

Inspector-General Practice Statement 14

IGPS 14 - Referring offences against the Bankruptcy Act 1966 to the Inspector-General

1. Introduction

1.1 The Insolvency Practice Rules (Bankruptcy) (IPR) outline the standards for registered trustees generally and section 19 of the *Bankruptcy Act 1966* (the Act) outlines the duties of a trustee in bankruptcy. Paragraphs 19 (1)(g), (h) and (i) of the Act specifically provide statutory obligations for trustees to enquire into the conduct of a bankrupt to ensure the bankrupt discharges his or her obligations under the Act, to consider whether the bankrupt has committed an offence against the Act and refer to the Inspector-General, or to the relevant law enforcement authority, evidence of any offence by a bankrupt against the Act.

1.2 It is also expected that a trustee will report any offence committed by any person under the Act to AFSA's Regulation and Enforcement ([R&E](#)) Division. For example, a person commits an offence under section 263(1)(d)(iii) if they lodge a proof of debt that is untrue in any particular, or a person commits an offence under section 263(1)(a)(i) if they conceal property of a bankrupt with intent to defeat creditors.

1.3 Trustees are considered officers of the court and have a pivotal role in supporting the integrity of the Australian personal insolvency system. Trustees are therefore expected to discharge their duties in a manner that not only serves the operation of the Act, but also provides equality between creditors and fairness to bankrupts and debtors.

[1.4 From 27 June 2019 registered debt agreement administrators also have a duty to consider whether a debtor has committed an offence against the Act; and to refer to the Inspector-General or a relevant law enforcement agency, any evidence of an offence by the debtor against the Act.¹](#)

[1.45](#) The ~~Regulation and Enforcement~~[R&E](#) Division acts as a delegate of the Inspector-General in Bankruptcy and consequently conducts enquiries and investigations into alleged Bankruptcy Act offences. Where appropriate, ~~Regulation and Enforcement~~[we](#) refers matters to the Commonwealth Director of Public Prosecutions (CDPP) to consider prosecution action. The decision to prosecute is a decision made solely by the CDPP in accordance with the [Prosecution Policy of the Commonwealth](#).

[1.56](#) This document seeks to provide guidance to practitioners on when to submit pre referral enquiries (PRE) and alleged offence referrals to ~~Regulation and Enforcement~~[R&E](#) and to clarify what information may be required to support those enquiries and referrals.

[1.76](#) ~~AFSA Regulation and Enforcement~~[We](#) categorises offences as either 'compliance offences' or 'complex offences' and each type is discussed in detail below.

2. Compliance offences

2.1 Compliance offences are administrative-type bankruptcy offences where an individual, whether bankrupt or not, has failed to comply with a requirement under the Act, the IPR or the *Bankruptcy Regulations 1996* (the Regulations). Typically, these offences involve a failure by a person to provide the trustee or Official Receiver with specific information and/or

[¹ This applies to debt agreements that came into force on or after this date, where the proposal was given on or after that date.](#)

documents and the matter can be dealt with, in the first instance, by way of a letter seeking voluntary compliance.

2.2 Compliance matters that are punishable by a term of imprisonment of six months or less (e.g. matters under sections 139U, 139ZO, 139ZIE, 139ZIEA and 80) have a 12-month statutory period of limitations (See section 15B of the *Crimes Act 1914* (Cth)). This means prosecution action must be commenced within 12 months of the commission of the offence or the matter cannot be actioned by way of a prosecution.

2.3 Due to this time constraint, these matters will not be accepted for investigation if the referral is received within four months of the expiry of the statutory period of limitations. The reason these matters cannot be accepted is that it is probable the statutory period of limitations will expire before prosecution action can be commenced.

2.4 If an offence date cannot be determined or the matter is within four months of the statute of limitation period expiring a trustee should make a written record (file note or similar) to document the decision identifying the potential offence and the reasons why the matter was not referred to Regulation and Enforcement.

Evidence of knowledge of obligations

2.5 To prove the majority of compliance related offences, [Regulation and Enforcement](#) needs to establish that a bankrupt (or person), intentionally or recklessly failed to comply with their obligations. If this cannot be proven to the requisite standard (beyond a reasonable doubt) then there will be insufficient evidence to substantiate the offence.

~~With regard to offences relevant to persons subject to Debt Agreements and offences against s269 this knowledge can usually be established by viewing the prescribed information signed by the debtor, the certification and any file notes or audio files held on the DAA's files detailing their discussions with the debtor about obligations/consequences (if available) all would assist as evidence of the debtors knowledge.~~

2.6. In the case of a bankrupt, this can usually be evidenced by the acknowledgment of the prescribed information in the Debtor's Petition (depending on the offence), an acknowledgment of the bankruptcy first day letter or confirmed receipt of a request for information. Proof of notification in these instances can be supported by the evidence outlined below:-

- an Australia Post delivery confirmation receipt signed by the intended recipient-
- an affidavit of personal service of documents-
- a contemporaneously-made case note detailing a conversation or meeting with the bankrupt or person during which:
 - their obligations are explained
 - directions given
 - documents served and/or
 - the bankrupt or person confirms receipt of correspondence previously sent by mail or email.

2.7 With regard to offences relevant to persons subject to Debt Agreements and offences against section 269 of the Act, this knowledge can usually be established by viewing the prescribed information sheet signed by the debtor, the certification and any file notes or audio files held on the DAA's files detailing their discussions with the debtor about obligations/consequences (if available). ~~a~~ All would form assist as evidence of the debtorsdebtors' knowledge of their obligations at the relevant point in time.

2.78 If this evidence is not available, a trustee or administrator should make a written record (file note or similar) to document the decision identifying the potential offence and the reasons why the matter was not referred to Regulation and Enforcement R&E.

2.89 Notwithstanding that Bankruptcy Regulation 16.01 allows for service of documents by other means, by itself this provision is insufficient for criminal prosecution standards.

Statement of affairs

2.910 Subsection 6A(2) of the Act states that:

'A reference in a provision of this Act referred to in subsection (1) to a statement of affairs is a reference to a statement that:

(a) is in an approved form; and

(b) includes a statement identifying any creditor who is a related entity of the debtor or bankrupt; and

(c) contains a declaration that, so far as the debtor or bankrupt is aware, the particulars set out in the statement are correct.'

2.101 In Wangman v The Official Receiver [2006] FCA 202 the Federal Court also considered the extent to which a statement of affairs needed to be completed before it could be considered to be a valid statement of the debtor's affairs. In his judgment at first instance Jarrett FM stated that a statement of affairs form must carry sufficient information for it to be considered a statement of the debtor's affairs and to assist the trustee in the administration, otherwise it fails to comply with the Act. His Honour dismissed the application and found, inter alia, section 306(1) Bankruptcy Act was of no assistance to the appellant, for the reason that the defects in his Statement of Affairs were so significant that the document could not be said to be a statement of affairs at all. On appeal, Collier J endorsed this finding and noted that "[o]bviously, it would not satisfy s 54(1) for a bankrupt to seek to file a blank statement of affairs in the form approved by the Inspector-General without including the personal information required by the form, because then the form would not be a statement of the bankrupt's personal affairs as required by the section." Further elaboration provided on appeal, citing Nilant v Macchia [2000] FCA 1528, was that "the lack of information inserted by the appellant into the 1998 Statement of Affairs meant that the document was not a valid statement of affairs within the meaning of s 54(1) Bankruptcy Act. It was clearly not a statement of *the appellant's affairs*. This is not to say that *any* omission from a statement of affairs sought to be filed by a bankrupt would render the document so defective as to be invalid for the purposes of the section."

2.142 Due to the operation of subsection 6A(2) of the Act, subsection 54(1), and further supported by the line of authority cited in Wangman v The Official Receiver, the Official Receiver has a discretionary power to either accept or not to accept a statement of affairs as being a valid statement of the debtor's affairs.

2.123 Should a trustee receive a completed or partially completed statement of affairs from a bankrupt, that document (or an original copy of it) should be forwarded to the Official Receiver for consideration as to whether or not it has been properly completed. It is not appropriate for trustees to make a determination as to whether or not such a document is properly completed and therefore acceptable to the Official Receiver. To facilitate this process, statement of affairs forms may be faxed, delivered or posted to any AFSA Registry or emailed to registry@afsa.gov.au.

2.134 It is the Inspector-General's expectation that trustees will ensure any statement of affairs form they receive directly from the bankrupt or the bankrupt's proxy is forwarded to the Official Receiver as soon as practicable. This expectation is in line with the trustee's duty to take whatever action is practicable to try to ensure that the bankrupt discharges all of his or her duties under the Act (refer to paragraph 19(1)(g)). It is also important to ensure that the term of bankruptcy is not extended due to procedural inefficiencies. This gesture of client service will also serve to reduce the number of complaints made to the Regulator alleging that a practitioner allowed a statement of affairs to remain outstanding in order that the trustee might benefit in some way from a longer term of bankruptcy.

2.145 In instances where a trustee does not receive a statement of affairs form, the following criteria should be met before an allegation contrary to section 54 (failure to file a statement of affairs) is referred to Regulation and Enforcement:

- confirmation that the bankrupt has been advised of their bankruptcy status and their legal obligation to file a statement of affairs (see the proof of notification provisions in paragraph 2.4 of this Practice Statement)
- the proposed referral is within 12 months of the date the bankrupt was notified of their bankruptcy and the requirement to file a statement of affairs. However, matters in excess of 12 months will be considered where there are justifiable delays or hindrances in contacting the bankrupt.

2.156 At the conclusion of a prosecution for non-compliance with section 54 of the Act and where the bankrupt continues to fail to file their statement of affairs, Regulation and Enforcement will consider re-prosecuting the matter if the trustee requests in writing that Regulation and Enforcement continue their involvement.

2.167 Failure to refer matters to Regulation and Enforcement that meet the above standards may constitute a Regulation inspection error as a breach of a trustee's paragraph 19(1)(i) duty. If it is considered a breach has occurred, an inspection error will be recorded by Regulation and noted on the trustee's registration record.

77CA notices

2.178 When a statement of affairs has not been filed and the trustee has evidence that the bankrupt is aware of their bankruptcy and the obligation to file a statement of affairs, the trustee may apply for a 77CA notice. When the Official Receiver issues a 77CA notice there will be no expectation that the trustee will refer an allegation of non-compliance with section 54 of the Act to Regulation and Enforcement.

2.189 The provision of information to the Inspector-General in these circumstances will be deemed to comply with the trustee's obligations in accordance with paragraph 19(1)(i) of the Act in relation to referring a bankrupt for not filing their statement of affairs form.

3. Complex offences

3.1 Complex offences are those offences which do not fall within the definition of a compliance offence (administrative) and cannot be resolved by way of a compliance letter. Generally speaking, complex offences are those that involve fraud and/or financial loss. Typical offences within this category may include subsections 263(1), 265(4), 265(5), 265(8), 267(2) and 269(1), and sections 266, 271 and 272.

3.2 To prove the majority of post-bankruptcy complex offences [Regulation and Enforcement](#) we need to establish that the bankrupt or debtor intentionally or recklessly failed to comply with their obligations (see section 2 for further information about evidence requirements).

3.3 Complex offences are to be referred to [Regulation and Enforcement R&E](#) for consideration by either a PRE or offence referral (depending on the circumstances).

False declarations

3.4 An offence under section 267(2) may be alleged if a statement of affairs [or debt agreement proposal and explanatory statements, and debt agreement statement of affairs after statement of affairs from a bankrupt or a debtor](#) includes incorrect or omitted information. Section 265(1)(f) can also apply to statement of affairs forms submitted for bankruptcies caused by sequestration orders and when information is omitted from a Statement of Income (or similar document). For these offences [Regulation and Enforcement](#) we requires evidence to prove the person making the declaration or statement knew it was false.

3.5 For offences under section 265(1)(f) the omission needs to be material, so if a bankrupt [or debtor](#) has made an omission in a statement of income or statement of affairs, the omitted particular must be of significance, and not merely minor or inconsequential. It must be relevant to the purpose for which it ought to have been made.

Scenario

A bankrupt omits one non-significant creditor on a statement of affairs form. When questioned by the trustee, the bankrupt advised it was an oversight. There appears to be no motive and it has had no material impact on the estate.

To prove an offence of section 267(2) or section 265(1)(f), if relevant, evidence that the bankrupt was aware of the debt at the time the form was completed and that the omission was intentional is required. Considering the bankrupt's response and the circumstances, it would be difficult to prove the bankrupt's knowledge and recklessness associated with the conduct.

There is no requirement to refer the matter [to R&E Regulation and Enforcement](#) in this scenario. A trustee should make a written record (file note or similar) to document the decision identifying the potential offence and the reasons why the matter was not referred to [Regulation and Enforcement R&E](#).

However, if information is available from the relevant creditor indicating that there had been recent contact with the bankrupt regarding the debt this may be sufficient to prove the knowledge and recklessness aspects of this offence.

3.6 If there is any doubt, scenarios such as the [two-one](#) noted above could be resolved by a trustee through the use of a PRE (see advice regarding PREs in section 6 of this Practice Statement).

4. Objections to discharge

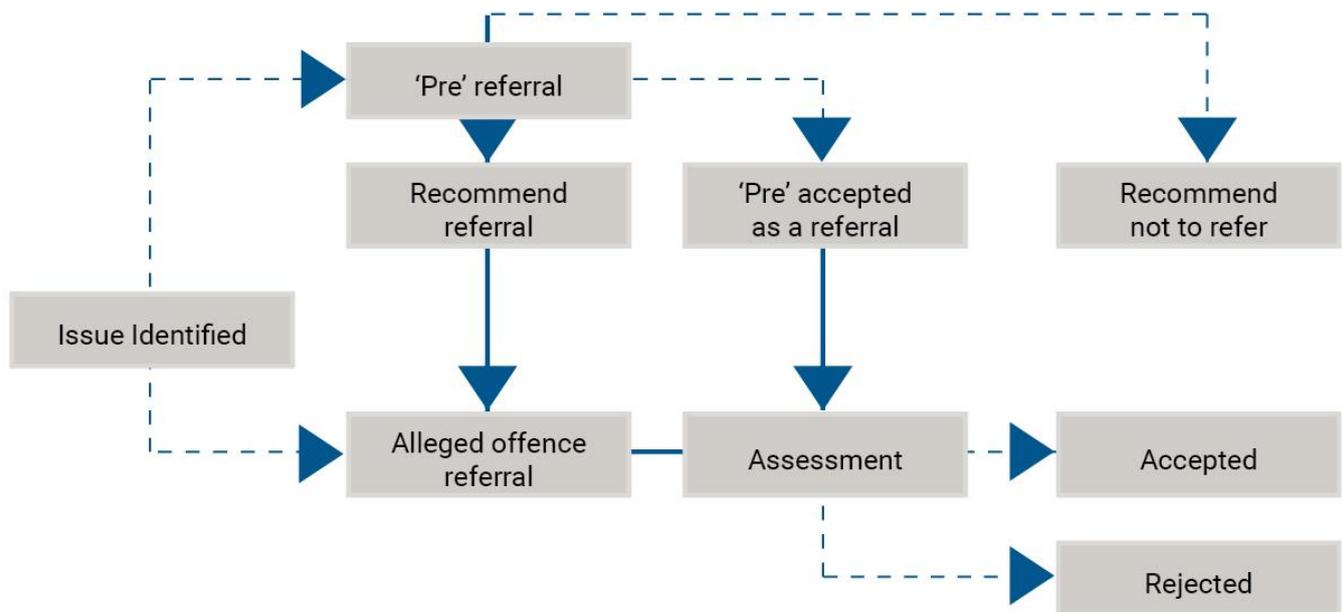
4.1 Where a trustee files an objection to discharge pursuant to section 149B of the Act and the grounds for the objection relate to conduct which could be characterised as a bankruptcy offence, the trustee, pursuant to section 19 of the Act, is also expected to consider referring the alleged conduct to [Regulation and Enforcement R&E](#) for consideration.

~~4.2 Failure to refer matters where there is sufficient information to indicate that an offence may have occurred may constitute an Regulation inspection error as a breach of a trustee's paragraph 19(1)(i) duty. If it is considered a breach has occurred, an inspection error will be recorded by Regulation and noted on the trustee's registration record.~~

5. Referral process

5.1 The diagram below shows the referral process. Matters may be referred by either submitting a PRE or an alleged offence referral. Advice regarding the appropriate use of PREs and alleged offence referrals is contained in sections 6 and 7 of this Practice Statement.

[Referral process diagram](#)



6. Pre referral enquiries

6.1 PREs aim to improve efficiency and save [trustees-practitioners](#) time in cases where it is not clear whether an offence has occurred.

6.2 The PRE and offence referral process is not a two-step process. That is, a PRE does not always need to precede an offence referral, both are individual methods of referring matters to [Regulation and Enforcement R&E](#) as required under sections [19\(1\)\(i\)](#) and [185LA\(1\)](#) of the Act.

6.3 PREs should be used when a [trustee-practitioner](#) considers that an offence against the Act may have occurred and it is unclear (or the [trustee-practitioner](#) is undecided) whether

there is sufficient evidence to support the completion of an offence referral. A PRE can also be used if a [trustee-practitioner](#) considers a suspected offence to be minor in nature and having no material impact on the administration of the estate.

6.4 PREs should not be submitted if a [trustee-practitioner](#) holds no evidence to support the allegation or knows that they hold insufficient evidence to support the allegation.

6.5 However if the [trustee-practitioner](#) is satisfied that there is evidence of the commission of an offence that has a material impact on the estate and/or involves a high level of criminality, an offence referral should be made - a PRE is not required in these circumstances.

6.6 PREs can be submitted by:

- completing the [PRE referral enquiry form](#) available from the AFSA website
- or by emailing fraud.enquiries@afsa.gov.au with the PRE details including:
 - The alleged offender's:
 - Name
 - Address
 - Date of birth
 - Administration number
 - Administration date ([or date of debt agreement](#))
 - The type of enquiry (e.g. is there sufficient evidence?)
 - Details of any advisors acting for the bankrupt, [debtor](#) or creditors
 - Relevant suspected offence(s) with a brief summary of what has occurred.

The summary is to include all known relevant facts so an Enforcement investigator can make an informed decision.

[Trustees-Practitioners](#) are not required to attach any supporting evidence [but may do so if available](#). However, an Enforcement investigator may [also](#) ask for further information or documents during the assessment of a PRE.

7. Offence referrals

7.1 An individual offence referral form is to be completed for each alleged offender. Each referral requires information to be provided, such as the alleged offender's details, a summary of the alleged offender's conduct and a list of all relevant documents. Care should be taken to provide all relevant information in possession of the [trusteepractitioner](#).

7.2 Template [offence referral forms](#) are accessible from the AFSA website.

7.3 The following documents ~~s are~~ [are to be attached](#) to every offence referral as a minimum:

- a copy of all letter(s) sent to the alleged offender relevant to the allegation/s
- copies of all relevant file notes

- copies of relevant Bankruptcy Act notices (eg 77C, 77A, 139V, 6A(3), 139ZL) [\(if applicable\)](#)
- proof of service/notification (if applicable)
- copies of any other information or documents that relate to the allegation (e.g. bank statements, title searches, account applications, loan documentation).

7.4 The proper completion of the offence referral form and the inclusion of all relevant documents ~~best~~ enables [Regulation and Enforcement](#) to properly assess the referral. If a referrer is unsure if a piece of information is relevant or not, it would be prudent to attach it to the referral for [Regulation and Enforcement's](#) consideration and determination. If there is insufficient information attached to the referral the matter may be rejected ~~by Regulation and Enforcement~~.

8. Failure to refer - Inspection errors

8.1 Failure to refer matters where there is sufficient information to indicate that an offence may have occurred may constitute an ~~an~~ [Regulation inspection](#) error as a breach of a trustee's paragraph 19(1)(i) ~~or an administrator's paragraph 185LA(1)(e)~~ duty. If it is considered a breach has occurred an ~~inspection~~ error will be recorded by Regulation and noted on the trustee's ~~or debt agreement administrator's registration record~~ [registration profile](#).

9. Further information

9.1 For more information please contact AFSA Regulation and Enforcement at fraud.enquiries@afsa.gov.au or via 1300 364 785 and ask to speak to Enforcement.

Bankruptcy offences list

Offences list

 Offences list [PDF 287.26 KB]

Offences list

 Offences list [DOCX 60.77 KB]