






# PERSONAL INSOLVENCY REGULATOR

Volume 8

















Issue 1

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This client newsletter by ITSA's independent Regulation and Enforcement branch will be issued each quarter to registered trustees, registered debt agreement administrators and controlling trustees. In keeping with one of Regulation and Enforcement branch's main purposes it is aimed at informing practitioners of changes to personal insolvency law, both legislative and case law, and discussing areas of practice and Inspector-General requirements. **ARTICLES ARE WELCOME** and can be forwarded by email to [tim.cole@itsa.gov.au](mailto:tim.cole@itsa.gov.au) or [registrations.officer@itsa.gov.au](mailto:registrations.officer@itsa.gov.au).

-  **Recommended reading for all practitioners**
-  **Particular interest for registered debt agreement administrators (RDAA's)**
-  **Particular interest for trustees**

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# 1. Inspector-General's Column

## a. RDAA Professional Development Day and Major Creditor Forum

In keeping with ITSA's commitment to continuous improvement, I am pleased to report ITSA recently hosted two important events involving several major stakeholders.

The first event was the 4<sup>th</sup> RDAA Professional Development Day which was conducted in Brisbane on 12 March 2010. The second event was the Major Creditor Forum and this was conducted in Sydney on 16 March 2010.

The theme of both days was "*Perspectives, Perception and Reality*" - emphasising the need to understand the importance of each stakeholder's view in the personal insolvency system and in particular within the Part IX industry.



Both days were well attended by relevant stakeholders and the RDAA Professional Development Day even broke new ground in having representatives from the Financial Counselling industry exchange perceptions of the debt agreement profession in open and robust discussion.

This session was complemented by a presentation from the Debt Agreement Practitioner's Association (DAPA) who provided an update on its activities and developments - including that the DAPA has now joined the Bankruptcy Reform Consultative Forum.

ITSA encourages all Practitioners to get behind both the IPA and the DAPA in order that all views may be heard as the personal insolvency system evolves and future legislative amendments are considered.

An important component of both days was the open forum sessions and, flowing from these sessions, ITSA undertook to communicate common themes to relevant stakeholders.

The main messages communicated by Debt Agreement Administrators were for creditors and these were:

- Creditors need to appreciate the debt agreement system is based on affordability and shouldn't apply any pre-determined criteria, nor use the weight of their vote to seek higher returns or influence other voting behaviours.
- Creditors need to appreciate variations are time consuming and can add extra costs.

- Creditors need to continue to engage in communication with RDAAs and information must be provided when a debt has been sold so the correct creditor is subsequently identified and paid.
- Creditors need to look at long term, not short term agreements (as in finish times) i.e. will the debt agreement be completed on time regardless of arrears and they also need to be flexible to accommodate those debtors who may have fallen slightly behind (sometimes due to unavoidable circumstances), but who still wish to see their debt agreement through to completion.

The 6<sup>th</sup> Major Creditor Forum was similarly fruitful and involved representatives from most of the major creditor groups across Australia.

Of particular interest to the Major Creditors was the outcome of a self-evaluation exercise undertaken by Debt Agreement Administrators on the debt agreement profession as a whole and what level of confidence there was in the market for debt agreements. An identical self-evaluation exercise was undertaken by the Major Creditors and it delivered almost identical findings – i.e. showing 60-70% confidence in the level of professionalism in the debt agreement market.

Not surprisingly the main messages communicated by Major Creditors were for Debt Agreement Administrators and these were:

- Creditors wish to work more closely with administrators to improve the debt agreement system.
- The Creditor group saw benefit in having more direct contact with the RDAA group and ITSA is willing to assist in this regard.
- Creditors expressed that, given the fees being charged by administrators, they expect to see quality and viable proposals. Creditors remain concerned that sometimes the preparatory work hasn't been done to match the level of fees charged. Creditors still regularly see debt agreement proposals with missing debts and an apparent lack of attention to detail.
- In addition, Creditors often have debt agreement (DA) debtors complaining to them that they didn't realise a debt agreement would affect their credit rating and they believe too much reliance is being placed on just sending debtors the prescribed information rather than explaining the overall implications of entering into a DA with the debtor.

It was pleasing to note the similar themes being expressed by both client groups and ITSA will continue to facilitate educative forums of this kind into the future.

Feedback from participants at these ITSA Forums is always highly valued and taken seriously. I would like to comment specifically on two anonymous pieces of feedback we received. This feedback and my response below will be of interest to all practitioners.

One participant remarked,

*"the concept of ITSA not providing legal advice needs to change."*

ITSA provides a wide range of explanatory material (See article 16 below) to assist practitioners and the community understand their obligations and rights. However, under ITSA's legislation and having regard to its role as a regulator, ITSA cannot provide legal advice and any information it provides is to be regarded as a guide only. Other financial regulators such as ASIC and the ACCC are in the same position. The special relationship between a lawyer and client is fundamental to a proper understanding of your legal rights and responsibilities. It ensures you obtain an explanation of how the law applies to the particular circumstances of your case. A decision on the need to approach a lawyer to obtain legal advice is a matter solely for a practitioner and it must be considered privately and on a case by case basis.

The second comment was,

*"ITSA needs to remain consistent with its regulatory approach - far too often does ITSA state that it will strictly discipline administrators - rarely is this implemented."*

In this regard, ITSA's approach to the publicising of disciplinary action is to pay close attention to the practitioner's rights to privacy and confidentiality. It is not always possible to publicise the results of disciplinary action - but that is not to say it is rarely implemented.

ITSA employs a number of different strategies with regard to discipline and these are outlined in [Inspector-General Practice Statement 8](#) (Registered Trustees) and [Inspector-General Practice Statement 9](#) (Registered Debt Agreement Administrators). I can advise that in the period from 1 July 2003 to 30 June 2007, twelve (12) unregistered debt agreement administrators were declared ineligible to act for unsatisfactory performance of their duties. Furthermore, since the implementation of the new debt agreement regime on 1 July 2007, a further three (3) unregistered debt agreement administrators have been declared ineligible and two (2) registered debt agreement administrators have been de-registered. This represents a total of seventeen (17) administrators that ITSA has pro-actively managed out of the industry since 1 July 2003.

ITSA will continue to take disciplinary action wherever appropriate and we will publicise such actions wherever possible having due regard to the law. If any practitioner is aware of specific circumstances surrounding any personal insolvency practitioner and where they feel disciplinary action is warranted - they are welcome and strongly encouraged to contact Jeff Hanley, National Manager Regulation and Enforcement, to discuss this in confidence.

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#### **b. Bankruptcy Law Amendment Bill (BLAB) 2009**

Further to my last message on 2 February 2010 about the *Bankruptcy Legislation Amendment Bill 2009* the Senate granted its Legal and Constitutional Affairs Committee an extension of time until 23 February 2010 for reporting on the Bill. Fifteen submissions were received. Public Hearings were held in Sydney on 28 January 2010. Witnesses included Insolvency Practitioners Australia; the Australian Institute of Credit Management; the Consumer Credit Legal Centre; the Consumer Action Law Centre (Vic); Australian Financial Counselling and Credit Reform Association (AFCCRA); and (jointly) ITSA and the Attorney-General's Department.

The Committee's Report was tabled on 24 February 2010. The majority of the Committee recommended that the BLAB 2009 be passed.

We are currently awaiting advice on the legislative program in the Senate for the Budget session. If passed it is expected the Bill would commence later in the year.

Submissions and transcripts of the Public Hearings and the Report are available here [www.aph.gov.au](http://www.aph.gov.au).

**Veronique Ingram, Inspector-General in Bankruptcy and Chief Executive**

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## **2. Regulatory Activity Summary – 9 months to 31 March 2010**

As stated in article 2 of the December 2009 edition of the Personal Insolvency Regulator (PIR) this edition has been held back so as to provide you with the most up to date regulatory statistics possible.

Please find below the Regulatory Activity Summary for the 9 months to 31 March 2010 compared to the previous two (2) full financial years.

<b>Regulatory Business Information</b>	<b>2007-08</b>	<b>2008-09</b>	<b>2009-10</b>
<b>1. TRUSTEE REGISTRATIONS</b>			
Registration applications received	7	12	7
<i>Number of Trustees registered at end of period:</i>	206	218	209
<b>2. RDAA REGISTRATIONS</b>			
Registration applications received	46	17	6
<i>Number of RDAAs registered at end of period:</i>	46	58	57
<b>3. INSPECTIONS</b>			
Official Trustee estates examined	303	-	150
Official Trustee errors identified	83	-	12
Registered Trustee estates examined	618	426	315
Registered Trustee errors identified	349	362	137
RDAA administrations examined	645	441	247
RDAA errors identified	85	55	45
<i>Total administrations examined</i>	1,566	867	691
<i>Total errors identified</i>	517	417	188
<b>4. PART X &amp; s73 PROACTIVE REVIEWS</b>			
Part X & s73 proposals reviewed	329	302	300
Part X & s73 meetings attended	35	58	48
Meetings where ITSA Regulation intervention	3	4	14
<i>Percentage of intervention required</i>	9	7	29
<b>5. COMPLAINTS</b>			
Official Trustee complaints received	34	42	29
Official Trustee complaints justified	6	5	4
Registered Trustee complaints received	232	268	246
Registered Trustee complaints justified	26	40	17
RDAA complaints received	112	108	81
RDAA complaints justified	9	24	6
<i>Total complaints received</i>	378	418	356
<i>Total complaints justified</i>	41	69	27
<b>6. INSPECTOR-GENERAL REVIEWS</b>			
Income assessment reviews received	26	33	34
Income assessment reviews varied by IG	14	18	12
Objection to discharge reviews received	59	39	49
Objection to discharge reviews cancelled or varied by IG	15	10	16
Hardship application reviews received	3	5	9
Hardship application reviews varied by IG	-	-	1
<i>Total IG Reviews received</i>	88	77	92
<i>Total IG Reviews varied or cancelled by IG</i>	29	28	29
<b>7. AAT MATTERS</b>			
AAT matters received re: Objections to discharge	8	11	12
AAT matters received re: Income assessments	5	5	6
AAT matters received re: Hardship	-	3	-
AAT matters received re: IG decision to not register	-	-	-
AAT matters received re: IG decision to de-register	-	-	3
<i>Total AAT matters received</i>	13	19	21

### *Noteworthy Trends*

- Inspector-General Reviews received in the 9 months year to date in 2009-10 are more than the number received in each of the entire financial years in 2007-08 and 2008-09. The increasing number of bankruptcies over the last three years goes some way to explain this increase.
- AAT matters received in the 9 months year to date in 2009-10 are also greater in number than those received in each of the entire financial years in 2007-08 and 2008-09.
- Additionally, there has been a proportionate increase in the number of complaints received in the 9 months year to date 2009-10, but a decrease in the number of complaints found to be justified. ITSA's examination of this trend indicates that practitioners are complying with the law, but that some complainants still feel compelled to complain. Our research indicates this increased level of complaint making goes to both communication issues and a lack of understanding on the part of bankrupts and debtors in most cases – i.e. that many bankrupts and debtors still do not fully appreciate the raft of ramifications and obligations applicable to them once they become bankrupt or enter into a Part IX or Part X agreement.
- Tied in with the above dot point is that one of the major inspection errors across all practitioners continues to be a lack of communication – practitioners are reminded of [Article 4 from the September 2009 PIR](#) in this regard.
- Significantly more intervention and corrective action has been required by Regulation in the 9 months year to date 2009-10, when attending Part X and Section 73 meetings. Trustees and their employees are reminded of the Trustee Information Session (and related handouts) given in November 2009 on this topic.
- The number of registered trustees has decreased to 209 as at 31 March 2010 mainly due to voluntary de-registrations in the period.
- One registered debt agreement administrator and one registered trustee were also subject to adverse committee decisions during the 9 months year to date to 31 March 2010. However, seeing as how each of these decisions is subject to appeal before the Administrative Appeals Tribunal, further details cannot be provided at this point in time.

Please also note that it will not be possible to provide statistics for the June 2010 quarter and for the full year to 30 June 2010 in the next edition of the PIR. These statistics will be released by ITSA as part of its Annual Report for 2009-2010 – it is expected the Annual Report will be published in the first quarter of the 2010-2011 financial year.

Jeff Hanley  
National Manager  
Regulation and Enforcement

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### 3. Debt Agreement Practitioner's Association & Bankruptcy Reform



For the first time, Debt Agreement practitioners (through its industry association, DAPA) have a seat at the table with the Bankruptcy Reform Consultative Forum which is chaired by the Attorney-General's department.

As many would be aware, the Attorney-General has announced that a review of the Debt Agreement regime will be carried out this year and DAPA is delighted to be involved in the process.

DAPA will publish its submissions in due course, however, members feel reform should be focused on the following areas:

- Provide greater incentives for debtors to enter into voluntary agreements;
- Provide an education process to better educate debtors on the options available to avoid bankruptcy;
- Empower the Official Receiver or a delegate of the Inspector-General with a discretion to review and override a dissenting creditors' votes if the proposal is in the best interests of all creditors generally;
- Streamline reporting to creditors to enhance confidence in the system;
- Regulate set-up fees, but elevate them to a priority payment in the proposal.

Whilst there are a number of points that will no doubt draw lively debate, DAPA feels the focus should be squared on making the scheme more efficient and equitable for all stakeholders and, with this in mind, DAPA looks forward to participating in what will undoubtedly be reflected upon as a critical point in time for the rising profession.

The Executive  
DAPA

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### 4. Controlling trustee applies for sequestration, and becomes trustee



Michael Murray



The decision in *Holbrook v Muntz* [2010] FMCA 105 involved a failed Part X proposal and an application by the controlling trustee – Kim Holbrook - for the debtor to be made bankrupt. The debtor resisted the

bankruptcy. As well, the debtor claimed there was a conflict of interest preventing Holbrook becoming trustee. Timing and other issues also arose.

### ***Application under s 221(1)(c) made as controlling trustee***

Holbrook's application was made under s 221 of the *Bankruptcy Act*, which relevantly says that where a Part X agreement does not proceed, the controlling trustee may apply to the court for a sequestration order against the debtor's estate. An initial question was whether the controlling trustee remained in that role – if the controlling trusteeship has ended under s 189(1A), they are no longer the controlling trustee and they are unable to apply under s 221: *Borck v Williamson* (1994) 49 FCR 16.

Holbrook did remain the controlling trustee at the time he filed the application on 29 September 2009. He consented to the trusteeship on 29 May 2009. The first creditors' meeting was held on 3 July 2009 and was then adjourned a number of times but ultimately, on 3 September 2009, a special resolution under s 204(1) failed to pass, including any resolution releasing the controlling trustee. Hence, Holbrook was entitled to bring the application under s 221(1)(c) because none of the required special resolutions had been passed within four months from the date the meeting of creditors was called.

Although the four months period was not then due to expire til 3 November, it was clear that none of the s 204 resolutions would or could ever be passed – once a s 204 resolution has been put and determined, that resolution cannot be put again either at that meeting or any adjourned meeting: *Re Ringuet* (1986) 11 FCR 45.

### ***Independence***

In opposing the appointment, the debtor claimed that Holbrook had a conflict of interest because his fees would be payable by him in his capacity as trustee in bankruptcy.

The Court said there was no conflict for these reasons:

- the application for a sequestration order was made in his capacity as controlling trustee, not as a creditor;
- the controlling trustee's fees had already been fixed at creditors' meetings, and were not susceptible to further increase because the controlling trustee's authority ended on 21 September 2009, and there would of necessity be no further creditors meetings;
- those fees would be afforded the priority dictated by s 109(1)(b) of the *Bankruptcy Act*, and would not be susceptible to change by the trustee in bankruptcy;
- the sole creditor, the ATO, did not object to the appointment of the controlling trustee as trustee in bankruptcy; and
- no further payments of controlling trustee's fees were required personally from the debtor.

The Court then said that even if there were a conflict, the advantages of appointing the same person as controlling trustee outweighed any detriment caused by any possible conflict, because there would be a general saving to creditors by appointing a person who has already spent time in investigating the debtor's affairs. Indeed, the appointment was "entirely sensible" from both a:

- practical viewpoint, given the controlling trustee's knowledge of the debtor's affairs; and

- a costs viewpoint, given that there would inevitably be costs savings by reason of the controlling trustee's appointment as trustee in bankruptcy because of his knowledge of the debtor's affairs and the reports he had already prepared in his capacity as controlling trustee. As the Court said, part of the purpose or intent of Part X is to reduce costs and fees.

### ***What if the controlling trusteeship had ended?***

An interesting point arises if the controlling trusteeship has ended under s 189(1A). In such a case, the former controlling trustee may be able to apply as a creditor, in respect of unpaid fees. That would involve an application under s 44 of the *Bankruptcy Act*, based on, for example, an act of bankruptcy of signing the s 188 authority (s 40(1)(i)), assuming any petition was presented within 6 months. That would give a different slant to the application, in that the former controlling trustee would not so much be exercising their statutory authority to see through the controlling trusteeship to bankruptcy; rather they would be pursuing their rights as creditor to be paid from the debtor bankrupt's assets. Independence may more readily arise as an issue in such a case.

The debtor did argue in this case that Holbrook had made the s 221 application for no other reason than to secure the payment of his fees as a priority creditor. The Court said that was not supported by any evidence and was in fact "an assertion so lacking in foundation that it ought never to have been made" [28].

### ***Opposition to the sequestration order***

As to the debtor's various grounds of opposition to the sequestration order itself, Mr Muntz argued that he had only the one creditor, the ATO, though for a debt in excess of \$600,000, that there was 'no public morality issue' and he wanted to continue to try to settle his on-going litigation with the ATO. As the court pointed out however, Mr Muntz had paid nearly \$500,000 into his superannuation fund in the midst of his litigation with the ATO, effectively preventing him being able to pay his tax debt. The Court concluded:

"[This] payment made for his own benefit, is conduct which weighs heavily against him, and in favour of the issuance of the sequestration order. That is particularly so where the issuance of the sequestration order might result in the recovery of some of those monies for the benefit of a creditor, namely the Tax Office".

### **Comment**

Although there was a challenge to independence in this case, there was no basis to it – controlling trustees invariably become trustees. But it is useful at times to go back to the basics, as the court did in this case, in analysing why it was not relevant. In other facts and circumstances, it could be. For information and guidance on practitioner independence, see Schedule 4A, Performance Standards for Trustees including Controlling Trustees at 2.3; the IPA Code of Professional Practice; and APES 330 Insolvency Services (formerly APS 7), which commences on 1 April 2010.<sup>1</sup>

Other issues in the case show that while Part X is there to deal with valid agreements with creditors outside bankruptcy, the law recognises that bankruptcy can provide a more appropriate mechanism to pursue investigations and asset recovery, assuming that funding to do this is available: see *Stedman v DCT* [2000] FCA 336.

Other points to note from the decision are that:

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<sup>1</sup> See Article no. 5 of this edition "A new Professional Standard for Insolvency Services."

- there are important timing and status issues under s 221;
- applications under s 221 may also be made by the Inspector-General and a creditor; and
- an application under s 221 could be made by a solicitor who takes on a controlling trusteeship, though a registered trustee would then be required to be appointed under any sequestration order made.

### **Insolvency Practitioners Association – IPA**

The decision in *Holbrook v Muntz* is reported on the IPA website at [www.ipaa.com.au](http://www.ipaa.com.au) through which the IPA seeks to keep its members informed about latest case law on matters of independence, duties and powers, remuneration and other practice-focussed issues. We also report on regulatory issues, including relevant items from the Personal Insolvency Regulator that we particularly wish to bring to IPA members' attention. Our journal – the quarterly *Australian Insolvency Journal* – contains other comment and analysis. Our education program covers personal insolvency and Part X arrangements; in fact completion of our course and full IPA membership allows solicitors to act as controlling trustees. The IPA welcomes any feedback. We are also pleased to be given the opportunity by ITSA to contribute to the Personal Insolvency Regulator.

I am grateful for comments from Mr Kim Holbrook, and the lawyer in the matter, Mr Francois Carles, in preparing this article.

#### **Michael Murray**

Legal Director  
 Insolvency Practitioners Association  
 e [mmurray@ipaa.com.au](mailto:mmurray@ipaa.com.au)

***Editor's Note:*** *In the context of controlling trustees and their duties and roles generally, all trustees are strongly encouraged to be fully conversant with [Inspector-General Practice Direction 12](#) which was released on 19 February 2010.*

***ITSA appreciates and highly values IPA's ongoing contribution to the Personal Insolvency Regulator.***

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## **5. A new Professional Standard for Insolvency Services**

The Accounting Professional & Ethical Standards Board (APESB) has issued a new professional standard which will impact on the work of members of three Australian professional accounting bodies (namely the Institute of Chartered Accountants in Australia, CPA Australia and the National Institute of Accountants) who undertake insolvency services. APES 330 *Insolvency Services* (APES 330) is a revision of an existing professional standard APS 7 *Statement on Insolvency Standards*.

APES 330 is effective from 1 April 2010 and primarily addresses formal appointments undertaken as a liquidator or administrator (excluding members' voluntary liquidations) under the *Corporations Act 2001*, the *Bankruptcy Act 1966*, or any other similar legislation. During the development phase of APES 330, APESB collaborated with the Insolvency Practitioners Association of Australia (IPA) and the Insolvency and Trustee Service Australia (ITSA) to ensure appropriate coverage of formal appointments.

The fundamental responsibilities of members of the accounting profession relating to *public interest, professional competence and due care, confidentiality and marketing* have been substantially revised from the existing APS 7 in line with APES 110 *Code of Ethics for Professional Accountants* (APES 110).

Professional independence requirements for members of the accounting profession have been significantly updated in APES 330. The standard stipulates that members must determine whether there are threats to their independence prior to accepting an appointment to conduct an insolvency service. APES 330 mandates that members have an obligation to consider prior or existing personal and/or professional relationships with the insolvent entity as these relationships can create actual or perceived threats to the member's independence. Where there are threats to a member's independence which are not trivial or inconsequential, and it is not a circumstance permitted by the standard, then the member must obtain court approval if the member wishes to accept or continue the insolvency service.

Members are also prohibited from accepting an insolvency service which results in payment of referral or recurring commissions, spotters' fees, or any other arrangements that may restrict the proper exercise of the member's judgement.

APES 330 includes a mandatory requirement that a member shall provide a *Declaration of Independence and Relevant Relationships and Indemnities* (DIRRI). A DIRRI must include an assessment of actual or perceived threats, a disclosure of prior relationships and services performed, and a declaration of indemnities.

Further, where circumstances change subsequent to the commencement of the insolvency service, the member has a mandatory obligation to update the DIRRI. The standard includes a prohibition on members or their employees deriving a benefit from dealing with the insolvent entity's property or other assets, without the prior approval of the creditors or the court. The only exception to these rules is when the insolvency service is in respect of a retail operation and the relevant assets are also available for sale to the general public at the same price.

In certain circumstances a member who is providing an insolvency service may be requested to act as an expert witness in respect of the administration. The applicable expert witness obligations are also specified in the standard.

The professional obligations in respect of professional fees and expenses in APES 330 have been substantially updated compared to APS 7. APES 330 stipulates that a member of the accounting profession can only claim professional fees and expenses that are necessarily incurred for the administration. Where the member's firm provides other professional services to the administration, the standard mandates that these fees must be claimed as professional fees and not as expenses. Further, the member can only draw fees after the proper authority has been obtained from the creditors or the court.

The standard limits the circumstances in which a member of the accounting profession can receive contingent fees in respect of an insolvency service. The member is prohibited from entering into a contingent fee arrangement that would impair the member's independence or fiduciary obligations. The member is also required to make specific disclosures to the creditors or the court if entering into a contingent fee arrangement. Further, the standard mandates that (except for controllerships) the member must disclose the methods that can be used to calculate professional fees and justify the chosen method.

Members of the accounting profession who provide insolvency services are encouraged to visit [www.apesb.org.au](http://www.apesb.org.au) to obtain a copy of APES 330 Insolvency Services.

Channa Wijesinghe CA, CPA  
Technical Director  
APESB

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## 6. Assigning Property to Undischarged Bankrupts – Neither Allowed nor Effective

We have previously reported on the Full Federal Court matter of *Meriton Apartments Pty Ltd v Industrial Court of NSW* [2008] FCAFC 172. One issue canvassed was whether s.134(1)(a) of the *Bankruptcy Act 1966* (the Act) authorises the trustee to sell to the bankrupt, ahead of his or her discharge from bankruptcy, property of the bankrupt generally, or the right to prosecute a legal proceeding in particular. The court held that a trustee in bankruptcy cannot assign a cause of action back to an un-discharged bankrupt ([The Bankruptcy Regulator December 2008](#)).

Many bankrupts who have house properties seek to retain the property. If a property has minimal equity, the trustee is entitled to sell the bankrupt's interest in the property back to the bankrupt, *once the bankrupt is discharged*, or alternatively to a non-bankrupt co-owner if one exists, during or after the bankruptcy. To transmit the property, the trustee is required to become registered on title and execute a transfer in favour of the discharged bankrupt or co-owner, as the case may be, such transfer generally attracting stamp duty. It is not surprising that some bankrupts attempt to secure a right during the bankruptcy to reacquire the property at an agreed price. Trustees are reminded of the effect of subsection 58(1)(b) which states:

### ***Vesting of property upon bankruptcy - General Rule***

(1) *Subject to this Act, where a debtor becomes a bankrupt.....*

(b) *after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.*

This provision was central to an application brought in the matter of *Pascoe & Anor v Official Trustee in Bankruptcy & Ors* [2006] FMCA 1099. In this case Scott Darren Pascoe and Gypset Pty Ltd (In Liquidation) sought a review of the decision by the Official Trustee in Bankruptcy to assign to three un-discharged bankrupts their property rights in relation to causes of action for damages which they wished to pursue in proposed litigation against the applicants.

Smith FM in setting aside the trustee's decision to assign the chose in action, made the following comments:

*“..an assignment of a chose in action to an un-discharged bankrupt would be legally ineffective due to the provisions of [s.58\(1\)\(b\)](#). I therefore accept the submission of the present applicants, accepted by counsel for the trustee,..... the proposed assignment would be legally ineffective or improper, due to the proposed assignees' status as un-discharged bankrupts..”*

Mark Findlay  
Business Manager – Central Region  
Regulation & Enforcement

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## 7. Section 254 of the Act and Unidentified Moneys<sup>2</sup>

The question has arisen as to whether funds received by an administration or estate, in cases where the practitioner (i.e. trustee or registered debt agreement administrator) has been unable to identify the provider of those funds can be paid to the Commonwealth pursuant to Section 254 of the *Bankruptcy Act 1966* (the

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<sup>2</sup> Please note section 254 of the Act has no application to pre 1 July 2007 debt agreements.

Act). Subsection 254(2) of the Act provides for payment to the Commonwealth in situations where the practitioner has under his/her control:

- (a) any dividend or other moneys that have remained unclaimed for a period exceeding 6 months; or
- (b) any moneys that it is proposed not to distribute or pay to any person.

It is the Inspector-General's position that paragraph 254(2)(a) applies in situations where the person entitled to the dividends or other money has been identified but cannot be located or contacted. Paragraph 254(2)(b) should be limited to cases where, for example, it is not proposed to distribute or pay the money to any person because there is no person entitled to the money (e.g. the person entitled has died leaving no will and no dependants or relatives), rather than situations where it is clear that some person is entitled to the money, but that person cannot presently be identified because the source of the money cannot be ascertained. It is therefore considered that section 254 is not designed to deal with unidentified moneys. However, this leaves two questions:

1. How long does a practitioner need to keep trying to identify the source of, and/or person entitled to, the money?
2. What should be done with the money after making appropriate but unsuccessful efforts to identify the source/person entitled?

In answer to those questions - the practitioner should make every reasonable effort to identify the source of the funds. The time period required will depend to a degree on the particular circumstances, but it is conceivable that a period up to 12 months may be required. Moneys that remain unidentified despite reasonable efforts should be placed in a suspense account operated by the practitioner until the issue is resolved.

In particular, the non-identification of receipt funds by administrators has significant consequences for those debtors in a debt agreement. Those provisions that relate to the 3-month arrears default and also 6-month arrears default (including the non-completion 6-months after the finalisation date) can lead to the agreement being terminated in some cases where all the funds have been paid, but some part of those funds remains unidentified by the administrator and thus not allocated against the correct agreement. It is imperative, in the Inspector-General's view, that administrators have sufficient systems and controls in place to identify funds and that in the event moneys are unidentified, extensive efforts are made to identify those funds.

Robert Tom  
Business Manager – North West Region  
Regulation & Enforcement

**Editor's Note:** *A recent case involving section 254 may be found at this link [Application of Tsantis \(In the Matter of Bauer\) \[2010\] FMCA 112](#). A summary of this case is provided below.*

- ***Bankruptcy annulled in 1992 by the Official Trustee. Surplus of \$56,000 paid to the bankrupt in November 1992. The cheque was never banked by the bankrupt so the Official Trustee paid the funds into consolidated revenue pursuant to section 254.***
- ***Bankrupt died early November 2008.***
- ***Daughter of the bankrupt found correspondence from the Official Trustee amongst her mother's possessions including the surplus cheque not banked.***
- ***In her capacity as administrator of her mother's deceased estate the daughter made a successful application under subsection 254(3) of the Act to recover the surplus of \$56,000 for the benefit of the deceased estate.***

*Please also refer to the September 2009 article written by Inspector Brett Hereward (Regulation – Southern Region) for further important information on this section of the Act.*

You can access this article at this [link](#).

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## 8. Trustee Information Sessions

The next round of Trustee Information Sessions have been tentatively set down for later this calendar year. These will be practical information sessions in relation to the implementation of the BLAB 2009. As you will appreciate many of us within ITSA are busily preparing for and liaising with the Attorney-General's Department in readiness for the commencement of the BLAB.

Our aim, in the second half of 2010, is to also deliver information sessions across the country on the topic of income assessments and the incoming infringement notice regime. This is in direct response to your feedback that you would appreciate further guidance in these areas.

Further updates on Regulation and Enforcement's ongoing educational role in the industry will be provided as we move forward and as the roll-out dates for all aspects of the BLAB become known. If you have any queries in the interim or ideas for topics you would like covered in future information sessions, please do not hesitate to contact Tim Cole, Regulation's Practice Manager at: [tim.cole@itsa.gov.au](mailto:tim.cole@itsa.gov.au) / 1300 364 785.

Jeff Hanley  
National Manager  
Regulation and Enforcement

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## 9. ITSA Regulation Registrations Officers – Update

Part of the role of ITSA Regulation Registration's Officers is maintaining contact lists for Registered Trustees and Registered Debt Agreement Administrators. Any change to a practitioner's particulars should be emailed to them at [registrations.officer@itsa.gov.au](mailto:registrations.officer@itsa.gov.au) at the first opportunity.

### a. Professional Indemnity Insurance

Registered Trustees would have all received an e-mail recently requesting evidence of current professional indemnity insurance. If you have not yet provided this information, please do so at your earliest convenience. To assist in this on-going monitoring process in the future, Registered Trustees are requested to forward their new certificate of currency (not the entire policy itself) to the Registrations Officer as soon as the policy has been renewed at [registrations.officer@itsa.gov.au](mailto:registrations.officer@itsa.gov.au) or at:

ITSA Registrations Officer  
Confidential  
Level 15, 340 Adelaide Street  
Brisbane Qld 4000

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## b. RDAA Registration Renewals

Letters and invoices have been emailed to RDAs whose registration is due to expire between 30 June and 31 July 2010. RDAs are required to re-apply for registration by completing the appropriate form depending upon whether they are trading as an individual, as a company or as both.

Form 24A Application for Registration as a Debt Agreement Administrator (Individual or Person with Overall Management Responsibility) [PDF](#)

Form 24B Application for Registration as a Debt Agreement Administrator (Company) [PDF](#)

RDAs are also reminded of the need to forward a new “Criminal History” check with their registration application form. As the process of receiving a response to criminal history checks has been known to take up to six (6) weeks, RDAs should request this search at the earliest possible opportunity.

If RDAs have any queries regarding any aspect of the renewal the process, please do not hesitate to contact either Cheryl Spriggs or Kellie Rosser – via email at [registrations.officer@itsa.gov.au](mailto:registrations.officer@itsa.gov.au) or by telephone on 07 3360 5916 or 07 3360 5404.

Kellie Rosser  
Registrations Officer  
Regulation and Enforcement

Cheryl Spriggs  
Registrations Officer  
Regulation and Enforcement

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## 10. ITSA’s Enforcement Unit

As mentioned earlier in this edition of the Personal Insolvency Regulator (PIR) this edition was held back so as to provide the most up to date statistics possible. Please find below the Enforcement Activity Summary for the 9 months to 31 March 2010 compared to the previous (comparative) period.

One thing to note regarding the focus of Enforcement in 2010, has been its move towards larger and more complex investigations.

For example; the matter of Lisa Robertson of St Kilda in Victoria – see [Robertson Media Release](#) which in essence was a \$200,000 fraud investigation resulting in the offender being sentenced to perform 100 Hours unpaid community service.

Also see the matter of Tony Markovski of Keilor in Victoria – see [Markovski Media Release](#) which related to 1 count of failing to provide the Trustee with an income questionnaire and 1 count of failing to provide the Trustee with information and documentation, resulting in this offender also being ordered to perform 100 hours of unpaid community service.

For further details about ITSA’s recent investigations and prosecutions – see [Media Releases](#)

<b>Business Outcomes</b>	<b>As at 7/4 / 2009</b>	<b>As at 7 /4/ 2010</b>	<b>% + / -</b>
Offence Referrals received	761	849	+12%
Investigations Commenced	598	607	+2%
Investigations Finalised	688	567	- 18%
Voluntary Compliance achieved	214	165	-23%

Warning Letters Issued	118	93	-21%
Persons Prosecuted	182	167	-8%
\$ Value of Charges prosecuted	\$2.220m	\$2.530m	+13%
Number of Charges Proven	277	230	-17%
Briefs submitted to the CDPP	250	256	+3%
Briefs currently with the CDPP	n/k	253	n/k

Jeff Hanley  
National Manager  
Regulation and Enforcement

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## 11. Advertising creditors' meetings

Trustees may recall an article, which appeared in the May 2007 edition of this publication, advising that the *Bankruptcy Regulations 1996* (the Regulations) had been amended to allow for advertising of meetings of creditors in a manner approved by the Inspector-General. The Regulations, as amended, permit approval by the Inspector-General of online advertising of meetings of creditors.

To this end discussions are continuing between ITSA, stakeholders and potential website hosts with a view to setting up an online forum for advertising meetings of creditors in the near future. Trustees will be kept informed of developments in this area as and when they occur.

In the interim, Trustees are reminded that under the current legislative requirements, notices of meetings of creditors **must** be published in both a national daily newspaper that is circulated throughout Australia, and in a regional daily newspaper of the State or Territory in which the debtor or bankrupt resides.

Please refer to the ITSA website ([www.itsa.gov.au](http://www.itsa.gov.au)) or contact your regional Regulation office or Regulation's Practice Manager for further information.

Tim O'Neill  
Inspector Regulation - Southern Region  
Regulation and Enforcement

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## 12. Online Services for Trustees: Release 2

Throughout March, ITSA held information sessions across Australia to coincide with the latest release of Online Services. It was pleasing that so many Registered Trustees and their employees attended the sessions and the level of interest this release has generated.

Release 2 enables Registered Trustees and their employees to complete the Annual Estate Return (AER) information via Online Services throughout the year. Online Services can also generate the Realisations Charge (RC) (Form 16) and the Interest Charge (IC) (Form 15) online without the need for lengthy data entry.

During the information sessions, a number of attendees provided feedback as to the existing functionality and also on what they would like to see included with Release 3 - scheduled for October 2010. Some of this feedback is detailed below, alongside the responses from the Online Services team.

ITSA welcomes any further feedback in this regard and any feedback can be provided by email to [onlineservices@itsa.gov.au](mailto:onlineservices@itsa.gov.au) or by telephoning (free call) 1300 364 785.

No.	Trustee feedback	ITSA response
1	<i>Some users are being asked to login twice before their password is accepted by Online Services</i>	If you have this issue please contact us on <a href="mailto:onlineservices@itsa.gov.au">onlineservices@itsa.gov.au</a> with your user name, date and time it occurred and the internet browser you use. ITSA's Support Team can rectify this once they have more information.
2	<i>When lodging documents relating to Objections to Discharge, ITSA need to ensure the Registered Trustee can upload some lengthy documents</i>	We are currently looking at the size of documents sent to ITSA to ensure the system accommodates this.
3	<i>Ability for Registered Trustee systems to interface directly with Online Services, such as MYOB, AO and Core</i>	Our Support Team are working on an Electronic Data Transfer component for Release 3. We will be talking to providers of insolvency systems during April and will be able to provide more information on this later this year.
4	<i>User would like a total amount to appear at the bottom of the "Generate RC/IC Remittance" screen tallying up all payments made</i>	The AER lodgment screen has a total of the RC & IC due by estate and the Generate RC/IC remittance pages list the total paid to ITSA in the year to date at that time. We will review the screen layout and endeavour to make it easier to access.
5	<i>Ability to see individual payments made throughout the year rather than just the cumulative total in the AER screen</i>	We will review and endeavour to create a transaction statement, where Registered Trustees will be able to see a history of all transactions that leads to the current estate balance and cumulative total.
6	<i>Ability to export entered AER data to excel for Trustee's own records and/or printing</i>	We will endeavour to increase functionality to allow AER data to be exportable and printable.
7	<i>Ability to submit/quarantine data for approval by Registered Trustee before submitting to ITSA</i>	At present, Online Service enables the Trustee to approve the level of access for each user. An "enter data only" role enables the Trustee's staff member to complete all the fields and save the data in Online Services. Another user such as the Trustee could then log into and review the data prior to submitting to ITSA. We will also look into the feasibility of a more formalised process.
8	<i>Registered Trustees would like to see a warning message before submitting data to ITSA</i>	Yes, this will be done.
9	<i>NPII extracts online</i>	We anticipate being able to provide services such as NPII searches, Online Creditor Services and Online

		Debt Agreement Administrations in coming releases.
10	<i>Users would like to be able to view/record feedback they submit</i>	We will look at the possibility of generating a receipt for feedback that has been lodged via Online Services.

If you require any information about Online Services or would like to provide feedback, please contact the Online Services team on [onlineservices@itsa.gov.au](mailto:onlineservices@itsa.gov.au), or use the feedback link on the Online Services homepage.

Your input is greatly appreciated and invaluable to developing future Online Services releases.

Lirazel Cowper  
ITSA eSolve Trainer

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## 13. Release of IAIR Comparative Study

On 19 March 2010 the International Association of Insolvency Regulators (IAIR) released its international comparative study on the development of the insolvency profession and assessment of its performance. The studies' findings, based on the completion of questionnaires by the various member countries, provide a useful comparison of international insolvency regimes. Legal and Executive Support provided input on Australian personal insolvency, and was greatly assisted in formulating its responses to the relevant questionnaire by Michael Murray of the IPA, and Tim Cole and Annette Moodie of ITSA Regulation.

### Background to IAIR

IAIR is an international body of government insolvency regulators. Member countries meet annually to share experiences and expertise and to discuss developments in their respective jurisdictions.

IAIR was formally established at a meeting in Hong Kong in November 1995 and attended by representatives from Australia, Hong Kong, India, Jersey, Malaysia, New Zealand, Singapore, United Kingdom and United States of America. This core group became the founding members of IAIR.

Membership of the organisation has more than doubled since its formation.

IAIR describes its aim as 'to promote liaison and co-operation and provides a forum for discussion amongst insolvency regulators. The Association thereby contributes to a wider understanding of insolvency issues, procedures and practices and the development of approaches that reflect the different legal, socio-economic, historical, cultural and institutional frameworks of the member countries from which members come'.

The next IAIR General Meeting and Conference will be held in Dublin, Ireland on 20-23 September 2010.

### The Study

Topics covered by the questionnaire included licensing; training and education; work capacity; performance standards; funding for the realisation of assets; remuneration; monitoring and supervision; and sanctions for breach of duty.

Full details of the study may be viewed at this [IAIR web link](#).

Amanda Pearce  
Senior Legal Officer  
Legal and Executive Support

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## 14. Trustees Seeking Directions from the Court

This article discusses the facts and summarises the lessons that may be learned from two cases where a trustee has used their power pursuant to subsection 134(4) of the Act.

Subsection 134(4) of the Act states:

*"The trustee may at any time apply to the Court for directions in respect of a matter arising in connexion with the administration of the estate.*

*Note: Section 178 allows an application to be made to the Court by the bankrupt, a creditor or any other person who is affected by an act, omission or decision of the trustee."*

### Facts

In *Re: Hamilton* [2009] FMCA 1040 the trustee sought the court's directions to accept an offer of settlement on behalf of the bankrupt estate. Specifically the trustee requested that the court direct he accept a compromise proposal in the sum of \$30,000, put forward by the wife of the bankrupt in respect of a claim by the trustee under sections 120 and 121 of the Act. The trustee sought the court's directions as it was believed that certain of the bankrupt's creditors were not in favour of the settlement proposal. In particular one creditor who had financed the costs of an examination of the bankrupt's wife was against acceptance of the proposal. The court adjourned the matter and ordered that each creditor be given details of the wife's proposal and the date of the adjourned hearing. At the recommencement of the hearing no creditors were represented and no documents were filed suggesting any opposition to the proposal.

The court directed that the trustee accept the settlement proposal as it was shown that there was now little equity in the property and even if the trustee brought a successful claim against the wife the end result might be payment of less than the amount currently offered. At 8, Raphael FM stated:

*"So, whilst there is no general rule that a court is obliged to give directions when a Trustee seeks them in respect of a bankrupt estate I think that in this particular case it is appropriate for the court to do so and thus protect Mr Hamilton from the in terrorem indications that his advocate advises have been made."*

As part of the settlement the costs of the subsection 134(4) application were paid by the bankrupt's wife.

In *Re:Houston (Bankrupt)*, [2008] FCA 1519 the trustees sought the court's directions in order to call upon the executors of a deceased estate, of which the bankrupt was a beneficiary, to make an in specie distribution. The issue of concern to the trustees was that the in specie distribution involved the sale of shares which would give rise to a tax event and a new capital gains tax liability representing a post bankruptcy debt of the bankrupt. It was held that it was not unfair nor unconscionable conduct of the trustee in the sense of *Ex parte James*, to call upon and receive the in specie distribution notwithstanding the consequences of leaving the bankrupt with a capital gains tax liability and the Australian Taxation Office with a fresh claim.

### Conclusion

In the absence of a clear legal precedent and creditor approval (if appropriate), it can be concluded that the trustees acted prudently in seeking the court's directions so that the full impact and potentially negative consequences on all parties could be considered.

While the discretion to use the power in subsection 134(4) rests with the trustee, the choice to use the power should be considered in the context of a trustee's section 19 duties. In particular paragraphs 19(1)(j) and 19(1)(k) which state:

*19(1)(j) administering the estate as efficiently as possible by avoiding unnecessary expense;*

*19(1)(k) exercising powers and performing functions in a commercially sound way.*

Tim Cole  
Practice Manager Regulation  
Regulation and Enforcement

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## 15. Meet the Regulation People



Mark Findlay is the Regulation Business Manager of Central Region (NSW/ACT/SA). Mark joined ITSA, or the Official Receivers' Office as it was then known, in 1991 after a period in the Australian Navy.

Mark has worked in most of the main business lines within ITSA, but has spent the majority of his career in bankruptcy administration. Mark joined Regulation in August 2008 upon the retirement of his predecessor, Mike Barr.

Mark enjoys his role and is keen to contribute to increasing the level of knowledge and standards of Administration of trustees, administrators and their staff.

Mark is a CPA and holds a Bachelor of Commerce and a Diploma of Financial Planning.

Jeff Hanley  
National Manager  
Regulation and Enforcement

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## 16. ITSA's Resources

All practitioners and ITSA stakeholders are reminded of the wealth of resources available in the area of personal insolvency on ITSA's website at [www.itsa.gov.au](http://www.itsa.gov.au)

As ITSA's Chief Executive and the Inspector-General in Bankruptcy has stated in *article 1a* of this edition, it is not the role of ITSA to provide legal advice to practitioners or stakeholders. Rather ITSA will provide Inspector-General Practice Directions and Practice Statements from time to time to give guidance and outline expectations.

Prior to contacting ITSA for assistance, stakeholders are encouraged to become familiar with ITSA's website as, quite often, the guidance being sought can be obtained from the information it contains.

In particular, the web links to areas of interest are likely to include are:

1. [ITSA's Practices and Policies](#) – please note the new releases in the March 2010 quarter were:
  - (i) [Inspector-General Practice Statement 14](#) - Referring Offences to Enforcement;
  - (ii) [Inspector-General Practice Direction 12](#) – Controlling Trustee's Role and Duties; and
  - (iii) [Inspector-General Practice Direction 14](#) – Proper Performance of a Trustee's Duties

2. [Personal Insolvency Regulator - Index of all articles A-Z](#)
3. [Current Amounts](#)
4. [ITSA Fact Sheets](#)

Tim Cole  
Practice Manager  
Regulation and Enforcement

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## How to contact Regulation and Enforcement:

For Regulation and Enforcement locations and contacts click [here](#).

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## Personal Insolvency Regulator (PIR) Editors

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.

Jeff Hanley, National Manager, Regulation & Enforcement, [jeff.hanley@itsa.gov.au](mailto:jeff.hanley@itsa.gov.au)

Tim Cole, Practice Manager, Regulation & Enforcement, [tim.cole@itsa.gov.au](mailto:tim.cole@itsa.gov.au)

Charles Smith, Senior Inspector, Regulation & Enforcement, [charles.smith@itsa.gov.au](mailto:charles.smith@itsa.gov.au)

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## Acronyms used in this Newsletter

Acronym	Full title
AER	Annual Estate Return
APESB	Accounting Professional and Ethical Standards Board
ATO	Australian Taxation Office
BLAB	Bankruptcy Law Amendment Bill
CA	Chartered Accountant
CPA	Certified Practising Accountant
DAPA	Debt Agreement Practitioners Association
IAIR	International Association of Insolvency Regulators
IC	Interest Charge

IPA	Insolvency Practitioners Association
ITSA	Insolvency and Trustee Service Australia
PIR	Personal Insolvency Regulator
R&E	Regulation & Enforcement
RC	Realisations Charge
RDAA	Registered Debt Agreement Administrator
RT	Registered Trustee

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