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Australian Government
Australian Financial Security Authority

# PERSONAL INSOLVENCY REGULATOR

## In this issue



## Introducing our new-look PIR newsletter

Hello, and welcome to our brand new format of the Personal Insolvency Regulator (PIR) newsletter.

Since our first issue launched in 2002, we've aimed to provide insolvency professionals and stakeholders with sound guidance, helpful practice material, and news on initiatives and important areas of focus.

Our commitment remains with the achievement of our core goals:

> We ensure the public has confidence in the systems we administer.
> We are financially sustainable and operate in a commercially sound manner.
> We deliver our services in a manner that meets the needs of clients and stakeholders.
> We deliver accessible, accurate and consistent information services, empowering clients and stakeholders to make informed decisions.

Sixteen years on, our new-look newsletter reflects our commitment to place our clients at the centre of what we do—supporting the sustainable flow of credit within the Australian economy, through our role in administering and regulating Australia's personal insolvency and personal property securities systems.

### Our new 'snap shots'

From this latest issue, we're now providing snapshots of our regulatory and enforcement functions, which includes key statistics at-a-glance. You can access these 'snapshots' via links in the PIR newsletter footer.

### Interested in corporate insolvency too?

AFSA and the Australian Securities and Investments Commission (ASIC) work closely together as regulators of Australia's insolvency system. ASIC's equivalent of this newsletter—ASIC's Corporate Insolvency Update—is available on their website.

**Paul Shaw**

National Manager - Regulation and Enforcement

## Objections to discharge—a commitment to quality decisions

With the possibility of the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 being passed this year, the prospect exists of bankruptcies being limited to one-year from the filing of the statement of affairs. In anticipation of the changes, the Inspector-General is urging trustees to ensure the objections to discharge they lodge are completed with the utmost quality.

This article provides trustees with:

- a reminder of relevant factors to be considered before lodging a notice of objection
- guidance regarding what evidence a trustee is required to provide and detail in support of a notice of objection
- a reminder about the required timing for lodging of the notice.

Trustees will no doubt be thinking about how they will change their practices to, more than ever, elicit the early and full cooperation of bankrupts, in the administration of the estate.

One tool that remains available to trustees under the *Bankruptcy Act 1966* ('the Act') is the power to object to the discharge of bankrupt—thereby extending the period of bankruptcy to 5 years, or in the case of there being special grounds[1] for doing so, 8 years after the filing of the statement of affairs.

This power has been described as a 'great' power[2] and this description will be even more apt if the usual period of bankruptcy is one year, as the extended periods remain 5 years and 8 years despite the reduction in the default period.

Given the possible imminent legislative change, which may bolster the use of the objection regime, what follows is a refresher for trustees on how the objection regime should work.

### Time given to bankrupt to comply

In the case *Wharton v Official Receiver in Bankruptcy (Including Supplementary Reasons dated 1 March 2001 [2001] FCA 96 (20 February 2001)*, His Honour Weiberg J said in respect to the power to object to bankrupt's discharge under s.149A (with emphasis added):

> *Section 149A is an important provision. It provides a strong incentive to bankrupts to co-operate with their trustees during the administration of their estates. In some circumstances, an incentive of that type is plainly necessary. However, unless the section is construed in a sensible manner, it is capable of operating oppressively. It is reasonable to assume that trustees who make requests for information from bankrupts, including*

> *those concerning their income, will make due allowance for what might be regarded as the ordinary exigencies of life. Requests for information are often not met in as timely a manner as they ought to be. Some delays may be regarded as excusable while others will properly give rise to the filing of notices of objection. A bankrupt cannot ignore requests from his or her trustee. A particularly lengthy delay in responding to a request may trigger a notice of objection to discharge, which is entirely justifiable. A relatively short delay in answering a request may be a different matter. Section 149D(1)(d) must be construed in the light of the requirement in s 149B(2)(b)* ***that the trustee must believe that the filing of a notice of objection is the only way to induce the bankrupt to discharge his duties under the Act. It is plainly a course of last resort.***

## Warning the bankrupt

When considering an objection to discharge based on special grounds, the Inspector-General in Bankruptcy—in a review role—will consider whether the bankrupt has a reasonable excuse[3]. Special grounds are at paragraphs 149D(1)(ab), (d),(e),(f), (g), (h), (ha), (ia), (k) or (ma).

If the bankrupt is required to discharge a duty owed to the estate, it is strongly recommended that the trustee, when asking or reminding the bankrupt to discharge the duty, provide a written warning of the consequences of any failure to discharge the duty, specifically that the bankruptcy may be extended to either 5 or 8 years (as the case may be). This approach puts the bankrupt on notice and is consistent with the objection to discharge being a course of last resort. When lodging an objection on special grounds it is highly recommended if there is a reference in the notice of objection to the warning(s) that have been provided. The absence of an adequate warning being given, may be regarded as a reasonable excuse on the part of the bankrupt.

## Evidence

The notice of objection should put the bankrupt in a position where he or she can identify, and if necessary search out, the evidence or other material relied upon for the purpose of the objection[4]. **It is the Inspector-General's expectation** that in the notice of objection, trustees will refer to the evidence specifically relied upon for each ground of objection, in in appropriate order and detail and have such evidence (if not referred to in the notice) ready to provide to the Inspector-General in the event of a review. As mentioned above, reference to warnings given to the bankrupt will assist if the notice is reviewed.

## Reasons

Reasons are required for non-special grounds. Non-special grounds are at paragraphs 149D(1) (a), (aa), (ac), (ad), (b), (c), (i), (m), and (n). The reasons are meant to relate to the ground of objection and explain the utility in having the person remaining a bankrupt. The reasons must be directed to achievement of a purpose of the law of bankruptcy[5]. The objection to discharge should not be

punitive.

## Withdrawal of notice

Under Section 149J, a trustee may withdraw a notice of objection at any time prior to the discharge. It would not be appropriate for a trustee to refuse to withdraw an objection under s 149J where the bankrupt had attended to the matters that gave rise to the objection and there was no other utility in continuing the administration[6].

Trustees cannot currently withdraw objections using AFSA's online service. AFSA will be offering the ability to withdraw objections in a future release. Stay tuned for updates on this.

## Specific guidance on particular grounds

***(aa) any transfer is void against the trustee in the bankruptcy because of section 120 or 122***

For this ground to be upheld, in addition to showing that the provisions under ss. 120 or 122 apply, also relevant for s.120 will be whether the benefits of avoiding the transaction exceed the costs in doing so, in accordance with Regulation 6.09. The ground would be strengthened by the trustee having at least commenced recovery action in some form.

***(ab) any transfer is void against the trustee in the bankruptcy because of section 121***

For this ground to be upheld, the trustee must show, amongst other things, the bankrupt's main purpose in transferring the property was to prevent the property becoming divisible. The bankrupt's main purpose is taken to be this purpose if the bankrupt is insolvent. The ground would be strengthened by the trustee having at least commenced recovery action in some form.

***(c) after the date of the bankruptcy the bankrupt engaged in misleading conduct in relation to a person in respect of an amount that, or amounts the total of which, exceeded $3,000***

Misleading conduct is defined by section 148.

***(d) the bankrupt, when requested in writing by the trustee to provide written information about the bankrupt's property or expected income, failed to comply with the request***

For paragraph 149D(1)(d) of the Act, a bankrupt is taken to have failed to comply with a request to provide information if the bankrupt has provided information that is incomplete or inaccurate, under Regulation 7.01A. The ground is directed at deliberate actions by the bankrupt to defeat creditors or hinder the trustee's administration of the bankrupt estate[7]. Paragraph 149D(1)(d) must be construed in the light of the requirements in paragraph 149B(2)(d) that the trustee believes that the filing of a notice of objection is the only way to induce

the bankrupt to discharge their duties under the Act. It is plainly a course of last resort[8].

***(da) after the date of the bankruptcy, the bankrupt intentionally provided false or misleading information to the trustee***

Intention is a matter of a state of mind, which may be established by direct evidence or inferred from the surrounding circumstances[9].

False or misleading information can be provided by an act of commission or of omission.

***(e) the bankrupt failed to disclose any particulars of income or expected income as required by a provision of this Act referred to in subsection 6A(1) or by section 139U***

For an objection on this ground to be upheld, it is suggested that the bankrupt be given an income questionnaire towards the end of the contribution assessment period (CAP) informing them of their duty to comply within 21 days after the end of the CAP. At the time of the request, the bankrupt should be expressly warned that non-compliance might result in an objection being lodged.

***(f) the bankrupt failed to pay to the trustee an amount that the bankrupt was liable to pay under section 139ZG***

The bankrupt must be given at least the 14 days clear notice required by section 139ZI for the first payment to be made. No deadline or a deadline of less than 14 days will result in the ground being cancelled.

***(ha) the bankrupt intentionally failed to disclose to the trustee a liability of the bankrupt that existed at the date of the bankruptcy***

In one matter, a bankrupt had not disclosed a particular debt to the trustee. It was contended by the bankrupt that he did not however intentionally fail to disclose the debt as he regarded it as a 'gentleman's agreement' and believed that not disclosing it would allow the creditor to claim the full amount from him personally. This desire to keep the debt unaffected by the bankruptcy was found by the Tribunal to be a conscious decision to fail to disclose a liability and therefore the ground was established[10].

## Lodgement of the notice—don't leave it until the last moment!

As the objection takes effect at the beginning of the day on which details of the notice of objection are entered in the National Personal Insolvency Index (not necessarily the day of lodgement), it is important that trustees do not leave the lodgement of the notice until the last moment. Trustees can now lodge the objection online (AFSA Online Service/Forms) but even with this system it is recommended that trustee lodge at least a two business days before the date of discharge in case there are any system outages. If for any reason, a trustee cannot lodge an objection on line or chooses not, objections may be lodged by email.

We recommend that any notices of objection emailed to the AFSA Registry (registry@afsa.gov.au), be emailed at least 5 days prior to the date of discharge and include the words 'notice of objection' as the subject heading for the email.

### Give a copy to the bankrupt

Remember to give a copy of the notice of objection to the bankrupt as soon as practicable after the notice is filed, together with notice to the effect that the bankrupt may request the Inspector-General to review the decision of the trustee to file the notice of objection. The notice must set out the effect of subsection 149K(3).

**Mark Findlay**
**Director - Regulation and Enforcement**

*[1] Grounds found at paragraphs 149D(1)(ab), (d), (da), (e), (f), (g), (h), (ha), (ia), (k) or (ma).*
*[2] Re Ernst Abraham Siewsertsz Van Reesema v the Official Trustee In Bankruptcy [1983] FCA 202; (1983) 69 FLR 424 (26 August 1983)*
*[3] Paragraph 149N(1A)(c)*
*[4] Re Peter Arthur Ray Hall Ex Parte: Peter Arthur Ray Hall v the Trustee of the Property of Peter Arthur Ray Hall and the Registrar In Bankruptcy of the Bankruptcy District of South Australia [1994] FCA 1319 (9 September 1994)*
*[5] Inspector-General v Nelson (1998) 86 FCR 67*
*[6] Frost v Sheahan [2008] FCA 1073 (25 July 2008)*
*[7] Broadley v Inspector-General in Bankruptcy [2007] FMCA 1714 (12 October 2007)*
*[8] Wharton v Official Receiver in Bankruptcy (2001) 107 FCR 28; [2001] FCA 96*
*[9] D'Souza and Inspector-General in Bankruptcy [2010] AATA 708 (16 September 2010*
*[10] Arundell and Inspector-General in Bankruptcy [2006] AATA 88 (3 February 2006)*

## It's that time of year again! 2017–18 AER

The next Annual Estate Return (AER) deadline for 2017–18 is approaching, and we remind practitioners of their obligation to lodge a completed AER and pay the applicable realisation and interest charge by 4 August 2018.

This year, as 4 August falls on a Saturday, Monday 6 August will be the final payment and lodgement date.

Due to the final lodgement and payment date of Monday 6 August, please be aware that AFSA technical and registry staff will be unavailable on the Saturday 4 and Sunday 5 August.

We recommend that all necessary enquiries be made ahead of COB Friday 3 August.

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

Please remember, AER Online includes the following features:

- AER Online is available to all registered and controlling trustees and debt agreement administrators and AER data can be updated and lodged at any time during the year.
- Practitioners are able to view the running total of all their realisations and interest charge receipts and liabilities at any point in time:
    - AER Online reports realisations and interest charge payments at the practitioner level, not against each individual administration.
    - Practitioners remain responsible for conducting an overall reconciliation and ensuring the accuracy of data provided to AFSA. This will continue to be included in our regulatory oversight.
- AER Online offers additional, streamlined payment options. The AFSA payment advice from AER Online is unique to each practitioner. Payments can still be made by cheque, but must be sent to the new address as detailed on your AFSA payment advice. EFT payments must use the new account details as detailed on your AFSA payment advice. (BSB and account numbers are unique to each practitioner.)

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

- the AER Online Services Guide – AUSKey Account Users
- the AER Online Services Guide – User Management Username and Password Account Users
- the AER Online Services Guide – Obtain lodge and view
- the AER Frequently Asked Questions (FAQ) page – AER FAQs.

The following Inspector-General Practice Statement and Direction have also been designed to assist you with your queries:

- Inspector-General Practice Statement 7 Annual Estate Returns
- Inspector-General Practice Direction 2 Collection of realisation and interest charges

If after consulting these reference materials you are unable to resolve an issue, you can contact us for assistance by lodging an AER support form or an incident report form. Please submit your queries through these online forms rather than calling or emailing AFSA, as this will allow us to properly manage and monitor your enquiry. We will contact you within 2 days from the receipt of your online form.

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

there is adequate time to comply with these obligations.

**Charles Smith**
**Director - Regulation and Enforcement**

## Trustees' entitlements for pre-appointment work

Are you being paid for work done prior to your appointment out of an administration's realisations? What are trustees' entitlement to remuneration/disbursements for pre-appointment work?

Following the amendments to the *Bankruptcy Act 1966* (the Act) introduced by the Insolvency *Law Reform Act 2016* (the ILRA), it is worthwhile addressing the question of how this has affected the entitlement of trustees to claim remuneration and/or disbursements for any work performed **before** their appointment to a personal insolvency administration.

The short answer is—there has been **no change**. That is because the entitlement arises under subparagraph 109(1)(j)(ii) of the Act, which provides:

> *Section 109 – Priority payments*
>
> *109 (1) Subject to this Act, the trustee must, before applying the proceeds of the property of the bankrupt in making any other payments, apply those proceeds in the following order:*
>
> ...
>
> *(j) ninth, in payment of:*
>
> ...
>
> *(ii) such costs, charges and expenses incurred in the interests of creditors before the date of the bankruptcy; as a meeting of the creditors, by special resolution, resolves.*

While it does not explicitly refer to remuneration and/or disbursements of a person who subsequently becomes the appointee, a plain reading of the provision would not appear to limit who may incur/claim the costs—as long as they were **in the interests of creditors and they are approved by special resolution at a creditors' meeting**.

It is worth noting that this entitlement is also implicitly recognised in the ARITA Code[1] (section 14.5 pp 67-68) and APESB standard[2] APES 330—Insolvency Services (clause 8.7).

Where trustees do not obtain the required approval of creditors, their only other alternative is to apply to the Court for appropriate orders empowering them to draw amounts relating to pre-appointment remuneration/disbursements from the estate.

While the underlying basis of the entitlement remains unchanged by the ILRA, the consequence of drawing funds from an estate with authority has.

Trustees who draw remuneration and/or disbursements for pre-appointment work from an estate **without proper approval** from creditors or **direction by the Court** commit an offence of strict liability under section 65-25(2) of Schedule 2 to the Act, punishable by 50 penalty units (or $10,500) on conviction (see para 1.10 of IGPD 5 - Trustees' guidelines relating to handling funds and keeping records).

Given the new offence introduced by the ILRA for unauthorised payments from the estate of a regulated debtor, trustees should be careful to ensure that they obtain proper approval/authority before drawing any remuneration and/or disbursements for pre-appointment work.

Notwithstanding the serious nature of this penalty, it does not affect any other disciplinary action the Inspector-General in Bankruptcy may also take under Division 40 of Schedule 2 to the Act.

**Paul Eric**
**Assistant Director - Regulation and Enforcement**

[1] Australian Restructuring Insolvency & Turnaround Association (ARITA) code of professional practice.
[2] Accounting Professional & Ethical Standards Board (APESB) professional standard.

## Untrustworthy advisors

AFSA is committed to addressing harms in both the personal insolvency and personal property securities systems. This includes responding to legal and illegal untrustworthy advisor behaviour that undermines, or has the ability to undermine, the confidence in the personal insolvency and personal property security systems.

AFSA is working with external stakeholders such as the Australian Securities and Investments Commission, the Australian Taxation Office, the Australian Federal Police, the Commonwealth Director of Public Prosecutions and the Australian Restructuring Insolvency & Turnaround Association to address existing behaviours and develop strategies to minimise harm.

An untrustworthy advisor can be any type of advisor who provides unlawful or questionable advice, guidance and assistance to persons who under financial stress. This behaviour can look like:

- exploiting consumers who are not aware of the law/processes (e.g. charging excessive amounts to lodge a debtor's petition)

- providing false information to AFSA and practitioners about a client's financial circumstances
- recommending bankruptcy and promising clients will be 'out of bankruptcy' within 6 months
- arranging for friendly creditors to lodge questionable proofs of debt
- acting as a buffer between a practitioner and bankrupts and creditors in an attempt to remove clients from any wrongdoing.

AFSA has observed that untrustworthy advisor behaviour changes quickly as advisors find innovative ways to operate in a largely unregulated market. For this reason, we are continually reviewing our intelligence holdings, and monitoring industry trends to deliver effective targeted regulation and enforcement activity.

If you have any information about untrustworthy advisor conduct, please contact AFSA's Regulation & Enforcement division by email to fraud.enquiries@afsa.gov.au. Alternatively, if you wish to remain anonymous, please submit a tip-off.

**Gemma Denton**
**Director - Regulation and Enforcement**

## AFSA releases new debt agreement practice statement

The Official Receivers have replaced the suite of ten debt agreement Official Receiver Practice Statements (ORPS) with one single document, ORPS11 – debt agreements.

This enhancement consolidates the existing ORPS 11 to 20 on the AFSA website and includes information on the new Debt Agreement Online process.

The consolidation means readers need only refer to the one document, as is already the case with other ORPS topics.

We trust this makes it easier for readers to locate information about the debt agreement process.

If you have any feedback about the new ORPS11, please contact practice@afsa.gov.au.

**Cheryl Cullen**
**Official Receiver - Insolvency and Trustee Services**

## Prosecution sentencing—your questions answered

CDPP
Australia's Federal Prosecution Service

AFSA often receives questions about our prosecution sentencing results. The Commonwealth Director of Public Prosecutions (CDPP) has answered some of your common questions.

### What are the key issues that a court considers when sentencing someone for an offence?

The court considers the list of matters in s 16A(2) of the *Crimes Act 1914* (Cth) (Crimes Act) in so far as they are relevant to the case, as well as any other relevant matters not listed. This includes the maximum penalty for the offence, the nature and circumstances of the offence, any harm or loss caused to victims, general and personal deterrence, whether the offender has pleaded guilty and shown remorse, the personal circumstances of the offender, whether the offender has a criminal history, the offender's means to pay a fine, and the effect a sentence would have on the offender's family or dependents.

## Why aren't the penalties under the Bankruptcy Act imposed?

The penalties for the offences listed in the *Bankruptcy Act 1966* (Bankruptcy Act) are the maximum penalties for the offences. The maximum penalty of the offence serves as a yardstick for the court and as a basis for comparison between the case before the court and the worst example of the offending: *Markarian v The Queen* (2005) 228 CLR 357 at [30]-[31].

The court is required to impose a sentence that is of a severity appropriate in all the circumstances of the offence: Crimes Act section 16A(1), not to just impose the maximum. Further, if the court is going to impose imprisonment, it must also be satisfied that no other sentence is appropriate in all the circumstances of the case: Crimes Act section 17A.

Although a given offence may specify imprisonment as the maximum penalty, this means that the court may impose imprisonment (whether immediate or suspended), or a lesser sentence, such as an intensive corrections order, community corrections order or community service order (depending on which state the offender is in) a conviction and bond, a conviction and fine or discharge the accused without recording a conviction.

## Why aren't sentences under specific sections consistent?

Due to the many factors that are taken into account (see question 1 above), no two cases are the same. It therefore cannot be expected that any two cases will receive the same sentence.

However, courts are guided by the same legislation and sentencing principles which should be applied in sentences for the same offence. The court may also have regard to what sentences were imposed in earlier cases, however bearing in mind that each case is determined on its own facts.

Due to the many factors involved in sentencing, Judges and Magistrates have wide discretion in imposing a sentence. Courts have said that in any case there is no one correct sentence. At most, it can be said that there are range of possible sentences available to the judge.

## What does the CDPP consider in deciding whether or not to appeal a sentence?

The factors the prosecution consider are set out in the Prosecution Policy of the Commonwealth. These matters include whether:

- the sentence is manifestly inadequate (not merely just 'low')
- it reveals an inconsistency in sentencing standards
- the sentence is substantially and unnecessarily inconsistent with other relevant sentences
- the case would enable the appeal court to lay down general principles for the guidance of other cases it will enable the Court to maintain adequate standards of punishment for crime.

Courts have set a high bar for a prosecution sentence appeal to succeed, as allowing the prosecution to appeal exposes the offender to 'double jeopardy' (that is, being sentenced again for the same conduct). A prosecution appeal will not succeed merely because a sentence is 'low'. As such, the Prosecution Policy of the Commonwealth

states that the right to appeal by the prosecution should be exercised with 'appropriate restraint'.

### Is a reparation order available against a bankrupt who is being sentenced for an offence where money was removed from the estate?

The CDPP's view is that reparation orders are available against a bankrupt. However, whether an order is made is in the discretion of the court (considering the list of matters in question 1 above). The CDPP will consider case by case whether to seek such an order.

**Commonwealth Director of Public Prosecutions**

## Accountants' duty to disclose non-compliance with laws and regulations

Most registered trustees are qualified accountants who are also members of at least one of the following professional accounting bodies: CPA Australia, Chartered Accountants Australia and New Zealand, or the Institute of Public Accountants.

Members of these bodies are bound by their respective professional codes of practice as well as the standards imposed by the Accounting Standards Practice Board (APESB).

On 30 May 2017, APESB issued a new standard called '*Responding to Non-Compliance with Laws and Regulations*' (NOCLAR), which has been incorporated into existing standard APES 110 – Code of Ethics for Professional Accountants under section 225 of the code.

NOCLAR came into effect on 1 January 2018 and provides a framework for all members on how best to act in the public interest when they become aware of non-compliance or suspected non-compliance with laws and regulations. It allows members to set aside the principle of confidentiality and report NOCLAR to an appropriate authority, if that is in the public interest.

Examples of laws and regulations that section 225 of the code addressed includes those dealing with fraud, money laundering, tax liabilities and proceeds of crime.

All trustees have a duty under the *Bankruptcy Act 1966* (the Act) to consider whether a regulated debtor has committed an offence against the Act, and refer any evidence they have to the Inspector-General in Bankruptcy or to relevant law enforcement authorities.

In addition to this obligation, the Inspector-General expects trustees who are also members of the professional accounting bodies to comply with NOCLAR when administering any personal insolvency administration.

Where AFSA identified instances of trustees having knowledge of (or suspecting) non-compliance with laws and regulations (either by the regulated debtor or an associated entity such as a pre-insolvency advisor or referrer) to which NOCLAR relates, the Inspector-General has the power to disclose such information to the relevant professional body for potential disciplinary action under subsection 12(4) of the Act and paragraph 2.05(b) to (d) of the Bankruptcy Regulations 1996.

**Paul Eric**
**Assistant Director - Regulation and Enforcement**

## A worthwhile investigation tool for trustees

Helpful hints for section 130 warrants: seizure of property connected with a bankrupt—an investigator's perspective.

Having come from a policing background prior to joining AFSA, I was involved in the execution of numerous search warrants during the course of criminal investigations. About 90 per cent of the time, we found something at the property we searched that was of value from either an evidential or an intelligence perspective. In many cases, we found evidence (documents, drugs, property) that significantly helped in proving the offences against the alleged offender.

Similar to police search warrants, section 130 warrants require reasonable grounds for suspicion that evidence will be at the place to be searched. Those reasonable grounds for suspicion for the issue of a warrant are detailed in an affidavit by the person seeking the warrant and sworn before an eligible judge. Like the police warrants, the section 130 warrants are executed by a Constable of police who must remain at the property until the warrant is completed.

Examples of evidence obtained from successful search warrants and section 130 warrants I have been involved with since joining AFSA include:

### Gold Coast property search warrant, located:

- copy of a will and inheritance to the bankrupt of $500,000 that vested in the trustee
- diarised accounting of the money spent to date from the inheritance
- evidence of income and unknown assets.

### North QLD property s130 warrant, located:

- farm machinery and other undeclared assets that vested in the trustee
- documentation proving purchase and ownership of those assets
- evidence of income.

Both matters provided some sound outcomes for everyone including creditors of the bankrupts who expected they would get nothing from their estate prior to the execution of the search warrants.

I'm aware of a recently executed section 130 warrant where a trustee had reasonable grounds for suspecting the bankrupt was hiding assets from them. A warrant was obtained with the assistance of a solicitor and executed by state police and the trustee's staff on a house and business property. Speaking with the trustee, they have commented numerous items of property were located and seized at both premises that have greatly assisted them in their ongoing administration and investigation of the estate.

I don't profess to be an expert on search warrants but do believe in the right circumstances, they can be a beneficial tool to use during investigations of persons who are concealing property or information.

### Helpful hints to executing section 130 warrants

- Approximate solicitor's costs for drafting up an affidavit and section 130 warrant is between $4,000–$8,000.
- To locate an eligible Judge to issue the warrant, check with the Federal Court Registry in your state
- Prior to swearing the affidavit for the warrant check with the police for a suitable time they will be able to execute it for you.

- Be aware it may take some time, say, 1–3 weeks to get everything ready to be in a position to execute the search warrant.
- Have a property seizure record document so that you can record the details of items of property that are going to be seized. At the end of the search request the bankrupt sign the property seizure record to accept that you are seizing the items listed.
- Before commencing the search, draw a sketch of the house/property and identify each room.
- Consider what specialist resources you might need (e.g. copying computer or other digital records).
- It is your opportunity to have a thorough search of the property, so don't rush and make sure you search everywhere.
- Clarify any technical issues you might be unsure of with your solicitor prior to executing the search warrant.

A well thought out strategy to execute a section 130 search warrant could help you locate assets and property you are looking for during your administration. From an Enforcement perspective, please be mindful that some of the property or information you locate during the course of executing a section 130 warrant might be used as evidence at a later date.

**John Maloney**
**Assistant Director - Regulation and Enforcement**

## AFSA intervenes in RDAA set up fee overcharging

Take a look at how AFSA responded to a complaint about fee overcharging and proactive undertaking to ensure the matter was not systemic.

A debtor contacted an RDAA seeking relief from his unmanageable financial burden. The RDAA assessed the debtor's financial situation and began collecting a 'set up fee' prior to submitting a debt agreement proposal for AFSA's consideration. The debtor continued to pay the RDAA for in excess of 9 months.

At some point, the debtor came under the mistaken apprehension that he was paying towards his debt agreement. By this time, the debtor had paid $2,728 in 'set up' fees. Initially, the debtor's total unsecured liabilities were circa $7,300.

After 9 months, the debtor was of the belief that the debt agreement proposal (DAP) was submitted to AFSA and then enquired on the progress directly with AFSA. We informed the debtor that no DAP had been received. The debtor then complained to AFSA, alleging that in the intervening time, his debts had blown out to $10,000, and sought a refund of the set-up fees.

We contacted the RDAA in question and sought an explanation as to what had occurred from the RDAA's perspective. During the course of AFSA's inquiries, the RDAA undertook to repay the entire amount of the set-up fee collected from the debtor. We then requested a full inventory of matters that were older than 4 months with no DAP lodged to ensure that the issue was not systemic, and undertook further inquiries into the RDAA's internal controls.

The debtor received a refund of the entire amount of the set-up fee paid to the RDAA. The RDAA's systems and controls were reviewed and changed to ensure situations like this would not recur.

**Steve Bonnor**
**Assistant Director - Regulation and Enforcement**

## Are you completing 40 hours of continuing professional education each year?


From the annual trustee returns being lodged, it is apparent that some trustees are not complying with the industry-wide condition on registration under Section 20-5 of the Insolvency Practice Rules (Bankruptcy).

This condition states that the person undertake at least 40 hours of continuing professional education during each year that the person is registered as a trustee, of which 10 hours must be capable of being objectively verified.

Apart from the 10 hours—which needs to be verifiable such as conferences, and courses and the like—the time could be made up by reading any relevant written material—legislation, judgements, opinions, texts, articles, listening to relevant audio or watching relevant video. If such non-verifiable time is relied upon, a brief record should be kept by trustees of those activities.

Trustees who have not met the condition will receive a reminder and further action may be taken if there is a repeated failure to meet the condition. Trustees are expected to make up any shortfall in hours and any record of non-compliance will also be noted against their risk profile.

**Mark Findlay**
**Director - Regulation and Enforcement**

## The importance of independence

We have noticed that there has been an increase in the last 12 months in practitioners leaving the profession. However, the untrustworthy pre-insolvency advisors are still present in what is largely an unregulated market.

It is therefore as important as ever, that practitioners keep in mind the need for independence when considering whether to accept work from whatever source, but especially untrustworthy pre insolvency advisors.

Much has already been written about the Full Court decision particularly relevant on this subject, *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd [2014] FCAFC 85 (18 July 2014)*. This case concerned the referral of insolvency work by the Mawson Group (a corporate advisor engaged in transactions with the insolvent clients) to Lawler Draper Dillon (LDD) an insolvency firm. On 8 November 2013, two companies—Walton Construction Pty Ltd (WCPL) and Walton Construction (Qld) Pty Ltd (WCPL)—were wound up and Messrs Franklin, Horne and Stone from LDD were appointed liquidators.

The Australian Securities and Investments Commission (ASIC) commenced proceedings in the Federal Court seeking:

a. a declaration that the liquidator respondents had not made proper disclosure in their declarations of independence and relevant relationships (DIRRI)
b. orders for removal of the liquidators on the ground of a reasonable apprehension that the respondents lacked independence and impartiality.

At trial, Davies J dismissed ASIC's application. ASIC appealed the decision.

In the proceedings, ASIC submitted that the respondents had a 'referral relationship' with the Mawson Group, which they would not wish to jeopardise, and that therein lay an interest conflicting with the proper discharge of their duties as liquidators.

The Court heard that in the 2012 financial year, the revenue of LDD from referrals from the Mawson Group (about $500,000) comprised just under 10 per cent of the revenue of the firm's insolvency division, and some 4.4 per cent of the firm's overall revenue. In the 2013 financial year, revenue from the Mawson Group's referrals (about $250,000) comprised a little over 5 per cent of the revenue of LDD's insolvency division, and a little under 2 per cent of the firm's overall revenue.

In the Full Court judgement White J said:

> *'... I do not consider that the fair-minded observer would regard remuneration of the order of that received by LDD from the Mawson Group's referrals as modest. Most creditors of companies such as WCPL and WCQPL are likely to regard amounts such as $250,000 and $500,000 as significant and the hypothetical fair-minded observer is likely to have the same view. At the very least, the fair-minded observer might apprehend that LDD may not wish to put their continued receipt of income of these proportions in jeopardy. That is especially so in the circumstance that the 'referral relationship' had only recently been formed and that the number of referrals had been slowly increasing. Hence, I conclude that ASIC has established that the reasonable fair-minded observer might consider that LDD had an interest which conflicted with their duties...'*

And at paragraphs 104, 124 & 125 His Honour said:

> *104. '…However, by analogy with the principle that litigants do not get to choose their judges, of which the fair-minded observer can also be taken to be aware, the observer might reasonably think that the Mawson Group's involvement as participants in pre-administration transactions, whose lawfulness would be investigated, and their role in influencing the appointment of those who would examine their conduct, were causes for disquiet. It would be natural for the fair-minded observer in these circumstances to think that, by reason of the Mawson Group's relationship with LDD, it regarded LDD as being possibly more amenable to its interests than others might be. Accordingly, I consider that this circumstance could add to the apprehension of the fair-minded observer. It is appropriate, however, to repeat in this context that ASIC eschewed any suggestion of incompetent or non-diligent performance of duties by the respondents...'*
>
> *124. 'In summary, I consider that there is a conflict, which is more than theoretical between the interest of LDD in not jeopardising the prospect of further remunerative referrals from the Mawson Group, on the one hand, and the proper discharge of their duties as liquidators of WCPL and WCQPL, on the other. The reasonable fair-minded observer would perceive this conflict…*
>
> *125. 'I also think that a reasonable fair-minded observer might reasonably apprehend that, because of the respondents' interest in not jeopardising future income, they might not discharge their duties with independence and impartiality. I note in this respect the observation of Spigelman CJ at [26], 510 in McGovern that '[when] a relevant conflict of interest is established the reasonable apprehension follows almost as of course.'*

Some registered trustees have established relationships with trustworthy and untrustworthy pre insolvency advisors, which would constitute a significant source of their work. Others have relationships with financial institutions, which comprise a large source of their work. There have been instances of an untrustworthy pre insolvency advisor taking property of his insolvent clients in lieu of fees, prior to bankruptcy. When the trustee with the referral relationship was appointed as trustee of the bankrupt estates, the trustee faced having to investigate whether the property could be recovered for the estates from the referring untrustworthy pre insolvency advisor.

Trustees need to exercise great care in the current times when competition for work may be particularly fierce, to avoid conflicts. Further information on independence is available in Inspector General Practice Direction 1 – Independence of personal insolvency practitioners.

**Mark Findlay**
**Director - Regulation and Enforcement**

## What's reasonable? It's reasonable if it isn't unreasonable!

In the 9 months since tranche 2 of the *Insolvency Law Reform Act 2016* took effect on 1 September 2017, one regular query being received from stakeholders is how a trustee determines the **reasonableness** of a request for information from debtors and creditors.

The answer is in the Insolvency Practice Rules (Bankruptcy) 2016—and specifically, subsection 70-10(4) with regard to creditors, and subsection 70-17(4) in relation to debtors. Essentially, a request is reasonable if it isn't unreasonable!

Unreasonable requests may be categorised into one of seven main types. It is acceptable for a trustee to not comply with a request for information if:

1. it would substantially prejudice the interests of one or more creditors or a third party and that prejudice outweighs the benefits of complying with the request or
2. it would be privileged from production in legal proceedings on the ground of legal professional privilege or
3. disclosure would found an action by a person for breach of confidence or
4. there is not sufficient available property to comply with the request or
5. it has already been provided or
6. it is required to be provided under the Act (including Regulations) within 20 business days of the request being made or
7. the request is vexatious.

In each of the above examples, it is acceptable for a trustee to not comply with the request for information. Notwithstanding that, a trustee must notify the person or body making the request that it is not reasonable, why that is the case and make a written record of this in the books of the administration.

For further information and guidance on this issue, we encourage trustees to refer to IGPD 22 - Effective Practitioner Communication, paras 4.11 to 4.20.

**Tim Cole**
**Director - Regulation and Enforcement**

## Recent decisions

Read about recent insolvency case law decisions:

- Official Assignee in Bankruptcy of the Property of Hanna, in the matter of Hanna v Hanna [2018] FCA 156
- Bloomfield & Grainger [2018] Fam CA 36

- Abate, in the matter of Chang Rajii v Chang Rajii (No 2) [2018] FCA 241
- Estate of Nicholas Saad and Inspector-General in Bankruptcy [2018] AATA 487 (15 March 2018)Official Assignee in Bankruptcy of the Property

## Official Assignee in Bankruptcy of the Property of Hanna, in the matter of Hanna v Hanna [2018] FCA 156

*Bankruptcy and insolvency, whether to provide assistance to New Zealand Official Assignee in Bankruptcy under s 29 of the Bankruptcy Act 1966 (Cth) and s 10 of the Cross-Border Insolvency Act 2008 (Cth) ('Cross-Border Insolvency Act') – assistance granted – whether to recognise New Zealand bankruptcy as a foreign proceeding or foreign main proceeding pursuant to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law ('Model Law') as given force by s 6 to the Cross-Border Insolvency Act and grant relief under Art 21 of the Model Law – New Zealand proceeding recognised as foreign proceeding, but not foreign main proceeding.*

### Facts

New Zealand's Official Assignee in Bankruptcy[1] (the OA) was administering the bankrupt estate of James Adair Hanna. It sought assistance from the Federal Court of Australia in relation to the undischarged New Zealand bankruptcy of James Adair Hanna (the respondent). It did this by way of a letter of request from the High Court of New Zealand.

The respondent was made bankrupt in the High Court of New Zealand on 24 July 2009. Following this, the respondent filed a statement of affairs (SOA) in which he disclosed that he was retired. The OA was unable to locate any property in New Zealand to benefit the respondent's creditors. Further information became known, on the basis of which the OA objected to the respondent's discharge on 29 November 2011.

The OA alleged that the respondent has been earning income and acquiring assets in Australia without any disclosure to the OA. The OA contended that the respondent had been working with an Australian company, Multi Resources Development Pty Ltd, since December 2014 and was now the sole director and shareholder of that company. As the respondent is an undischarged bankrupt, the OA contended that his interest in the company and shares vest with the OA.

The OA sought:

- recognition of the New Zealand bankruptcy as a foreign proceeding and a foreign main proceeding under the *Cross-Border Insolvency Act 2008* (Cth) (CBI Act)
- consequential relief under Article 21 of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (Model Law), which has the force of law in Australia pursuant to s6 of the CBI Act
- relief under s29 of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) for orders in aid of the New Zealand High Court.

### Court's analysis

The Court began by examining the relief sought under s29 of the Bankruptcy Act. Section 29 provides that Courts are to help each other and shall act in aid of, and be auxiliary to courts of external territories and prescribed countries that have jurisdiction in bankruptcy. Where a letter of request is filed requesting aid in a bankruptcy matter, the Court may exercise such powers with respect to the matter as if it had arisen in the Court's own jurisdiction. As the New Zealand High Court is a court of a prescribed country that has jurisdiction in bankruptcy, His Honour was satisfied that s29(2)(a) of the Bankruptcy Act was engaged.

The Court noted that the use of the word 'shall' in this provision, has been interpreted to mean that the Court is 'bound to give all the assistance that it can' to the Court of a prescribed country (In Re Ayres; Ex parte Evans [1981] FCA 45, quoting Farwell J in Re Osborn [1931] 32 B & CR 189), while the relief granted would be a matter for judicial discretion (Re Cooksley [2017] FCA 1193). In light of the evidence indicating that there may be assets in Australia, which should be administered or realised, the Court considered that it would be appropriate to appoint a receiver. Gleeson J noted that similar orders had been made in Kapila, Re Edelsten [2014] FCA 1112, but denied in Re Cooksley, which involved small amounts of income.

Gleeson J then turned to the relief sought under the CBI Act and Model Law. His Honour highlighted the relevant relief that may be granted under Article 21, if the proceeding is recognised as a foreign proceeding, main or non-main. This relief includes the ability of the Court to entrust the administration or realisation of a debtor's Australian assets to the foreign representative or another person designated by the Court, and to grant additional relief that may be available to a trustee in bankruptcy under the Bankruptcy Act.

After examining the definitions of 'foreign proceeding' and 'foreign main proceeding', it was held that the New Zealand proceeding could not be considered a 'foreign main proceeding', as that requires that the proceeding take place in the State the debtor has the centre of its main interests (COMI). In making their submission, the OA suggested that the proceeding satisfied the COMI definition because New Zealand was the respondent's COMI at the time of his bankruptcy in 2009. However, the Court favoured a construction that required a determination of the COMI at the time of the application for recognition (Moore [2012] FCA 1002). The evidence indicates that the respondent did not have New Zealand as his COMI at this time.

His Honour did not discuss whether the foreign proceeding could otherwise be considered a 'foreign non-main proceeding', which is defined as a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor carries out non-transitory economic activity (Article 2(b)). The distinction between the two effects the relief that follows. Certain moratoria are automatically imposed upon the recognition of a foreign proceeding (Article 20), but are a matter of discretion for the Court upon the recognition of a foreign non-main proceeding, at the request of the foreign representative (Article 21).

Although relief may have been available under Article 21 of the Model Law, the Court determined orders under this article unnecessary in light of the decision to grant the relief sought pursuant to s29 of the Bankruptcy Act. These comments suggest that an applicant need not be granted relief under both Acts, particularly if the relief available under the Bankruptcy Act is sufficient, or would have the same effect.

### Decision

Subject to an undertaking by the Official Assignee, the Court ordered, inter alia, that:

- The New Zealand proceeding be recognised as a foreign proceeding pursuant to the CBI Act.
- All property and after-acquired property of Mr Hanna is vested in the Official Assignee pursuant to the NZ Insolvency Act and the Official Assignee may exercise all powers as would have been conferred on a trustee of an Australian bankruptcy under the Bankruptcy Act.

## Bloomfield & Grainger [2018] FamCA 36

*Family Law – Jurisdiction – Initiating Application filed by creditor in 2014, seeking to set aside asserted financial agreement entered into between First Respondent and wife – in November 2017, First Respondent asserts that the agreement is not a financial agreement as that term is defined in the Family Law Act 1975 Mr S and seeks declaration that the agreement is not a financial agreement as defined by the terms of s 90C of the Act, that the Initiating Application is dismissed and that the Applicant creditor pay costs – Applicant seeks leave to amend Initiating*

*Application to add alternative claim pursuant to s 228 of the Property Law Act 1974 (Qld) – Application for leave to amend Initiating Application refused – Initiating Application dismissed for want of jurisdiction.*

## Summary

The agreement in question was not a financial agreement, because it did not deal with the subject matter of s 90C Family Law Act 1975 (Family Law Act). See http://www.wolterskluwercentral.com.au/legal/family-law/gloomfield-subject-matter-important-financial-agreements/;

## Exerpts from judgment

50. 'In the circumstances, I accept the tenor of the submissions made by Mr Looney QC that, whilst the Agreement deals with how specific property of the First Respondent and Ms Grainger was to be dealt with when the Agreement was made, it does not deal with how that property is to be dealt with in the event of the breakdown of their marriage. Rather, the evident intention leading to, and the purpose of, the Agreement seems to me to have been immediately to transfer the T Street property from Ms Grainger to the First Respondent in anticipation of Ms Grainger's imminent bankruptcy.'

...

52. 'For the reasons expressed, I consider that the Agreement does not satisfy the terms of s 90C(2)(a) of the Act.'

...

62. 'For the reasons outlined above, I have concluded that the Agreement is not a 'financial agreement' as that term is defined in s 90C of the Act because:

a. it is not with respect to how, in the event of the breakdown of the marriage between the First Respondent and Ms Grainger, their property or financial resources (or the property of each of them and their respective financial resources) are to be dealt with; and
b. it is not with respect to the maintenance of the First Respondent or Ms Grainger.

The subject matter of a financial agreement is important. The parties and their lawyers overlooked this fundamental and preliminary point in the long-running *Bloomfield & Grainger* litigation, which commenced in 2014 and ended in 2018.

There were many hearings at which no issue was taken as to whether or not the litigation was about a financial agreement. In *Bloomfield & Grainger* [2018] FamCA 36, Justice Hogan finally determined that the agreement in question was not a financial agreement, because it did not deal with the subject matter of s 90C *Family Law Act 1975*, although it purported to be an agreement under s 90C.'

## Background

The litigation started in the Federal Circuit Court. The main issue in dispute throughout was the standing of a creditor to apply to set aside the financial agreement. The Full Court delivered judgment in *Grainger & Bloomfield and Anor* (2015) FLC 93-677 and found that a creditor retains standing, after a party becomes bankrupt, to apply to set a financial agreement aside under s 90K(1)(aa) or to apply for orders under s 90K(3), but cannot rely on other grounds under s 90K(1). A creditor cannot, however, apply to set aside a property settlement order, being barred by s 79(10A) and s 90SM(11). This case is discussed in more detail on the Wolters Kluwer website.

The High Court dismissed an application by the husband for special leave to appeal in *Grainger & Bloomfield and Anor* [2016] HCA Trans 61.

There were further hearings in the Family Court before the husband filed an Application in a Case in November 2017 seeking a declaration that the agreement was not a financial agreement as defined by s 90C Family Law Act.

### What was the subject matter of the agreement?

The parties' intention was to transfer the wife's interest in the property to the husband prior to the wife's imminent bankruptcy. In summary, the agreement provided:

1. The wife was to transfer, after execution of the agreement, her legal and beneficial interests in the T Street property to the husband to be held for the maintenance of the children during the marriage.
2. In the event of a separation, the husband would assume all liability under the mortgage.
3. A recital and a substantive clause were the only paragraphs to use the words 'breakdown of the marriage'. These paragraphs stated that neither party was precluded from further exercising any right available to them under the Family Law Act in relation to how any or all of the 'property of the marriage' is dealt with 'in the event of the breakdown of the marriage', in circumstances where the property or the needs of the parties' children have materially changed.

After executing the agreement, the transfer of the property was effected and the husband relied on the financial agreement to obtain an exemption from stamp duty. Notably, the agreement did not provide for how the T Street property would be dealt with in the event of a breakdown of the marriage, but only how it would be dealt with immediately upon the execution of the agreement.

### What does s 90C require?

Section 90C requires that a financial agreement cover certain 'matters'. Specifically, s 90C(1)(a) provides that the parties to a marriage can make a written agreement with respect to any of the matters mentioned in s 90c(2). Sections 90C(2) and (3) state:

*'(2) The matters referred to in paragraph (1)(a) are the following:*

a. *how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the marriage, is to be dealt with;*
b. *the maintenance of either of the spouse parties:*
    i. *during the marriage; or*
    ii. *after divorce; or*
    iii. *both during the marriage and after divorce.*

*(3) A financial agreement … may also contain:*

a. *matters incidental or ancillary to those mentioned in s-s(2); and*
b. *other matters.'*

So, whilst a financial agreement under s 90C may deal with incidental or ancillary or other matters, it must deal with one or both of the matters in s 90C(2).

### Why was the agreement not a financial agreement?

Justice Hogan delivered judgment on 31 January 2018 and held that the agreement was not a financial agreement as defined by s 90C of the Family Law Act because it did not deal with either:

1. how, in the event of the breakdown of the marriage between the parties, their property or financial resources (or the property of each of them and their respective financial resources) are to be dealt with or
2. the maintenance of either party.

The effect of this finding was that the transfer of the wife's legal and beneficial interests in the property was not done pursuant to a financial agreement. The agreement did not need to be set aside to attack the transaction. A remedy under the relation back provisions of the *Bankruptcy Act 1966* could have been sought by the trustee in bankruptcy without the agreement being set aside first. It was not clear from the various judgments whether the trustee was prepared to do this. Although a party to the family law proceedings, the trustee appeared not to take an active part and was prepared to accept the court's determinations at various times without being heard.

### What next?

The trustee in bankruptcy may not have the same thirst, or funding, for litigation as the creditor had in the family law proceedings. It remains to be seen whether the trustee will pursue the husband under the Bankruptcy Act.

The husband and the trustee in bankruptcy are likely to apply for costs orders against the creditor, as the judge gave any party 14 days to make an application for costs.

The only comfort the creditor received was that she was given 14 days to seek leave to obtain an order that the reasons for judgment be provided to the Office of State Revenue (Qld), to investigate whether or not the exemption from stamp duty was obtained fraudulently.

For lawyers, the case is a useful reminder of the importance of checking the wording of the Family Law Act. Sections 90B and 90C are worded differently from s 90D and their effect is different. The equivalent sections for de facto couples in Pt VIIIAB of the Act (s 90UB, 90UC and 90UD) are different again. When drafting a financial agreement, look at the wording of the relevant section. If the agreement does not cover one of the 'matters' that must be dealt with in a financial agreement made under that section, it will not be a financial agreement.

## Abate, in the matter of Chang Rajii v Chang Rajii (No 2) [2018] FCA 241

*Bankruptcy and insolvency – whether to grant relief under Arts 20 and 21 of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law ('Model Law'), as given force by s 6 of the Cross-Border Insolvency Act 2008 (Cth), and entrust applicant with bankrupt's assets in jurisdiction – whether to recognise Chilean bankruptcy as a 'foreign proceeding' or 'foreign main proceeding' pursuant to the Model Law – Chilean proceeding recognised as both a foreign proceeding and a foreign main proceeding – whether to recognise applicant as 'foreign representative' – applicant recognised as 'foreign representative' – relief granted under Arts 20 and 21 of the Model Law.*

### Background

1. This was an application for recognition of a foreign proceeding pursuant to the Cross-Border Insolvency Act 2008 (Cth) ('CBI Act') and consequential relief.
2. The applicant ('Mr Abate') is a Chilean registered on Chile's Trustee List.
3. Mr Abate sought orders to the following effect:

    a. recognising the Chilean bankruptcy proceeding as a 'foreign proceeding' and a 'foreign main proceeding'
    b. recognising Mr Abate as the 'foreign representative'; and
    c. conferring on Mr Abate relevant powers under the *Bankruptcy Act 1966* (Cth) ('Bankruptcy Act') and

other associated relief to assist his investigations and recovery of assets in Australia.

4. Mr Chang is a Chilean national who is described by Mr Abate as 'the author of what is being reported in the media as Chile's largest Ponzi scheme'. Mr Chang has been charged in Chile with fraud but, as far as Mr Abate is aware, has fled to Malta. Mr Chang's assets have been frozen by a Chilean Court order which order extends to assets in Australia. Proceedings have been commenced to seek Mr Chang's extradition from Malta to Chile.
5. The Chilean bankruptcy proceeding has already been recognised in Switzerland, England, the United States of America and the Isle of Man. In England, Mr Abate is in the process of auctioning real and personal property in his capacity as Mr Chang's liquidator.
6. According to Mr Abate's investigations, Mr Chang has assets in Australia. These comprise:
    1. an apartment in Sydney
    2. two bank accounts held in Mr Chang's name; and
    3. four bank accounts in the name of companies associated with Mr Chang.
7. Mr Abate's evidence is that the majority of the victims of Mr Chang's fraud reside in Chile. However, there is at least one potential creditor in Australia. The Owners of a Strata Plan assert that Mr Chang is indebted to them for unpaid levies in respect of the Sydney apartment.

## Excerpts

### 'Centre of main interests'

29. By Art 17(2)(a), a 'foreign proceedings' must be recognised as a 'foreign main proceeding' if it is taking place in the State where the debtor has the 'centre of its main interests'.

...

31. By Art 16(3), an individual's habitual residence is presumed to be the centre of the debtor's main interests. 'Habitual residence' is not defined in the Model Law. However, in Re *Edelsten*, Beach J said this at [46] to [48]:

The concept 'habitual residence' has been used in many international conventions and other instruments. To treat it as presenting just a question of fact is attractive, but wrong. First, its use and content must be read in the light of the specific convention being considered and its context. Second, objective criteria derived from or implicit in such a context may need to be identified so that the conclusionary composite phrase can be applied to the facts. Third, the composite phrase may usefully be divided in the first instance, although ultimately the whole phrase must be construed and applied. Where does the insolvent reside? A wide variety of circumstances may bear upon that question. Is that residence habitual? Again, a wide variety of circumstances may bear upon that question. Past and present intentions of the insolvent may bear on such questions. Such intentions may manifest themselves in terms of the duration of connection or residence with a particular place. But intention is not to be given controlling weight (see LK v Director- General, Department of Community Services [2009] HCA 9; (2009) 237 CLR 582 (LK) at [28]). Moreover, an insolvent's intentions may be ambiguous.

It is also possible that a transnational insolvent may lead such a nomadic life so as not to have a habitual residence (see LK at [25]).

One useful practical test may be to identify the centre of a person's personal and family life (as disclosed by the individual's activities) and to align that centre with the concept of habitual residence (cf LK at [25]), but care needs to be taken.

### Recognition of 'foreign main proceeding' and stay pursuant to Art 20

49. By Art 17(2), the Chilean bankruptcy proceeding was required to be recognised as a 'foreign main proceeding' if it is taking place in the state where Mr Chang has the centre of his main interests.

50. I was satisfied that Mr Chang's centre of main interests is Chile, for the following reasons given on Mr Abate's behalf:

1. Mr Chang holds a Chilean passport and habitually resided in Chile and conducted the administration of his business interests on a regular basis in Chile until April 2016 when the fraud was uncovered and he fled to Malta. Mr Chang continues to own nine vehicles and six apartments in Chile, one of which Mr Abate believes to be Mr Chang's residence. Mr Chang listed this apartment as his home when opening a new bank account in 2015, and requested that mail be sent there once a year. Mr Abate has inspected Mr Chang's residence and gives evidence that Mr Chang's personal effects, personal documents, furniture, decor and electronics all remain there.
2. Mr Abate also believes that Mr Chang's residence has remained unoccupied during his absence in Malta. Mr Abate's evidence is that he believes that the only reason Mr Chang has not returned to Chile is because Mr Chang fears arrest there.
3. These circumstances indicate that Mr Chang's activities in Malta are not permanent or the centre of his personal or family life; they are instead temporary, transitory, and solely or primarily for the purpose of evading justice.
4. The majority of Mr Chang's economic interests are in Chile, including Onix and the sums owed by him under the personal guarantees given by him to investors.
5. Most of the victims of Mr Chang's alleged fraud (and as such his creditors) are in Chile.
6. Mr Chang is the subject of criminal proceedings in Chile, in relation to the same matters the subject of this application.
7. Mr Chang's mother is a Chilean national, is ordinarily resident in Chile and is a co- defendant in the criminal proceedings involving Mr Chang in Chile.

51. I accepted Mr Abate's submission that, while Mr Chang owns real estate and bank accounts in places other than Chile, the mere presence of these assets in jurisdictions other than Chile does not displace the overwhelming inference, based on the matters set out above, that his centre of main interests is Chile.

## Estate of Nicholas Saad and Inspector-General in Bankruptcy [2018] AATA 487 (15 March 2018)

*Bankruptcy – notice of objection to discharge lodged by trustee – request by applicant for review of notice – whether applicant intentionally failed to disclose beneficial interest in property – decision set aside and remitted.*

### Excerpts

1. Mr Nicholas Saad is a bankrupt. The delegate of the Inspector-General in Bankruptcy decided on 22 December 2016 to confirm the objection of his trustee to his discharge from bankruptcy. The decision of the delegate of the Inspector-General is before me for review.

2. The trustee's objection to Mr Saad's discharge was based upon s.149D(1)(ma) of the Bankruptcy Act 1966 (Cth) (the Act). That section makes it a ground of objection to discharge that the bankrupt intentionally failed to disclose to the trustee the bankrupt's beneficial interest in any property.

3. The basis of that allegation is that the bankrupt signed on 9 October 2013 a Statement of Affairs declaring that the particulars set out in the statement were correct. The form drew attention to the fact that signing a declaration that the person knows to be false is an offence under s.267(2) of the Act.

4. The form contained provision for a person who provided assistance to the declarant in completing the form. That part of the form was filled out by Mr Michael Shehadie and the reason he gave as to why the debtor required his assistance was that the 'debtor is deaf + intellectually challenged'. The printed form contained a declaration by Mr Shehadie in the following terms: 'I declare that before this form was completed, I carefully read to/interpreted for the person named above the prescribed information and the questions on this form or [where the person is physically incapacitated] satisfied myself that the person had read and understood the information and questions. The responses provided in this form are those of the person named above.' (emphasis in original)

5. Question 32 on the form asked: Do you have an interest in a deceased estate? The response given was 'No'.

6. In fact, Mr Saad was named in his late mother's will.

...

11. Mr Saad is profoundly deaf as a result of a head injury sustained when he fell off a truck as a young child. He has major hearing disorders, and associated speech impairment. When communicating in person he relies heavily on lip-reading. Dr Bauer, his treating general practitioner, says that it has been his experience that he frequently misunderstands communications passed to him.

...

15. It does not seem that Mr Saad has been examined by a neurologist, or otherwise examined to determine the extent of any cognitive disorder. However his learning difficulties and school performance suggests that some cognitive disorder or mental incapacity may be present.

16. I did not detect in the manner in which he gave evidence any sign that he was dissembling. He appeared to me to be telling the truth.

...

### Decision

19. The conclusion which I reach on the whole of the evidence is that Mr Saad did not intentionally fail to disclose to the trustee his beneficial interest in any property, so that the reviewable decision should be set aside and remitted for reconsideration with a direction that the trustee's objection is to be cancelled because there is insufficient evidence to support the existence of the ground of the objection.

**Matthew Osborne**
**Principal Legal Officer - Legal and Governance**

[1] The Official Assignee is appointed under the State Sector Act 1988 to administer the Insolvency Act 2006, the insolvency provisions of the Companies Act 1993 and the Criminal Proceeds (Recovery) Act 2009. The Official Assignee administers all bankruptcies, No Asset Procedures, Summary Instalment Orders and some liquidations.

## Fox Symes pays $37,800 for potentially misleading advertising

The Australian Securities and Investments Commission (ASIC) has issued three infringement notices to debt management firm Fox Symes and Associates Pty Ltd (Fox Symes) for making potentially misleading statements in its advertising. The company has paid a total of $37,800 in penalties.

ASIC took action against Fox Symes after it made a number of potentially misleading representations in banner advertisements, Google ads and on its website. These representations included '*Free Debt Assistance*','*Reduce Debt in Minutes*' and '*15sec Approval*'.

ASIC was concerned that such statements misrepresented the cost and speed of Fox Symes' debt management services.

ASIC Deputy Chair Peter Kell said 'Debt management firms are often engaging with particularly vulnerable consumers who are seeking assistance with their debts. They should be careful not to misrepresent their services using high impact terms like 'free', 'minutes' and 'seconds' suggesting that debt assistance will be quick and at no cost.'

Read the infringement notices

## Background

'Free Debt Assistance' appeared in a banner advertisement and on the Fox Symes website. Fox Symes did not disclose to consumers that there was a limit to the 'free debt assistance' and that charges apply for most of Fox Symes' services. The 'free' component referred to the initial first phone consultation.

'Reduce debt in minutes' appeared in banner advertisements. As Fox Symes' services generally require engagement with third parties, a reduction in debt cannot feasibly be achieved in minutes, seconds or any other similar short period of time.

'15sec approval' appeared in Google paid AdWord results. Where Fox Symes provides credit services, the responsible lending requirements under the *National Consumer Credit Protection Act 2009* (Cth) apply. Approval could not be provided within such short timeframes.

Fox Symes voluntarily amended its advertising once ASIC raised its initial concerns.

Fox Symes is the holder of Australian Credit Licence 393 280, which authorises it to engage in credit activities other than as a credit provider.

Fox Symes was issued with three infringement notices for the representations. Each infringement notice was for a penalty of $12,600.

ASIC's MoneySmart website has guidance for consumers about what debt management firms can and can't do, which includes information on how consumers can fix their own credit history.

The payment of an infringement notice is not an admission of a contravention. ASIC can issue an infringement notice where it has reasonable grounds to believe a person has contravened certain consumer protection laws.

**Peter Kell**
**Deputy Chair - Australian Securities & Investments Commission**

# Disciplinary committee decides: Thomson to remain registered

In March 2018, a disciplinary committee interviewed Ms Louise Thomson to consider whether she should remain registered as a trustee. The basis for the interview were the four grounds outlined in a show cause notice issued by the Inspector-General in Bankruptcy to Ms Thomson on 10 November 2017.

In its report to the Inspector-General in Bankruptcy dated 5 April 2018, the committee decided that Ms Thomson should continue to be registered without condition or restriction.

The committee also recommended that the Inspector-General in Bankruptcy strongly consider conducting an annual review of up to five (5) of the trustee's files during each of the next two years—and that the trustee also be asked to demonstrate that she has met the continuing professional development requirements at each annual review.

Further, the committee also recommended that the Inspector-General in Bankruptcy publish the committee's reasons for its decision and its report.

Consistent with section 40-65 of Schedule 2 of the *Bankruptcy Act 1966*, the Inspector-General in Bankruptcy has given effect to the committee's decision.

In noting the committee's decision the Inspector-General in Bankruptcy, Mr Hamish McCormick said, 'Trustees must maintain high professional standards. In circumstances such as this, AFSA will not hesitate to investigate and if necessary refer matters to a disciplinary committee to enable appropriate sanctions to be considered. Public confidence in, and the integrity of, Australia's personal insolvency system is of paramount importance.'

If you are interested, the report is available on the AFSA website.

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

## Updated median industry rates for work transferred from OT

AFSA has completed its annual review of median industry rates for registered trustees, for work transferred from the Official Trustee (OT).

It is a key condition to membership of the National Panel that remuneration in estates transferred from the OT does not exceed median industry rates.

The current rates were reviewed on 9 May 2018, emailed to panel members on 24 May 2018 and came into effect on 1 June 2018.

If you are a member of the national panel, please update your records accordingly. If you are not a member and wish to join the national panel to receive estates from the OT that meet the criteria, a copy of the application is available on the AFSA website.

| Role | Range (per hour) |
|---|---|
| Appointee / trustee | $470 - $600 |
| Supervisor / manager | $350 - $450 |
| Analyst / senior | $275 - $315 |
| Intermediate / accountant | $225 - $295 |
| Secretary / graduate | $175 - $215 |
| Junior / admin support | $80 - $175 |

**Jason Ball**
**Assistant Director - Insolvency & Trustee Services, AFSA**

## Recent prosecution outcomes

See the below media releases for recent prosecution outcomes:

- Vic (BOULAD)—Convicted for removing property and failing to comply with trustee's direction
- Vic (MANDRI)—Former bankrupt ordered to perform 18 months community service for making false declarations
- Vic (AUJARD)—$500 good behaviour bond for false declarations
- NSW (ULUCANLI)—bankrupt sentenced to imprisonment
- NSW (XENOS)—bankrupt convicted for obtaining credit without disclosing his bankruptcy
- NSW (QUINN)—bankrupt convicted for disposing of property and making a false declaration
- Vic (NGUYEN and TRUONG)—former bankrupt cousins failed to disclose information and knowingly signed false declaration.

**Enforcement snapshot**

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