

# Inspector-General Practice Direction 1

## IGPD 1 – Independence of personal insolvency practitioners

### 1. Introduction

1.1 The purpose of this document is to outline the Inspector-General in Bankruptcy's expectations relating to the importance of personal insolvency practitioners ensuring that they maintain independence and the perception of independence.

#### Who this direction applies to

1.2 This practice direction applies to:

- registered trustees; and
- registered debt agreement administrators.

The above are collectively referred to as personal insolvency practitioners (unless otherwise stated).

1.3 All personal insolvency practitioners are expected to observe the principles and guidance outlined in this practice direction to ensure compliance with their statutory duties and conformance with best practice standards.

#### What this direction applies to

1.4 This practice direction applies to any behaviour, conduct, arrangements, transactions or relationships which may compromise the independence of personal insolvency practitioners and affect their ability to effectively perform their functions or duties under legislation, professional codes or best practice standards.

1.5 It covers any activity which personal insolvency practitioners may engage in before or during appointment to a:

- bankruptcy
- controlling trusteeship
- personal insolvency agreement, or
- debt agreement

which requires the exercise of professional judgment to ensure that they act honestly, impartially and avoid conflicts of interest.

## 2. Regulatory framework

### Legislation

2.1 The legislative framework regulating the conduct of personal insolvency practitioners is found within the:

- [Bankruptcy Act 1966](#) (the Act) including the [Insolvency Practice Schedule \(Bankruptcy\)](#) (the Schedule)
- [Bankruptcy Regulations 1996](#) (the Regulations)

- [Insolvency Practice Rules \(Bankruptcy\) 2016](#) (the Rules)

2.2 The Act, Schedule, Regulations and Rules impose a range of duties on personal insolvency practitioners which require their independence.

### **Standards for registered trustees**

2.3 The Rules impose specific standards for registered trustees to ensure that:

- they act at all times according to their powers and duties under the Act, Regulations and Rules and bankruptcy law practice generally; and
- carry out administrations consistently at a high level.

2.4 Division 42 of the Rules prescribes standards for registered trustees to:

- act honestly and impartially (section 42-10)
- communicate objectively (section 42-15)
- notify relevant parties of actual or potential conflicts of interest and take appropriate steps to avoid them (section 42-20)
- act reasonably when determining ownership of (or an interest in) assets and claim only the amount(s) that fairly represent divisible property (42-45)
- obtain advice from an independent expert when required to assess the value of divisible property likely to have a material impact on the administration (42-50)
- act independently and impartially in undertaking transactions and dealings for the disposal of property (section 42-55)<sup>1</sup>

2.5 The duties to act honestly and impartially are especially important whenever registered trustees exercise powers under the Act including:

- discretionary powers in section 134(1)
- investigatory powers in sections 19AA, 6A(3), 77A, 81, 139U
- recovery powers in sections 129, 120-122, 128B, 128C

2.6 The standards apply to registered trustees, however the Official Trustee will, where appropriate observe these standards<sup>2</sup>.

2.7 The standards in Division 42 of the Rules also apply to controlling trustees.

<sup>1</sup> Also note controlling trustees have a duty to exercise powers and perform functions in an impartial and independent manner under paragraph 190A(i) of the Act.

<sup>2</sup> [Inspector-General Practice Direction 9 - Standards for trustees and controlling trustees.](#)

### **Declaring relationships**

2.8 Section 189A of the Act requires a controlling trustee to make a written declaration stating whether they (or their related entity) are related to the debtor. A copy must be provided to the Official Receiver and to each of the creditors.

2.9 In addition, paragraph 70-30(3) of the Rules imposes a duty on registered trustees to give a written declaration to creditors at the same time as they first communicate with them about a regulated debtor's estate stating:

- whether they, a partner<sup>3</sup>, or a body corporate<sup>4</sup> (or associate of that body corporate) has had a relationship with the regulated debtor (or their former trustee) within the preceding 24 months; and
- if so, reasons for believing that none of those relationships result in them having a conflict of interest or duty<sup>5</sup>.

2.10 Where a declaration of relevant relationships is given to creditors and it becomes out of date or the trustee becomes aware of an error, subsection 70-51(2) of Rules requires that a replacement declaration be given to creditors as soon as practicable.

## Offences

A trustee who agrees or offers to give to another person any valuable consideration to secure their own appointment or nomination as a trustee of an estate, or to secure or prevent the appointment or nomination of someone else as a trustee to the estate, commits an offence<sup>6</sup>.

3 If the firm is a partnership.

4 If the firm is a body corporate.

5 A similar duty applies under subsection 75-265(2) of the Rules to an incoming trustee appointed by resolution of creditors in place of an outgoing trustee.

6 Section 60-21 of the Schedule

## Voting entitlements

2.11 Paragraph 75-100(2)(b) of the Rules imposes a duty on trustees when deciding whether a creditor is entitled to vote at a meeting of creditors to act impartially and independently without regard to the regulated debtor's wishes.

## Guidelines for registered debt agreement administrators

2.12 Guidelines made under section 186Q of the Act<sup>7</sup> prescribe duties which registered debt agreement administrators must comply with to effectively perform their functions.

2.13 Central to these are the duties of registered debt agreement administrators to:

- ensure debt agreement proposals are correctly certified<sup>8</sup>
- the debtor's property is dealt with as specified in the debt agreement
- not to be reimbursed for expenses incurred as administrator unless they are of a kind specified in the agreement
- handle and properly account for money and keep books and records of the administration
- consider whether a debtor has committed an offence against the Act and refer to the Inspector-General or to a relevant law enforcement authority any evidence of such an offence.

2.14 Implicit in these duties is that registered debt agreement administrators act honestly and impartially when dealing with debtors, creditors and AFSA<sup>9</sup>.

2.15 For a debt agreement proposal to be properly certified, registered debt agreement administrators must first:

- provide prescribed information to debtors about alternative means of dealing with financial difficulty
- have reasonable grounds to believe the debtor is likely to be able to discharge their obligations under the debt agreement as and when they fall due,
- make reasonable enquiries about a debtor's financial situation
- take reasonable steps to verify the debtor's financial situation
- have reasonable grounds to believe all information in the debtor's statement of affairs and explanatory statement to the proposal has been set out and properly disclosed to creditors
- where a broker has referred a debtor to the administrator, set out the details of their relationship and any payments made, or to be made, to the broker, and
- where a related entity of the administrator is an affected creditor, specify the name and nature of the relationship with the affected creditor.

2.16 For debt agreement proposals lodged on or after 27 June 2019, an administrator who gives, agrees or offers an affected creditor an incentive for voting on a proposal, variation or termination, commits an offence<sup>10</sup>.

7 Guidelines relating to the registration and cancellation of a registered debt agreement administrator

8 See [Inspector-General Practice Direction 13 - Debt agreement administrators' guidelines to certification requirements](#).

9 See [Inspector-General Practice Guideline 1 – Guideline relating to advertising and marketing of debt agreements](#).

10 Section 185EC(6) of the Act

## Case law

2.17 This legislative framework is supported by relevant legal cases in which courts have considered and determined whether insolvency practitioners (both personal and corporate) have failed to act honestly, impartially or avoid conflicts of interest. A selection of relevant decisions is included below under section 6. Related information.

2.18 The relevant test for independence has been considered and determined by the courts as whether a fair minded observer:

- aware of the statutory duties which an insolvency practitioner must discharge impartially and without influence by relationships in a given situation<sup>11</sup>
- might reasonably apprehend that the insolvency practitioner might not be impartial<sup>12</sup>.

2.19 The duty of registered trustees to be independent is closely related to their role as fiduciaries and recognition as officers of the Court<sup>13</sup>.

2.20 Their special position as custodians of regulated debtors' property on behalf of creditors imposes common law duties on registered trustees to use care and skill and act in good faith when they administer a personal insolvency.

2.21 Given their similar function as custodians of property, registered debt agreement administrators are similarly regarded as fiduciaries at common law with duties owed to both debtors and creditors for whom they act.

11 *McCann v Mawson Restructures and Workouts Pty Ltd, in the matter of Walton Construction (Qld) Pty Ltd (In Liq)* [2016] FCA 1152.

12 Full Federal Court in *Re Walton Construction Pty Limited (In Liquidation); ASIC v Franklin* [2014] FCA 68.

13 See [Inspector-General Practice Direction 14 – Proper performance duties of a bankruptcy trustee](#) (para 4.1 - 4.23) and [Inspector- General Practice Direction 12 – Controlling trustees' roles and duties](#) (para 7.1 - 7.6).

## Professional codes and bodies

2.22 Personal insolvency practitioners who are members of professional bodies may also be subject to codes of conduct that regulate their activities.

2.23 The main professional bodies representing personal insolvency practitioners in Australia are:

- the Australian Restructuring Insolvency and Turnaround Association (ARITA)
- the Association of Independent Insolvency Practitioners (AIIP)
- the Personal Insolvency Professionals Association (PIPA).

2.24 Two of these bodies have a professional code of practice which governs the conduct of their members and provide specific guidance on independence:

- [ARITA Code of Professional Practice](#)
- [PIPA Code of Professional Practice](#)

2.25 Many personal insolvency practitioners are also a member of the main professional bodies representing accountants in Australia:

- CPA Australia (CPAA)
- Chartered Accountants Australia and New Zealand (CAANZ)
- Institute of Public Accountants (IPA).

2.26 These professional accounting bodies also have professional codes of practice which govern the conduct of their members who are also bound by the code of ethics and standards set by the national Accounting Professional and Ethical Standards Board (APESB).

2.27 APESB provides specific guidance to members of CPAA, CAANZ and IPA on independence within the below standards:

- [APES 110 Code of Ethics for Professional Accountants \[PDF\]](#)
- [APES 330 Insolvency Services \[PDF\]](#)

2.28 CPAA, CAANZ and IPA comprise the Joint Accounting Bodies in Australia which have also issued guidance to their members on independence in the:

- [Joint Accounting Bodies Independence guide \[PDF\]](#)

2.29 This guide outlines the fundamental principles which members must observe and comply with:

- a. Integrity

- b. Objectivity
- c. Professional competence and due care
- d. Confidentiality
- e. Professional behaviour.

2.30 The guide states that:

*Independence requires an individual member to act with integrity and to exercise objectivity and professional scepticism. Members are obliged to be straightforward and honest in professional and business relationships and not to allow their judgement to be compromised by bias, conflict of interest or the undue influence of others.*

*Independence comprises both:*

- *Independence of mind*
- *Independence in appearance*

*This means that members must not only be independent in action but they must also be perceived, by an informed third party, to be independent. This is particularly relevant when providing assurance services.*

2.31 The Inspector-General supports the position stated above as a set of principles that all personal insolvency practitioners should observe and comply with and which are consistent with the legal duties imposed under the Act, Regulations and Rules.

### **3. Inspector-General's expectations**

3.1 The expectations of the Inspector-General accord with the professional codes of practice regarding independence of personal insolvency practitioners.

3.2 The Inspector-General expects all personal insolvency practitioners to ensure that they comply with their legislative duties relating to independence, together with relevant case law, codes of professional practice and best practice standards.

The Inspector-General will investigate and (where warranted) discipline personal insolvency practitioners who breach their legal duties under the Act, Regulations or Rules or engage in conduct which undermines the integrity of the personal insolvency system.

A decision by the Inspector-General or committee to discipline<sup>14</sup> a personal insolvency practitioner for failure to act honestly, impartially or avoid conflicts of interest will depend on:

- a. the nature of the breach
- b. the seriousness of the effect of a failure to comply, including the impact on a particular administration or individual, and
- c. their performance and compliance history and whether they have previously failed to comply when able to.

## 4. Examples

4.1 Personal insolvency practitioners might encounter independence issues in various contexts. Common examples which arise in practice and serve as useful guidance for personal insolvency practitioners are outlined below.

### Third party referrals

4.2 It is accepted practice for personal insolvency practitioners to accept appointments from third parties such as solicitors, accountants (including other insolvency practitioners), creditors, brokers and financial counsellors.

4.3 However, third party referrals may compromise the independence of personal insolvency practitioners whenever there is an express arrangement or implicit expectation that:

- payment will be provided
- services will be procured<sup>15</sup>, or
- actions will/will not occur<sup>16</sup>

4.4 Such arrangements (whether periodic or ongoing in nature) undermine the independence of personal insolvency practitioners by creating actual or perceived conflicts of interest.

4.5 Every referral will not create an independence issue of itself. However personal insolvency practitioners must take care not to make arrangements which might affect their impartiality or create that impression in a reasonable minded observer.

4.6 Relevant factors to consider include (but are not limited to) the:

- frequency and financial value<sup>17</sup> of referrals accepted and services procured from third parties; and
- nature and extent of any undertakings sought by or concessions given to third party referrers.

4.7 Although not exhaustive, the above are useful indicators that courts have considered when asked to review conduct of registered trustees (and liquidators) about their independence or conflicts of interest.

4.8 Another aspect of third party referrals which personal insolvency practitioners must be alert to are untrustworthy advisors. Certain advisors target debtors whose businesses or individual circumstances may be in financial distress and suggest that they take actions which are unethical or illegal (e.g. suggest or arrange the transfer of assets to another person or company without payment). These actions can lead to serious consequences for debtors including large fines or even imprisonment.

4.9 The Inspector-General expects personal insolvency practitioners to undertake appropriate enquiries of any “untrustworthy advisors” from whom they intend to accept referrals to ensure that:

- they do not provide unqualified (and possibly) unlawful advice to debtors

- they do not facilitate any voidable transfers to related entities for debtors

4.10 Where a personal insolvency practitioner engages with an untrustworthy advisor, either knowingly or unknowingly, the association will attract the attention of R&E. The Inspector-General expects and will monitor the conduct and decisions of personal insolvency practitioners in an administration to be independent, free from the influence of an untrustworthy advisor. Failure to maintain independence from this influence could result in disciplinary sanctions, including cancellation of registration.

4.11 It is an offence for a trustee to agree or offer to give to another person any valuable consideration with the intention of securing their own appointment or nomination as a trustee of a regulated debtor's estate; or securing or preventing the appointment or nomination of a third person as a trustee of an estate. There is a serious penalty for committing such an offence.

15 For example, engaging the solicitor acting for a petitioning creditor to pursue legal action to recover property.

16 For example, selling assets or pursuing voidable transactions.

17 Typically calculated based on remuneration earned from appointments.

## Professional relationships

4.12 It is common for personal insolvency practitioners to develop professional relationships in the ordinary course of their business.

4.13 When they realise assets, registered trustees often engage agents such as:

- real estate agents
- valuers
- auctioneers
- lawyers
- insurance brokers
- stock brokers
- stock and station agents
- advertisers

4.14 Registered debt agreement administrators often engage brokers who advertise debt agreements or develop networks with providers of debt help and financial management services.

4.15 Professional relationships can adversely affect the independence of personal insolvency practitioners where they create conflicts of interest or give rise to potential breaches of fiduciary duties. This might include:

- services supplied in a personal insolvency administration by an entity in which the appointee has an interest<sup>18</sup> e.g. a registered trustee engages a solicitor (who is his brother) to recover a voidable transaction
- a supplier of services used by an appointee in all personal insolvency administrations without ensuring value for money e.g. a registered trustee uses a preferred auctioneer to sell any vested bankruptcy assets without reference to the costs of realisation

- marketing done on behalf of a personal insolvency practitioner to generate leads by promoting services to debtors which are misleading e.g. a broker who advertises debt agreements as 'debt consolidation'<sup>19</sup>
- a supplier of services offers inducements to a personal insolvency practitioner expecting to be engaged on future appointments e.g. a registered trustee who regularly accepts invitations to VIP style events.

4.16 It is important to recognise and understand that professional relationships are different to one-off commercial transactions. Both involve the exercise of judgment to ensure probity but professional relationships are often more subtle and complex to manage.

4.17 In this context, personal insolvency practitioners should consider whether a professional they might engage may themselves have an actual or perceived conflict of interest. For example, a trustee who intends to realise a residential unit in a bankruptcy arising from unpaid body corporate fees should consider whether engaging solicitors who act for the petitioning creditor owners corporation to do the conveyance might represent either an actual or perceived conflict of interest.

4.18 Personal insolvency practitioners are exposed to pressures from various sources: debtors, creditors, courts, regulators, professional bodies, other professionals, competitors and the general public. Effectively balancing these can be challenging and lead some to take risks with their professional integrity and reputation.

4.19 The Inspector-General expects personal insolvency practitioners to be aware of these risks and seek appropriate guidance from relevant professional bodies<sup>20</sup> of which they are members if and when they have independence concerns.

<sup>18</sup> An interest may be direct or indirect and financial or personal in nature.

<sup>19</sup> See [Inspector-General Practice Guideline 1 – Guideline relating to advertising and marketing of debt agreements](#) (para 5.1 to 5.12).

<sup>20</sup> For example, CAANZ has a professional standards team to support members with practice issues, queries and ethics concerns: [www.charteredaccountantsanz.com/member-services/mentoring-and-support/professional-and-ethical-support](http://www.charteredaccountantsanz.com/member-services/mentoring-and-support/professional-and-ethical-support).

## **Associated or related entity appointments**

4.20 Personal insolvency practitioners must be careful to avoid potential conflicts of interest involving appointment to an associated or related entity<sup>21</sup>.

4.21 An associated entity includes a person or private company that is associated with a debtor or bankrupt to which a personal insolvency practitioner may be appointed.

4.22 A related entity includes:

- a relative of the debtor or bankrupt
- a company of which the debtor or bankrupt (or their relative) is a director
- a beneficiary under a trust of which the debtor or bankrupt (or their relative) is a trustee
- a trustee of a trust under which the debtor or bankrupt (or their relative) is a beneficiary
- a member of a partnership of which the debtor or bankrupt (or their relative) is a partner.

4.23 Registered trustees may encounter particular risks of actual or perceived conflicts from accepting an appointment (whether sequential or concurrent) to a debtor/bankrupt and an associated or related entity.

4.24 Issues usually arise when there are disputes between parties over:

- interests in vesting property (e.g. between spouses, siblings, parents, children)
- voidable transactions (e.g. loan or gifts to an associated entity or related entity)
- creditor claims to participate in voting and/or entitlement to dividend payment.

4.25 Registered trustees should anticipate and (wherever possible) decline appointments likely to impair their ability to perform duties and exercise powers to resolve potential disputes or claims without actual or perceived conflicts of interest.

4.26 The Inspector-General expects registered trustees to exercise special caution to minimise such risks **before they arise** to avoid potentially costly and time consuming action **after the fact** (e.g. applying to court for directions, voluntary resignation or involuntary removal by creditors, court reviews into conduct and/or Inspector-General disciplinary proceedings).

4.27 Before accepting an appointment, registered trustees must sign a Trustee Consent to Act Declaration (Form 12) under section 156A of the Act. That form includes a declaration of relationships which requires disclosure of whether the registered trustee (or their related entities) are related to the debtor they consent to act for.

4.28 Registered trustees should be aware that failure to declare the existence of relationships (or properly disclose) may expose them to a potential:

- order of the court that they cease to be trustee of an estate under paragraph 90-15(3)(b) of the Schedule
- offence referral under subsection 263(1)(d) for making a false declaration
- disciplinary action under section 40-55 of the Schedule.

21 Associated entity and related entity are both defined in section 5 of the *Bankruptcy Act 1966*.

## **Pre-appointment dealings**

4.29 Personal insolvency practitioners must take care when accepting appointments where they have had prior professional dealings with debtors. This typically includes situations where they may have:

- provided advice to the debtor on personal or business asset structures or financing
- provided advice as expert witness in a legal action involving the debtor
- acting for the debtor in a dispute e.g. negotiated informal arrangement with creditors

4.30 While meeting with a debtor to discuss their personal insolvency options before a formal appointment is not likely to create an actual or perceived conflict, the examples cited above may do so.

4.31 Before accepting an appointment in such circumstances, the personal insolvency practitioners should ask themselves whether the nature and extent of prior professional dealings with the debtor will (or may):

- impede or prevent them properly performing their duties or exercising their powers if appointed, or
- undermine confidence of creditors and/or the general public by a perceived conflict if appointed.

4.32 The Inspector-General expects that where the answer to either question is yes (and there is no reasonable and practicable way to mitigate these issues) that the personal insolvency practitioner will decline the appointment.

## 5. Conclusion

5.1 The provisions of the Act, Schedule, Regulations and Rules impose specific duties on personal insolvency practitioners to act with integrity and maintain professional independence when administering personal insolvencies.

5.2 These duties are supplemented by the common law, which recognises personal insolvency practitioners as fiduciaries who must use care, skill and act in good faith in the interests of debtors and creditors.

5.3 Personal insolvency practitioners who are members of professional bodies must also comply with relevant codes of conduct. Central to the codes of conduct of the major insolvency and accounting bodies is the requirement to maintain professional independence.

5.4 The Inspector-General expects all personal insolvency practitioners to observe and comply with their legal obligations and uphold the highest practice standards to maintain public confidence and integrity in the personal insolvency system.

5.5 Personal insolvency practitioners must ensure that they exercise appropriate professional judgement at all times to ensure that their conduct, arrangements and relationships do not compromise their professional independence.

5.6 For more information please contact AFSA Regulation and Enforcement at [regulation@afsa.gov.au](mailto:regulation@afsa.gov.au) or via [1300 364 785](tel:1300364785).

## 6. Related information

### Information sheets

[ASIC INFO 84 – Independence of external administrators: a guide for creditors \[PDF\]](#)

AFSA/ASIC/ARITA – [Personal bankruptcy and liquidation of a company: Information for people in business and their advisers](#)

### Regulatory guides

[AFSA IGPS 1 – Regulatory framework](#)

[AFSA IGPS 2 – Regulation of bankruptcy trustees and debt agreement administrators](#)

[AFSA IGPD 9 – Standards for trustees and controlling trustees](#)

[AFSA IGPD 12 – Controlling trustees' roles and duties](#)

[AFSA IGPD 13 – Debt agreement administrators' guidelines to certification requirements](#)

[AFSA IGPD 14 – Proper performance of duties of a bankruptcy trustee](#)

[AFSA IGPS 10: Complaint handling process for complaints against bankruptcy trustees and debt agreement administrators](#)

## Legislation

- [Bankruptcy Act 1966](#)
- [Bankruptcy Regulations 1996](#)
- [Insolvency Practice Rules \(Bankruptcy\) 2016](#)

## Cases

- *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63
- *IND Energy Inc (BVI) v Langdon & Rocke as administrators of Petro Ventures International Ltd (Administrators Appointed)* [2014] WASC 364
- *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85
- *BC39 Pty Ltd v Rambaldi, in the matter of Wharington (Bankrupt)* [2014] FCA 1076
- *In the matter of Anglican Development Fund Diocese of Bathurst Board (Receivers and Managers appointed)* [2015] NSWSC 6
- *In the matter of Sutton-Ford Pty Limited (in liq)* [2015] NSWSC 1552
- *Scott (Trustee) v Icicek Holdings Pty Limited, in the matter of Icicek Holdings Pty Limited* [2015] FCA 1387
- *Bank of Queensland Ltd & Anor v Ross Auto Auctions Pty Ltd (in liq) (Receivers and Managers appointed) & Anor* [2016] QSC 19
- *Leroy as trustee of the bankrupt estate of Mogilevsky v Mogilevsky* [2016] FCCA 1742
- *In the matter of 77738930144 Pty Limited (in liq) (formerly Commercial Indemnity Pty Ltd)* [2017] NSWSC 452

## Professional codes

- [ARITA Code of Professional Practice](#)
- [PIPA Code of Conduct](#)
- [APES 110 Code of Ethics for Professional Accountants \[PDF\]](#)
- [APES 330 Insolvency Services \[PDF\]](#)
- [Joint Accounting Bodies, Independence guide, \(4th edn\), 2013 \[PDF\]](#)

## Articles

- S Kingston, *Pre-insolvency advisors and other relationships*, 2016, <https://www.maddocks.com.au/pre-insolvency-advisors-relationships/>
- ASIC/CPA, *At what cost? ASIC is concerned by the proliferation of pre-insolvency advisers*, 2015 [www.intheblack.com/articles/2015/11/05/insolvency-at-what-cost](http://www.intheblack.com/articles/2015/11/05/insolvency-at-what-cost)
- ASIC, 'Disrupting untrustworthy pre-insolvency advisors and improving information for creditors', *Australian Restructuring Insolvency & Turnaround Association Journal*, vol. 28 no. 3, 2016
- Justice PW Young AO, 'Fiduciary obligations and trustees in bankruptcy', *Australian Law Journal*, vol. 83 no. 4, 2009

