, was sentenced on 4 May 2017 after pleading guilty to offences of removing part of her property to the value of $20 or more, and signing a declaration contained in her statement of affairs that she knew to be false.

Ms Benson filed for voluntary bankruptcy on 27 February 2014.

On 25 February 2014, Ms Benson transferred $23,000 from her bank account via online banking to an account in her daughters' name. Ms Benson was a signatory to this account and the only person to have internet banking access to all the accounts.

Ms Benson's statement of affairs was signed on 24 February 2014 in which she declared that she had one bank account with a balance of $900. Ms Benson actually had four bank accounts with the same bank, which held a total of $26,110 as at 24 February 2014.

Between 28 February 2014 and 5 March 2014, Ms Benson transferred a total of $19,200 from her daughter's bank account to her own.

On 4 May 2017, Ms Benson entered a plea of guilty at the Ringwood Magistrates Court.

Magistrate Crowe found the offences proven, commenting that she took into account Ms Benson's character and antecedents, citing that the offending was at the lower end of the scale for this type of offending.

Ms Benson was released on a $2,000 good behaviour bond for two years without conviction.

Ms Benson was ordered to pay disbursement costs of $178.90.

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

CEBO (SA): Bankrupt convicted for obtaining goods and services without informing that she is an undischarged bankrupt

Bankrupt Adelaide woman, 49-year-old Jolanta Teresa Cebo, was convicted on 7 April 2017 for obtaining services from a law firm between April and October 2015 for amounts aggregating $3,000.00 or more, without first informing the law firm that she was an undischarged bankrupt.

Ms Cebo pleaded guilty to the offence at the Adelaide Magistrates Court. She was released on an 18-month good behaviour bond and ordered to pay security in the amount of $1,500.

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

KOL (Vic): Former bankrupt convicted for travelling overseas without trustee's permission and making false statement

Mr Serbulent (Bill) Kol was convicted on 30 March 2017 of charges of travelling overseas without the written permission of his bankruptcy trustee, and providing incomplete information in his income questionnaire.

Mr Kol became bankrupt on 9 March 2010 and was discharged by law on 5 December 2014. During his bankruptcy period, Mr Kol travelled to Turkey for a two-week holiday, and failed to obtain the written permission from his trustee to do so.

During his bankruptcy period, Mr Kol was required to complete income questionnaires to his trustee detailing how much money he had received during a contribution assessment period. Mr Kol understated his income earned and as a result, the trustee based the compulsory income contributions to his bankrupt estate on the understated income instead of the true amount earned by him.

Mr Kol pleaded not guilty and after a contested hearing was found guilty on both counts. A second charge of omitting a material particular from a statement relating to his examinable affairs was dismissed. Magistrate Metcalf convicted and fined Mr Kol a total of $3,000 and ordered he pay disbursement costs of $216.

Mr Kol had previously been prosecuted in March 2011 for failing to file a statement of affairs and four counts of travelling overseas without written permission of his trustee.

The matter was prosecuted in the Melbourne Magistrates Court by the Office of the Commonwealth Director of Public Prosecutions.

ALLAN (NSW): Bankrupt pharmacist found guilty of an offence under the Bankruptcy Act

Mr Douglas John Allan of Orange, New South Wales, was convicted on 21 March 2017 for transferring his interest in a property with intent to defraud his creditors.

Mr Allan became bankrupt on 8 February 2013 by order of the Federal Magistrates Court.

On 13 August 2012, Mr Allan had transferred his half-interest in a property in Nashdale NSW to his former spouse. The market value of the property at the time was between $1,000,000 and $1,200,000. The transfer was made with the intention to secure the property for the benefit of his former spouse, and effectively defraud his creditor.

Mr Allan pleaded guilty to the offence at the Sydney Downing Centre Local Court.

He was convicted by Magistrate Swain and released on a two-year good behaviour bond.

The Magistrate commented that the seriousness of the offence and general deterrence were considerations in sentencing.

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

Paul Shaw, National Manager
Regulation and Enforcement

Rambaldi (Trustee) v Commissioner of Taxation, in the matter of Alex (Bankrupt) [2017] FCA 567 (25 May 2017) (North J)

Summary

Loan monies from a third party to the bankrupt paid subject to a loan agreement established with the specific purpose to discharge the debt owed by the bankrupt to the Commissioner of Taxation (Commissioner) are not property of the bankrupt estate and do not vest in the trustee.

Background

On 15 November 2013, Ms Alex failed to comply with a bankruptcy notice issued by the Deputy Commissioner of Taxation and thereby committed an act of bankruptcy.

On 18 March 2014, the Deputy Commissioner of Taxation presented a creditors' petition seeking a sequestration order against the estate of Ms Alex.

On 1 June 2014, Quality Australia Investments Pty Ltd (QAI) entered into a loan agreement with Ms Alex and City Nominees Pty Ltd ATF The City No. 1 Trust (City Nominees) by which QAI agreed to lend Ms Alex $131,000.

The loan agreement specifically set out the purpose for which the loan would be provided to Ms Alex, namely that the borrower must only use the loan for the purpose presented to the lender, that is, the payment of the income tax debt relating to Ms Alex owed to the Australian Taxation Office and payment to her legal representative.

On 1 June 2014, Ms Alex signed an authority to pay authorising and directing QAI to pay the sum of $126,000 to the Deputy Commissioner of Taxation.

On or about 7 July 2014, the Deputy Commissioner of Taxation received a bank cheque issued by the Commonwealth Bank of Australia for $118,071.62, which was applied in payment of an income tax that was then owed by Ms Alex.

On 8 December 2014, a sequestration order was made against the estate of Ms Alex and the trustees were appointed.

Decision

North J dismissed the trustee's application with costs on the basis that the loan funds paid by QAI were held on a Quistclose trust and did not become property of the bankrupt estate.

His Honour commented that the agreement between QAI and the bankrupt was in writing and the intention of the parties was disclosed, where the borrower agreed to use the loan money for one purpose only, namely, payment to the Commissioner and to the bankrupt's solicitors. The transaction proceeded in accordance with the expressed intention. The substance of the transaction was identical to the transaction in the Quistclose case itself, excepting that in Quistclose the loan money was paid into the bank account of the payee whereas here the funds went directly by cheque from QAI to the Commissioner.

The term Quistclose trust originates from the decision of *Barclays Bank Limited v Quistclose Investments Limited* [1970] AC 567 in which Lord Wilberforce stated that funds advanced for the payment of a person's creditors by a third person, gives rise to a primary trust in favour of creditors and a secondary trust in favour of the lender, if the primary trust fails. Thus, money advanced for a specific purpose does not become part of the bankrupt's estate. These arrangements, said Lord Wilberforce, have been recognised in case law since 1819.

Jody McTaggart, Senior Inspector
Regulation and Enforcement

Kiem Dang Investment Pty Ltd v Mansfield & Anor [2017] FCCA 725 (24 May 2017) (Altobelli J)

Background

At the trustee's request, the Official Receiver (the OR) had issued a notice under s139ZQ of the *Bankruptcy Act 1966* (the Act) on the Kiem Dang Investment Pty Ltd (KDI) seeking recovery of alleged preference payments made by the bankrupt. KDI argued that the decision to issue the notice, and then not to revoke it, was an abuse of process by the OR. KDI sought relief under the *Administrative Decisions (Judicial Review)* Act 1977 (ADJRA) contending that the decision to issue the notice, and then not to revoke the same, were decisions covered by that legislation.

The OR applied to the Court to refuse KDI's request for review under the ADJRA and, in effect, dismiss the part of the claim based on abuse of process.

The OR relied on the Court's power under s10(2)(b)(i) and (ii) of the ADJRA, which provide:

> *b) the Federal Court or the Federal Circuit Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason:*
>
> *i. that the applicant has sought a review by the court, or by another court, of that decision, conduct or failure otherwise than under this Act; or*
>
> *ii. that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.*

Legal issue/s

The OR's contention was that the relief available under the Act made 'adequate provision' for the purposes of s10(2)(b)(ii). The OR submitted that the combined effect of s30 (given the court 'full power to decide all questions, whether of law or fact, in any case of bankruptcy…') and 139ZS (allowing the Court to set aside a s139ZQ notice on application of the recipient or other affected person) of the Act completely 'swamp any ADJRA rights available to KDI', and thus more than adequate provision is available to KDI under the Act.

The OR, and the trustee, both submitted that the remedies available to KDI under the Act were more than adequate and that, in effect, as a matter of policy, challenges to 139ZQ notices should be dealt with under *that* legislation, as bankruptcy law is a specialised jurisdiction in which the Courts have exercised a developed supervisory jurisdiction. They both submitted that the potential application of the ADJRA adds nothing to the width of powers available to the Court under the Act and, indeed, under common law.

The OR further argued that in circumstances where a statutory right of appeal is granted (s139ZS of the Act) such provision should be treated by the Courts as the *exclusive* remedy for any breach of natural justice. The OR relied in this regard on the decision of the High Court of Australia in *Twist v Randwick Municipal Council* (1976) 136 CLR 106. Pursuant to this principle of statutory interpretation, therefore, the statutory scheme created by ss139ZQ—139ZT of the Act should be treated as the exclusive remedy available in this case, thus excluding the ADJRA remedy.

KDI's main submission was that the existence of 'adequate provision' for the purposes of s10(2)(b)(ii) had not been established.

Decision

The Court found that the Act made adequate provision under the Act and concluded that the discretion should be exercised in favour of the OR against KDI. In refusing to grant relief under the ADJRA, the Court was mindful not just of the interest of the parties but of the broader public interest in the bankruptcy jurisdiction.

Altobelli J considered it was not appropriate to seek both a judicial review and a statutory appeal.

The Court therefore dismissed KDI's abuse of process claim to the extent that it relied on: the ADJRA (given its ruling under s10(2)(b)(ii)) and any other basis (given it had not been particularised).

Amanda Pearce, Senior Legal Officer
Legal and Governance

Talacko v Bennett [2017] HCA 15 (3 May 2017) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ)

Background

In March 1992, several properties in central Prague that had been seized by and vested in the state of Czechoslovakia after World War II were restored to Jan Emil (the son of the owners of the properties) who resided in Melbourne.

In 1998, Mr Emil's sister and the children of his deceased brother sought equitable relief in the Supreme Court of Victoria on the basis that it had been agreed that the three siblings would share equally in the benefit of the restored properties.

In 2009, Kyrou J held that the plaintiffs in the application (the respondents in the High Court) were entitled to equitable compensation pursuant to the terms of a settlement agreement reached in 2001.

On 4 November 2011, the plaintiffs commenced proceedings in the courts of the Czech Republic to enforce the orders of Kyrou J for the payment of equitable compensation. Also, upon the request of the plaintiffs, the Supreme Court of Victoria issued a document entitled 'Certificate of finality of judgments and orders' (the Certificate) in reliance on s15 of the *Foreign Judgments Act 1991* (the FJA), which was filed in the execution proceeding.

On 7 November 2011, Mr Emil was made bankrupt by order of North J of the Federal Court of Australia. In 2014, Mr Emil's widow sought to have the Certificate set aside.

In Australia, there is a statutory regime for the recognition and enforcement of certain foreign judgments under the FJA. The FJA provides, by way of registration, for the enforcement of judgments rendered by the superior courts (and some specified inferior courts) of those countries listed in the Foreign Judgments Regulations 1992.

Legal issue/s

The issue before the High Court was the proper construction of the phrase 'any stay of enforcement of the judgment' in s15(2). Specifically, the question was whether the prevention of the execution of a judgment brought about by s58(3) of the *Bankruptcy Act 1966* (the Act) is a 'stay of enforcement' within the meaning of s15(2).

Decision

The High Court unanimously decided that a judgment creditor cannot apply for a certificate to effect enforcement overseas in circumstances where the judgment debtor is bankrupt. The High Court held that the Court of Appeal of the Supreme Court of Victoria erred in concluding that s15(2) of the FJA did not prevent the issue of a certificate under s15(1) of that Act, even though the judgment in question could not be enforced by execution by reason of s58(3) of the Act.

Section 58 of the Act vests the bankrupt's property in the bankruptcy trustee and prevents creditors from seeking to enforce payment of a provable debt. It relevantly provides:

(1) Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and…

(3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or

(b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

The Court stated that the purpose of s15(2) is to prevent the possibility of a foreign court acting upon a certificate to allow the execution of a judgment that would not be enforceable by execution under Australian law.

It was also held that excluding the operation of s58(3) from the reach of s15(2) would serve to undermine an essential feature of the Bankruptcy Act because it would enable a judgment creditor to take action for the purpose of obtaining payment of a debt due to them, thereby obtaining an unfair advantage over other creditors.

Amanda Pearce, Senior Legal Officer
Legal and Governance

Low v Barnet (Trustee) [2017] FCAFC 60 (13 Apr 2017) (Flick, Jagot & Gleeson JJ)

In April 2016, our article published in the PIR newsletter (Volume 14, Issue 1) reported on a decision of Foster J in *Low v Barnett (Trustee); in the matter of Mathai* (2015) FCA 1386; a case in which the only creditor of a bankrupt estate (Ms Low) sought to recover from the bankrupt estate what she regarded as a 'just and equitable' amount as a reward for the assistance (both personal and financial); which she had provided to the trustee for the purposes of recovery proceedings.

Ms Low was unsuccessful at first instance. She was not able to satisfy Foster J that the phrase in section 109(10) of the Bankruptcy Act 'over others' extended to conferring an advantage 'over all others, including the bankrupt'.

Ms Low appealed to the Full Federal Court and judgment was delivered on 13 April 2017.

Background

The Bankrupt was made bankrupt on 18 May 2004. He was discharged from that bankruptcy on 21 April 2008. The trustee retained, as vested bankruptcy property, substantial cash as well as a piece of real estate in Victoria.

That property has been recovered in litigation taken by a former trustee of the estate against the bankrupt's son challenging certain pre-bankruptcy transfers of property. That litigation had been conducted with the benefit of funding and indemnities provided by Ms Low.

The total amount recovered in that litigation was sufficient to enable the repayment, in full, of all amounts advanced to the former trustee by Ms Low in connection with the litigation as well as the payment of all other costs and expenses incurred in the administration of the bankrupt estate (including trustee remuneration claims) and payment in full of the debt owed to Ms Low, plus interest.

In the ordinary course, the substantial surplus that remained in the trustee's hands would, ultimately, either revert to the bankrupt or be payable to the bankrupt's son.

Ms Low claimed the surplus pursuant to s109(10).

First Instance decision

Foster J rejected Ms Low's claim on two bases:

1. as a matter of statutory construction, section 109(10) was confined to circumstances in which there were competing creditors and not where there was only one creditor and

2. as a matter of discretion, the claim should be rejected.

Full Federal Court decision

The Full Federal Court dismissed the appeal.

Meaning of s109(10)

In so doing, the Full Court confirmed that the correct interpretation of the words 'over others' in section 109(10) is confined to mean 'over other creditors'. Amongst other reasons, the Full Court held that to construe the section otherwise would permit the use of the Act to punish the bankrupt. Punishment of the bankrupt is a purpose found nowhere in the Act and is in fact contrary to its object of allowing a discharge from future liability for existing debts, enabling debtors to start afresh.

Exercise of discretion

The Full Court also agreed with Foster J that, although the construction of s109(10) meant they did not have to decide the issue by exercising the discretion conferred by the section, if they were required to exercise that discretion they too would have rejected Ms Low's claim.

The Full Court's reasons for finding that a payment to Ms Low of more than her proven debt, interest and costs by way of an order under section 109(10), thereby giving her an 'advantage over' the bankrupt would not be 'just and equitable' were:

1. The only person who ever lodged a proof of debt was Ms Low. As such, the only likelihood always was (and remained) that she alone was to be the beneficiary of the risks she took. Accordingly, it must be inferred that she acted in her own interest at all times.
2. The purpose of section 109(10) cannot be to compensate a creditor for incurring costs in pursuing a debt that are not otherwise recoverable under the Bankruptcy Act.
3. It was not in dispute that Ms Low would obtain not only 100 per cent of the proven debt, but also interest and costs.
4. Ms Low was, and is, only an unsecured creditor of the bankrupt estate. It is not a purpose of the Bankruptcy Act to enable a creditor to make a profit out of bankruptcy, in return for 'investing funds' and 'taking risks'.
5. The exercise of discretion would be contrary to the purpose disclosed by section 107 of the Bankruptcy Act, which provides that a creditor is not entitled to receive, in respect of a provable debt, more than the amount of a debt and any interest payable to him or her under this Act.
6. the 'advantage' sought by Ms Low would neither be 'just and equitable' nor consistent with the legislative objective ensuring that the 'remainder' of the bankrupt's estate, after payment of all debts and expenses and any 'advantage' to be ordered, revert to the bankrupt.
7. The purpose of the Bankruptcy Act is not best served by construing section 109(10) in a manner which discourages a bankrupt from attempting to defraud creditors by exposing the entirety of the bankrupt estate to an order under that section.
8. Nothing in the scheme of the Bankruptcy Act indicates that a creditor has any right to obtain more than a proven debt plus interest and costs, let alone a windfall that is not quantified by reference to any 'risk assumed'.

Comment

While this case has a unique set of facts very rarely found in Bankruptcy cases—a solvent estate and a sole creditor determined to expend significant funds over two decades to overturn antecedent transactions—it does clarify the reach of section 109(10) (and the equivalent provision in section 564 of the Corporations Act).

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TressCox Lawyers*

*[*TressCox Lawyers acted for the trustee in the proceedings]*

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Personal Insolvency Regulator (PIR) editors

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