



**NEW ZEALAND
INSOLVENCY AND
TRUSTEE SERVICE**

Enforcement policy guidelines



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
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Introduction

About these guidelines

The Insolvency and Trustee Service is part of the Ministry of Business, Innovation and Employment (MBIE). The Service (“ITS”), through the statutory office of the Official Assignee, administers the personal insolvency processes of bankruptcies, no-asset procedures and summary instalment orders under the Insolvency Act 2006 (“the Act”).

These guidelines set out the ITS approach to compliance and enforcement in respect of personal insolvencies. They are intended to guide and to inform those who are subject to statutory duties under the Act, as well as the business community and the public.

They are intended to be a living document, and will be revised over time to reflect developments in legislation and our organisational objectives and priorities. They are not exhaustive, and are not intended to be legally binding.

Objectives

These guidelines reflect the relevant objectives of the Act, which are:

- To provide a predictable and simple regime for financial failure that:
 - can be administered quickly and efficiently
 - imposes the minimum necessary compliance and regulatory costs on its users, and
 - doesn’t stifle innovation, responsible risk taking and entrepreneurialism.
- To maximise returns to creditors by providing flexible and effective methods of insolvency administration and enforcement.
- To enable individuals in bankruptcy and other insolvency procedures under the Act to participate again in the economic life of the community by discharging them from their remaining debts in appropriate circumstances.

These guidelines further recognise that in order to achieve these objectives, individuals who are subject to bankruptcy, the no-asset procedure or a summary instalment order under the Act should comply with their statutory obligations. In these guidelines, those individuals will be referred to as “debtors”.

Guiding principles

The ITS enforcement strategy reflects the need for a proportional and risk-based approach to enforcement, and therefore seeks to ensure that cases of regional or national significance are prioritised, so that resources are used effectively to protect the interests of the commercial community and the public at large.

The strategy is underpinned by the philosophy that, as far as possible, ITS aims to enable debtors to achieve compliance with their statutory obligations, rather than seeking to penalise them for any and every breach. It recognises that the majority of debtors wish to, and do, comply with their obligations, and seeks to overcome any obvious barriers to compliance.

In accordance with this underlying principle, ITS uses the most appropriate and cost-effective compliance tools available to it. It will establish compliance pathways, which may include progressively

more serious consequences for non-compliance. In cases of severe or flagrant breaches, this may include the taking of prosecution action.

Complaints and investigations

A complaints process enables members of the public, creditors, insolvency practitioners and other agencies to make complaints or provide information on potential breaches of legislative obligations administered by ITS.

All complaints will be considered, however ITS will not investigate or take action on every complaint that it receives. Further investigation decisions will be made based on factors such as:

- the principles set out in these guidelines
- the strength of the available evidence
- whether the public interest requires a prosecution
- the best use of available resources, and
- the cost-effectiveness of proceeding with an investigation.

Other agencies

ITS coordinates with other agencies, such as Police, the Serious Fraud Office and other regulatory agencies in order to achieve its compliance and enforcement aims. It will:

- share information with other agencies (within the limits of the law), and
- collaborate in any joint agency initiatives that relate to breaches of the relevant legislation, and which may form part of wider financial or other criminal activity.

Compliance

Compliance is of primary importance to the Official Assignee. In all cases where appropriate, ITS provides information and tools to enable individuals to comply with their obligations under the Act. Compliance tools such as written information and booklets, website information, a Freephone telephone enquiry line, and reminder letters are made available to educate and inform debtors about their statutory obligations.

Where compliance is not achieved using these tools, further enforcement measures will be considered. In cases that meet the prosecution criteria in the ITS Prosecution Strategy (set out below) this will include consideration as to whether prosecution action should be taken.

Enforcement

Where there is a public interest in enforcement action being taken (eg, because the non-compliance is serious, prolific or has caused serious financial loss, or there are persistent failures to comply through the use of the compliance tools outlined above), ITS will consider further enforcement measures.

These may include:

- formal compliance warning letters
- the exercise of other statutory powers available under the Act, such as the powers to:

- obtain documents
- summon and examine a debtor
- object to the automatic discharge of the debtor, or
- seek that there be conditions imposed on the debtor upon discharge, or
- prosecution.

Prosecution

The Official Assignee, through ITS, will consider each complaint on its own merits when making the decision to bring criminal proceedings. Prosecution action is a significant enforcement measure, and the Official Assignee will ensure that decisions to prosecute are made fairly and consistently. The Official Assignee will also be mindful that not all offending should result in prosecution action, and that prosecution decisions must be made in the context of the available resources and to ensure the best value outcome.

In all cases, the Official Assignee will make an independent decision to provide instructions to the relevant Crown Solicitor to proceed with a prosecution, which will be guided by the Solicitors General's Prosecution Guidelines 2013 and this enforcement strategy.

The Official Assignee will also have regard to the overarching principles of MBIE's prosecution framework, which is attached as an Appendix to this document. That document is referred to as the "Ministry Prosecution Guidelines".

Evidence

The Official Assignee must consider whether there's sufficient evidence to succeed in a prosecution. Relevant factors may include:

- whether there's sufficient evidence to identify a particular offender
- the credibility of available witnesses
- the admissibility of available evidence, and
- an objective assessment of the prospect of obtaining a conviction.

Public interest

The Official Assignee must also be satisfied that a prosecution is required in the public interest. The factors taken into consideration will vary on the circumstances of each particular case, but may include a consideration of:

- The seriousness of the offending, which is influenced by the likely penalty or sanction for the alleged offending.
- The extent of improper benefit or gain to the bankrupt from the alleged offending.
- The size of the bankrupt's estate, including the number and nature of creditors.
- The extent and level of financial or other loss or harm caused by the offending, comparable to the circumstances of each particular case, and whether there is potential for further losses to creditors from the alleged offending.
- The impact on the community where alleged offending has occurred.
- The offending is prevalent within the community.
- The offending is premeditated or intentional.

- Whether the offender has a previous history of offending.
- The extent to which the offending involves an abuse of the Official Assignee's role to administer a bankrupt's estate and recover monies for creditors.
- The offending is likely to be continued or repeated.
- The risk to the overall integrity of the insolvency regime or to New Zealand's international reputation.
- The availability of appropriate alternatives to a prosecution, such as formal warning letters or an inter-agency referral to a body more appropriately placed to address the issues raised by the alleged offending.

Charges to be laid

Once a decision to prosecute has been made, a choice as to which charges should be laid should reflect the criminality of the defendant's conduct.

In general, where the facts to be alleged at trial support a charge under both the Crimes Act and the Insolvency Act, the more serious charge should be brought. This is a general rule however, and the circumstances of each prosecution must be carefully weighed before charges are laid.

In making this decision, the Assignee will have regard to any advice of the relevant Crown Solicitor.

Disclosure

The Official Assignee will adhere to the Ministry Guidelines in respect of disclosure under the Criminal Disclosure Act, and in respect of the process for appeals.

Focussed programmes

From time to time ITS may concentrate on a particular area or areas of offending by way of focussed programmes. This aim of such focussed programmes would be to bring about compliance and provide deterrence in particular areas of concern.

Publicity

ITS will publicise the outcomes of prosecution cases where appropriate, unless there are legal or other compelling reasons not to. This is intended to:

- act as a deterrent for the offender and other potential offenders who would consider offending in the same way, and
- provide information and education generally on the relevant statutory obligations.

Evaluation and review

These guidelines will be reviewed on a regular basis, and adjusted according to changes in ITS priorities and emerging trends or issues of concern.

In order to inform such reviews, ITS will undertake regular evaluations of its compliance and enforcement activities, and the costs and benefits of these activities. It may seek the views of outside agencies or interested parties in undertaking such evaluations.