

Inspector-General Practice Statement 11

IGPS 11 - Monitoring and inspection of bankruptcy trustees and debt agreement administrators

1. Introduction

1.1 The regulatory responsibilities of the Inspector-General in Bankruptcy are aimed at ensuring high national standards of bankruptcy practice and procedure. These functions are undertaken by the AFSA Regulation and Enforcement division (R&E), which oversees registered trustees in private practice, AFSA's trustee function (the Official Trustee), registered debt agreement administrators and solicitors who act as trustees in personal insolvency agreements. AFSA Regulation and Enforcement R&E acts independently from the Official Trustee and reports directly to the Chief Executive and Inspector-General in Bankruptcy.

1.2 One strategy employed by AFSA Regulation and Enforcement R&E staff, as delegates of the Inspector-General, is to monitor the standard of bankruptcy trustees and debt agreement administrators and their administrations through an annual inspection compliance programme program. This may include for example:

- an annual inspection of administrations, systems and practices
- attending some meetings of creditors
- reviewing the quality of trustee decisions
- targeted or strategic investigation compliance monitoring
- reviewing the complaints made against the practitioner in the period
- surveying debtors and creditors.

1.3 This practice statement articulates the Inspector-General's practices and expectations when monitoring practitioners through the annual programme program of inspection of administrations, systems and practices and attending meetings of creditors.

2. Inspection of administrations and systems

2.1 The purpose of AFSA Regulation and Enforcement's R&E's annual inspection programme program is to examine the quality of administration by practitioners with particular emphasis on:

1. compliance with legislation and common law requirements
2. proper performance of statutory and fiduciary duties and functions in accordance with legislation and standards
3. financial records, billing and money handling practices
4. control and system weaknesses and other areas of risk.

2.2 This is a pro-active process aimed at providing constructive feedback to practitioners to improve compliance and practice. However, it should be recognised that on occasion issues may be identified that warrant further investigation and the adoption of more reactive strategies, including disciplinary proceedings, to obtain compliance and remedial action.

Fraud control issues

2.3 An important benefit of this ~~programme~~program is that, while an inspection of a sample of administrations cannot be expected to identify all ~~compliance issues~~instances of ~~defalcation~~, it is a valid preventative control to minimise the risk of fraud.

2.4 Accordingly, ~~AFSA Regulation and Enforcement~~we ~~has~~yes built into ~~in our~~its inspection ~~programme~~program tests of the systems and controls of ~~trustees~~practitioners. The following aspects of ~~AFSA Regulation and Enforcement's~~the annual inspection ~~programme~~program should be noted:

- the ~~AFSA Regulation and Enforcement~~file sample is selected on the basis of risk and the spread of types of estates. At least one file is randomly selected. computer-generated and, whilst targeted to higher risk estates, includes a sizable computer based random sample. As a consequence any file, including one inspected in previous periods, could be selected
- the random sample can include estates where no assets were shown as realised and no funds recorded and could therefore include estates where there may have been deliberate omissions
- estates with assets, contributions or dividends are closely examined and the transactions followed through the course of the administration to final payments/dividend. This may well include tracing a series of cheques to the accounts to which they are presented
- on a sample basis, contributions may be reconciled with the bankrupt's payment records
- ~~AFSA Regulation and Enforcement~~we may contact both creditors and debtors on a sample basis (and in some cases may contact banking institutions) to verify transactions and that claims are properly recorded and authentic
- practitioners will be required to reconstruct any files unable to be located and ~~AFSA Regulation and Enforcement~~we will treat the inability to do so within a reasonable time frame as a serious breach of duty.

2.5 As an added deterrent to possible employee fraud it is the Inspector-General's expectation that practitioners will inform their employees of these aspects of the ~~AFSA Regulation and Enforcement's~~inspection ~~programme~~program.

Arranging the inspection

2.6 ~~AFSA Regulation and Enforcement~~R&E aims to provide practitioners with at least seven days' notice of the date of its attendance for inspection. A mutually convenient date and time to inspect will be coordinated with the practitioner. At this time the practitioner will be requested to complete and provide either a summary of documents evidencing their systems and controls or an update of changes since the ~~date of~~last inspection.

2.7 As a control to minimise the incidence and risk of fraud, ~~AFSA Regulation and Enforcement's~~our policy regarding the timing of notice provided to ~~trustees and debt agreement administrators~~practitioners is to provide details of the specific files to be inspected 24 hours before the commencement of the inspection. If ~~AFSA Regulation and Enforcement~~we ~~identify~~ies older files that may be archived, 48 hours' notice will be provided to allow for file retrieval.

2.8 This practice is used with all practitioners including the Official Trustee. ~~AFSA Regulation~~has previously identified fraud where the provision of a longer ~~preparation notice period~~time frame ~~adopted~~provided a trustee's employee the time to remove, alter and forge records prior to the inspection.

2.9 AFSA is required to comply with workplace health and safety legislation in providing its employees with a healthy and safe work environment. With this in mind and to ensure both privacy and efficiency in undertaking inspections, practitioners are requested to provide either an office with a workstation and office chair or a workstation and office chair with access to a power point and some level of privacy ~~and to ensure some privacy with access to a power point.~~

Determining the ~~sample and~~ scope of the inspection

2.10 ~~In determining the size of the sample of files to inspect, AFSA Regulation and Enforcement will undertake a risk assessment of the practice. Practitioners are rated in accordance with the quality of their systems and controls and the prior quality of practices and procedures. Since 2018, R&E generally use a standard number of files to inspect to ensure a minimum number of files are included in the sample size.~~

2.11 An evaluation is undertaken of a practitioner's systems and controls during the first inspection or after obtaining this information from the practitioner via a questionnaire, in the first year of inspection and details are maintained as part of the practitioner risk profile. This is updated as new data is made available and specifically after each inspection. This data will form part of information used to select the areas to examine during an inspection, on the AFSA Regulation and Enforcement practitioner file. During the second and third years of inspection the evaluation is updated. During the fourth year of inspection a complete reevaluation will be undertaken to ensure any significant changes have been documented and included in the assessment.

~~2.12 Key elements of the practitioner's risk assessment that will be used to determine the size and scope of the sample include:~~

~~the structure of firm~~

~~the qualifications and experience of support staff~~

~~an assessment of systems and controls~~

~~their history of justified complaints~~

~~their prior inspection results~~

~~the quality of prior decisions subject to Inspector General review (for trustees only).~~

~~2.13 The rating defines the minimum number of administrations to be sampled and will also be used to identify issues or the attributes AFSA Regulation and Enforcement wishes to more closely examine.~~

2.14² The second element of the sampling is the computerised targeted selection of the files to inspect. ~~AFSA Regulation and Enforcement's~~Our methodology is based on a number of risk attributes. For example, attributes in a Part X personal insolvency agreement or a Part IV bankruptcy might include:

- estates where the extent of assets realised is greater than a certain amount
- estates where the percentage of remuneration is greater than a certain amount
- estates where dividends have been paid
- estates with high amounts of liabilities

- Part Xs with a low percentage dividend.

2.153 While the Part IX sample is largely random in nature, some attributes may be examined. For example, ~~AFSA Regulation and Enforcement will include in its inspection sample~~ ~~administrations~~ may be selected where:

- the debt agreement proposal (DAP) has been rejected or cancelled by AFSA's Debt Agreement team (DAI)
- ~~practice queries were raised on processing of the DAP by the DA~~
- variations and terminations in the first 6-12 months have occurred
- the fees charged are outside the normal range.

2.164 It should be noted that in every inspection there will also be some files which will be randomly chosen. These may display no identifiable attributes and may include estates previously examined.

Undertaking the inspection

2.1715 The inspection commences with an entrance interview with the registered practitioner. This interview is an opportunity for the practitioner to discuss matters or technical areas of interest with the ~~AFSA Regulation and Enforcement~~R&E inspector, particularly if there is an area where the practitioner seeks additional feedback. The practitioner's response and documents provided from ~~to~~ the systems and controls questionnaire will also be discussed at the entrance interview. It is therefore important that the practitioner is present at this interview.

2.186 It is preferable that queries identified during the inspection be informally discussed and, where possible, clarified with the practitioners or their nominee during the inspection. To minimise any disruption to workflow, the practitioner should outline the protocols they require of ~~AFSA Regulation and Enforcement~~our staff, including who ~~AFSA Regulation and Enforcement~~inspectors should contact for clarification of issues during the ~~interview~~inspection. If the practitioner feels that this may be too disruptive, arrangements can be made to collate queries for discussion at the exit interview or for response at a later time. ~~responses either at that time or later.~~

2.197 ~~AFSA Regulation and Enforcement~~Our inspectors are required to maintain a professional, independent and courteous approach. If during the inspection a practitioner is concerned as to the conduct of the officer or the inspection process they should raise these concerns directly either with the regional/local AFSA Regulation ~~and Enforcement~~ Director or the Regulation and Enforcement National Manager.

2.2018 If a possible error is found (see the 'Reporting of non-compliance' section below) further testing may be carried out to determine whether the error is a one off occurrence, a systematic problem or ~~identifies~~ if it identifies a weakness in supervision or training.

2.2119 ~~AFSA Regulation and Enforcement~~We will inspect each selected estate or administration for compliance. ~~We~~ will then ~~compile and~~ analyse and compile the results to assess whether there are systemic issues or control weaknesses.

2.220 The inspection ~~at the practitioner's office~~ will be completed by way of exit interview. Feedback will be given about the quality of the administrations inspected. Any preliminary errors and/or observations noted and discussed throughout the inspection will be raised at the exit interview and the practitioner will be given the opportunity to comment. ~~AFSA Regulation and Enforcement~~We will also provide comments about any issues identified by

the practitioner at the entrance interview plus any issues of best practice where greater efficiencies could be achieved.

2.231 Records are made and retained of discussions and comments made both at the entrance and exit interviews.

Reporting of non-compliance

2.242 In providing feedback and to make overall conclusions as to the standard of practice, any identified areas of non-compliance—referred to as errors—are compiled and reported. ~~Errors are classified by the~~ based both on the level of seriousness (the category) and ~~their descriptive nature~~ by a descriptor e.g. [certification issues](#) [conflict of interest](#).

2.253 If any breach or non-compliance with the law is identified, ~~AFSA Regulation and will Enforcement~~ we will consider when determining the category of error:

- a. the nature [and circumstances](#) of the breach
- b. the seriousness of the effect of a failure to comply, including the impact on a particular estate or individual
- c. ~~whether the practitioner has previously failed to comply and the practitioner's performance history~~ [the relevant prior conduct of the practitioner](#).

2.264 The majority of practitioners are willing to comply and view the inspection ~~programme~~ [program](#) as an opportunity to obtain feedback about the quality of their administrations. However, there is an expectation that practitioners who regularly fail to comply with the Bankruptcy Act and Regulations without a reasonable explanation, who regularly diverge from acceptable practice or ~~their whose~~ behaviour/conduct brings the integrity of the profession ~~into~~ [disrepute](#), will be subject to disciplinary action.

2.275 To assist in assessing the seriousness and relevant regulatory response and to alert practitioners of the issues and possible repercussions, non-compliances are classified as either Category A, B or C depending on the level of seriousness.

Category A

These are very serious errors or breaches requiring immediate attention and include fundamental breaches and lack of controls that are likely to bring into question the integrity of the system. These include any repeat occurrences of serious breaches identified in previous inspections as category B errors. These matters will generally give rise to legal action, referral to fraud investigators, consideration as to whether the practitioner should have their registration cancelled under sections ~~455H~~ [Division 40 of the Insolvency Practice Schedule to the Act \(the Schedule\)](#), 186K or 186L [of the Act](#) or at least have their registration suspended or conditions placed on it. In the case of a solicitor controlling trustee or unregistered [debt agreement administrator](#)¹ this would result in action which could result in them being declared ineligible to act.

Category B

These are serious or systemic errors that will have a material impact on the administration and require timely remedial action. The practitioner should be counselled and timely remedial action taken. These include where in prior inspections breaches were identified and either not remedied or repeated [ed](#) errors are made in the same area.

¹ [Only applicable until 27 September 2019 – all administrators will require registration from that date](#)

Category C

These are one-off practice or procedural errors and non-compliance errors that are not systemic ~~and/or~~ don't have a significant impact on the administration, dividends, creditors, debtors' rights or system integrity but should be brought to the attention of the practitioner and monitored.

Finalising the inspection

2.286 After ~~attending the offices of the practitioner undertaking the inspection (either on site or remotely)~~, ~~AFSA Regulation inspectors~~ may write to a sample of creditors in administrations identified during the inspection where the practitioner's records show a dividend has been paid to creditors. This verification is to ensure that the creditors are bona fide and that they received and banked dividend cheques ~~or payments~~. ~~AFSA Regulation and Enforcement Inspectors~~ may also sample and seek verification from debtors as to the amount paid.

2.297 Once ~~information our analysis and review~~ is complete the practitioner will be provided with an ~~initial draft~~ inspection report seeking comments about any ~~identified~~ issues ~~raised~~. The report will outline the overall results of the inspection, any provisional errors or systemic issues ~~or observations of significance~~ as discussed ~~either at or after~~ the exit interview, ~~any observations of significance discussed at the exit interview~~ and any remedial action that may be required. In cases where serious or systemic issues appear to have been identified, the report will be reviewed and issued by the ~~responsible AFSA Regulation and Enforcement Director~~ ~~responsible~~.

2.3028 The practitioner's response is generally expected within 14 days. The inspection ~~report~~ is ~~completed finalised~~ once the practitioner either responds to the inspection report or elects to not respond. ~~The response will be taken into account in determining the final errors or observations to be made in the final report. This report is then issued to the practitioner to finalise the inspection. This report may require certain remedial action to be undertaken.~~

2.3429 The practitioner's risk ~~assessment rating profile~~ is then updated ~~for future inspections~~ and ~~AFSA Regulation and Enforcement R&E~~ will monitor any specific administrations requiring remedial action.

2.3230 The Inspector-General is bound by the *Privacy Act 1988* and will maintain the confidentiality of individual inspection results unless Privacy Act exceptions apply. Exceptions allowed for under privacy legislation ~~or~~ where AFSA Regulation and Enforcement is able to provide specific details to others include:

- where the information has been obtained for a specific purpose and allowed for under Bankruptcy legislation (~~an example of this would be~~ g. provision of information to Parliament)
- where there has been consent by the practitioner
- information required by a law enforcement agency
- where the information has become public knowledge, for example through publishing of a court or Administrative Appeals Tribunal judgment.

Possible actions when breaches are identified

2.331 There is a range of strategies available to ~~AFSA Regulation and Enforcement R&E~~ ~~should if it determine that~~ a breach of legislation or duty or other non-compliance has occurred (see IGPS1 Regulatory Framework). These ~~strategies~~ relate to all practitioners and include:

- i. guidance—making practitioners aware of systemic problem areas and the correct practice ~~or law individually and collectively~~ that is expected under law – either individually or to all
- ii. individual feedback—by far the most effective means to achieve timely remedial action
- iii. counselling of the practitioner
- iv. changing in the risk classification profile of a practitioner. ~~This will lead to a larger sample of files being selected for future annual inspections~~
- v. formal investigation and reporting under section 12, for example to creditors, police or professional bodies such as ARITA, CAANZ, CPA or Law Council
- vi. special audit of accounts
- vii. imposing penalties for realisations and interest charge breaches
- viii. litigation
- ix. involuntary cancellation or registration proceedings (or illegibility proceedings in the case of unregistered debt agreement administrators² and solicitors who act as controlling trustees). See also IGPS8 and IGPS9 dealing with involuntary cancellation of registration.

3. Attending meetings of creditors

Introduction

3.1 ~~AFSA Regulation and Enforcement~~ R&E staff, as delegates of the Inspector-General, attend a sample of meetings of creditors in both Part X matters and section 73 proposals for all trustees involved as part of the its inspection compliance programme, irrespective of whether there are matters warranting our attendance ~~by AFSA Regulation and Enforcement~~.

3.2 Attendance at a sample of meetings provides ~~AFSA Regulation and Enforcement~~ R&E with an opportunity to monitor and report on the standard of controlling trustees in Part X administrations and trustee meeting practices generally. It also provides an effective and efficient method of monitoring debtors' Part X proposals and addressing creditor queries and perceptions concerns.

3.3 In addition, ~~AFSA Regulation and Enforcement~~ we examines reports sent to creditors under both section 189A and subsection 73(2) rule 75-175 of the Insolvency Practice Rules (Bankruptcy). ~~reports and, if it has~~ any queries or concerns are identified, we will discuss matters with the trustee and may attend the meeting, taking an active role if needed. Often issues are clarified or problem areas rectified before creditors are asked to vote at the meeting.

² [Unregistered debt agreement administrators will require registration from 27 September 2019](#)

3.4 Irrespective of whether a criterion detailed below is evident or not, as part of ~~our AFSA Regulation and Enforcement's~~ normal ~~inspection compliance programme~~ program involving trustees ~~who~~ are conducting meetings, ~~we~~ it will endeavour to attend no fewer than one meeting for every trustee each year.

~~3.5 The issues and performance of trustees in Part X matters generally is analysed by the Inspector-General and reported to Parliament annually.~~

~~3.56~~ The following information documents the criteria that ~~AFSA Regulation and Enforcement is to utilise~~ we use in determining which creditors' meetings are attended and the protocols and processes to be used.

~~3.67~~ The term 'trustee' is utilised in this Practice Statement to represent registered trustees, the Official Trustee and solicitor controlling trustees.

The legislative framework

~~3.87 Subsection 12(4) of the Act~~ Section 75-30 of the Schedule provides authority for the Inspector-General to attend and participate in meetings of creditors. This ~~subsection~~ section states:

*~~(1) The Inspector-General:~~
~~(a) is entitled to attend any meeting of creditors held under this Act; and~~
~~(b)(2) sSubject to section 64ZA, any provision of this Act (including any provision in relation to voting), the Inspector-General is entitled to participate in any such meeting as the Inspector-General thinks fit.~~ of creditors held under this Act.*

Criteria for attending

General criteria

~~3.98 AFSA Regulation and Enforcement~~ R&E may attend meetings where there appears to be an inherent risk to the credibility of the personal insolvency system posed by the administration ~~for~~ which the meeting is being held. This would be the case where:

- i. it is suspected that creditors have not been properly informed, either because the debtor has not provided complete or accurate information or the trustee's report is deficient
- ii. the debtor is high profile with sizeable debts and there is public interest in the matter
- ii. ~~AFSA Regulation and Enforcement~~ R&E has concerns as to the validity of a creditor's claim and the creditor can affect the outcome of the meeting.

Trustee-specific criteria

~~3.409~~ Meetings may also be attended when:

- i. the trustee has a history of poor-quality reports and meeting practices ~~or is inexperienced in chairing meetings~~

ii. the ~~trustee is inexperienced or does not regularly conduct creditors' meetings~~
~~trustee is inexperienced and has not conducted a creditors' meeting in the last 12 months~~

iii. the debtor's statement of affairs or information from some other source indicates:

- ~~the debtor may have been involved in a high income occupation such~~
- as doctor or barrister, but displays little in the way of assets or income, and the offer to creditors is relatively small
- antecedent transactions
- ~~the debtor may have recently possessed substantial income, assets or~~
- ~~that~~ they controls trusts or private companies.

AND the s189A report contains no or inadequate discussion of those issues

AND the trustee has been requested to provide further advice but a satisfactory response has not been provided.

Creditor-specific criteria

3.140 Meetings may also be attended when:

i. a creditor lodges a complaint prior to the meeting

ii. there are related-party creditors whose vote can affect the outcome or there is a high number of creditors who may vote but don't wish to participate in a dividend, particularly where there is a substantial creditor likely to be affected.

Debtor-specific criteria

3.121 Meetings may also be attended when:

i. the debtor has been bankrupt or entered into a Part IX or Part X twice or more in the 10 years preceding the current section 188 authority

ii. the debtor's creditors exceed \$1million and their proposal would provide an insignificant return

iii. ~~AFSA Regulation and Enforcement~~R&E has reason to suspect that full and true disclosure of information was not made.

In ~~regions~~locations where a large number of meetings are held per annum it may not be possible to attend all meetings exhibiting one or more of the above criteria. In these circumstance,s ~~AFSA Regulation and Enforcement~~we will exercise judgement as to which meetings are attended.

Prior to the meeting

~~3.13 Attendance is likely to be in person but may at times occur through teleconference if these facilities are available.~~

3.1234 ~~AFSA Regulation and Enforcement~~R&E staff will inform the controlling trustee or trustee of the meetings it will be attending prior to these meetings. Where possible at least 24 hours' notice will be given. ~~3.13 Attendance is likely to be in person but may at times occur through teleconference if those facilities are available.~~

3.1543 ~~AFSA Regulation and Enforcement~~We will consider whether the issues identified warrant attendance at the meeting or can be resolved through prior discussion (either by telephone, email or direct meeting) and action. ~~AFSA Regulation and Enforcement~~We will consult with the trustee and raise queries and concerns privately prior to the meeting if possible. Every attempt will be made to resolve these issues prior to the meeting. Intervention may lead to a supplementary report or clarification of contentious issues at meeting.

At the meeting

3.1654 Usually two ~~AFSA Regulation and Enforcement~~R&E representatives will attend the meeting although each case will be treated on its merits.

~~3.165 Attendance is likely to be in person but may at times occur through teleconference if those facilities are available.~~

3.176 Should matters not be addressed to ~~AFSA Regulation and Enforcement's~~our satisfaction, the ~~AFSA Regulation~~inspectors may intervene in meetings, raise issues and seek clarification from the debtor, creditors or the trustee.

3.187 Confrontational and/or adversarial behaviour by parties at the meeting will not result in any reaction from ~~AFSA Regulation and Enforcement~~our staff at the time of the meeting. However, where appropriate, feedback will be provided at a later opportunity.

3.198 If questions are to be asked at the meeting by ~~AFSA Regulation and Enforcement~~our staff, every effort will be made to provide a list of those questions to the trustee prior to the meeting. The aim is not to 'ambush' the trustee at the meeting although issues may arise or events occur at the meeting that require immediate ~~AFSA Regulation and Enforcement~~ intervention. This would be the case with non-compliance with the law where immediate remedial action is necessary by the trustee.

3.20-19 A record will be made of those cases where the trustee or their staff has attempted to hinder ~~AFSA Regulation and Enforcement's~~our proper involvement at the meeting. Consideration will be given after the meeting as to whether further action is warranted.

Post-meeting

3.204 As part of ~~AFSA Regulation and Enforcement's~~R&E's educative role, where appropriate feedback will be provided to the trustee on the quality of the meeting processes.

3.212 Any specific patterns of inappropriate meeting processes will be recorded and any requirement for remedial action communicated to the trustee.

4. Conclusion

4.1 To contribute to the transparency of decision-making in the Australian Public Service, this Practice Statement has outlined the proactive ~~annual compliance and inspection~~inspection and meeting attendance strategies used by AFSA Regulation and

Enforcement to monitor the quality of [registered practitioners operating administrations](#) under the Bankruptcy Act. It has set out what AFSA undertakes to do, the basis of related decisions and what AFSA expects of practitioners in these areas.