



Australian Government

Australian Financial Security Authority

AUSTRALIAN FINANCIAL SECURITY AUTHORITY PERSONAL INSOLVENCY REGULATOR

March 2017, Volume 15, Issue 1

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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, 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 paul.eric@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(1) Personal Insolvency Regulator.

INSPECTOR-GENERAL'S COLUMN

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Personal Insolvency Practitioner Compliance Report

In December 2016, AFSA released its fourth Personal Insolvency Practitioners Compliance Report (PIPCR). This specialised report details the performance of private personal insolvency practitioners and highlights significant regulatory and enforcement outcomes.

The PIPCR highlights that we are working effectively with Australia's 291 private personal insolvency practitioners, who have collectively administered in excess of \$569 million across more than 59,000 personal insolvency administrations in 2015–16.

Regulator Performance Framework

AFSA released its first self-assessment report under the Regulator Performance Framework (RPF) in December 2016. The framework allows us to report objectively on our efforts to administer regulation fairly, effectively and efficiently. Our self-assessment report requires validation from the Bankruptcy Regulation Consultative Forum and approval by the Attorney-General before publishing.

AFSA performed strongly against all six key performance indicators in the RPF for 2015–16. A copy of the self-assessment report is available on the AFSA website (www.afsa.gov.au/about-us/corporate-information/regulator-performance-framework).

Insolvency Law Reform Act

Stage one of the Insolvency Law Reform Act (ILRA) changes commenced on 1 March 2017. You can find information on the reforms along with useful practitioner resources on the AFSA website (go to www.afsa.gov.au and click on the Professionals tab at the top.)

Updated guidance materials including Inspector-General practice statements and directions together with new ILRA forms are now also available on the website.

Translated videos to better support CALD clients

AFSA has re-released five of our most popular videos in languages other than English. The videos, covering a range of topics on personal insolvency and the personal property securities system, are now available in Arabic, Farsi, Korean, Vietnamese, Cantonese and Mandarin.

The visual content of each video hasn't changed, but the voice-over has been translated and re-recorded for these videos:

- Unmanageable debt – compare your options
- Consequences of bankruptcy

- PPSR in a nutshell
- PPSR quick motor vehicle checks
- PPSR basic business uses.

The videos are now available on AFSA's YouTube page (look for the YouTube icon at the bottom of our homepage – www.afsa.gov.au).

Information on AFSA's other translated publications is available at: <https://www.afsa.gov.au/help-your-language>.

Untrustworthy advisers

AFSA is producing a short video to warn people of unregulated, unlicensed advisers who may target vulnerable people in times of financial crisis and pressure. This is being done as part of our strategic focus on independence and compliance with performance standards, outlined in our 2016–17 Compliance Program.

The video will be available shortly.

Statistics

On 17 January 2017, AFSA released the personal insolvency statistics for the December 2016 quarter. Total personal insolvencies increased by 0.9% in the December quarter 2016 compared to the December quarter 2015. This rise was driven by increases in Western Australia (26.2%), Australian Capital Territory (14.8%) and Queensland (0.7%).

On 31 January 2017, AFSA released the regional personal insolvency statistics for the December quarter 2016 and on 14 February 2017, AFSA released the personal property securities register statistics for the December 2016 quarter. Full details are available on our website.

We are always interested in feedback on our statistics. We invite you to provide your views on whether you think there are any gaps in our published socio-economic statistics (we currently report on age, gender, occupation, income and debts).

Are there any particular combinations of data that you would like to see—for example, where an insolvency is business related, would it be helpful to have additional detail, such as the gender and income of the bankrupt?

Are there any hot topics that you've identified or are there any other areas where statistics might assist?

We can't guarantee that we will be able to deliver on any requests, but it would certainly help us to prioritise.

INSPECTOR-GENERAL'S COLUMN

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Signing of MOU

AFSA and ARITA recently signed a Memorandum of Understanding (MoU) to build on our existing positive and cooperative relationship. The MoU sets out a framework for AFSA and ARITA to assist each other in the exchange of relevant information, and co-operation in compliance, regulatory, education and training activities.

Thank you and farewell

This is my last column as Chief Executive and Inspector-General in Bankruptcy at AFSA. After eight years with AFSA, I am retiring on 30 April 2017.

My time at AFSA has been very rewarding and I am proud of how much we've grown and achieved. Of course there is always more to do and AFSA will continue to develop and take on new challenges.

Our stakeholders are very important to us and I thank you for your commitment and support.

Veronique Ingram PSM
Chief Executive and Inspector-General, AFSA

Insolvency Practice Rules (Bankruptcy) 2016 – key changes

The first tranches of the Insolvency Practice Rules (Bankruptcy) 2016 and the Insolvency Practice Rules (Corporations) 2016 came into force on 1 March 2017, with the remainder commencing on 1 September 2017.

The Bankruptcy and Corporations Rules provide mirror rules for the regulation of personal and corporate insolvency. The rules aim to align personal and corporate insolvency as much as possible to provide greater consistency, particularly for practitioners who work across both regimes.

Both sets of rules have undergone rigorous targeted consultation and public consultation throughout the drafting process. The submissions and discussions that came out of the consultation stage were instrumental to the development of the rules.

This article will discuss some of the key changes to the regulation of trustees, including the Bankruptcy Rules for:

- Establishing a register of trustees,
- Imposing industry-wide conditions,
- Simplifying the standards for registered trustees, and
- Requiring trustees to provide information to creditors, regulated debtors and committees of inspection, in certain circumstances.

Establishing a register of trustees

Section 15-1 of Schedule 2 to the *Bankruptcy Act 1966* provides that the Inspector-General in Bankruptcy must keep a “Register of Trustees” and that the Bankruptcy Rules will provide for what details are kept in the register and which parts of the register are publically available.

Rule 15-1 of the Bankruptcy Rules provides a list of the details to be included on the register including: name of registered trustee, place of practice, current conditions on registration etc. Of note, the rules provide that the register must include “particulars of any disciplinary action [other than a direction to lodge or give documents under section 40-5]”. This information must be made publically available.

Publically available information on disciplinary action taken against a trustee will provide greater transparency, improving community confidence in the regulation of trustees.

In the event that a party is found to be innocent, the outcome of the disciplinary action can be noted on the register.

Imposing industry-wide conditions

Section 20-35 of Schedule 2 to the Bankruptcy Act provides that the Bankruptcy Rules may impose industry-wide conditions.

Rule 20-5 of the Bankruptcy Rules currently provides for three conditions on registered trustees:

1. That the trustee undertake at least 40 hours of continuing professional education each year,
2. That at least 10 hours of that continuing professional education be verifiable, and
3. Where a trustee’s registration has been suspended, they must continue to maintain their insurance requirements for the suspension period.

This level of continuing professional education is consistent with the level required of practitioners that are members of accounting or legal professional bodies.

Simplifying the standards for registered trustees

Subsection 40-40(4) of Schedule 2 to the Bankruptcy Act allows the Bankruptcy Rules to prescribe standards applicable to registered trustees. Where a trustee fails to comply with these prescribed standards, the Inspector-General may give a show cause notice as per paragraph 40-40(1)(p) of Schedule 2 to the Bankruptcy Act.

Division 42 of the Bankruptcy Rules carries over elements of the professional standards from Schedule 4A to the Bankruptcy Regulations (which has also been repealed). The standards have been simplified and do not carry over standards that are redundant, overly prescriptive and/or no longer necessary.

The Insolvency Practice Schedule (Corporations) does not provide the same power to prescribe standards and there are no equivalent standards in the Corporations Rules. The rationale for this divergence is the differing regulatory requirements for personal insolvency practitioners and corporate insolvency practitioners. The minimum performance standards for trustees (including controlling trustees) will assist those practitioners who perform the role infrequently to understand what is expected of them.

The divergence also reflects the fact that regulated debtors and creditors in a personal insolvency may be less sophisticated than those involved in a corporate insolvency. As such, the expectations and standards placed on personal insolvency practitioners warrant greater transparency, certainty and consistency.

Requiring trustees to provide information, in certain circumstances

Sections 70-40, 70-45, 70-56 and 80-40 of Schedule 2 to the Bankruptcy Act provide for creditors, individual creditors, regulated debtors, and committees of inspection to request information from the trustee.

These provisions also provide that the Bankruptcy Rules may prescribe circumstances in which it is or is not reasonable for the trustee to comply with such requests.

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All requests for information are reasonable if they are not unreasonable as outlined in the relevant Bankruptcy Rules (sub-rules 70-10(2), 70-15(2), 70-17(2) and 80-15(2)). Unreasonable requests for information include requests where:

- Compliance with the request would prejudice someone's interests and that prejudice outweighs the benefits,
- Disclosure of the information would be in breach of confidence,
- The information is subject to legal professional privilege,
- There is insufficient property to comply with the request,
- The information has already been or will be provided within 20 business days, and
- The request is vexatious.

If the person(s) requesting the information agrees to bear the cost of complying with the request, certain unreasonable requests can be considered reasonable.

Why create rules?

Unlike amendments to the Act and Regulations, changes to the Bankruptcy Rules require the Attorney-General's approval rather than approval by the Governor-General or the passing of amendment legislation through Parliament. This allows greater flexibility for the Bankruptcy Rules to adapt to meet any future changes to the personal insolvency profession.

The Attorney-General's Department and the Australian Financial Security Authority welcome any feedback on the operation of the Insolvency Practice Rules (Bankruptcy) 2016 and any suggested improvements to the regime.

Wendy Hau
Acting Senior Legal Officer, Civil Law Unit
Commonwealth Attorney-General's Department

ARITA personal insolvency law reform training

The Australian Restructuring Insolvency and Turnaround Association (ARITA) will be offering training from Apr–Aug 2017 on changes to personal and corporate insolvency under the *Insolvency Law Reform Act 2016* (ILRA).

Of particular relevance for trustees will be the courses on:

- Personal insolvency administrations; and
- Dealing with creditors under the new law

Personal insolvency administrations

This course will cover changes under the ILRA (including Insolvency Practice Rules and transitional provisions), compare new and old requirements and highlight changes to procedure and practice for bankruptcies, controlling trusteeships and personal insolvency agreements.

Dealing with creditors under the new law

This course will cover both external administrations under the *Corporations Act 2001* and regulated debtors' estates under the *Bankruptcy Act 1966*, including:

- Creditors' rights to request meetings and information
- Creditors' rights to remove an external administrator or trustee
- Creditors' rights to direct an external administrator or trustee
- Mandatory reporting of appointment and likelihood of a dividend
- Remuneration reporting and approval
- Proposals without meetings
- Changes to creditors' meetings
- Committees of Inspection – appointment, meetings and powers

There are no prerequisites to attend the courses which are open to members and non-members.

More information about training dates, locations and enrolment is available on ARITA's website (www.arita.com.au/education/law-reform-training).

Kim Arnold, Policy and Education Director
Australian Restructuring Insolvency and Turnaround Association

Official Receiver changes practice for s77CA notices

The Official Receiver Notices area of AFSA have ceased their practice of prompting Registered Trustees to apply for notices under section 77CA of the *Bankruptcy Act 1966* where no Statement of Affairs (SoA) has been filed.

Trustees may still apply for a section 77CA notice at any time, provided that the SoA remains unfiled, and the current contact details of the bankrupt have been verified by the trustee's office.

We have changed our practice so as to give trustees more time to verify the contact details of each bankrupt, and to allow them more control over whether they choose to use the section 77CA notice tool to assist in the administration of their estates.

Applications can be submitted online through the specific Official Receiver Notices online login on the AFSA website.

Ravi-Inder Kaura, Acting Director
Insolvency and Trustee Services

Trustees realising Strata Title property

The 2016 inspection programme highlighted what appears to be two issues in how trustees are dealing with residential apartments particularly when the petitioning creditor is the owners corporation.

In one administration inspected, the owners corporation was the petitioning creditor. The solicitors who acted for the owners corporation subsequently acted for the registered trustee in the sale of the bankrupt's residential apartment.

The first issue – the trustee not complying with orders of the Federal Court fixing the Petitioning Creditor's costs

The costs of the owners corporation in taking bankruptcy proceedings were fixed by the Federal Court in the amount of \$5935.50.

However the trustee allowed the owners corporation to be paid \$9282.68 at settlement in respect to its costs in the Federal Court. This was \$3347.18 more than the amount fixed by the Court.

The trustee and his solicitors asserted that the entitlement to pay the excess costs was under section 80 of the *Strata Schemes Management Act 1996* (NSW) ("SSMA 1996").

The Inspector-General has considered the position and is of the view that:

1. The then entitlement to recover an unpaid levy contribution debt was under section 80 of the SSMA 1996. That section was a statutory cause of action vesting in the owners corporation to recover as "*a debt a contribution not paid at the end of one month after it becomes due and payable together with any interest payable and the expenses of the owners corporation incurred in recovering these amounts.*"
2. The NSW Court of Appeal decision *The Owners Strata Plan No. 36131 v Dimitriou 74NSWLR370* addresses the issue of the expenses of the owners corporation when recovering debts for unpaid owner contributions. "Expenses" of an owners corporation incurred in recovering contributions includes reasonable legal costs and disbursements, however they must be proved in order to obtain judgement for those amounts. Further the words "together with" in the section mean that any claim for legal expenses must be made in the same proceedings as the claim to recover unpaid contributions. The *Owners Strata Plan No. 36131 v Dimitriou 74NSWLR370* at 384 [43]-[45]; 401 [127]; 385 [47]; 401 [138]; 403 [143].
3. In other words it is clear from *Dimitriou* that to recover contributions (and associated legal expenses) as a debt an owners corporation must do so all at once and in the same proceeding (the section

80 debt). This debt may then found the issue of a Bankruptcy Notice under subsection 41(1): 40(1)(g) of the *Bankruptcy Act 1966* ("the Act").

4. Non-compliance with a bankruptcy notice may give rise to an act of bankruptcy. This in turn may found a creditor's petition and an entitlement to costs of that petition. The Federal Court (Bankruptcy) Rules 2016 at rule 13.01 and the Act at section 32 deal with the power of the Court to order costs. The costs of the proceedings under the creditor's petition are separate and distinct from the section 80 debt. This is made clear by section 51 of the Act which is in the following terms:

Subject to section 109 the prosecution of a creditors petition to and including the making of a sequestration order on the petition shall be at the expense of the creditor.
5. The fixed costs order in terms, limits the petitioning creditor's costs of the application that could be paid from the estate.
6. As an order of the Court, its legal effect does not depend on the subjective intention of any of the parties, their solicitors or the trustee appointed. It is to be ascertained from the language of the order in the context of the relevant rules of the Court: *NSW Insurance Ministerial Corporation v Anderson* (NSW Court of Appeal, unreported 14 June 1994) Gleeson CJ at p6.
7. In the context of the relevant rules the reference to costs in the orders means "*as between party and party*". That is, between the Owners Corporation as petitioning creditor (and applicant for the sequestration order) and the respondent to that application, the bankrupt.
8. Therefore the legal effect of a costs order fixing the costs of the petitioning creditor is binding on the creditor and the trustee.
9. The petitioning creditor cannot claim any sum in excess of the amount fixed for costs for the creditors petition and the trustee cannot pay any more than the amount so fixed.
10. Section 80 of the SSMA 1996 is not and could not be a vehicle for the recovery of any additional costs independently of the fixed costs order.

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Effect of the *Strata Scheme Management Act 2015 (NSW)*

11. The position is effectively the same under section 86 of the *Strata Schemes Management Act 2015* because of the similar effect of the section to section 80 by parity of reasoning with what is set out above. The 1996 act is now repealed and replaced by the new Act. The new provision does not materially change the Inspector-General's view.

Consequences where there is no fixed costs order made

12. In circumstances where costs are not fixed but ordered to be taxed, the position is the same. This is because once costs are taxed and a certificate issues that certificate has the effect of a Court order.

Consequences of excess costs payment

13. If a trustee has paid from the estate of a bankrupt excess costs (whether for the sale of a NSW property or any other property), he or she has done so contrary to the fixed costs order made by the Court and contrary to duties.
14. The trustee would have acted contrary to his or her duties as a trustee and as an officer of the Court by not acting in accordance with the costs order made. If a trustee has paid from the bankrupt estate excess costs, the trustee would have a duty to recover the excess costs for the benefit of the estate, and if unable to do so would be personally liable to make restitution to the estate.

The second issue - Trustees engaging the solicitor for the owners corporation to act on the conveyance at exorbitant cost

The matter inspected raised another important issue. The legal costs for the conveyance were in the order of \$9,000 (a standard conveyance, with no court applications). The Inspector-General is concerned that there may be other matters in which trustees have engaged the solicitor for the owners corporation to conduct the conveyance, paid higher than commercial costs for the conveyance, and allowed the owners corporation to be paid more than the amount fixed or taxed by the Federal Court for its costs in the bankruptcy proceedings.

In *Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement)* [2004] FCA 1682 His Honour Justice Finkelstein observed relevantly,

An insolvency practitioner stands in a fiduciary relationship with the creditors. He must act with the same care as a prudent businessman would act in his own affairs at his own cost and risk. A prudent businessman will run litigation as a last resort and when he embarks upon litigation he will keep it under close scrutiny. A prudent businessman will

shop around to ensure that he obtains the services of good lawyers (solicitors and counsel) at the best possible rate. Personal relationships should not obscure the practitioner's duty. The sole selection criteria should be the benefit to him as a litigant. So he will avoid cosy relationships with solicitors and counsel. He will negotiate over fees with both solicitors and counsel. He will closely monitor the fees as they are incurred. (In some jurisdictions contingency fees are permitted and where they are they should be exploited). Overall, this approach is likely to cause disquiet among the profession. Lightman J said that the requirement of adopting the perspective of the insolvency practitioner expending his own money in place of the perspective of spending his client's money is a "sea change". If made it is a change that will restore public confidence in this area of commercial life.

Conclusion

The two issues that have been discussed, overpayment of petitioning creditor's costs and payment of excessive conveyancing costs, indicate that there may be trustees who are not acting as fiduciaries should when it comes to dealing with strata title property.

1. Given the role that the solicitor engaged on a conveyance has in terms of overseeing cheque directions for settlement, where the owners corporation's unsecured debt gets paid, it would be most unwise of a trustee to engage on a conveyance, the same solicitor who acts for the owners corporation.
2. Trustees are expected to pay competitive rates for conveyancing costs, by for example, seeking quotes for fixed costs for the conveyance.
3. Finally trustees must ensure that the costs of the petitioning creditor paid from the estate are limited to the costs already set out in the creditor's petition, and the costs fixed or taxed by the Court.

The sale of residential (and commercial) strata title properties will be closely scrutinised by the Inspector-General in future and trustees should ensure full compliance with their fiduciary duties to avoid remedial or potential disciplinary action.

Mark Findlay, Director
Regulation and Enforcement

GENERAL NEWS

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Growing reliance on AFSA guidance

In the six months to 31 December 2016, AFSA received 11,279 visits across 33 Inspector-General practice documents published on its website. Around 80% of those views related to 19 practice documents seen in the below table shaded blue.

Document views	Jul 2016	Aug 2016	Sep 2016	Oct 2016	Nov 2016	Dec 2016	YTD	%	Cum %
IGPD 18 - Trustee remuneration notifications	158	228	229	136	212	30	993	8.8%	8.8%
IGPD 2 - Collection of realisations and interest charges	340	169	125	120	166	4	924	8.2%	17.0%
IGPD 9 - Standards for trustees and controlling trustees	132	157	192	151	131	6	769	6.8%	23.8%
IGPS 7 - Annual estate returns	401	116	74	48	96	20	755	6.7%	30.5%
IGPD 14 - Proper performance of duties of a bankruptcy trustee	124	162	126	101	164	11	688	6.1%	36.6%
IGPS 1 - Regulatory framework	434	73	52	34	61	6	660	5.9%	42.5%
IGPD 6 - Remuneration entitlements of a registered bankruptcy trustee	122	133	126	110	89	3	583	5.2%	47.6%
IGPS 1 - Guidelines relating to advertising and marketing of debt agreements	349	55	42	66	44	3	559	5.0%	52.6%
IGPS 14 - Referring offences against the Bankruptcy Act 1966 to the Inspector-General in Bankruptcy	103	95	140	83	91	4	516	4.6%	57.2%
IGPS 16 - Guidelines relating to administrators' duty to notify the Official Receiver of 6-month arrears default	86	106	53	79	53	7	384	3.4%	60.6%
IGPS 12 - Statutory reviews of trustees' decisions under the Bankruptcy Act 1966 by the Inspector-General in Bankruptcy	52	75	59	51	56	13	306	2.7%	63.3%
IGPD 12 - Controlling trustees' roles and duties	46	60	73	61	59	0	299	2.7%	65.9%
IGPS 4 - Guidelines and processes for registration of debt agreement administrators	84	62	57	54	38	4	299	2.7%	68.6%
IGPS 15 - Assessment by the Inspector-General in Bankruptcy of a trustee's remuneration approval request	55	67	53	41	49	2	267	2.4%	70.9%
IGPS 6 - Referral of offences under section 271 of the Bankruptcy Act 1966 (rash and hazardous gambling)	44	51	43	43	52	0	233	2.1%	73.0%
IGPD 20 - Guidelines for the payment of monies to the Commonwealth pursuant to Section 254 of the Bankruptcy Act 1966	47	67	48	32	35	1	230	2.0%	75.1%
IGPS 10 - Complaint handling process for complaints against bankruptcy trustees and debt agreement administrators	41	52	55	34	44	0	226	2.0%	77.1%
IGPD 13 - Debt agreement administrators' guidelines to certification requirements	47	50	40	50	33	5	225	2.0%	79.0%
IGPS 18 - Trustee remuneration notifications	50	46	55	34	33	7	225	2.0%	81.0%
IGPD 10 - Treatment of secured creditors in a Part IX debt agreement	54	44	38	32	34	0	202	1.8%	82.8%
IGPS 2 - Regulation of bankruptcy trustees and debt agreement administrators	67	34	28	35	32	2	198	1.8%	84.6%
IGPD 8 - Eligibility requirements for controlling trustees	36	46	46	31	27	2	188	1.7%	86.3%
IGPD 15 - Debt agreement administrators' guidelines relating to keeping proper accounts	32	49	22	42	29	9	183	1.6%	87.9%
IGPD 22 - Effective practitioner communication	40	42	30	27	37	1	177	1.6%	89.4%
IGPD 16 - Guidelines relating to administrators' duty to notify the Official Receiver of 6-month arrears default	43	43	37	27	16	0	166	1.5%	90.9%
IGPS 11 - Monitoring and inspection of bankruptcy trustees and debt agreement administrators	43	38	33	16	31	1	162	1.4%	92.4%
IGPD 11 - Trustees' guidelines for issuing objections to discharge when statements of affairs not yet filed	30	40	32	22	27	4	155	1.4%	93.7%
IGPD 21 - AFSA website advertising of meetings of creditors	34	28	24	19	33	5	143	1.3%	95.0%
IGPD 3 - What constitutes an expense recoverable in a debt agreement by an administrator	36	32	23	18	20	2	131	1.2%	96.2%
IGPS 13 - Trustee registration application process under the Bankruptcy Act 1966	30	32	14	20	27	6	129	1.1%	97.3%
IGPD 17 - Guidelines relating to administrators' duty to notify creditors of 3-month arrears default	28	30	21	15	25	3	122	1.1%	98.4%
IGPS 8 - Involuntary cancellation of trustee registration	28	29	21	11	21	0	110	1.0%	99.4%
IGPS 9 - Involuntary cancellation of registration of debt agreement administrators and eligibility process	21	15	11	11	14	0	72	0.6%	100.0%
	3,237	2,326	2,022	1,654	1,879	161	11,279	100.0%	

Compared to the same period in 2015 (which received 10,652 visits), there was almost a 6% increase, indicating strong stakeholder engagement with AFSA's online guidance material.

During the same period, AFSA also received over 500 visits across its practitioner guidance video series, annual compliance programme and personal insolvency practitioners' compliance report pages.

Pages viewed	Jul 2016	Aug 2016	Sep 2016	Oct 2016	Nov 2016	Dec 2016	YTD
Practitioner Guidance Video Series	35	44	73	62	23	1	238
Personal Insolvency Practitioners Compliance Report	32	39	15	28	27	5	146
Compliance Program	56	1	54	0	2	6	119
	123	84	142	90	52	12	503

Paul Eric, Assistant Director Practice Regulation and Enforcement

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ATO update

The ATO has received a number of questions in relation to the Superannuation Guarantee Charge obligations in an insolvent event.

Superannuation Guarantee Charge - obligations

Employers are required to provide a prescribed minimum level of superannuation support for employees in a particular calendar quarter (by making contributions to a superannuation scheme for the benefit of the employee). 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%)
- an administration fee (\$20 per employee, per quarter).

In the event of insolvency, practitioners need to 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

If this information is not received, the ATO cannot pay the employees' Superannuation fund.

For bankruptcy trustees:

The information can be submitted in a digital format via the Business Portal - Mail function. You can attach a spreadsheet with [all](#) the required information as above.

For liquidators:

The information can be submitted in a digital format via the Business Portal SGC Online Form by following the below steps:

- Log in to the Business Portal
- Select an ABN
- Select Online Forms
- Select SGC Statement Quarterly
- Start new form
- Complete employer, employee details, review and submit the form

Submitting the information via the portal is our preferred method. Once you submit the form the superannuation account will be updated automatically and the system will issue a statement of account without delay. Alternatively details may be provided in writing.

Superannuation Guarantee Charge - nominal interest calculation

The nominal interest component of an SGC claim is not "interest" in the ordinary sense, but rather it is a part of the SGC claim as a whole and is not separable. As the SGC claim is calculated once the SGC statement is lodged, that is when the nominal interest is calculated to. The occurrence of an insolvency event after the due date for lodgement does not limit the imposition of nominal interest.

Superannuation Guarantee Charge – proof of debts (POD)

The ATO has been asked if there is scope to accommodate the lodgement of PODs by super funds or their collection agencies.

A POD lodged by a super fund or collection agency with respect to an SG shortfall amount is not admissible. The current administrative process by which liquidators advise the ATO of SG shortfall amounts, enabling the Commissioner to assess the amount and lodge a POD, is in line with section 553AB of the *Corporations Act 2001*.

Section 553AB of the *Corporations Act 2001* prevents the duplication of superannuation debts by giving superannuation guarantee charge (SGC) debts precedence over superannuation guarantee (SG) debts payable to a super fund.

SGC is imposed on any SG shortfall (section 5 *Superannuation Guarantee Charge Act 1992*), therefore any SG shortfall will ultimately give rise to a provable SGC debt. In circumstances where there is an SG shortfall, section 553AB will apply to extinguish the SG debt regardless of whether SGC has yet been assessed by the Commissioner. By extension, if the SG debt is not a shortfall amount and thus does not give rise to SGC, it will not be extinguished (at least until it becomes a shortfall amount).

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This approach is consistent with how the SGC system operates generally. Ordinarily, an employer is required to pay direct to the super fund by the due date. If they do not, then from this point forward the debt is payable to the Commissioner. At this point an SGC statement needs to be lodged, and the Commissioner will make an assessment.

Interacting with the ATO electronically

We continue to see an increase in secure messages being received using the ATO Business Portal functionality – no doubt because this has proven to be a faster and more efficient way to have your queries resolved.

When you send a secure message to us via the portal, we receive your message instantly and you will be provided with a unique receipt number, allowing you to follow up on the request more easily should it be necessary.

When creating a message in the portal, ensure you select the subject matter of the message so that your request reaches the correct department and is actioned efficiently. Where a response is required, we will reply via the portal and include any documents as attachments.

If you would like to find out more about using the business portal within your firm, please send a request to InsolvencyPractitionerServices@ato.gov.au.

More information

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

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

RECENT PROSECUTIONS

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LAMANDA (Vic) – Bankrupt convicted for removing property and making a false declaration

Mr Claudio Lamanda, a bankrupt, was prosecuted in the Heidelberg Magistrates Court on 15 February 2017 for removing property within 12 months prior to the presentation of the petition which made him bankrupt.

Mr Lamanda became bankrupt on 27 June 2013 by virtue of a sequestration order. Prior to his bankruptcy, Mr Lamanda and his wife were the directors of C & T Lamanda Building Constructions Pty Ltd (in Liquidation).

Six days before C & T Lamanda Building Constructions was placed into liquidation, Mr Lamanda withdrew \$266,794 from his business account and transferred the money into his personal bank account. From December 2012 to June 2013, Mr Lamanda withdrew in total of \$263,643 from his personal bank account which was not declared in his Statement of Affairs.

He also made a false declaration in his Statement of Affairs, failing to declare two personal bank accounts that he had within the previous 12 months, a business account where he and his son were the signatories, as well as two unsecured creditors.

Mr Lamanda pleaded guilty and was convicted on both counts. Magistrate Tregent sentenced Mr Lamanda to perform a 12 month Community Corrections Order, with the condition that he perform 150 hours of unpaid community work, and undergo a mental health assessment and treatment.

Mr Lamanda was also ordered to pay the disbursement costs of \$178 by 15 March 2017.

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

ROSENBERG (NSW) – Twelve month good behaviour bond for offence against the Bankruptcy Act

Mr Gary Steven Rosenberg of St Ives, New South Wales, was sentenced on 21 February 2017 after pleading guilty to an offence of materially contributing to his insolvency by gambling.

Mr Rosenberg filed for voluntary bankruptcy in June 2014.

Between June 2012 and June 2014, Mr Rosenberg gambled at various casinos in Australia and New Zealand and participated in online gambling. As a result of these activities he lost over \$1.3 million dollars.

Mr Rosenberg entered a plea of guilty at the Sydney Downing Centre Local Court.

Magistrate Atkinson found the offence proven and commented that there needs to be a deterrent. Mr Rosenberg was

released on a good behaviour bond for twelve months without conviction.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecution on behalf of the Australian Financial Security Authority.

MAJEED (NSW) – Bankrupt convicted of four counts of attempting to travel overseas without consent

Mr Mohd Farok Abdul Majeed of Neutral Bay, New South Wales, was convicted and sentenced on 20 December 2016 for four counts of attempting to travel overseas without the trustee's consent.

Mr Majeed became bankrupt on 9 November 2009 by order of a court.

Between 23 September 2012 and 24 February 2014, Mr Majeed attempted to travel overseas four times departing from the Sydney Kingsford Smith Airport and on each occasion officers from the Australian Federal Police denied him access to the flight.

Mr Majeed pleaded guilty to the offences at the Sydney Downing Centre Local Court.

He was convicted by Magistrate Atkinson and released on a good behaviour bond for twelve months. The Magistrate commented that general deterrence is important in this matter and that the Bankruptcy Act is important legislation.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecution on behalf of the Australian Financial Security Authority.

GEORGE (NSW) – Previous company director pleads guilty to an offence under the Bankruptcy Act

Mr Alan Jeffrey George of Bayview, New South Wales, was convicted and sentenced on 21 November 2016 for disposing of property within one month prior to becoming bankrupt, with intent to defraud his creditors.

Mr George became bankrupt on 13 October 2011 by order of the Federal Magistrates Court.

On 14 September 2011, Mr George received a cheque for the sum of \$299,146.22 as an initial distribution from his late father's deceased estate.

Mr George endorsed the cheque and the funds were paid to his wife.

At the time, Mr George was aware that a creditor had obtained a judgment against him to pay the creditor \$321,833.13.

Mr George pleaded guilty to the offence at the Sydney Downing Centre District Court.

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He was convicted by Judge Syme to 6 months imprisonment and released on recognizance to be of good behaviour for two years.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecution on behalf of the Australian Financial Security Authority.

VO (Vic) – Conviction for undischarged bankrupt builder

Mr Vu Son Vo (also known as James Vo) was convicted on 24 October 2016 for supplying goods and services over the amount of \$3,000, without disclosing his bankruptcy status.

Mr Vo came under the scrutiny of the Australian Financial Security Authority after it received complaints from two home owners about renovation projects at Noble Park, Victoria in 2013 and Wheelers Hill, Victoria in 2015.

The first complaint related to a renovation job where Mr Vo quoted \$30,500 to undertake the work. The complainant paid Mr Vo a total of \$32,355 between June 2013 and February 2014 into his nominated bank account, for materials and building works.

In March 2014, the complainant informed Mr Vo that he no longer wanted him to make the renovations due to his unreliability. Mr Vo was asked to return the money paid as very little work had been done by that stage.

Mr Vo agreed to repay \$25,000 as a lump sum, however only \$1,500 was repaid in instalments.

The second complaint related to a concreting job and the construction of a masonry fence. Mr Vo quoted \$42,500 in April 2015.

Between April and September 2015 the complainant had paid Mr Vo \$40,325 in cash as requested, for the initial contract.

In May 2015, the complainant also paid Mr Vo \$810 cash for replacing a boundary fence.

In both instances, Mr Vo failed to disclose to the complainants that he was an undischarged bankrupt.

Mr Vo was prosecuted in the Dandenong Magistrates Court by Coram Magistrate Ms P Spencer. He pleaded guilty to the two charges under section 269(1)(ad) of the *Bankruptcy Act 1966* and was released on a \$2,000 good behaviour bond.

This matter was prosecuted by the Commonwealth Director of Public Prosecutions (CDPP).

McCormack (WA) – Bankrupt convicted of two counts of removing property

Michael James McCormack of Perth, Western Australia, was convicted in the Perth Magistrates Court on 21 November 2016, and sentenced for two counts of removing property within 12 months of going bankrupt.

Mr McCormack plead guilty to the charges, and was convicted and placed on a 12 month good behaviour bond of \$3,000.

Mr McCormack filed for voluntary bankruptcy in January 2014 following a judgment against him in the Perth Magistrates Court for an amount of \$80,050.01.

Prior to his bankruptcy, Mr McCormack withdrew over \$80,000.00 in cash from an account in his name. Mr McCormack could not provide the Official Trustee with a sufficient explanation about how the funds were spent. Over \$30,000.00 was removed within the 12 months prior to his bankruptcy.

This matter was referred by the Official Trustee in Bankruptcy and prosecuted by the Office of the Commonwealth Director of Public Prosecutions.

Currie (Vic) – Bankrupt sells asset

Mr Christopher John Currie of Truganina, Victoria, was prosecuted in the Sunshine Magistrates Court on 4 November 2016, for failing to disclose information to his trustee and disposing of property after he was made bankrupt.

On 3 April 2012, Mr Currie was made bankrupt by order of the court.

He declared to his trustee that he owned a Mitsubishi Triton motor vehicle but failed to provide any further information as directed by his trustee.

He also refused to make the vehicle available to be valued.

The vehicle was estimated to be worth between \$10,900 and \$12,800.

Mr Currie later sold the vehicle for \$8,000 cash, despite knowing that it was part of his bankrupt estate and he was not to deal with it.

Due to his non-cooperation, his bankruptcy was extended until 23 May 2020.

Mr Currie pleaded guilty to the charges.

He was convicted and fined \$3,000 to be paid by weekly instalments of \$50.00.

In sentencing, Magistrate MacCullum stated that general deterrence was important in bankruptcy matters.

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

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Kurtovic (NSW) – Bankrupt excavator found guilty of an offence under the Bankruptcy Act

On 19 October 2016, Mr Anel Kurtovic, now of Woodville, South Australia, was convicted and sentenced at the Central Local Court for failing to disclose his bankruptcy to a finance company when he obtained finance to purchase excavating equipment.

Mr Kurtovic became bankrupt on 22 February 2006 by order of a court.

On 21 February 2013, Mr Kurtovic applied for finance in the amount of \$119,751 to purchase equipment for his business.

Mr Kurtovic did not disclose his bankruptcy to the finance company when he applied for finance, knowing that he was under obligation to do this.

Mr Kurtovic pleaded not guilty to the offence but was found guilty by Magistrate Forbes, who convicted him without passing sentence and ordered him to serve a two year good behaviour bond.

The matter was prosecuted by the Office of the Commonwealth Director of Public Prosecution on behalf of the Australian Financial Security Authority.

**Paul Shaw, National Manager
Regulation and Enforcement**

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[Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd \(in liq\) \(receivers and managers appointed\) \[2017\] NSWCA 8](#) (6 February 2017) (Bathurst CJ, Beazley P & Ward JA)

Background

General Electric International Inc (“General”) leased several gas turbines worth about \$44 million to Forge Group Power Pty Ltd (“Forge”), which were installed in a temporary power station at Port Hedland WA.

GE later assigned its lease to PowerRental Op Co Australia LLC (“OpCo”) and title in the turbines to Power Rental Asset Co Two LLC (“AssetCo”) as part of a business sale to APR Energy PLC (“APR”). Both OpCo and AssetCo were former subsidiaries of GE that were transferred to APR under the sale.

A dispute arose between the parties over title to the turbines and Forge brought an action against General and its former subsidiaries in the NSW Supreme Court under section 267 of the *Personal Property Securities Act 2009* (“the PPSA”).

Forge claimed that failure by General and/or its former subsidiaries to perfect their security interest in the turbines meant they vested in the company upon going into voluntary administration and therefore it had superior title or right to them.

The primary judge found that the turbines were subject to a lease under the PPSA which had not become fixtures to the land. The Court held that the lease vested in Forge as OpCo and AssetCo had failed to register their interests under the PPSA.

AssetCo and OpCo appealed the decision to the NSW Court of Appeal.

Legal issue(s)

The Court had to determine whether the term ‘fixtures’ under section 10 of the PPSA relied on common law concepts of affixation and, if so, whether the turbines had become fixtures under that definition.

Decision

The Court found that:

- the term “fixtures” relies on common law notions of affixation ie an item of tangible personal property is annexed to real property in such a way as to become a part of the real property
- the relevant test depends on the degree and purpose of annexation as well as the rebuttable presumption that what is fixed to land is a fixture and what is not remains a chattel

- the turbines in this case had not become fixtures for the purposes of the PPSA.

The appeal was therefore dismissed.

[In the matter of OneSteel Manufacturing Pty Ltd \(administrators appointed\) \[2017\] NSWSC 21](#) (31 January 2017) (Brereton J)

Background

Allleasing Pty Ltd (“the lessor”) leased equipment and parts to OneSteel Manufacturing Pty Ltd (“the lessee”). The leases were personal property securities as defined in the *Personal Property Securities Act 2009* (“the PPSA”) and therefore security interests.

The lessor registered the leases under the PPSA using the lessee’s Australian Business Number (ABN) rather than Australian Company Number (ACN). The Personal Property Securities Regulations 2009 (“the PPSR”) require that an Australian company grantor’s ACN be recorded.

The lessee went into voluntary administration. Under section 267 of the PPSA, all unperfected security interests vest in the grantor when a voluntary administrator or liquidator is appointed to the company.

Legal issue(s)

The court had to consider whether:

- the purported registration by the lessor was effective despite the defect in registration
- the lessor could claim relief by an extension of time to perfect its defective registration
- vesting of the leased equipment in the lessor amounted to acquisition on unjust terms.

Decision

The court found that:

- the registration was ineffective under section 164(1) of the PPSA on the grounds that the PPSR requires an Australian company’s ACN (and not its ABN) to be recorded; and it was seriously misleading because a search against the grantor’s ACN would not disclose the security interest.
- the vesting of equipment was not invalid as an “acquisition on unjust terms” under section 51(xxxi) of the Australian Constitution and section 252B of the PPSA because it:
 - was not an acquisition of property and even if it was, no property was applied for any purpose over which the Commonwealth had power to make law; and
 - was a genuine adjustment of competing rights between owners of interests in personal property.

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- no extension of time was available under section 588FN of the Corporations Act 2001 because the security interest was unperfected at the 'critical time' (ie when the voluntary administrator was appointed); and even if relief could be given, the security interest had already vested under section 267 of the PPSA, which an extension of time could not undo.

Key points

These cases show the need for lessors and other parties to take great care in dealing with their interests under the PPSA. Some key lessons are that:

- Failure to register (or properly register) can render security interests unperfected and therefore ineffective.
- In the event of voluntary administration, bankruptcy or liquidation, any unperfected security interest automatically vests in the insolvent grantor under section 267 of the PPSA.
- Unperfected security interests vesting in a grantor upon insolvency cannot be invalidated as an "acquisition of property on unjust terms" under the Constitution.

Official Trustee in Bankruptcy & Galanis and Anor [2017] FamCAFC 20 (17 February 2017) (Bryant CJ, Aldridge & Austin JJ)

Background

Ms Galanis ("the wife") and Mr Dukas ("the husband") started a relationship in 1999 and were married in 2006.

In 2008 the husband was made bankrupt and the Official Trustee in Bankruptcy ("the trustee") was appointed to administer his estate, which included an interest in real property acquired with his wife in October 2002 as tenants in common.

The trustee lodged a caveat over the property claiming the husband's beneficial interest in the matrimonial home.

The husband was discharged from bankruptcy and separated from his wife in 2011. The husband and wife later entered into a financial agreement ("the agreement") in February 2013 under section 90D of the *Family Law Act 1975* ("the FLA")

According to the agreement:

- the wife and husband held a 60 percent and 40 percent interest in the property respectively
- the husband made no contribution to the purchase of the property
- the mortgage over the property had been increased by \$100,000 to pay the husband's personal and business debts
- the wife had made all of the mortgage repayments
- the wife would receive the entire beneficial interest in the property given her contributions.

In July 2013 the trustee applied to the Federal Circuit Court of Australia ("the FCCA") seeking the agreement to be set aside and for 40 percent of the net sale proceeds from the property to be paid to the trustee for the benefit of the husband's estate.

The parties agreed for the property to be sold and 40 percent of the proceeds to be held until the matter was resolved.

In January 2014 the wife brought an action to dismiss the proceedings on the grounds that the FCCA lacked jurisdiction because the application was not a "matrimonial cause" as defined in section 4(1) of the FLA.

The matter was transferred to the Family Court of Australia ("the FCA") and in October 2014 the proceedings were dismissed for want of jurisdiction.

The trustee appealed that decision to the Full Court of the Family Court of Australia ("the FCFCA").

Legal issue(s)

The FCFCA had to determine whether the FCA had jurisdiction to deal with the trustee's claim to have the agreement set aside under section 90K of the FLA. In doing so, the Court had to consider the phrases "bankruptcy trustee of a bankrupt party to the marriage" and "government body acting in the interests of a creditor" as defined by "matrimonial cause" in sections 4(1) and 4A of the FLA.

Decision

The FCFCA reviewed the history of both phrases – looking at 2003 and 2005 suite of legislative amendments – and noted that:

- they allowed a trustee to be a party to maintenance and property proceedings and enabled property orders to be made against vesting property
- trustees could now attack financial agreements under the Bankruptcy Act 1966 ("the BA"); and
- they were clearly aimed to prevent the use of financial agreements to transfer assets to defeat or delay creditors.

After doing so, the court examined the construction of each phrase and concluded that:

- "bankruptcy trustee of a bankrupt party to the marriage" means a trustee of an undischarged bankrupt; and
- "government body" does not include the Official Trustee, which is a distinct entity from the Commonwealth.

Because the trustee was not a government entity and its action was taken after the husband's discharge from bankruptcy, the application did not constitute a "matrimonial cause" under section 4(1) of the FLA. Accordingly, the trustee's appeal was dismissed.

However, the FCFCA observed that the appeal did not affect the trustee's substantive rights to pursue any relevant legal or equitable remedies to recover vested bankruptcy property in either the NSW Supreme Court or Federal Court of Australia.

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[Palmer v Ayres; Ferguson v Ayres \[2017\] HCA 5](#) (8 February 2017) (Kiefel, Keane, Nettle & Gordon JJ)

Background

Queensland Nickel Pty Ltd (“QN”) went into voluntary administration and was later put into liquidation.

In addition to liquidators appointed by creditors, several Special Purpose Liquidators (SPLs) were appointed to QN by the Federal Court of Australia (“the FCA”).

The SPLs applied to the FCA for orders to summon two former QN directors (Mr Palmer and Mr Ferguson) to produce books and attend for examination about its affairs. Mr Palmer and Mr Ferguson both attended the FCA and were each examined.

Both then applied to the High Court of Australia (“the HCA”) seeking various relief, including:

- a declaration that section 596A of the Corporations Act 2001 (“the CA”) was invalid; and
- an injunction restraining the special purpose liquidators from pursuing the examinations.

Legal issue(s)

The HCA had to consider whether section 596A of the CA was invalid under the Constitution because it conferred non-judicial power on federal courts and on courts exercising federal jurisdiction.

Mr Palmer argued that the power of a court to summon a person for examination under section 596A was invalid on the grounds that it:

- is not within the “core” or “practical conception” of judicial power under section 71 of the Constitution
- is not incidental or ancillary to the exercise of judicial power related to voluntary winding up
- is not analogous to pre-Federation powers exercised by courts to qualify as judicial power or, alternatively, should no longer be followed based on historical analogues.
- is not compatible with or is outside the judicial power of the Commonwealth; and
- does not engage the judicial power of the Commonwealth.

Mr Ferguson adopted those grounds and further argued that the power poses a real risk to the independence and impartiality of the court, and offends the separation of powers.

[Note: While this case deals with examinations under the *Corporations Act 2001*, the issues considered are comparable for examinations under section 81 of the *Bankruptcy Act 1966*.]

Decision

Kiefel, Keane, Nettle and Gordon JJ held that section 596A of the CA was not incompatible with, and did not fall outside, the exercise of the judicial power of the Commonwealth.

Their Honours said that the fact gathering or investigation power in section 596A provides a system of discovery allowing an inquiry to ensure justice is done in potential litigation:

The making of a summons order is a procedure designed to lead to a controversy regarding potential rights and liabilities in possible further litigation. It is a procedure directed at the future exercise of judicial power, in aid of anticipated adversarial proceedings, analogous to other pre-trial procedures.

While the power to examine derived from English Courts of Chancery exercising supervisory jurisdiction, the majority did not consider this as a necessary (or appropriate) basis to define the power and processes in section 596A.

Their Honours found that provided the conditions in section 596A were satisfied, a judicially supervised examination was permitted.

In a separate judgment, Gageler J noted that Australian Courts in modern times were accustomed to exercising supervisory jurisdiction over applications by trustees, receivers, provisional liquidators and others responsible for the conduct of insolvency administrations.

His Honour also held that the power in section 596A to examine did not take the court beyond the role of supervising an administration as part of other processes intended to ultimately protect and adjust the rights of companies and their creditors.

The proceedings were consequently dismissed.

[Pseudos v Commonwealth Bank of Australia \(No. 2\) \[2017\] FCA 19](#) (25 January 2017) (Charlesworth J)

Background

In June 2009 Schutara Pty Ltd (“Schutara”) borrowed \$2.5 million from Commonwealth Bank of Australia Ltd (“CBA”). The loan was secured by a mortgage over a land owned by Schutara.

Soon afterward Schutara borrowed \$378,000 from Orio Investment Trust (“Orio”), secured over the same land. Mr Pseudos executed the loan agreement as trustee of Orio.

In July 2009 Mr Pseudos lodged a caveat claiming an equitable interest as mortgagee over the land. CBA did not become aware of the caveat until August 2009.

In October 2009 CBA amended its mortgage (subject to the caveat) so that Orio’s mortgage could be registered.

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Mr Psvedos knew of CBA's mortgage when he executed the loan agreement with Schutara.

In 2014 CBA applied to the SA Supreme Court ("the SC") for a declaration that its equitable interest in the land had priority over Mr Psvedos. This was opposed by Mr Psvedos who argued that he had superior priority because CBA had elected to make its mortgage subject to his caveat.

However, Mr Psvedos conceded at trial that CBA's mortgage predated his and that he was aware of this from the start. The SC held that CBA's mortgage was first in time.

CBA pursued costs for the trial and an order for a taxed costs certificate of \$120,000 was made against Mr Psvedos. Having received no payment by the deadline, CBA issued a Bankruptcy Notice against him, followed by a creditor's petition in the Federal Circuit Court of Australia ("FCCA") under section 43(2) of the *Bankruptcy Act 1966* ("the BA")

Mr Psvedos opposed the petition, arguing that he was solvent, that he was not personally liable and that CBA's judgment was affected by fraud and collusion.

Just before judgment, Mr Psvedos offered to pay CBA \$122,000 which was rejected. Despite this, that sum was deposited (by a third party) into the trust account of CBA's solicitor. However, CBA did not change its position.

Mr Psvedos again sought to dismiss the petition based on that payment and by arguing that CBA's rejection showed its "bloody mindedness" and collateral purpose to make him bankrupt.

A sequestration order was made against Mr Psvedos which he then appealed to the Federal Court of Australia ("the FCA").

Legal issue(s)

The FCA had to consider three issues:

- the alleged fraud and the SC proceedings
- Mr Psvedos' personal liability for the debt; and
- the purported payment by way of deposit.

Decision

On the 1st issue, Charlesworth J reviewed the principles of exercising the FCA's discretion to "go behind" a judgment to investigate whether a valid debt existed to support it.

His Honour noted that an enquiry would be relevant where there was a genuine allegation that no debt actually existed or was effected by apparent fraud or collusion. However, on the facts Charlesworth J found that Mr Psvedos had:

- failed to argue the principles to establish fraud as he did not present sufficient supporting evidence; and
- limited his own position in the SC proceedings by abandoning his defence over a superior priority.

His Honour also observed that Ms Psvedos had been legally represented in the SC proceedings.

On the 2nd issue, Charlesworth J examined whether Mr Psvedos acted solely in his capacity as trustee for Orio and the general principles governing liability of a trustee. Having done so, His Honour concluded that the terms of the loan agreement were for Mr Psvedos and held that he was personally liable for the debt.

On the 3rd issue, Charlesworth J queried the third party payment to CBA and noted that:

- it raised doubt over Mr Psvedos' own solvency because he did not pay it; and
- it could be deemed as a voidable preference under section 122 of the BA.

Give these factors, His Honour dismissed the appeal.

[Beaman v Bond & Anor \(No. 2\) \[2016\] FCCA 3249](#) (23 December 2016) (Lucev J)

Background

Ms Beaman brought property proceeding against Mr Bond in the WA Family Court ("the FC") in 2010.

In 2013 the FC ordered Mr Bond pay the Ms Beaman \$100,000 for legal and forensic fees to be incurred in the proceeding to discover Mr Bond's assets and financial resources.

On 9 April 2013 the applicant applied to enforce the order.

On 11 April 2013 Mr Bond appointed a Controlling Trustee over his estate under section 188 of the *Bankruptcy Act 1966* ("the BA"). His Statement of Affairs disclosed four related party creditors totalling some \$4.4 million and eight other creditors, which included Ms Beaman

Ms Beaman applied to the Federal Circuit Court of Australia ("the FCCA") in May 2013 seeking orders to release the property of Mr Bond under section 208 of the BA. The objective being to 'undo' the effect to the Controlling Trustee authority on the property proceeding.

That application succeeded and in early April 2014 a section 208 order was made allowing property settlement orders under Part 5A of the *WA Family Court Act 1997*.

Later in April 2014 the FC ordered Mr Bond to put \$100,000 in the trust account of Ms Beaman's solicitors.

After non-compliance, Ms Beaman sought an enforcement order.

In June 2014 Mr Bond presented a debtor's petition. On the same day the FC made the enforcement order sought but was not put into effect given Mr Bond's intervening bankruptcy.

Ms Beaman subsequently applied to the FCCA seeking an order to annul Mr Bond's bankruptcy under section 153B of the BA.

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Legal issue(s)

The Court had to determine whether to annul the bankruptcy under section 153B(1) of the BA on the basis that the debtor's petition should not have been presented.

Decision

Lucev J first considered whether the debtor's petition should not have been presented, noting the limited circumstances under which an annulment could be made, including where there was an abuse of process or the debtor's estate was being placed beyond the reach of creditors.

The Court then reviewed the impact of Mr Bond's insolvency. Lucev J noted that Ms Beaman had argued that Mr Bond was 'not under any financial pressure' and asserted that his related party loans should be ignored. However, His Honour did not accept this criterion was relevant to determine solvency and rejected her contention about the loans.

His Honour also rejected Ms Beaman's argument as to Mr Bond's lavish lifestyle, noting that there was no evidence that he could dictate payments to him by his supporters who had indicated no intention of paying his very substantial debts.

The Court therefore concluded that Mr Bond was insolvent when he lodged his petition and it could not be said that it should not have been presented on that basis.

Lucev J then considered whether the petition was lodged to stymie another person in conducting proceedings. After reviewing the case law, His Honour concluded that simply because the petition was lodged on the same day as Ms Beaman applied to enforce a payment order did not mean it was designed to frustrate any other proceedings.

The final issue to be decided was whether the petition was an abuse of process. Lucev J noted that Mr Bond was entitled to use the BA to shield himself from further liability or harassment and went on to conclude that:

- his assets, liabilities and creditors could all be effectively dealt with under the BA regime; and
- his actions were consistent with the BA and the public interest in a bankrupt not continuing to accrue debts.

Therefore the application for annulment was dismissed.

Paul Eric, Assistant Director Practice
Regulation and Enforcement

CONTACT

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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.

Personal Insolvency Regulator (PIR) editors

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