



Australian Government

Insolvency and Trustee Service Australia

**INSPECTOR-GENERAL
PRACTICE DIRECTION No 1**

**Proper Performance of Duties
of a Bankruptcy Trustee**

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Introduction

1. Section 155H “Consideration of Involuntary Termination of Registration” requires the Inspector-General to consider whether a trustee has failed to exercise powers of a registered trustee **properly** or has failed to carry out the duties of a registered trustee **properly**.
2. It is therefore implicit in this that not only does a trustee need to undertake the duties and exercise the powers of a trustee, the inclusion of the words “properly” means that the Inspector-General needs to assess whether the action was undertaken properly.
3. This paper explores the meaning of “properly” by reference to the common law covering the fiduciary duties of a bankruptcy trustee and clarifies the Courts and the Inspector-General’s expectations of trustees in this regard. For completeness trustees should also look to the Schedule 4A standards not discussed in this document.

Trustees as Officers of the Court

4. A bankruptcy trustee must act justly. They are considered officers of the Court and in exercising powers and discretions and making decisions no lesser standard is to be expected of them than of a court or judge. This principle is referred to as the rule in *Ex parte James*¹.
5. The *Ex parte James* principle received further airing recently in *Thomas v Donnelly*², *Nguyen v Pattison*³ and *Draper v Official Trustee*⁴. In the *Nguyen* case Weinberg J (in referring to the *Thomas v Donnelly* case) stated that in making decisions:

“No lesser standard is to be expected of them than of a court or judge”.
6. A trustee in bankruptcy is a person who must command and retain the confidence of the Court, of the creditors and debtors in bankruptcy proceedings and of the general community. (*Muir v Bradley*⁵).

Independence

7. A bankruptcy trustee is precluded from having a personal interest or a duty to a third party which conflicts with his or her duty - irrespective of whether that interest or duty actually deflects the fiduciary from the loyal performance of that duty.
8. In *Re Lamb*⁶ at 396, Sweeney J said:

“The objects of the Act are of public importance and it is of great importance to the community that the role given by the legislature to a trustee, is fulfilled only by persons who are, and who are seen to be, completely independent.”

¹ *Ex parte James, Re Condon* (1874) LR 9 Ch App 609 at 614 (and also see *Re Hurt; Ex parte Hurt* (1988) 80 ALR 236 at 240);.

² *Thomas v Donnelly (No. 2)* [1997] 1142 FCA (23 October 1997)

³ *Nguyen v Pattison* [2005] FCA 650 at 86

⁴ [Draper v Official Trustee in Bankruptcy \[2006\] FCAFC 157 \(10 November 2006\)](#)

⁵ *Muir v Bradley* (1984) 57 ALR 155

⁶ *Re Lamb; Ex parte Registrar in Bankruptcy* (1984) 1 FCR 391

9. A trustee carrying out his or her duty has to be conscious of the needs of independence and perceived independence and faces difficulty in carrying out those duties if he or she has to be seen to be completely independent and must remove themselves from conflict if there can be any perception of partiality. The test is whether there might be, in the eyes of a reasonable person, a perception of conflict. Where there is an actual or potential conflict of interest the trustee must notify the relevant parties and take appropriate steps to avoid the conflict of interest. (see *Southern Hotels*⁷, *Pascoe v Deltawiz*⁸ and *Starkey v Rondo*⁹).
10. In *Re Partridge*¹⁰, cited in both the and *Starkey* cases, Lockhart J stated that a trustee:

“must be scrupulously careful to ensure that he never allows himself to be placed in a position of conflict or potential conflict. A registered trustee must not only be impartial; he must be seen to be impartial”.

Fairness

11. A trustee plays a central role in the administration of estates under the Act and is under a general duty to exercise the powers committed to him in such a fashion that the objects of the Act, including those of equality between creditors and fairness to bankrupts and debtors are served (see *Re Lamb*).
12. A trustee will not be allowed to retain monies for distribution where it would be contrary to fair dealing to do so (see *Re Tyler*¹¹).

Impartiality and Equality

13. The minimum standard required of the trustee is that he shall handle the assets with a view to achieving the maximum return from the assets to satisfy the claims of the creditors and to provide the best surplus possible for the bankrupt (see *Mannigel v Aitken*¹²).
14. The trustee’s responsibility to the bankrupt of fairness and equality of interests and providing the best surplus possible are sometimes forgotten. Trustees often only focus on providing the maximum return to creditors. The fact that a trustee has to consider more than the interests of the creditors was reaffirmed in *Adsett v Berlouis*¹³ where Northrop J concluded:

“the trustee has a dual function: first, to administer the estate in the interests of the creditors and the bankrupt; second, to exercise, as a public duty and for the public welfare, certain powers given, and duties imposed, under the Act, (Re Campbell; ex parte Official Trustee (1987) 13 FCR 326 at 329).”

15. Justice Spender in *Doolan v Dare*¹⁴ at 37 provided a summary of relevant case law and commentary on the duties of a trustee as follows:

⁷ *Southern Hotels Pty Ltd in the matter of Temple* [2000] FCA 1406

⁸ *Pascoe (Trustee) v Deltawiz Pty Ltd, in the matter of Deltawiz Pty Ltd* [2003] FCA 1100

⁹ *Starkey as Trustee of the Estate of Peter John Dance v Rondo Building Services Pty Ltd* [2005] FCA 1081

¹⁰ *Re Partridge* (unreported FCA Lockhart J 22 September 1982)

¹¹ *Re Tyler; Ex parte Official Receiver* [1907] 1 KB 865

¹² *Mannigel v Aitken* (1983) 77 FLR 406 at 408-409

¹³ *Adsett v Berlouis* (1992) 37 FCR 201

¹⁴ *Doolan v Dare* [2004] FCA 682

“It is clear that the trustee has an obligation to administer the estate in the interests of the creditors and the bankrupt.

*The High Court approved the following statement of principle in *The Attorney-General for the Commonwealth v Breckler* (1999) 197 CLR 83 at 99:*

‘Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settler or without giving a real or genuine consideration to the exercise of the discretion.’”

*39 In *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, a judgment of Finn J, His Honour referred to the standard required of a trustee. His Honour said at 81:*

*‘... if a fiduciary is one expected to act in another’s interest in a particular matter, that person is (informed consent apart) precluded from having a personal interest or a duty to a third party which conflicts with his or her duty to that other in that matter - irrespective of whether that interest or duty actually deflects the fiduciary from the loyal performance of that duty. And so it can be said “[a] man of integrity can be a defaulting fiduciary without ceasing to be honest”: J. Glover, *Commercial Equity: Fiduciary Relationship*, Butterworths, Sydney, 1995, para 5.24.’*

*40 In *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41, a judgment of the High Court, Mason J, as he then was, said at 103:*

*‘The rule that a fiduciary is not entitled to make a profit without the informed consent of the person to whom the fiduciary duty is owed is not limited to profits which arise from the use of the fiduciary position or of the opportunity or knowledge gained from it for it is said that the basis of this rule is the fiduciary may not place himself in a situation where his duty and his interest conflict: *Consul Development Pty. Ltd. v. O.P.C. Estates Pty. Ltd.* (1975) 132 C.L.R. 373, at p. 393.’*

His Honour continued at 107:

‘A fiduciary is liable to account for a profit or benefit if it was obtained (1) in circumstances where there was a conflict, or possible conflict of interest and duty, or (2) by reason of the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position.’”

Conclusion

16. A bankruptcy trustee must act with a high duty of care, reasonable prudence and diligence, demonstrating competence of a high order, honesty, independence and impartiality to a standard that commands and retains the confidence of the Court, of the creditors and debtors in bankruptcy proceedings and of the general community.
17. A bankruptcy trustee needs to have regard to the interests of the creditors, the bankrupt and the community.

18. A bankruptcy trustee must not act in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the interests of the creditors or without giving a real or genuine consideration to the exercise of the discretion.
19. Trustee conduct which demonstrates a pattern of indifference to the legislative requirements, a lack of knowledge of the law and a disregard for standards published as a guide to practitioners, is inconsistent with the high standard expected of a trustee and would not be tolerated by the Court, nor should the Inspector-General tolerate such conduct. This is so even where there is no bad faith or dishonesty on the trustee's part.
20. These principles are fundamental to the performance of a trustee's role. Where the Inspector-General sees actions by trustees that contravene these principles, immediate disciplinary action is likely to be taken.