

**TRAIL & ASSOCIATES PTY LIMITED**

**PRACTICAL INSOLVENCY  
CONFERENCE**

**29 – 30 March 2010**

**PRESENTED BY SALLY NASH**

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## **CURRICULUM VITAE OF**

### **SALLY SUSAN NASH**

Sally is acknowledged as a leading insolvency lawyer. She was admitted to practice in 1977 and has practiced in insolvency, general commercial litigation and debt recovery litigation since that time. Her practice is in all State and Federal Courts involving commercial and insolvency litigation acting for creditors, Trustees, Liquidators, bankrupts and directors. Sally has been involved in many leading edge cases and is very well considered by her clients and fellow practitioners. She also has extensive experience acting for secured creditors in the enforcement of their securities.

Often asked to speak to the profession and clients, Sally is happy to assist with PLT and in house training.

Sally is a member of the Law Society of NSW, Law Council of Australia, Commercial Insolvency and Reconstruction Committee; Insolvency Practitioners Association of Australia; Turnaround Management Association Australia and Member of the Smaller Practice Issues Committee of INSOL International, International Association of Restructuring, Insolvency and Bankruptcy Professionals.

In 2008 Sally reviewed and updated the Lawyers Practice Manual for New South Wales debt recovery chapter.

See also website [www.sallynashandco.com.au](http://www.sallynashandco.com.au)

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## **BANKRUPTCY LEGISLATION AMENDMENT BILL**

### **1. REMUNERATION**

1.1 *"The objects of this bill are:-*

- (a) To provide a more streamlined process for fixing trustee remuneration and a more transparent process for reviewing that remuneration;*
- (b) Strengthen the penalties for some offences and ensure these are in line with the penalties for other similar offences;*
- (c) To remove the outdated concept of Bankruptcy Districts in order to provide more flexibility in personal insolvency administration;*
- (d) To increase the minimum debt for a creditors petition to reflect changes in the economic environment;*
- (e) To increase the stay period that follows a declaration of intent to file a debtor's petition to allow debtors to better assess their options; and*
- (f) To increase the debt, income and asset tests thresholds for debt agreements to ensure the thresholds keep pace with increasing wages and the increasing availability of credit."*

1.2 *".....the provide a more accessible and streamlined process for challenging the Trustee's remuneration claim. The amendments reinforce the principle that creditors have oversight of a trustee's administration of a bankrupt estate and should be required to approve claims for remuneration. This ensure creditors, who are the beneficiaries, can be satisfied that the remuneration is reasonable and reflects the value added to the estate by the Trustee's work."*

1.3 In *Pantzer v Wenkart* [2006] FCAFC 140 the Full Court stated at paragraph 1:-

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*“A fundamental feature of Australian bankruptcy law is that the estate of the bankrupt vests in a trustee. The trustee must administer the estate and deal with the bankrupt’s real and personal property in accordance with the provisions of the [Bankruptcy Act 1966 \(Cth\)](#) (“the Act”) and do so for the benefit of the creditors of the bankrupt and the bankrupt. The trustee must be a suitably qualified accountant. Some estates are simple to administer, others are not. Often, property is marshalled and sold by the trustee and the proceeds used to pay creditors, though creditors can be paid from funds realised by other means. The trustee must be involved in the process. The costs of administering the estate are paid out of the estate. Those costs will include the professional fees of the trustee as well as expenses and legal costs. Sometimes there are sufficient funds in the estate to meet the trustee’s remuneration, disbursements and expenses. On other occasions there are not and the trustee bears the loss.”*

1.4 The above paragraph was used in *Boensch v Pascoe* [2008] FCA 412 to disentitle the Trustee from costs. The Trustee would, in the normal course, be entitled to be remunerated out of the estate. The Court ordered that his costs were to be paid out of the bankrupt estate. It is useful to set out the orders:-

- “1. Mr Pascoe’s costs of defending the primary proceedings assessed on a party party basis are to form part of the trustee’s costs of administration of the bankrupt estate of Mr Boensch.
2. Mr Pascoe is to pay Mr Boensch’s costs of the costs application but only where funds are available and Mr Boensch’s bankrupt estate to meet the costs referred to in order 1.”

1.5 Regrettably there were no funds in the estate of Mr Boensch so neither party were remunerated.

1.6 In *Brake v Townsend* [2006] FCA 1156 the bankrupt challenged the Trustee’s remuneration in circumstances where the remuneration was 5 times the amount of debts in the estate. This was caused by the Trustee having to answer numerous complaints and issues raised by the bankrupt.

*“.....it seems to me that s178(1) may well confer a power to determine or fix the quantum of the costs (both expenses and remuneration) in respect of an administration. In addition, s30(1)(b) of the Act confers a power upon the Court to make such orders as the Court considers “necessary for the purpose of carrying out or giving effect to the Act in any particular matter.*

*.....however, between the exercise of such powers directed to the subject matter of the trustee’s remuneration and the proper application of s162 of the Act which specifically addresses the mechanisms by which the trustee’s remuneration is to be determined, must be carefully considered in any particular case. The trustee’s remuneration might be determined by resolution of the creditors, or by a Committee of Inspection. Where the remuneration of the trustee is not so determined, the trustee is to be remunerated as prescribed by the Regulations (s162(4)).”*

1.71 I think it is important to set out the orders that were made in Brake’s case as to the way in which the Court can, if it sees fit, assist the Trustee:-

- “1. *The appellant trustee of the estate of Ms Julie-Ann Townsend is entitled to be paid costs, charges and expenses of the administration of the bankruptcy including the remuneration of the trustee on the following basis:*
  - (a) for the period 20 June 2003 to 5 November 2004, an amount of \$40,110.23 less the amount received in the sum of \$15,000.00 plus applicable GST; and*
  - (b) for the period from 5 November 2004 to the date of this order, remuneration of the trustee as determined by operation of s 162 of the Bankruptcy Act 1966 (Cth) and Bankruptcy Regulations; and*
  - (c) costs, charges and expenses incurred on an indemnity basis.*
2. *The respondent shall pay to the appellant the sum of \$25,110.23 plus applicable GST within 45 days of the date of this order.*
3. *The respondent shall pay the appellant the amount of the remuneration determined in accordance with order 1(b) of these orders within 45 days of delivery by the appellant to the respondent of an itemised Bill of Costs or, alternatively, within 14 days of the issuance of a certificate of taxation in the event that the respondent requests such Bill of Costs to be taxed under the provisions of the Act and the Bankruptcy Regulations.*

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4. *The respondent shall pay the appellant the amount of the costs, charges and expenses referred to in order 1(c) of these orders within 45 days of delivery of an itemised Bill of Costs or alternatively within 14 days of the issuance of a certificate of taxation in the event that the respondent requests such Bill of Costs to be taxed under the provisions of the Act and the Bankruptcy Regulations.*
5. *The appellant shall be entitled to apply the property of the former bankrupt still vested in the trustee in payment of the costs, charges and expenses of the administration of the bankruptcy including the remuneration and expenses of the trustee as determined in accordance with these orders.*
6. *The respondent shall pay the appellant's costs of the hearing in the Federal Magistrates Court limited to those costs of and incidental to the relief sought by the respondent pursuant to s 153A of the Act and the following orders sought by paragraphs 1 and 2 of the respondent's application dated 16 February 2004 and filed on 24 February 2004, namely: '(1) that the bankruptcy of the applicant be annulled on the grounds that the applicant has paid every creditor in full including trustee's fees; and (2) a declaration that the trustee has deliberately contributed to the excessive charges imposed on the bankrupt by over administering a very simple estate'.*
7. *The respondent shall pay the appellant's costs of the appeal."*

1.8 Ignoring the statutory method of calculation of remuneration for the Official Trustee in Bankruptcy, private Trustees generally charge on an hourly rate. The Trustee is allowed his hourly rate. The issue of whether or not a service company provide staff is generally ignored but is a matter for consideration.

1.9 Section 161B prescribes the minimum amount of entitlement to remuneration by a Trustee. The Trustee can recover that sum as a debt from the bankrupt. At present the amount is \$1,109.

1.10 Section 162 enables the Trustees remuneration to be fixed by:

- a) Resolution of the creditors

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- b) Committee of inspection
- c) As prescribed by the regulations

- 1.11 Regulation 8.09 prescribes the method of taxation by “the bankrupt or a creditor who is dissatisfied with the amount of the claim, may, by notice in writing lodge within 28 days of being notified in writing or becoming aware of the amount of the claim, request the taxing officer to tax the claim”.
- 1.12 In *McKinnon v Pattison* [2009] FCA 1421 the bankrupt sought to have the remuneration of his Trustee taxed. There was no benefit to the bankrupt in making this application. The 28 day time limit was not observed by the bankrupt’s application. The bankrupt made an application under Section 33(1)(c) of the Bankruptcy to extend the time for seeking taxation. It was opposed.

*[30] The power to extend time under s 33(1)(c) of the Act is a broad discretionary power...*

*[31] In the exercise of his discretion pursuant to s 33(1)(c) his Honour focused solely on the question of whether the grant of an extension of time would be futile as it would not improve the financial circumstances of the appellants. His Honour did not appear to consider any other relevant factors in the exercise of his discretion. In denying an extension of time, on the ground of “futility” alone, his Honour erred in the exercise of his discretion...*

*[34] First, the appellants’ failure to lodge their notice for taxation within the required time period does not appear to be due to deliberate delay on their part...*

*[35] Second, the time lapse between the date by which the appellants should have lodged their notice under reg 8.09(1) and the date by which they applied for an extension of time under s 33(1)(c) was only about three months. The appellants acted promptly once they became aware they had not lodged a notice in conformity with the requirements of reg 8.09(1)...*

*[36] The third factor which needs to be considered is that there is a public interest in ensuring that the time limits set out in the Regulations*

*are adhered to. As has been noted the purpose of the time limit in reg 8.09(1) is to ensure that finality and certainty are brought to the quantification of a trustee's remuneration within a relatively short period of time; see Wenkart v Pantzer (No 6) [2003] FCA 1210 at [34] per Lindgren J. This would ordinarily militate against the granting of an extension of time...*

*[37] Fourth, the respondent did not argue before Phipps FM that he would suffer any other prejudice if the extension of time is granted...*

*[38] The fifth factor to be taken into account is that the respondent has argued that the grant of the extension of time is futile because, in essence, even if the remuneration claimed by the respondent is taxed it will not improve the financial circumstances of the appellants...*

*[39] A trustee in bankruptcy is under an obligation to exercise reasonable skill in the performance of his or her duties and "[a] trustee in bankruptcy who acts for remuneration is under a duty of care greater than that of a gratuitous trustee"; see Adsett v Berlouis (1992) 37 FCR 201 at 208... the trustee's right to remuneration is limited to work properly undertaken. In this context, "properly" means work reasonably and bona fide undertaken for the purpose of administering the estate or performing any public duty imposed by the Act, conformably with the trustee's duty to perform the work with reasonable care and skill and in an efficient and economical way.*

*[40] There exists a public interest in ensuring that trustee's remuneration is open to objective scrutiny... A prima facie entitlement to taxation, provided by legislation which promotes the public interest, should not be overridden by factors peculiar to the financial standing of any particular bankrupt, without good reason...*

*[42] The respondent also relies on the creditors' approval of his claim for remuneration. However, the creditor's approval of the claim does not diminish the public interest in ensuring that the trustee's remuneration is limited to work properly undertaken..."*

- 1.13 The bankrupt was allowed to apply for taxation of the Trustee's claim for remuneration.

## **2. REMUNERATION ON AN ANNULMENT OF A SEQUESTRATION ORDER**

- 2.1 There is no issue that the Trustee is entitled to his remuneration on an annulment from bankruptcy by the Court under Section 153B of the

Bankruptcy Act. That remuneration is a charge on the assets of the bankrupt pursuant to Section 154 of the Bankruptcy Act.

### **3. REMUNERATION ON A REVIEW OF A SEQUESTRATION ORDER**

- 3.1 A more problematic issue arises on an application to review the Registrar's decision to make a Sequestration Order. As a re-hearing of a Sequestration Order made by a Registrar is a de novo hearing, it is as if the Registrar's Sequestration Order had not been made and there is no automatic protection in the Bankruptcy Act for the Trustee's remuneration.
- 3.2 The Rules enable the Federal Magistrate or Judge hearing the review application to direct the Trustee file an Affidavit by way of report on solvency and conduct issues in the Court. If such an order is made the Trustee will be allowed his costs but not necessarily his remuneration. This matter was discussed by Giles J in *Rangott v Marshall* [2004] FCA 961:-

*"[28] There is no decision precisely in point. The problem is real. What is the result of many months of active administration of the affairs of the respondent? He cannot be restored to his former position. By what mechanism is partial restoration to take place? Is the applicant immune from action? Is the applicant entitled to remuneration and, if so, from where? Could those issues have been dealt with by consequential orders of the Full Court? If so, what is the effect of no such orders having been made?"*

*[29] I am bound by Simon v Vincent J O'Gorman Pty Ltd to conclude that the appellate provisions apply to a sequestration order. That being so, they cannot be read down. It would follow from the Full Court decision that the sequestration order made on 13 August 2002 and the consequent appointment of the applicant as trustee are set aside. If full effect is given to these provisions it is as if the sequestration order had never been made and the respondent had never been a bankrupt. On that basis the applicant is no longer trustee of the estate of the respondent and was not trustee at the date this proceeding was*

*commenced. That conclusion appears to be consistent with the reasoning in Guss v Johnstone...that concerned a different, but not dissimilar, issue although no argument by counsel was directed to that decision. Precisely how the eggs broken from 13 August 2002 to the present day are to be unscrambled is a question that does not arise in the present proceeding (cf the authorities referred to by Sackville J in Shephard v Chiquita Brands South Pacific Limited..." (references omitted)*

- 3.3 In the above matter the bankruptcy for Mr Marshall was successfully reviewed and the Trustee was not entitled to any remuneration.
- 3.4 In *Ivanhoe Grammar School v Raschilla [2003] FMCA 30* McInnes FM made an order setting aside the Sequestration Order by way of review of the Registrar's order but also made a further order annulling the bankruptcy which is probably a more correct way of dealing with matters.
- 3.5 Weinberg J in *Kyriackou v Shield Mercantile Pty Ltd (with Corrigendum dated 14 May 2004) [2004] FCA 490* considered the question whether to set aside a Sequestration or annul the bankruptcy and thereby strike a balance between the rights of the bankrupt and the interests of the Trustee. The dilemma is referred to below.

*"[28] Turning to the failure to include the words "the creditor" in the bankruptcy notice, Mr Fary submitted that a purposive approach should be adopted when considering whether the omission of those words meant that the notice "fail[ed] to meet a requirement made essential by the Act". While the inclusion of those words aided in the description of the parties, that description was complete without them. There could be no doubt, when reading the bankruptcy notice as a whole, as to the identity of the creditor. Accordingly, it should not be inferred that the legislature intended that a bankruptcy notice that omitted those words would be invalid."*

3.6 In that matter Weinberg J refused to annul the bankruptcy and set aside the Sequestration Order thereby creating a dilemma for the Trustee's remuneration. Again the Trustee was not ordered remuneration.

3.7 In *Quirk v Hampshire [2009] FMCA 545* orders were made protecting the Trustee up to the date when the Trustee was served with the application for review. In other words the Trustee was protected for his statutory obligation to prepare a report. It is useful to set out the orders below:-

- (1) *"The application for review is allowed.*
- (2) *The sequestration order made on 20 February 2009 is set aside.*
- (3) *The petition is dismissed.*
- (4) *The respondent debtor must pay the applicant's costs in the petition and in the application to set aside, including reserved costs, as agreed or taxed under the Federal Magistrates Court (Bankruptcy) Rules 2006 (Cth).*
- (5) *The Court notes that the parties have agreed that, in consideration of orders 1, 2 and 3, the Respondent:*
  - (a) *Agrees to pay the applicant the following sums:-*  
*\$10,000.00 by 2 June 2009 receipt of which is acknowledged*  
*\$5,000.00 by 4 June 2009*  
*\$10,000.00 by 30 June 2009*  
*\$10,000.00 by 30 July 2009*  
*\$7,528.45 by 30 August 2009*
  - (b) *To cause Callbank International Pty Limited to sign a mortgage to the applicant securing the payments in paragraphs 5(a) and 4 over the property in folio identifier 85/786964 the mortgage to provide that if any of the payments are not made in accordance with these orders then the applicant will be able to immediately enforce the mortgage.*
  - (c) *To cause a company resolution to be passed by Callbank International Pty Limited adopting the above mortgage to be passed by 3 June 2009.*
  - (d) *To give to the applicant's solicitor the Certificate of Title for folio identifier 85/786964 which will be returned upon payment of the sums in paragraphs 4 and 5(a).*
- (6) *The respondent debtor must pay the trustee's remuneration and expenses incurred under the sequestration order up to and including 13 March 2009.*

- (7) *The respondent debtor must pay the trustee's legal costs in the proceedings, including reserved costs, as agreed or taxed under the Federal Magistrates Court (Bankruptcy) Rules 2006 (Cth).*
- (8) *The applicant must provide a copy of this order to the Official Receiver within 2 days."*

3.8 In *Re Darryl Gollan Ex Parte: Darryl Gollan [1992] FCA 606; (1992) 113 ALR 475 (1992) 40 FCR 38* Spender J made an order that the former bankrupt pay the reasonable costs of the administration undertaken by the Official Trustee, however this order was made in circumstances where the bankrupt had indicated to the Court his willingness to consent to such an order.

#### **4. REMUNERATION ON AN APPEAL FROM A SEQUESTRATION ORDER**

4.1 On an appeal the Court can order a stay of the Sequestration Order. I would usually recommend a Trustee consent to that course. On a review or annulment application the Act does not enable a stay of the Sequestration Order to be granted. The Trustee may find it necessary to make application to the Court for directions as to his duties.

#### **5. BANKRUPTCY LEGISLATION AMENDMENT BILL**

5.1 In my opinion item 12 in the BLAB being the repeal of subsection 162(4) will have no effect on the above problems. The repeal is designed to deal with other issues, where there are no creditors voting for remuneration. If there is no bankruptcy to administer then clearly there are no creditors. The BLAB has nothing to say on the issue of the Trustee's unrecoverable remuneration on a review of a Sequestration Order although it has been a problem since the Full Court handed down *Marshall* in 2004

5.2 Creditors may approve the rate at which a Trustee wishes to be remunerated. This is required to be set out in accordance with Section 64U(5). For reasons which I do not fully understand Section 64U(6)A is to be inserted to state: -

*“The president must invite the creditors and their representatives to propose a motion that the Trustee be remunerated in accordance with the statement, and if no such motion is proposed, the Trustee may propose such a motion”*

I'm sure this is designed to prevent a stalemate where the remuneration of the Trustee is not in fact approved.

5.3 Minimum remuneration is to be increased to \$5,000.00.

5.4 The proposed section 161B(1) says:-

*“(1) If the total remuneration payable to the Trustee under s162 would be less than the following amount (the statutory minimum):-  
 (a) \$5,000.00;  
 (b) If another amount is prescribed by the Regulations for the purpose of this paragraph – that other amount;  
 The trustee is entitled to be paid, from the funds in a bankrupt's estate, additional remuneration equal to the shortfall.”*

5.5 Section 162(4) is to be repealed and in its place a new section:-

*“(4) If the remuneration of the trustee is not fixed by the creditors or the committee of inspection, the trustee may, in the circumstances prescribed by the regulations, make an application, in accordance with the regulations, to the Inspector-General for the Inspector-General to decide the trustee's remuneration.  
 (4A) If an application is made to the Inspector-General under subsection (4), the Inspector-General must, by writing, decide the trustee's remuneration, having regard to the matters prescribed by the regulations.”*

*(4B) The Inspector-General must give written notice of his or her decision under subsection (4A) to the trustee and to the bankrupt and creditors.”*

- 5.6 Notice of payment of third parties is to be given to both the creditors and to the bankrupt. Therefore I suggest a practice whereby, prior to making any payment, notice is given of the amount of the account and to whom it is payable. I do not believe it is necessary to forward a copy of the account either to the bankrupt or to the creditors. The time for review of the decision to make the payment will be 60 days under s178.
- 5.7 The Inspector General is now being given the power to review the decisions of the Trustee, either to withdraw or propose to withdraw funds from the estate when requested by the bankrupt or a creditor to review the remuneration.
- 5.8 A similar power to review applies to the Inspector General to review bills of costs for services provided by third parties when requested by the Trustee to review the third party bill.
- 5.9 The Regulations are to provide the powers of the Inspector General and provide information and documents relating to these provisions for review. The Regulations are also to provide for the Inspector General to provide for a Trustee to repay money. I query how the Inspector General can bind a third party service provider.
- 5.10 Rights of appeal apply to the Trustee, the bankrupt or the creditor, but not the third party service provider. In my opinion the Inspector General's decision only applies to what funds can be removed from the estate but does not avoid the personal liability of the Trustee to the third party service providers. The Trustee has a right of indemnity from the estate and in my opinion, it is that

right of indemnity which the Inspector General is reviewing, not, for example, the third party contract or rates for provision of services to the Trustee.

## 6. **PENALTIES**

6.1 A number of penalties of 5 penalty units or 25 penalty units apply to time limits which have now been proposed under the BLAB, such time limits are:

- Section 54(1) failure to file Statement of Affairs within 14 days increase from 5 to 25 penalty units.
- Section 56F extra duties of non petitioning partners who become bankrupts to provide notice within 14 days to Official Receiver 25 penalty units increase from 5.
- Section 73(1A) Trustee to give copy of Section 73 proposal to Official Receiver within 2 working days increase penalty 5 units.
- Section 74(5A) penalty 5 units.
- Section 153A(2) notification of annulment by Court by Trustee within 2 days penalty 5 units and is strict liability.
- Section 153B notification of Court order for annulment within 2 days penalty 5 units and is strict liability.
- Section 155J(1) 7 days and failure to notify is a penalty of 5 penalty units.
- Section 170A the Trustee must within 35 days after the financial year give the Inspector General a return failure to do so is strict liability and a penalty of 5 units.
- Section 182(4) notification by 28 days of the death is 5 penalty units.

6.2 A penalty unit is worth \$110.00 at present

- 6.3 The regime of paying a fine for non compliance with a time limit is known in relation to corporations law matters. I expect the infringement notice provision will apply but there may be a provision at a later time for determining whether a Trustee should have his registration renewed if there are a number of continual infringements of time limits to be observed under the Act. In my opinion payment of a fine for non compliance with a time limit imposed upon the Trustee under the Act is a personal liability and is not an expense of the administration.
- 6.4 There are many more provisions to which a penalty now applies. I think it is fair to say that if a duty is imposed on a professional practitioner such as a Trustee the penalty unit is 5 and if on a bankrupt the penalty units are 25.
- 6.5 Section 277B is intended to bring in an infringement notice procedure to pay the penalty to the Commonwealth as an alternative to a prosecution. Those items are significantly for penalties of 1 or 2 penalty units e.g. Section 52(1A), (6N), (6A), 245(3). The offences are contained in schedule 2 to the BLAB. The infringement notice system is designed to give an alternative prosecution procedure and the Commonwealth can issue the infringement notice for the penalty being an amount not exceeding one fifth of the maximum fine that the Court would otherwise impose.

## **7. DECEASED ESTATES - PROPERTY**

- 7.1 The High Court in *Official Receiver in Bankruptcy v Schultz (1990) 170 CLR 306* determined that the right to have a deceased estate properly administered is a right which vests in the Trustee in Bankruptcy.

- “15. The right which any beneficiary has in an unadministered estate springs from the duty of the executor to administer the estate, to preserve the assets and to deal with them in the proper manner. Each beneficiary has an interest in seeing that the whole of the assets are treated in accordance with the executor’s duties.....”
17. Mrs Schultz’s right to due administration arose from cl.3(a) and (g) of the will. That right vested in the Official Receiver as soon as it vested in Mrs Schultz, since it was clearly “property” as defined in s.5(1) of the Bankruptcy Act. It follows, from what has been said above, that the interest derived from that right also passed to the Official Receiver at that time.”

7.2 It should be remembered that it is not the deceased’s assets that vest in the Trustee. A deceased estate is administered in much the same way as a bankrupt estate. The debts and testamentary expenses are paid any legacies are paid and thereafter the entitlement vests with the Trustee.

7.3 Where there is a life interest granted to a beneficiary and the bankrupt receives the benefit of a deferred interest consideration must be given to Section 129AA Notice being issued.

## **8. SECTION 129AA**

8.1 Section 129AA of the Bankruptcy Act now applies to all administrations.

8.2 I have had a few enquiries as to its effect. In summary:-

1. It reverts the bankrupt’s property in the bankrupt 6 years from discharge.
2. The effective date was 5 May 2009 which has now passed.

3. It only applies if the property (other than cash) was disclosed in the bankrupt's Statement of Affairs. In other words, if it is not disclosed it does not re-vest.
  4. The section applies to after acquired property although clearly it cannot be disclosed in the Statement of Affairs. The after acquired property must be disclosed to the Trustee before the bankrupt is discharged from bankruptcy.
  5. An extension notice can be issued to the bankrupt in writing, allocating a new re-vesting date. A number of extension notices can be issued.
  6. In old estates where there are vested assets which have not been realised, particularly real estate, you may find your Caveats being lapsed as the property is deemed to be re-vested.
- 8.3 Consideration ought to be given immediately upon a bankrupt being discharged from bankruptcy to sell any remaining assets in the estate to the discharged bankrupt. This includes real estate and any chose in action.

## **9. SECTION 60 OF THE BANKRUPTCY ACT**

- 9.1 The bankrupt's chose in action being a claim which he commenced prior to bankruptcy vests in the Trustee in Bankruptcy. For this reason the Trustee is given the right to elect to continue with proceedings which the bankrupt commenced prior to bankruptcy.
- 9.2 Usually a Defendant will issue a notice to the Trustee to make such an election. If the election is not made within 30 days the proceedings are

deemed abandoned. Generally the Court regards such a deemed abandonment as the same as a discontinuance of the claim. In my opinion it is not necessary for the Trustee to go to the Court but for the Defendant to make an application for the proceedings to be dismissed on evidence that the Trustee has not given notice.

- 9.3 In my opinion the Trustee not giving notice under Section 60 is a reviewable decision under Section 178 of the Bankruptcy Act. To this end the timing does not assist. Section 178 has a 60 day time limit and Section 60 a 30 day time limit. The decision is able to be reviewed by either the bankrupt or the Defendant in the litigation.
- 9.4 If the notice is given and there is an issue the Trustee can have the right under Section 33 of the Bankruptcy Act to extend the time for compliance with Section 60 of the Bankruptcy Act. The difficulty in bankruptcy administrations is that the Section 60 Notice often comes in very quickly after the Trustee has been appointed and the Trustee has little or no knowledge of the proceedings, nevertheless the Trustee has to give a considered valuation of the strength of the claim and its likely result.
- 9.5 In *Meriton Apartments Pty Limited v Industrial Appeal Court NSW [2008] 171 FCR 380* Meriton unsuccessfully argued that a Section 60 Notice issued to the Trustee gave the bankrupt no entitlement to continue to pursue it in the Industrial Relations Court. The Full Court upheld the decision of the Industrial Court to allow the bankrupt to continue with his claim against Meriton, but with reservations. Branson and Greenwood JJ concluded that the Industrial Court could recognise the Bankruptcy Trustees entitlement to assign the chose in action to prosecute proceedings to the undischarged bankrupt and that did not

involve an exercise of jurisdiction in bankruptcy and therefore there was no Federal State issue.

- 9.6 In *Lauren Kay Cordes as Trustee for Alexander George v. Dr Peter Ironside P/L Ors* [2009] QCA 302 a matter heard in the Queensland Court of Appeal the bankrupt unsuccessfully argued that Section 27 of the Bankruptcy Act enabled him to continue with litigation in the Supreme Court of Queensland. The Court of Appeal in Queensland determined: -

*"[37] Questions affecting the position of a trustee, including determination of the trustee's title to a right of action were part of jurisdiction in bankruptcy, as s 31(1)(f) served to demonstrate. Since the question of whether the assignment was valid determined the title of the trustee to the right of action, any such question was within the exclusive jurisdiction of the Federal Court. Indeed, it followed, Perram J said, that Sutherland v Brien was wrong: the proceedings there had involved the declaration of rights to property; and it did not suffice to say that proceedings were not "proceedings under or by virtue of the Bankruptcy Act"..."*

*"[39] This case falls squarely within what was described in Scott v Bagshaw: the orders the appellant seeks, to the extent that they recognise title in her, as trustee or otherwise, must have a "necessary adverse effect on the title" of the trustee in bankruptcy. That case makes it clear that it is irrelevant whether one of the parties to the proceeding is a bankrupt or a trustee in bankruptcy...the general jurisdiction "to determine and declare rights to property" referred to by Austin J in Sutherland v Brien must give way to the Federal Court's exclusive jurisdiction to determine "applications to declare for or against the title of the trustee to any property..."*

The Trustee in Bankruptcy had commenced and obtained orders in the Federal Magistrates Court of Australia with respect to property at Mogill. It was registered in the Trustee's name and in subsequent Family Court proceedings it was treated as matrimonial property. The Court found that the Appellant was prevented from raising these issues because they had already

been determined in favour of the Trustee in Bankruptcy in the Federal Magistrates Court: -

*“The case is, we think properly one of res judicata. The Trustee in Bankruptcy obtained Judgment in the Federal Magistrates Court, his cause of action was “determined to exist and Judgment was given upon it”. Therefore it merged in the Judgment and the Appellant may not now deny the Trustee in Bankruptcy’s right to the Mogill property. Her action which says to do just that cannot be allowed to proceed...”*

## **10. AFTER ACQUIRED PROPERTY**

10.1 The Supreme Court of Western Australia in *Rodway v White [2009] WSC 201* determined that the bankrupt committed a criminal offence under Section 265(1)A of the Bankruptcy Act for failing to disclose to his Trustee in Bankruptcy shares in various listed companies on the Australian Stock Exchange which he had purchased after bankruptcy from his own income. The bankrupt was convicted and fined and the Court gives an interesting discussion on the property acquired as after acquired property: -

*“[6] The appellant’s contention, before the learned magistrate and on this appeal, is that because after-acquired income of a bankrupt does not constitute after-acquired property to which s 116(1) of the Act applies - Re Gilles; Ex parte the Official Trustee in Bankruptcy v Gilles [1993] FCA 289; (1993) 42 FCR 571 - property, such as these shares, acquired by the use of that income does not need to be disclosed by the bankrupt pursuant to s 265 of the Act or at all...”*

10.2 An interesting dissertation of the Meriton and Cordes cases takes place: -

*“[51] It is immediately apparent that there is some incongruity in speaking of after-acquired income as not vesting in the trustee yet maintaining that after-acquired property (whether acquired with the use*

*of that income or not) does... Plainly there is a difference in those concepts but income generally means money (or other valuable consideration) itself constituting property, obtained by a person over some period. Such income, take wages or salary for example, once received will probably be in the form of cash or credit in a bank or similar account. The accumulating cash on hand, and the accumulating balance in the bank or other account will each be a form of property of the bankrupt from the moment it is paid or received..."*

- 10.3 The shares were found not to have been paid with protected money nor exempt money within the concepts of Section 116(2)D or (3) of the Bankruptcy Act: -

*"[62]... therefore, the use of post bankruptcy income which the bankrupt is entitled to retain, to purchase after-acquired property may have two consequences. It may result in the purchase of property (which if owned by the bankrupt at the time of bankruptcy would be protected under s 116(2)) which would not, on acquisition, vest in the trustee or require disclosure under s 77(1)(f), or it may result in the acquisition of property which would not have been protected under s 116(2) which immediately upon acquisition would vest in the trustee and would generate an obligation of disclosure under s 77(1)(f)..."*

*"[66]... If that difficulty of definition can be put aside then I, too, incline to the view foreshadowed by French J in Gilles (supra) that the conversion of that income (or specie) into a distinctly different form of property, as for example by the purchase of shares in the present case, will result in the acquisition of after-acquired property divisible among creditors and so vest in the trustee, unless within any of the categories excluded by s 116(2)..."*

## **11. REVIEW AND/OR REMOVAL OF TRUSTEES – SECTIONS 178/179 ISSUES**

- 11.1 In contested matters the bankrupts are becoming more litigious in an effort to either remove their Trustee or have the Trustee's remuneration taken away. Examples of such matters are:-

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(a) In *Wade v Leroy* [2010] FCA 178:-

“Before ultimately dismissing the application for an enquiry and removal of the trustee, .....a number of factors to consider.....

In its terms this power is plainly concerned with the “conduct” of the trustee in relation to a bankruptcy.”

(b) *Maxwell Smith v Donnelly* [2006] FCAFC 150:-

*“The power to order an enquiry is a discretionary one. In addition, as just discussed, it is a discretionary power which is not ordinarily exercised. A clear case must be made out to warrant an enquiry.”*

An enquiry was ordered but found not to have any success.

(c) In *Moore v Macks* [2007] FCA 10 there was a dispute concerning the Trustee’s deemed abandonment of litigation the bankrupt felt he wanted to pursue (s60(3)):-

*“There was no basis in fact to impugn Trustee’s decision that it is not in the interests of the bankrupt estate to prosecute the appeals under s178 and s179 of the Bankruptcy Act.”*

(d) In *Boensch v Pascoe* [2007] FCA 1977 no enquiry was ordered, notwithstanding the fact that it was asserted there was a breakdown of relationship between Trustee and bankrupt and the Trustee admitted a creditor to vote at a creditor’s meeting where there was the potential for conflict:-

“It is clearly an insufficient ground for removal of a trustee that a bankrupt resists the proper administration of his estate or sets out to frustrate a trustee in the proper performance of his duties. Mr Boensch’s obligation was to co-operate fully with his trustee. He is obliged to “aid to the utmost of his power in the administration of his estate (s77(g)).....”

- 11.2 As *Macchia v Nilant* [2001] FCA 7 demonstrates, the Court must first consider whether it should enquire into the conduct of the Trustee. If an enquiry is undertaken, the next question is whether the Trustee should be removed from office and/or whether any other order should be made. The Court should be reluctant to undertake an enquiry, unless there are **substantial grounds for believing that the Trustee erred in the administration**. If an enquiry is unlikely to reveal misconduct, it should not be undertaken. The Court should not unduly interfere with the day to day administration of a bankrupt’s estate by the Trustee. In order to remove a Trustee in Bankruptcy, it is necessary to find misconduct on the part of the Trustee. Removal is possible if the relationship between the Trustee and the bankrupt has broken down totally: *Doolan v Dare* [2004] FCA 682 at 49. In that case, Spender J found that there was a clear conflict of interest between the Trustee’s interest in having her remuneration paid and how she thought that might be achieved and her obligations as a fiduciary to the creditors and the bankrupt. No enquiry was ordered in this matter and the former bankrupt was ordered to pay the Respondent’s costs.

## **12. TRAVEL OUTSIDE AUSTRALIA - PASSPORTS**

- 12.1 A Bankrupt is required to give his Trustee his passport if so requested to do so. He is also required not to travel outside of Australia without the consent of his Trustee. The decision not to grant consent is a reviewable decision under

Section 178 of the Bankruptcy Act. Usually the Trustee will grant consent where the travel involves employment related matters. The Trustee is entitled to provide terms. Such a term might be that the employer provides a bond to the Trustee in an amount of money, say \$10,000, as security for the bankrupt returning. This will have the advantage of related entities providing security for travel. The Trustee can also require that the income contribution be prepaid. Before being allowed to travel all income contributions are required to be paid up to date.

- 12.2 In *David Keith Mcgregor Ex Parte: Hans Sens Pty Ltd [1994] FCA 1430* the Federal Court of Australia made the following order: -

*“Upon the debtor or persons on his behalf providing a bond, guarantee or other security to the satisfaction of the Official Receiver in the sum of \$10,000 and further upon the debtor's undertaking to return to Australia on or before 23 January, 1995,*

*THE COURT ORDERS THAT:*

- 1. The Official Receiver return the debtor's passport to him for the purpose of a trip to the United States to conclude upon the debtor's return to Australia on 23 January, 1995;*
- 2. Upon his return to Australia as aforesaid, the debtor forthwith return the passport to the Official Receiver.”*

- 12.3 A bankrupt cannot seek leave to travel overseas for a conference. It must be in connection with his income. Permission was not granted for a cosmetic surgeon to attend an overseas conference as it was not regarded as necessary for him to earn his income. *Lee v Pascoe [2000] FCA 540.*

### **13. SALE OF BANKRUPT'S REAL ESTATE TO CO-OWNER**

- 13.1 I am often asked by Trustees how best to sell real estate to a joint owner. We have devised a Deed for sale which in my opinion complies with the

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requirements of the Conveyancing Act, 1919 (NSW). Section 54A Conveyancing Act requires that a sale or disposition of any interest in land must be in writing.

- 13.2 Often in a bankruptcy there is a joint tenancy. At law that joint tenancy is severed upon bankruptcy and the Trustee in Bankruptcy becomes co-owner with the other party, usually the spouse. Often there is a mortgage or other charge. Sometimes there are unpaid rates and land tax. In an arm's length sale to a third party the mortgage is paid and discharged and the outgoings adjusted on settlement. In my opinion this is not required in a sale between co-owners because the co-owner remains liable for the mortgage debt and outgoings in the jointly owned property.
- 13.3 If the sale were an arm's length transaction, the Conveyancing (Sale of Land) Regulations (2005) (NSW) requires that the standard contract for sale of land provide vendor disclosure documents such as a title search, deposited plan, drainage diagram, a zoning certificate, easements and covenants be attached and if they are not attached then the agreement so far as it purports to exclude, modify or restrict any provision of Section 52A Conveyancing Act and its Regulations is void. However Regulation 10 and Schedule 4 of the Conveyancing (Sale of Land) Regulations 2005 exempts the legal requirements set out above in circumstances where: -

*"a contract between co-owners providing for the acquisition by one or more co-owners of the whole or any part of the share or interest of any other co-owner."*

- 13.4 In my opinion it is entirely appropriate for a Trustee in Bankruptcy to sell the bankrupt's interest in the land to the co-owner by simple Deed which should recount the agreement for sale, terms of sale including any terms as to

payment, occupation, adjustment and whether or not the mortgage is to be discharged.

- 13.5 The Trustee must be aware that there is an issue as to whether or not the Trustee can sell to the undischarged bankrupt assets which would re-vest in the Trustee in Bankruptcy as an after acquired asset. In other words can the bankrupt sell the equity in real estate to the bankrupt. In my opinion the decision in *Meriton* (supra) is incorrect. In that matter the Trustee did sell the chose in action to the undischarged bankrupt. Whilst a Section 60 Notice was issued to the Trustee in Bankruptcy by Meriton, the Court upheld the sale of the chose in action but with considerable reservations. In my opinion the Trustee cannot sell to the undischarged bankrupt assets. They can be sold to a related party, to the spouse, to the co-owner but not to the undischarged bankrupt.
- 13.6 Upon discharge from bankruptcy attempts should be made to realise all unsecured assets by selling them to the discharged bankrupt.
- 13.7 It will very much depend on the nature of the claim as to whether or not it is vested in the Trustee in Bankruptcy. If it is not vested then no right of sale arises.

#### **14. UPDATE ON FAMILY LAW CASES**

- 14.1 In *Lasic v Lasic* [2007] FamCA 837 the husband was bankrupt. The wife had been transferred all of the assets. The Trustee in Bankruptcy represented one creditor. The creditor's debt was minor compared with the overall costs of the administration, which included the cost of the Family Court litigation.

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- 14.2 On appeal, the Full Court of the Family Court in *Trustee for the bankrupt estate of Lasic v Lasic* [2009] FamCAFC 64 ordered the payment made to the creditor was not within power. It confirmed that on bankruptcy the creditors rights were converted into a right to prove in the bankruptcy and then participate in any dividend. There was no separate right of a creditor to enforce the judgment nor receive payment. However there are some exceptions to this in relation to HECS debts and some criminal fines and penalties.
- 14.3 In *Lemnos v Lemnos* [2007] 38 FamLR 594, the husband, a solicitor, had not paid tax and owed in excess of \$6 million. The wife moved the Family Court for an order for a 50% interest in a house property registered solely in the name of the husband. The husband was declared bankrupt by the ATO for unpaid tax and all of the husband's property, which included the house, vested in John Melliush, a Registered Trustee in Bankruptcy. The argument was that the vesting remained and the ATO debt would be paid and anything left over would become part of the matrimonial pool. At first instance the wife received a 50% interest in the house.
- 14.4 The Family Court noted that the status of creditors of other considerations required under s75(2) did not elevate the entitlement to creditors to be paid in priority.
- 14.5 The Full Court of the Family Court in *Trustee of the property of Lemnos v Lemnos* [2009] 223 FLR 53 allowed the appeal but remitted the matter for rehearing. The Full Court did not regard the husband's conduct as disentitling conduct under *Kowaliw v Kowaliw* [1981] FLC 91. His conduct was not designed to, nor did it diminish the value of the matrimonial assets. Indeed

his conduct increased the matrimonial pool. The first instance Judge gave no consideration to the significance of the fact that the wife had enjoyed the benefits flowing from the husband's conduct and this was a necessary matter for consideration to determine if the wife was complicit in the husband's conduct.

14.6 Further, the approach at first instance that the ATO should be satisfied from the husband's interest was an error in interpreting s75(2)(ha). The Full Court directed that the primary Judge consider the size of the debts to the creditors and the offsetting approach made by the primary Judge was incorrect. Further, the Judge could have made an adjustment in favour of the Trustee and did not do so. This was an incorrect approach.

14.7 The High Court of Australia in *The Trustees of the Property of John Daniel Cummins, a bankrupt v Cummins* [2006] HCA 6 simply chose to adopt the orders and reasons of Sackville J at first instance to set aside the transfer of property by the husband to the wife under s121 Bankruptcy Act.

14.8 The High Court has introduced a new concept of the joint matrimonial enterprise. In *The Trustees of the Property of John Daniel Cummins, a bankrupt v Cummins* [2006] HCA 6, the Court stated:-

"72. *The present case concerns the traditional matrimonial relationship. Here, the following view expressed in the present edition of Professor Scott's work respecting beneficial ownership of the matrimonial home should be accepted:*

*"It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and*

*discharged or services are rendered in the maintenance of the home before or after the purchase."*

To that may be added the statement in the same work:

*"Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them."*

72. *That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses. There is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common. The subsistence of the matrimonial relationship, as Mason and Brennan JJ emphasised in Calverley v Green, supports the choice of joint tenancy with the prospect of survivorship. That answers one of the two concerns of equity, indicated by Deane J in Corin v Patton, which founds a presumed intention in favour of tenancy in common. The range of financial considerations and accidental circumstances in the matrimonial relationship referred to by Professor Scott answers the second concern of equity, namely the disproportion between quantum of beneficial ownership and contribution to the acquisition of the matrimonial home."*

14.9 In *Official Receiver v Huen* [2007] FMCA 304 the Court declared that an agreement signed between the husband and wife dated 1 September 2003 and purporting to give the wife the sole beneficial ownership of real estate was invalid at law and if valid at law, was void under s120 of the Bankruptcy Act. The Court declared the Trustee in Bankruptcy and the wife to be the joint owners of the land as tenants in common in proportions:-

- "(a) to be agreed between the applicant and the bankrupt having regard to the Court's reasons for judgment and subject to further order of the court;*
- (b) failing agreement between the applicant and the respondent, as further determined and ordered by the court."*

14.10 The Court considered *Cummins, Parsons, McBain* as to the principle to be applied in determining whether or not the transaction should be set aside and if so, the value to be given to the Bankruptcy Trustee's interest. The Federal Magistrate quoted *Cummins* as follows:-

*“The transaction to which attention must be directed, in the sense given in Charles Marshall respecting the principles of resulting trusts, is a composite of the purchase of the Hunters Hill property followed by construction of a dwelling house occupied as the matrimonial home for many years preceding the August transaction. The relevant facts bearing upon, and helping to explain, the nature of the joint title taken on registration on 10 August 1970 includes the other elements in that composite. To fix merely upon the unequal proportions in which the purchase of monies were provided for the calculation of the beneficial interests in the improved property which was dealt with subsequently in August 1987 would produce a distorted and artificial result, at odds with the practical and economic realities.”*

14.11 The land in the *Huen* case had been purchased by the wife with a \$5,000.00 deposit but they purchased the property as joint tenants and obtained finance jointly over the property and other property. The Court did not consider the fact that the bankrupt left the land and left the matrimonial property and his wife and 3 children relevant or connected to the transaction which was being set aside. The parties had previously owned joint property which was sold and the proceeds used to acquire the current land. The Court found there was no intention to create neither a resulting trust nor a constructive trust. It was a joint matrimonial venture of the type referred to in *Cummins*.

14.12 The High Court recently had cause to consider a transfer in the matter of *Vale v Sutherland* [2009] HCA 26. Mr and Mrs Vale had not separated and were not the subject of any family law application. However the case is a useful guide as to the insight into the way in which the High Court will review a s120 void transfer. The wife had transferred her interest in real properties to Mr Vale. The

wife was subsequently declared bankrupt. At the time they were joint tenants of the property. The transfer was said to be for \$2.00. The transfer occurred on 23 April 1999 and the bankruptcy commenced with the commission of the act of bankruptcy on 26 February 2001.

14.13. The Trustee issued a statutory notice under s139ZQ which was set aside at first instance and overturned by the Full Court. To procure a win for the Trustee, the High Court allowed the Trustee to file a Cross Claim seeking relevant declarations that the transfer between the husband and wife was void under s120 of the Bankruptcy Act. The Trustee sought payment of the monetary value of the property which had been transferred although it would have been open to him to actually seek the property to be re-transferred to him. The majority of the decision deals with s139ZQ but the High Court in relation to valuation says:-

“21. *Valuation for the purposes of s120 (and s121 and s122) involves market value at the time of the transfer. Valuation is a notoriously inexact science. It is apparent from the reference in the opening words of s139ZQ(1) to those provisions as rendering transactions void under Div 3 of Pt VI of the Act, that questions of the accuracy of particular valuations may be presented by sub division J. Section 139ZQ(8) makes allowance for this by using the phrase “recoverable.....as a debt” stating:-*

*“An amount payable by a person to the trustee under this section is recoverable by the trustee as a debt by action against the person in a court of competent jurisdiction”*

*The provision requires treatment as a liquidated sum of an amount claimed by the trustee as being equal to the value received. In that sense, it represents an adaption and extension of the rule in Sheppard v Hills respecting statutory obligations to pay money and recovery of a liquidated claim. The scheme of subdivision J encourages the saving of costs by, on the one hand, compliance with the notice by the transfer to the trustee of property in respect of the value of which the notice requires payment (s139ZQ(7)) and on the other hand, by the revocation or amendment of notices to accommodate a settlement (s139ZQ(4)) but s139ZS does not*

*provide the means for the determination of a dispute,.....such disputes are to be resolved in proceedings.....”*

14.14 In my opinion a Trustee in Bankruptcy is able to lodge a **caveat** in circumstances where he is satisfied that there is sufficient evidence to void a transfer between parties in circumstances where the criteria under s120 and/or s121 of the Bankruptcy Act are met. This is because the opening paragraph of each section states:-

“(1) *A transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy”*

14.15 The sections do not state is void if declared by a Court to be void but declares that the transfer is void.

14.16 However the High Court does make reference to *Calverley v Green* which was the case primarily relied on by Mrs Cummins to support her trust argument. Their Honours decided to duck the issue by deciding that it was unnecessary in Cummins to look at the conflicts between *Calverley v Green* and *Pettitt v Pettitt*, an English authority (see paragraphs 67 and 68 *The Trustees of the Property of John Daniel Cummins, a bankrupt v Cummins* [2006] HCA 6):-

*“When two or more purchasers contribute to the purchase of property and the property is conveyed to them as joint tenants, the equitable presumption is that they hold the legal estate on trust for themselves as tenants in common in shares for a proportionate to their contributions unless their contributions are equal”.*

## **15. SECTION 181A – METHOD FOR REPLACING TRUSTEE**

- 15.1 The Official Trustee causes a change of Trustee by operation of Section 181A without the need for a meeting of creditors. In the matter of *Coshott v Burke*, Rares J upheld the procedures of the Official Trustee in Bankruptcy. The bankrupt's family had been sued in relation to the bankrupt's interest in real estate. The bankrupt, his wife and son had each filed Defences to the Court proceedings that there was a defect in the appointment of the registered Trustee under Section 181A of the Bankruptcy Act and that he had not been properly appointed. In evidence given on behalf of the Official Trustee in Bankruptcy, Rares J accepted that there had been a notification to the then known creditors under Section 64A of the Bankruptcy Act, notwithstanding the fact that the bankrupt's Statement of Affairs had not been received and that the delegation from the Official Receiver to a senior manager and a supervision by the senior manager of junior staff was not a secondary delegation for which there was no power but a direction to a cipher to carry out certain work, namely prepare the documents for preparation of the paper meeting under Section 181A.
- 15.2 This case is supported by the earlier decision of Emmett J in *Official Trustee in Bankruptcy (as Trustee for the 15 estates named in Schedule A) – David Patrick Watson, deceased* [2009] FCA 850 in which the Federal Court declined to transfer all the deceased bankruptcy administrations by use of s30 and required the Official Trustee to deal with each estate under s181A Bankruptcy Act.
- 15.3 Section 164 should be considered in circumstances where there is a change of Trustee. It requires each of the Trustees to determine by agreement how

the remuneration is to be paid and that agreement is to be endorsed by resolution of the creditors.

## **16. CROSS-BORDER INSOLVENCY ACT, 2009 (CTH)**

- 16.1 The Cross-Border Insolvency Act, 2009 (CTH) has commenced. The Federal Court (corporations) Rules, 2000 set out the prescribed form as do the Federal Court Rules order 25A. Prescribed bankruptcy forms exist for the application of this Act.
- 16.2 Two cases considered in 2009 under the Act are *Hur v Samsung Logix Corporation [2009] FCA 372*, and *Levy v Reddy [2009] FCA 63*. In both matters orders were made for the protection of Australian creditors, in Logix concerning matters in Korea and in Levy concerning the appointment of a receiver over jointly owned assets in Australia of which the bankrupt was only one joint owner.

## **17 INSPECTOR GENERAL'S INCREASED POWERS**

- 17.1 The Inspector General in Bankruptcy will be given the power to investigate possible offences under the Bankruptcy Act. Whilst offences such as failing to file a Statement of Affairs will be apparent from the NPII and failure to update to NPII by Trustees increased provisions for failure to comply with Section 77C will be an offence under Section 267B. Section 77C Notice is issued by the Official Receiver upon payment of a fee and again, the Official Receiver has sufficient information to be able to determine if the notice has been answered adequately or at all.

## **18 HIGH COURT CASES**

### ***Coventry v Charter Pacific Corporation Limited* (2005) HCA 67**

18.2 Only certain debts are provable in bankruptcy unless they have been converted into a Judgment debt. Only liquidated debts are provable in bankruptcy without a Judgment. Obviously goods sold and delivered claims under a guarantee claims for services rendered are such claims. However the claim in Coventry related to damages for breach of Trade Practices Act and Corporations Act by engaging in misleading and deceptive conduct in security dealings. Coventry was made bankrupt in 1994 and discharged in 1997 and in 1994 Chartered Pacific commenced the proceedings which came to hearing in 2000. Coventry unsuccessfully argued that any claim was a provable debt in bankruptcy and therefore he was not personally liable for the debt even though the cause of action arose before bankruptcy and Judgment was entered after his discharge from bankruptcy. Other issues discussed were whether, if the claim was a provable debt, leave to proceed against the bankrupt was required, even for a costs order.

### ***Foots v Southern Cross Mine Management Pty Ltd* (2007) HCA 56**

18.3 The High Court determined that a costs order made against a bankrupt was not a provable debt in his bankruptcy which occurred before the costs order. Although Judgment had been given against the bankrupt the final determination of the costs had not been made. Nevertheless, after Judgment but before determination of costs the debtor filed a Debtor's Petition. He argued that the costs order was a provable debt. He lost because the costs are entirely in the discretion of the Court and is not a debt or liability from an obligation incurred prior to his bankruptcy and nor was the liability incidental to

a provable debt. Because costs of a proceeding are in the discretion of the Court and are not automatically an order that “costs follow the event” and as there is no absolute rule in the respect to the exercise of power to award costs. There was no provable debt for the costs order in the bankruptcy. The creditor could make him bankrupt again.

***Adams v Lambert (2006) HCA 10***

- 18.3 The High Court determined that a formal defect or irregularity of a Bankruptcy Notice was insufficient to have the Bankruptcy Notice set aside. Section 306 of the Bankruptcy Act states that bankruptcy proceedings should not be dismissed simply because of a “formal defect or irregularity”. The meaning of that phrase had in past years been given a narrow interpretation. It amounts to a degree of defect. Is a Bankruptcy Notice a nullity if it “fails to meet a requirement made essential by the Act”. The Court indicated that one must not conclude that a Bankruptcy Notice is invalidated by defect. One must consider whether it was capable of misleading

*“Section 306 in its application to Bankruptcy Notices, makes it plain that some instances of non-compliance with the requirements as to form of a notice will not invalidate the notice. The practical significance of an error or deficiency could vary according to the circumstances of each particular case. Errors or deficiencies in compliance with requirements as to form may involve questions of degree as of kind”.*

*“Given that Section 306 relieves against the invalidating consequences of some mistake in the preparation of Bankruptcy Notices, the mistake that was made in this case falls within its terms”*

## SCHEDULE

### **“Schedule 1—Remuneration of trustees of estates of bankrupts**

#### **Bankruptcy Act 1966**

##### **1 Subsections 64U(2) to (4)**

*Repeal the subsections.*

##### **2 Subsection 64U(5)**

*Omit “A statement to be made by the trustee as mentioned in subsection (3)”, substitute “The trustee must then state the basis on which the trustee wishes to be remunerated. The statement”.*

##### **3 Subsection 64U(5A)**

*Omit “subsection (3)”, substitute “subsection (5)”.*

##### **4 After subsection 64U(6)**

*Insert:*

*(6A) The President must invite the creditors and their representatives to propose a motion that the trustee be remunerated in accordance with the statement and, if no such motion is proposed, the trustee may propose such a motion.*

##### **5 Subsection 64U(7)**

*Omit “subsection (4)”, substitute “subsection (6A)”.*

##### **6 After subsection 64U(7)**

*Insert:*

*(7A) If:*

*(a) the meeting is the first meeting of the bankrupt’s creditors and the trustee is a registered trustee; and*

*(b) the following apply:*

*(i) before the meeting the trustee had given a notice under section 64ZBA that contained a proposal relating to how the trustee was to be remunerated;*

*(ii) the notice satisfied subsections 64ZBA(2) and (2A);*

*(iii) the proposal was taken to have been passed under subsection 64ZBA(3);*

*then subsections (1) to (7) of this section do not apply in relation to the meeting.*

##### **7 After subsection 64ZBA(2)**

*Insert:*

*(2A) If the proposal relates to how the trustee is to be remunerated, the notice must also:*

*(a) if the trustee proposes to charge on a time-cost basis:*

(i) if there is only one rate at which the remuneration is to be calculated—state that rate; or

(ii) otherwise—state the respective rates at which the remuneration of the trustee and the other persons who will be assisting, or will be likely to assist, the trustee in the performance of his or her duties are to be calculated; and

(b) if the trustee proposes to charge on the basis of a commission upon money received by the trustee—state the rate of that commission; and

(c) state the periods at which the trustee proposes to withdraw funds from the bankrupt's estate in respect of the trustee's remuneration; and

(d) include an estimate of the total amount of the trustee's remuneration and an explanation of the likely impact of that remuneration on the dividends (if any) to creditors.

**8 Subsection 64ZD(1)**

Omit "subsection 64U(4)", substitute "subsection 64U(6A)".

**9 Subsection 161B(1)**

Repeal the subsection, substitute:

(1) If the total remuneration payable to the trustee under section 162 would be less than the following amount (the **statutory minimum**):

(a) \$5,000;

(b) if another amount is prescribed by the regulations for the purposes of this paragraph—that other amount; the trustee is entitled to be paid, from the funds in the bankrupt's estate, additional remuneration equal to the shortfall.

**10 Subsection 161B(1A)**

Omit "(as affected by section 304A)".

**11 Subsections 161B(2) and (3)**

Repeal the subsections.

**12 Subsection 162(4)**

Repeal the subsection, substitute:

(4) If the remuneration of the trustee is not fixed by the creditors or the committee of inspection, the trustee may, in the circumstances prescribed by the regulations, make an application, in accordance with the regulations, to the Inspector-General for the Inspector-General to decide the trustee's remuneration.

(4A) If an application is made to the Inspector-General under subsection (4), the Inspector-General must, by writing, decide

the trustee's remuneration, having regard to the matters prescribed by the regulations.

(4B) The Inspector-General must give written notice of his or her decision under subsection (4A) to the trustee and to the bankrupt and creditors.

### **13 Section 167**

Repeal the section, substitute:

#### **166 Payment to third parties**

The trustee must, in relation to the payment for services provided by another person in relation to the administration of a bankrupt's estate, give such notices to the bankrupt and creditors of the bankrupt as are required by the regulations.

#### **167 Review of remuneration etc.**

*Trustee's remuneration*

(1) The regulations may make provision for and in relation to:

(a) the Inspector-General reviewing decisions of the trustee of the estate of a bankrupt to withdraw, or to propose to withdraw, funds from the estate for payment of the trustee's remuneration; and

(b) the bankrupt or a creditor of the bankrupt applying for the review.

*Payment to third parties*

(2) The regulations may make provision for and in relation to:

(a) the Inspector-General reviewing a bill of costs for services provided by a person (the **third party**) in relation to the administration of a bankrupt's estate; and

(b) the trustee of the estate applying for the review.

*Content of regulations*

(3) The regulations may provide for:

(a) the powers available to the Inspector-General in relation to the review; and

(b) the trustee or the third party to provide information or documents to the Inspector-General; and

(c) the decisions that may be made by the Inspector-General in relation to the review; and

(d) the notification of decisions made by the Inspector-General.

*Repayment—trustee*

(4) The regulations may provide that, if the Inspector-General is satisfied that a withdrawal by the trustee of funds from the estate of the bankrupt for payment of the trustee's remuneration exceeds the amount of remuneration the trustee is entitled to

*under this Division, the Inspector-General may require the trustee to repay the excess to that estate.*

*(5) The amount of the excess is recoverable by the Inspector-General, as a debt due to the estate of the bankrupt, by action against the trustee in a court of competent jurisdiction.*

*Appeal to the Court*

*(6) The trustee, the bankrupt or a creditor of the bankrupt may appeal to the Court from a decision of the Inspector-General in relation to the review. In addition, if the review is of the kind mentioned in subsection (2), the third party may also appeal to the Court from a decision of the Inspector-General in relation to the review.*

*Interpretation*

*(7) Subsections (3) and (4) do not limit subsections (1) and (2).*

**14 Subsection 304A(1) (paragraph (i) of the definition of indexable amount)**

*Repeal the paragraph.*

**15 Subsection 304A(4)**

*Repeal the subsection.*

**16 Subsection 304A(6)**

*Omit “, (4)”.*

**17 Application**

*The amendments made by this Schedule apply in relation to bankruptcies for which the date of the bankruptcy is on or after the day on which this item commences.”*