



# PERSONAL INSOLVENCY REGULATOR

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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 [br.qld@itsa.gov.au](mailto:br.qld@itsa.gov.au)

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# 1. Inspector-General's Column

## a. Looking back on 2009 and looking forward to 2010 and beyond

### *Looking back on 2009*

Since taking on the role of Inspector-General in Bankruptcy and ITSA's Chief Executive in February 2009, ITSA has undergone a number of significant changes - all geared towards improving our service levels and enhancing client satisfaction.

I thank those of you who have provided valuable feedback to us as we undertook this change process – a journey that has allowed us to tailor our services to better meet your on-going needs and expectations, whilst maintaining public confidence in the personal insolvency system.

As ITSA is committed to continuous improvement, I ask that you keep providing us with feedback if you think we can improve any of our services moving forward.

The agency-wide restructure of ITSA in mid-2009 saw ITSA move away from being a regionally based organisation, to one that has nationally focussed business lines.

What this means for our clients and stakeholders is that all ITSA services are now delivered in a more consistent and efficient manner. One National Manager has been appointed to lead each Business Line: the Debt Agreement Service, Information and Registry, Trustee Services, Regulation and Enforcement, and Corporate Strategy and Support. These five National Managers are accountable for the delivery of the relevant specialist services, not only within their respective portfolios, but across ITSA.

ITSA has continued its commitment to providing ongoing education to our clients and partners in 2009.

Over the year we convened two Registered Debt Agreement Administrator Professional Development Days, two Major Creditor Forums, multiple Trustee Information Sessions, and conducted numerous presentations to Financial Counsellor's Conferences and Workshops, various Regulatory Conferences as well as making a number of contributions to Insolvency journals.

ITSA will continue to facilitate educative forums of this kind into the future.

### *Looking forward to 2010*

2010 is set to be another exciting year for ITSA and for the personal insolvency community in Australia. ITSA will be working closely with our colleagues in the Attorney-General's Department on the following major projects leading into 2010 – all of which are geared towards continuous improvement in the personal insolvency industry – in legislation, practice and policy:

#### **BLAB 2009**

I am pleased to note the passage of the *Bankruptcy Legislation Amendment Bill 2009* (BLAB) through the House of Representatives. It has been referred to the Senate Legal and Constitutional Affairs Legislation Committee with a report due 2 February 2010. On the regulatory front BLAB contains some important updates to the *Bankruptcy Act 1966*, such as the introduction of several new offences and the harmonisation of numerous penalty provisions, which will align them with other State and Commonwealth legislation. More generally, BLAB will facilitate greater assistance to those facing financial hardship in the community.

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## **b. Personal Property Securities Register**

You may be aware that the Attorney-General recently announced that ITSA will be jointly involved with the Commonwealth Attorney-General's Department in the development of the new Personal Property Securities Register (PPSR) and associated Contact Centre.

Following-on from the development and testing phases, ITSA will assume operational responsibility for the Registrar's Office, maintaining the Register and the Contact Centre. Planning is already underway and from May 2011 lenders and purchasers entering into transactions involving personal property (basically all property other than land or water rights) will be able to check, cheaply and easily, whether there is any form of encumbrance / financial lien on the property in question.

This new role will build upon ITSA's existing core business as an information provider to major creditors, financial institutions and to the public generally (through the National Personal Insolvency Index and our Information Service).

Personal property securities reform is an important part of the COAG's deregulation agenda. Currently there are over 70 Commonwealth, State and Territory laws, as well as common law and rules of equity governing security interests in personal property.

By harmonising the current laws and creating a single national online register, the PPSR reforms will have a very real and positive impact for business and consumers alike.

Further information can be obtained from the AGD website at this link [Personal Property Securities](#).

I take this opportunity to wish each of you and your families a very happy and safe festive break. ITSA staff and I look forward to working with you in 2010.

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

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## **2. Regulatory Activity Summary – July to Sept 2009**

As foreshadowed in the September 2009 edition of the Personal Insolvency Regulator it is my intention to publish a national "Regulatory Activity Summary" for each quarter of the financial year. However, given that ITSA's reporting systems generate statistics in the first week following the end of each quarter, such reports will always be a quarter behind.

Therefore future editions of the Personal Insolvency Regulator will be published soon after the end of each quarter in order to enable readers to have the most up to date information that is available.

The national Regulatory Activity Summary for the quarter ended 30 September 2009 is shown below.

### **Regulatory Activity Summary – July to September 2009**

<b>Type of regulatory activity</b>	<b>Notes</b>	<b>Trustees</b>	<b>RDAAs</b>
Applications for registration received	<b>1</b>	3	2
Inspections completed		32	3
Inspection errors identified	<b>2</b>	40	4
Complaints received	<b>3</b>	108	30
Inspector-General Review applications received	<b>4</b>	36	N/A

## Notes

1. The number of trustee registration applications received is comparable to the number received at the same time in 2008-09. RDAA registration applications received, however, are significantly less than this time last year.
2. Common trustee inspection errors identified continue to be inadequate communication by trustees and unreasonable delays in timely action. Trustees are reminded of the September 2009 edition article "[Regulatory Findings 2008-09](#)" that highlighted the major issues in the 2008-2009 financial year. Although it is too early to draw trends from RDAA inspection errors, ensuring proper certification will continue to be a focus for Regulation.
3. An upward trend has been noted in the year to date in terms of complaints received in relation to trustees. It is apparent this is linked to the ongoing trend of inspection errors being recorded in relation to inadequate communication by trustees and unreasonable delays in timely action.
4. There is a significant upward trend in year to date particularly in terms of Inspector-General Review requests of Trustee's income contribution assessments.

In relation to disciplinary action that has commenced or is ongoing in the September 2009 quarter, we can provide the following update.

### Regulatory Disciplinary Summary – July to September 2009

Type of disciplinary action 1[1]	Trustees	RDAA's
Investigations commenced	2	4
Investigations continuing	1	-
Show cause letters sent	-	4
Conditions placed on continued registration	-	-
Voluntarily surrendered registration	1	4
Deregistered	-	-
Declared ineligible to act	N/A	-

Results of the above disciplinary actions will be published at the completion of the investigations if appropriate and where privacy and legal considerations allow.

From myself and my staff, I wish you all the very best for a safe and happy festive season and a prosperous 2010. We look forward to working with you all in 2010.


Jeff Hanley  
National Manager  
Regulation and Enforcement

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<sup>1[1]</sup> IGPS 8 paragraph 8 or IGPS 9 paragraph 11

### 3. Securing Trust Account Cheques

	<p>How often do you reconcile your trust account?</p> <p>During reconciliation, a Registered Debt Agreement Administrator recently discovered that a cheque issued, as a creditor disbursement, appeared on the trust account bank statement as being presented for the amount of \$9,000 when it had only been issued for an amount of \$300.</p>
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A bank error? No, the cheque had been stolen from transiting mail, altered to reflect a new payee, the amount changed and the instrument transacted at a post office for cash.

How can this possibly occur? Well the relevant cheque printing company has since advised the Administrator that all it takes to effect fraud of this nature is a few manual interventions on the part of a fraudster (the exact instructions which explain how this can be achieved cannot be reproduced here for obvious reasons) and the original text (ie: numerals & words) can be removed and replaced with different text. If cheque signatories execute in biro then the signatures will remain unscathed.

Fortunately, the relevant Administrator's cheques are 'secured cheques' printed in coded language and its bankers remain liable at all times in respect of fraudulent activity.

Additionally, the administrator's practices require that its trust account be reconciled on a weekly basis and this procedure assisted in identifying the attempted fraud quickly.

While handwriting cheques is arduous and time consuming work, particularly if thousands are being issued, they remain the safest way to ensure cheques are not as easy a target for manipulation. Having said this, they can still be altered, but most fraudsters will steer away from these and head straight for those that are easier to manipulate. Given most administrators these days rely on technology to calculate and print out cheques, this may well be an on-going problem for the industry and, if your practice relies on such technology, it may be prudent to ensure you are using secured cheques and taking preventive measures against fraud of this type on a regular basis.

Cliff Mearns  
Executive Director, DAPA

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### 4. A bankruptcy trustee's powers and discretions, and the position of creditors



Michael Murray



In any bankruptcy, it is the creditors who have lost out financially and their views on how the estate is administered are necessarily important. Nevertheless, it is ultimately the trustee, subject to the control of the Court, who has the task and duty to make the final decisions.

## ***Powers and discretions***

Trustees have significant powers, and discretions, in performing their role as trustees in bankruptcy. Duties of the trustee are listed in s 19 of the *Bankruptcy Act*, supplemented by the regulations<sup>2</sup> and the general law, and their particular powers in dealing in and realising assets in the estate are set out in s 134. All these powers are exercisable at the trustee's discretion: s 134(3).

The trustee has many statutory and other obligations to inform and consult with creditors and to respond to their reasonable inquiries.<sup>3</sup> In some cases, the trustee will need creditor approval, for remuneration for example;<sup>4</sup> or the trustee may ask creditors for litigation funding to pursue claims.<sup>5</sup>

Section 177 of the Bankruptcy Act in fact requires the trustee to have regard to lawful directions given by creditors at a meeting or by a committee of inspection. However at this point it is important to emphasise that the trustee is under no statutory or other legal obligation to comply with those directions. Creditors cannot ultimately direct the trustee to do something or to refrain from taking action. The section says only that the trustee should "have regard to" any directions, although necessarily the trustee will be making decisions acting with care, diligence and skill and with proper regard to the creditors' interests.

A trustee may therefore sell property, or pursue litigation, or compromise a claim, or exercise any of the other powers in s 134 using their professional discretion. In practice, the views of creditors will be sought and heeded. But ultimately it is the trustee's decision. In any challenge, the court will generally support the trustee and not interfere with the exercise of a trustee's discretion, even if others may have acted differently, unless the trustee has acted unreasonably. Indeed, while the trustee may seek directions from the court,<sup>6</sup> the court will not assist where the decision is properly a matter for the trustee's judgment.

Conversely, it would not be proper for a trustee to simply exercise a power based on an ill-informed consent of creditors or their inappropriate views. For example, while creditors may want the bankruptcy to be extended, from some punitive sentiment towards the debtor, the trustee must not lodge an objection to discharge unless there are valid grounds and reasons to do so. A trustee's sale of property at a value merely enough to meet creditors' claims, without regard to the bankrupt, would not be proper. Creditors' hostility to the bankrupt is not a relevant factor in the trustee deciding whether the bankrupt should be permitted to travel overseas. As was said in a 19<sup>th</sup> century case,<sup>7</sup>

*"It is not for the creditors in the case to decide how the bankruptcy law shall be administered; the Court constantly overrules their views, if it thinks they have been persuaded to agree to some course which the Court thinks an improper one ..."*

## ***Statutory responsibilities***

Nor is the trustee solely there to act in creditors' interests.<sup>8</sup> For one thing, a trustee has statutory duties under s 19 and elsewhere under the Act which address the public interest role that a trustee performs – for example to try to ensure the bankrupt discharges their duties under the Act,<sup>9</sup> and to determine if offences have been committed and referring those for prosecution;<sup>10</sup> to respond to regulatory requests;<sup>11</sup> and

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<sup>2</sup> Bankruptcy Regulations Schedule 4A

<sup>3</sup> Section 19(1)(d)

<sup>4</sup> BA s 162(1)

<sup>5</sup> Even then, the trustee is not to be fettered by the views of creditors in properly pursuing that funded litigation.

<sup>6</sup> Section 134(4)

<sup>7</sup> *Re Lord Thurlow; Ex parte Official Receiver* (1895) 1 QB 724 at 729 cited by Clyne J in *Re Crawford* 13 ABC 272.

<sup>8</sup> *Re Weiss; Ex parte the Official Trustee in Bankruptcy* [1986] FCA 287

<sup>9</sup> Section 149B

<sup>10</sup> Section 19(1)(h)(i)

<sup>11</sup> Schedule 4A 2.6(j)

generally to have regard to the bankrupt's legitimate interests. The trustee must also maintain proper records of the administration and attend to various statutory reporting obligations.<sup>12</sup> While attention to these serves the proper administration of the estate, creditors may not in fact see any direct dividend benefit to themselves from these actions. Creditors cannot challenge the fact that remuneration may be properly claimed by the trustee in respect of work done in giving attention to these statutory responsibilities even if that only serves to reduce, or eliminate, their dividend.<sup>13</sup>

### ***The liquidation of One.Tel***

This perspective on the position of creditors applies as much in corporate insolvency. An instructive decision comes from the administration of the liquidation of One.Tel.<sup>14</sup> The committee of inspection had refused to fix the liquidator's remuneration. It claimed it could not assess whether work had been reasonably undertaken because the liquidator had not given the committee detailed information about the work he was doing. That involved seeking litigation funding to pursue a major piece of litigation. The Court disagreed with the committee's view - there was in fact no reason why the liquidator should provide the committee detailed information on the litigation funding. A committee has a statutory role to play under both the *Corporations Act*, and the *Bankruptcy Act*, in the fixing of remuneration, and in the exercise of certain other powers,

*"but it has no power to direct a liquidator; nor is the liquidator bound to have regard to any directions the committee gives".*<sup>15</sup>

As the Judge said, it was the liquidator's responsibility to perform his functions and in the particular circumstances he may properly decide not to consult with the committee on these matters or at least to delay consultation.

*"The committee cannot complain about that. It is not some kind of supervisor whose consent must be obtained".*<sup>16</sup>

### **Conclusion**

None of this is to say that a trustee should not fully explain to creditors the issues that arise and seek their views. Proper explanation of the trustee's decisions will allay concerns and avoid costly court challenges that may not in fact succeed but which may have been avoided by more timely or better communications with creditors.<sup>17</sup>

But when it comes to the crunch, it is the trustee who is appointed under the Act, and subject to the legal and regulatory requirements, it is the trustee who ultimately has to make the decision on how the estate is administered. The trustee should neither simply defer to creditors nor disregard their views but should steer a course based on the trustee's exercise of their own commercial and professional judgment.

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<sup>12</sup> For example, Schedule 4A as to maintenance of files - 2.17, and accounts - 2.24.

<sup>13</sup> The IPA Code explains these broader duties and obligations of insolvency practitioners at ch 2.

<sup>14</sup> *Onefone Australia Pty Ltd v One.Tel Ltd* [2009] NSWSC 1231. The liquidator was in fact a 'special purpose liquidator'. See also *Onefone Australia Pty Ltd v One.Tel Ltd* [2008] NSWSC 1335; (2008) 69 ACSR 290.

<sup>15</sup> At [10]

<sup>16</sup> At [11]

<sup>17</sup> See the IPA Code at Ch 8 as to requirements and guidance on communications, and at ch 9, as to timeliness.

## 5. After-acquired Property

*Prepared by  
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The August 2009 Worrells e-Update included an article on the 20 July 2009 decision in *Rodway v White*. In our November 2009 Worrells e-Update we provided a further update on the position.

The case involved a bankrupt who purchased property with surplus income that he had earned and which had been subject to an income assessment. It was found and confirmed on appeal, that the property purchased with that money was after-acquired property and vested in the trustee. It was also found that the bankrupt should have notified the trustee when that property was purchased.

This raises the strange position of a bankrupt having to say to his trustee: "I have just spent some of my protected money - earned working whilst a bankrupt - and bought something. Please come over and take it away from me".

Another case was brought to our attention recently that highlighted another position that catches unaware bankrupts and their family or friends.

*Randall & Albaugh* was decided in the Federal Magistrates Court - Family Law Division – on 14 May 2009. It involved an estranged wife of a bankrupt who had purchased a lotto ticket and won \$400,000. Statements made by the bankrupt at the time indicated that the ticket was bought in their joint names. Based on this the trustee believed that one-half of the winnings vested in him. The wife maintained that she had bought the winning ticket solely.

The court found that there was no evidence of a joint purchase and the winnings were the property of the wife solely, not the bankrupt or more correctly his trustee.

But what if she had bought the ticket jointly?

The Bankruptcy Act says that divisible property includes all property belong to the bankrupt at the time of bankruptcy, or that devolves on him or her after bankruptcy.

***116(1)(a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge;***

If the ticket had in fact been purchased by the wife and bankrupt jointly or had been purchased solely by the bankrupt, the winnings or the bankrupt's share of the winnings would vest in the trustee.

The result is the same for amounts received from deceased estates. Any money received by bankrupts from a deceased estate will vest in the trustee at that time and, according to the Rodway case, it is an offence for the bankrupt not to disclose the acquisition of this property to his or her trustee.

One particular file (not conducted by Worrells) was of a bankrupt who decided to take a moral stand and not lodge his Statement of Affairs, meaning that he remained bankrupt indefinitely. The trustee could find no assets at the time of bankruptcy. 6 years after the bankruptcy started - and 3 years after it should have ended - the bankrupt's mother died and left him \$500,000. The money vested in the trustee as the bankruptcy was still continuing. The trustee paid out all of creditors and returned about \$5,000 to the (now annulled) bankrupt after doing so. Some people would call that justice.

Obviously, if the bankrupt had lodged his statement of affairs when he was meant to, he would have been discharged when his mother died, and the money would have been his.

### **Superannuation monies**

Superannuation funds and money received from those funds after bankruptcy are protected assets. The Bankruptcy Act specifically sets out this exclusion from divisible property:

*116(2) Subsection (1) does not extend to the following property:*

*116(2)(iii) the interest of the bankrupt in:*

*(A) a regulated superannuation fund (within the meaning of the Superannuation Industry (Supervision) Act 1993 ); or*

*(B) an approved deposit fund (within the meaning of that Act); or*

*(C) an exempt public sector superannuation scheme (within the meaning of that Act);*

*116(2)(iv) a payment to the bankrupt from such a fund received on or after the date of the bankruptcy,*

But what is the position if money is withdrawn from a superannuation fund just before bankruptcy? Is that money protected?

The answer is no. It loses that protection the moment it is withdrawn as the protective provisions do not apply until a bankruptcy occurs. This has been tested in the past. The soon-to-be bankrupt withdrew a significant amount of money from his superannuation fund and used these monies to pay a creditor. We recovered the money as it was found that it did not have any protection under the Act not being superannuation monies at the time of bankruptcy.

Money in a regulated superannuation fund or the other funds mentioned in the section is protected only if it is in the fund at the time of the bankruptcy. If it is converted to cash before the bankruptcy starts it is not an "interest of the bankrupt in .. a regulated superannuation fund". It is simply cash that vests or, in our case, can be recovered.

Sometimes a bankrupt may be able to withdraw money from their superannuation fund under the relevant provisions. But they should be aware that, if that money is withdrawn prior to the bankruptcy, it is not afforded any protection.

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## **6. ATO Creditor claims in annulments**

The September 2009 edition of the PIR contained an article entitled, "17. ATO Creditor claims in annulments". It may be viewed [here](#).

The purpose of that article was to put forward Regulation's view that in circumstances where the bankrupt had not filed tax returns for a number of years and it could not be determined whether the ATO was a

creditor, that trustees should not unreasonably prolong the administration of the estate and thereby increase the costs of the estate in order that the bankrupt bring their tax affairs into order.

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

A number of queries were received in relation to comments in the original article which were aimed at the practical consequences of this view. The purpose of this article is to reiterate the intent of the original article and to address the queries that have been received with respect to those comments.

The article included the statement that ‘...the liability for tax arose at the relevant "balance date" only becoming payable following the issue of an assessment usually after the lodgement of either of a BAS or income tax return’. It is acknowledged that without further commentary this statement may be interpreted as incorrect.

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

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

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

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

## Summary

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

Bryce Tomiczek  
Inspector Regulation, Central Region  
Regulation and Enforcement

Amanda Pearce  
Senior Legal Officer  
Legal and Executive Support

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## 7. Trustee Information Sessions

In November and December 2009, ITSA Regulation and Enforcement (R&E) held Trustee Information Sessions in Brisbane, Sydney, Hobart, Adelaide and Melbourne for trustees and their employees. Over 150 trustees and employees attended the sessions. This same session will be repeated for Perth and North Queensland-based trustees and their employees in the New Year. R&E is committed to delivering further information sessions on an ongoing manner, whenever and wherever required.

These sessions are just one of the ways that R&E carries out an educational role for Practitioners in the personal insolvency industry. In conducting these sessions, R&E educates trustees on the latest trends, recent statistics, Inspector-General Practice Statements (IGPS) and interpretation of grey areas of the law. On this occasion R&E spoke of IGPS11 on Regulation's Monitoring and Inspections role, and technical issues regarding Meetings of Creditors.

Further updates on Regulation and Enforcement's ongoing educational role in the industry will be provided as we move forward. If you have any queries in the interim or ideas for topics you would like covered in future sessions please contact Tim Cole, Regulation's Practice Manager at: [tim.cole@itsa.gov.au](mailto:tim.cole@itsa.gov.au).

Jeff Hanley  
National Manager  
Regulation and Enforcement

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## 8. ITSA Legal & Executive Support – Update

### a. ATO policy on debt agreements and tax refunds

There has been some uncertainty surrounding the ATO's approach to income tax refunds and debt agreements.

The issue is whether, when the ATO is a party to a debt agreement and the debtor receives an income tax refund, the ATO will apply the retained refund to its debt agreement debt, thereby reducing that debt.

The ATO has advised ITSA Legal and Executive Support (L&ES) of its policy in this regard. The ATO's approach is that, where it has agreed to participate in a debt agreement and has subsequently applied a credit against its debt, the debt agreement administrator will be formally notified of the reduction in debt. This means that the ATO will reduce its claim in the debt agreement.

Administrators should contact Regulation and Enforcement for clarification if necessary.

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### b. Meaning of “carrying on a business” for tax purposes

Paragraph 8(3)(a) of the *Bankruptcy (Estate Charges) Act 1997* (BECA) prescribes that 'amounts paid by the (trustee) in carrying on the business of the bankrupt...' are a 'permitted deduction' for the purposes of calculating the realisations charge. The meaning of 'carrying on a business' in this context is not defined in either the BECA or the *Bankruptcy Act 1966* (the Act). However, the term is necessarily confined by the powers given to the trustee pursuant to the Act.

Paragraph 134(1)(b) of the Act gives the trustee the power to carry on the business of the bankrupt, so far as may be necessary to dispose of it or wind it up for the benefit of creditors'. There is no power in a trustee, even with the authority of the creditors, to carry on the bankrupt's business except as far as may be necessary for the beneficial disposal or winding up of the business: *Ex parte Emmanuel; Re Batey* (1881) 17 Ch D 35 (CA); *Re Kleiss; Ex parte McDonough (No 1)* (1968) 15 FLR 281; [1970] ALR 737.

It is neither possible nor desirable to compile an exhaustive list of the circumstances that would entitle a trustee to claim this permitted deduction. However, the following is an example of where L&ES has concluded that the trustee was not 'carrying on the business' of the bankrupt for these purposes.

Property subject to a lease had vested in the trustee. It was submitted by the trustee that he was entitled to claim the deduction on the basis that the bankrupt had previously been involved in property development, and had been earning income from the rental property. In support of his argument, the trustee referred to the deductibility for income tax purposes of expenses incurred in 'carrying on the business'.

To this end, s8.1 of the *Income tax Assessment Act 1997* (ITAA) provides that:

*(1) You can deduct from your assessable income any loss or outgoing to the extent that:*

*(a) it is incurred in gaining or producing your assessable income; or*

*(b) it is necessarily incurred in carrying on a business for the purpose of gaining or producing your assessable income.*

In the absence of a definitive test, the ATO and the Courts have regard to a number of factors in reaching a decision as to whether a business is being carried on. These include:

- the scale of the operations
- whether employees are involved
- the frequency of acts and transactions
- is there a view to profit or is the activity a hobby
- is conduct continuous or spasmodic
- the amount of capital involved
- whether business records are kept and the nature of any records kept, and
- whether or not there is advertising and market research

Notwithstanding the above 'test', the ATO generally takes the view that rental activities are a form of investment and do not amount to 'carrying on a business' for the purposes of s8-1, or taxation legislation generally. Taxation Ruling No. IT 2423 provides:

*Whether the letting of property amounts to the carrying on of a business will depend on the circumstances of each case, (Californian Copper Syndicate (Limited and Reduced) v. Harris (1904) 5 TC 159). Generally, it is easier for a company that derives income from the letting of property to show that it carries on a business than it is for an individual. If a company's objects are business objects and are, in fact, carried out it carries on business, (IRC v. Westleigh Estates [1924] 1 KB 390 at pp 408, 409 per Sir Ernest Pollock, M.R.). In American Leaf Blending Co. Sdn Bhd v.*

*Director-General of Inland Revenue (Malaysia) [1978] 3 All E.R. 1185 at p 1189 Lord Diplock concluded that it would be difficult to displace the prima facie inference that the gainful use of a company's property in letting it out for rent would constitute the carrying on of a business.*

More recently in the Federal Court, Pincus J, in *Lilydale Pastoral Co. Pty. Ltd. v. FCT* 87 ATC 4235; 18 ATR 508, held, in the context of the withholding tax provisions, that the purchase of property to rent out, whether or not after renovating it, and the proprietorship of that property, constitute an undertaking of a business or commercial kind.

A conclusion that an individual is carrying on a business of letting property would depend largely upon the scale of operations. An individual who derives income from the rent of one or two residential properties would not normally be thought of as carrying on a business. On the other hand if rent was derived from a number of properties or from a block of apartments, that may indicate the existence of a business.

Trustees would be aware that there is a lack of case law on when the trustee will be taken to be carrying on a business for BECA purposes. However, L&ES takes the view that interpretation of the term should be influenced by its interpretation in the context of other legislation (such as taxation legislation), and by what a reasonable person would conclude to be 'carrying on a business'. A trustee who is simply maintaining the status quo by taking on the leasing responsibilities of *one* rental property cannot reasonably be perceived to be 'carrying on the business of the bankrupt'. The trustee cannot be said to be in the 'business' of rental properties merely because the bankrupt was previously involved in property development. And, as noted, maintaining one rental property cannot reasonably be held to render one in the 'business' of this type of endeavour.

Accordingly, it was concluded that the trustee could not claim expenses incurred in relation to the rental property as a permitted deduction for the purposes of the BECA. The trustee was not 'carrying on the business of the bankrupt' for these purposes.

Amanda Pearce  
Senior Legal Officer  
Legal and Executive Support

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## **9. ITSA's Enforcement Unit – The Year That Was**

ITSA's Enforcement Unit has received 458 offence referrals so far this financial year and, of those, 352 matters have been investigated. Readers will note the number of referrals ITSA received is greater than the number received at the same time last year, however other Enforcement outputs have decreased.

The reason for this is that, since ITSA's restructure, which took effect 1 July 2009, ITSA's Enforcement Unit has devoted more of its resources to larger, team-based and more complex investigations – such as those outlined below. This is not to say that the compliance related referrals, such as non-filing of statements of affairs, etc... have been neglected – its just that ITSA has been focussing on more serious offending by assigning more Investigators to each complex matter in order to resolve them more expediently.

A snapshot of ITSA's Enforcement outputs is illustrated in the following table.

<b>Business Outcomes</b>	<b>As at 8/12/2008</b>	<b>As at 8 /12/ 2009</b>	<b>% + / -</b>
Referrals received	442	458	+4%
Investigations commenced	383	352	-8%
Investigations finalised	443	318	- 28%
Compliance achieved	139	90	-35%
Warning letters	68	58	-14%
Persons prosecuted	109	96	-12%
\$ Value of charges prosecuted	\$2m	\$1.6m	-20%
Charges proven	151	136	-10%
Briefs to CDPP	166	142	-14%

Of the 458 offence referrals received, 344 involved allegations relating to persons who had failed to comply with their responsibilities under the Bankruptcy Act - including not filing a statement of affairs, failing to respond to a trustee's requests for books or information and failing to respond to an Official Receiver notice. As a result of the Enforcement Unit's investigations, 139 persons subsequently complied with their responsibilities rather than face prosecution.

A total of 318 investigations were finalised during the quarter and 142 briefs of evidence were referred to the Commonwealth Director of Public Prosecutions ("CDPP") for prosecution. The CDPP prosecuted 96 offenders in relation to 136 separate offences with a value of over \$1.6m.

#### Noteworthy Prosecution results for the year

**Mark Bibby**, an eight-time bankrupt was convicted of obtaining credit from several businesses in the Lismore and Grafton areas without disclosing his bankruptcy status, operating a business in the name of Four Mile Auction Centre and Recycling, and making a false declaration on his Statement of Affairs. Bibby, who used the aliases of Mark Kent, Mark Bowe and Mark Stewart was convicted and sentenced to 12 months imprisonment - to be served by way of periodic detention.

**Fadia Teko** of Greenvale (Vic) was convicted on 5 counts of obtaining property by deception and 1 count of disposal of property prior to bankruptcy with intent to defraud her creditors. Between March 2007 and January 2008, Ms. Teko obtained credit cards and personal loans from various financial institutions totalling in excess of \$61,000.00 by providing false and misleading information. Teko pleaded guilty to the charges and was placed on a community based order for 12 months, ordered to perform 200 hours of unpaid community work and fined \$1500.00

**Julianne Truscott** of Cheltenham (SA) was charged with 6 counts of making a false declaration and 3 counts of operating a business in contravention of the Bankruptcy Act. Ms. Truscott, who is also an eight-time bankrupt (since 1989) used numerous aliases including Julianne Carson, Julianne Cocker, Julianne Copley and Julianne Perry to operate various beauty and nail schools in the Adelaide area whilst bankrupt. She was convicted and imprisoned for 12 months, but was released upon entering into a recognizance to be of good behaviour for 2 years.

**Lisa Robertson** of St.Kilda (Vic) was charged with 1 count of concealing income money from her bankruptcy Trustee and 1 count of attempting to leave Australia without her Trustee's permission. Forty one year old Robertson became bankrupt by way of a Debtor's Petition in July 2004 and disclosed personal debts of \$460,000.00

Robertson shot to media attention as a result of her self-confessed mid-flight encounter with international film star Ralph Fiennes in a Qantas aircraft lavatory. As a result of the ensuing media attention surrounding her mid-air tryst with Fiennes, Robertson entered into media contracts with an international media outlet in London and subsequently received \$201,000 from the exclusive rights to her tell-all story.

Robertson was convicted on both charges and sentenced to perform 100 hours unpaid community work and ordered to attend on-going alcohol and drug assessments and undertake treatment as directed.

**Jonathon Cantor**, a three-time bankrupt from Sorrento (Vic) was charged with 4 counts of obtaining credit without disclosing his bankrupt status and 1 count of failing to provide an Income Questionnaire. Cantor, a 64 year old former finance broker, conned several of his former school friends out of over \$135,000.00 on the promise that he was setting up a “big deal” and required urgent finance to get it up and running.

Cantor was convicted and imprisoned for 12 months - 10 months of which was suspended. In sentencing Cantor, Justice Smallwood was scathing and said the sentence he was imposing needed to reflect that the Bankruptcy Act “had teeth” and that the type of offending Cantor engaged in “must be denounced”. Cantor will spend Christmas in prison and be eligible for release early in 2010.

To check out ITSA’s other media releases – including all of the more serious prosecution outcomes, please visit our Website at [www.itsa.gov.au](http://www.itsa.gov.au) or, if viewing this document electronically, please click here - [Media Releases](#).

Continuing with its responsibility to provide education to ITSA’s clients and stakeholders, the Enforcement unit has also conducted a number of information and training sessions to Trustees and other organisations associated with the insolvency industry. This is an ongoing activity within the Unit which will increase during the year and include Regulation personnel as well.

Jeff Hanley  
National Manager  
Regulation and Enforcement

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## 10. Effect of Household Rental Increases

Household rental increases in Australian capital cities now exceeds wage growth and the CPI. Rents have risen, on average, 30% over the last 3 years<sup>[1]</sup> with approximately 29% of all houses being rented<sup>[2]</sup>.

These significant statistics have important consequences for the personal insolvency system as they impact on the ability of people to maintain repayment obligations. While this pressure may lead to people becoming insolvent and considering the various options under the Bankruptcy Act (“the Act”), it also affects those people in administration under the Act who are making repayments - whether under a debt agreement, personal insolvency agreement or paying income contributions under the income assessment requirements of Part IV of the Act.

In the case of Part IXs and Part Xs, many budgets prepared prior to the commencement of the administration estimating a debtor's ability to make repayments, will be affected. This is a factor that administrators and trustees should take into account when considering a contribution schedule that will involve payments over a number of years.

The other area where rental increases can have an impact is in respect of section 139T of the Act, which permits the determination of higher income thresholds in cases of hardship. Paragraph 139T(2)(c) refers to the cost of rented accommodation which a bankrupt is required to pay wholly or mainly from their own

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<sup>[1]</sup> [www.realestate.com.au](http://www.realestate.com.au) Newsletter August 2009 issue 2

<sup>[2]</sup> Australian Social Trends 2008 ABS 4102.0

income. Applications for hardship reviews have to be dealt with by trustees on a case by case basis and may be reviewed by the Inspector-General. It is suggested that, as a guideline, the available options for access to reasonable premises proximate to work and amenities, need to be considered in determining whether the rental costs are a matter giving rise to hardship, which would result in a higher threshold being assessed.

Greg Barrett  
Inspector Regulation, North-West Region  
Regulation and Enforcement

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## **11. Online Services for Trustees: Status Update**

The eSolve team has had a very busy year improving ITSA's internal systems, including our first Online Services for Registered Trustees, which was released in August of 2009. This first release incorporated a facility for Trustees to amend their contact details and submit these changes to ITSA, view administrations online, finalise and reactivate administrations online, and request up-to-date Certificates of Appointment.

This was a great starting point for us and just the beginning for you. ITSA wishes to express its appreciation to those who were involved in the testing and to everyone who took the time to attend the rollout demonstrations around the nation. ITSA received valuable input from those who attended, and we have also received additional feedback from everyone who registered for Online.

The next release is due to roll into production in early 2010. This second release will include the online generation and submission of Form 15s and Form 16s for realisations and interest charges, removing the need for manual creation of these forms. This process produces a unique reference number for each submission, which can then be quoted when making the payment to ITSA, removing the need to send the paper work. Trustees need only quote the reference number when processing an EFT payment or when sending a cheque. Each submission is visible online providing clarity on what information ITSA has on hand.

In addition to realisations and interest charges this release includes an online Annual Estate Return (AER) function. The Online AER function enables users to enter information relating to their administrations throughout the year and when most convenient. Users can also log on and update the information whenever new activity occurs within an administration.

The Online AER function also has a nil return button which will auto-populate a nil return AER, making it easier for users to file returns for administrations with no receipts and payments activity. Historical AER lodgement data is also displayed online for user's convenience making it easier to recall what has been submitted for the current or previous financial years. Most importantly, AER information can be submitted in Online Services on an administration by administration basis, in batches of multiple administrations, as well as the traditional bulk one-off lodgement. Trustees can therefore manage their AER lodgements in a manner that best suits them.

There will be more information released closer to implementation of this and later releases in 2010.

Warm festive season wishes.

**Lirazel Cowper**  
ITSA eSolve Trainer

In other news: ITSA will be reviewing the Consent to Act Form following feedback received from the Federal Court regarding trustee contact details. If you would like to provide any feedback on this form please contact Rebecca Smith of ITSA's Information and Registry on phone number 08 8112 4313.

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## 12. Voting eligibility at Adjourned Meetings of Creditors

At the recent Trustee Information Session held in Melbourne (25 November 2009), a question was posed as to whether a creditor that was not present (in person or by proxy) at a meeting of creditors, was eligible to vote at any adjourned meeting.

By way of clarification, an adjournment will arise in the following circumstances:-

- Through want of a quorum (S64N(3));
- Through want of a motion proposing that the meeting be held at a different time, date and place that is convenient to the majority of creditors (S64Q(2));
- To enable a trustee to determine voting entitlements (S64ZA(9));
- To enable a controlling trustee to carry out further investigations (S64Y(1) as modified by item 14 of schedule 6 of the regulations)

Adjournments of meetings are addressed in section 64Y of the *Bankruptcy Act 1966* (the Act). Section 64Y of the Act specifically states:-

### *Adjournment of meeting*

*(1) If, at any time during a meeting, the meeting is adjourned, or a resolution is passed for the adjournment of the meeting:*

*(a) the adjourned meeting is taken to be a continuation of the original meeting; and*

*(b) without limiting the application of paragraph (a):*

*(i) the persons who carried out the duties of President and minutes secretary at the original meeting are to continue to do so at the adjourned meeting; and*

*(ii) any matters required to be dealt with at the original meeting that were not so dealt with are to be dealt with at the adjourned meeting.*

*(2) The trustee must give notice of the time, date and place of the adjourned meeting to each creditor in accordance with subsection 64A(2).*

As specified, subsection 64A(2) requires the trustee give notice of the meeting to *each creditor*. Further, subsection 64A(1) provides that where:-

*the bankrupt has told the trustee, or the trustee has otherwise found out, that a person is a creditor of the bankrupt;...the trustee must give notice to the person of any meeting of the bankrupt's creditors.*

The adjourned meeting would therefore constitute a meeting for which all known creditors of the bankrupt would be entitled to receive notice. The meeting is therefore regarded as a continuation of the original meeting and will be able to deal with those matters that were not dealt with at the original meeting.

To be eligible to vote at any meeting of creditors, a creditor must provide:-

1. A statement as to the amount the bankrupt is indebted to the creditor (S64D) and;
2. A proxy and instrument of appointment (if the creditor is not participating in person or by telephone) (S64ZB(3))

The section 64D statement must be provided *at or before the meeting* whilst the subsection 64ZB(3) proxy and instrument may be provided *either before or after the announcement is made under section 64M about the appointment of proxies and attorneys*.

Therefore, any creditor who did not attend and participate in the first convening of the meeting and who wishes to participate in the reconvened meeting (post-adjournment) may comply with the statutory provisions of sections 64D and 64ZB(3) by submitting a statement of claim and proxy form at the adjourned meeting.

As the adjourned meeting is a continuation of the original meeting, the creditor would only be eligible to vote on matters that had not been addressed prior to the adjournment. This is consistent with the voting entitlement of creditors in adjourned meetings for externally administered matters under the Corporations Act.

Notwithstanding the above, any question as to the entitlement of a creditor to vote at a meeting of creditors is, in the first instance, a matter to be determined by the trustee (or controlling trustee) pursuant to subsection 64ZA(8) of the Act, with the trustee's (or controlling trustee's) decision reviewable by a Court of law pursuant to section 178 of the Act.

Fabian Micheletto  
Senior Inspector Regulation Southern Region  
Regulation and Enforcement

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## **13. Reviewable Decisions – Supervised Account Regime**

### **Section 139ZIE**

Not many requests are received by the Inspector-General to review decisions relating to the supervised account regime although there are numerous decisions made by the trustee in relation to the regime that are reviewable. The reviewable decisions that are relevant to the supervised account notice regime are:

- (a) to determine that the supervised account regime applies to the bankrupt;
- (b) to refuse to revoke the determination that the supervised account regime applies;
- (c) to specify a period of longer than 10 days to open an account;
- (d) to refuse to specify a period of longer than 10 days to open an account;
- (e) to specify requirements in a supervised account notice;
- (f) to refuse to revoke a supervised account notice and issue a fresh notice requiring the bankrupt to open a new account and transfer the balance in the first account to the new account;
- (g) to refuse to give a consent for the bankrupt to make withdrawals from the account;
- (h) to vary a consent to make withdrawals;
- (i) to refuse to vary a consent to make withdrawals;
- (j) to revoke a consent to make withdrawals.

The approved form (Form 20) must be used when giving written notice of the supervised account regime. Such notification is required to be accompanied by a supervised account notice (Form 21) and a statement setting out the effects of the supervised account regime and the review process. Forms 20 and 21 are available on the ITSA website and can be accessed [here](#).

Katrina Woodrow  
Senior Inspector, Regulation North-West Region  
Regulation and Enforcement

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## **14. Fees on proposals to vary a debt agreement**

Several creditors have recently raised concerns with ITSA's Debt Agreement Service in relation to proposals to vary a debt agreement that have been submitted by a registered debt agreement administrator and where the administrator was seeking significant additional fees to prepare the variation proposal.

Creditors have observed that some administrators do not charge any additional fees for assisting in formulating and submitting a proposal to vary, whilst others charge additional fees of up to \$1,000.

Creditors have expressed concerns that they are not being treated equally where a variation proposal is lodged and where the administrator takes additional fees and have expressed views that they would prefer the variation costs be factored into the initial percentage fee.

Several creditors have also indicated that they will vote against a variation proposal where they consider the variation fee to be excessive and / or where it does not reflect the work involved in undertaking the variation process. ITSA has been asked to draw these views to the attention of registered debt agreement administrators.

Michelle Tilke  
Client Manager  
Debt Agreement Service

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## **How to contact Regulation and Enforcement:**

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

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