# Practitioner independence vital for personal insolvency system

Malcolm Howell, Partner, Jirsch Sutherland

A new report released last month by The Australian Financial Security Authority (AFSA) has highlighted the critical role that the independence of insolvency practitioners plays in maintaining the integrity of Australia's personal insolvency system.

The report, *Practitioner Independence in the personal insolvency system*, is designed to clarify what practitioner independence means in practice and to address the misconceptions surrounding it. "Independence is the cornerstone of the personal insolvency industry because practitioners – particularly registered trustees – have significant powers which may impact on the outcomes for creditors and debtors," the report states.

AFSA Deputy Chief Executive, Gavin McCosker, reiterated the critical foundation that independence provides to the insolvency system. "Put simply, practitioner independence is fundamental to the insolvency system in Australia," he says. "Using examples from case law and industry guidance, our report will help all stakeholders to better understand our expectations of independence – highlighting the importance of transparency in maintaining confidence in the system overall.

"The report provides clarity for practitioners, while also helping other parties involved understand the importance of integrity and fairness."

McCosker says that while much of the responsibility for independence lies with practitioners, it's also important that debtors and creditors engage with the system.

"For creditors, engaging with the system is the best defence against unfair activity. Carefully reviewing the Insolvency Practitioner declaration and raising any concerns is vital," he says. "For debtors in financial difficulty, it is important to be wary of untrustworthy pre-insolvency advisors who are unregulated and may seek to influence the proper work of insolvency

practitioners. Reporting untrustworthy behaviour can help protect your interests in the long term.”

## Conflicts of interest

**To demonstrate independence, AFSA expects practitioners to (and be seen to):**

- act impartially and objectively in exercising a duty
- avoid a real or perceived conflict between duty and interest
- be unaffected by influences that may compromise professional judgement

**AFSA details some common examples of conflicts of interest, including:**

- dual appointments where the trustee of a director's bankrupt estate also acts as the liquidator of the company; or where it's uncertain whether the property belongs to the person made bankrupt or the company (or has been transferred between the two)

- professional relationships with the debtor or their creditors
- personal relationships with the debtor
- referral relationships with accountants and lawyers acting for debtors, which may lead to actual or perceived conflicts of interest

“AFSA is aware that the insolvency system is referral based and, to attract work, insolvency practitioners develop contacts and relationships with actual or prospective sources of referrals. This can create a conflict between the practitioner’s interest in receiving further referrals and their duties of care and independence. This is one of the reasons why we will always pay close attention to this area. The possibility of a conflict is heightened when the referrer is a pre-insolvency advisor,” the report states.

Jirsch Sutherland Partner and Bankruptcy Trustee Malcolm Howell says the words of the former Federal Court Judge, the Hon Justice John S Lockhart AO QC, still ring true today – nearly 40 years later.

“In a 1982 determination, Mr Lockhart stated that: ‘A trustee must be scrupulously careful to ensure that he never allows himself to be placed in a position of conflict or potential conflict. A registered trustee must not only be impartial; he must be seen to be impartial’,” says Howell.

“It’s vital that Bankruptcy Trustees remain objective and independent, particularly if a referral source – such as accounting or legal professionals – endeavours to influence a practitioner’s decision. Throughout the bankruptcy process, it’s paramount to have open and honest communication and full disclosure with creditors, who are key stakeholders.”

***Re Partridge (unreported FCA Lockhart J 22 September 1982)***