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Supporting better outcomes for consumers, business and the community.

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

In keeping with AFSA's fourth corporate goal: quality information, this newsletter aims to inform practitioners of relevant changes to personal insolvency laws, both legislative and case law, and discusses areas of practice and Inspector-General (I-G) requirements. For more information about our vision, purpose and goals, see our corporate plan 2017–18.

If you would like to submit an article for inclusion in the next edition of the PIR, please forward it to one of the following:

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We actively seek 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 PIR may be cited as (2018)16(1) Personal Insolvency Regulator.

PRACTICE MATTERS

March 2018, Volume 16, Issue 1

Reforms to personal insolvency procedures likely in 2018

This year is likely to see some significant changes made to both bankruptcy and debt agreement procedures. The Bankruptcy Amendment (Enterprise Incentives) Bill 2017 and the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 were both considered by the Senate Standing Committee on Legal and Constitutional Affairs, which reported on both bills on 21 March 2018.

The key change proposed in the Bankruptcy (Enterprise Incentives) Bill is to reduce the default period of bankruptcy from three years to one year. Liability for income contributions would continue to be payable as now, generally for a three year period.

The Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 would make some significant changes to the operation of Part IX of the *Bankruptcy Act 1966* (the Bankruptcy Act). Key proposed changes in the Bill include:

- a three-year maximum term for debt agreement proposals
- doubling the asset eligibility threshold
- restricting payment obligations by debtors based on income level
- changes to the conditions of registration for registered debt agreement administrators, including allowing the Minister to impose industry-wide conditions.

Further information about the progress of the Bills and the Committee's inquiry is available at the Australian Parliament website, www.aph.gov.au.

Andrew Sellars, General Counsel
Legal and Governance, AFSA

Frequently asked questions about the Debt Agreement Reform Bill 2018

The government recently released an exposure draft of the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 (the Bill). The Senate Legal and Constitutional Affairs Legislation Committee is currently inquiring into provisions of the Bill, and will report to the Senate by 19 March 2018.

The exposure draft of the Bill and explanatory material is available on the Committee webpage to enable stakeholders to review and comment on the Bill by the Committee's public consultation deadline of 16 February 2018.

Public submissions on the Bill have been made to the Committee directly, to facilitate their inquiry.

The purpose of the following frequently asked questions is to provide stakeholders with a succinct overview of the key reforms in the Bill.

How does the Bill affect a debtor's eligibility to enter into a debt agreement?

The Bill prevents a debtor from giving the Official Receiver a debt agreement proposal if the total proposed payments under the agreement (over the life of the agreement) exceed the debtor's yearly after-tax income by a prescribed percentage. Total payments include payments to creditors, the administrator's remuneration and the realisations charge. The Attorney-General can prescribe the percentage by legislative instrument. This percentage is yet to be fixed and will be worked out by the Attorney-General's Department in close consultation with industry groups and stakeholders. The percentage will operate as a safeguard to exclude agreements that are clearly not suitable for debtors.

The Bill broadens the scope of debtors who are eligible to lodge a debt agreement proposal by doubling the assets threshold amount. Currently, a debtor is prevented from giving the Official Receiver a debt agreement proposal if, at the proposal time, the value of the debtor's property that would be divisible among creditors if the debtor were bankrupt (assets threshold) is more than the threshold amount.

Does the Bill limit the length of debt agreements?

Yes. The Bill prevents a debtor from proposing a debt agreement that would last longer than three years from the day the agreement is made. The rule will also apply to proposals to vary an agreement, so a variation cannot have the effect of extending the timeframe for making payments under the agreement beyond three years from the original agreement date. If a debtor has not satisfied the obligations created by the agreement three years after the agreement is made, the agreement will continue until it terminates, ends, or otherwise concludes under Part IX of the Bankruptcy Act.

Does the Bill change the Official Receiver's power to reject a debt agreement proposal?

Yes. The Bill provides that the Official Receiver can refuse to accept a debt agreement proposal for processing if the Official Receiver reasonably believes that complying with the debt agreement would cause undue hardship to the debtor.

Under the Bankruptcy Act, an administrator is already required to certify that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due. This certification, in addition to the Bill's new requirement for a debt agreement proposal to satisfy a prescribed payments to income ratio (see above), will already prevent most agreements that would cause the debtor undue hardship. Accordingly, it would only be in exceptional circumstances that the Official Receiver would be called upon to consider whether to exercise this discretion not to send the debt agreement proposal to affected creditors for voting. For example, the Official Receiver may exercise this discretion when facts have been brought to its attention that create a reasonable belief in the mind of the Official Receiver satisfying the requisite statutory standard that the debtor would experience 'undue hardship'.

This proposed change will also apply to proposals to vary a debt agreement. For both original and varied debt agreements, the power is discretionary and will not require the Official Receiver to review every request.

Will the Bill affect creditor voting rules?

Yes. Under the Bill, the Official Receiver must not request a vote from an administrator that is an affected creditor, or from a related entity to the administrator. This applies to proposals to enter into, vary or terminate a debt agreement.

A separate amendment in the Bill would make it an offence for an administrator to give, agree, or offer to give an affected creditor an incentive for voting a certain way on a debt agreement proposal, or on a variation or termination proposal.

What are some of the other changes in the Bill?

Other changes in the Bill include:

- making registration as a debt agreement administrator mandatory so that only a registered debt agreement administrator, registered trustee or the Official Trustee can administer a debt agreement
- requiring debt agreement administrators to obtain adequate and appropriate professional indemnity and fidelity insurance, similar to the requirements imposed on registered trustees in the Bankruptcy Act
- introducing a fit and proper person requirement for registration as a debt agreement administrator
- where a variation to an agreement is proposed, requiring the administrator to certify that the debtor is likely to be able to discharge the obligations created by the agreement (as proposed to be varied) as and when they fall due
- consistent with the requirements placed on bankruptcy trustees, requiring an administrator to consider whether the debtor has committed any offences under the Bankruptcy Act and, if so, to refer the conduct to the Inspector-General in Bankruptcy or to relevant law enforcement authorities
- introducing new offences in relation to the administration of trust accounts and the keeping of proper books to ensure alignment between the bankruptcy and debt agreement offence regimes
- allowing the Attorney-General to make legislative instruments for the purposes of determining industry wide conditions for registered debt agreement administrators
- providing that the Inspector-General's investigation and inquiry powers extend to any conduct of a registered debt agreement administrator. This amendment will allow the Inspector-General to investigate or inquire into the debt agreement administrator's conduct during the period starting from when the debt agreement administrator and debtor first engage. It will also allow the Inspector-General to investigate or inquire into any other conduct of a debt agreement administrator, including their advertising practices.

When would the proposed changes commence?

Most changes would commence six months after the date the Bill receives Royal Assent and would apply to debt agreement proposals given to the Official Receiver on or after commencement.

Attorney-General's Department
Australian Government

Choice of charge—revised CDPP guidelines for prosecuting a failure to file statement of affairs

In November 2017, the CDPP revised their Practice Group Instruction (PGI) about bankruptcy prosecutions.

According to the updated PGI 8, the CDPP will now adopt a tiered approach to prosecuting defendants who have failed to file their statement of affairs.

Where a defendant has failed to file a statement of affairs, the brief of evidence may disclose an offence against both section 54 and section 267B of the Bankruptcy Act. An offence under Section 54(1)—failing to provide a statement of affairs following a sequestration order—carries a maximum penalty of 50 penalty units, whereas an offence under section 267B(1) the offence of not complying with a 77CA notice issued by the Official Receiver—carries a maximum penalty of one year imprisonment.

When a first-time offender is referred, the CDPP will commence a prosecution under section 54(1). Where there has been a previous section 54 conviction, the section 267B offence will be used.

This change supports a strategic approach to prosecuting these types of matters and is expected to lead to better sentencing outcomes when dealing with long term offenders.

For further information about CDPP's instructions regarding bankruptcy prosecutions, visit the CDPP's website.

Gemma Denton, Director
Regulation and Enforcement, AFSA

Income contribution disputes: an alternative to filing objections for non-payment

Is there an alternative course of action to filing an objection for non-payment of income contributions where there is a dispute about the amount payable?

The answer is yes! There is another option to lodging an objection to discharge or maintaining an objection where:

1. there has been a failure to pay the assessed income contributions
2. there is a live dispute regarding the income assessment(s)—such as where a request for a review has been made to the Inspector-General, or the Inspector-General's decision on review has been appealed to the Administrative Appeals Tribunal and
3. the date for automatic discharge is approaching and there is no reason to object to discharge other than for non-payment of income contributions, or an objection has been filed for failure to pay income contributions and there are no other grounds of objection.

In these circumstances, a trustee could consider giving the bankrupt the opportunity to pay the disputed amount into a trust fund controlled by a third party, such as a trustee or lawyer nominated by the bankrupt or trustee, pending the resolution of the dispute.

This alternative course:

- meets a trustee's duty to act commercially and efficiently
- deals with the issue of any overpaid income contributions not being able to be refunded under section 139ZH of the Bankruptcy Act
- avoids the need for an objection, or allows the withdrawal of objection where the bankrupt has the funds personally or can access the funds to pay the outstanding contributions.

It does not limit the trustee's ability to make an assessment —including a fresh assessment—at any time under section 139WA of the Bankruptcy Act.

Should a trustee wish to use this alternative course, it is recommended that they obtain a written agreement with the bankrupt in relation to the trust fund. The terms of the agreement should specify the person holding the funds, and the circumstances in which those funds can be dealt with (for example, only after the income assessments in dispute have been resolved). The agreement could also deal with any circumstances specific to an administration, for example, a trustee who has not yet made an assessment for the third contribution assessment period may require the bankrupt to make a provision in the funds paid into trust for any unassessed contributions as a term of agreeing to the alternative course.

Regulation and Enforcement, AFSA

Spotlight on: remuneration reviews

Since the Bankruptcy Act was amended in 2010, reviews of trustee remuneration have generally only been performed when there have been exceptional circumstances to justify a review. The vast majority of applications have been made by bankrupts or former bankrupts rather than creditors. I'd like to briefly discuss one of the more recent matters in which a review was performed.

In December 2017, the Inspector-General completed a review of a trustee's remuneration in a bankruptcy matter, reducing the trustee's remuneration from $60,557.75 to $40,076.57.

The matter involved a female bankrupt with an unencumbered house property worth approximately $850,000 and unsecured debts totalling $35,249.59 inclusive of post-bankruptcy interest claims.

The administration was protracted because of the delay in the bankrupt filing a statement of affairs and delays in the bankrupt securing finance to pay out the bankruptcy.

Nevertheless as delegate, I considered that a review should be performed for the following reasons:

1. The estate appeared to have sufficient property for an annulment to occur. This was significant as it gave the former bankrupt standing to seek a review, due to their interest in the outcome (Rule 90-10).
2. The remuneration of $60,557 was nearly double the unsecured liabilities total of $35,249.59. This goes to **proportionality**, a concept I will expand on later.
3. The involvement of a solicitor for the trustee added legal costs of $31,350.
4. Remuneration was charged to the matter after it was annulled under section 153A.
5. There was a lack of file notes in respect to numerous staff discussions and meetings.
6. The trustees bill of charges in many instances, lacked sufficient description of the work performed (Rule 42-70).
7. The bankrupt's affairs were not complex—no business, no contributions and just two credit card liabilities.

Proportionality

Proportionality was an important consideration in reaching my conclusion that there were exceptional circumstances in this matter. The Full Federal Court in *Templeton v Australian Securities and Investments Commission [2015] FCAFC 137* made findings about the relationship between reasonableness and proportionality at paragraph 30:

> *'Generally, the language of the Orders, and the context in which they were made, permit of proportionality being considered in order to assess the question of reasonable remuneration. Indeed, the question*

> *of proportionality is an anterior question to consider in order to determine whether time was reasonably spent. If the relevant work plan underpinning the actual time spent and the allocation of personnel at the requisite level of seniority was disproportionate to the nature, importance and complexity of the task and the benefit to be achieved from the task, then it might be said that the time spent on the task was not time reasonably spent.'*

The Court went on to make findings about the relationship between proportionality and the value of the services rendered at paragraphs 33 and 34 (emphasis added):

> *Generally, in looking at proportionality, the value of the services rendered must be considered. We would endorse the observations of McLure JA in Conlan as liquidator of Rowena Nominees Pty Ltd (in liquidation) v Adams [2008] WASCA 61; (2008) 65 ACSR 521 at [47] where her Honour observed:*
>
> > *As to the performance of a task reasonably embarked upon, the work done must be proportionate to the difficulty or importance of the task in the context in which it needs to be performed. This is what is encompassed in assessing the value of the services rendered.* ***Using an example from the law, the time spent by an appropriately qualified and experienced practitioner in drafting a statement of claim should be proportionate to the amount in issue.***
> >
> > *Finally, even if one was not to address proportionality as an express factor, nevertheless its absence may have forensic significance in determining reasonableness. Another way to look at proportionality can be to conclude from a lack of proportionality between the cost of the work done relative to the* ***value of the services provided*** *that there has been overcharging or excessive remuneration claimed (see Thackray v Gunns Plantations Ltd [2011] VSC 380; (2011) 85 ACSR 144 at [64] per Davies J).*

The nature and complexity of the required work can therefore have a bearing on the proportionality of the work performed due to its relationship with value of the services provided. Proportionality in turn is one factor in assessing reasonableness of the time charged. In this sense, the amount charged given the value of the services rendered was considered unreasonable. At the risk of oversimplifying the work undertaken, it can be summarised as the following: after a period of the trustees' solicitor commencing possession proceedings, the bankrupt was permitted to refinance her solely owned unencumbered property and the proceeds were used to pay two institutional creditors approximately $35,000. The trustees' remuneration and expenses of $104,000 (GST incl.) were not proportionate due to the nature and difficulty of the work performed or the value of services provided. Of course, a trustee has duties broader than collecting money and paying creditors, but those duties must be performed as efficiently as possible, avoiding unnecessary expenses (s.19(1)(j); and the value and complexity of an administration must be considered before costs are incurred. (Rule 42-60).

In this matter, the trustee was directed to refund $20,481.18 to the former bankrupt, and did so.

Conclusion

Unsurprisingly, matters in which net asset value exceed unsecured liabilities are more likely to be the subject of review than other types of matters. In determining whether to perform a review, a variety of decisive factors are taken into account, including proportionality.

Mark Findlay, Director
Regulation & Enforcement, AFSA

Gess Michael Rambaldi and Andrew Reginald Yeo (As Joint and Several Trustees of the Property of Athina Alex, A Bankrupt) v Commissioner of Taxation [2017] FCAFC 217

For the purposes of this case note, we will refer to Gess Michael Rambaldi and Ors as the Appellant Trustee and the Deputy Commissioner of Taxation as the Respondent Commissioner.

Catchwords

Bankruptcy; whether a loan agreement between third party and bankrupt to discharge debt to Commissioner of Taxation was a transfer of property; whether a preference under section 122 of the Bankruptcy Act; whether a Quistclose trust existed; appeal dismissed.

Facts

At first instance

- On 18 March 2014, the Respondent Commissioner filed a petition in the bankruptcy against Athina Alex (bankrupt) for her failure to comply with a bankruptcy notice.
- On 1 June 2014, Quality Australia Investments Pty Ltd (QAI) entered into a loan agreement with the bankrupt and City Nominees Pty Ltd ATF The City No 1 Trust (City Nominees) by which QAI agreed to lend the bankrupt and City Nominees a sum of $131,000.
- The loan agreement stipulated that:
    - the bankrupt had a net income debt with the ATO of approximately $85,000.00 and was the sole director and shareholder of City Nominees
    - the bankrupt wants to borrow $126,000 for the purposes of paying the income tax debt and lawyer fees of $5,000.
- On 7 July 2014, the Australian Taxation Office (ATO) received a cheque for $118,071.61 in payment for the bankrupt's owed income tax.
- On 8 December 2014, the Court made a sequestration order against the bankrupt's estate.
- The Appellant Trustee argued that the loan was:
    1. a preference payment pursuant to s 122 of the Bankruptcy Act
    2. the property of the bankrupt and City Nominees, and paid to the ATO at their direction and therefore vested in the trustee to be divisible amongst the estate's creditors.
- The Respondent Commissioner argued the loan was:
    1. not property of the bankrupt and City Nominees, and instead was held on a Quistclose trust for payment to the ATO
    2. in default, on trust to be repaid to QAI.

On 25 May 2017, the primary Judge found that the loan money was held on a Quistclose trust and was intended only to pay the ATO and legal debts. The Judge concluded that: the funds paid by QAI were held on a Quistclose Trust and did not become the property of the bankrupt and City Nominees.

Accordingly, the Appellant Trustee could not recover the money from the Respondent Commissioner.

On appeal

The Respondent Commissioner accepted that the effect of the bankrupt's transaction was to give him a preference, priority or advantage over other creditor, and that it was made during the relevant period. However, it was contended that there was no transfer of property to, or by the bankrupt.

Court analysis

At issue was whether the loan agreement between QAI and the bankrupt to discharge a debt owed to the Respondent Commissioner constituted a transfer of property. The Court considered the decision of the House of Lords in *Barclays Bank Ltd v Quistclose Investments Limited*[1] and noted the term 'Quistclose trust' derived from this decision. This case involved a party (the lender) advancing money to another party (the debtor) who owed money to a third party (the creditor), on the agreed basis that the advance would only be used to discharge the relevant debt and the debtor agreeing to repay the lender at some future time:

> *'That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognized in a series of cases over some 150 years.'*

The Court examined subsequent decisions applying this principle, noting that it has generally been accepted that a Quistclose Trust may arise where a lender and borrower intend, in relation to moneys advanced to a borrower for a specific purpose, that:

- the lender shall retain the equitable interest in the moneys advanced
- the moneys advanced shall constitute a fund separate from the assets of the borrower[2].

1 [1970] AC 567.

2 Fiona R Burns, 'The Quistclose Trust: Intention and the Express Private Trust' (1992) 2 *Monash University Law Review 18, 147.*

The Court ultimately held that no Quistclose Trust arose in the matter, 'because, in effect, no legal or equitable interest ever passed to the bankrupt [3].'Instead, the funds owed to the ATO passed directly from QAI to the Respondent Commissioner by bank cheque, and so no trust came into effect. In determining whether a transfer of property occurred, the Court concluded at paragraph [38]:

> *'In submissions, the trustees emphasized that the agreement reflected a borrowing by Ms Alex, and so the payment to the Commissioner should be viewed as a payment by direction of her money. That, however, is to mischaracterize the transaction. Ms Alex's indebtedness arose because of QAI's payment of its money to the Commissioner pursuant to the agreement with her. She received no property from QAI and made no payment to the Commissioner.'*

Decision

The Court held that there was no transfer of property, and hence no Quistclose Trust arose in the circumstances. The Appeal was dismissed with costs following the event.

Jessica Macdonald, Legal Officer
Legal & Governance, AFSA

George Town Council v Neilsen [2018] FCCA 74

Catchwords

Bankruptcy; Judicial Review; costs order of Tribunal; whether constitutes a final or judgment order pursuant to s.42(1)(g) of the Bankruptcy Act; application dismissed.

An application for a review of a Registrar's decision was made on 13 April 2017, dismissing the applicant's creditors petition filed against the respondent on 5 December 2016. The Registrar dismissed the petition because:

- A costs order of the Resource Management and Planning Appeal Tribunal (Tas.) (the Tribunal) made 10 July 2014, and later quantified by an amended Certificate of Taxation issued by the Tribunal on 8 September 2015, was unenforceable because the order was not registered with the Supreme Court of Tasmania pursuant to s.28(6) of the *Resource Management and Planning Appeal Tribunal Act 1993* (Tas.) (RMPAT Act)
- The order is not a final judgment or order in accordance with s.40 (1) (g) of the Bankruptcy Act.

Excerpts from judgment of McGuire J:

20 It follows that I agree with the Registrar that the Certificate of Taxation is not synonymous with an order. They are concepts of different character. The order is a tool of compulsion whereas the Certificate is only a tool of supplementary implementation and itself carries no compulsion absent the order.

21 The material provided by the applicant from the Supreme Court simply shows the registration of the Certificate and does not assist in satisfaction of the requirements of the relevant legislation for registration of the primary order.

22 Consequently, I concur with the Registrar that the provisions of the RMPAT Act have not been satisfied in that the order, later quantified by the by the Certificate, has not been registered with the Court and proceedings for enforcement cannot properly be taken under s.28 (7).

23 The applicant argues in the alternative that the order of the Tribunal is, in any event, a final judgment or final order for the purposes of s.41 of the Act and, attached to the Bankruptcy Notice, constitutes a valid Bankruptcy Notice and therefore registration of the order for enforcement is not required.

24 The applicant relies on the wording of s.28 (6) that 'an order may (my emphasis) be registered in Court having jurisdiction for the recovery of debts of the amount ordered to be paid by or under the order (my emphasis).

25 However, s.40 (1) (g) of the Act contemplates only an order that is capable of immediate execution. I repeat and adopt the Registrar's citation of Drummond J in re: Gibbs, ex parte Triscott[4] concluding:

> *… Only judgment on which a creditor is entitled to issue execution at the time of the issue of the bankruptcy notice can constitute a final judgment of the kind referred to in s40 (1) (g) of the Bankruptcy Act.*

26 That is, to issue a valid bankruptcy notice, the creditor must be in a position to execute the order. However, I agree with the Registrar that that the order, not being taken out, but simply quantified by the Certificate of Taxation, has not been registered pursuant to s.28 (6) of the RMPAT Act and does not, therefore, constitute a final judgment or final order for the purposes of s.40 (1) (g) of the Act.

27 Consequently, I reject the arguments in the alternative put by the applicant. I am satisfied that the bankruptcy notice served on the respondent does not have attached to it a final judgment or final order capable of execution and is, therefore, invalid. It follows that the respondent has not committed an act of bankruptcy and that the creditor's petition and the application for review are to be dismissed.

3 Paragraph 43.
4 (1995) 133 ALR 718 2 p721

Palmer v Registrar General of Land Titles of the ACT [2017] ACTSC 407

Catchwords

Bankruptcy; foreign trustee; Australian representatives appointed under *Cross-Border Insolvency Act 2008 (*Cth); whether foreign trustee entitled to be registered as proprietor of immovable property by virtue of recognition of foreign proceedings under the *Cross-Border Insolvency Act 2008* (Cth)

Land titles; application; application to have register corrected by removing Australian representative of foreign trustee in bankruptcy and replacing with a foreign trustee; section 132 of the *Land Titles Act 1925 (ACT)*

Background

Julie Anne Palmer, the plaintiff, was the trustee of the bankrupt estate of David Ross Slater. She was appointed as trustee of the bankrupt estate of Mr Slater by an order of the County Court at Croydon, England, with effect from 9 February 2016. By originating Application filed 11 October 2017, she applied for an order under section 161 of the Land Titles Act to correct the register of land titles by requiring and directing the Registrar-General of Land Titles to remove Jason Lloyd Porter and Richard Moretti as the registered proprietors of Block 13, Ainslie, in the Australian Capital Territory (the Ainslie property), and register herself as the registered proprietor of that block. Mr Porter and Mr Moretti were her Australian representatives appointed as such by Gleeson J of the Federal Court of Australia by order on 16 August 2016. They were registered as the proprietor of the property on 20 March 2017.

On 22 December 2015, Deputy District Judge Sadd of the Croydon County Court, England, adjudged Mr Slater to be bankrupt. By operation of section 306 of the *Insolvency Act 1986* (UK), the property of Mr Slater automatically vested in the Official Receiver and subsequently in his trustee in bankruptcy. The plaintiff was appointed as trustee of Mr Slater's bankrupt estate with effect from 9 February 2016.

Having initially declined to make the orders sought: see Palmer (trustee), in the matter of Slater (bankrupt) [2016] FCA 780, on 16 August 2016, Gleeson J made orders under the Cross-Border Insolvency Act (the CBI Act) and the Model Law: Palmer (trustee), in the matter of Slater (bankrupt) (No 2) [2016] FCA 960. The orders were as follows:

…

> 3. Pursuant to s 6 and article 21(1)(e) of the Model Law, the administration and realisation of all of the assets of David Ross Slater located in Australia be entrusted to Jason Lloyd Porter and Richard Moretti of SV Partners Insolvency (NSW) Pty Ltd, of Level 7, 151 Castlereagh Street, Sydney in the state of New South Wales, as the local representatives of the applicant (Australian representatives).

The issues in the present case turn upon the operation of order 3.

Excerpts from judgment

19 Of significance in the present case is the manner in which the recognition of bankruptcy proceedings is given effect and, in particular, the manner in which a foreign trustee in bankruptcy may take steps in relation to assets that are within Australia. The Model Law defines a 'Foreign representative' as 'a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debt or is assets or affairs or to act as a representative of the foreign proceeding'. Chapter II of the Model Law relates to access of foreign representatives and creditors to courts in Australia. It permits a Foreign Representative to apply directly to a court in Australia: Article 9 and, if the conditions for commencing proceedings under the Bankruptcy Act are otherwise met, to commence a proceeding under that Act: Article 11.

37 In summary, a foreign bankruptcy may be given effect in relation to immovable property within Australia by a court making orders vesting the property in the foreign trustee or assignee, appointing the foreign trustee or assignee (or someone else) as receiver of those properties for the purposes of their sale or by methods such as those adopted in Re Greenway and Re Fogarty.

38 Therefore in the present case, the position is that Australian law does not automatically recognise the title of the plaintiff to the real property of the bankrupt within Australia. That is notwithstanding that under the Insolvency Act 1986 (UK) property vests automatically without any requirement for registration: Insolvency Act, section 306 and extends to property outside the jurisdiction: Insolvency Act 1986 (UK), section 436; Singh v Official Receiver [1997] BPIR 530 at 531. As a consequence, in the absence of orders of the court under s 29 of the Bankruptcy Act or, as here, orders made under the CBI Act, the plaintiff, as foreign trustee, has no immediate entitlement to have the property registered in her name or capacity to take control of it for the purposes of the bankruptcy. Section 132 of the Land Titles Act operates (and its predecessors referred to at [14] have operated) within the context of the rules of private international law and hence does not compel her registration as a proprietor.

42 As a consequence, I accept the submission made on behalf of the Registrar-General that as a result of the terms of order 3 made by Gleeson J, the 'administration and realisation' of the assets of Mr Slater in Australia was entrusted to Mr Porter and Mr Moretti. This was expressly an order under article 21(1)(e). That paragraph permits a binary choice, namely to entrust the administration or realisation of the debtor's assets to either the foreign representative or 'another person designated by the court'. The plaintiff, is not the person referred to in the order. That situation, of course, arises from the fact that those were the terms of the orders that the plaintiff sought from the Federal Court.

As a consequence, Gleeson J's orders did not empower the plaintiff to become the registered proprietor of the Ainslie property. She does not have, by reason of the recognition of the foreign proceedings, any relevant general power under the CBI Act and Model Law that arises in the absence of a court order. The rules of private international law which provide the context in which the CBI Act and the Land Titles Act operate do not give automatic effect to the law of the United Kingdom so as to permit the plaintiff in the absence of an order under s 29 of the Bankruptcy Act or under the CBI Act to become the registered proprietor of the Ainslie property.

43 The plaintiff's application must therefore be dismissed.

Szepesvary v Weston (Trustee), in the matter of Szepesvary (Bankrupt) (No 2) [2018] FCA 87

Catchwords

Bankruptcy; application to set aside sequestration order; where bankrupt claims not to have received notice of assignment of petitioning creditor's debt; whether sequestration order ought not to have been made.

Assignment of debt; legal assignment of debt; requirements for 'express notice' under section 134 of the *Property Law Act 1958* (Vic.); whether requirement to give 'express notice' is satisfied where recipient claims non-receipt; presumptions regarding post.

Excerpts from judgment

7. In this proceeding, which was commenced more than 2.5 years after the sequestration order was made, Mr Szepesvary seeks, in substance, an annulment of his bankruptcy pursuant to s153B of the Bankruptcy Act and the setting aside of the bankruptcy notice upon which the creditor's petition was based, pursuant to section 30(1) of the Bankruptcy Act. ACM appeared by counsel at the hearing of the application to oppose the relief sought.

8. Section 153B(1) of the Bankruptcy Act relevantly provides:

> *(1) If the Court is satisfied that a sequestration order ought not to have been made ... the Court may make an order annulling the bankruptcy.*

9. At the hearing of the application, Mr Szepesvary, who appeared without a lawyer, but with the assistance of his partner, Ms Ozdil, contended that the principal basis upon which his bankruptcy should be annulled was that he did not receive notice of the assignment of debt pleaded in paragraph 5 and 6 of ACM's statement of claim, set out at [1] above.

...

15. Whether the notice was served matters because s 134 of the Property Law Act 1958 (Vic), as with many other like provisions (for example, s 12 of the Conveyancing Act 1919 (NSW) and s 136 of the Law of Property Act 1925 (UK)), provides that an absolute assignment by writing of any debt will only be effective if express notice is given to the debtor.

16. 'It is trite law that there is a prima facie presumption of fact that an envelope addressed and posted and not afterwards returned reached its destination in the ordinary course of post': Leveraged Equities Ltd v Goodridge [2011] FCAFC 3; (2011) 191 FCR 71 at 119 [399], per Jacobson J (Finkelstein and Stone JJ agreeing). Although Mr Curtis did not expressly say that the notice of assignment was not returned undelivered, it is 'implicit in the conduct of the case' that it was not so returned: cf Westpac Banking Corporation v Market Services International Pty Ltd BC9604615, Supreme Court of Victoria, at p 8 per Batt J. See also, in any event, s 160(1) of the Evidence Act 1995 (Cth), which provides that '[i]t is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external territory was received at that address on the fourth working day after having been posted'.

17. The evidence presented in Mr Curtis' affidavit supports a finding that the Notice of Assignment was indeed addressed and posted which, in turn, is sufficient to enliven the presumption set out in paragraph [16] above. Mr Szepesvary's evidence that he had three letter boxes, including one fashioned from an ice cream container, and that mail was sometimes delivered to his neighbour in error, is not sufficient to displace the relevant presumption. As Lindgren J explained in Deputy Commissioner of Taxation v Trio Site Services Pty Ltd [2007] FCA 776 at [27], in the context of service of a statutory demand at the registered office of a corporation:

> *... There are strong policy reasons why any risk arising from the fact that there is no letter box or other facility for receipt of mail at the registered office or from such an arrangement should lie with the company. It is the company that chooses not to have such a facility, or to have as its registered office premises to which it is not practicable for mail to be delivered...*

18. The same policy considerations mean that whatever risk of non-delivery of mail was created by Mr Szepesvary's unorthodox mailbox arrangements could not have been known by Westpac and must be sheeted home to Mr Szepesvary, not to Westpac or to ACM.

19. There being no evidence adduced to raise any sufficient doubt about the presumption, I am therefore satisfied on the evidence of Mr Curtis that someone on Westpac's behalf posted the Notice of Assignment to Mr Szepesvary at his residential address on 6 October 2011 and that it was delivered accordingly.

20. It follows that Mr Szepesvary's contention that his bankruptcy should be annulled because he did not receive the notice of assignment must fail, because there is no basis to conclude that the sequestration order ought not to have been made within the meaning of s153B(1) of the Bankruptcy Act.

21. The evidence of Mr Curtis, and the resultant presumption it enlivens, distinguishes this case from Ozdil v Vrsecky (trustee) [2016] FCA 881. In that case, Jessup J annulled the bankruptcy of Ms Ozdil under section 153B of the Bankruptcy Act because Ms Ozdil gave unchallenged evidence that she did not receive notice of the relevant assignment of debt.

Matthew Osborne, Principal Legal Officer
Legal and Governance, AFSA

Australian Taxation Office update

Intent to enter debt agreement

We receive a number of requests from debt management firms notifying us of their intent to propose a debt agreement on behalf of a taxpayer. In February, we introduced a new letter to respond to these requests. The letter confirms any outstanding tax liabilities and lodgements for the taxpayer and provides information on how to make electronic payments.

These requests should be submitted via the ATO Business Portal.

Request for documents format

We continue to focus on improving the services we provide to the insolvency industry. Since August 2017, we have been answering your requests for documents submitted via the Business Portal in a new digital format. Your feedback has been positive and you will continue to see improvements in the way we provide documents and information relating to insolvent entities.

If you have any feedback about the new format please contact us using the email below.

Prospective fee approval

The practice of an external administrator or trustee seeking creditors' approval of future remuneration is well established and it is commonplace for practitioners to seek prospective fee approvals. As an active creditor, we critically assess all remuneration proposals and each request is considered on its merits, including using data analysis to identify anomalous charging practices. When asked to consider prospective fee approvals, it is essential we receive full details of the work being proposed together with the anticipated benefit to creditors. This information is necessary for us to assess whether the fees claimed are reasonable in the circumstances.

Generally, for small and relatively straightforward administrations we will consider prospective fee approvals for the total fees for the duration of the administration. When seeking future remuneration for larger or more complex administrations, while we expect external administrators and trustees to provide an estimate of the total fees for the duration of the administration, we expect fee approval to be sought progressively in stages by reference to specific milestones or time periods. Insolvency practitioners may seek further prospective fee approval at the end of each stage, following a remuneration approval report and a general report on the progress of the administration.

While many external administrators and trustees already follow this approach, a significant number currently do not. We would encourage all external administrators and trustees wanting to obtain ATO approval for future fees on larger or complex matters to adopt this phased approval regime.

More information

If you would like to find out more about the new letters, using the ATO Business Portal, managing access or our education visits, please email 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

New Zealand Insolvency and Trustee Service update

In the 12 months ended 31 December 2017, the Integrity and Enforcement Team of Ministry of Business, Innovation and Employment (MBIE) succeeded with nine persons convicted under the Insolvency Act 2006, on charges including:

- eight convictions for managing a business with consent
- five convictions for concealing property away from the Official Assignee
- two convictions for obtaining credit without disclosing their bankruptcy status
- two convictions for failing to provide a satisfactory statement of affairs
- two convictions for misleading the Official Assignee
- one conviction for being employed by a relative without consent.

Sentences resulting from the convictions include being convicted without discharge, community detention, eight months home detention plus $35,000 awarded as reparation, through to one-year and 10-months imprisonment.

Two prosecutions in that time that may be of interest:

1. Mr S was sentenced on 12 December 2017. He faced one MBIE charge of taking part in the management of a business while bankrupt, as well as a very serious representative charge brought by the police of using forged documents. The Court adopted a starting point of 4.5 years imprisonment on the offending but given the lengthy delays to all matters proceeding to sentence that were running alongside these matters; the Court was compelled to provide discounts to Mr S for:

- credit for guilty plea
- credit for the Instrument Forfeiture Order the Court made in the sum of approximately $600,000
- credit for previous good character
- credit for delay

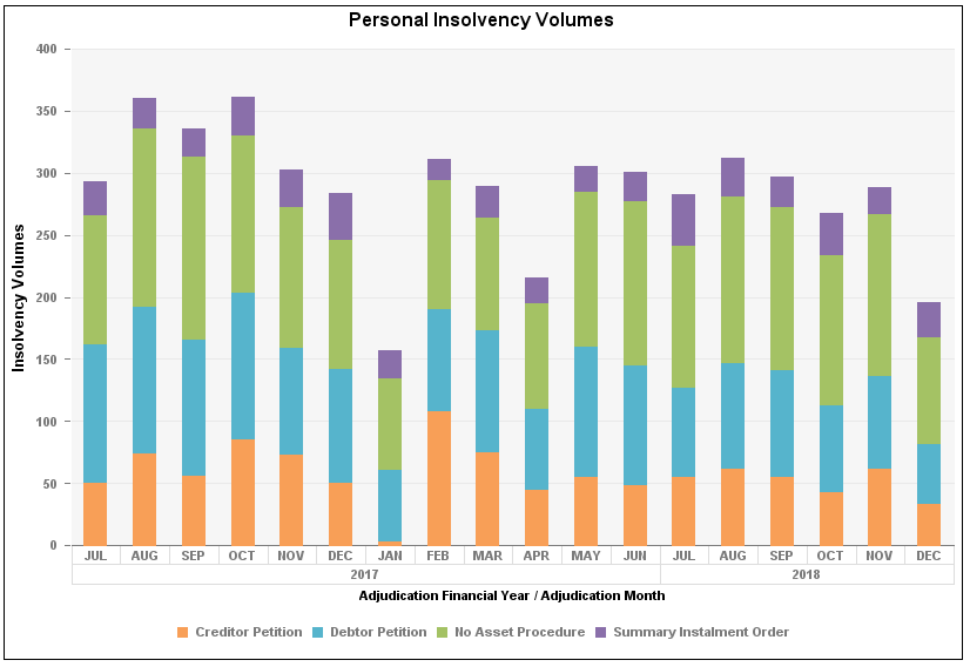
Mr S was ultimately sentenced on the police offence to 26-months imprisonment, which the Court considered was an appropriate overall sentence.

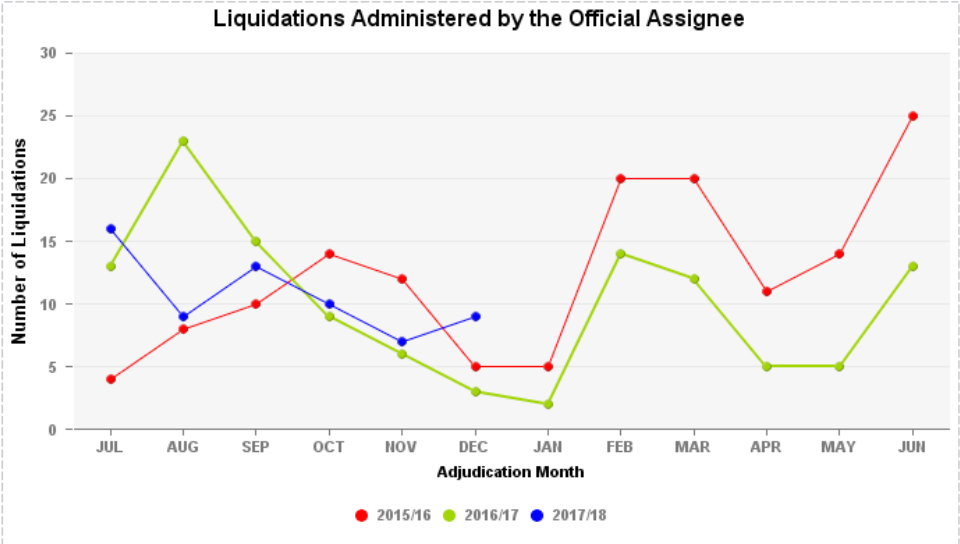
2. Mr A was sentenced on 12 December 2017 on three charges brought by MBIE and he received the following sentences:

- Concealing property—1 year and 10 months imprisonment
- Managing a business—nine-months imprisonment
- Misleading the Official Assignee—six-months imprisonment

All penalties to be served concurrently.

Statistics:





Joanne Basher, Central Regional Manager and Official Assignee
New Zealand Insolvency and Trustee Service

Melbourne Law School research explores the practical impact of personal insolvency

Researchers at Melbourne Law School are currently completing the Personal Insolvency Project, a major empirical study of Australia's personal insolvency system funded by the Australian Research Council. This project has been carried out in partnership with three leading non-profit organisations: Consumer Action Law Centre, Financial Counselling Australia and Good Shepherd Australia New Zealand. Drawing on the expertise and practical experience of these organisations, the researchers have explored the tangible impact of Australia's personal insolvency system on the lives of people experiencing financial stress.

Over three years, this study has entailed major online surveys of individual debtors, financial counsellors, community solicitors and members of the public. The researchers have conducted focus groups and consultations with financial counsellors, consumer solicitors and various industry stakeholders, including a debt agreement administrator and a large debt collection firm. They have studied the experiences of debtors responding to creditors' petitions in the Federal Circuit Court. They have also liaised with the Australian Financial Security Authority (AFSA) to obtain a large data set containing de-identified records of nearly 29,000 individual bankruptcies initiated between 2006 and 2017. This multi-faceted research strategy has afforded a unique insight into the Australian personal insolvency system and the characteristics of insolvent debtors.

To date, the Personal Insolvency Project has produced articles on a wide range of topics, including:

- **Recent trends in Australian personal bankruptcy.**
  This article analyses the records of 29,000 individual bankruptcies, provided by AFSA. It demonstrates a marked decline in Australian bankruptcy rates, since a peak in 2009, and a consistent rise in levels of unsecured debt among bankrupts. It identifies a number of distinct cohorts within the bankrupt population, and important differences between men and women, younger and older people, and professional and blue-collar workers. It finds that the debts of bankrupt individuals tend to fall into two distinct categories: a combination of taxation debts and legal liabilities; or a mixture of personal loan, overdraft and credit card debts, often linked to consumer spending.

- **The role of financial counselling in the bankruptcy system.**
  This article presents an empirical analysis of an innovative financial counselling service offered to self-represented debtors in the Bankruptcy List of the Federal Circuit Court. This pilot service offered on-site financial counselling to debtors who attended the court without legal representation, in response to a creditor's petition. To evaluate the success of this service, the research team conducted surveys of self-represented debtors and creditors' solicitors. They interviewed financial counsellors and court Registrars, and drew upon unique data compiled by court staff. The study finds that on-site financial counselling services improve the efficiency of the Bankruptcy List. They also enable debtors to navigate the bankruptcy system more effectively, in some cases helping them to avoid bankruptcy.

- **The interrelationship between bankruptcy, reliance on social security and long-term poverty.**
  This article is based upon a survey of financial counsellors and consumer solicitors who specialise in assisting people in financial hardship. It explores the practical impact of bankruptcy for clients of these services. It finds that bankruptcy offers many tangible benefits, including relief from debtor harassment and immediate improvements in health and wellbeing. At the same time, it finds that bankruptcy is an inadequate solution to financial hardship for many social security recipients. It finds that many debtors in this category experience ongoing, entrenched poverty because their incomes do not meet the basic costs of living.

- **The long term impact of bankruptcy on individuals' finances, health, social relationships and general quality of life.**
  This article reports the results of a major survey of current and former Australian bankrupts, as well as the survey of financial counsellors and consumer solicitors described above. It finds that, for many Australian debtors, bankruptcy results in genuine improvements to financial stability, health, relationships and general well-being, but that these outcomes vary significantly according to the underlying reasons for a debtor's financial hardship. It presents evidence that debtors whose problems relate to unemployment are less likely to achieve favourable outcomes, since their post-bankruptcy incomes are simply not high enough to meet their basic needs. On this basis, the article concludes that while bankruptcy offers valuable assistance to many Australian debtors, it is not a comprehensive or fail-safe means of financial rehabilitation.

- **Bankruptcy stigma.**
  This article draws upon parliamentary debates, court judgments, media reports and other sources to provide an historical account of bankruptcy stigma in Australia and other common law jurisdictions. It outlines key aspects of the United Kingdom's Enterprise Act (2002), which sought to combat bankruptcy stigma by introducing formal distinctions between 'honest' and 'culpable' bankrupts. The article concludes that such legislative measures are likely to have little influence on public attitudes to bankruptcy. It calls for a wider public discussion about rising levels of household debt—one that would reframe bankruptcy as a social issue, rather than purely a matter of personal morality.

- **Attitudes to bankruptcy in Australia.**
  Building on the researchers' earlier study of bankruptcy stigma, this article reports the results of an online survey of 2,000 members of the public. It finds that bankruptcy arouses considerable public disapproval in Australia, since it is frequently associated with greedy and dishonest corporate 'high flyers'. At the same time, it finds evidence of widespread sympathy for individuals who go bankrupt due to unemployment, illness or other unforeseeable events.

- **The debt agreement system.**
  This study draws upon AFSA's statistics, a survey of debtors and consultations with consumer advocates, a major creditor and a debt agreement administrator. It considers the extent to which debt agreements are achieving their objectives and examines concerns that debt agreements may be causing harm, particularly to vulnerable debtors on low incomes. It argues that fresh measures are needed in order to protect vulnerable debtors from harm and to enhance the efficiency of the system. These include more rigorous disclosure requirements, to ensure that debtors understand the risks and adverse consequences of debt agreements; a greater onus on administrators to demonstrate that agreements are suitable options for their clients; greater transparency regarding administrators' fees; and stricter eligibility rules, to target the debt agreement system more effectively towards those who can afford to repay their debts, while reducing the potential harm that debt agreements pose to low-income and vulnerable debtors.

These research findings are freely available online via the Social Science Research Network (https://www.ssrn.com/) and the Personal Insolvency Project website (http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/personal-insolvency-project).

Associate Professor Paul Ali, Lucinda O'Brien and Professor Ian Ramsay

AFSA notes that law reform—in relation to debt agreements and bankruptcy—is currently being considered by the Government and wide consultation is taking place. Any proposed law reform may also take into account and consider the issues raised in this article. Please also refer to the article 'Frequently asked questions about the Debt Agreement Reform Bill 2018' under 'Practice matters' in this edition.

RECENT PROSECUTION OUTCOMES

March 2018, Volume 16, Issue 1

TRIMBLE (Qld) Bankrupt sentenced to imprisonment

Mr Anthony John Trimble was sentenced at the Caboolture Magistrates Court on 4 December 2017, on three counts of removing property prior to bankruptcy, two counts of failing to deliver property in his possession to his trustee, and failing to disclose information about his examinable affairs to his trustee.

Mr Trimble was also found guilty of failing to file his statement of affairs in an acceptable form.

On 23 June 2014, Mr Trimble was served a bankruptcy notice, relating to an unpaid credit card debt of $24,111. On 2 July 2014, Mr Trimble sold his house and deposited the net proceeds of $189,615.16 into an account in his name.

On three subsequent dates, Mr Trimble made cash withdrawals totalling $164,000.

On 15 October 2014, Mr Trimble was made bankrupt via sequestration order.

The next day, when questioned about the cash withdrawals he had made, Mr Trimble initially told his trustee that he had gambled the funds. He subsequently stated that the sale proceeds were paid to the mortgagee.

On 20 October 2014, Mr Trimble attempted to file a statement of affairs with the Official Receiver; however, it was rejected as it lacked critical details.

On 3 February 2015, Mr Trimble received a section 77CA notice requiring him to file a statement of affairs in an acceptable form within 15 days. To date, Mr Trimble has not complied, nor has he provided a satisfactory account of the significant cash withdrawals he made in 2014.

Mr Trimble was convicted and sentenced to nine months imprisonment, to be released after serving three months imprisonment and entering into a recognizance release order of $1000 with the conditions that he be of good behaviour for two years and file a statement of affairs on or before 4 April 2018.

Mr Trimble was ordered to pay costs of $89.80.

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

LAW (WA): Sister of bankrupt pleads guilty to offences

On 17 November 2017, Ms Thi Thu Hang Lam was sentenced at the Perth Magistrates Court for receiving property from a debtor who became bankrupt, with intent to defraud creditors.

Ms Lam was sentenced to 12 months imprisonment, to be released immediately on a $1000 good behaviour bond for two years.

Magistrate DeMaio noted the need for general deterrence, given that Ms Lam used the money to benefit herself, knowing that the bankrupt's creditors would miss out.

Around August 2013, Ms Lam's brother met with a registered trustee to prepare for bankruptcy. Ms Lam assisted her brother with the required paperwork.

In December 2013, Ms Lam's brother became bankrupt via debtor's petition.

In November 2013, Mr Lam's home was repossessed and Ms Lam became aware that her brother would be entitled to $42,949.90 of surplus funds from the sale.

Ms Lam forged her brother's signature and had his $42,949.90 transferred into her account. She then spent the money on herself and her family.

After initially pleading not guilty, and having the matter listed for a three-day trial, Ms Lam admitted committing the offences in an interview with AFSA investigators. On 13 October 2017, she attended the Perth Magistrates Court and changed her plea to guilty.

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

ROMI (Qld): Bankrupt pleads guilty to two offences

Mr Ian Romi, also known as Naim Rahimi, was sentenced on 22 November 2017 at the Brisbane Magistrates Court after pleading guilty to the disposal of funds prior to bankruptcy and making a false declaration in his statement of affairs.

In July 2014, Mr Romi received $30,000 as a result of a property settlement. Within two weeks, he had withdrawn $24,000 in cash from his account, using $10,000 for a holiday and gambling the balance at a casino. This money should have been used to pay his creditors.

On 28 July 2014, Mr Romi filed for voluntary bankruptcy with debts in excess of $113,000.

He failed to disclose in his statement of affairs that he had sold a house in 2013, that he had made a profit in relation to the sale of another house and that he had transferred ownership of motor vehicles prior to bankruptcy.

In an interview with AFSA investigators, Mr Romi admitted he received the $30,000 prior to bankruptcy and just 'blew it.'

Magistrate Quinn convicted Mr Romi and placed him on a good behaviour bond for two years. In sentencing, the Magistrate considered Mr Romi's early plea, which indicated his remorse, his cooperation and the fact that he had no previous convictions.

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

Gemma Denton, Director
Regulation and Enforcement, AFSA