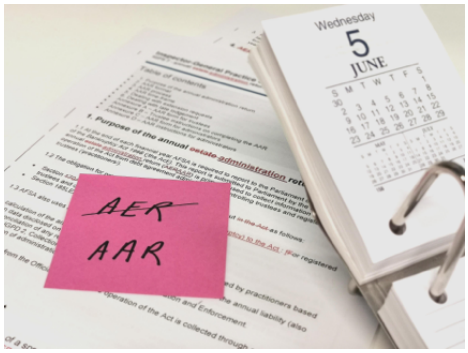
Volume 17, Issue 2, **June 2019**

In this issue

Did you see?

Our recent AFSA news article 'Getting tough on untrustworthy advisors'

'Annual estate returns' become 'annual administration returns'



You may have noticed that we've renamed the 'annual estate return' to the 'annual administration return'.

This name change took effect in AFSA's online services from 5 June 2019 and will apply for the 2018–19 financial year and future years.

We've changed the name in AFSA's online services and on our website to implement the law reform and subsequent administrative changes from the *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* and the *Insolvency Law Reform Act 2016*.

We've updated our practice guidance to reflect the reforms, and you can now view the amended versions of Inspector-General Practice Direction 2 – Collection of realisations and interest charges and Inspector-General Practice Statement 7 – Annual administration returns.

We've also updated the annual administration returns user guides, online support forms and webpages. Please take some time to familiarise yourself with these documents in preparation for lodging your annual administration return.

As previously outlined in the March edition of the Personal Insolvency Regulator, the due date for returns to be filed by insolvency practitioners has changed from 35 calendar days after the end of the financial year, to **25 business days**. This change applies for the 2018–19 financial year, and subsequent years.

This means that annual administration returns (formerly annual estate returns) for 2018–19 **must be filed by 2 August 2019**. Realisations charge and interest charge payments for 2018–19 will be due and payable on 4 August 2019. As 4 August 2019 is a Sunday, the due date defaults to the next business day, which is **Monday, 5 August 2019**.

We recommend that practitioners aim to have both lodgements and payments made by **2 August 2019**.

If you have any queries, please contact regulation@afsa.gov.au.

Amanda Hodges
Acting Assistant Director, Technical – Regulation

Drawing remuneration before petitioning creditor's costs are taxed

AFSA has revised its position on drawing remuneration before petitioning creditor's costs are taxed.

Accordingly, AFSA is of the view that a practitioner is permitted to draw remuneration and make other payments in accordance with the *Bankruptcy Act 1966* while waiting for a petitioning creditor to have their costs taxed, subject to certain requirements.

Background

In the June 2015 edition of the *Personal Insolvency Regulator*, AFSA advised practitioners to follow a time-based, or temporal, approach when distributing funds from an estate, in accordance with the order outlined under section 109 of the *Bankruptcy Act 1966* (the Act) and Schedule 3 of the Bankruptcy Regulations 1996.

Section 109 of the Act states:

> (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:
>
> > (a) first, in the order prescribed by the regulations, in payment of the taxed costs of the petitioning creditor and the costs, charges and expenses of the administration of the bankruptcy, including the remuneration and expenses of the trustee and the costs of any audit carried out under section 70-15 or 70-20 of Schedule 2

Schedule 3 of the regulations states that the order of payment for first priority claims are:

> …
> 5. The taxed costs of the petitioning creditor, the administrator of the estate of a deceased person or the applicant under Part X of the Act for a sequestration order and, if a petitioning creditor under Part X of the Act also applied for an order under Division 5 or 6 of Part IX of the Act, any

> taxed costs of the creditor in respect of the application
>
> 6. The trustee's lawful remuneration

In the June 2015 *Personal Insolvency Regulator* article, 'Drawing remuneration before paying petitioning creditor costs', we advised practitioners that there were no qualifying criteria in the operation of these provisions that allowed a practitioner to draw remuneration before a petitioning creditor's tax costs—even if there were sufficient funds held (or expected to be held) in the estate to satisfy both claims. The legislation was interpreted in a way that the trustee of the bankrupt estate must adhere to the strict order identified under these provisions.

Interpretation of section 109 of the Act

AFSA has decided to reconsider its advice to practitioners on this issue.

The effect of section 109 of the Act is qualified, as it applies 'subject to this Act'. Where section 109 is in conflict with another section of the Act, because it must be read subject to the Bankruptcy Act, the other section should not be read down. Such an approach could allow a practitioner to distribute monies without holding off payments until the priorities can be fully met in a strict time-based order.

One provision that section 109 of the Act could be read as subject to is subsection 140(2) of the Act, which states:

> (2) Subject to the retention of such sums as are necessary to meet the costs of administration or to give effect to the provisions of this Act, the trustee shall distribute as dividend all moneys in hand.

Section 42-135 of the Insolvency Practice Rules (Bankruptcy) 2016 also states:

> A registered trustee must distribute estate funds in a timely manner, having regard to:
>
> (a) the complexity of the administration and the claims of creditors; and
>
> (b) the amount of funds available for distribution; and
>
> (c) the need to retain funds in the estate to meet existing or expected commitments.

AFSA has also considered the recent article in the *ARITA Journal*, Volume 31, 'A taxing question for bankruptcy trustees', by Séamus Ryan and Demian Walton of Rigby Cooke Lawyers, which queried the temporal approach to the priorities in distribution.

AFSA's revised position

AFSA's revised position is that a practitioner is permitted to draw remuneration (including interim remuneration) and make other payments in accordance with the Act while waiting for a petitioning creditor to have their costs taxed. However, the practitioner must still comply with section 109 by setting aside sufficient funds to meet the petitioning creditor's costs once taxed before making payments of lower priority.

In circumstances where there is a delay in the petitioning creditor having their costs taxed, it would be reasonable for a practitioner to send a written request to:

- invite the petitioning creditor to have their costs taxed
- request a certificate of taxation within a reasonable period (e.g. 60 days)
- request an estimate of the taxed costs so that a sufficient amount is retained by the practitioner to pay the petitioning creditor when the costs are eventually taxed. Where there is no response from the petitioning creditor, a practitioner may estimate their reasonable costs.

Where the petitioning creditor has not claimed their taxed costs within six months of this request, it may be appropriate for the practitioner to remit the retained funds to the Commonwealth under section 254 of the Act. From 27 June 2019, a person who claims to be entitled to any such monies can make an application to the Official Receiver to be paid the amount claimed.

This would also allow a practitioner to then finalise the estate, which accords with their duty to minimise costs and administer the estate efficiently under section 19 of the Act.

Jody Leong
Senior Inspector – Regulation

Administering income contribution assessments

A major form of realisation within a bankrupt estate is a bankrupt's payment of income contribution liabilities.

This article examines the relevant provisions of the *Bankruptcy Act 1966* and incorporates some of the common feedback AFSA Enforcement's Compliance Team provides to trustees when a bankrupt fails to comply with requests for income records.

Duties of bankrupts and trustees

There are mutual duties that bankrupts and trustees have in administering income

contribution assessments:

> 1. Bankrupts have a duty to provide timely information about employment and income details as required (paragraphs 77(1)(ba), 77(1)(bb) and 77(1)(bc) of the *Bankruptcy Act 1966* (the Act)).
>
> 2. Trustees have a duty to make an assessment of the income as soon as practicable after the start of each income contribution period, being the anniversary date of the date the bankrupt became bankrupt (subsection 139W(1) of the Act).

This mutually dependent relationship will work best through strong communication and cooperation between a trustee and a bankrupt. However, from time to time the relationship may become adversarial and particular conduct can give rise to a potential offence under the Act.

The AFSA Enforcement Compliance Team regularly receives referrals relating to a bankrupt's failure to disclose income, and they most commonly take one of two forms:

> 1. an allegation of contravention of section 139U of the Act, which requires the bankrupt to produce particulars of his or her income within 21 days after the end of the contribution assessment period (CAP)
>
> 2. an allegation of contravention of paragraph 265(1)(ca) of the Act, for the failure to provide full and true information about any of the bankrupt's conduct and examinable affairs.

Provisions of the Act

Section 139U of the Act provides:

> (1) A bankrupt must, as soon as practicable, and in any event not later than 21 days after the end of a contribution assessment period, give to the trustee:
>
> (a) a statement:
>
> (i) setting out particulars of all the income that was derived by the bankrupt during that contribution assessment period; and
>
> (ia) setting out particulars of all the income that was derived by each dependant of the bankrupt during that contribution assessment period; and
>
> (ii) indicating what income (if any) the bankrupt expects to derive during the next contribution assessment period; and
>
> (iii) indicating what income (if any) the bankrupt expects each dependant of the bankrupt to derive during the next contribution

assessment period; and

(b) such books evidencing the derivation of the income referred to in subparagraph (a)(i) as are in the possession of the bankrupt or the bankrupt can readily obtain.

Penalty: Imprisonment for 6 months.

Proving a contravention of the Act

We now discuss the factors to be considered when proving a contravention of section 139U or paragraph 265(1)(ca) of the Act.

Contravention of section 139U

In order for AFSA Enforcement to prove a contravention of section 139U to a criminal standard, the following are important factors to be considered:

1. It must be proven that the bankrupt was aware of the requirement to provide the statement and intended not to provide it and/or accompanying books.

2. To prove the relevant intent, it must be shown on the evidence that:

i. the bankrupt received a notice containing the statement and request for accompanying books and records prior to the end date of the CAP and understood the requirements of the notice (acceptable forms of evidence are set out in paragraph 2.6 of Inspector-General Practice Statement 14 and are discussed in our article in the December 2018 *Personal Insolvency Regulator*, 'The usefulness of service documents')

ii. the bankrupt was capable of producing answers to the questions and accompanying books (e.g. a request for tax returns that are not completed will not be able to be complied with and therefore will not give rise to offending—that a taxpayer has an obligation to complete a tax return is not evidence that they did)

iii. the notice must comply with the legislation in that it cannot provide a due date that contravenes the date prescribed by the legislation as this will invalidate the direction, making it unenforceable by AFSA Enforcement

- a trustee cannot subsequently provide an extension of time to the 21-day deadline, i.e. by agreeing to an extension of time if requested by the bankrupt, or by enclosing a copy of the notice containing the statement and request for books and records with a new letter setting out a conflicting due date

iv. the letter sets out the requirement under subsection 139U(1) of the Act, such that upon receipt, the bankrupt understands that

noncompliance may give rise to offending under the Act.

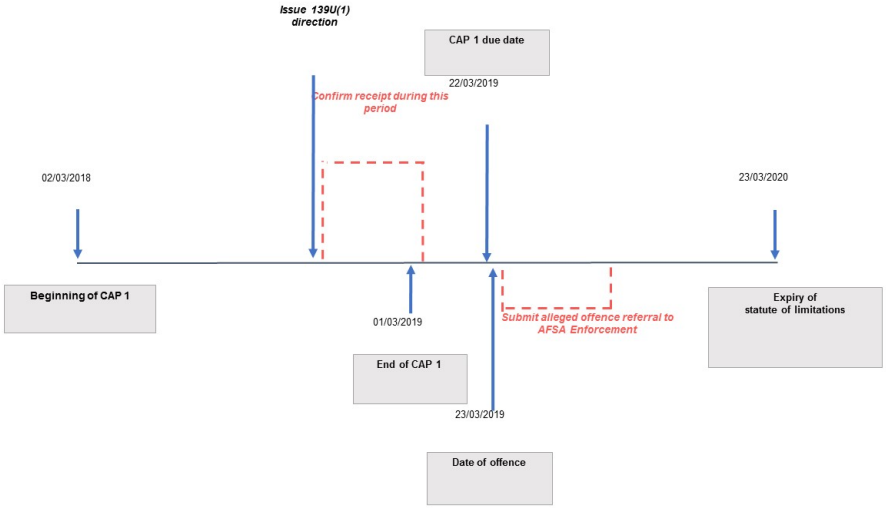
3. It is also noted that subsection 139U(1) carries with it a 12-month limitation period. This means that instances of noncompliance should be referred to AFSA Enforcement as soon as possible to allow us to commence prosecution action promptly. The 12-month period will start on the first day after the expiry of the 21-day period. Consequently, the earlier the referral of this type of misconduct, the better.

Section 139U of the Act only requires the production of information about the income derived during that contribution period and the next contribution period, and accordingly, a request for income records for multiple CAPs (or a letter enclosing questionnaires for multiple CAPs) would be invalid. Where there are multiple periods where income has not been reported, we recommend a request under paragraph 265(1)(ca) of the Act.

Where requests pursuant to subsection 139U(1) are made, it is good practice to issue these one to two months prior to the CAP end date, to allow time for proof of delivery of the notice to be received, and for the bankrupt to be afforded a reasonable amount of time to comply.

If there is no proof of delivery to support the bankrupt's receipt of the notice prior to the due date, a written record should be created to document the decision to not refer the matter to AFSA Enforcement, as per paragraph 2.7 of Inspector-General Practice Statement 14.

A demonstration of the timeframe surrounding the requirements for successfully proving an offence under subsection 139U(1) of the Act is illustrated below.



(If you have trouble viewing this image, right click on it and save to view.)

Contravention of paragraph 265(1)(ca)

There is an alternative way to seek income information, where similarly a failure to provide such information may give rise to an offence.

Pursuant to paragraph 265(1)(ca) of the Act:

> (1) A bankrupt:
>
> …
>
> (ca) shall fully and truly disclose to the trustee such information about any of the bankrupt's conduct and examinable affairs as the trustee requires;
>
> …
>
> Penalty: Imprisonment for 1 year.

In order for AFSA Enforcement to prove a contravention of paragraph 265(1)(ca) to a criminal standard, the following are important factors to be considered:

1. As with subsection 139U(1) of the Act, it must be proved that the bankruptcy occurred, and the bankrupt's failure to comply with the disclosure requirement must be satisfied according to the standard of proof relating to 'intention'.

2. A bankrupt is entitled to two statutory defences:

   i. if the information and/or records provided was to the best of the bankrupt's knowledge and belief, that shall be taken to be compliance with the provision (subsection 265(1A) of the Act)

   ii. the bankrupt is able to prove that the act or omission of information and/or records was done without the intent of defrauding his or her creditors.

3. The request for information and/or records should:

   i. be made by the trustee (e.g. an email by a trustee's staff member may not be considered a request by the trustee)

   ii. include a description of information or records that is easily identifiable by the recipient bankrupt (e.g. 'all bank records' is very broad, 'all bank records for the past five years' is more specific, 'bank statements for all of the bank accounts you have, or had authority to transact on, in the past five years which are in your possession' is quite specific)

   iii. set out the basis upon which the failure to comply with the direction constitutes an offence

   iv. specify a 'direction' or 'requirement' to produce information and/or records (e.g. 'direct' or 'require' is better than 'request', as 'request' implies a degree of optionality)

   v. contain a realistic deadline for production as at the time the bankrupt

becomes aware of the requirement to produce, considering the age and volume of records required. The trustee may consider phrasing the due date for compliance along the lines of 'Your response is due [14/21/etc.] days from your receipt of this correspondence'. This will negate the need to reissue old requests with new covering letters where the new due date conflicts with that stipulated on the original request.

AFSA Enforcement will consider alleged offence referrals regarding paragraph 265(1)(ca) of the Act for requests for 'income' information when there is no reference to subsection 139U(1), CAPs or income assessments. In those circumstances, the request must:

1. be expressly based upon the trustee's power in paragraph 77(1)(ba) of the Act; or

2. specifically request financial information for a tax year; or

3. makes express reference to the offence in paragraph 265(1)(ca); or

4. any combination of the above three points.

Using a paragraph 265(1)(ca) request for the provision of income information may appear involved; however, there are a number of benefits of issuing a request under this section:

1. The due date is not fixed and does not expire if delivery of the notice is delayed (as opposed to a request pursuant to subsection 139U(1), which will fall due at a specific time of the year that is unique to the administration it relates to, and where the notice must be proven to have been received by the bankrupt within a sufficient time prior to the statutory 21-day deadline).

2. As the maximum penalty for a bankrupt, if convicted, is 12 months imprisonment, there is no statute of limitations compared to the 12-month period applicable to a section 139U request; therefore, a single request can be issued for multiple tax years if required.

3. A trustee can combine the income request with other enquiries (e.g. regarding assets, voidable transactions) or with a request for the production of records for the administration of the bankrupt estate.

Note that the offending in respect to a request pursuant to paragraph 265(1)(ca) is taken to have occurred on the day after the expiry of the period as set out in the request. Where partial compliance occurs, this improves the likelihood of the bankrupt being able to avail themselves of a subsection 265(1A) defence.

Consequently, unless a trustee has evidence about intentional omission (which can be difficult to obtain), AFSA Enforcement would recommend new subsequent requests as the trustee considers the information and records obtained, and the extent of what is

required to administer the estate changes.

For example, if a tax return prepared by a third party tax agent for a specific tax year is produced, pay slips requested in an original request may cease to be relevant. AFSA Enforcement would likely not commence an investigation in respect to records that might be considered superfluous to the request.

As the information and records held by a trustee change, the records required from a bankrupt to administer a bankrupt estate will change also. They will also change when certain issues have been addressed through information provided by third parties, including lawyers, accountants, and government agencies such as the Australian Taxation Office.

As such, it is also important to be able to demonstrate how the missing/omitted records are essential to administration of the bankrupt estate.

Conclusion

These are general guidelines, as the AFSA Enforcement Compliance Team assesses referrals of misconduct under sections 139U or 265 of the Act on a case-by-case basis.

Any trustee who considers that they have a circumstance not covered in the above commentary is welcome to contact the Compliance Team to discuss the specifics of the matter they have and the conditions under which a referral might be accepted for investigation.

Brett Warren
Compliance Team Leader – Enforcement
Ruby Clements
Acting Compliance Investigator – Enforcement

New Zealand Insolvency and Trustee Service update

The Official Assignee's Integrity and Enforcement Team laid 28 charges for breaches of the Insolvency Act 2006 (NZ) against six bankrupt individuals for the period 1 July 2018 to 30 April 2019.

The range of charges laid include:

- 2 x failing to file a statement of affairs—s 37 and s 433(1)(a)
- 11 x concealing assets from the Official Assignee—s 420(2)
- 6 x taking part in the management of a business—s 436(1)(b)
- 5 x misleading the Official Assignee—s 440(1)(b)
- 2 x obtains credit whilst bankrupt—s 433A
- 2 x travels without consent of the Official Assignee—s 433(1)(f)(ii).

During this same period, seven individuals were convicted of 39 charges against the Insolvency Act 2006 (NZ), Companies

Act 1993 (NZ) and Crimes Act 1961 (NZ). The convictions include:

- forgery
- using forged documents
- obtaining by deception
- managing a company whilst prohibited
- managing a business without the Official Assignee's consent
- concealing property and income
- wilfully misleading the Official Assignee
- materially increasing the extent of the insolvency by extravagant living.

Sentences resulting from these offences include:

- 3 years 7 months imprisonment
- 17 months imprisonment
- 3 x prohibitions from promoting or being involved in the management of a company for periods of 5 years, 12 years, and one permanent lifetime ban.

Prosecutions

In line with the New Zealand Insolvency and Trustee Service guidelines for enforcement, we publicise the outcomes of prosecution cases where appropriate, as a deterrent for the offender and other potential offenders who would consider offending in the same way, and to provide information and education generally on the relevant statutory obligations.

Three prosecutions during the period 1 July 2018 to 30 April 2019 are outlined below.

Mr A—Auckland District Court

Mr A was convicted in the Auckland District Court in March 2019 following a jury trial resulting from a joint prosecution by the Official Assignee and the New Zealand Police. Mr A has been bankrupt since 2008 and has twice previously been prosecuted for breaching his bankruptcy obligations.

Between 2015 and 2017, he operated a business importing motor vehicles from Australia, repairing those vehicles and selling them in New Zealand. He did so without the consent of the Official Assignee and while prohibited from managing a company.

In doing so, Mr A also forged invoices relating to an Australian company operated by his son, conveying the false impression he was operating a legitimate business. A number of witnesses gave evidence about how Mr A took more than $500,000 from them and failed to ultimately deliver the vehicles they were promised or a refund. He was remanded in custody pending sentencing on 20 May 2019.

Mr T—District Court

Mr T is a car dealer and bankrupt for a third time. Rather than complying with his obligations under the Insolvency Act, Mr T commenced operating a business as a self-employed motor vehicle trader using a bank account that was not revealed to the Official Assignee.

Mr T failed to disclose at least $550,000 of money received into his bank account in the course of his business.

The District Court ruled that while Mr T's sentence was within the range for a home detention sentence, imprisonment was appropriate given the nature and extent of the offending.

Mr R and Mr B—bans imposed under the Companies Act

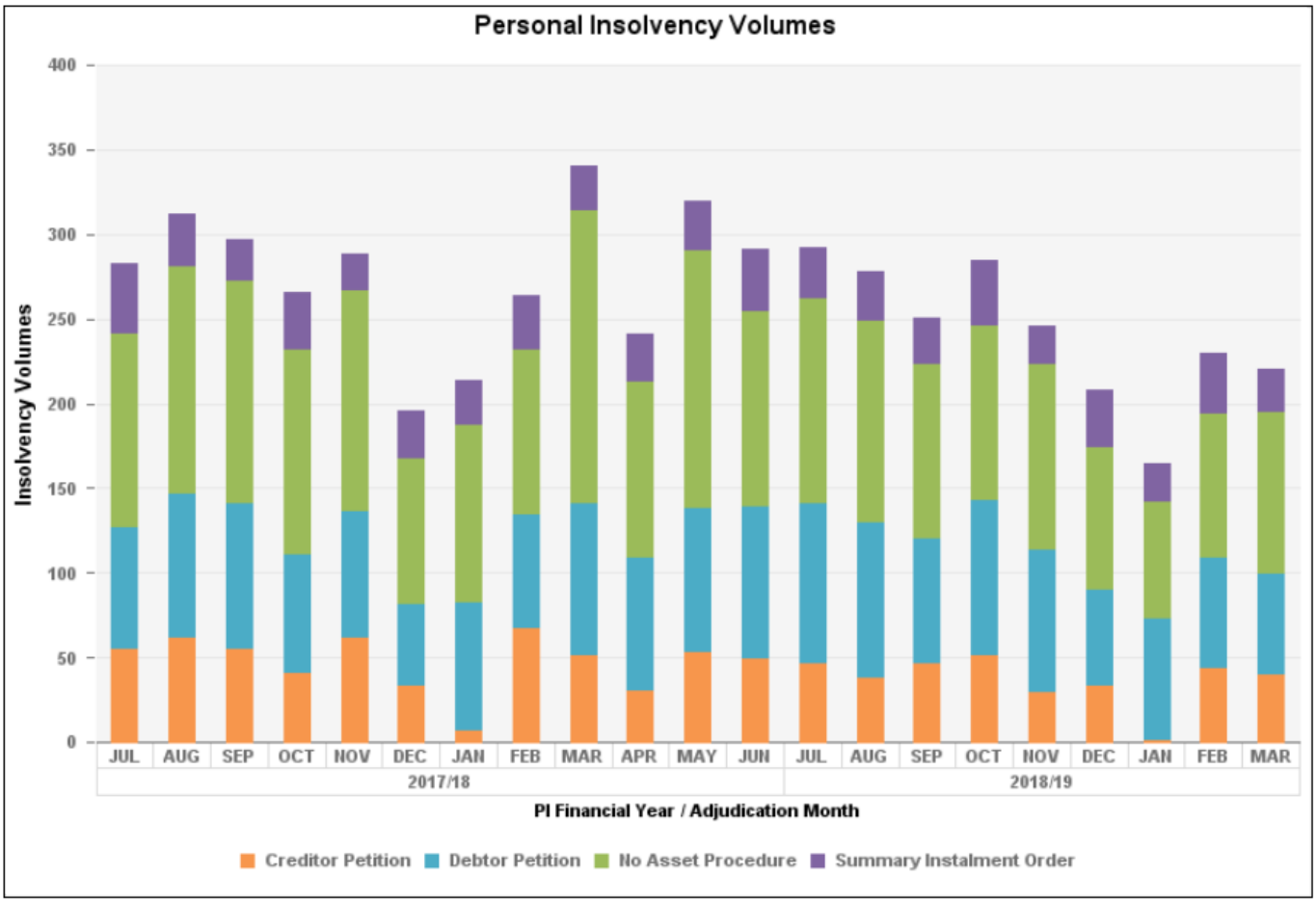
Two of the longest bans ever imposed under the Companies Act 1993 (NZ) were given to two former bankrupts—one a permanent lifetime prohibition and the other for 12 years.

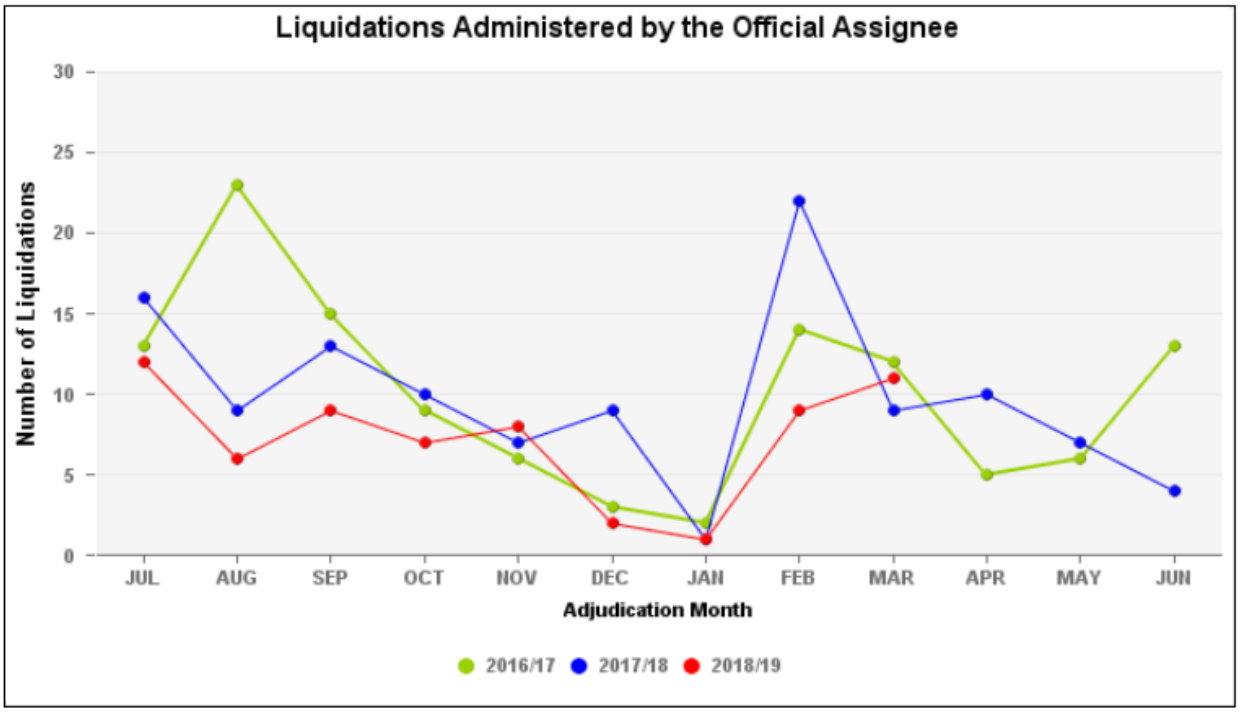
In determining that it was appropriate to impose a lifetime prohibition on Mr R, the judge noted that 'Mr R has been guilty of persistent and ongoing dishonest behaviour involving the use of company structures to obtain money from the public. His case is one of the most serious cases and is an appropriate case for a lifetime ban.'

In relation to Mr B, the judge noted that 'Mr B has displayed an arrogant disregard for the law and the compliance obligations … Mr B's conduct was wilful and deliberate. He set out to circumvent the statutory ban imposed on him as a result of his earlier convictions. Despite his protestations of ignorance, the pattern of behaviour was clear and deliberate.'

Statistics

Statistics on personal insolvency volumes, and liquidations administered by the Official Assignee, are provided below.





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

ATO update—indemnities for insolvency practitioners

Australian Government
Australian Taxation Office

The Australian Taxation Office (ATO) is a creditor in many bankruptcies and liquidations. As an active creditor, and one of the largest creditors, the ATO plays an important role in indemnifying insolvency practitioners in appropriate circumstances.

The ATO will indemnify insolvency practitioners to undertake a wide range of actions, with a significant focus on matters that encourage positive community perceptions of fairness in the tax system and willing participation.

Before the ATO will consider an indemnity request, the request must comply with minimum published standards.[1] This is due to legal and policy obligations imposed on the Deputy Commissioner of Taxation in relation to the expenditure of public money.

Upon receiving an indemnity request, the ATO undertakes an initial review to check if it complies with the published minimum requirements.

The ATO will only consider the request if:

- the insolvency practitioner has admitted the Commissioner's proof of debt
- the amount of the indemnity requested (payable throughout the life of the indemnity) is in proportion to the amount of the ATO's proof of debt
- the recovered funds or assets, including the expected benefits to the Commonwealth, are likely to outweigh the costs of the indemnity

- the insolvency practitioner has clearly explained the reason for the request and provided the necessary facts and documents to support the request, including setting out the likely outcomes and reasons for those views
- the ATO does not have other viable options available that are likely to achieve a good outcome without exposure to the costs and risks associated with providing an indemnity.

The ATO will not agree to an unlimited indemnity.

Where the initial review indicates that the indemnity request is worth considering further, the ATO will undertake a full assessment including the risks, merits and prospects of success.

More information

If you would like to find out more about using the ATO Business Portal, managing access or our education visits, please email your contact details to InsolvencyPractitionerServices@ato.gov.au.

For general information, please refer to the 'Insolvency practitioners' section of the ATO website at ato.gov.au/insolvency.

[1] For further information on the minimum standards, see www.ato.gov.au/tax-professionals/your-practice/insolvency-practitioners/indemnities-for-trustees-and-liquidators or email InsolvencyPractitionerServices@ato.gov.au.

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

Protecting trust accounts against cyber fraud

An ACT law firm was recently affected by cyber fraud when a client transferred their personal funds to a fraudulent bank account, thinking they were depositing funds into the law firm's trust account. More than $600,000 has gone missing.

Other examples from interstate jurisdictions involve law firms having transferred funds out of the trust account for conveyancing settlements into a different bank account, after receiving an email supposedly from their client or the seller's law firm.

The attackers either gain access to the law firm's email system or to a client's email account. There will often be no outward sign of unauthorised access. The attackers wait, monitoring traffic, and then when one party is due to deposit funds to a specified account, the request email is intercepted and the account number changed.

The diverted funds may be paid by clients who thought they were depositing funds intended for a solicitor's trust account. This is a particularly dangerous attack as the instruction to transfer the funds is expected, and is genuine except for the changed bank account number. Communications from the attackers seem credible and use appropriate language.

Please ensure that all your staff and clients are educated about recent fraudulent activities affecting the legal profession.

Not only do law firms need to be vigilant, they must ensure they advise their clients to be alert to any communication regarding bank account details. Firms should avoid communicating bank account details by email and advise clients to confirm bank details by telephone.

How can I check if my emails are being automatically forwarded without my knowledge?

The use of automatic forwarding rules in Microsoft Outlook to send a copy of incoming and outgoing mail to a hostile party can be checked in some cases. In Microsoft Outlook, click the 'File' tab (top far-left of the screen), then click on 'Rules and Alerts', and then highlight each rule and check what it is doing. When highlighted, what the rule does is mapped out in the text area below. Remember that an intruder can reconfigure an existing rule to also forward email. Even if you see a rule that you may have set up, this does not mean that it has not been tampered with.

The Law Council of Australia has a website, Cyber Precedent, with cyber security resources custom-designed for legal professionals.

ACT Law Society

Annual administration statistics for 2017–18 now available

AFSA's annual administration statistics for 2017–18 are now available. You can find all of our statistics by going to afsa.gov.au and clicking on 'Statistics' at the bottom of the homepage.

For enquiries about our statistics or to provide feedback, please contact us at statistics@afsa.gov.au.

Recent court decisions

Read recent decision case notes and judgment excerpts for:

- David v Cohen [2019] FCCA 70
- Stojanovski v Stojanovski [2018] NSWSC 1967
- Riva NSW Pty Ltd v The Official Trustee in Bankruptcy [2019] NSWSC 49
- Official Trustee in Bankruptcy v Pham & Anor [2019] FCCA 797
- Appleby v Carter as trustee of the bankrupt estate of Appleby [2019] FCCA 564

David v Cohen [2019] FCCA 70

Background

Ms Suzy David and Mr Fred David, trading as David Legal (the applicants), sought a sequestration order against

Mr Robin Cohen (the respondent), who owed the applicants an amount of $211,085.89, being a judgment debt obtained in the District Court of NSW.

The act of bankruptcy relied upon was Mr Cohen's failure to comply on or before 9 June 2018 with the bankruptcy notice served on 19 May 2018. The respondent, however, challenged the validity of the bankruptcy notice on the ground that it was not served in accordance with reg 16.01(1)(c) of the Bankruptcy Regulations 1996 (Cth) by leaving it at his last known address.

The act of service of the bankruptcy notice relied on was that on 19 May 2018. The process server left the bankruptcy notice (among other documents) in a sealed envelope addressed to the respondent at 142 Bossley Road, Bossley Park, New South Wales, 2176 (Bossley Park address). The process server served the documents by personally placing them in the sealed envelope addressed to Mr Cohen and affixing the envelope to the front door of the Bossley Park address.

The respondent disputed that the Bossley Park address was his last known address within the meaning of reg 16.01(1)(c) of the Bankruptcy Regulations.

Issues

The issue for determination before the court was whether service to the Bossley Park address constituted valid service of the bankruptcy notice on the respondent at his 'last known address', in accordance with reg 16.01(1)(c), in the absence of proof to the contrary, within the meaning of reg 16.01(2)(b), or whether the respondent can prove to the contrary.

In seeking to provide proof that his last known address was not the Bossley Park address, the respondent relied on two affidavits which set out an address in China in which he resided since 2015. Government records show the respondent entering and exiting Australia on numerous occasions since then. In attempting to serve the respondent at the China address, FedEx tracking records evidence that the China address is an 'incorrect address' and does not exist.

The applicants relied upon the FedEx records and familial relationships with the Bossley Park address, given it is the residence of the respondent's son and his ex-spouse. Land title searches showed that the respondent's ex-spouse was the registered proprietor; however, RP Data records showed that the phone contact for the property was the respondent. In addition, Australian Securities and Investments Commission (ASIC) records identified the respondent as residing at the Bossley Park address. He was also the director of three companies, secretary of two, and shareholder of one—each listed the Bossley Park address as the registered address of the respondent.

Reasoning

The meaning of the phrase 'last known address' for the purposes of reg 16.01(1)(c) was considered in a number of cases and summarised in *Macquarie Leasing Pty Limited v Culleton* [2014] FCCA 1714 at [18].

The reasoning of Baird J, citing *Civic Video Pty Limited v Warburton* (2013) 216 FCR 61, was that:

1. since the purpose of the rule is that the bankruptcy notice should be brought to the debtor's attention, ordinarily the creditor is under an obligation to take steps to ascertain the debtor's most recent address as made known by him or her in readily accessible public records
2. it would be wrong to confine the expression, in all instances, to the last address made known to the creditor
3. the fact that none of the submissions put forward by the respondent in fact listed the China address, did not

provide reasons as to why FedEx were unable to locate the address
4. therefore, it was reasonable to infer that the China address was not a physical location, if it existed at all.

Baird J accepted that the respondent had a real and continuing connection with the Bossley Park address. Although he attested he did not reside there, the respondent's public statements on ASIC records stood as notice to the world that the Bossley Park address continued to be his usual residential address.

Accordingly, Baird J was persuaded that the Bossley Park address was the respondent's last known address for the purposes of service under reg 16.01(1) and that the respondent had not provided proof to the contrary.

Decision

A sequestration order was made against the respondent.

Stojanovski v Stojanovski [2018] NSWSC 1967

Background

The plaintiff (Steven Stojanovski) and his brother, the first defendant (Robert Stojanovski—the bankrupt), were the sole surviving children of the late Nada Stojanovski, who died on 20 January 2006, leaving a will dated 3 January 2006. The genesis of the dispute between Steven and the bankrupt relates to an alleged testamentary agreement that Steven sought to enforce after his mother's death and the entry by the two brothers into a deed of release in June 2009 to (unsuccessfully) resolve their differences.

The fourth defendant, Angelina Stojanovski, was the estranged (though not yet divorced) wife of the first defendant, the bankrupt. She was the registered proprietor of the three parcels of land—the subject of the present summary judgment application (the Breakwell, Kemp and Morts properties).

On 31 May 2013, the bankrupt transferred land as follows:

- his interest as joint tenant in the Morts property (the Morts transfer)
- his interest as joint tenant in the Breakwell property (the Breakwell transfer)
- the Kemp property (the Kemp transfer)

(collectively, 'the transfers').

In each case, the transferee recorded on the transfer was Angelina, and in each case, the transfer recorded that it was made pursuant to an order of the Family Court and no consideration for the transfer was specified, whether in monetary terms or otherwise.

Following his discovery of the transfers, Steven lodged caveats and made an application to set aside the Family Court orders pursuant to s 79A(1) of the *Family Law Act 1975* (Cth). On 30 July 2014, the Family Court heard that application on an undefended basis and made orders setting aside the Family Court orders pursuant to s 79A due to the bankrupt and Angelina 'failing to disclose the prospective and pending third party interest' of Steven and his former spouse Jovanka.

The trustees brought on a cross-claim to the main proceedings on the basis that:

- the transfers to Angelina were void pursuant to s 120 of the *Bankruptcy Act 1966* (Cth)
- they should receive details as to the rental income received by Angelina (the trustees submitted that Angelina had been receiving rental income to which she was not entitled).

The trustees also sought costs of the application on an indemnity basis.

Issues

The application was on the basis of the trustees' motion to file for summary judgment against Angelina and sought declarations that the transfers to Angelina of the Morts, Kemp and Breakwell properties were void against the trustees, by reference to s 120 of the Bankruptcy Act.

Angelina's submissions

Angelina's primary submission was that s 120 was not engaged because the transfers were effected pursuant to court order and therefore do not satisfy the requirement under s 120 that the relevant transfer must be 'by a person'.

The trustees' submissions

The trustees submitted that, as the Family Court orders had been set aside:

1. each of the transfers has been effected for no consideration and thus, pursuant to s 120 of the Bankruptcy Act, each of the transfers is void as against the trustees

2. it could be said that the transfers were merely a transfer of the bare legal interest, the market value of which must be nil by reason of those court orders; rather, the transfers constituted a transfer of all of the bankrupt's legal and equitable interest in the properties for no consideration.

In addition, Angelina could be entitled to rely upon her own conduct (in obtaining the Family Court orders by way of a miscarriage of justice) to ground a defence to a claim under s 120 of the Bankruptcy Act.

The trustees accepted that, as the bankrupt's former wife, Angelina may be entitled to make a claim pursuant to the Family Law Act for an adjustment of interests as between herself and the trustees in respect of the three properties. However, that did not constitute consideration provided in respect of the transfers for the purposes of s 120 of the Bankruptcy Act. And it was not open to Angelina (in circumstances where the transfers are expressly stated to have been made pursuant to the Family Court orders) to seek to re-characterise the transfers as having been made in consideration for some claim under the Family Law Act.

Reasoning and decision

The void transfer

The court distinguished *Official Trustee v Mateo* [2003] FCAFC 26, in which the Family Court had made consent orders under s 79 of the Family Law Act that included an order that within 28 days, the husband transfer to his wife his interest in the home and that the wife pay certain amounts to the husband and become responsible for certain amounts.

The husband became bankrupt on 10 April 2001. Subsequently, the trustee issued a notice to the wife asserting that she had received property from the bankrupt as a result of a disposition of property that was void against the trustee under s 120 of the Bankruptcy Act and requiring her to pay the trustee a sum equivalent to the bankrupt's interest in that property.

Wilcox J stated that the 'fundamental problem' for the trustee was that 'the critical divesting event is the Family Court's order under section 79 of the Family Law Act, and that event lies outside the reach of s 120 or s 121' (at [69]); and that the appropriate course was for the trustee to bring an application under s 79A, in the Family Court, to have

the orders set aside (at [70]). However, Ward CJ noted that the feature which distinguished *Official Trustee v Mateo* from the instant matter was that the Family Court order which authorised the transfers and vested an immediate equitable interest in Angelina had been set aside [87].

Ward CJ held that the effect of the setting aside of the Family Court orders (as having been procured by a miscarriage of justice) was that each transfer of title to the properties should be understood as having been a transfer 'by a person' (the bankrupt) as required by the terms of s 120 (which refers to 'a transfer of property by a person'), acting in accordance with a court order that had been improperly obtained by him and his wife Angelina and which was liable to be set aside. Put another way, it was not to be understood to have operated as a transfer by the court (though it would have been understood as such until such time as the Family Court orders were set aside).

Account for rents and profits

On the basis that Angelina was likely to bring forward a Family Court application, Ward CJ considered the relief sought in accounting for past rent, profit and benefits should await a determination of the family law claim. Ward CJ was of the opinion that the trustees should be entitled to receive those monies unless and until any family law claim made by Angelina was determined (and also having regard to the final determination made in the present proceedings as to the claims by Steven and Jovanka).

Costs

Costs orders were made favouring the trustees but not on an indemnity basis, because Angelina's conduct was not so unreasonable as to warrant that order.

Riva NSW Pty Ltd v The Official Trustee in Bankruptcy [2019] NSWSC 49

Background

The court noted that the litigation surrounding this matter arose from events that took place more than a decade ago and raised issues that have been comprehensively investigated, analysed, and contested before other judges in other courts—there had been 10 previous related judgments in the NSW Supreme Court and Federal Court of Australia.

In October 2000, Gustavo and Angelo Ferella purchased a property in Point Piper, New South Wales, as trustees of the Cavallino Unit Trust. In April 2005, they resigned as trustees and Riva NSW Pty Ltd (the plaintiff) was appointed as the new trustee but the Ferellas remained the registered proprietors. In the first series of judgments, it was held that the trust property never vested in the plaintiff because there had been no compliance with the trustee deed.

In October 2005, the Ferellas were made bankrupt and in April 2006, their mortgagee sold the property and the net proceeds of sale of approximately $1.7 million were remitted to the Official Trustee (the defendant) and it was accepted that the defendant was entitled to be indemnified from the net proceeds of sale in respect of certain debts for which proofs had been lodged in the bankruptcy.

Having failed to establish that the property was held by the plaintiff at the time of bankruptcy, the Ferellas turned their attention to the defendant's conduct of the administration of their bankrupt estates. They sought orders that the defendant be removed from office and funds held by it be released. The claims were dismissed.
In 2005, the Ferellas and the plaintiff commenced proceedings seeking damages and related orders for alleged breaches of duty by the defendant in its conduct of the administration of the bankrupt estate. A central component of the claim was the allegation that the defendant owed obligations to Riva NSW as trustee de son tort and as a fiduciary—the claims were dismissed and summary judgment given for the defendant.

In 2018, the plaintiff commenced proceedings that the defendant was a constructive trustee for Riva NSW rather

than a fiduciary or trustee de son tort—based on the same facts—and the defendant sought dismissal of the claim and summary judgment against the plaintiff or a permanent stay.

Reasoning

Pembroke J noted that courts are wary of attempts to re-litigate issues and the oppression and vexation caused to defendants by plaintiffs who are unreasonably fixated with their claim or who may be motivated by extraneous considerations:

> The resources of the court are not available to indulge endlessly the misconceived whims and unshakeable convictions of disappointed litigants. The public interest in the finality of litigation requires that an end be brought to the causes that have already been given a fair opportunity. In this case I have concluded that it is time to close the book …

His honour found that the allegations and pleadings in the prior 2015 case are overwhelmingly similar but for minor variations, and in essence the substance of both proceedings and commercial objectives are the same.
In relying on the same facts as previous matters, the plaintiff merely substituted in its allegations in these proceedings, the duties of a constructive trustee for those of a trustee de son tort and those of a fiduciary as per the 2015 matter. His honour stated:

> It is the same underlying complaint. The choice of legal terminology makes no difference. I am not satisfied that invoking the concept of a constructive trustee involves any substantial difference to the legal analysis that will be required. It certainly makes no difference to the facts.
>
> It is not in the interests of justice, let alone the interests of the defendant, to allow the claim to be maintained. It is an abuse of process for the plaintiff to pursue this claim given the previous findings, the extensive prior litigation, the use of public resources, the vexation to the defendant and the unlikely prospects of success.

Decision

His honour made the following orders as set out the in Official Trustee's notice of motion filed on 6 July 2018:

1. judgment be given for the defendant against the plaintiff for the whole of the plaintiff's claim
2. the plaintiff's statement of claim be struck out
3. the proceedings be permanently stayed
4. costs be paid.

Official Trustee in Bankruptcy v Pham & Anor [2019] FCCA 797

Background

On 2 April 2012, the bankrupt and his sister purchased a property and were registered as joint tenants. The consideration for the transfer was $437,000.

On 23 March 2015, the bankrupt's father and sister (the first and second respondents respectively) became the registered proprietors of the property, as tenants in common in equal shares, with a mortgage to the Commonwealth Bank of Australia registered against the title as at that date. The transfer records that the consideration was 'natural love and affection' and that the assessed dutiable value of the transaction was $225,000. Prior to the 2015 transfer, the property was unencumbered.

On 15 October 2015, the bankrupt filed a debtor's petition and a statement of affairs. On 12 February 2016, the

respondents entered into a contract for the sale of the property. The contract for sale of land by offer and acceptance was entered into between the respondents as vendors and a third party as purchaser for consideration of $460,000. That sale resulted in the transfer of the property to the third party being registered on 1 April 2016 and the discharge of the mortgage.

In the period leading up to the 2016 sale, the Official Trustee entered into an agreement with the respondents to remove its caveat with 50% of the net proceeds of sale after payment of the mortgage to be placed into a lawyer's trust account but with the proviso the Official Trustee might seek to recover more of the net proceeds.

The sale price was $460,000. The mortgage was discharged at settlement. The balance, after the payment of sale and other fees and adjustments, was to be paid as to $151,565.77 to the trust account, and as to $151,565.78 to the respondents.

Bank records show that $151,565.78 was deposited into an account held solely in the name of the sister. On the same day, two amounts that totalled $142,597.97 were credited to other accounts, also in the sister's sole name.

On 29 September 2016, the $151,565.77 retained in the solicitor's trust account was transferred to the Official Trustee.

Issues

The court set out four issues that it saw as needing to be determined:

1. whether the transfer of the bankrupt's interest in the property was void under s 120 of the *Bankruptcy Act 1966* (Cth) (the Act)
2. whether the distribution of the proceeds of the 2016 sale of the property was in accordance with the interests of the parties entitled to those proceeds
3. whether the applicant was entitled to an order for the payment of part of the proceeds of the 2016 sale from the second respondent
4. whether the applicant was entitled to interest.

Reasoning

The court found that the father did not give valuable consideration for the transfer as that concept is explained in ss 120(5)(a) and (d) of the Act. The 2015 transfer was for consideration of 'natural love and affection'. This transfer took place at a time when the dutiable value of the bankrupt's interest in the property was $225,000.

Hence, the court reasoned, the 2015 transfer can be found to be either for no consideration, in accordance with the definitions in s 120(5) of the Act, or for consideration of less than market value. The court also made a finding that nothing indicated that at the time of the transfer the bankrupt was solvent or that s 120(3)(a)(ii) of the Act was satisfied, so the transfer was not exempt.

The court concluded that as at the appointment of the trustee, the 2015 transfer was void under s 120 of the Act and the property transferred, being the bankrupt's half interest in the property, vested in the trustee for distribution in accordance with the Act.

Decision

On being satisfied that:

1. the question was real and not a theoretical question

2. the applicant had a real interest in raising that question
3. there was to be a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought
4. there was utility in exercising the wide discretionary power
5. the power would be exercised with a proper sense of responsibility
6. there were circumstances that call for the making of the order

the court considered that the discretionary power in s 30(1)(b) of the Act to make declaratory orders should be exercised. A declaration was made that the transfer whereby the bankrupt and the sister transferred the whole of their estate, title and interest as joint proprietors in the property to the father and the sister as tenants in common in equal shares was void against the applicant by virtue of s 120(1) of the Act. The sister was ordered to pay the Official Trustee the total sum of $83,110.71.

Appleby v Carter as trustee of the bankrupt estate of Appleby [2019] FCCA 564

Judgment excerpts

9. It is not always the case that s 139ZL notices are served upon a trustee of a family trust carrying on business, where that trustee is the sister of the bankrupt, as is the case here. Often, such notices are served upon entities where the controlling minds of such entities have no idea that an employee is bankrupt. It is therefore of the utmost importance that s 139ZL notices are so drafted that a recipient of such a notice is left in no doubt, not only as to why they have been served with the notice, but also the reason why they are being required to make payment of stipulated amounts of money to a person, or otherwise have their property charged in favour of a person, with whom they have no personal or business relationship.

17. The matters which the notice did not set out included the following:

- particulars of how each of the CAP1 and CAP2 payments were calculated [*note: 'CAP' refers to 'contribution assessment period'*]
- whether the CAP1 and CAP2 amounts were net of tax or otherwise subject to withholding tax, and if so what types of tax (income tax, fringe benefits tax, capital gains tax, etc.)
- the alleged nature of the bankrupt's employment with the trust giving rise to the assessments
- the class/category of employment allegedly carried out by the bankrupt, including whether such employment was allegedly part time or full time
- the hours of employment used to calculate the assessed CAP amounts
- the terms of employment
- how the sum of $2,084.96 was calculated as the net weekly wage.

18. The particulars set out in paragraph 17 above which were not included in the notice, were necessary for the trustee to fully appreciate why it was that the payment of a substantial amount of money was required to be made by the trust over more than a two (2) year period.

19. As was in the case of *Lucera*, the notice fell short of setting out those particulars required to give proper notice to the trustee of their obligations. The notice is irregular and is set aside.

[*In Lucera (Re Lucera: Ex parte Official Trustee in Bankruptcy v Lucera* (1994) 53 FCR 329) the deficiencies were identified as follows:

29. The notice given to Mrs Lucera does not correctly identify the property said to have been received by Mrs Lucera, nor does it attempt to value the 'property' which Mrs Lucera received as a result of the void transaction. It is not

altogether clear how a trustee in bankruptcy should value a former interest of a bankrupt as a joint tenant in his matrimonial home. It is not an interest which necessarily has a market value and it certainly cannot be assumed that it is worth half of the market value of the property as a whole. Be that as it may, the notice in this case states a value for the whole property which is not supported by evidence and further it makes an unstated, but unsupported, assumption that the value of the interest transferred by the bankrupt was valued at half of a sum thought to be somewhere near its value more than four years later. For these reasons I am of the opinion that the notice is irregular and should be set aside.]

Recent prosecutions

NSW (McLaughlin) - Bankrupt convicted of making false declaration

QLD (Sarnelli) – Bankrupt convicted of further offences

NSW (Tarrant) – AFSA exercises coercive powers to obtain books and records

QLD (Gordon) – Bankrupt convicted of disposing of property

WA (Culleton) – Bankrupt convicted for refusing to file a Statement of Affairs

NSW (Crawley) – Credit card spending, disposal of property and making a false declaration results in conviction for Sydney bankrupt

VIC (Soulsby) – Bankrupt convicted of disposing of property

QLD (Gordon) – Bankrupt convicted of disposing of property

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