



**Australian Government**

**Insolvency and Trustee Service Australia**

**INSPECTOR-GENERAL  
PRACTICE DIRECTION No 14**

**Proper Performance of Duties  
of a Trustee**

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## Acknowledgements

Sections of this Inspector-General Practice Direction are based on papers presented by well-known and widely-respected persons in the area of insolvency law and practice at ITSA's 7<sup>th</sup> Bankruptcy Congress in Sydney in October 2008.

These individuals and links to their papers are shown below. Their papers were delivered as part of a Congress panel that discussed the topic "*Understanding your Responsibilities and Performance Standards – are Trustees and practitioners in the firing line?*"

[Justice Peter W Young AO](#)

[Michael Murray](#)

[Andrew Robinson](#)

The content of these papers has been instrumental to the development of this Inspector-General Practice Direction.

## Introduction

1. Mr Robert Sanderson, Past President of INSOL International, in launching the IPA Code of Professional Conduct stated <sup>1</sup>:

*“It is global societies’ increasing expectations of professionals that they will do the right thing for the right reason and this expectation has never been higher. It is no longer globally acceptable for insolvency professionals who have lost sight of the intent of the legislation, and who try to fit around the rules, to say ‘I followed the rules’.”*

2. This coincides with a belief by some practitioners that ITSA Regulation on behalf of the Inspector-General in Bankruptcy, in undertaking the regulatory function, is only entitled to focus on compliance by personal insolvency trustees (“trustee”) with the Bankruptcy Act (“the Act”) and Regulations, along with undertaking the duties of a trustee as set out in the Bankruptcy Act. This is part of the Inspector-General’s role but only one aspect.
3. In a 2006 disciplinary hearing<sup>2</sup> the Federal Court said it will have regard to professional standards and codes of conduct in determining whether the standard of performance of an insolvency practitioner is proper and adequate. In his defence the practitioner argued that the Regulator (that is, the Companies Auditors and Liquidators Disciplinary Board (“CALDB”)) had to “point to a particular legislative provision imposing the duties and obligations in respect of which there has been a failure to perform.” The Court rejected that saying at paragraph 26,

*..... “The interpretation advanced for the applicant, in my view, is too narrow in requiring the identification of a specific duty directly imposed by legislation. The level of performance called for is that of “adequacy.” The standard is that the duty must be performed “properly.” The provision is designed to enable a Board representative of the commercial and accounting communities (ie. CALDB) to consider whether the function has been adequately and properly carried out. To assess this, it is permissible, in my view, to have regard to the standards operative in the relevant sphere of activity.”*

4. Therefore it is not just the Act and Regulations the Inspector-General will expect compliance with, it is professional standards (eg [APES 330 Insolvency Services](#)), Codes of Professional Conduct (eg [IPA Code of Professional Practice](#)) and [Inspector-General Practice Directions](#), like this document, that need to be complied with.
5. Section 155H of the Act: “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**.
6. Therefore, in making an assessment under section 155H, the Inspector-General will consider not only whether the trustee has exercised powers and carried out duties, but that such action was undertaken **properly**.

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<sup>1</sup> IPA National Conference 2008

<sup>2</sup> *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board (2006) FCA 1438 (8 November 2006)*

7. This paper outlines the existing legislation that guides a trustee, explores the meaning of “properly” by reference to the common law covering the fiduciary duties of a trustee and clarifies the Court’s and the Inspector-General’s expectations of trustees in this regard. *Appendix “A”* lists the cases referred to in this paper with internet links to most of them.

## The Legislative Framework

### Section 155H

8. Section 155H is the basis on which the Inspector-General can decide to convene a Committee to consider whether a trustee is in breach and whether these breaches warrant the cancellation of the trustee’s registration or the imposition of conditions.
9. The relevant paragraphs are:

*155(1) The Inspector-General may ask a registered trustee to give the Inspector-General a written explanation why the trustee should continue to be registered, if the Inspector-General believes that:*

- (f) *the trustee has failed to exercise powers of a registered trustee **properly** or has failed to carry out the duties of a registered trustee **properly**; or*
- (g) *the trustee has failed to comply with a standard prescribed for the purposes of subsection (5).<sup>3</sup>*

### Section 12

10. While this section essentially provides certain powers to the Inspector-General it also imposes a duty on trustees (and debt agreement administrators). The relevant provision is s12(1A) which provides:
- (1A) Where the Inspector-General requests a registered trustee or the administrator of a debt agreement, for the purposes of subsection (1), to provide a report as to the operation of this Act, **the registered trustee or administrator, as the case may be, shall forthwith provide the report requested.***
11. The term “for the purposes of subsection (1), to provide a report as to the operation of this Act”, is to be read broadly to apply to situations where a registered trustee or for that matter a debt agreement administrator, has been formally requested under subsection 12(1) to provide a report irrespective as to whether it relates to a particular estate, their personal insolvency administration practice as a whole, or any other purpose under the Act, including in particular the provision of the annual estate return information.
12. It is implicit in this that to properly carry out this duty the registered trustee or debt agreement administrator has an obligation to provide a timely and accurate report.
13. Subsection 12(2) states that:
- (2) *For the purposes of discharging his or her functions under this Act, the Inspector-General may:*
- (a) *require the production of any books kept by an Official Receiver **or by a trustee**; and*

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<sup>3</sup> The standards are prescribed by regulation 8.34A and are set out in Schedule 4A to the Regulations

- (b) *require a trustee to answer an inquiry made to him or her in relation to any of the following matters in which the trustee is, or has been, engaged:*
    - (i) *a bankruptcy;*
    - (ii) *the control of property under an authority given under section 188;*
    - (iii) *an administration under Part XI;*
    - (iv) *a personal insolvency agreement, scheme of arrangement or composition;*  
*and*
  - (c) *at any time investigate the books of a trustee;*
14. Hence the trustee has a duty to assist ITSA Regulation by allowing reasonable access to books and records and accurately answering any enquiry within a reasonable time frame.
15. Subsection 12(4) states:
- (4) *The Inspector-General:*
    - (a) *is entitled to attend any meeting of creditors held under this Act; and*
    - (b) *subject to section 64ZA, is entitled to participate in any such meeting as the Inspector-General thinks fit.*
16. It is implicit in subsection 12(4) that a trustee should not engage in conduct that prevents or attempts to prevent ITSA Regulation from attending and participating in a meeting of creditors (subject to s64ZA<sup>4</sup>). ITSA Regulation will comply with its published protocol when attending such meetings.<sup>5</sup>

## **Section 19**

17. Specific duties of a trustee **of the estate of a bankrupt** are set out in subsection 19(1):
- (1) *The duties of the trustee of the estate of a bankrupt include the following:*
    - (a) *notifying the bankrupt’s creditors of the bankruptcy;*
    - (b) *determining whether the estate includes property that can be realised to pay a dividend to creditors;*
    - (c) *reporting to creditors within 3 months of the date of the bankruptcy on the likelihood of creditors receiving a dividend before the end of the bankruptcy;*
    - (d) *giving information about the administration of the estate to a creditor who reasonably requests it;*
    - (e) *determining whether the bankrupt has made a transfer of property that is void against the trustee;*
    - (f) *taking appropriate steps to recover property for the benefit of the estate;*
    - (g) *taking whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt’s duties under this Act;*
    - (h) *considering whether the bankrupt has committed an offence against this Act;*
    - (i) *referring to the Inspector-General or to relevant law enforcement authorities any evidence of an offence by the bankrupt against this Act;*
    - (j) *administering the estate as efficiently as possible by avoiding unnecessary expense;*

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<sup>4</sup> Refer particularly subsection 64ZA(3) – “a person other than a creditor is not entitled to vote.”

<sup>5</sup>Refer [IGPS 11 paragraph 37-59](#)

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

18. It is important to understand that these duties relate to individual estates rather than broader responsibilities or duties of a trustee. Clearly, failing in respect to any of these is a fundamental breach of duty although allowance needs to be made for what is reasonable in the particular circumstances, the seriousness of the breach, its impact and the trustee's history of compliance.

### **Schedule 4A Performance Standards for Trustees**

19. Schedule 4A to the Regulations sets out standards for the minimum level of acceptable conduct and performance for registered trustees (and solicitor controlling trustees).

20. The purpose of the standards, stated in 1.1(2):

*“is to ensure:*

- (a) *that a person to whom these standards apply acts at all times in accordance with the person's powers and duties under the Act and these Regulations and in relation to the practice of bankruptcy law generally; and*
- (b) *that an administration to which these standards apply is carried out consistently at a high level.”*

21. This Practice Direction does not set out all of Schedule 4A, but focuses on those standards that are not prescriptive, but rather use subjective terms (highlighted for ease of reference) to describe conduct expected:

#### **“2.2 Duty to act honestly and impartially**

- (1) *The trustee must act **honestly and impartially** in relation to each administration, including not signing, or associating himself or herself with, a document that the trustee knows, or ought reasonably to know, is false or misleading.*
- (2) *The trustee must not include in any document prepared by the trustee a clause that disclaims the trustee's responsibility for the document's authenticity.*

#### **2.3 Conflict of interest**

*If, during an administration, it becomes apparent that the trustee has an **actual or potential conflict of interest** in relation to the administration, the trustee must, as soon as practicable after becoming aware of the conflict of interest:*

- (a) *notify the creditors, the person who appointed the trustee, a committee of inspection or the court, as appropriate, of the conflict of interest; and*
- (b) *take appropriate steps to avoid the conflict of interest.*

*Examples of conflicts of interest*

- 1. *The appointer or, in the case of a sequestration order, the bankrupt is or was a client of the trustee or the trustee's firm in relation to a financial, trust or insolvency planning matter.*
- 2. *The trustee or a member of the trustee's firm is a personal friend, relative or business associate of the debtor.*

## **2.8 Realising assets**

*The trustee must realise only those assets:*

- (a) that will give a **cost-effective** return to creditors; or*
- (b) that contribute to the payment of the costs of the administration; or*
- (c) that may be realised in accordance with a personal insolvency agreement.*

## **2.9 Ownership or interests in assets**

*In determining the ownership of, or an interest in, an asset that is part of divisible property, the trustee must **act reasonably** and claim only the amount that **fairly represents** the interest in, or value of, the asset.*

## **2.11 Disposal of property**

*The trustee must act **independently and impartially** in undertaking transactions and dealings relating to the disposal of the property of a bankrupt, debtor or deceased person.*

## **2.13 Costs incurred to be necessary and reasonable**

*In conducting an administration, the trustee must:*

- (a) incur only those costs that are **necessary and reasonable**; and*
- (b) before deciding whether it is appropriate to incur a cost, **compare** the amount of the cost likely to be incurred with the value and complexity of the administration.*

## **3.6 Creditors' views to be considered**

*The trustee must **consider** the views of creditors in relation to whether moneys held by the trustee should be:*

- (a) applied to conduct further investigations in relation to the administration; or*
- (b) distributed as a dividend.*

## **3.7 Distribution of estate funds**

- (1) The trustee must distribute estate funds in a **timely** manner, having regard to:
  - (a) the complexity of the administration and the claims of creditors; and*
  - (b) the amount of funds available for distribution; and*
  - (c) the need to retain funds in the estate or property to meet existing or expected commitments.**
- (2) The trustee must make an interim distribution of dividends to creditors unless an existing or expected commitment is likely to account for a significant level of the available funds from the estate or property.*

## **4.5 Income and contribution assessment**

- (1) The trustee must, **as soon as possible** after all necessary information has been made available, make an assessment of:
  - (a) the income of a bankrupt in respect of a contribution assessment period; and*
  - (b) the contribution that the bankrupt is liable to pay.**

- (2) *The trustee must:*
- (a) *act **fairly and reasonably** in determining the time for payment of contributions liability; and*
  - (b) *if full payment within the contribution assessment period or before discharge would cause hardship to the bankrupt, consider giving the bankrupt an extension of the time for payment of contributions liability.*
- (3) *The trustee must give the bankrupt a copy of the assessment of income and contributions liability, setting out and explaining the basis on which the amount of any contributions liability has been calculated.”*

22. The terms highlighted in the Performance Standards set out in paragraph 21 set the context for the following paragraphs of this Practice Direction. The duties and responsibilities of trustees as fiduciaries and officers of the Court are often couched in very subjective terms, making it a challenging aspect of personal insolvency law. Notwithstanding this, practitioners can obtain guidance from the Schedule 4A Performance Standards and case law precedents led by *Ex parte James* and the other cases listed in **Appendix “A”** to this Practice Direction.

## **Trustees as Fiduciaries and Officers of the Court**

23. A trustee in bankruptcy is classed as a fiduciary. “Fiduciary” is a term that may be defined in various ways but, essentially, it involves a person who has an obligation to act on behalf of another, subject to certain duties. In particular, a person who is a fiduciary generally owes two types of duties to those with whom he or she is in professional contact.
24. These are:
- a duty to use care and skill and;
  - a duty to act in good faith.
25. The duty to use care and skill is allied to common law obligations. A person may be under a contract whose terms, express or implied, require that person to use skill and care. Furthermore, such a person may owe a duty of care under the law of negligence. The way in which the common law duties are vindicated are by an award of damages to the person damaged by the conduct. With the breach of a statutory duty in the nature of a fiduciary duty, the remedy may be set out in the relevant statute or it may be an order that the defaulting fiduciary restore the fund or person to the state it or he/she would have been in but for the breach.

### ***The Rule in Ex parte James***

26. A 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*<sup>6</sup>.

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<sup>6</sup> *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)

27. The rule requiring a trustee to act justly or fairly can apply even in situations where this may not otherwise be strictly required by law – for example where some property has come into the hands of the bankrupt which was never intended to be property of the bankrupt, but, in law, is his property<sup>7</sup>.
28. In such circumstances, for the rule in *Ex parte James* to operate, it has been suggested that four requirements must be met. These are:
- that the bankrupt estate has been enriched by the relevant transaction;
  - that the claimant is unable to submit a proof of debt in the ordinary way;
  - an honest person would consider it unfair for the trustee to retain the money in question; and
  - the rule only operates so as to nullify an enrichment of the bankrupt estate.
29. The rule in *Ex parte James* was referred to in two relatively recent cases, *Re Houston (Bankrupt)*<sup>8</sup> and *Foyster v Prentice*<sup>9</sup>.
30. In the *Houston* case the trustees sought the court’s directions pursuant to subsection 134(4) of the Act in order to call upon the executors of a deceased estate, of which the bankrupt was a beneficiary, to make an *in specie* distribution. It was held that it was not unfair nor unconscionable conduct of the trustee in the sense of *Ex parte James*, to call upon and receive the *in specie* distribution notwithstanding the consequences of leaving the bankrupt with a post bankruptcy capital gains tax liability and the Australian Taxation Office with a fresh claim. It can be concluded that the trustees acted prudently in seeking the court’s directions so that the full impact and negative consequences on all parties could be considered. See also *Re: Hamilton*<sup>10</sup>.
31. In the *Foyster* case the bankrupt made an unsuccessful application for review of the trustee’s conduct and in particular sought orders that the trustee had not acted impartially and had breached the fiduciary duty owed to him during the conduct of his duties and administration of the bankrupt estate. At 185 Wilson FM stated:

*“The complaint by the applicant can be answered when regard is had to the duties of a trustee in bankruptcy. As I have said it is not the function of a trustee to act as directed by the bankrupt. Nor is it his function to consult the bankrupt before taking any action, even action that may be adverse to the bankrupt’s interests.”*

And at 202:

*“There is authority that a trustee in bankruptcy is required to act as a fiduciary in relation to the estate of the bankrupt except where the Bankruptcy Act provides otherwise: Re Ladyman<sup>11</sup>; Pridmore v Magenta Nominees Pty Ltd<sup>12</sup>. However, in my view the trustee does not act as a fiduciary vis a vis the bankrupt in the widest sense of that word in equity. As the cases extracted show, the trustee has public duties to efficiently administer the bankrupt estate.”*

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<sup>7</sup> *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* (2007) 64 ACSR 31

<sup>8</sup> *Re Houston (Bankrupt)* [2008] FCA 1519

<sup>9</sup> *Foyster v Prentice* [2008] FMCA 757 (11 June 2008).

<sup>10</sup> *Re: Hamilton* [2009] FMCA 1040

<sup>11</sup> *Re Ladyman* (1981) 55 FLR 383

<sup>12</sup> *Pridmore v Magenta Nominees Pty Ltd* [1999] FCA 152; (1998) 161 ALR 458.

32. The *Ex parte James* principle received further airing in *Thomas v Donnelly*<sup>13</sup>, *Nguyen v Pattison*<sup>14</sup> and *Draper v Official Trustee*<sup>15</sup>. In the *Nguyen* case Weinberg J stated that in trustees making decisions:
- “No lesser standard is to be expected of them than of a court or judge”.
33. A trustee 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. His competence must be, and remain of a high order - see *Muir v Bradley*<sup>16</sup> and *Wong v Inspector-General in Bankruptcy*<sup>17</sup>.
34. If a trustee has a situation where he or she is considering whether *Ex Parte James* applies, unless the answer is obvious or all the creditors agree, the trustee would be wise to take the best advice or seek the direction of the court under subsection 134(4) of the Act.

### ***Independence and avoiding conflicts of interest***

35. A trustee is precluded from having a personal interest or a duty to a third party which conflicts with his or her fiduciary duty and duty as a trustee.<sup>18</sup>
36. In *Re Lamb*<sup>19</sup> at 24, 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.”
37. In carrying out his or her duties, a trustee must not only act independently, but must be seen to act independently. Therefore, if a conflict of interest arises the trustee must avoid or remove that conflict if it raises 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*<sup>20</sup>, *Pascoe v Deltawiz*<sup>21</sup> and *Starkey v Rondo*<sup>22</sup>). See also Schedule 4A Performance Standard 2.3 and [IPA Code of Professional Practice for Insolvency Practitioners](#) Section 6 for further guidance.
38. In *Re Partridge*<sup>23</sup>, cited in the *Southern Hotels*, *Starkey* and *Boral Montoro* (see paragraph 38) cases, Lockhart J stated that a trustee:

<sup>13</sup> *John Robert Thomas v Max Christopher Donnelly (In the matter of John Robert Thomas)* (No. 2) [1997] FCA 1142 (23 October 1997)

<sup>14</sup> *Nguyen v Pattison* [2005] FCA 650 at 86

<sup>15</sup> *Draper v Official Trustee in Bankruptcy* [2006] FCAFC 157 (10 November 2006)

<sup>16</sup> *Muir v Bradley* (1984) 57 ALR 155

<sup>17</sup> *Wong v Inspector-General in Bankruptcy* [2008] AATA 487

<sup>18</sup> *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1

<sup>19</sup> *Re Lamb; Ex parte Registrar in Bankruptcy* (1984) 1 FCR 391

<sup>20</sup> *Southern Hotels Pty Ltd in the matter of Temple* [2000] FCA 1406

<sup>21</sup> *Pascoe (Trustee) v Deltawiz Pty Ltd, in the matter of Deltawiz Pty Ltd* [2003] FCA 1100

<sup>22</sup> *Starkey as Trustee of the Estate of Peter John Dance v Rondo Building Services Pty Ltd* [2005] FCA 1081

<sup>23</sup> *Re Partridge* (unreported FCA Lockhart J 22 September 1982)

*“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”.*

39. In the case of *Boral Montoro Pty Ltd v McLachlan*<sup>24</sup> the proposed trustee was a partner of a firm that was a creditor of the debtor. The debtor was applying to persuade the Court not to appoint that trustee. At paragraph 15, Wilson FM concluded,

*... “The solicitor for the petitioning creditor advised the court that the firm would not prove in the bankruptcy thereby seeking to dispel any suggestion of a conflict. However the matter is not so simple, the appearance of such a conflict already exists and is not dispelled by such an intended course of action.”*

### ***Impartial and Fair***

40. As stated in Schedule 4A Performance Standard 2.2, a trustee must act honestly and impartially in relation to each administration.
41. 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 or her 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*).
42. The minimum standard required of the trustee is that he or she 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*<sup>25</sup>).
43. The trustee’s responsibility to the bankrupt of fairness and equality of interests between the bankrupt and his or her creditors and providing the best surplus possible are sometimes forgotten. On occasion trustees have only focussed 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*<sup>26</sup> 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<sup>27</sup>).”*

44. Justice Spender in *Doolan v Dare*<sup>28</sup> at paragraph 37 provided a summary of relevant case law and commentary on the duties of a trustee as follows:

*“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:*

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<sup>24</sup> *Boral Montoro Pty Ltd v McLachlan* [2007] FMCA 533

<sup>25</sup> *Mannigel v Aitken* (1983) 77 FLR 406 at 408-409

<sup>26</sup> *Adsett v Berlouis* (1992) 37 FCR 201

<sup>27</sup> *Re Campbell; ex parte Official Trustee* (1987) 13 FCR 326 at 329

<sup>28</sup> *Doolan v Dare* [2004] FCA 682

*‘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.’”*

38 *In my judgment, the payment of the dividend was motivated not by a consideration of the interests of the creditors or of Mr Doolan but by a consideration of the trustee’s own self-interest, and her conduct in borrowing the funds and declaring the dividend was for an improper purpose.*

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.’”*

45. 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*<sup>29</sup>).

### **Efficient and Commercial**

46. In accordance with paragraph 19(1)(j) of the Act a trustee has a specific duty to “administer the estate as **efficiently** as possible....” Further, and pursuant to paragraph 19(1)(k) of the Act, a trustee also has a specific duty to act “... in a **commercially sound** way.”

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<sup>29</sup> *Re Tyler; Ex parte Official Receiver* [1907] 1 KB 865

47. At paragraph 74 of the decision in *Growden v Committee under Part VIII of the Bankruptcy Act*<sup>30</sup> it is stated:

*“The Tribunal, in undertaking this exercise, has concentrated on assessing whether the answers provided by the applicant were satisfactory for the purpose of his registration as trustee in bankruptcy. His lengthy discursive answers are antithetical to efficiency and s19(1)(j) of the Act requires an estate to be administered as efficiently as possible by avoiding unnecessary expense. If the applicant spends time carrying out the administration of an estate by researching and utilising novel interpretations he claims are available under the Act, rather than utilising more readily understandable and accessible provisions then efficiency will decline and expense will rise. Additionally creditors, the bankrupt and the courts, when considering reports prepared by the applicant, are likely to experience some difficulty determining why he is relying on obscure combinations of provisions when more readily comprehensible and better known provisions are available. Such usages are also not consistent with performing the functions of a trustee in a commercially sound way.”*

48. The trustee is not obliged to take steps which would be unrealistic or expensive. *Citicorp Australia Ltd v Official Trustee in Bankruptcy*<sup>31</sup>.

49. In *Boensch v Pascoe*<sup>32</sup> the Court said,

*.... “A trustee does not (thereby) become disabled from an efficient and, if necessary robust, administration of an estate because his own fees may depend on the outcome.”*

50. It has been recognised by the Courts that a trustee cannot expect to recover all their costs and remuneration in every bankruptcy and that the scale of fees set by a trustee for themselves and their staff reflect this risk. In *Vaucluse Hospital Pty Ltd v Phillips*<sup>33</sup> Riethmuller FM said:

*“...it must also be borne in mind that undertaking the role of trustee is a function that a trustee embarks upon aware of the inherent risk that he or she may not be remunerated. If an estate contains no assets that can be realised then the trustee will remain without remuneration, unless creditors are prepared to fund investigations. Prescribed remuneration rates are higher than the scale fees for similar work carried out in the course of litigation, presumably (at least in part) to recompense trustees for the risk inherent in the function.*

*The result is that a lack of remuneration ‘may be an incident of the risk associated with the performance of the trustee’s duties in the period between the sequestration order and the expiry of the 21 days’: see Garrett v Deputy Commissioner of Taxation [2005] FMCA 19 at [34] per Lindsay FM. It is certainly a well accepted incident of the risk inherent in the performance of the trustee’s duties in assetless estates.”*

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<sup>30</sup> *Growden v Committee under Part VIII of the Bankruptcy Act* [2008] AATA 604

<sup>31</sup> *Citicorp Australia Ltd v Official Trustee in Bankruptcy* (1996) 71 FCR 550 at 561.

<sup>32</sup> *Boensch v Pascoe* [2007] FCA 1977 at paragraph 41

<sup>33</sup> *Vaucluse Hospital Pty Ltd v Phillips & Anor* [2006] FMCA 44

## Sequestration Orders being challenged

51. The trustee's duty to act in a commercially sound way should be given increased attention when there is an appeal against the making of a sequestration order.
52. Trustees are faced with the challenge of securing the bankrupt's assets and administering the estate while being cognisant of the fact that there have been cases where the court has not made provision for trustees fees to be paid where the sequestration order has been set aside (as opposed to the order being annulled by the Court, which is dealt with in section 154 of the Act).
53. In *Kyriackou v Shield Mercantile Pty Ltd [No 2]*<sup>34</sup>, in the Federal Court, a bankruptcy notice that had led to the making of a sequestration order was later declared invalid, and therefore set aside. Because the sequestration order had been wrongly made in the first place, Weinberg J, at paragraph 40 stated,

*"It would be quite wrong, in my view, to burden Mr Kyriackou, who is the successful applicant in this proceeding, with the costs of administering the estate that should never have been made the subject of a sequestration order. Regrettably, that leaves the Official Trustee with no obvious and immediate recourse against either the appellant or the first respondent. It also leaves him with what might be considered a legitimate sense of grievance. He may be out of pocket for doing no more than what he was required by statute to do."*

Weinberg J concluded at paragraph 42,

*"It seems to me that a trustee who administers a bankrupt estate, in the knowledge that the bankrupt is challenging the validity of the sequestration order, must exercise caution when incurring expenses whilst the status of the bankruptcy remains uncertain."*

54. In *Pattison v Hadjimouratis*<sup>35</sup>, which was decided by the Full Federal Court, a sequestration order was also set aside. The key factors in this decision were, first, that the trustee was on notice at a very early stage that the bankrupt disputed his bankrupt status and intended to make an application to the court. This early notice meant that the trustee was "required to exercise caution in incurring expenses." The second factor was that the debtor was solvent and wished to pay his debts. As such, it was thought to be "unfair" to burden the debtor with the costs of administering the estate. The trustee in bankruptcy was left to pursue his remedies at general law. However, Jacobson J noted that where a sequestration order is "on foot", it is open to the court to annul it rather than setting it aside.

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<sup>34</sup> *Kyriackou v Shield Mercantile Pty Ltd [No 2]* [2004] FCA 1338

<sup>35</sup> *Pattison v Hadjimouratis* (2006) 155 FCR 226

## **Principles that can be concluded**

### ***General Fiduciary Principles***

55. In summarising these cases we can determine some basic principles on what is proper performance of duties and proper exercise of powers.
56. A trustee must act justly. Trustees are 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 is referred to as the rule in *Ex parte James*. They have a general duty to exercise the powers committed to them in such a fashion that the objects of the Act, including those of equality between creditors and fairness to bankrupts and debtors, are served.
57. A 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 personal insolvency proceedings and of the general community.
58. A trustee needs to have regard to the interests of the creditors, the bankrupt and the community.
59. A 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.
60. A 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 trustee from the loyal performance of that duty. 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.

### ***Specific Principles***

61. We can now overlay some of these general principles with the Schedule 4A Performance Standards for Trustees and the specific roles undertaken by a trustee in bankruptcy:

#### **When delegating matters to staff**

62. Pursuant to Schedule 4A Performance Standard 2.5 the trustee must ensure that his or her employees comply with the Performance Standards.
63. Trustees need to consider when they should act personally, and when and how far they may delegate matters to staff. Generally speaking, where an important or material decision has to be made or policy needs to be set, the trustee must do so personally. That is not to say that he or she should not get advice from others or receive reports from members of staff, but the decision must be made personally.
64. However, with administrative, routine or mechanical tasks, the trustee is expected to use common sense in having the task performed as economically as practicable.

## When dealing with information

65. A trustee must comply with section 16A of the *Privacy Act 1988* when dealing with information relating to an administration.

*Note: Section 16A of the Privacy Act 1988 provides that an organisation must not do an act, or engage in a practice:*

- (a) that breaches an approved privacy code binding the organisation; or*
- (b) to the extent (if any) that the organisation is not bound by an approved privacy code — that breaches a National Privacy Principle.*

The National Privacy Principles are set out in Schedule 3 to the *Privacy Act 1988*.<sup>36</sup>

66. The resolution to the Privacy Commissioner’s investigation in *Own Motion Investigation v Bankruptcy Trustee Firm*<sup>37</sup> was as follows:

*“The Commissioner recommended that the trustee firm take steps to prevent general internet users from browsing the bankruptcy files, for example by securing the information using password protection. The Commissioner also recommended that the trustee’s opinion on whether bankrupts had breached the Bankruptcy Act be removed from the file made available to creditors.*

*The trustee firm agreed to these recommendations and, once satisfied that they had been implemented, the Commissioner closed the own motion investigation on the basis that the trustee firm had adequately dealt with the matter.”*

## When Claiming Assets

67. A trustee must act **independently and impartially** in undertaking transactions and dealings relating to the disposal of the property of a bankrupt, debtor or deceased person and when claiming assets must act **reasonably** and claim only the amount that fairly represents the interest in, or value of, the asset.
68. A trustee must realise only those divisible assets
- (a) that will give a cost-effective return to creditors; or
  - (b) that contribute to the payment of the costs of the administration; or
  - (c) that may be realised in accordance with a personal insolvency agreement.<sup>38</sup>

and in doing so needs to maximise the return both to creditors, maximise any possible surplus to the bankrupt and demonstrate **fairness**.

## Contributions

69. A trustee must:
- (a) act **fairly and reasonably** in determining the time for payment of contributions liability; and

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<sup>36</sup> Schedule 4A Performance Standard 2.4. See also *Own Motion Investigation v Bankruptcy Trustee Firm* [2007] PrivCmrA 5

<sup>37</sup> *Own Motion Investigation v Bankruptcy Trustee Firm* [2007] PrivCmrA 5

<sup>38</sup> Schedule 4A Performance Standard 2.8

- (b) if full payment within the contribution assessment period or before discharge would cause hardship to the bankrupt, consider giving the bankrupt an extension of the time for payment of contributions liability.<sup>39</sup>

## Remuneration, Costs and Dividends

70. In conducting an administration, a trustee must:
- (a) incur only those **costs that are necessary and reasonable**; and
  - (b) before deciding whether it is appropriate to incur a cost, compare the amount of the cost likely to be incurred with the value and complexity of the administration; and
  - (c) consider the views of creditors in relation to whether moneys held by the trustee should be applied to conduct further investigations in relation to the administration; or distributed as a dividend.<sup>40</sup>
71. As stated in [Inspector-General Practice Direction 6](#) at paragraph 35,
- “Similarly, in the administration of Part IV estates an issue of concern is the appropriateness or otherwise of a trustee arranging with the debtor to be remunerated or indemnified by the debtor or related third party in return for consenting to act as trustee on a debtor’s petition bankruptcy.”*
72. A fundamental principle in bankruptcy administration is that a trustee is entitled to be indemnified for their reasonable remuneration and costs **from trust funds**<sup>41</sup>.
73. IGPD 6 goes onto say at paragraphs 40 and 41 that,
- “the only circumstances where I might accept such a payment as valid is where the trustee has:*
- *informed the debtor of the income contribution regime and that any other payments or surety is purely voluntary; **and***
  - *informed the debtor of alternative choices of trustees, should the debtor not be prepared to voluntarily make the payment; **and***
  - *reports to creditors on the source and basis of the funds; **and***
  - *does not endeavour to execute legally enforceable contracts concerning the payment and does not pursue the debtor for any payment other than as prescribed in section 161B; **and***
  - *takes remuneration in accordance with section 162.*
- This position has been endorsed in the [IPA Code of Professional Practice](#) at pages 22-23, paragraph 6.10(b).”*

## Filing Objections

74. The discretion to object to the bankrupt’s discharge must be applied sensibly and not oppressively. Misuse of this power would occur when it is used to punish the bankrupt.<sup>42</sup>

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<sup>39</sup> Schedule 4A Performance Standard 4.5(2)

<sup>40</sup> Schedule 4A Performance Standards 2.13; 2.7(1) and 3.6

<sup>41</sup> *Adsett v Berlouis* (1992) 37 FCR 201 paragraphs 53-54

<sup>42</sup> Refer [IGPD 11](#)

75. In *Frost v Sheahan*<sup>43</sup> it was decided that it was unacceptable for a trustee to extend a bankruptcy on the basis the bankrupt was a high income earner and an extension would realise more income contributions. It was stated at paragraph 35,

... “*In my opinion, the fact that there will be a further CAP is not a factor to be taken into account. It is a consequence of an administration continuing, but not a reason to continue it.*”

## Conclusion

76. This paper outlines a broad principles-based framework which is aimed at clarifying the conduct that the Inspector-General expects of trustees, including the Official Trustee. *Appendix “A”* lists the cases referred to in this paper with internet links to most of them.
77. When it is found that a trustee has erred and not properly performed their duties or exercised their powers, the principles embodied in both the ITSA Regulation error category system<sup>44</sup> and the Schedule 4A Performance Standards, are a guide as to what the Inspector-General will consider namely:
- (a) the importance of the duty or power exercised incorrectly;
  - (b) the seriousness and impact of the action, including the impact the failure to comply has on a particular estate or related parties and on the integrity of the personal insolvency system; and
  - (c) a trustee’s performance history - whether the trustee has previously failed to comply, been advised and continues to make the same errors.
78. Action which may be taken depends upon the seriousness of the breach. One-off errors in judgement of little importance or impact, breaches that are minor and temporary and technical errors that have little or no impact on the quality of the administration or parties are to be dealt with through reporting, discussion, persuasion, guidance, education and training.
79. In the most serious matters where trustee conduct 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, such conduct 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. In such cases strong disciplinary action will be taken.

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<sup>43</sup> *Frost v Sheahan* [2008] FCA 1073

<sup>44</sup> Refer [IGPS 11 paragraph 30](#)

## “Appendix A” Case Law – Trustees Duties

No	Case
1	<a href="#">Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board (2006) 24 ACLC 1, 412</a>
2	Ex parte James, Re Condon (1874) LR 9 Ch App 609 at 614
3	<a href="#">Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd (2007) 64 ACSR 31</a>
4	<a href="#">Houston (Bankrupt), [2008] FCA 1519</a>
5	<a href="#">Foyster v Prentice [2008] FMCA 757 (11 June 2008)</a>
6	<a href="#">Thomas v Donnelly (No.2) [1997] 1142 FCA (23 October 1997)</a>
7	<a href="#">Nguyen v Pattison [2005] FCA 650 at 86</a>
8	<a href="#">Draper v Official Trustee in Bankruptcy [2006] FCAFC 157 (10 November 2006)</a>
9	<a href="#">Muir v Bradley (1984)</a>
10	<a href="#">Wong v Inspector-General in Bankruptcy [2008] AATA 487</a>
11	<a href="#">Re Lamb: Ex parte Registrar in Bankruptcy (1984) 1 FCR 391</a>
12	<a href="#">Southern Hotels Pty Ltd in the matter of Temple [2000] FCA 1406</a>
13	<a href="#">Pascoe (Trustee) v Deltawiz Pty Ltd, in the matter of Deltawiz Pty Ltd [2003] FCA 1100</a>
14	<a href="#">Starkey as Trustee of the Estate of Peter John Dance v Rondo Building Services Pty Ltd [2005] FCA 1081</a>
15	<a href="#">Boral Montoro Pty Ltd v McLachlan [2007] FMCA 533</a>
16	Re Tyler; Ex parte Official Receiver [1907] 1 KB 865
17	<a href="#">Citicorp Australia Ltd v Official Trustee in Bankruptcy (1996) 71 FCR 550 at 561</a>
18	<a href="#">Boensch v Pascoe [2007] FCA 1977</a>
19	<a href="#">Kyriackou v Shield Mercantile Pty Ltd [No 2] [2004] FCA 1338</a>
20	<a href="#">Pattison v Hadjimouratis (2006) 155 FCR 226</a>
21	<a href="#">Vaucluse Hospital Pty Ltd v Phillips &amp; Anor [2006] FMCA 44</a>
22	<a href="#">Mannigel v Aitken (1983) 77 FLR 406 at 408-409</a>
23	<a href="#">Adsett v Berlouis (1992) 37 FCR 201</a>
24	<a href="#">Doolan v Dare [2004] FCA 682</a>
25	<a href="#">Own Motion Investigation v Bankruptcy Trustee Firm [2007] PrivCmrA5</a>

### Notes and Disclaimer

1. Cases may be an authority for more than one broad principle.
2. The above table is not an exhaustive list of relevant cases and is offered as a guide only.
3. Practitioners should bear in mind the individual circumstances and differences of estates they are administering when referring to the above.