



Australian Government

Insolvency and Trustee Service Australia

## INSPECTOR-GENERAL PRACTICE DIRECTION No 20

Guidelines for the Payment of Monies  
to the Commonwealth Pursuant to  
section 254 of the Bankruptcy Act 1966

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**PLEASE NOTE: This draft Practice Direction is released for comment and consultation at the Registered Debt Agreement Administrators Professional Development Day on 9 September 2010. It is therefore possible that the content of this Practice Direction may change before being finalised and published to [ITSA's Policies and Practices Website](#).**

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<sup>1</sup> Released in draft in September 2010 for comment and consultation

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## Introduction

1. The purpose of this Inspector-General Practice Direction (IGPD) is to outline the expectations of the Inspector-General in Bankruptcy in relation to the steps to be taken by Registered Trustees, the Official Trustee and Debt Agreement Administrators (“Personal insolvency practitioners”) before deciding to pay funds to the Commonwealth pursuant to section 254 of the Bankruptcy Act 1966 (the Act).
2. Personal insolvency practitioners may be faced with the situation of holding funds which cannot be distributed, including dividends where the payee is unlocatable. Section 254 of the Act sets out the authority and process by which such funds can be paid to the Commonwealth and how funds can be returned to the payee after payment to the Commonwealth.

## Statutory Provisions

3. Section 254 of the Act states,

### ***Payment of unclaimed moneys to the Commonwealth***

(1) *In this section, trustee means:*

- (a) *a trustee of the estate of a bankrupt; or*
  - (aa) *the administrator of a debt agreement; or*
  - (b) *a trustee of a personal insolvency agreement; or*
  - (c) *a trustee of a composition or a scheme of arrangement; or*
  - (d) *a trustee of the estate of a deceased person in respect of which an order has been made under Part XI of this Act;*
- and includes the Official Trustee.*

(2) *Where a trustee has under his or her control:*

- (a) *any dividends 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;*
- he or she shall forthwith pay those moneys to the Commonwealth.*

(2A) *Where:*

- (a) *the Court has, after the presentation of a creditor’s petition against a debtor, directed the Official Trustee, an Official Receiver or a registered trustee to take control of the property of the debtor;*
- (b) *the petition has been withdrawn or dismissed;*
- (c) *the Official Trustee, Official Receiver or registered trustee, as the case may be, has moneys under its control in pursuance of the direction; and*
- (d) *it is not reasonably practicable to pay those moneys to the person entitled to them;*

*the Official Trustee, Official Receiver or registered trustee, as the case may be, shall pay those moneys to the Commonwealth.*

- (3) *A person who claims to be entitled to any moneys that have been paid to the Commonwealth by a trustee in pursuance of subsection (2) or (2A) may apply to the*

*Court for an order under this subsection declaring him or her to be so entitled and, if the Court is satisfied that the applicant is entitled to those moneys or a part of those moneys, it may make an order accordingly.*

*(4) Upon receipt by the Official Receiver of an office copy of an order under subsection (3), the Official Receiver shall pay to the person in whose favour the order was made the amount specified in the order out of moneys lawfully available for the purpose.*

### **Application of Statutory Provisions to Debt Agreements**

4. The provisions of section 254 of the Act only apply to debt agreements that were accepted by creditors on or after the commencement of the *Bankruptcy Legislation Amendment Act 2007*, namely 1 July 2007.

### **Circumstances Where funds shall be paid to the Commonwealth**

5. Subsection 254(2) of the Act sets out two (2) circumstances where funds held by a personal insolvency practitioner are required to be paid to the Commonwealth.

#### **(1) Subsection 254(2)(a) - Practitioner holds unclaimed dividends or other monies for more than 6 months**

6. 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.

#### **(i) Creditor or payee can't be located or payment is returned**

7. In cases where a creditor is entitled to be paid a dividend or there is another payee entitled to payment and either no address is known or payment has been returned unclaimed it is expected that reasonable steps will be taken by the personal insolvency practitioner to identify the intended payees whereabouts and effect the payment. This may require issuing a new cheque or authorising an electronic transfer to a different account.
8. The specific steps required to be taken depend on the particular circumstances. Some suggestions to enable the personal insolvency practitioner to locate a creditor or payee include:
  - Searching on the internet
  - Search of the white or yellow pages
  - Enquiry of the debtor or bankrupt
  - Phone call or e-mail to the last known contact.
9. It is not expected that an exhaustive investigation will be undertaken but that reasonable enquiries will be made depending on the circumstances.

**(ii) Payment remains unrepresented, uncollected or is lost & not returned**

10. In cases where payment is made and the creditor/payee does not present the cheque, but it is not returned, then steps should be taken to follow up the creditor/payee and ascertain why by using the last known contact details. If needed, enquiries as set out above can also be undertaken to assist in locating the creditor/payee.
11. Where appropriate the cheque should be cancelled after a reasonable period within the six (6) months and reissued when the creditor/payee is located.
12. Where funds are held for more than six (6) months and reasonable steps have been taken but the payee cannot be located then the funds should be paid to the Commonwealth as required by subsection 254(2) of the Act.

**(2) Subsection 254(2)(b) - Where funds are held and a decision is made not to pay them to anyone**

13. The second circumstance where monies held by a personal insolvency practitioner are required to be paid to the Commonwealth is where a decision is made not to pay the funds to anyone. It is the Inspector-General's position that paragraph 254(2)(b) of the Act is confined 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 or it is not cost effective to do so (e.g. the person entitled has died leaving no will and no dependants or relatives).
14. In circumstances where a relatively small amount is held by the personal insolvency practitioner and the cost of distributing these funds to creditors would outweigh the benefit the practitioner may make a decision to not pay them to anyone.
15. Ultimately this is a matter for the personal insolvency practitioner to consider and determine on a case by case basis.

**Considerations relating to the 6 month period**

16. In circumstances where payment is made by cheque, it may be necessary to reissue the cheque within the six (6) month period where the cheque becomes lost or the creditor can't be located. However, the reissuing of a cheque does not have the effect of recommencing the unclaimed money period for the purposes of the requirement to pay the funds to the Commonwealth.
17. Two examples are shown below to represent the principle in paragraph 16 above.

**Example:** Where a cheque was issued on 1 July 2009 and it was determined to be lost, another cheque may be reissued - for the purpose of this example the reissuing occurred on 1 September 2009. If the replacement cheque is not presented by 1 January 2010, then the monies would at this point be payable to consolidated revenue in accordance with section 254 of the Act.

In this example it would be expected that the personal insolvency practitioner would contact the payee to determine the reason for the failure to present the reissued cheque prior to taking any action and cancelling the cheque. If after 1 January 2010 reasonable steps were taken and the creditor could not be contacted the cheque should be cancelled and the funds paid to the Commonwealth.

**Example:** A cheque was issued on 1 July 2009, and by 1 January 2010 the cheque had not been presented and had been cancelled, but shortly after this date the creditor re-establishes contact with the personal insolvency practitioner and the correct contact details provided. If the funds had not been remitted to the Commonwealth prior to re-establishing contact then it would be appropriate for the personal insolvency practitioner to pay the funds to the creditors notwithstanding that the statutory time limit, imposed by section 254, had expired. In these circumstances, a pragmatic approach needs to be taken to ensure that a creditor or other class of payee is not unfairly disadvantaged.

18. Personal insolvency practitioners should ensure that they have systems and controls in place to identify when monies become unclaimed and take appropriate steps to mitigate the risk of the six (6) month period passing without notice and without taking the appropriate action required.

## Unidentified Monies

19. In cases where the personal insolvency practitioner has been unable to identify the provider of funds received into their estate or trust administration bank account, section 254 of the Act has no application.
20. In situations where it is clear that some person is entitled to the money, but that person cannot be identified because the source of the money cannot be ascertained, section 254 does not apply. However, this leaves two questions (most prominently in practice for administrators):
  - a. How long does a practitioner need to keep trying to identify the source of, and/or person entitled to, the money?
  - b. 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.

21. 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 monies are unidentified, extensive efforts are made to identify those funds.

### **Arranging Payment of Funds to the Commonwealth**

22. Once a decision has been made to make payment to the Commonwealth pursuant to subsection 254(2) the funds should be sent to the nearest ITSA office.
23. Cheques are to be made payable to the “Insolvency Trustee Service Australia” (not the shortened form of ITSA) and details should be sent with the payment identifying the estate from which the funds are paid and the creditor or person to whom the funds relate.

### **Applying for repayment of Funds from the Commonwealth**

24. Once a payment has been made to the Commonwealth the only way that a person claiming to be entitled to the funds can obtain the funds is by making application to the Court (subsection 254(3)).
25. ITSA does not have the authority to refund the monies without a Court order.
26. A recent case involving subsection 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.

### **ITSA Regulation and Enforcement Involvement**

27. Section 12 of the Act provides ITSA Regulation and Enforcement with the power to investigate and where there are issues of concern either during the annual inspection program or through a complaint being made, ITSA Regulation and Enforcement will examine the issue in relation to unclaimed monies by reference to these stated principles.
28. Where breaches of the law or a lack of record keeping are identified a personal insolvency practitioner will be asked to take remedial action. This may also lead to counselling or in serious cases to either litigation or disciplinary action being initiated.

### **Conclusion**

29. This Practice Direction sets out the expectations of the Inspector General in Bankruptcy where monies are required to be paid to the Commonwealth pursuant to section 254 of the

Act. It will be against these expectations that a personal insolvency practitioner's conduct of an administration will be assessed by ITSA Regulation and Enforcement.

30. When there are other specific issues where clarification is required, following consultation with the Insolvency Practitioner's Association ("IPA") and the Debt agreement Practitioner's Association ("DAPA"), the Inspector-General will continue to develop policy and practice statements to assist practitioners.

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