Australian Government
Australian Financial Security Authority

AUSTRALIAN FINANCIAL SECURITY AUTHORITY
PERSONAL INSOLVENCY REGULATOR

October 2017, Volume 15, Issue 3

CONTENTS

October 2017, Volume 15, Issue 3

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

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

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

- Tim Cole, Director Technical and Strategy, Regulation and Enforcement, tim.cole@afsa.gov.au
- Lukas Krajewski, Assistant Director Governance and Risk, Regulation and Enforcement, lukas.krajewski@afsa.gov.au

AFSA actively seeks contributions from outside parties and the views expressed therein are not necessarily endorsed by, or reflect the views of, the Inspector-General in Bankruptcy, Official Trustee or the Official Receiver.

This issue of the Personal insolvency regulator (PIR) may be cited as *(2017)15(3) Personal insolvency regulator.*

INSPECTOR-GENERAL'S COLUMN

October 2017, Volume 15, Issue 3

New Chief Executive

It gives me great pleasure to introduce myself as the Australian Financial Security Authority's (AFSA) new Chief Executive and Inspector-General in Bankruptcy. I commenced in the role on 14 August 2017.

My background is in trade and international economic issues and their linkages to legislation and the domestic economy. Prior to joining AFSA, I was the Head of the Office of Trade Negotiations, in the Department of Foreign Affairs and Trade. I've also served previously as Deputy Chief Executive at the Australian Trade Commission, in the Department of the Prime Minister and Cabinet, and as a Ministerial adviser.

I've represented Australia abroad on a number of diplomatic postings, most recently in Geneva from 2013 to 2017 as Australia's Ambassador to the World Trade Organization, the World Intellectual Property Organization and to the United Nations Conference on Trade and Development (UNCTAD).

I'm very excited about the opportunity to lead AFSA and I look forward to working with you.

Changes to the personal insolvency regulator

Thank you to everyone who took the time to complete our recent survey on the PIR. This gave us some very useful feedback on what you find most beneficial in terms of content. We will use this feedback to refine the PIR publication. The new-look PIR will have a greater focus on practice matters and recent decisions.

AFSA's 2017–18 corporate plan

I was pleased to release AFSA's corporate plan 2017–18 on 31 August 2017. Our corporate plan is produced annually and outlines our focus for the next four years, the strategies we will use to achieve our purpose and how we will measure our success. The plan is available on our website.

Insolvency Law Reform Act 2016

The second and final tranche of reforms introduced by the *Insolvency Law Reform Act 2016* (ILRA) started on 1 September 2017. AFSA has worked closely with the Australian Securities and Investments Commission (ASIC) and the Australian Insolvency, Reconstruction and Turnaround Association (ARITA) to prepare for the commencement of the reforms.

You will find more information on the reforms and resources for practitioners on our website.

International Association Insolvency Regulators

I attended the International Association of Insolvency Regulators general meeting and conference in London from 4–7 September, with David Bergman, acting Chief Operating Officer. This was a very useful opportunity to meet with our international colleagues, discuss how common issues are handled in different jurisdictions and consider developments in insolvency law and administration.

International delegation

AFSA recently hosted a delegation from the Korean Ministry of Justice, who were keen to learn from our experience and expertise as they look to implement their own Personal Property Securities Register (PPSR) system.

The invitation to host the delegation came from Mr Bruce Whittaker, Senior Consultant at Ashurst, who undertook the review of the *Personal Property Securities Act 2009* (the PPS Act).

Fine tuning our website to meet user needs

AFSA is committed to ensuring our services are simple, clear and fast. One of the ways we do this is to undertake research and analysis to identify what information is most important to our clients. We recently explored the words most commonly used to find our website and the most viewed pages on our website.

Two of the most viewed pages were 'consequences of bankruptcy' and 'bankruptcy forms'. As a result, we've changed the quick links on our homepage to make it easier for clients to navigate to these pages.

Hamish McCormick
Chief Executive and Inspector-General in Bankruptcy, AFSA

PRACTICE MATTERS

October 2017, Volume 15, Issue 3

Joint and separate estates: accounting for remuneration

Our regulatory activities have identified instances of trustees failing to recognise and appropriately account for joint and separate estates in circumstances where debtors who own property jointly have become bankrupt on separate debtor's petitions on the same day.

In the December 2008 edition of the ITSA (now AFSA) *The Bankruptcy Regulator*, an article titled 'Joint property and section 110', reminded trustees and their staff that:

'if a property is owned jointly by two or more owners who become bankrupt on the same day, but subject to separate bankruptcies, it is appropriate to deal with the property as a joint asset and consolidate the bankruptcies to create a joint estate if there are joint liabilities and the property was held as a joint tenancy (instead of tenants in common). This allows the jointly owned property to be applied in accordance with section 110, as no severance of joint tenancy occurs when joint owners become bankrupt at the same time.'

Section 110 of the *Bankruptcy Act 1966* (the Bankruptcy Act) states:

1. *In the case of joint debtors, whether partners or not, the joint estate shall be applied in the first instance in payment of their joint debts, and the separate estate of each joint debtor shall be applied in the first instance in payment of his separate debts.*
2. *If there is a surplus in the case of any of the separate estates, it shall be dealt with as part of the joint estate and if there is a surplus in the case of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each joint debtor in the joint estate.*

Furthermore, Section 142 of the Bankruptcy Act states:

Where joint and separate estates are being administered, the expenses of and incidental to the administration of the estates shall be fairly apportioned by the trustee between the joint and separate estates, having regard to the work done for, and the benefit received by, each estate.

Trustees should have regard to this when accounting for their remuneration in dealing with joint and separate estates.

A failure to identify and appropriately account for joint and separate estates can have a material impact on the outcome for stakeholders.

Rohan Hughes, Senior Inspector
Regulation & Enforcement

AFSA's Insolvency Practitioner Compliance Programme 2017–18

On 12 July 2017, we released our 2017–18 Insolvency Practitioner Compliance Programme.

The risk-based programme focuses on early resolution of systemic issues by adopting a proactive and preventative regulatory approach wherever possible.

This financial year, our focus will be on five key areas:

1. Remuneration and expenses

We will focus on early identification and where possible remedy instances of overcharging or over-servicing by insolvency practitioners. This will be identified and handled through a number of functions including our inspection programme, targeted campaigns, complaint handling process and own-initiative Inspector-General (I-G) reviews (from 1 September 2017).

We will review dealings with property, particularly strata title property to ensure petitioning creditors costs and conveyancing costs are paid appropriately.

We will review the expenses taken in debt agreements to ensure they have been paid appropriately.

2. Law reform readiness

We will focus on ensuring that trustees understand and comply with the new provisions of the Bankruptcy Act, Bankruptcy Regulations introduced by the ILRA and Insolvency Practice Rules.

3. Independence

We will focus on compliance with the trustee standards under the new Insolvency Practice Rules 2016, Inspector-General Practice Direction 1: Independence (IGPD 1) (currently being finalised) and the ARITA and Personal Insolvency Professionals Association (PIPA) codes of professional practice to ensure practitioners remain independent including with pre-insolvency advisors.

4. Administration funds held on trust

We will seek assurance that administration trust funds are reconciled under the relevant provisions and standards. This will be carried out by remote targeted campaign as well as the inspection programme.

5. Information

We will focus on ensuring that information provided by practitioners is accurate, relevant and comprehensible, thereby enabling informed decisions to be made by debtors, creditors and all relevant stakeholders.

Paul Shaw, National Manager
Regulation and Enforcement

PRACTICE MATTERS

October 2017, Volume 15, Issue 3

The Personal Property Securities Register

The PPSR is a national online register established under the PPS Act. It's accessible 24 hours a day, seven days a week (apart from short outages for maintenance).

Personal property covers goods including crops and livestock, motor vehicles, planes, boats, intellectual property (such as copyright, patents and designs), bank accounts and debts (sometimes known as receivables), shares and other financial property and certain licences.

The PPSR offers businesses risk protection and can increase access to credit, where the business can use collateral to access secured credit and financiers can offer credit at a reduced risk. This creates both an increase in access to finance and a reduction in the price of finance (usually reflected in interest rates).

Searches of the PPSR can provide information to help protect consumers when they are buying personal property such as cars, boats or artworks.

AFSA administers the PPSR. The Registrar of Personal Property Securities:

- is required to establish and maintain the PPSR and ensure that it is kept operational
- can refuse access to the PPSR and suspend its operation in certain circumstances
- has a range of administrative decision making powers connected with the data contained on the PPSR.

Use of the PPSR is optional, but failure to register can have serious commercial consequences for secured parties. Rules regarding the creation, registration, priority and enforcement of security interests are spelt out in the PPS Act.

Practitioners, who are appointed to failed corporates as voluntary administrator, liquidator or receiver and manager, or to act as a trustee in bankruptcy, are reminded of the need to check the PPSR, to help establish the secured and unsecured creditors, and the priority of creditors.

In fulfilling this role, practitioners should report registrations that give rise to some suspicion of fraud to AFSA. This can be done by emailing enquiries@ppsr.gov.au

Stephen Abraham, Acting Director
PPSR Strategy & Operations

AAT affirms decisions by the Inspector-General not to perform reviews of trustee decisions

In the last 12 months, the Administrative Appeals Tribunal ('AAT' or 'Tribunal') has made decisions in two separate matters, which clarify the position when a decision of the I-G refusing to conduct a review of a trustee's decision is appealed to the AAT. The decisions by the AAT make clear that when the I-G refuses to conduct a review, and that refusal decision is appealed to the AAT, the AAT's role is limited to reviewing the I-G's refusal decision and does not extend to reviewing the underlying decision by the trustee. The decisions also reinforce the fact that a review does not occur by right but when there are reasons that appear to the I-G, sufficient to justify a review (paragraphs 139ZA(1)(b) and 149K(1)(b) of the Bankruptcy Act).

In the first matter, a bankrupt, Delores Lavin, sought a review of an income assessment performed by her trustee, Aaron Lucan. The trustee had invoked section 139Y of the Bankruptcy Act and deemed that the bankrupt was earning a higher amount of income than she had reported to the trustee. The trustee relied in part on statements on the website www.dlm.com.au that:

'*Founder, Lavin, is regarded as one of the most influential agents in the world today, with a keen and precise eye for talent which has not only successfully recognised, but nurtured rising stars to the top of their game*'.

For a variety of reasons, the I-G refused to perform a review. The bankrupt appealed to the AAT. In *Lavin and Inspector-General in Bankruptcy [2016] AATA 798* (12 October 2016), the AAT firstly dealt with two preliminary questions:

1. Where a bankrupt has requested the I-G to review a decision of a trustee in bankruptcy to make an 'assessment' within the meaning of 139ZA(1)(b) *Bankruptcy Act 1966* (Cth) ('the trustee's decision'), but the I-G has decided not to review the trustee's decision within the meaning of section 139ZA(5) ('the I-G's decision'), does the Tribunal nevertheless have jurisdiction to carry out a review of the trustee's decision if it were to determine that the I-G's decision should be 'set aside' as sought in the applicant's application?
2. Where the I-G's delegate ('the delegate') has stated on 27 May 2016, that he has made a 'decision to refuse to conduct review', such that the delegate decided not to review the trustee's decision within the meaning of section 139ZA(5) *Bankruptcy Act 1966* (Cth), does the Tribunal have the jurisdiction and power to determine that as a matter of fact, the delegate made a different decision to that stated by the delegate, as asserted by the applicant in this case?

The answer given by the AAT to both questions was 'no'. The bankrupt applicant relied upon the decision in *Jonathon Durrant Woodman and Inspector-General in Bankruptcy [1996] AATA 115*, as authority for the AAT's power, when faced with an appeal against the I-G's refusal to perform a review, to review the underlying decision of the trustee. In Woodman, the I-G refused to perform a review of a decision by a trustee to file a notice of objection. The AAT decided to cancel the objection, rather than remit the matter back to the I-G to perform a review. However, the Woodman case was decided in 1996 when bankrupts could appeal a decision of their trustee directly to the AAT, rather than to the I-G in the first instance, as is the case now. The law was changed from 1 May 2003 so that any right to seek a review is to the I-G first.

Having established that the role of the AAT was limited to reviewing the refusal decision by the I-G, the AAT in a later decision *Lavin and Inspector-General in Bankruptcy [2017] AATA 890* (16 June 2017) affirmed the decision of the I-G to refuse to conduct a review.

In a separate matter of Moncef Neffati, the I-G refused to conduct a review of the decision by Mr Neffati's trustee, Andrew Aravanis to file a notice of objection to discharge, on three grounds relating to the non-disclosure of a creditor, and non-disclosure of, and disposal of property in Tunisia. A similar preliminary question faced the AAT that is: was the AAT's role limited to reviewing the refusal decision or could it review the underlying decision by the trustee? The applicant bankrupt relied upon the aforementioned Woodman decision in submitting that the AAT had the power to go behind the refusal by the I-G and review the trustee's decision. The AAT said:

> *The removal of the right to apply direct to the Tribunal for review of a trustee's decision to file a notice of objection was one of the objects of the amending legislation. If the interpretation contended for by the applicant is correct, it would in effect apply the legislation, as it existed at the time of Woodman. Moreover, it would render the respondent's power to decide not to review a trustee's decision pointless.*

The AAT's decision on the preliminary question was that its role was confined to reviewing the I-G's refusal to conduct a review: *Neffati and Inspector-General in Bankruptcy [2016] AATA 941* (25 November 2016) at 31:

Although the Tribunal is commonly said to 'stand in the shoes' of the original decision-maker, its power remains one of review. It has 'all the powers and discretions conferred on the person who made the decision' (emphasis added). The fact that the respondent could have decided to conduct a review does not give the Tribunal power to do so.

In the subsequent decision by the AAT *Neffati and Inspector-General in Bankruptcy [2017] AATA 1108* (19 July 2017), the AAT affirmed the decision of the I-G not to perform a review, on the basis that there were not sufficient reasons to justify a review.

These decisions recognise that there is a threshold for a review by the I-G to occur.

Mark Findlay, Director
Regulation & Enforcement

ATO update: request for documents

New digital format

We continue to focus on improving the services we provide to the insolvency profession. From August 2017, we have adopted a new digital format for requests for documents submitted via the ATO Business Portal. The new digital format will enable the Australian Taxation Office (ATO) to respond to your requests quicker, enabling you to use the data more effectively during your investigations.

We encourage you to use the Business Portal to send and receive requests for documents, as it's a secure digital platform. This allows us to manage your requests more efficiently and reduce delays.

Third party information

The confidentiality provisions in the *Taxation Administration Act 1953*, permit the ATO to disclose taxpayer information in certain specified circumstances. For information to be provided it must be an authorised disclosure and we need to exercise our discretion before we disclose.

Generally, third party information is not provided unless we can establish it is relevant to our administration of the taxation laws, or is necessary to assist the practitioner in fulfilling their obligations.

Third party information is any information that is not about an insolvent entity or a bankrupt client. It may include, but is not limited to the following:

- references to director penalty notices
- personal address and phone numbers of authorised contacts (including employees)
- personal information (e.g. ill health, divorce and separation, beneficiaries details on trust returns, third party bank account details)
- tax file numbers
- solicitor details
- an authorised professional representative's details (e.g. addresses and other contact details).

Tax agent details (tax agent name, phone numbers and addresses) may be disclosed and are not generally censored.

Excise obligations for insolvency practitioners

When you are appointed as bankruptcy trustee for a client with excise obligations, there are a number of responsibilities that pass to you. These are set out in the *Excise Act 1901* and in the *Customs Act 1901*.

What is Excise?

Excise is a tax payable on certain alcohol, tobacco and petroleum products made in Australia, known collectively as excisable goods. When these products are imported they are known as excise equivalent goods and customs duty is payable on them.

Anyone who produces stores or manufactures excisable goods in Australia needs to have an excise licence. Before excisable goods are delivered into the Australian market, they are subject to the Commissioner's control and are known as underbond goods. An excise duty liability is triggered when these goods are delivered into the Australian market.

Your responsibilities

If you have been appointed to a client with excise obligations, there are a number of things you need to do, including:

- You may need to arrange for a final audit to work out your client's stock on hand and any excise duty payable.
- If your client has underbond goods and wishes to move, sell or dispose of these goods, you'll need to obtain permission from the ATO prior to doing this. This permission may also apply to certain equipment, including stills.
- You are responsible for paying any excise duty arising from goods sold while under your appointment and you will need to contact the ATO to arrange payment.
- Licences are not transferable, so in the event your client's business is sold, the new owner will need to apply for an excise licence.

If you don't meet your obligations

You should be aware that it may be a criminal offence if you do not meet your obligations for manufacturing, storing, moving or otherwise dealing with underbond goods for which excise duty has not been paid.

How the ATO can help

The ATO will provide you with a proof of debt to help you comply with your duties, which might need to be amended once we have assessed your client's position with respect to their excisable goods.

More information

For more information on excise visit ato.gov.au/excise, or call 1300 137 290, 8 a.m. to 6 p.m., Monday to Friday.

If you would like to find out more about using the ATO Business Portal, our education visits, electronic payments or the new request for documents format, please email your query to InsolvencyPractitionerServices@ato.gov.au

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

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

When to seek approval for disbursements—ARITA's view

New version of section 60-20: post-amendment guidance

Please note: this extract from a recent ARITA article has been reproduced with the permission of ARITA.

The five, key take-away points regarding the 'new' section 60-20 are:

1. 'Internal disbursements' (as defined and explained in section 14.10 of the ARITA Code of Professional Practice) will require approval before being paid (because it will very rarely be the case that there is no 'above-cost' element to an internal disbursement; even a negligible premium will technically be caught by section 60-20). Internal disbursements are for goods and non-professional services; common examples are telephone calls, postage, stationary and photocopying.
2. External disbursements, at cost, incurred for goods or services provided by arms-length providers will not require approval.
3. Where there is an 'uplift' or charge (above cost) rendered on any external disbursement, that will require creditor approval because either the external administrator or a related entity of the external administrator—e.g. the incorporated practice or fellow partners of the firm—will be directly or indirectly deriving a profit or advantage from the external administration of the company and will thereby be 'caught' by section 60-20.
4. External disbursements payable to a service provider related to the external administrator/trustee (or in which the insolvency practitioner holds an interest) will require approval under section 60-20 before being paid. An example would be where a liquidator engages an incorporated service provider in which the liquidator holds shares or of which the liquidator is a director.
5. Professional, non-insolvency services provided by another division of the practitioner's firm (or indeed by any related entity) will require approval by creditors in the same manner as remuneration. This is currently required by the ARITA Code of Professional Practice and will continue to be required after 1 September 2017 (see section 14.10.2: 'Internal non-insolvency professional costs').

The term 'related entity' in section 60-20 is defined in section 5-5 of Schedule 2 and incorporates the definition of the term found in section 5 of the Bankruptcy Act.

We would anticipate that ARITA members will usually seek approval of internal disbursements at the same time as their first remuneration approval. This could include a resolution for approval of internal disbursements incurred to date together with a resolution for prospective approval of future internal disbursements as per set rates but subject to an overall capped amount.

Narelle Ferrier and Mark Wellard
ARITA

New Zealand Insolvency and Trustee Service update

The New Zealand Insolvency and Trustee Service carried out is annual client survey to all debtors who filed for insolvency between June 2016 and April 2017 and all creditors who had filed claims over the same period, with known email addresses.

We achieved an impressive overall quality of service delivery rating of 4.3 out of 5, which was an increase from last year's rating which was also impressive at 4.26.

We are proud to provide high level results such as:

1. providing consistent information/advice
2. acting impartially in dealings with clients
3. processing applications within a reasonable amount of time

Also in this period, we were successful in a Court judgment, which reinforced the Official Assignee's (OA) methodology in assessing contributions to be paid by a bankrupt—*Official Assignee v van der Walt [2017] NZHC 1664*.

The bankrupt made seven of the assessed contributions payments and then stopped the arrangement. The OA sought an order for ongoing payments at the rate of $3,333.40 per fortnight together with payment of arrears. The bankrupt opposed the application on the ground the assessed amount was excessive and should be reduced.

The Court was satisfied the OA reached a reasonable determination using the methodology that produces an overall assessment of reasonable living costs by reference to the average expenditure figures published by Statistics NZ and Working for Families thresholds used by the Inland Revenue Department to calculate tax credits.

The intention of this is to establish a consistent and objective formula to assess a bankrupt's ability to make contributions towards their bankruptcy debts.

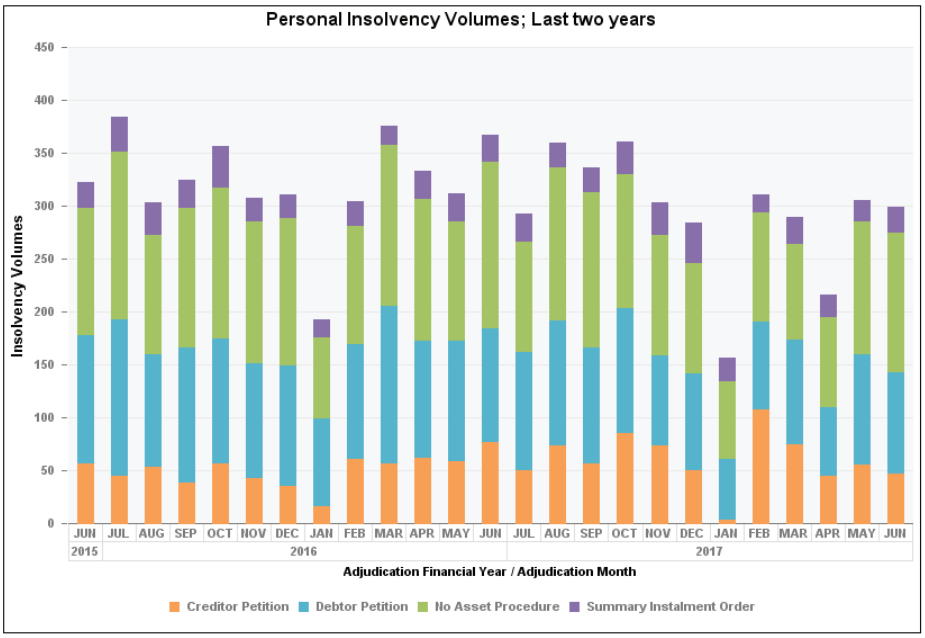
A second step to the process of determining the amount of contributions to be paid, is to consider the bankrupt's actual circumstances e.g. incurring or not incurring particular costs such as rent, medical costs etc. and does it cause hardship to the bankrupt and their dependents?

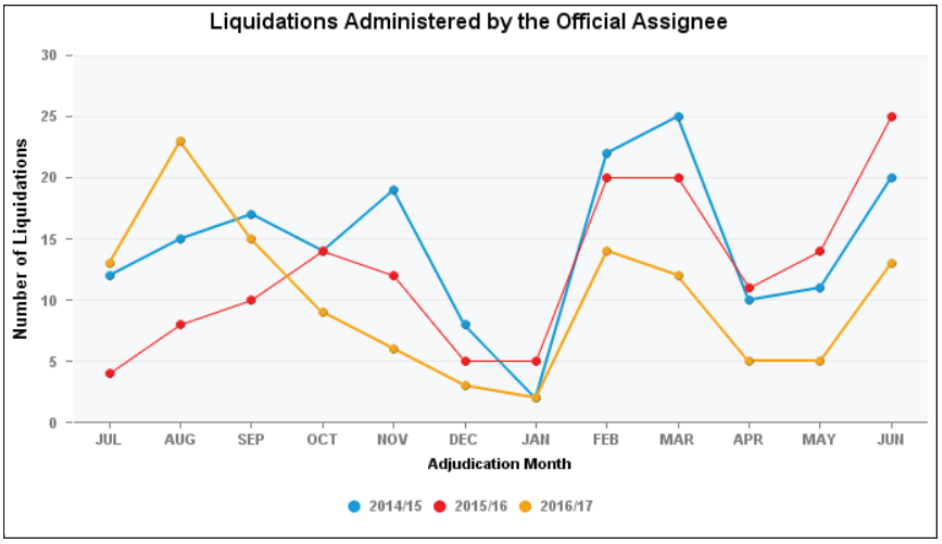
A third step to the assessment is that the OA will ensure some discretionary income is left in the bankrupt's hands.

The judgment is clear that the burden of proof of establishing the reasonable allowance is on the bankrupt, this means that once the assessment is made by the OA it is for the bankrupt to provide sufficient evidence to show that the contributions determination does not leave sufficient for reasonable expenditure. In this case, the bankrupt did not meet this threshold.

The outcome was an order for ongoing contributions at the rate of $3,333.40 per fortnight together with the arrears of approximately $64,000.

Statistics:





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

AFSA to use electoral roll to search for ORN recipient details

To assist bankruptcy trustees to apply for an Official Receiver notice (ORN), we are now able to access basic information on the electoral roll, such as the recipient's surname and given names, residential address, gender and date of birth.

The information can be accessed at no cost. The ORN team will provide this service as part of our assessment of an ORN application.

AFSA has a Memorandum of Understanding with the Australian Electoral Commission (AEC), which allows this information to only be used to:

- locate and investigate bankrupts and their associates in relation to obligations under the Bankruptcy Act
- conduct criminal investigations in relation to the Bankruptcy Act or
- investigate identity fraud.

For further information, please contact our ORN team at OR.Notices@afsa.gov.au .

Joyce Fu, A/g Assistant Director
Insolvency and Trustee Services

VIDOVIC (Vic): Builder disposes of cash then declares voluntary bankruptcy

Mr Nenad VIDOVIC was sentenced on 15 June 2017 after pleading guilty to charges of removal of property prior to bankruptcy, making a declaration in his statement of affairs (SOA) that was false and removal of property after bankruptcy.

Mr Vidovic filed for voluntary bankruptcy on 17 February 2015 with debts of over $861,000. Between 3 November 2014 and 13 February 2015, Mr Vidovic withdrew in excess of $365,000 from his personal bank accounts. This money should have been used to pay his creditors. He told his bankruptcy trustee that he suffered from a depressive illness and alcoholism, and although he could not remember what he used the money for, he did spend a lot of time at gaming outlets.

Mr Vidovic was a self-employed builder trading as SN Construction. He owed the Australian Tax Office in excess of $372,000. On his SOA, he failed to declare his income for the previous 12 months, eight bank accounts and the ownership of a motor vehicle.

After becoming bankrupt, Mr Vidovic received about $5,200 into his account as a result of gambling winnings. These monies vested in his bankrupt estate. He then failed to advise his trustee of these funds as required, and then withdrew $3,000.

Mr Vidovic was sentenced at Ringwood Magistrates Court by Magistrate La Rosa. He convicted and sentenced Mr Vidovic to a Community Corrections Order to perform 175 hours of unpaid community work over 15 months. He was also ordered to undergo treatment and rehabilitation and to pay disbursement costs of $178.90.

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

SARNELLI (Qld): Bankrupt convicted of offence under the Bankruptcy Act

Adriano (Adro) Sarnelli was charged on 6 February 2017 with contracting a debt within two years of becoming bankrupt, and without having any reasonable expectation of being able to pay the debt given his other liabilities.

Mr Sarnelli became bankrupt on 12 February 2015 by an order of the court. In November 2014, prior to becoming bankrupt, he obtained a credit card from Citigroup and then proceeded to make purchases in excess of $8,000 when at that time he had personal liabilities of over $280,000.

Mr Sarnelli pleaded not guilty to the charge in the Southport Magistrates Court, and was found guilty after a contested hearing on 16 June 2017. Magistrate Phillipson convicted Mr Sarnelli and imposed a 12-month good behaviour bond with $2,000 surety. In sentencing, the Magistrate stated that Mr Sarnelli was in a very precarious financial position when he incurred his financial debt. The Magistrate described his behaviour as a serious offence and stated others needed to be deterred from engaging in similar conduct.

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

VAN der HECHT (NSW): Two-year suspended sentence for an offence against the Bankruptcy Act

Mr Quentin VAN der HECHT of Lismore, New South Wales, was sentenced on 13 June 2017 after pleading guilty to an offence of disposing money with an intent to defraud his creditors.

Mr Van der Hecht filed for voluntary bankruptcy in July 2011.

In June 2011, Mr Van der Hecht received over $200,000 from the sale of his property.

Mr Van der Hecht directed his solicitor to pay the surplus funds from the sale to his estranged wife to keep the funds out of reach of his creditors.

The Court found the offence proven and convicted Mr Van der Hecht. He was sentenced to two years imprisonment that was suspended upon him entering into a $2,000 good behaviour bond for two years.

The Magistrate noted the importance of the bankruptcy system and the need to prevent bankrupts from exploiting the system.

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

PHUNG (NSW): Bankrupt found guilty of an offence under the Bankruptcy Act

Dr Van Thien Phung, of Potts Point, New South Wales, lodged an appeal after being convicted and sentenced for removing property within 12 months of going bankrupt.

He relied on a defence that he gambled money without intent to defraud any of his creditors.

Dr Phung filed for voluntary bankruptcy in September 2013 with debts of over $1 million.

Prior to his bankruptcy, Dr Phung received proceeds of over $138,000 from the sale of property in Croydon Park, NSW.

Dr Phung withdrew $126,700 in cash within the 12 months prior to his bankruptcy, and claimed he 'lost the lot' on gambling.

He pleaded not guilty.

Magistrate Williams found him guilty on 11 November 2016, and sentenced him to five months imprisonment, to be released on a 12-month good behaviour bond upon giving security.

On 15 June 2017, District Court Judge Tupman accepted that Dr Phung gambled some of the money but concluded that he had failed to establish his defence.

Judge Tupman confirmed the conviction and released Dr Phung without passing sentence on a $500 good behaviour bond for 12 months.

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

RAFFIE (NSW): Five time bankrupt convicted of multiple offences

Ms Aziza Raffie of Cecil Hills, New South Wales, was sentenced on 11 July 2017 for making a false declaration on five occasions, providing false information to her bankruptcy trustee and obtaining credit without disclosing her bankruptcy.

Ms Raffie was convicted and ordered to perform 250 hours of community service.

Ms Raffie has been bankrupt five times since 1998. She was bankrupt twice using her current legal name of Aziza Raffie in 1998 and 2011, twice using her previous name of Lenka Carovska in 2007 and 2011 and most recently in 2014 using the name Azira Raffie.

Ms Raffie made false declarations on her bankruptcy forms on each occasion when she filed for bankruptcy.

She obtained a loan without disclosing to the finance company that at the time of the application she was bankrupt under the three different names.

During her most recent bankruptcy, she provided false information in a questionnaire provided to her trustee.

Magistrate Tsavdaridis commented that the offences had an aura of public policy impropriety about them in that AFSA made it abundantly clear to Ms Raffie what her obligations were in completing the forms required for the debtor's petitions and disclosing her bankruptcy when applying for credit. She not only provided false answers, she did so intentionally to suit her financial needs and the offences required him to take into account the need for general deterrence.

The Magistrate also commented that while these offences were occurring, Ms Raffie committed other offences causing a loss to the Commonwealth. She received a community service order for those offences.

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

HOLLEY (Qld): Bankrupt found guilty of offences under the Bankruptcy Act

Ms Faye Sheree Holley, of Cranley, Queensland, pleaded guilty on 13 June 2017 to two offences under the Bankruptcy Act related to her examinable affairs.

Ms Holley's offences included failing to file a completed statement of affairs with the Official Receiver within 14 days of being notified of her bankruptcy by sequestration order; and failing to provide information to her trustee when directed to.

The trustee directed Ms Holley to provide information about a Mack truck that vested in the trustee as an asset of the bankrupt estate. Ms Holley failed to provide the trustee with the location of the truck. Ms Holley also gave little information about a potential buyer for the truck.

The Magistrate at the Toowoomba Magistrates Court convicted and sentenced Ms Holley for both offences, and placed her on an 18-month good behaviour bond of $900. She also ordered her to either give the trustee access to the Mack truck, or to provide the proceeds of the sale of the Mack truck to the trustee within 30 days.

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

ALTER (Vic): Train driver convicted of Bankruptcy Act offences

Mr Werner Martin Willem Alter was sentenced on 3 August 2017 after pleading guilty to 31 counts of incurring a debt without any reasonable or probable grounds of being able to repay that debt.

With debts worth over $13 million, Mr Alter filed for voluntary bankruptcy on 6 May 2015. In the month prior to filing for bankruptcy, he made purchases and cash advances from nine credit cards totalling more than $222,000. Shortly before incurring these debts, he was served with a Judgment to pay damages of $380,000. It was alleged that after taking his assets and salary as a train driver into account, there was no reasonable expectation that he could repay those debts.

Mr Alter, aged 52, was discharged from his bankruptcy on 17 May 2017.

Magistrate Martin at Ringwood Magistrates Court sentenced Mr Alter to a Community Corrections Order for 18 months with a condition that he perform 300 hours of unpaid community work over 12 months. In sentencing, his Honour noted that a substantial discount had been applied due to his early guilty plea however, the offence was serious and a very large sum of money was involved.

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

DURAS (SA): Former AFSA employee convicted of Bankruptcy Act offences

Mr Paul Alexander Duras was sentenced on 2 August 2017 after pleading guilty to one count of incurring a debt by fraud prior to bankruptcy.

Mr Duras filed for voluntary bankruptcy on 5 September 2013 with debts of approximately $14,000. In the days leading up to filing his petition, Mr Duras obtained a loan from Cash Converters of $2,000 stating he was employed with AFSA, when in fact he was not. Had Cash Converters known he was unemployed they would not have advanced the loan.

Mr Duras was employed by AFSA between May 2013 and 22 August 2013. Mr Duras was discharged from his bankruptcy on 6 September 2016.

Magistrate Bennett at Adelaide Magistrates Court sentenced Mr. Duras to a 15-month good behaviour bond in the sum of $1,000. In sentencing, his Honour noted that the offending was serious as it rendered creditors unable to recover their funds.

However, due to his plea of guilty, and the fact that he had not re-offended, a non-conviction was appropriate in this case.

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

BLISS (NSW): Two year good behaviour bond for offences against the Bankruptcy Act

Mrs Leonie Bliss of Albion Park, New South Wales, was convicted on 10 August 2017 after pleading guilty to two offences of disposing property, namely shares, with intent to defraud her creditors.

Mrs Bliss filed for voluntary bankruptcy in April 2013. On 10 April 2013, eight days before filing for bankruptcy, Mrs Bliss transferred a parcel of shares with a value over $9,000 to her husband.

The day after becoming bankrupt, Mrs Bliss transferred a second parcel of shares with a value of $3,400 to her husband.

The share value was subsequently converted to cash, which was deposited into Mrs and Mr Bliss's joint bank account.

After a number of requests from the trustee for payment of the proceeds from the sale of the shares, Mrs Bliss eventually paid approximately $12,000 to her bankruptcy trustee.

Mrs Bliss entered a guilty plea at Albion Park Local Court. She was convicted and released on a two-year good behaviour bond in the sum of $1,000.

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

Paul Shaw, National Manager
Regulation and Enforcement

Morris Finance Ltd v Brown [2017] FCAFC 97

(19 Jun 2017) (Beach, Markovic and Moshinsky JJ)

The Full Court of the Federal Court has recently clarified the law regarding the ability of a secured creditor to commence proceedings against a bankrupt pursuant to the Bankruptcy Act. The Full Court has held that, as an exception to the general rule that a creditor requires leave of a court to bring a claim for a provable debt against a bankrupt; proceedings to enforce an equitable charge do not require leave.

The facts

The Browns owned real property in New South Wales. In 2012, they entered into a commercial goods lease with Morris Finance and charged their interest in the property in favour of Morris Finance in order to secure their obligations under the lease. Morris Finance claimed an equitable charge over the property.

After the Browns became bankrupt, Morris Finance commenced proceedings in the New South Wales Supreme Court seeking, amongst other things, an order for sale of the property and ancillary orders regarding the sale proceeds to discharge the Browns' debt owed under the lease.

The primary judge held that because of the Browns' bankruptcies Morris Finance required leave under the Act to commence proceedings to enforce its charge. Morris Finance sought leave to appeal that decision.

The Full Court's analysis

The key question on appeal was whether a proceeding seeking to realise or enforce an equitable charge through judicial means can fit within section 58(5) of the Bankruptcy Act and therefore not require leave under section 58(3)(b).

Beach, Markovic and Moshinsky JJ, delivering a joint decision, stated at the outset that 'it is contrary to the text, context and purpose of section 58(5) to exclude from its operation judicial processes to enforce an equitable charge.'[1]

In reaching this view, their Honours considered first that, for the purposes of the Bankruptcy Act, a 'secured creditor' includes a creditor secured by an equitable interest as well as one secured by a legal interest.

Their Honours then turned to the more contentious question: the scope of the phrase '[to] realise or otherwise deal with' in section 58(5) and how it might bear upon the requirement to seek leave to commence proceedings with respect to an equitable charge.

Their Honours considered that the primary means of enforcement of an equitable charge is a judicial order for sale of security property, and that Morris Finance was a secured creditor seeking, in the Supreme Court proceeding, orders for sale of the property so as to 'realise or otherwise deal with [its] security' for the purposes of section 58(5). It therefore did not require leave under section 58(3)(b).

In reaching this view, their Honours noted the following:

- Section 58(5) should be construed 'relatively liberally' to embrace judicial realisation of an equitable charge.
- In light of the purpose of section 58, there would be no unfair advantage to a secured creditor, and no inappropriate depletion of a bankrupt's estate, in seeking an order for sale of property over which the secured creditor has an equitable charge.
- The fact that Morris Finance's claim for an equitable charge had yet to be heard and determined by the Supreme Court was of no consequence; taking steps to realise or otherwise deal with a security interest under section 58(5) does not require that the security interest first be established.
- There is no distinction between steps taken by an equitable mortgagee and an equitable chargee in terms of the exercise of rights over a security property and the act of realisation; '[p]roceedings seeking either possession or sale or both can come within the phrase "realise or otherwise deal with his or her security".'[3]
- It did not matter that Morris Finance sought, in addition to an order for sale of the security property, orders regarding the proceeds of sale. Such orders were ancillary to the orders for sale and '[did] not seek adjudication on the quantum of the amounts but rather an endorsement of the general protocol for distribution' of the sale proceeds.

Conclusion

In reaching its decision, the Full Court has provided useful guidance on the policy and operation of section 58 of the Bankruptcy Act, including the meaning of the expression '[to] realise or otherwise deal with [a] security'. The Court's reasons are also noteworthy for the way in which they characterise the enforcement of an equitable charge for the purposes of the Bankruptcy Act, and how this affects whether or not a creditor requires leave to bring a claim against a bankrupt.

Cameron J. Charnley
Barrister

KTXP v Inspector-General in Bankruptcy [2017] AATA 1278

(16 August 2017)

Catchwords: *bankruptcy — realisations charge — whether charge should be remitted — whether applicant had standing to bring the application for review — applicant a creditor — whether failure to remit would cause the applicant undue hardship — whether appropriate to remit — decision under review set aside.*

The facts

By section 283(1) of the Bankruptcy Act, the Inspector-General in Bankruptcy (the respondent) has power to remit a realisations charge in certain circumstances. The respondent declined to do so in this case.

The AAT noted that the circumstances of this case are unusual. The applicant suffered serious, permanent injuries in a horrific assault some years ago. The assailant, who subsequently became bankrupt, was sentenced to a lengthy term of imprisonment.

The applicant commenced proceedings against the bankrupt. The Court awarded her $295,000 in damages plus interest and costs. However, the bankrupt transferred the property to another person. The applicant brought proceedings in the Supreme Court for declarations that the transfer was made with intent to defraud and was void, and for an order that it be set aside.

The Tribunal made the orders sought. The applicant was subsequently awarded costs in the amount of $214,124.88. The bankrupt was made bankrupt. The applicant lodged a proof of debt in the amount of $514,430.85. After payment of the trustee's remuneration and legal expenses, and allowing $30,232.97 on account of the realisations charge, the dividend payable to the applicant was $293,627.88. After payment of legal and associated costs, she was left with approximately $6,000.

The Tribunal's analysis

The Tribunal confirmed that there must be a causal relationship between the failure to remit and the hardship claimed, further that section 283(1) contemplates prospective undue hardship and that it is not designed to be compensatory. The Tribunal stated that it is not enough that an applicant has suffered, or will in future suffer, undue hardship. The undue hardship must flow from the failure to remit the realisations charge. It added that notwithstanding the severity of hardship suffered in the past by an applicant, the Tribunal cannot take a compensatory approach to the exercise of the discretion.

The Tribunal also considered the issue of standing. It held that while it may appear that section 283(2)(a) would only permit the trustee, as the person liable to pay the charge, to seek review by the Tribunal of a decision to refuse remission, when section 283(2)(d) is read with section 27(1) of the *Administrative Appeals Tribunal Act 1975*, it is clear that a review application may be made to the Tribunal for a review of a decision by or on behalf of any person *whose interests are affected by the decision.*

The Tribunal also provided a useful summary of what constitutes 'undue hardship', observing that it is hardship that is inappropriate, unjustifiable, unwarranted, excessive, or disproportionate beyond that which she would ordinarily suffer as a creditor.

Conclusion

The Tribunal held that repayment of $5,000 by the applicant to her parents would add to her financial burden and cause undue hardship. Therefore, it order $5,000 to be remitted. It went on to order a further $10,000 should be remitted on account of the emotional and psychological hardship experienced by the applicant as a result of her 'sense of grievance.' Hence, in total the court ordered $15,000 of the $30,000 original realisations charge was subject to remission.

Lane (Trustee), in the matter of Lee (Bankrupt) v Deputy Commissioner of Taxation [2017] FCA 953

Catchwords: *bankruptcy and insolvency — trustee in bankruptcy's right to insolvent trustee's right of exoneration — discussion of the nature of the right of exoneration — whether the funds are to be distributed to all creditors or only to trust creditors — whether right of indemnity 'property divisible among the bankrupt's creditors' or trust property*

The facts

The Warwick Lee Family Trust was established by a deed dated 11 March 1998. The trustees initially appointed under that deed were Mr Lee and his wife, Wendy Ellen Lee. By the time of his bankruptcy in February 2013, Mr Lee was the sole trustee. The trust was a discretionary trust of which, inter alia, Mr Lee, Mrs Lee and Mr Lee's children were 'beneficiaries' in the sense that they were objects of the exercise of the trustee's discretionary power to distribute income and in whom the corpus of the trust vested on the vesting day.

Prior to his bankruptcy, Mr Lee, as trustee, operated the business of a Subway franchise located in the suburb of Brassall in the state of Queensland. In the course of the operation of that 'fast-food' business, Mr Lee employed a number of staff and incurred a number of significant liabilities. Apparently, the Subway business was not a financial success. It was advertised for sale and a contract for its purchase by an unrelated third party was entered into on 18 December 2012.

On 22 February 2013, Mr Lee was made bankrupt on a debtor's petition. Mr Rajendra Kumar Khatri and Mr Morgan Gerard James Lane were appointed as the trustees in bankruptcy of Mr Lee's estate. The bankruptcy trustees ascertained the nature and scope of Mr Lee's personal estate. Necessarily, that required that they also ascertain the nature and scope of the trust estate.

The net proceeds of the sale of the Subway franchise, in the sum of $448,659.49, were received by the bankruptcy trustees in the period from 20 March 2013 to 28 May 2013. The bankruptcy trustees finalised all recovery actions, and ascertained all known unsecured creditors and were in a position to distribute the funds under their control. However, due to some legal uncertainties they sought directions as to the appropriate method of disposal.

The Court's analysis

The Court noted central to many of the questions raised was the issue of whether Mr Lee's right of indemnity out of certain assets that were held by him on trust could be utilised for the purposes of meeting the claims of 'non-trust' creditors or the claims of the trustees in bankruptcy for their costs, expenses and remuneration of the administration of the estate.

The Court was at pains to emphasise what it termed the 'critical distinction' between the:

a) the right of 'recoupment' or 'reimbursement' on the one hand

b) the right of 'exoneration' on the other.

This distinction, the court observed, while fundamental had been often overlooked by Courts. Going on to explain the two categories the Court noted that what comes into the hands of a bankruptcy trustee is a trustee's right of recoupment, it is a right to take money from the trust funds for the benefit of the insolvent trustee's estate. It is, in effect, the Court stated, 'the payment of an amount owing to the trustee for the purposes of reimbursing the trustee's personal estate. Such a payment is received by the bankruptcy trustee as part of the bankrupt's personal estate and is available to meet the claims of both trust and non-trust creditors.'

However, the Court went on to contrast the position when what the bankruptcy trustee receives is merely a right or entitlement to have trust assets applied to discharge trust debts. That is, the Court considered, a considerably more limited right.

Citing *In re Richardson* [1911] 2 KB 705), a case concerning a bankruptcy trustee's entitlement to the benefit of the insolvent trustee's right of indemnity from a beneficiary, the Court endorsed the principle that where the trustee has paid a trust debt out of his own money, the right of reimbursement is the trustee's own property absolutely and, if the trustee is insolvent, any bankruptcy trustee might use that right of reimbursement for the benefit of all of the creditors of the trustee's estate.

In stark contrast, the right of exoneration is merely a power that is exercisable by the trustee solely for the purposes of paying the expenses of the trust. The Court also noted that this 1911 decision also supported the proposition that, while in a bankruptcy administration a right of exoneration might vest in the bankruptcy trustee, it does not change its character to become a right to use trust funds to pay non-trust creditors. If the right of exoneration is limited in the trustee's hands, it is equally limited in the hands of the bankruptcy trustee. Neither the trustee nor, in his stead, the bankruptcy trustee, is entitled to use funds which are the subject of the right of exoneration to discharge non-trust liabilities.

Finally, the Court also found support for its conclusions concerning the nature of the right of exoneration (that is as a mere right or power to use trust funds to meet debts incurred in the operation of the trust), could also be detected in the origins of the rights of trust creditors to be subrogated to that right on the trustee's insolvency. This suggested that where the creditors of the executors were entitled to prove in the estate under an administration decree and their debts were accepted, they would be paid directly out of the estate. The trustee was not entitled to assume beneficial ownership of the funds for the purposes of discharging the trust debts.

Conclusion

Following this reasoning, the Court held that even though the right of exoneration is the 'property of the bankrupt' of which the bankruptcy trustees took possession, the only use to which it can be put in the course of the administration of the bankruptcy is to discharge liabilities owing to trust creditors. It was not capable of being used to meet the claims of non-trust creditors although they would benefit by having the claims on the remaining property of the bankrupt reduced.

Matthew Osborne
Principal Legal Officer