

# **CITY INSOLVENCY DISCUSSION GROUP**

Wednesday, 6 November 2019

## **TOPIC**

*“Regulatory Trends and AFSA Compliance Program 2019-20”  
and  
“Income Assessment under section 139Y of the Bankruptcy Act-  
1966”*

## **PRESENTED BY**

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WillisTowersWatson 



**Australian Government**

**Australian Financial Security Authority**

# City Insolvency Discussion Group

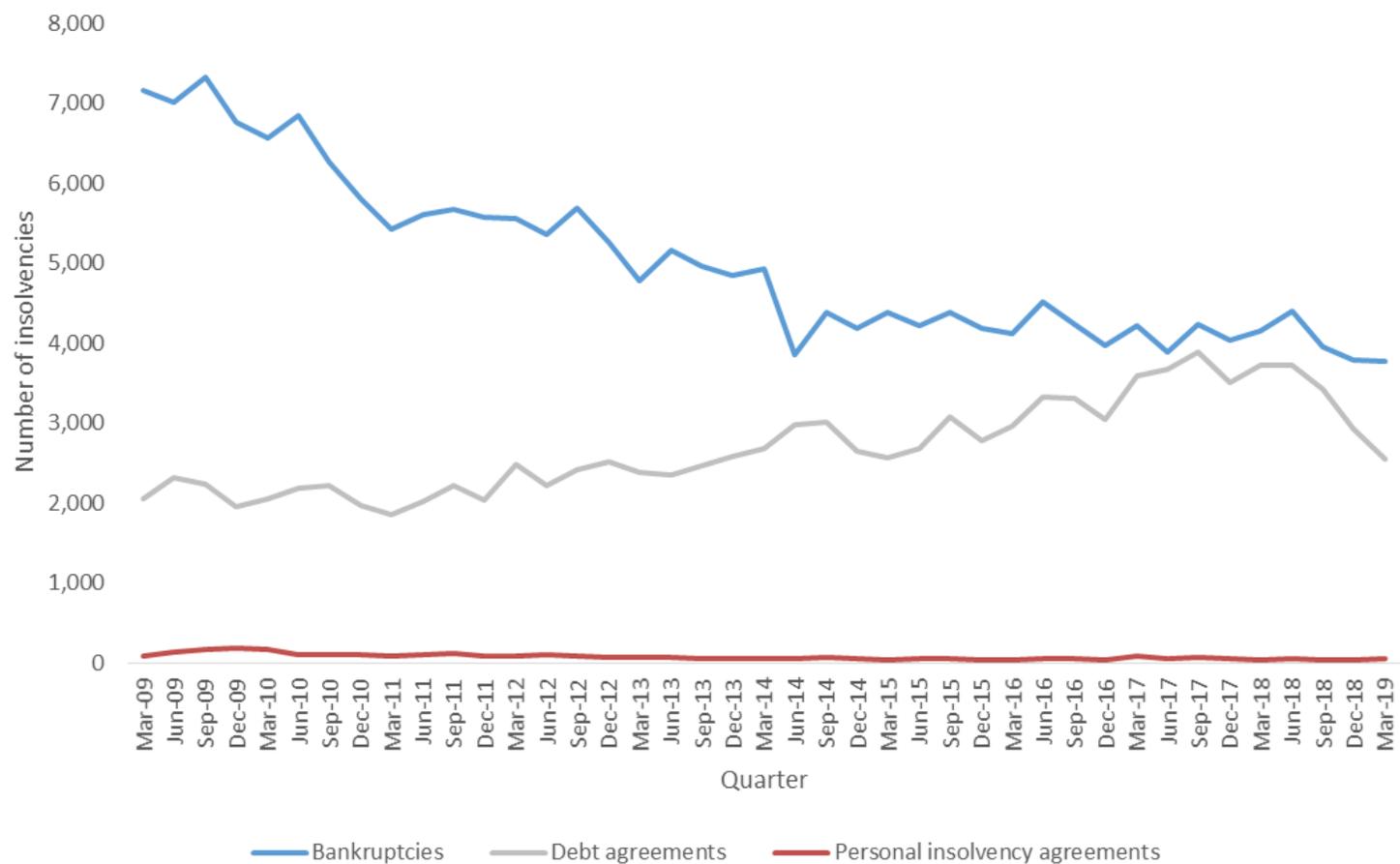
Regulatory Trends, AFSA compliance program 2019-20  
and s139Y income assessments

6 November 2019 - Perth

## Session overview

- **Personal insolvencies – the last 10 years**
- **Targeted regulatory activities**
- **Compliance trends 2018-19**
- **Focus areas – compliance program 2019-20**
- **Hayne Royal Commission - implications for AFSA**
- **Law reform**
- **Official Receiver – a compliance tool**
- **Regulatory and industry trends - “The Big 5”**
- **Section 139Y Income assessments**
- **Feedback and discussion**

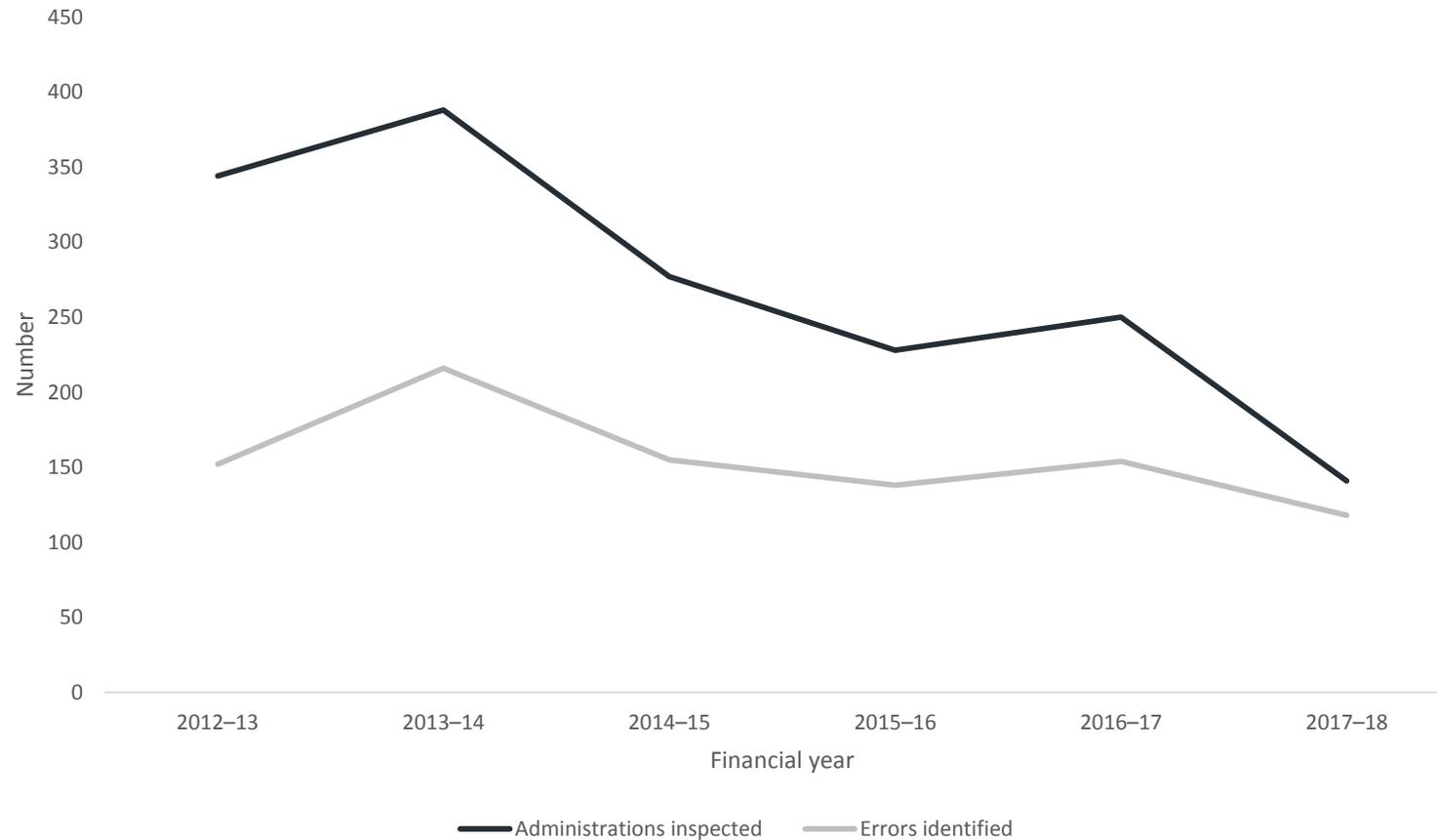
# Total personal insolvencies in past 10 years



# Targeting of compliance and regulatory efforts on the greatest harms

- **AFSA's inspection program has each year become more focussed**
- **Using live risk profiling and data to inform compliance program - focus on those likely to cause the greatest potential harm**
- **Supporting debtors to make sensible informed decisions with the 'the right option, the first time'**
- **Untrustworthy Advisors – harmful to the system**

# AFSA's inspection program has become more focused



# Compliance trends - 2018-19

- 35 practitioners inspected - the highest proportion of inspection errors were category C (91%) – pleasing result
- 343 complaints about practitioners finalised with 9 found justified
- 406 requests for I-G reviews were finalised; 29 trustee decisions were cancelled or varied
- 299 Part X and s73 proposals reviewed; AFSA attended meetings in 25 proposals and intervened or took corrective action in 10 instances
- 107 advertising reviews were conducted; 19 practitioners and 18 brokers/pre-insolvency advisors contacted to correct and/or remove content. 2 were referred to ASIC for alleged misleading and deceptive conduct.
- 4 show cause notices
- 201 RTs – 9 voluntarily de-registered, 2 new RTs, 1 involuntarily de-registered. 209 RTs as at 30 June 2018.

# Trends in compliance issues – RT Inspections

- **The top three areas issues were:**
  - Property, income and asset errors (44%)
  - Inadequate communication by trustee (12%)
  - Creditor claims not properly dealt with (12%)

# Offence referrals by trustees

- **Offence Referrals**

- **984 offence referrals were assessed**
- **744 (76%) were accepted for investigation**

- **Pre Referral Enquiries (PREs)**

- **948 PREs were received and assessed**
- **567 (60%) did not require a detailed offence referral from practitioners**

# Assessment of offence referrals

- **Enforcement Strategy – strategic focus areas**
- **Prosecution Policy of the Commonwealth**
- **Referrals prioritised to ensure alignment with AFSA's purpose and goals are achieved.**
- **Enforcement outcomes**
  - **Compliance/Education**
  - **Official cautions**
  - **Referrals to Commonwealth Director of Public Prosecutions**

# Royal Commission into Banking, Superannuation and Financial Services - Implications

- “Failings of organisational culture, governance arrangements and remuneration systems, are at the heart of much of the misconduct examined in the Commission”.
- “The primary responsibility for misconduct in the financial services industry lies with entities concerned and with those who manage and control them: their boards and senior management”.

# Royal Commission into Banking, Superannuation and Financial Services – Implications for AFSA

- Need to be a firm and fair regulator, and to be seen as such
- Culture – it can be assessed, and influenced
- Remuneration, ensure it supports confidence
- Use of litigation / enforcement

# Personal Insolvency Compliance Program 2019-20

- Four strategic focus areas are proposed:
  1. Debt Agreement Law Reform
  2. Independence and pre-insolvency advisors
  3. Remuneration
  4. Culture

# Bankruptcy reforms

- **Bankruptcy Amendment (Enterprise Incentives) Bill 2017 – introduced Oct 2017.**
- **As the Bill was not passed prior to dissolution of the last Parliament, the Bill lapsed.**

# Debt agreement reforms

- **Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 – introduced Feb 2018, took effect 27 June 2019**
- **Key changes include**
  - **DA period capped at 3 years**
  - **RDAAs to get adequate and appropriate PII and FI**
  - **New fit and proper person requirement for RDAAs**
  - **RDAAs to consider and refer offences under the BA**
  - **I-Gs inquiry/investigation powers extended to any conduct of RDAA**
  - **Debtor's payments compared to income**
  - **New power for Minister to impose industry-wide conditions – expected to commence early 2020**

# Official Receiver – a compliance tool

- **Powers of OR include:**
  - **Information Gathering:**
    - 77C (power to obtain information and evidence, 77AA (access to premises),
    - 77CA (power to obtain a SOA),
    - 81A (off-shore information notices)
  - **Requiring payment:**
    - s123E (super account freezing notice),
    - 139ZL (require persons to make contributions),
    - 139ZQ (recovery of transactions which are void against the trustee under Division 3),
    - 139ZR (Certificate for charge against property).

## Trends – “The Big 5”

1. Culture
2. Remuneration
3. Independence and Untrustworthy advisors – how much harm is being done upfront in the pre-insolvency space?
4. “Right option the first time”
5. Creditor engagement

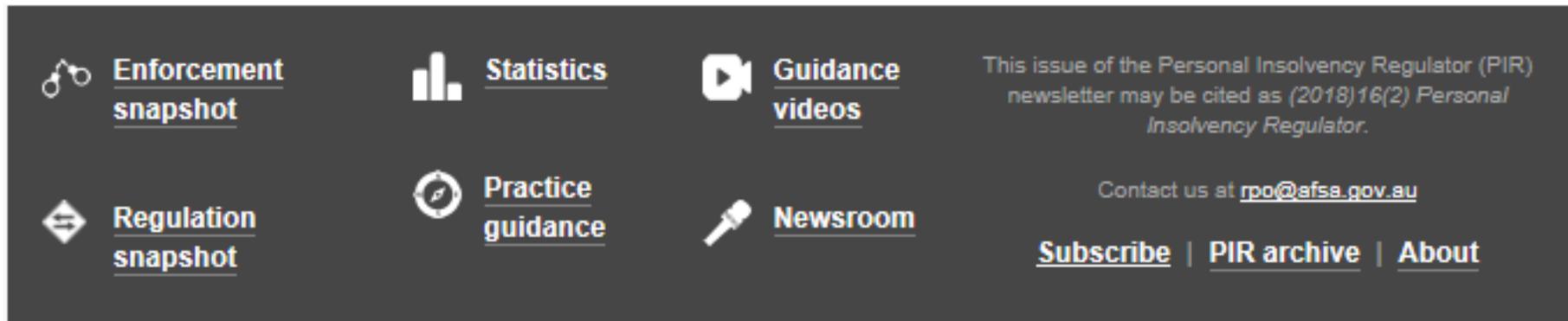
# Further statistical information

## • [www.afsa.gov.au/about-us/statistics](http://www.afsa.gov.au/about-us/statistics)

<p><a href="#">Social characteristics</a> &gt;</p> <p>Social characteristics of personal insolvency debtors.</p>	<p><a href="#">Regional statistics</a> &gt;</p> <p>Quarterly regional personal insolvency statistics.</p>	<p><a href="#">Personal insolvency statistics</a> &gt;</p> <p>We publish provisional quarterly and annual personal insolvency statistics on bankruptcies, debt agreements and personal insolvency agreements...</p>
<p><a href="#">Business and non-business statistics</a> &gt;</p> <p>A breakdown of business and non-business personal insolvency statistics is published quarterly for bankrupts, debt agreement debtors and...</p>	<p><a href="#">Profiles of debtors</a> &gt;</p> <p>Profiles of Debtors presents information on the socioeconomic circumstances of insolvent debtors in the calendar year.</p>	<p><a href="#">Annual administration statistics</a> &gt;</p> <p>This publication provides annual information on the administration of personal insolvencies.</p>
<p><a href="#">Regulation, Enforcement and Compliance statistics</a> &gt;</p> <p>We publish statistics on our regulation and enforcement activities.</p>	<p><a href="#">Provision of non-standard data and information for research purposes</a> &gt;</p> <p>Information about AFSA's policy on providing non-standard data and information for research purposes.</p>	<p><a href="#">Statistics release schedule</a> &gt;</p> <p>Expected release dates of personal insolvency statistics.</p>
<p><a href="#">PPSR statistics</a> &gt;</p> <p>We publish regular statistics on the operation of the Personal Property Securities Register (PPSR).</p>		

## Further statistical information

• **Personal Insolvency Regulator – now includes regulation and enforcement YTD statistics** <https://www.afsa.gov.au/professionals/pir-newsletter>



 [Enforcement snapshot](#)

 [Statistics](#)

 [Guidance videos](#)

*This issue of the Personal Insolvency Regulator (PIR) newsletter may be cited as (2018)16(2) Personal Insolvency Regulator.*

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Contact us at [rpo@afsa.gov.au](mailto:rpo@afsa.gov.au)

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## **Trustee's powers and duties under the Act to assess bankrupt's income contributions**

- **The terms “income”, “pension” and “annuity” referred to in s139L.**
- **Section 139W- Trustee to make timely assessments.**
- **Section 139U- Bankrupt's obligations to provide evidence of income.**
- **Sections 139X(1) and 139X(2)- Trustee's powers to accept or not to accept income information provided by the bankrupt.**
- **Alternatively, the trustee may make an assessment based on what he/she believes to be the correct information or under s139Y.**

# Deemed Income Assessment under section 139Y

- s139Y sets out the circumstances under which the trustee may exercise his/her powers to determine bankrupt's reasonable remuneration.
- Determination of reasonable remuneration.
- Elements to be considered in assessing the bankrupt's "reasonable income"
- Other factors to be taken into consideration.
- Helpful observations and guidance provided by Deputy President McMahon in Re: Nelson and Inspector- General in Bankruptcy (1994)  
35 ALD 113

# **Allowable Income tax deductions in income assessments under s139Y.**

- **Section 139N(1)(i) -Allowable deduction for income tax paid .**
- **Allowable income tax deduction under s139N(1)(i) does not apply for relevant income assessed under s139Y**
- **Refer Case law: Pattison v Schiffer [2007] FMCA 319 (16 March 2007)**

## Contact us

- **National Service Centre - call on 1300 364 785**
- **For regulatory enquiries email our National Allocations Team:** [regulation@afsa.gov.au](mailto:regulation@afsa.gov.au)
- **For any general enquiries with respect to enforcement, the Bankruptcy Act 1966 offence provisions, or simply questions about whether or not to refer an offence allegation to us for investigation, email:** [fraud.enquiries@afsa.gov.au](mailto:fraud.enquiries@afsa.gov.au)
- **Online tip offs:** <https://www.afsa.gov.au/about-us/complaints-and-reviews/tip-offs>

# Feedback and discussion

# **CITY INSOLVENCY DISCUSSION GROUP**

Next CIDG Session

**Wednesday, 4 December 2019**



**MANN JUDD**  
INSOLVENCY WA



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