

No. 1 of 1998

## Calculation and Payment of Charges - Reminder

In the previous *IMPORTANT NOTICE TO TRUSTEES* (No. 2 of 1997, dated 31 October 1997) the view of this office regarding the calculation and payment of the interest charge and the realisations charge was noted in detail. Recent enquiries demonstrate the need to restate the main points which are:

### 1. Deduction of bank fees and charges when paying the Interest Charge

Charges that may be deducted are those fees or charges imposed by the bank in providing an interest-bearing account. Accordingly, whilst an account keeping fee or a transaction fee would be an allowable deduction, Financial Institutions Duty (FID), Bank Activity Debits (BAD) and dishonoured cheque fees are not allowable deductions. They should be borne by the estate.

The payment of the 'interest charge' net of FID and BAD is acceptable only in those situations where trustees operate one bank account for two or more estates. While this is anomalous, it is the only practical approach. *Please note that subsections 169(1) and (1A) of the Act do not force trustees to operate one account for all estates, but require that funds belonging to an individual estate not be split between accounts.*

### 2. Withholding tax and the interest charge

For the charge period that commenced on 1 November 1997, trustees were to ensure that the total amount of interest earned, net of bank charges only, is paid to the Commonwealth. Trustees should have provided banks with the requisite tax file number(s) or made other arrangements with banks to avoid the need for them to deduct withholding tax (see *IMPORTANT NOTICE TO TRUSTEES* No. 2 of 1997 for more detail). We recognise that there is an additional administrative burden on trustees which produces no net revenue gain to the Commonwealth. This matter has been taken up with the Australian Taxation Office as it requires changes to the tax legislation. The time frame of the change is uncertain.

### 3. Calculation of the Realisations Charge

The cost incurred in realising assets is a cost for which the trustee is personally liable, but with a corresponding right of reimbursement out of the estate. Accordingly, the

<p><b>The realisations charge is the first charge on the estate. (refer to section 109; regulation 6.01 and schedule 3)</b></p>
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'amount received' by the trustee is the amount realised (amount for which the asset is sold) less only deductions permitted by subsection 8(3) of the [Bankruptcy \(Estate Charges\) Act 1997](#). Trustee's costs of securing and realising assets are not permitted deductions. Any compulsory or voluntary contributions made to the estate by bankrupts are also subject to the realisations charge.

## Indemnity Funds and the Realisations Charge

Some clarification is needed in relation to the applicability of the realisations charge to 'indemnity funds' received by trustees for the payment of legal and other expenses. Subsection 8(2) of the [Bankruptcy \(Estate Charges\) Act 1997](#) makes it clear that the realisations charge does not apply to 'indemnity' funds received either from creditors or under section 305 of the [Bankruptcy Act 1966](#). However, the Estate Charges Act does not appear to cover the situation where a trustee has entered into an arrangement with another body (eg. an insurance company that provides indemnities for the recovery of assets) which is not a creditor of the relevant estate, and the trustee receives 'indemnity' funds from that body. Essentially, the scheme of the legislation is that the realisations charge applies only to the trustee's equity in the debtor's/bankrupt's property that is vested in the trustee and to contribution payments made by the debtor/bankrupt. The legislation shows no intention to extract a realisations charge from 'indemnity' funds received into an estate from any party.

Accordingly, it is the view of this office that the **realisations charge does not apply to those 'indemnity' funds** received by trustees as a result of arrangements with organisations that provide indemnities for the recovery of assets.

## Special Resolutions

It is evident from some special resolutions passed at Part X meetings, and some statements provided by controlling trustees under section 189B of the [Bankruptcy Act 1966](#) (the Act), that some practitioners have not understood what constitutes a special resolution. Section 5 of the Act states that a special resolution "means a resolution passed by a majority in number and at least three-fourths in value of the creditors ...". However, some practitioners appear to consider that 50% in number is "a majority in number". It is not: **a majority is more than 50%**. Practitioners should ensure that their staff are aware of this and that 'precedent' documents such as notices to creditors, in relation to Part X matters in particular, are checked both for accuracy and the correct interpretation of the section 5 definition.

## Entitlement to Vote - Creditor Holding Security

The major amendments to the meeting procedures that came into effect in July 1992 have caused some people some doubt in relation to the voting rights of a secured creditor. A literal reading of the current subsection 64ZA(5) and paragraph 64D(b) of the Act suggests that a creditor who holds security over property belonging to a third party (as opposed to property belonging to the debtor) is only entitled to vote for that component of the debt, if any, that exceeds the value of the security. Prior to the amendments, the established law relating to the rights of secured creditors was properly reflected in the use of the term "secured creditor", defined as one who held **security over the property of the debtor**. The doubt about subsection 64ZA(5) comes from the use of the words "creditor [who] holds a security". The subsection does not specify that the security referred to is one over the property of the debtor.

There is no evidence to suggest that the Parliament intended to change the well-established principles of bankruptcy law in this area when amendments were undertaken in 1992. Moreover, the scheme of the legislation suggests that the same principles should govern both the extent to which a creditor is entitled:

- (a) to vote at a meeting; and
- (b) prove against an estate

under the Act.

Accordingly, it is the view of this office that the reference in subsection 64ZA(5) to a creditor who holds security should be taken as referring to a "secured creditor" as defined in section 5 of the Act. Therefore, **for voting purposes, a creditor holding a security need discount its debt by the value of that security only if it is held over the property of the debtor.**

Office of the Inspector-General in Bankruptcy  
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