

Remuneration of registered trustees: amendments to the Bankruptcy Act and Regulations

Background

1. In May 2008 the Attorney-General released a proposals paper outlining potential changes to the provisions of the Bankruptcy Act (the Act) and Bankruptcy Regulations (the Regulations) relating to the remuneration of registered trustees.
2. The proposals have been refined in response to submissions received on the proposals paper, and Government approval has been received to make amendments to the legislation to implement them.
3. It should be noted that amendments to the Act will set the broad framework, with the detailed workings of the process for fixing and claiming remuneration to be contained in the Regulations. It is envisaged that the Inspector-General will also issue guidelines to assist in the interpretation of the new arrangements.
4. As mentioned in the proposals paper, it is not proposed to make wholesale changes to the remuneration provisions. Rather, the amendments will focus on specific aspects of the process of fixing and claiming remuneration to make it more transparent and reduce disputes.
5. In particular, the amendments relate to the:
 - statutory minimum entitlement to remuneration;
 - process for setting remuneration where creditor approval cannot be obtained;
 - process for resolving disputes about remuneration claims.

Minimum entitlement

6. Section 161B of the Act provides for a minimum entitlement to remuneration for trustees. This amount is currently set at \$1,541 and is linked to the Consumer Price Index. The section provides that if there are insufficient funds in the estate to pay this entitlement the trustee may recover the amount as a debt directly from the person who is or was bankrupt.
7. The entitlement to minimum remuneration is important to enable trustees to undertake preliminary tasks in an administration before they have the opportunity to seek the approval of creditors. However, there is less justification for enabling trustees to claim this amount from the bankrupt in the event that there are insufficient funds in the estate. At common law trustees are generally limited to seeking reimbursement of costs and expenses from the assets of the estate itself. An ability to pursue the bankrupt directly can be used inappropriately as a means of securing the bankrupt's cooperation.

Section 161B will be amended to increase the minimum entitlement to \$5,000. The amount will not be indexed to the CPI, but will be capable of variation by regulation. It will no longer be recoverable as a debt from the bankrupt where there are insufficient funds in the estate.

Remuneration where creditor approval cannot be obtained

8. Subsection 162(4) provides that, where the remuneration of the trustee is not fixed by the creditors or the committee of inspection, the trustee is to be remunerated as prescribed by the Regulations.
9. Regulation 8.08 provides that a trustee may be remunerated at 85% of an amount calculated in accordance with the scale of charges set out in the Guide to Hourly Rates, published by the Insolvency Practitioners Association of Australia (IPA). The guide was last issued on 18 June 1999. The IPA has indicated that it does not intend to revise or reissue the Guide.
10. The use of a default scale of fees has been subject to criticism, primarily on the grounds that it undermines effective price competition.
11. A default scale of fees may be useful in certain circumstances. In particular, it can provide a fall-back position when fees are unable to be otherwise set, because agreement of creditors is unachievable.
12. However, it is felt the anti-competitive effects of the 'default' scale, and the fact that it is somewhat dated, outweigh its usefulness.

Regulation 8.08 will be removed.

Determination by Inspector-General

13. It is recognised that there will be situations in which it may not be practical or cost effective for the trustee to seek creditor approval (for example, because the assets in the estate do not justify calling a creditors' meeting or creditors do not respond to a remuneration proposal put forward by the trustee). There may also be cases in which the trustee and creditors disagree about the amount of remuneration sought.

In place of regulation 8.08, trustees will have the right to apply to the Inspector-General to determine whether remuneration arrangements are reasonable where - a resolution or proposal relating to the basis on which a trustee is to be remunerated is not agreed to; there is a failure to vote on the resolution/proposal (e.g. due to lack of a quorum); or the trustee considers that it is not cost-effective to seek creditor approval of remuneration.

14. In making this determination, the Inspector-General may take into account any one or more of the following factors:

- Whether the trustee has given the required notice to creditors concerning the remuneration proposal;
 - Whether the work to be undertaken by the trustee has been adequately described to creditors;
 - Whether the estimate of remuneration for the work appears to be commensurate with the tasks that have to be conducted; and
 - Whether the work to be undertaken appears to be necessary and reasonable.
15. Essentially, the Inspector-General will need to be satisfied that the trustee has followed the correct process in notifying creditors and estimating remuneration – this includes ensuring that tasks are charged at the appropriate rate for the level of staff who would be reasonably expected to undertake the task. However, the Inspector-General will not consider the reasonableness of the (for example, hourly) rate of remuneration charged by the trustee.
16. There will be no mechanism for review of, or appeal from, a determination of the Inspector-General. If a trustee is not satisfied with the decision it is open to the trustee to vacate the office by the method provided in the Act, or to put a revised remuneration proposal to creditors.
17. Likewise, creditors who are unhappy with a determination of the Inspector-General may remove the trustee under section 181 of the Act if they wish.

Trustee providing information on remuneration

18. Section 64U of the Act provides that, at a first meeting of creditors, trustees must state the basis upon which they wish to be remunerated. Information about the rate of time or commission-based remuneration must be given to creditors, as well as an estimate of the total remuneration and an explanation of the likely impact on dividends to creditors. Creditors have the right to ask questions of the trustee and may propose amendments to the basis of remuneration. However, the requirements in section 64U do not apply to proposals put forward without a meeting (for example, under section 64ZBA).

The requirements in section 64U will apply, as far as appropriate, to remuneration proposals put to creditors outside of a meeting.

Resolution of disputes relating to remuneration claims

19. The current taxation process applies in two situations:
- A trustee may require a bill of costs for services provided by a person in relation to the administration of the estate to be taxed under section 167;
 - A bankrupt or creditor may require taxation of the trustee’s remuneration pursuant to regulation 8.09.

20. Taxations are conducted by taxing officers appointed by the Inspector-General.
21. Criticism has arisen regarding the inflexibility and cost of the taxation process. More generally, the word 'taxation' gives rise to perceptions of the nature of the process that do not necessarily reflect its purpose. The proposed new process outlined below is therefore referred to as a 'review'.

It is proposed that all reviews of a trustee's claim for remuneration will be conducted by the Inspector-General.

Costs of the review

22. The current taxation process can be costly and this may place it outside the reach of many bankrupts or creditors.

The costs of reviewing remuneration claims will be funded through the Realisations Charge - thus there will be no fee to apply for review. However, the Inspector-General will have power to reject an application in certain circumstances - see below.

23. Parties will have to bear their own costs of preparing for and attending reviews. The changes outlined below, including the power to reject frivolous or vexatious applications for review, and changes to streamline the review procedure, will reduce the costs associated with reviews compared to the taxation process.

Time limits for seeking review

24. The current time limits for seeking taxation detract from its usefulness. They may encourage a party to seek taxation without considering other action to resolve a dispute about remuneration (such as negotiation or mediation). Although the Court has power to extend the time limit there is currently no administrative power to do so.

The Inspector-General will have power to grant an extension of time within which a person may apply for a review of a remuneration claim. For example, an extension might be warranted where the application is out of time due to attempts at resolving the dispute through mediation.

Rejecting an application for review

25. It is recognised that the removal of any cost to apply for a review may encourage unmeritorious applications to be made.

The Inspector-General will have power to reject an application for review if it appears that the application is frivolous or vexatious, or the applicant has insufficient interest in the outcome. For example, where a bankrupt applies for a review in circumstances where, even if the trustee's claim is reduced, there is no prospect of a surplus accruing to the bankrupt.

Powers of Inspector-General during the review

26. In conducting a review, the Inspector-General will have power to:

- set out the proposed procedure and timetable for the review.
- conduct the review in full or part either in person or by written correspondence.
- direct a trustee to deliver a bill of costs in a specified form within a specified time - the Inspector-General will not be obliged to require a bill of costs in all matters.
- disallow all or part of an item claimed, if the bill of costs is unclear or lacks sufficient details to identify the nature of the tasks being performed and how they relate to the administration of the estate.
- make enquiries and issue directions in respect of the production of material which is considered relevant to the review, and not merely have to rely on the material provided by the parties to the review.
- interview any party, including the trustee, any delegate of a trustee who has performed work the subject of the review, or the bankrupt.

27. These powers are designed to ensure that there is flexibility in the review process, such that it focuses on issues in dispute, and the cost (in time and money) involved in finding a resolution is minimised.

28. As with the current taxation system, decisions of the Inspector-General will be appealable to the Court. This will include decisions to extend a time limit to apply for review and to reject an application for review, as well as any 'substantive' decision (e.g. to reduce or confirm a remuneration claim).

Next steps and further consultation

29. The amendments to the Bankruptcy Act will be introduced into parliament late in 2008 or early 2009 (depending on the Government's legislative priorities).

30. While those amendments are progressing through the Parliament, amendments to the Regulations will be prepared along with any Inspector-General guidelines considered necessary. The content of the regulation amendments and guidelines will be the subject of further consultation.

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