



## REGULATION OF BANKRUPTCY TRUSTEES AND DEBT AGREEMENT ADMINISTRATORS IN AUSTRALIA

The regulatory responsibilities of the Inspector-General in Bankruptcy, as set out in the Australian Bankruptcy Act, are essentially aimed at ensuring high national standards of Bankruptcy Act practice and procedure.

ITSA's independent Regulation Branch acts as delegate for the Inspector-General. The branch oversees both registered and unregistered debt agreement administrators (DAAs), registered trustees in private practice, solicitor controlling trustees and ITSA's trustee function.

The Inspector-General's regulatory functions can be described in three main areas:

- proactive (registration and supervision program);
- reactive (complaints, enforcement and disciplining);
- administrative review of some trustee decisions.

### **A. Registration of Trustees and Administrators**

ITSA has strict licensing regimes aimed at ensuring that only suitably qualified persons who will be able to immediately perform the duties if successful are registered to practice as bankruptcy trustees or debt agreement administrators.

A person who has appropriate accountancy qualifications and ability may apply to the Inspector-General in Bankruptcy to become registered. Applications to become a trustee can only be made by a natural person. Corporations, partnerships and associations cannot be registered as trustees. Applications to become a debt agreement administrator can be made by either a natural person or an Australian registered company.

The application is filed with ITSA's Regulation Branch. Along with contact and personal details the application must state any relevant qualifications and experience and nominate referees who can attest to their background. The applicant must also pay a prescribed fee which as of 1 April 2007 is \$2,000.

In considering a *trustee* application:

- A Committee consisting of the Inspector-General or his delegate, another public official and a trustee nominated by the peak trustee representative body, the Insolvency Practitioners' Association of Australia (IPAA), is formed to consider the application.
- The applicant must satisfy a Committee that they are not insolvent, and have the current qualifications, skills, knowledge and ethics to act as a trustee in an impartial and honest way. Applicants need to provide police checks evidencing that they have not been convicted in the last 10 years of fraud or dishonesty, provide

references and evidence of their experience and their professional indemnity insurance. Applicants are interviewed by the committee and asked a range of both technical and ethical questions and can also be required to sit an examination. If the application is approved the Inspector-General must give effect to the committee's decision. The applicant must then pay \$1,200 to initially become licensed.

In considering application to become a *registered debt agreement administrator*:

- The applicant must first pass a basic eligibility test, which prohibits them if in the last 10 years they have been insolvent, convicted of fraud or dishonesty, deregistered as a trustee or liquidator; prohibited from being a company director or declared ineligible to practice as an administrator;
- A Committee consisting of the Inspector-General or his delegate and another public official is formed to consider the application;
- Applicants are examined as to their capability to perform the duties including their knowledge and business systems. Applicants need to provide police checks, provide the name of referees that can attest to their character and evidence of their qualifications. Applicants are firstly interviewed by the committee and asked a range of questions and can also be required to sit an examination. If they pass this preliminary phase their business systems and practices are then examined as to adequacy;
- If the application is approved the applicant must then ensure they have the requisite trust account created and pay \$1,200 to initially become registered.

Registrations for both are renewable every 3 years requiring a further payment of \$1,200 and further evidence that they have maintained their ability, including knowledge, and in the case of a trustee, that they are currently practicing.

This registration process ensures only those of an acceptable standard are registered.

---

## **B. Eligibility of Solicitor Controlling Trustees (SCTs)**

---

Solicitors may consent to be controlling trustees under Part 10 of the Act, which is essentially an offer to be put to creditors. These solicitors are required to control any property, investigate and report to creditors and run the meeting of creditors called to consider a personal insolvency agreement proposed by the debtor under Part 10 of the Bankruptcy Act.

ITSA will refuse to accept Part 10 administrations from solicitors who do not hold the prescribed insolvency qualifications or who fail to meet certain eligibility requirements. In general terms they can not be practitioners if they:

- are insolvent under administration;
- have been a deregistered trustee or liquidator;
- are prohibited from being a company director;
- have been convicted of a criminal offence involving fraud or dishonesty.

- have been declared ineligible by the Inspector-General for failing to properly perform the duties required.

---

## **C. Supervision of Practitioners**

---

The Inspector-General is responsible for ensuring that all bankruptcy trustees, including ITSA's Official Trustee (OT), solicitor controlling trustees and administrators conduct themselves properly in administering matters under the Bankruptcy Act.

The main supervision occurs through a targeted annual inspection program which involves a sample of files, examination of their systems and practices and attendance at creditor's meetings.

The purpose of the inspection program is to monitor compliance and evaluate the financial and qualitative standard of trusteeship and administration. The sample of administrations targeted for inspection is based on a risk assessment of each practitioner, including an evaluation of systems and controls as well as the level and seriousness of prior errors found in their administrations, and designated risk criteria associated with particular types of administrations.

Around 1400 administrations and 220 practitioners are planned to be inspected each year.

### **National Standards**

The Bankruptcy Regulations set out performance standards that all Bankruptcy Act trustees must adhere to when undertaking their responsibilities. The Standards, developed in consultation with the two main professional bodies, the Insolvency Practitioners Association and the Law Council, are incorporated in Schedule 4A of the Bankruptcy Regulations and cover different factors that apply as between bankruptcies and Part 10 personal insolvency agreements. They cover the following topics:

- General – acting honestly and impartially, dealing with conflicts of interest, complying with privacy principles, mandatory inquiries;
- Assets – Investigation, securing and sale;
- Trustee Remuneration and costs;
- File maintenance and access to information;
- Meetings of creditors;
- Trust accounts;
- Reporting to creditors;
- Dealing with creditor's claims;
- Distribution of dividends
- Income contributions;

These standards are used as a benchmark when undertaking annual inspections and in investigation of complaints. Breaches of the standards can lead to disciplinary action.

At this time, with the registration of debt agreement administrators only just being embodied into legislation, legislative standards have not yet been developed in this area.

---

## ***D. Investigation of Complaints***

---

ITSA Regulation branch handles complaints made by debtors and creditors about the conduct of solicitors who act as controlling trustees, bankruptcy trustees (including the OT) and debt agreement administrators. All complaints received are examined in detail. In many instances complaints are quickly finalised without the need for in depth investigations. In these instances, applicants may be:

- informed that the trustee, solicitor or administrator's conduct is within their powers under the Act and standards of conduct;
- directed to their trustee or administrator for additional information; or
- provided with information about the alternative and proper remedies available to them.

The remaining complaints are investigated further and if deficiencies are identified, the action taken involves counselling, disciplinary proceedings which could lead to cancellation of registration or direct intervention in the trustee's or administrator's conduct of a particular administration through either adjournment of proceedings, mediation or litigation.

---

## ***E. Disciplinary Investigations and Committees***

---

The Inspector-General has the power to investigate the conduct of trustees, administrators and debtors and may cancel a person's registration.

Areas of investigation of **trustees** include whether the trustee:

- no longer has a qualification or ability that is prescribed by the regulations;
- no longer has the ability (including knowledge) to perform satisfactorily the duties;
- has been convicted of an offence involving fraud or dishonesty since registration;
- is not insured;
- is no longer practising;
- has contravened any conditions imposed by a licensing or disciplinary committee;
- has failed to carry out the duties or exercise powers properly;
- has failed to comply with a prescribed standard; and

- has failed to properly carry out the duties of a debt agreement administrator.

The Inspector-General may consider terminating the trustee's registration if any of these are established.

Disciplinary areas of investigation for a **debt agreement administrator** include:

- any loss of ability (including the knowledge) to satisfactorily perform the duties of an administrator in relation to a debt agreement;
- whether they have failed to properly carry out the duties of an administrator in relation to a debt agreement;
- possible loss of qualifications or experience prescribed by regulations; or
- contravention of a condition of registration.

Cancellation action may follow the establishment of any one of these grounds, usually initially identified either during ITSA Regulation branch's annual inspection or through the investigation of a complaint.

When considering whether a registration should be cancelled (or in the case of a SCT or unregistered DAA in determining whether a person should be declared ineligible) the matters that the delegate(s) of the Inspector-General might consider will include:

- (i) the importance of the duty that has not been complied with or the breach of the Act; and
- (ii) the seriousness of the effect of a failure to comply, including the impact the failure to comply has; and
- (iii) a practitioner's performance history including whether previous failures to comply with the Act or undertake the duties have been raised.

Usually a practitioner will be given opportunity to rectify simple problem areas. However if the issue is serious or has not been rectified the delegate of the Inspector-General from ITSA Bankruptcy Regulation branch will issue a formal notice of that determination to the practitioner. The practitioner then has 28 days to explain or show cause why their registration should not be cancelled.

The Inspector-General must cancel the individual's registration as a debt agreement administrator if the Inspector-General is satisfied that the individual no longer passes the basic eligibility test previously mentioned.

**In the case of a trustee:**

If the Inspector-General is not satisfied with that response, he may form a committee to consider terminating the trustee's registration. As with the registration process the committee consists of the Inspector-General or his delegate, another public official and a professional representative. The committee will consider information obtained in the course of investigations into matters handled by the trustee and will interview the trustee and other parties. It can determine whether the trustee should continue to be licensed or

whether conditions should be imposed on the trustee's licence. The Inspector-General must comply with the committee's decision.

Any such decision by the Inspector-General or delegate is reviewable in the Administrative Appeals Tribunal.

**In the case of a debt agreement administrator:**

The final decision as to whether the registration should be cancelled will be made by the Inspector-General's delegate upon review of the response from the administrator.

If registration is cancelled the trustee or administrator is provided with reasons for the decision. The decision is reviewable in the Administrative Appeals Tribunal (AAT).

ITSA assumes control of their administrations until a new administrator or trustee is appointed.

---

## ***F. DAA and SCT Ineligibility***

---

The Inspector-General may also ask a unregistered debt agreement administrator to give a written explanation why they should continue to be eligible to act as an administrator of debt agreements, if the Inspector-General has reasonable grounds to believe that the person or company has failed to properly carry out the duties of an administrator in relation to the debt agreement.

A solicitor acting as a controlling trustee under Part 10 may also be assessed by the Inspector-General or delegate as having failed to properly carry out duties or failed to cooperate with an inquiry or investigation, and can be declared ineligible to act.

In all cases ITSA assumes control of their administrations until a new administrator or controlling trustee is appointed.

If the administrator or solicitor is declared ineligible they will be provided with reasons for the decision and details of the right of review to the AAT.

---

## ***G. Inspector-General Review of Certain Trustee Decisions***

---

The Bankruptcy Act gives the Inspector-General in Bankruptcy power to conduct reviews of some decisions of trustees. Bankrupts who feel aggrieved by a decision of their trustee (whether it be a private sector registered trustee or the Official Trustee) can appeal the decision to the Inspector-General.

The decisions that are appealable are:

- Objections to discharge
- Income contributions:

- assessment of liability
- hardship applications to review contribution liability
- use of supervised bank accounts to collect contributions.

This administrative review process avoids debtors and trustees having to go to the time and expense of litigating the matter in the court. All decisions of the Inspector-General in Bankruptcy are appealable to the Administrative Appeals Tribunal or to the courts.

Around 90 reviews occur each year with around 20 of the Inspector-General's decisions on review being appealed in the Administrative Appeal Tribunal.

More information on [How to Complain](#), [How to Seek a Review](#), [How to Become Registered as a Bankruptcy Trustee](#) and [How to Become Registered as a Debt Agreement Administrator](#) can be found on ITSA's website.

### Where to contact BR:

In Australia Bankruptcy Regulation can be contacted on 1300 364 785 or:

<p><b>Queensland and NT</b> PO Box 10443, Adelaide Street BRISBANE QLD 4000 Facsimile: (07) 3360 5402 Email <a href="mailto:br.qld@itsa.gov.au">br.qld@itsa.gov.au</a></p>	<p><b>New South Wales and ACT</b> GPO Box 548 Sydney NSW 2001 Facsimile: (02) 8233 7805 Email: <a href="mailto:br.nsw@itsa.gov.au">br.nsw@itsa.gov.au</a></p>
<p><b>Western Australia</b> GPO Box H536 PERTH WA 6841 Facsimile: (08) 9268 1218 Email <a href="mailto:br.wa@itsa.gov.au">br.wa@itsa.gov.au</a></p>	<p><b>Victoria and Tasmania</b> Level 16, 300 La Trobe Street, MELBOURNE VIC 3000 Facsimile: (03) 8631 4940 Email <a href="mailto:br.vic@itsa.gov.au">br.vic@itsa.gov.au</a></p>
<p><b>South Australia</b> GPO Box 2604 ADELAIDE SA 5001 Facsimile: (08) 8112 4304 Email <a href="mailto:br.sa@itsa.gov.au">br.sa@itsa.gov.au</a></p>	