

No. 2 of 1997

This is the fourth in a series of circulars dealing particularly with the 'Estate Charges' legislation. Two were released in 1996 with another released on 11 April 1997.

Interest Charge and Withholding Tax Deductions

In the notes attached to the 11 April 1997 circular it was advised that, contrary to expectations, an amendment to the tax legislation would be necessary before trustees are relieved of the requirement to provide a tax file number in relation to bank accounts operated under the [Bankruptcy Act 1966 \(the Act\)](#). It was also advised that extensions of time, under section 282 of the Act, would be granted to trustees allowing them to defer payment of that component of interest deducted as withholding tax.

It is now apparent that an amendment to the tax legislation, that would give effect to subsection 169(1D) of the Act, will not be undertaken in the foreseeable future. Accordingly, if you have not already done so, it would be prudent to take steps to provide your Bank with the requisite tax file number to prevent any further withholding tax being deducted. Further extensions of time will not be automatically granted to trustees, in relation to future 'charge periods', deferring the payment of that component of the interest charge deducted by banks in withholding tax.

However, due to the cumbersome nature of procedures involved and for ease of administration, **you will not, in this instance, be required to pay that proportion of the interest charge already deducted in withholding tax from interest earned on or before 31 October 1997.** However, it will be your responsibility to **ensure that in future charge periods the total amount of interest earned (net of bank charges) is paid to the Commonwealth.**

Bank Fees and Charges

Pursuant to subsection 169(1B) of the Act and section 5 of the [Bankruptcy \(Estate Charges\) Act 1997](#) interest earned, less "an amount equal to the bank fees or charges (if any)", is payable to the Commonwealth. There appears to be some confusion as to what constitutes such bank fees or charges. It is the view of this office that the only charges that could 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 and should be borne by the estate. Therefore, trustees **should not deduct FID, BAD and dishonoured cheque fees from interest earned** when paying the interest charge. As was the case prior to the introduction of the estate charges legislation, such charges are an expense of the estate and should be borne by the estate.

However, it is recognised that it would be extremely work intensive, if not near impossible, to equitably apportion FID and BAD, particularly the BAD, against individual estates when only one bank account is used for two or more estates. Accordingly, until advice to the contrary is received, 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**. *Please note that subsections 169(1) and (1A) of the Act do not force trustees to operate one account for all estates, but requires that funds belonging to an individual estate not be split between accounts.*

Calculation of the Realisations Charge

There appears to be some inconsistency between trustees in the application of provisions relating to the calculation of the 'realisations charge'. Essentially, the fee imposed previously by the now repealed subrules 179(2) and (3) was replaced by the realisations charge. Apart from including the surplus in the calculations, **the method** used to calculate the realisations charge remains unchanged from that employed in calculating the fee payable under the old Rule 179.

Pursuant to section 8 of the [Bankruptcy \(Estate Charges\) Act 1997](#), the realisations charge payable is based on the **amount realised**, which is also defined as the **amount received** (but not including those amounts identified at paragraphs 8(2)(a) and (b) of the Estate Charges provisions) by the trustee "in the capacity referred to in subsection 6(1) during the charge period" **less certain deductions as described in subsection 8(3)**. The inconsistency arises when trustees consider the net amount received by them, after the deduction of payments to auctioneers, agents and the like, as being the 'amount received' for the purpose of calculating the realisations charge. It is the view of this office that such an interpretation is incorrect. Essentially, the 'amount received' by the trustee is the equity vested in the trustee plus any surplus.

The scheme of the legislation is such that costs 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 **'amount received' by the trustee is the amount realised (amount for which the asset is sold) less the permitted deductions identified at subsection 8(3)**. Thus, the **'amount received' is gross of the trustee's costs of securing and realising assets**.

Subsequent to a legal opinion, a practice note, detailing the appropriate method of calculation, was published in the September 1992 issue (Volume 2, Number 1) of "New Directions In Bankruptcy".

Remission of the Realisations Charge - Policies vested under Section 117

As subsection 117(1) of the Act effectively **vests in the trustee** proceeds of certain insurance policies, it appears that the operation of the relevant provisions of the [Bankruptcy \(Estate Charges\) Act 1997](#) and the recently amended subsection 169(1) of the Act ensures that a realisations charge is payable on such proceeds received by the trustee.

However, as the operation of section 117 of the Act essentially ensures that the trustee fulfils a function purely as a conduit for the smooth transfer of insurance proceeds between the insurer and a third party when the insured person has become bankrupt, the proceeds do not effectively form part of the 'realisations' that benefit the estate, the creditors of the estate, or the bankrupt. Therefore, in such situations, the realisations charge will be remitted under section 283 of the Act. However, to obtain such a remission, an application must be made in accordance with subsection 283(2) of the Act.

Division 6 of Part IV - No Charges Payable

Please note that **neither a realisations charge nor an interest charge is payable** in relation to those compositions or schemes of arrangements that come under Division 6 of Part IV of the Act.

Other Important Aspects

- Trustees are **encouraged to utilise section 280 of the Act to defer payment** in instances where the charge payable is less than \$50 and the relevant estate is yet to be finalised. In such cases, instead of directly notifying the Inspector-General in Bankruptcy (subsection 280(3)), it would be sufficient to notify, on

his behalf, the local Bankruptcy Regulation Section in the relevant ITSA Branch office.

- Please ensure that the appropriate forms (Forms 15 and 16) are used so that the two types of charges are appropriately credited.
- Please ensure that **cheques are made payable to the “Commonwealth of Australia”** and lodged with the local ITSA office.
- Please also ensure that the **relevant accounts remain open until all cheques are cleared**. *At the end of the last charge period, cheques as small as 1 cent were dishonoured!*

Section 161B - Minimum Entitlement

Please note that the wording of section 161B of the Act has been changed to eliminate a possible ambiguity that may have existed. As initially intended by Parliament, that section now clearly indicates that registered trustees are automatically entitled to, in remuneration, a minimum set (indexed) amount. The intention of the section has always been to provide trustees with an assured minimum **entitlement** in remuneration and not an entitlement to an amount in addition to ordinary remuneration.

Office of the Inspector-General in Bankruptcy
Canberra

31 October 1997