

Program 2

## **Business Affairs**

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### **Program objective**

To achieve a fair balance between creditors, debtors and the community in the administration of bankruptcies.

◀ **Program 1**

## Sub-program 2.1

# Insolvency and Trustee Service, Australia

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### **Sub-program objective**

A personal insolvency system which balances the need for rehabilitating insolvent debtors with maximising returns to creditors, and thereby produces public confidence in the credibility of the system, through:

- accessible information on bankruptcy and its alternatives, the exercise of statutory powers, and the investigation of possible offences under bankruptcy legislation;
- relevant and up-to-date personal insolvency laws;
- high-quality national standards of personal insolvency administration.

Contribute to the enforcement of proceeds-of-crime remedies in cooperation with other agencies.

### *Functions*

The principal functions of ITSA are:

- Administration of the personal insolvency system:
  - to provide information on bankruptcy and its alternatives to debtors in financial difficulty contemplating bankruptcy, and to the community;
  - to receive debtors' petitions, issue bankruptcy notices, accept debt agreements for processing and maintain and make available data on bankrupts and other debtors;
  - to exercise statutory powers regarding information-gathering, property realisation and the assessment of income contributions by bankruptcy trustees;
  - to consider applications by bankruptcy trustees for an indemnity for their costs in legal proceedings.
- Bankruptcy estate administration:
  - to administer those bankrupt estates in which a registered trustee is not appointed.
- Policy and regulation:
  - to provide policy advice to the Government on the Bankruptcy Act;
  - to regulate personal insolvency administration by all trustees.

- Proceeds of crime:
  - to control and realise property under the provisions of the Customs Act and the Proceeds of Crime Act.
- To provide other trustee services to government agencies.

## Our vision

**What we do:** We are a national government agency taking responsibility for performing a vital role in the Australian economy and society. We do this by helping to protect the Australian community from the impact of financial failure and by countering unlawful activities. We provide an expanding range of bankruptcy, trustee and related services, advice and regulation.

**What we stand for:** We strive to exceed the expectations of clients and to provide value for money. We act with impartiality, equity and integrity. We believe in teamwork, mutual trust and respect. We are committed to the enhancement of professional skills and to the optimal application of creativity and technology.

**What we aim to become:** Our vision is to see ITSA as a leading example of a productive and purposeful public agency, recognised for the quality of its service to clients and for the high standard of its internal working environment.

## Review of Bankruptcy Administration

The National Commission of Audit recommended in 1996 that ITSA should maintain its role as regulator of bankruptcies but it should withdraw from, or contract out, bankrupt estate administration services. This recommendation was reviewed and considered by the Government which decided to continue the current system of administering bankruptcy in Australia through both the Official Trustee (ITSA) and private registered trustees. The Government did not agree to withdraw from or contract out bankruptcy administration work undertaken by ITSA. The Government noted that creditors were able to appoint a private bankruptcy trustee at the outset or at any time during the administration of a bankruptcy, and that ITSA performs the role of trustee of last resort.

## Administration of the Personal Insolvency System

### *Function*

ITSA staff exercise statutory powers which help to maintain the credibility of the personal insolvency system. Several statutory powers and responsibilities were transferred to ITSA from the Federal Court, and other new statutory responsibilities were given to ITSA, when the *Bankruptcy Legislation Amendment Act 1996* came into operation on 16 December 1996. These new responsibilities included the provision of prescribed information about bankruptcy and its alternatives to debtors in financial difficulty contemplating bankruptcy, accepting debtor's petitions, accepting debt agreement proposals for processing and issuing bankruptcy notices. ITSA also became responsible for maintaining the National Personal Insolvency Index (NPII), the public bankruptcy register.

## Resources Summary—Sub-program 2.1 Insolvency & Trustee Service, Australia

FINANCIAL	1995–96	1996–97	1996–97
	Actual \$('000)	Estimate \$('000)	Actual \$('000)
<b>Appropriation Bill No. 1</b>			
Running Costs			
• Salaries (120–1) (p)	15 667	14 864	13 983
• Other (120–1) (p)	9 839	11 187	10 422
<b>RUNNING COSTS APPROPRIATIONS</b>	<b>25 506</b>	<b>26 051</b>	<b>24 405</b>
Other Program Costs			
• Compensation & Legal Expenses (120–2-04)	1 135	1 200	1 929
<b>Appropriation Bill No. 2</b>			
• Departmental Plant & Equipment (805–1-01) (p)	383	445	413
<b>TOTAL APPROPRIATIONS</b>	<b>27 025</b>	<b>27 696</b>	<b>26 747</b>
Adjustments affecting Outlays			
• Revenue			
– Miscellaneous	6 156	11 238	11 238
• Section 35 (Audit Act) Receipts	69	138	138
<b>TOTAL OUTLAYS</b>	<b>20 799</b>	<b>16 320</b>	<b>15 372</b>
STAFFING			
<b>Staff Years</b>	<b>280.0</b>	<b>285.4</b>	<b>283.5</b>
REVENUE AND/OR ITEMS NOT AFFECTING OUTLAYS			
<b>Miscellaneous Receipts</b>			

(p) indicates that the amount shown against an appropriation item is only part of the amount appropriated under that item.

Specific accrual accounting information can be found in the accompanying audited Financial Statements.

## Strategy

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Give the community access to high-standard information on the causes, alternatives and practice of personal insolvency.

### Performance measure

Increased public awareness resulting in more informed decisions by persons in financial difficulty.

### Performance outcome

ITSA delivered a wide range of information services in 1996–97, including:

- providing information over the counter, by telephone and by letter to 38 478 inquirers, an increase of 35.6 per cent over 1995–96;
- publishing a range of pamphlets including *Your Rights and Responsibilities as a Bankrupt*, *Overseas Travel*, *The Most Commonly Asked Questions About Bankruptcy* and *Early Discharge*;
- a new information video entitled *Bankruptcy, Not the Only Option*, launched by the Attorney-General on 23 May 1997, was made available for viewing at the offices of ITSA, financial counsellors and welfare organisations;
- public education and information presentations by trained ITSA staff were provided at seminars, conferences, workshops and other venues for the benefit of community groups, professions, business and financial institutions, insolvency practitioners and financial counsellors in major cities and regional areas. Major presentations were delivered on 182 occasions in 1996–97, compared with 104 in 1995–96.

ITSA conducted a number of information training sessions for insolvency practitioners and others prior to the commencement of the Bankruptcy Legislation Amendment Act. These sessions were in addition to the regular liaison meetings which all State branches of ITSA conduct with stakeholders such as major creditors, registered trustees, financial counsellors and law enforcement agencies.

ITSA publishes a free, widely circulated newsletter, *New Directions in Bankruptcy*, to provide information to all clients and stakeholders about changes to legislation, new procedures and cases of interest. Three editions were published in 1996–97.

### Function

Major statutory powers exercised by ITSA staff relate to the functions which bankruptcy trustees frequently perform as part of the task of administering a bankrupt estate – information gathering, property realisation and the collection of income contributions assessed by the trustee.

## Strategy

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Exercise statutory powers so as to maintain and enhance the efficiency, effectiveness and credibility of the personal insolvency system and investigate possible offences under bankruptcy legislation.

### Performance measure

Notices issued within five days of receipt of relevant supporting material to enable trustees to obtain information, recover and charge property and collect income liabilities.

### Performance outcome

The Official Receiver has information-gathering powers which can be exercised on behalf of any trustee. The powers include access to premises (s.77AA of the Bankruptcy Act) and the issue of a notice requiring a person to give information, attend and give evidence and produce books (s.77C). In 1996–97 there were 573 uses of the powers conferred by ss.77AA, 77A and 77C, including 109 on behalf of registered trustees. In 1995–96 the figures were 521 and 174 respectively. Ordinarily notices are issued within five days of receipt of relevant supporting material.

The Official Receiver's specific statutory power regarding property realisation is the power to issue, on behalf of any trustee, a notice under s.139ZQ which amounts to a requirement that the recipient yield up property forming part of the bankrupt's estate to the trustee. In 1996–97 there were 100 s.139ZQ notices issued, including 65 on behalf of registered trustees. Comparable figures for 1995–96 were 97 and 32 respectively.

Where a bankrupt has been assessed by the trustee as liable, under ss.139P or 139Q of the Act, to pay an income contribution to the trustee, s.139ZL empowers the Official Receiver to recover the amount from a person who, broadly, holds money for, or owes money to, the bankrupt. The Official Trustee may, at the request of any trustee, issue a s.139ZL notice requiring the person to pay to the trustee an amount on account of the income contribution assessed. In 1996–97 there were 70 s.139ZL notices issued, including 29 on behalf of registered trustees. Comparable figures for 1995–96 were 22 and 10 respectively.

### Function

ITSA also assesses applications by bankruptcy trustees under s.305 of the Act for an indemnity from the Commonwealth regarding their costs in legal proceedings necessary for the proper administration of a bankrupt estate, and where there are insufficient funds in the bankrupt estate to meet those costs. Typical legal proceedings for which trustees seek funding are proceedings against a bankrupt who refuses to lodge a Statement of Affairs, public examination of a bankrupt before a court and proceedings to recover assets from creditors paid at the expense of other creditors. The Minister's statutory powers under s.305 have been delegated to, and are exercised by, the Inspector-General in Bankruptcy and the Assistant Secretary, Secretariat Branch, ITSA.

### **Performance measure**

Approved applications for s.305 funding assistance to trustees which resulted in achievement of the identified benefit to creditors or the public interest.

### **Performance outcome**

In 1996–97 there were 49 applications for s.305 funding, of which 31 were approved, 15 rejected and three had not been determined by June 30 1997. In the previous year there were 64 applications and 50 approvals. The funding indemnity ceiling for s.305 applications approved in 1996–97 was \$286 000, up from \$280 000 the previous year. The operational standard of submitting a recommendation to the delegate within five working days (10 days if a complex matter is involved) of receipt of all relevant supporting material was met in 23 cases, or 50 per cent. In the 23 cases where it was not met, other work had a higher priority but this did not jeopardise the actions contemplated by trustees. From 1997–98 information will be collected on the extent to which funded matters result in the achievement of the identified benefit to creditors or the public interest.

### **Function**

ITSA's law enforcement role includes taking appropriate action to ensure the offence provisions of the Bankruptcy Act are enforced. This covers administrations of both the Official Trustee and private registered trustees.

### **Performance measure**

Refer appropriate cases for prosecution within 14 days of identification.

### **Performance outcome**

During 1996–97 a decision was made to be more active in the investigation of possible offences. Several ITSA branches began to apply in-house resources to investigation work, prior to matters being referred to the Director of Public Prosecutions. Staff in these branches received special training for this purpose from the AFP. It is proposed that this higher level of activity will occur in all regional branches.

## **Policy and Regulation**

In 1997 ITSA completed the formal separation of its regulatory activities from its estate administration activities. A Regulation and Policy Branch was formed comprising officers in Canberra and in each State capital. Through the branch head those officers report directly to the Inspector-General in connection with the regulatory activities.

### **Function**

ITSA provides policy advice to the Government in connection with bankruptcy and personal insolvency generally, and undertakes a regulatory role in respect of all bankruptcy trustees, both the Official Trustee and all private registered trustees.

## Strategy

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Develop proposals for relevant and up-to-date personal insolvency laws.

### Performance measure

The Bankruptcy Legislation Amendment Act was passed without amendment by Parliament and came into effect on 16 December 1996. It is planned to conduct a preliminary evaluation of the Act early in 1998 after it has been in operation for 12 months. A more substantive evaluation of the achievement of the objectives of those amendments will be conducted after two years of operation.

### Performance outcome

An extended service within ITSA has been created to give effect to administrative changes resulting from the abolition of the offices of Registrar and Deputy Registrar in Bankruptcy and the distribution of the functions performed by them among the Inspector-General in Bankruptcy, the Official Receivers, trustees and the Federal Court. Most users of the bankruptcy system, particularly debtors in financial difficulty, now need only to attend an ITSA office.

As well as introducing the new debt agreement scheme, other key features of the Act modernised the 'clawback' provisions, which assist bankruptcy trustees to recover assets for the benefit of creditors, and the provisions which set out the duties of trustees to reflect contemporary expectations and practices better when administering bankrupt estates.

Legislation to give effect to the Government's pre-election policy of greater cost recovery for ITSA services was also introduced into the Parliament. The *Bankruptcy Amendment Act 1997*, *Bankruptcy (Estate Charges) Act 1997* and the *Bankruptcy (Registration Charges) Act 1997* came into effect on 14 April 1997.

ITSA is one of the founding members of the International Association of Insolvency Regulators, which provides a forum for promoting a common understanding of insolvency regulation practices around the world and encourages closer cooperation on insolvency issues among members. ITSA provides the secretariat services for the association.

### Function

Regulatory activities involve monitoring the administrations of the Official Trustee and private trustees.

## Strategy

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Bankruptcy regulation has three main strategies to promote high-quality national standards of personal insolvency administration: routine inspections, special investigations and monitoring.

### **Performance measure**

Conduct an inspection of all registered trustees every 24 months covering at least 10 per cent of each trustee's administrations.

### **Performance outcome**

The inspection biennial concluded on 30 June 1997. While the target of inspecting all 163 registered trustees considered to be active was met, the target of examining a minimum of 10 per cent of the administrations was not met in relation to one trustee. However, the relevant Bankruptcy Regulation Unit (BRU) was satisfied that the lesser percentage of the administrations examined was sufficient to determine that the relevant trustee was administering estates under his control at a high standard. The unusually high number of complaints received by the relevant BRU (48.6 per cent of the total complaints received by all BRUs) compared to the limited resources in that unit available to resolve them was the reason for not being able to meet the operational standard fully in relation to the one trustee.

### **Performance measure**

Conduct an inspection of Official Trustee administrations received each year covering at least two per cent of administrations in each category across all work sections.

### **Performance outcome**

The target of examining two per cent of estates administered on behalf of the Official Trustee in each bankruptcy district was met. The inspections revealed only minor deficiencies, particularly in the areas of investigations and compulsory contributions. Those matters were referred back to the relevant Official Receivers who took appropriate remedial action.

### **Performance measure**

Complete each investigation within three months of the date of complaint.

### **Performance outcome**

The BRUs received 118 complaints regarding administrations under the control of registered trustees, and 30 complaints concerning administrations under the control of the Official Trustee. Of the 135 special investigations finalised during the year, 116 (86 per cent) were finalised within the three month target period. The main reason for not meeting the target was the unusually high number of complaints received by one BRU (72 received this financial year as compared to 29 last financial year). Other reasons were that some administrations were subject to litigation while some involved long and complex negotiations with a number of parties. Of the matters finalised, 19 complaints were found to be justified with 12 of those requiring further action. BRU staff counselled the relevant trustees in 10 of those occasions at the local level, with two matters being referred to the Inspector-General for further action. Of those, in one matter the Inspector-General determined that the Official Trustee failed to attend to appropriate procedures. Accordingly, a

total amount of \$4 990 was paid to the bankrupt estate and the bankrupts under s.18A of the Bankruptcy Act. In the other matter referred to the Inspector-General, the relevant registered trustee was requested to refund fees deducted in relation to a composition to the debtors as it was determined that the composition was invalid due to errors in procedure and application of the law by the trustee.

As part of the monitoring process, the BRU examined documents in relation to 782 Part X administrations and attended 73 meetings of creditors. There were no major deficiencies detected during this process. Minor deficiencies that arose in relation to a few of the meetings were brought to the attention of the relevant trustee or solicitor and resolved without detriment to the administrations.

## Bankruptcy estate administration

### *Function*

On behalf of the Official Trustee, ITSA administered 93 per cent of all new bankruptcies in 1996–97 as trustee of last resort. Private registered trustees administered seven per cent. In 1996–97 ITSA received 20 352 bankruptcies compared with 16 080 in the previous year, a 26.5 per cent increase. Comparable figures for registered private trustees were 1 492 for 1996–97 and 1 260 in 1995–96, an 18.4 per cent increase.

The following table sets out the balance of all ITSA estates on hand at the beginning and the end of the year; new estates received plus intercategory transfers; and estates finalised during the year.

<b>Estates under administration</b>	<b>1995–96</b>	<b>1996–97</b>
Estates on hand 1 July	5 525	5 472
Plus estates received *	21 001	25 174
	26 526	30 646
Less estates finalised**	21 054	25 972
<b>Estates on hand 30 June</b>	<b>5 472</b>	<b>4 674</b>

\* *Estates received include intercategory transfers, reactivated estates and those received from registered trustees. A reactivated estate is one which is reopened due, for instance, to the discovery of an asset or the bankrupt becoming liable to pay a compulsory contribution.*

\*\* *Estates finalised include those transferred to registered trustees.*

The decrease in the number of estates on hand at the end of the year reflected the effort by ITSA staff to administer bankruptcies promptly wherever possible. The ability to achieve this result, in a time of increasing bankruptcies, was due in part also to the fact that the bulk of new bankruptcies were either assetless, did not require investigation or involve a contribution, and therefore were able to be finalised within three months.

Each time ITSA receives a bankruptcy it is categorised according to the importance and complexity of the matter on a descending scale. These categories provide a guide to the priority and effort that

should be given to those matters. Fees for administering bankruptcies are charged as a percentage on a results basis (that is, funds realised to benefit creditors) and not on a time basis.

**Category 1:** These are cases where it is anticipated that one or more dividends totalling \$5 000 or more will be paid to one or more Commonwealth departments, and/or that realisations in the estate will amount to \$50 000 or more, thereby producing substantial fee revenue to the Commonwealth.

**Category 2:** These are cases where a law enforcement authority investigating a fraud on the Commonwealth advises the Official Trustee of assets, previously undisclosed, which may vest in the Official Trustee in his capacity as trustee of an insolvency administration, either past or present.

**Category 3:** These are cases where there is a high probability that action to protect, preserve or discover assets will realise more than \$20 000 or pay one or more dividends of more than \$5 000 to one or more creditors.

The category also involves cases where the deficiency in an estate exceeds \$100 000 and investigations are required to be undertaken into the deficiency to the extent necessary to be able to make a determination. It includes, as well, cases in which realisations and investigations are not straightforward or routine in nature.

**Category 4:** These are cases where the only matters requiring attention are straightforward realisations of assets and admissions of proofs of debt, including those estates in which the bankrupt makes payment of contributions (either compulsory or voluntary). Minor inquiries may also be necessary in order to realise other assets.

**Category 5:** This category includes those cases arising from a debtor's petition where there is no likelihood of a dividend; the deficiency can be readily explained with little inquiry and no other investigation is required; there is no conduct on the part of the bankrupt which is so reprehensible in terms of commercial morality or criminality to justify taking action against the bankrupt; and there is no payment of a contribution by the bankrupt either voluntarily or compulsorily.

## **Strategy**

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Prompt administration of bankruptcies through accessible, equitable and value for money service, maximising economical return to creditors and protecting the public interest.

## Performance measure

Category 1 to 4 estates:

- 50 per cent of dividends paid within 18 months
- 85 per cent of dividends paid within 36 months
- Dividend paid in 12 per cent of estates
- 85 per cent of estates finalised within three years

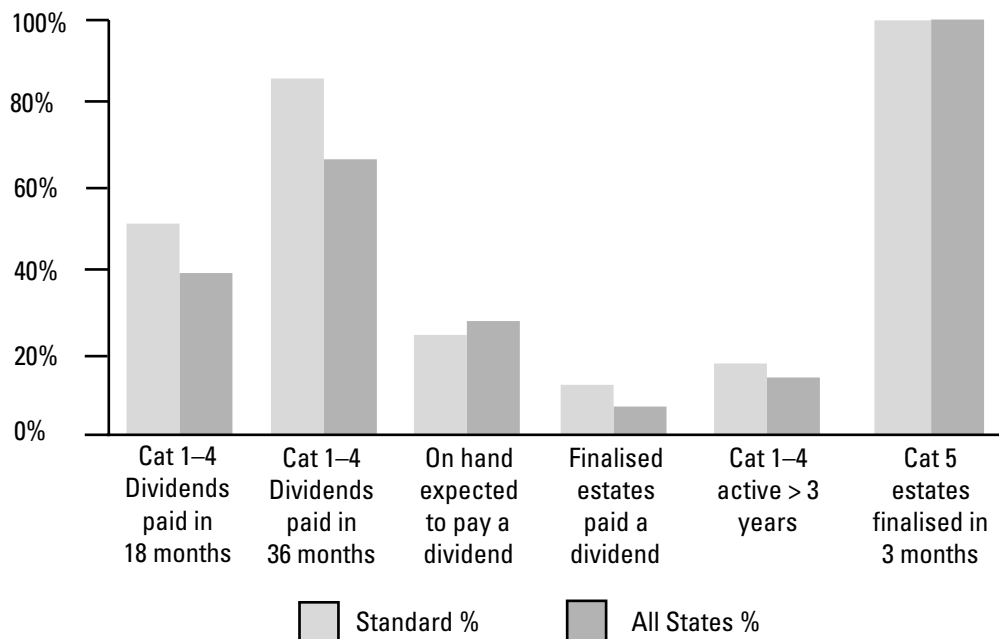
Category 5 estates:

- All estates finalised within three months

## Performance outcome

ITSA's achievement against these standards is illustrated by the following table:

### Dividends Paid and Bankrupt Estates Finalised, 1996-97



ITSA's ability to achieve fully the standard relating to finalisation of category 5 estates, and to achieve significantly the standard that no more than 15 per cent of category 1 to 4 estates should be older than three years, reflects the continuing effort given to an improved and more consistent approach to the management of the administrations. This compensated for the rising numbers of new bankruptcies and a reduction in staff numbers in 1996-97.

As was the case in the previous two financial years, the standards for payment of dividends within 18 and 36 months were not achieved. However, the level of achievement remained relatively

consistent. Reasons for inability to achieve those standards included the need in some States to give significant attention to the finalisation of estates greater than three years of age; the trend for an increasing proportion of assetless bankruptcies and, hence, a reduced percentage of estates able to produce a realisation and to pay a dividend; and the fact that estates administered by ITSA tend to have property with lower levels of equity available due to depressed real estate markets. ITSA is reviewing the appropriateness of these standards with a view to adopting more realistic benchmarks.

The following table sets out the amount of dividends paid by ITSA to the Commonwealth (e.g. the ATO) and the community (other creditors), the Official Trustee's fees and the interest earned by the Common Investment Fund (CIF) during 1996–97, with 1995–96 figures for comparison.

<b>Revenue</b>	<b>1995–96</b>	<b>1996–97</b>
Total dividends paid	12 404 897	10 700 073
Less paid to community	10 302 182	8 673 716
Dividends paid to Commonwealth instrumentalities	2 102 715	2 026 357
Official Trustee's fees taken	5 687 390	5 469 131
Interest on Common Investment Fund*	775 000	1 500 000
<b>Total payable to the Commonwealth</b>	<b>8 565 105</b>	<b>8 995 488</b>

\* *Because of timing differences, not all interest was paid to the Commonwealth during the 1995–96 year.*

### **Performance measure**

Number of justifiable complaints relating to Official Trustee administrations are less than one per cent of substantive estates on hand.

## **Performance outcome**

In respect of complaints about Official Trustee administrations made directly to the Attorney-General, the Inspector-General or the Ombudsman, one was found to be justified. A further five in respect of complaints made to BRUs were found to be justified. Accordingly, in view of the number of estates on hand, the number of justifiable complaints received was less than one per cent.

## **Proceeds of Crime**

### *Function*

On behalf of the Official Trustee ITSA implements orders relating to the control of property under the Proceeds of Crime and Customs Acts. When ordered by the court, ITSA takes control of property pending the making of either pecuniary penalty orders, forfeiture orders, or other orders.

ITSA works with other law enforcement agencies, including the AFP and the Director of Public Prosecutions, in the Proceeds of Crime law enforcement initiative. The objective is to ensure that criminals do not profit from illegally obtained gains. ITSA plays an important role in finding and monitoring assets, pending the outcome of the relevant criminal proceedings, and realising assets in accordance with orders.

## Strategy

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Contribute to the enforcement of proceeds of crime remedies.

### Performance measure

Achieve control of property specified in the control order or otherwise identified within one week.

### Performance outcome

All property was brought under control within the operational standard time of one week of the order being received, unless the property was overseas.

### Performance measure

All property subject to court orders to be realised within six months of final order.

### Performance outcome

The standard for realisation of relevant property was regularly achieved.

<b>Customs Act</b>		
	Number of Orders	Estimated Value of Property
On hand 1 July 1996	3	\$670 945
On hand 30 June 1997	4	\$620 555
<b>Proceeds of Crime Act</b>		
	Number of Orders	Estimated Value of Property
On hand 1 July 1996	88	\$18 599 042
On hand 30 June 1997	76	\$13 072 674

*Note: The figures as at 30 June 1997 represent the balance after taking account of new and final orders, and also the depletion of funds under control to pay defendants' legal costs.*

The property and assets realised under pecuniary penalty orders and forfeiture orders is paid into the Confiscated Assets Trust Fund which ITSA manages. In 1996–97 payments to the fund totalled \$3.5 million (\$4.9 million in 1995–96). In 1996–97 \$8 500 was paid out of the fund to law enforcement agencies, and \$9.05 million to the Consolidated Revenue Fund. Funds totalling \$459 000 remained available for distribution at 30 June 1997.

The Proceeds of Crime Amendment Act amended the Proceeds of Crime Act so that distributable funds in the Confiscated Assets Trust Fund are no longer distributed equally between the Department of Health and Family Services and relevant law enforcement agencies. Instead, the Attorney-General must determine once in each financial year the amount not required for other purposes under the Act, and the amount so determined will be paid to the Consolidated Revenue Fund.

## Staffing

### Strategy

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Develop and implement mechanisms for the selection and retention of staff to meet our operational needs, to plan for our future people requirements, to train staff to acquire and maintain relevant knowledge and skills, and to reward them for their performance.

#### **Performance measure**

Achievement of operational standards.

### Performance outcome

The reasonably consistent level of achievement of operational standards reflects the results of bankruptcy technical training given to ITSA staff and a better focus on the purpose and outcomes of estate administration and the objectives of system administration responsibilities. Bankruptcy regulation standards were effectively achieved.

#### **Performance measure**

Feedback from regular staff and client surveys showing:

- staff are recognised as experts in their field;
- staff retention high;
- staff satisfaction high.

### Performance outcome

In June 1997 a consultant engaged by ITSA conducted a staff survey in which 210 employees (72 per cent) participated. The feedback from that survey was to be available early in 1997–98.

## Program 3