



Australian Government

Insolvency and Trustee Service Australia

INSPECTOR-GENERAL PRACTICE STATEMENT 14.1

**Referring offences against the
Bankruptcy Act 1966 to the Inspector-General**

Release Date 2 February 2010

Updated 20 August 2010

Contents

Introduction1

Compliance Offences1

Proof of Receipt of correspondence / notice..... 2

Statement of Affairs form..... 2

77CA Notices..... 3

Complex Offences3

Objection to Discharge4

Referral Forms4

Further Information5

Appendix A – Compliance Offences6

Introduction

1. Section 19 of the *Bankruptcy Act 1966* (the Act) outlines the duties of a Trustee in bankruptcy. Paragraphs 19(1)(g)(h)&(i) specifically provide a statutory obligation for Trustees to enquire into the conduct of a bankrupt to ensure the bankrupt discharges his or her obligations under the Act; consider whether the bankrupt has committed an offence against the Act; and refer to the Inspector-General, or to the relevant law enforcement authority, evidence of any offence by a bankrupt against the Act.
2. Trustees are considered officers of the Court and provide a pivotal role in supporting the integrity of the Australian personal insolvency system. Trustees are therefore expected to discharge their duties in a manner that not only serves the operation of the Act, but provides equality between creditors and fairness to bankrupts and debtors.
3. ITSA's Enforcement business line acts as a delegate of the Inspector-General and consequently conducts enquiries and investigations into alleged offences contrary to the Act. Where appropriate, ITSA Enforcement refers matters to the Commonwealth Director of Public Prosecutions (CDPP) for prosecution actions.
4. This document seeks to provide guidance to practitioners on when to refer matters to ITSA Enforcement and to clarify what information may be required to support an offence referral.
5. ITSA Enforcement categorise offence referrals as either "Compliance Offences" or "Complex Offences" and each type is discussed in detail below.

Compliance Offences

6. Compliance offences are administrative-type bankruptcy offences where an individual, whether bankrupt or not, has failed to comply with a legislated requirement under the Act or the *Bankruptcy Regulations 1996* (the Regulations). Typically, these offences involve a failure by a person to provide the Trustee or Official Receiver with specific information and/or documents and the matter can be dealt with, in the first instance, by way of a letter seeking voluntary compliance. Appendix A provides a list of 'compliance' related offences within the Act that relate to bankrupts or debtors.
7. Compliance matters that are punishable by a term of imprisonment of 6 months or less (eg: S.139U, s.139ZO, s.139ZIE, s.139ZIEA & s.80 matters) have a twelve-month statutory period of limitations.¹ This means prosecution actions must be commenced within 12 months of the commission of the offence or the matter cannot be actioned by way of a prosecution. Due to this time constraint, these matters will not be accepted for investigation if the referral is received within four months of the expiry of the statutory period of limitations. The reason these matters cannot be accepted is that it is probable the statutory period of limitations will expire before prosecution actions can be commenced.
8. In offence referrals pertaining to the alleged failing to comply with a Trustee's direction or a formal Notice, there must be evidence accompanying the referral that the intended recipient

¹ See ss.15B of the *Crimes Act 1914* (Cth)

received the direction or Notice. Proof of notification in these instances can be supported by the provisions outlined below.

Proof of Receipt of correspondence / notice

9. Confirmation of receipt of correspondence or notice may include:
 - an Australia Post Delivery Confirmation receipt **signed by the intended recipient**,
 - an Affidavit of personal service of documents, or
 - a contemporaneously made Case Note detailing a conversation or meeting with the bankrupt or individual during which their obligations are explained, directions given and/or documents served.
10. Notwithstanding that Regulation 16.01 of the Regulations allows for service of documents by other means, by itself this provision is insufficient for criminal prosecution standards.

Statement of Affairs

11. Subsection 6A(2) of the Act states that:

A reference in a provision of this Act referred to in subsection (1) to a statement of affairs is a reference to a statement that:

- a) is in an approved form; and*
- b) includes a statement identifying any creditor who is a related entity of the debtor or bankrupt; and*
- c) contains a declaration that, so far as the debtor or bankrupt is aware, the particulars set out in the statement are correct.*

12. In *Wangman v The Official Receiver* [2006] FCA 202 the Federal Court also considered the extent to which a Statement of Affairs needed to be completed before it could be considered to be a valid statement of the debtor's affairs. In his judgement Jarrett FM stated that a Statement of Affairs form must carry sufficient information for it to be considered a statement of the debtor's affairs, and to assist the Trustee in the administration, otherwise it fails to comply with the Act.
13. Due to the operation of subsection 6A(2) of the Act, and further supported by *Wangman v The Official Receiver*, the Official Receiver has a discretionary power to either accept or not to accept a Statement of Affairs as being a valid statement of the debtor's affairs.
14. Should a Trustee receive a completed or partially completed Statement of Affairs from a bankrupt, that document (or an original copy of it) should be forwarded to the Official Receiver for consideration as to whether or not it has been properly completed. It is not appropriate for Trustees to make a determination as to whether or not such a document is properly completed and therefore acceptable to the Official Receiver. To facilitate this process, Statement of Affairs forms may be faxed, delivered or posted to any ITSA Registry, or emailed to registry@itsa.gov.au.
15. It is the Inspector-General's expectation that Trustees will ensure any Statement of Affairs forms they receive directly from the bankrupt, or the bankrupt's proxy, is forwarded to the Official Receiver as soon as practicable. This expectation is in line with the Trustee's duty to take whatever action is practicable to try to ensure that the bankrupt discharges all of the

bankrupt's duties under the Act (paragraph 19(1)(g)). It is also important to ensure that the term of bankruptcy is not extended due to procedural inefficiencies. This gesture of client service will also serve to reduce the number of complaints made to the Regulator alleging that a Practitioner allowed a Statement of Affairs to remain outstanding in order that they might benefit from a longer term of bankruptcy.

16. In instances where a Trustee does not receive a Statement of Affairs form the following criteria should be met before an allegation contrary to section 54 (failing to file a Statement of Affairs) is referred to ITSA's Enforcement unit;
 - Confirmation that the bankrupt has been advised of their bankruptcy status and their legal obligation to file a Statement of Affairs (see the proof of notification provisions in paragraph 9 of this Inspector-General Practice Statement), and;
 - The proposed referral is within 12 months of the date of the Sequestration Order. Matters in excess of 12 months will be considered where there are justifiable delays or hindrances in contacting the bankrupt.
17. At the conclusion of a prosecution for an offence contrary to section 54 of the Act, and where the bankrupt continues to fail to file their Statement of Affairs, ITSA Enforcement will consider re-prosecuting the matter if the Trustee requests in writing that ITSA Enforcement continue their involvement.
18. Failure to refer matters to ITSA Enforcement that meet the above standards may constitute an ITSA Regulation inspection error as a breach of a Trustee's subsection 19(1)(i) duty. If it is considered a breach has occurred an inspection error will be recorded by ITSA Regulation and noted on the Trustee's file.
19. Trustees may choose not to refer matters to ITSA Enforcement if the above criteria (paragraphs: 14 to 18 inclusive) are not met. In these matters it may be prudent to make a notation on the administration file indicating that a referral to ITSA Enforcement was considered, however, due to the requirements contained within this Inspector-General Practice Statement the matter was not referred.

77CA Notices

20. When a Statement of Affairs has not been filed, the Inspector-General may write to the Trustee to ascertain what attempts have been made to obtain the completed form from the bankrupt. This information will then be provided to the Official Receiver who will consider whether to issue a notice pursuant to section 77CA of the Act. When a Trustee provides information in response to the Inspector-General's request, and a 77CA Notice is issued, there will be no expectation that the Trustee will refer an allegation of non-compliance with section 54 of the Act to Enforcement.
21. The provision of information to the Inspector-General in these circumstances will be deemed compliance with the Trustee's obligations in accordance with paragraph 19(1)(i) of the Act in relation to referring a bankrupt for not-filing their Statement of Affairs form.

Complex Offences

22. Complex offences are those offences which do not fall within the definition of a compliance offence (administrative) and cannot be resolved by way of a compliance letter. Typical offences within this category may include subsections: 263(1), 265(4), 265(5), 265(8), 266,

267(1), 269(1), and sections 271 and 272. Generally speaking, complex offences are those that involve fraud and/or financial loss.

23. All ‘complex’ offences are to be referred to ITSA Enforcement for consideration. Failure to refer matters where there is sufficient information to indicate that an offence may have occurred may constitute an ITSA Regulation inspection error as a breach of a Trustee’s subsection 19(1)(i) duty. If it is considered a breach has occurred an inspection error will be recorded by ITSA Regulation and noted on the Trustee’s file.

Objection to Discharge

24. Where a Trustee files an objection to discharge pursuant to section 149B of the Act, and the grounds for the objection relate to conduct which could be defined as a ‘complex’ bankruptcy offence, the Trustee, pursuant to section 19 of the Act, is also expected to refer the alleged conduct to ITSA’s Enforcement unit for consideration.
25. Failure to refer matters where there is sufficient information to indicate that an offence may have occurred may constitute an ITSA Regulation inspection error as a breach of a Trustee’s paragraph 19(1)(i) duty. If it is considered a breach has occurred, an inspection error will be recorded by ITSA Regulation and noted on the Trustee’s file.

Referral Forms

26. An individual Offence Referral form is to be completed for each alleged offender. Each referral requires information to be provided - such as the alleged offender's details, a summary of the alleged offender's conduct and a list of all relevant documents. Care should be taken to provide all relevant information in possession of the Trustee.
27. Template offence referral forms are accessible from the ITSA website at www.itsa.gov.au.
28. The following documentation is to be attached to every offence referral as a minimum:
 - a copy of the Sequestration Order (if relevant);
 - a copy of all letter(s) sent to the alleged offender;
 - copies of all file notes;
 - copies of Bankruptcy Act notices (eg 77C, 77A, 139V, 6A(3), 139ZL);
 - proof of service/notification (if applicable); and,
 - copies of any other information or documents that relate to the allegation (eg: bank statements, title searches, account applications, loan documentation, etc).
29. The proper completion of the offence referral form and the inclusion of all relevant documents best enables ITSA Enforcement to properly assess the complaint. If a referrer is unsure if a piece of information is relevant or not, it would be prudent to attach it to the referral for ITSA Enforcement’s consideration and determination. If there is insufficient information attached to the referral the matter may be rejected by Enforcement.
30. If there is any doubt about referring a matter to ITSA Enforcement, then Trustees should contact any Enforcement office (via 1300 364 785) and seek advice. A notation can then be made on the relevant administration file detailing the contact that was made with Enforcement and this notation will address a Trustee’s section 19 duty and “reporting” obligations.

Further Information

31. For more information please contact ITSA Enforcement via 1300 364 785 or fraud.enquiries@itsa.gov.au.

Appendix A – Compliance Offences

Provision	Offence
54(1)&(2)	Bankrupt's failure to file a Statement of Affairs with Official Receiver
56F	Extra duties of non-petitioning partners who became bankrupts.
80(1)	Failure to notify trustee re: change of name or address.
139U(1)	Failure to provide evidence of income.
139ZIE(6)	Failure to comply with requirements of supervised account notice.
139ZIEA(6)	Failure to transfer funds from old supervised account into a fresh supervised account.
139ZIF	Failure to deposit all monetary income into supervised account.
139ZIG	Make unauthorised withdrawal from supervised account.
139ZIH	Enter into constructive income receipt arrangement or failure to cease participating in a constructive income receipt arrangement upon becoming bankrupt.
139ZIHA	Enter into non-monetary income receipt arrangement if supervised account regime applies.
139ZII	Receive income in the form of cash if supervised account regime applies.
139UZO(1)	Failure to comply with 139ZL Notice.
139ZT(1)	Failure to comply with 139ZQ Notice.
152	Failure of discharged bankrupt to give assistance.
189(2)	Failure to comply with directions, supply information or remove property by person subject to 188 authority.
246(1)	Failure to give a copy of the statement to the Official Receiver.
265(1)	Duty of a bankrupt to disclose information and/or property (Not including 265(1)(f) & (g)).
265A	Offences re: exercise of powers under section 77A or 130.
267B	Failure of person to provide information 6A(3), 77C, 77CA, 139Y
267D	Failure of person to attend under 77C(1).
267F	Refusal to be sworn or give evidence 77C(1).
268(2)	Duty of a debtor to disclose information and / or property (Not including 268(2)(d), (e) & (f)).
268(5)	Obligation of full disclosure of certain property.