Volume 16, Issue 3, September 2018

Australian Government
Australian Financial Security Authority

PERSONAL INSOLVENCY REGULATOR

In this issue

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

The Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 was passed by Parliament last week. The legislation is due to come into effect nine months after it receives Royal Assent.

This is to allow sufficient time for the industry and for AFSA to make the necessary preparations to efficiently implement the changes.

The reforms are designed to boost confidence in the professionalism of administrators, deter unscrupulous practices, enhance transparency between the administrator and stakeholders, and ensure that the debt agreement system is accessible and equitable.

The main changes implemented by the reforms are:

- the length of a debt agreement a debtor can propose
- debtor eligibility to enter into a debt agreement
- the Official Receiver's powers to refuse to accept a debt agreement proposal in exceptional circumstances
- creditor voting rules around debt agreements
- debt agreement administrator registration requirements
- the Inspector-General's investigation and inquiry powers.

We will liaise closely with registered debt agreement administrators over the coming months as we work towards commencement of the new legislation.

What's AFSA's compliance focus for 2018–19?

Following a detailed review of historical trends and emerging issues, and after consultation with the Australian Restructuring Insolvency & Turnaround Association (ARITA) and the Personal Insolvency Professionals Association (PIPA), we will focus on eight key areas as part of our Insolvency Compliance

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Program in 2018–19.

1. Law reform—practical implementation

Subject to enactment by Parliament, we will seek to ensure practitioners comply with changes implemented by the one-year bankruptcy bill and debt agreement reforms.

We will seek to ensure quality and efficient administration occurs in the first 12 months of a bankrupt estate—particularly with respect to the proper use of objections to discharge.

We will seek to ensure all affected parties are aware of changes implemented by the one-year bankruptcy bill and debt agreement reforms.

2. Certifications in debt agreements

We will verify that registered debt agreement administrators satisfactorily perform their duties to certify debt agreement proposals, particularly in the areas of affordability and disclosure.

3. Practitioners business systems and controls

We will seek to ensure that all practitioners have sound and up-to-date business systems and controls that aid the efficient undertaking of their duties.

4. Remuneration and expenses

We will identify and investigate, through our own initiative and using information from complaints and other sources, Inspector-General reviews of remuneration—addressing potential cases of overcharging or over-servicing.

We will investigate the process of collecting set up fees before submitting debt agreement proposals to ensure conformance with the spirit of the legislation and relevant guidelines, including the PIPA Code of Professional Practice.

5. Delays in administration

We will seek to ensure efficient and effective administration, particularly with respect to aged matters.

6. ‘Right option—first time’

We will seek to ensure that information and advice provided by practitioners is accurate, relevant and comprehensible for the recipient, thereby enabling debtors and creditors to make informed decisions.

7. Untrustworthy advisors

Using all available data and intelligence, we will take enforcement action (proactive and reactive) to disrupt untrustworthy advisor conduct that has the potential to undermine confidence in the personal insolvency system. We will focus on compliance with the trustee performance standards and the ARITA and PIPA Codes of Professional Practice to ensure practitioners remain independent, including with pre-insolvency advisors.

8. Debt agreements—offences

We will analyse debt agreement termination and variation trends and, where appropriate, investigate alleged offences of the *Bankruptcy Act 1966* and refer matters to the Commonwealth Director of Public Prosecutions for consideration of prosecution action.

As appropriate, we will be in contact with practitioners throughout the course of the 2018–19 financial year to ensure high quality in administration in each of the above focus areas. Thank you to practitioners, in advance, for your co-operation.

Paul Shaw
National Manager — Regulation and Enforcement

Help us shape our services—launching the AFSAsandpit

We are committed to designing client centric services—making our services as simple, clear and fast as possible. By doing this, we deliver a better experience for our clients and minimise the time we need to spend on administrative follow-up.

AFSAsandpit is our new digital engagement platform where stakeholders can have their say on how our services are designed and delivered. It's a space where we can test out new ideas and get early feedback. This helps ensure our services are user-friendly, fit for purpose, and meet the needs of the citizens who use them.

We encourage you to take a look at AFSAsandpit and get involved. If you register to join our research group, we'll notify you when there are new research or feedback activities to participate in. You can also provide feedback at any time about any of our services to help us continually improve.

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Victoria Bastable
A/g Assistant Director Digital Channels — Service Delivery

Be aware of the untrustworthy advisor

Untrustworthy advisors who take advantage of vulnerable people, provide false or misleading information and engage in fraudulent or unlawful activities undermine the confidence in the personal insolvency system and can tarnish the reputation of other professionals in the industry who do the right thing.

Together with partner agencies, we have increasingly been focusing resources on untrustworthy advisor (UA)-related fraud over the past four years. During this period, we've obtained a substantial amount of information and intelligence. This has led to a number of investigations—with a number of persons being charged and prosecuted—and with more currently awaiting charges or further action in court.

The majority of the unlawful behaviour relates to providing false information or documentation in bankruptcies, compositions or personal insolvency agreements (PIAs). However, there have also been matters where false mortgages or caveats have been placed on properties to give the appearance there is no recoverable equity. Unfortunately, this behaviour places the insolvency industry in a bad light and denies creditors dividends they should be paid via recovery action by trustees.

In a large number of cases, the identified UAs have not advised their vulnerable clients that including false information or deliberately omitting information in a bankruptcy process (such as a composition or PIA) are criminal offences. It is only when a matter is investigated—or the bankrupt/creditor/debtor is charged and prosecuted—that they realise the seriousness of their actions.

In all the matters prosecuted to date, criminal convictions have been recorded against the offenders, some of which have gone very close to going to jail. One bankrupt said to investigators in her defence, '*I think it's ridiculous that I have to engage a second advisor to make sure that what the first one is telling me is correct and lawful*'. While other bankrupts have made similar comments, it is ultimately their responsibility to ensure the documentation submitted by UAs on their behalf is accurate and does not contain any intentional falsities.

Recognising potential unlawful UA activity

Some tell-tale signs of a UA potentially engaging in unlawful conduct include:

- the UA providing to the trustee their own contact address as the contact address for the bankrupt and creditors
- the UA insisting all enquiries by AFSA or trustees' staff be through them instead of the bankrupt or creditors
- mortgages being taken out on property just before a person becoming bankrupt
- use of false companies to claim manufactured debts
- high number of 'friendly' creditors recorded as unsecured debts
- lack of supporting documents for proofs of debt
- late inclusion/submission of proofs of debt in compositions or PIAs.

Insolvency practitioners should exercise due diligence

While there are many professional and legitimate companies providing sound advice to persons in financial difficulty, unfortunately, there are those choosing to engage in unlawful activities who tarnish the reputations of everyone else. Where bankrupts have engaged in suspicious or unlawful activity with UAs, it also places the work of insolvency practitioners under scrutiny, as it raises the question whether they might have been implicated or be seen to have chosen to turn a blind eye rather than exercise due diligence.

Ignoring unlawful or unethical behaviour is seen by AFSA as being just as serious as actively being involved. While some individuals may consider they are at arm's length due to the conduit the UA provides, in reality, their professional reputation will be tarnished and they, in-turn, could then become subject of scrutiny and monitoring. If evidence of a practitioner being involved in unlawful behaviour with a UA becomes known, they risk investigation by Regulation and being issued with a show cause notice, which could then potentially result in losing their registration and livelihood.

Depending on the practitioner's involvement and actions, they may also be subject to criminal charges. As trustees are 'Officers of the Court', a Magistrate or Judge would likely see their offending to be very serious and apply an appropriate sentence.

As reported in the media, agencies such as AFSA, the Australian Securities and Investments Commission and the Australian Taxation Office consider UA-related fraud to be a serious issue, and we will continue to apply resources to capture intelligence and address the unlawful behaviours of those involved. It is not only up to these agencies to be on the lookout for suspicious and unlawful activities and behaviours by UAs, but also each person working in the insolvency industry. AFSA expects insolvency practitioners to be diligent and report any incidences they may witness or come across during the course of their work.

Through a collaborative approach by everyone, threats such as those imposed by UAs can be addressed so that the insolvency industry maintains a good reputation, free of fraudsters and unscrupulous persons. If you have any about suspicious UA activity, please contact AFSA Enforcement at fraud.enquiries@afsa.gov.au or call 1300 364 785 and ask for Enforcement. All information will be treated with confidentiality.

John Maloney
Assistant Director — Enforcement

Scheme gets Royal Assent

The *National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Act 2018* received Royal Assent and commenced on 21 June 2018.

The Act amends subsection 116(2) of the *Bankruptcy Act 1966* to add a new paragraph 116(2)(ga):

> *(ga) a payment under the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 to the bankrupt (whether before or after he or she became a bankrupt and whether or not he or she is the person who suffered the sexual abuse to which the payment relates).*

The new paragraph excludes payments made under the Scheme from the property divisible among the creditors of a bankrupt.

Legal & Governance — AFSA

Australian Taxation Office update

Keep up to date with what's happening at the Australian Taxation Office (ATO), including the introduction of Single Touch Payroll reporting and the new phoenix hotline.

Single Touch Payroll reporting has started

From 1 July, employers with 20 or more employees started sending their payroll data to the ATO each time they pay their employees. The information is sent from their payroll software, and includes information such as their employees' salaries and wages, pay-as-you-go (PAYG) withholding and super information. This is one of the biggest reporting changes since the introduction of the GST.

The transition to Single Touch Payroll, or STP, has largely been a positive one with the information of more than a million employees reported within the first two weeks. More than 25,000 employers are now reporting through STP, with that number growing substantially each week.

Do insolvency practitioners need to report through STP?

If you are an employer with 20 or more employees, you need to report through STP for your own business.

If you are an insolvency practitioner appointed to act on behalf of an employer, you are exempt from reporting through STP for that employer in 2018–19. However, if the employer was using STP-enabled software, you may choose to continue to use their software and report through STP. There is no need to advise the ATO if you choose to make use of the insolvency practitioner exemption.

Reporting through STP as an employer

If you are not already reporting through STP, see the ATO's checklist for information on how to get ready. Start by talking to your payroll software provider to find out if your software is STP-enabled. Some software providers have a later start date (a deferral). If that deferral applies to you, make sure you are ready to report through STP on or before the deferral date.

This may involve a number of steps—such as making sure your records are up-to-date, including employee records such as names, addresses and tax file numbers. You should also check that you are paying your employees correctly, and calculating the right amount of super. This will make your transition to STP a smooth one, and ensure your data is successfully received by the ATO.

New phoenix hotline

The ATO acknowledges the unique position insolvency practitioners are in to identify potential illegal phoenix activity. You are also aware that the actions of a few can tarnish the reputation of the industry as a whole, so we have taken steps to make it easier for you to report individuals or businesses that may be engaging in illegal phoenix activity.

Illegal phoenix activity is particularly prevalent in major centres in building and construction, labour hire, payroll services, security services, cleaning, computer consulting, cafés and restaurants and childcare services. It's also seen in regional Australia in mining, agriculture, horticulture and transport. You would be aware that some untrustworthy advisors actively facilitate illegal phoenix behaviour.

To measure the current impacts of illegal phoenix activity, three Phoenix Taskforce member agencies (the ATO, Australian Securities and Investments Commission and the Fair Work Ombudsman) commissioned PricewaterhouseCoopers to prepare a report 'The Economic Impacts of Potential illegal Phoenix Activity'.

The report estimates the annual cost of illegal phoenix activity at between $2.85 billion and $5.13 billion, which includes costs to:

- **Employees**: lose between $31 million and $298 million in unpaid entitlements (wages, annual leave, pay in lieu of notice, redundancy, long service leave and superannuation)
- **Businesses**: lose between $1,162 million and $3,171 million as unpaid trade creditors
- **Government**: loses $1,660 million in unpaid taxes and compliance costs.

Phoenix Taskforce members will use this report as a basis for future estimates.

If you suspect an individual or business of facilitating or engaging in phoenix activity, let the ATO know by:

- calling the phoenix hotline on 1800 807 875
- reporting it online at www.ato.gov.au/reportphoenix
- emailing your information to phoenixhotlinereferrals@ato.gov.au

You can choose to remain anonymous.

These new reporting methods link to the Phoenix Taskforce, a group of 31 federal, state and territory government agencies that work collectively to provide a whole-of-government approach to combatting illegal phoenix activity.

You can find out more at www.ato.gov.au/phoenix or www.ato.gov.au/costofphoenix

Where do I find more information?

Visit the ATO website for more information www.ato.gov.au/stp.

You can also join the conversation, or ask questions and seek answers, in ATO Community.

For detailed guidance on how to report through STP, visit the ATO's employer guidelines.

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

Updated practice statement—referring offences for rash and hazardous gambling

Inspector-General Practice Statement 6 (IGPS6) Referral of offences under section 271 of the *Bankruptcy Act 1966* (Rash and hazardous gambling) has recently been updated.

Recent changes include an emphasis that the guideline should not deter practitioners from sending a pre-referral enquiry (PRE) or offence referral to AFSA Enforcement when gambling is suspected to have contributed to a bankrupt's insolvency.

Often upon assessing gambling-related referrals, it is borderline whether a matter should be accepted for investigation or dealt with by way of an official caution. Through the use of an official caution, the bankrupt is both informed and put on notice of this offence provision. Gambling, which is 'rash and hazardous' and materially contributes to their bankruptcy, is a breach of section 271 of the *Bankruptcy Act 1966*, and may be investigated and prosecuted. We see the official caution as a good outcome as it provides a level of deterrence for persons contemplating engaging in high levels of gambling when they are in financial difficulty. Past prosecution statistics for section 271 revealed 90 per cent of offenders were convicted and put on probation for this offence.

Some refresher points on IGPS 6 include:

We will not refer a case for prosecution where it appears that the debtor could be classified as having been a 'problem gambler' and had not engaged in any associated criminal activity to finance their gambling habit.

We will consider referring a case to the Commonwealth Director of Public Prosecutions (CDPP) only where it involves:

- clear criminality
- complex offences
- ongoing allegations of repeat offending subsequent to the bankrupt being provided an official caution by AFSA Regulation and Enforcement.

Please note that from time-to-time, Enforcement may refer a brief of evidence for disposing of funds to the CDPP. However, depending on the circumstances, we may choose to charge with gambling.

If anyone has any questions about a potential gambling offence, and whether or not it should be referred as a PRE or offence referral, please contact Enforcement.

John Maloney
Assistant Director — Enforcement

Annulments under s153A: when tax returns are not up to date

It is apparent from inspections conducted and remuneration reviews performed, that some trustees are postponing the annulment of bankruptcies inappropriately on the basis that the bankrupt's tax returns are not up to date, as though the lodgement of all tax returns was a pre-condition for an annulment to occur.

It is certainly preferable for all tax returns to have been lodged and then for the Australian Taxation Office (ATO) to have been given the opportunity to lodge a proof of debt, but there is no legislative basis for delaying the annulment on this basis.

Some trustees have gone further and expended considerable effort trying to determine the extent of any possible liability to the ATO, as though they had a duty to do so. Under the *Bankruptcy Act 1966* (the Bankruptcy Act), creditors must bear the cost of proving their debt. It is not for the trustee to assume this role.

As His Honour Sackville J said in *Re Douglas Wong Ex Parte: Douglas Wong v Max Christopher Donnelly; Babsari Pty Limited and Raymond Yee Ping Tsui [1995]* FCA 1465 (18 August 1995)

> *'If the trustee is satisfied in a given case that all creditors likely to lodge proofs of debt have done so, he or she is not prevented by the theoretical possibility of a late proof being lodged, from being satisfied of the state of affairs specified in s.153A(1).'*

Guidance provided in the September 2009 and December 2009 editions of the Personal Insolvency Regulator (PIR) is reproduced below. The original articles are available via the Australian Government web archive.

September 2009 article: ATO creditor claims in annulments

Regulation has identified an issue of concern in relation to annulments and the treatment of claims, or possible claims, by the ATO. In a typical scenario, once the ATO has been notified of the bankruptcy, they will ordinarily do one of two things:

1. Lodge a claim for income tax or GST in relation to financial years and/or GST periods where the bankrupt has filed his/her tax returns or business activity statements. If there are unfiled income tax returns or business activity statements (BASs), they will state in a covering letter that a further proof of debt may be lodged when the liability (if any) in respect of a certain period is ascertained, which relates to various unfiled income tax returns and BASs.
2. If there is no liability, the ATO will advise that they do not presently have a claim; however, a proof of debt may be lodged when the liability (if any) in respect of a certain period is ascertained, which relates to various unfiled income tax returns and business activity statements.

At this point in the administration, some trustees will treat the bankrupt bringing their tax affairs up to date to be a condition of the annulment, so they can quantify the ATO's claim. In some cases, this will prolong the administration of the estate and substantially increase the costs, which in turn has the effect of reducing the surplus paid to the bankrupt.

The section relevant to annulments on payment of debts is 153A. For an annulment to take effect, the trustee must be satisfied that all the bankrupt's debts have been paid in full. A bankrupt's debts are defined as those debts that have been proved in the bankruptcy. Pursuant to section 84(1), a creditor who desires to prove a debt in a bankruptcy shall lodge, or cause to be lodged, with the trustee a proof of debt. Therefore, if a creditor wishes to prove their debt in the estate, once they are aware of the bankruptcy, the onus is on them to lodge a proof of debt. Once the ATO has lodged a claim in the estate, the trustee's sole duty is to adjudicate on it pursuant to section 102. Due to the nature of self-assessment in the Australian taxation system, it is not necessary or appropriate for trustees to proactively pursue the bankrupt to ensure that s/he bring their tax affairs up to date for trustees to be satisfied that all their debts have been paid pursuant to subsection 153A(1).

The bankrupt's liability to the ATO is created once the income tax returns or BASs have been filed. If after the annulment occurs, the bankrupt brings their tax affairs up to date, the annulment will not affect the ATO's right to pursue their claim.

While section 260-45 of the Schedule 1 of the *Tax Administration Act 1953* places certain obligations on company liquidators in relation to the company's tax liability and the distribution of the company's assets, there are no equivalent provisions for administrations conducted pursuant to the Bankruptcy Act. Clause

2.13 in Division 2.4 of Schedule 4A Performance Standard for Trustees (now found at Insolvency Practice Rule 42-6) requires trustees to incur only those costs that are necessary and reasonable. For the reasons outlined, it is not considered that the time spent in pursuing the bankrupt in order for him/her to bring their tax affairs up to date to be necessary or reasonable.

Obviously, there is some opportunity for the trustee to make limited enquiries with the ATO and with the bankrupt about the advantages of the ATO making a full and final claim in the estate, and for the bankrupt to bring their tax affairs up to date, but if either party is not willing to facilitate this, the trustee should proceed with the annulment.

December 2009 article: ATO creditor claims in annulments

The September 2009 edition of the PIR contained an article entitled, *'17. ATO Creditor claims in annulments'*.

The purpose of the article was to put forward our view that in circumstances where the bankrupt had not filed tax returns for a number of years—and it could not be determined whether the ATO was a creditor—**trustees should not unreasonably prolong the administration of the estate**, and thereby increase the costs of the estate in order that the bankrupt bring their tax affairs into order.

The article was specifically directed at the situation where an annulment under section 153A of the Bankruptcy Act might otherwise occur, but this view would equally apply to the situation where a dividend was payable and an annulment would not occur.

We received a number of queries about comments in the original article that were aimed at the practical consequences of this view. The purpose of the article was to reiterate the intent of the original article and to address the queries that have been received with respect to those comments.

The article included the statement that '*…the liability for tax arose at the relevant "balance date" only becoming payable following the issue of an assessment usually after the lodgement of either of a BAS or income tax return*'. We acknowledge that without further commentary, this statement may be interpreted as incorrect.

The case law establishes that the *Income Tax Assessment Act 1936* imposes an obligation on a person who derives assessable income within the meaning of that Act **at the time that such income is derived**, to pay income tax on so much of that income as proves to be taxable income *(Jones v DCT)*. In *Jones*, it was held that the obligation was a contingent liability within the meaning of s82(4) of the Bankruptcy Act.

However, income tax is 'due' when an assessment is made, and does not become 'due and payable' before the date specified in the notice of assessment *(Clyne v FDCT)*.

It is also the case that lodgement of an income tax return after bankruptcy in respect of the period prior to a date bankruptcy, will not in itself permit the ATO to recover income tax after a bankruptcy has been annulled.

The only exception relates to where a creditor has not proved in the bankruptcy. In that case, the debt will be revived notwithstanding an annulment pursuant to s153A. This is implicit in the definition of 'bankrupt's debts' in s153A(6)) (and see *More v More* (1962) Ch 424). Hence, the ATO's debt would be revived post the s153A annulment where it had not proved its debt.

Summary

Although it is accepted that trustees should act reasonably by informing the bankrupt of the obligation to comply with the relevant taxation laws and file returns and to communicate with the ATO, trustees should not unnecessarily delay the administration of an estate. This includes delaying fund distribution or adding to the costs of the administration with respect to the bankrupt bringing their taxation affairs into order. In cases where all debts of the estate are paid in full (apart from a possible claim by the ATO) and the trustee determines that it is appropriate to grant an annulment under section 153A, the ATO can take action to recover the amount of any debt that would have been provable in the annulled bankruptcy, even after the annulment.

Mark Findlay
Director — Regulation

Unpacking the AFSA Enforcement toolkit

AFSA's purpose is to maintain confidence in Australia's personal insolvency and personal property securities systems through delivering fair, efficient and effective trustee and registry services, and risk-based regulation.

To achieve our purpose, Enforcement must apply a risk-based approach to case selection to ensure an efficient and effective use of our limited resources

We use a range of enforcement tools to obtain effective outcomes.

Our toolkit includes:

- targeted communications to educate debtors about their obligations while bankrupt and to be aware of untrustworthy advisors
- engaging with alleged offenders to encourage them to comply
- issuing official cautions where there is a prima facie case an offence may have been committed
- issuing an infringement notice (only available for specific offences)
- referring briefs of evidence to the Commonwealth Director of Public Prosecutions (CDPP) for their consideration for prosecution action.

So, how does Enforcement decide which tool to use?

When Enforcement identifies a prima facie case, investigators consider a range of factors to determine the most appropriate course of action. The factors and the weight applied to these factors change on a case-by-case basis due to the unique circumstances of each referral. These factors can include:

- previous official cautions from AFSA Enforcement relating to similar conduct
- public interest factors such as:
    - the impact of the offending (whether the detrimental impact or potential detrimental impact is minor)
    - the degree of criminality of the offending
    - adverse findings in courts or tribunals which traverse or relate to the alleged offender's alleged conduct (i.e. pattern of behaviour that needs to be addressed
    - the need for personal or general deterrence.

AFSA and R&E's strategic priorities and focus areas are also considered. For most prosecutions, general deterrence is of the upmost importance. When considering referring matters to the CDPP, we know we have to choose matters we believe will deliver the most effective outcomes (the most serious penalties to deter others from doing the same thing). However, we understand that judicial officers must take into account a number of factors when sentencing an offender so sometimes sentencing doesn't go the way we think it will. We are also mindful of the potential high costs associated for government (including AFSA) and witnesses, such as practitioners, during an investigation and a prosecution.

In 2017–18, 33 per cent of our investigations were finalised with an official caution. Official cautions inform an alleged offender that they may have committed an offence and to deter and educate them from similar behaviour in the future.

Over the years, Enforcement's use of official cautions has continued to be an effective enforcement tool. Only a very small number of people who have received official cautions are referred back to Enforcement. When this occurs, in most cases these individuals are referred to the CDPP.

On occasion, Enforcement receives negative feedback from practitioners when a matter is resolved with an official caution.

This feedback includes complaints about costs associated with submitting a detailed offence referral. Sections 19(1)(h) and (i) of the *Bankruptcy Act 1966* requires trustees to consider if an offence against the Act has been committed and refer evidence of an offence to the Inspector-General. The pre-referral enquiry (PRE) process was introduced to improve efficiency for practitioners when complying with this obligation. The PRE process should be used when a practitioner is unsure if an offence has occurred or when the suspected offence is minor in nature.

While not all investigations result in a referral to CDPP, we have more than one tool in our toolkit, which have all proven to be effective when used appropriately. We also analyse our referral data to identify emerging trends and determine our focus areas for future insolvency compliance programs.

If you have any questions about our referral process and evidentiary requirements, please refer to IGPS14 for further information. Any general Enforcement enquiries can be directed to fraud.enquiries@afsa.gov.au.

Gemma Denton
Director — Enforcement

Insights from AFSA's review of practitioner information requests

A recent review of information requests from personal insolvency practitioners and their staff to AFSA Regulation over the last two financial years (2016–17 and 2017–18) revealed...

- 229 information requests were finalised in 2016–17 and 177 finalised in 2017–18
- nearly 60 per cent of information requests were from practitioners' staff each year
- general administration and accounting (52 per cent), fees and costs (11 per cent) and income and contribution liability assessment (10 per cent) were the most common topics during the entire period 2016–18.

An important qualitative finding of the review was a tendency of some practitioners and their staff to submit information requests seeking specific advice about what action they should take in administering an estate.

AFSA and the Inspector-General (IG) provide broad guidance across various subjects including, but not limited to:

- AFSA's policies, practices and procedures

- interpretation and application of bankruptcy law
- IG's expectations of practitioners administering personal insolvencies.

This is consistent with our goal of providing quality information set out in AFSA's corporate plan, namely to *'deliver accessible, accurate and consistent information services, empowering clients and stakeholders to make informed decisions*'.

However, in our regulatory role, we cannot provide estate specific or individualised advice to practitioners on decisions—whether discretionary or otherwise—that they must or may make under bankruptcy legislation.

We expect practitioners to exercise their own professional judgement to make decisions based on their knowledge and experience and (if necessary) advice from legal or other experts.

For practitioners who are also members of the Australian Restructuring Insolvency & Turnaround Association, we urge them to make use of the online technical support provided by its Specialist Team when needed.

To ensure that you make only relevant enquiries to AFSA, we ask that you promote our online publications and the AER Online support form with your staff. Any queries lodged with us should be submitted directly by the practitioner.

Relevant contact details are available on the AFSA practitioner support webpage, which includes how to:

- call us on 1300 364 785
- submit a document or form
- log into online services.

Practitioners may forward any feedback about our publications to AFSA corporate enquiries.

Paul Eric
Assistant Director — Regulation and Enforcement

Recent decision case note

Read about the recent decision: *Jones and Inspector-General in Bankruptcy [2018]* AATA 3260 (5 September 2018).

BANKRUPTCY – trustee's objection to discharge – does the objection specify at least one special ground – elements of s 149D(1)(d) – request in writing by the trustee to provide written information – was the request for information a valid request – did the applicants' fail to comply with the request – decision set aside and substituted.

Background

On 14 May 2014, Susan and Garrick Jones (**the bankrupts**) became bankrupt by way of debtor's petitions. Between 19 September 2014 and 29 August 2016, Mr George Lopez (**the trustee**) sent various requests to the bankrupts for information about their property, including details about various art pieces and the location and addresses and contact details of the parties that held those art pieces, and the bankrupts sent some information in response. On 29 August 2016, the trustee informed the bankrupts by letter that if they failed to provide the requested information by 30 August 2016, it would result in an objection to their discharge from bankruptcy.

On 31 August 2016, the bankrupts replied to the trustee's letter in an email. They attached a letter dated 30 August 2016 advising they did not know the exact physical location of any of the craft pieces and they needed an extension of time to get this information. In their letter, the applicants provided the name and email address of one representative, and stated they were endeavouring to get all of the information requested. The trustee stated he did not receive this email and letter and lodged a notice of objection to the bankrupts' discharge under s 149B on 13 September 2016 (**the objection**). The objection was on the ground that, under s 149D(1)(d), the bankrupts '*failed, when requested in writing by the trustee, to provide written information about your property, income or expected income, failed to comply with that request [sic]*'.

On 10 November 2016, the bankrupts requested that the Inspector-General in Bankruptcy (the IG) review the trustee's decision to file the objection. On 13 January 2017, the IG confirmed the trustee's decision to file the objection. The bankrupts appealed the IG's decision to the Administrative Appeals Tribunal (**the Tribunal**).

Analysis

Was s 149D(1)(d) complied with?

The Tribunal primarily examined whether there was a request fulfilling the requirements of s 149D(1)(d) of the *Bankruptcy Act 1966*. The Tribunal emphasised that a request under s 149D(1)(d) has five distinct elements, all of which must be fulfilled ([36]):

1. the request must be to the bankrupt (element 1)
2. the request must be in writing (element 2)
3. the request must be by the trustee (element 3)
4. the request must be **to provide written information** (element 4)
5. the information requested must be about the bankrupt's property, income or expected income (element 5).

The Tribunal found that element 4, a request to provide written information, was not complied with by the trustee. This was because the requests did not ask that the bankrupts' responses **be in writing**; to be valid, the request should have specified that the information sought must be provided by the bankrupt *in writing* ([49]). An example of a request not held to be a request to provide written information was a letter dated 22 September 2014 requiring '...a list of all art pieces created, including those prior and post to bankruptcy...' ([50]) It is notable that this issue was not raised by the parties or the Tribunal and so there had been no submissions on this point.

Further, the Tribunal found some of the requests were not directed toward the relevant bankrupt, and for other requests it was unclear whether they had been requested 'by the trustee' because they had been sent by the trustee's business office Melsom Robson.

Strict compliance required—analogous to bankruptcy notice

In summary, the Tribunal took a literal approach to s 149D(1)(d), and required 'strict compliance' (as opposed to 'substantial compliance') with each of its five constituent elements, because of the serious consequences for a bankrupt person who is found to have failed to provide information. Indeed, the Tribunal stated that a request under s 149D(1)(d) is: 'not dissimilar in seriousness to a failure to comply with a bankruptcy notice' ([73]), and just as the law requires strict compliance with the statutory requirements for a bankruptcy notice (see Kleinwort Benson Australia Ltd v Crowl [1988] HCA 34; (1988) 165 CLR 71), similar strict standards should be applied 'with respect to form and content of other notices where the consequences of non-compliance are serious' ([73]).

Did the bankrupts provide the requested information?

Although it was unnecessary for the Tribunal to do so, it considered whether the requested information had been provided and found it was not satisfied that the applicants had failed to comply with the requests. This was because 'most of [requests] seemed to be in effect asking for the information that had already been provided by the applicants on 23 September 2014' ([78]).

The Tribunal did not examine whether there was sufficient evidence to support the existence of at least one special ground specified in the objection, and whether the bankrupts had failed to provide the information requested, whether the bankrupts had failed to establish that they had a reasonable excuse for that failure.

Decision

The IG's decision was set aside and substituted with the decision to cancel the objection.

Recent prosecution outcomes

See the below media releases for recent prosecution outcomes:

- Vic (Green)—Imprisoned for breaching good behaviour bond
- Vic (Tasevski)—Bankrupt convicted and sentenced for making a false declaration
- Qld (Bui)—Bankrupt convicted for preparing to leave Australia without the trustee's consent
- NSW (Kaftel)—Bankrupt goes to jail and ordered to pay reparation
- NSW (Zannettides)—Bankrupt convicted for incurring a debt by fraud and preparing to leave Australia without the trustee's consent
- Qld (Billington)—Bankrupt convicted after receiving advice from untrustworthy advisor
- Qld (Wakeling)—Bankrupt convicted for disposal of funds bequeathed from deceased estate
- NSW (Mosesian)—Bankrupt convicted after transferring money to family and friends

This issue of the Personal Insolvency Regulator (PIR) newsletter may be cited as *(2018)16(3) Personal Insolvency Regulator*.

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