



Australian Government

Insolvency and Trustee Service Australia

## INSPECTOR-GENERAL PRACTICE STATEMENT NO 15

### Assessment by the Inspector-General in Bankruptcy of a Registered Trustee's request for approval of remuneration pursuant to section 162

**PLEASE NOTE:** This draft Practice Statement contains references to proposed amendments to the Bankruptcy Regulations. These amendments were issued in draft form for public consultation in July 2010. In light of comments received during the consultation process, the Government is considering whether any changes to the draft amendments are warranted. It is therefore possible that the content of this Practice Statement may change.

Release Date<sup>1</sup>: August 2010

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• <sup>1</sup> Note released in draft in August 2010 for comment

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## **Introduction**

1. The purpose of this Inspector-General Practice Statement (“IGPS”) is to explain the approach taken by the Inspector-General in Bankruptcy when dealing with a registered trustee’s request for approval of remuneration pursuant to subsection 162(4) of the Bankruptcy Act 1966 (“the Act”).
2. A basic principle of the bankruptcy regime is that creditors (as the ordinary cost bearers) should have primary control over remuneration and other costs that will be paid for the administration of the bankruptcy. However, there are circumstances where it may not be practical or cost effective for the trustee to seek creditors’ approval of remuneration and there may be cases in which the trustee and creditors disagree about the amount of remuneration sought.
3. If the trustee wishes to draw remuneration in excess of the statutory minimum, \$5,000, the trustee must have the full amount of the proposed remuneration fixed by creditors or by the committee of inspection pursuant to subsection 162(1) or, approved by the Inspector-General pursuant to the subsection 162(4A) of the Act. The statutory amount is not subject to indexation and is effectively inclusive of GST.
4. This IGPS does not relate to the Official Trustee whose remuneration is calculated in accordance with the terms of the Bankruptcy Act and Regulations. The Official Trustee’s remuneration does not require the approval of creditors as does the remuneration claimed by registered trustees.
5. This process only applies to bankruptcies or Personal Insolvency Agreements which commence after the commencement date for Schedule 1 of the Bankruptcy Legislation Amendment Act 2010, namely 1 October 2010.

## **Circumstances in which trustee may apply to Inspector-General for remuneration approval**

6. In order that the Inspector-General will consider an application by a registered trustee, under subsection 162(4) the trustee will need to satisfy the Inspector-General that one or more of the circumstances set out in regulation 8.09 exist. In order to do so, the trustee will need to provide supporting evidence as appropriate.

### **Circumstances to be shown by trustee – Regulation 8.09**

- i. creditors or the committee of inspection reject a resolution relating to remuneration put forward by the trustee at a meeting of creditors (refer section 64U);

- ii. creditors or the committee of inspection reject a proposal relating to remuneration put to creditors under section 64ZBA;
- iii. creditors fail to vote on a resolution or proposal relating to remuneration put forward by the trustee (for example, because there is no quorum at a creditors' meeting, or there is no response to a proposal put forward under section 64ZBA);
- iv. it is not cost-effective to seek creditor approval (for example, it may not be cost-effective where the value of the assets in the estate is so small that the expense of holding a creditors' meeting or putting forward a proposal under section 64ZBA is impractical or cannot be justified); or
- v. it is not practical to seek creditor approval (for example, it may not be practical to seek creditor approval where the bankruptcy is annulled and there are no longer any creditors to vote on a remuneration proposal – trustees sometimes need to perform 'tidying up' tasks after an annulment and/or may have done some limited work before annulment for which they have not yet sought creditor approval).

### **Form of the trustee's application:**

7. The trustee's application to the Inspector-General to approve remuneration must be made in writing and must include supporting evidence as required. The application must:
  - Contain a single proposal capable of being approved by the Inspector-General; and
  - State which of the prescribed circumstance(s) under regulation 8.09 applies and provide evidence of the prescribed circumstance being relied on for the application; and
  - Must explain:
    - Why any work already performed by the trustee was necessary; and
    - Why any work proposed to be performed by the trustee will be necessary; and
    - Why the proposed remuneration for the work or proposed work, is appropriate for the particular administration; and
  - Contain evidence of the trustee's statement to the creditors under subsections 64U(5) and 64U(5A) if applicable; and
  - Include a copy of any notices issued by the trustee to the creditors and bankrupt under subsection 162(6A)

### **Rejection of the Trustee's application**

8. The trustee's application may be rejected if the Inspector-General is not satisfied that any of the circumstances in regulation 8.09 exist. The Inspector-General will inform the trustee of the basis of a decision to reject the application.
9. If an application is rejected, the trustee may seek to address the deficiencies in the original application and make an amended application to the Inspector-General for approval. The amended application can not claim a different amount to that which was claimed in the

original application, however additional information can be provided to justify the Inspector-General accepting the application.

Alternatively the trustee can appeal to Court pursuant to section 7 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) in relation to the Inspector-General's decision to reject the application. Any Court application made at this stage can not involve an assessment of the trustee remuneration proposal.

## Assessing a Trustee's application

10. Where the Inspector-General has determined that the reasons and contents of the trustee's application are in accordance with subsection 162(4) and regulation 8.09, the Inspector-General will proceed with assessing the application, taking into account the following factors (see regulation 8.11):

- Whether the trustee has followed the process contained in section 64U or 64ZBA for estimating remuneration, including adequately describing to creditors the work performed<sup>2</sup> or to be performed.
- Whether the trustee has given the required notice to creditors concerning the remuneration proposal as contained in section 64U, 64ZBA and the Regulations.
- Whether the trustee has explained why the work performed or to be performed is likely to be reasonably necessary.\*
- Whether the proposed remuneration is commensurate with the work already performed, or whether the estimate of remuneration is likely to be commensurate with the work to be performed, taking into account the complexity (or otherwise) of the work.\*
- Any other relevant matters.

*(\* Further details in relation to the factors which may be taken into account by the Inspector-General when determining if the trustee's remuneration is reasonable in the context of the work performed being reasonably necessary, can be obtained from IGPS 16.)*

11. The matters considered by the Inspector-General in a specific case will vary depending on the circumstances under which the application is made. For example, if the trustee has satisfied the Inspector-General that it is not cost-effective or practical to seek creditors' approval, it will not be necessary for the Inspector-General to consider whether the trustee has followed the processes contained in section 64U or 64ZBA. It is expected however that in such a case the trustee will provide the Inspector-General with the information the trustee would have otherwise been required to provide to the creditors.

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<sup>22</sup> In some cases the IG may be deciding the trustee's remuneration where the trustee has already performed some work, for example in a situation where work has been performed before the first creditors meeting or post annulment.

12. Essentially, the Inspector-General will be concerned to ensure that the trustee has followed the correct processes in estimating his/her remuneration and explaining the basis of the estimate, along with the correct processes for notifying creditors and the bankrupt of the rates and methods of the proposed remuneration. It will not be within the Inspector-General's remit to consider the reasonableness of the trustee's hourly (or other time-based) rate.
13. Also, the Inspector-General should be satisfied that the trustee's proposal includes only the remuneration for work that is likely to be necessary and reasonable and, before deciding to incur remuneration, the trustee has compared the amount likely to be incurred with the value and complexity of the administration. The trustee's application to the Inspector-General must explain why the proposed remuneration for the work, or proposed work, is appropriate for the particular administration (see r8.10(e)(iii)). However, it will not be within the Inspector-General's remit to consider whether the amount of remuneration claimed is *proportionate to the size* of the estate. There are many circumstances in which the trustee's proposal will not be proportionate to the size of the estate- for example, in a complex estate with several large realisations where the administration is likely to be very straight forward or in a relatively small estate where the trustee considers it will be necessary to investigate a number of potentially voidable transfers. The Inspector-General will not refer to the proportion of realisations to fees but will consider the application on the basis of whether the work was necessary and reasonable and commensurate with the complexity in the estate.
14. It will be open to the Inspector-General to approve or not approve the application, or to seek further information before deciding the application. Section 12 of the Act allows the Inspector-General to make such inquiries and investigations as the Inspector-General thinks fit with respect to the administration of, or the conduct of a trustee, in relation to (among other things), a bankruptcy. This function will enable the Inspector-General to seek from the trustee any additional information required to decide the trustee's application.

### **Timeframe for assessing application**

15. The Inspector-General will endeavour to make a decision on the trustee's application within 10 working days after the application is accepted by the Inspector-General for processing. An application will not be accepted by the Inspector-General for processing until such time as sufficient evidence has been provided to demonstrate at least one of the circumstances in regulation 8.09. This timeframe may be extended if the Inspector-General requires further information from the trustee.
16. If the Inspector-General fails to make a decision within a reasonable period the trustee can apply to Court for an order of review in accordance with subsection 7(1) of the *ADJR Act*, on the ground that there has been unreasonable delay in making the decision.

### **Effect of the Inspector-General's Determination**

17. The trustee is entitled to draw remuneration once it is approved by the Inspector-General, in accordance with the terms of the approval. Trustees should be aware however that the amount that they are entitled to claim from the estate may be reduced following a review

by the Inspector-General, conducted pursuant to section 167, even if the total amount claimed is within the amount approved by the creditors or the Inspector-General.

18. This is consistent with the general principle that trustees are only entitled to remuneration for work that is proper or reasonable in the circumstances and the requirement that trustees must incur only those costs that are necessary and reasonable. The amount approved by creditors or by the Inspector-General may turn out to be greater than the amount that is necessary and reasonable for the trustee to incur in the circumstances. In the event of a review pursuant to subsection 167(1) by the Inspector-General, the trustee will need to justify the whole claim for remuneration, not only the portion in excess of the minimum entitlement of \$5000.
19. Example: Where the trustee has unsuccessfully sought approval from creditors for remuneration in the amount of \$20,000 and has made an application to the Inspector-General pursuant to subsection 162(4). If the Inspector-General decides not to approve the trustee's remuneration the trustee will not be able to claim that amount. Nor will the Inspector-General be able to allow the trustee to claim an amount less than the original amount claimed, ie \$20,000. Therefore, following the Inspector-General's refusal to approve remuneration the trustee will only have the right to claim the statutory minimum amount of \$5,000, unless the trustee puts a new remuneration proposal to creditors that is accepted.

## **Remuneration Claim Notice**

20. The trustee must give the bankrupt and the creditors a notice that complies with Regulation 8.12C when the remuneration claimed reaches the amount approved by the Inspector-General. Refer to Inspector-General Practice Direction 18.

## **Advising the Trustee, Bankrupt and Creditors of the Inspector-General's Decision**

21. The Inspector-General's decision will be notified to the trustee, the bankrupt and the creditors in writing as required by subsection 162(4B). If the application is not approved, the Inspector-General will provide the trustee with reasons for the decision, however the Inspector-General will not be able to substitute another amount for the trustee's claim for remuneration. The trustee may choose to put a revised remuneration resolution/proposal to creditors, or seek to vacate the office by the methods provided in Division 5 of Part VIII of the Act (resignation under section 180 or replacement by another Trustee (pursuant to section 181A)).
22. Creditors who are dissatisfied with a decision of the Inspector-General to approve a trustee's remuneration application may remove the trustee and appoint another registered trustee (under section 181 or 181A of the Act) or apply to court pursuant to section 178 or 179 in relation to the trustee's actions, decisions or omissions. Pursuant to section 164 where 2 or more trustees act in succession, the trustees must agree on the remuneration

and costs to be paid between them and have the amounts endorsed by a resolution passed at a meeting of creditors.

## **Review Rights**

23. There is no right to seek a review by the Administrative Appeals Tribunal (“AAT”) in relation to the various decisions that can be made by the Inspector General pursuant to section 162. However, judicial review by the Federal Court or Federal Magistrate’s Court may be sought pursuant to the ADJR Act.

# Appendix 1

## APPLICATION FOR APPROVAL OF TRUSTEE REMUNERATION

### 1. TRUSTEE DETAILS

|                           |                      |                      |                      |
|---------------------------|----------------------|----------------------|----------------------|
| <b>Trustee Details:</b>   |                      |                      |                      |
| Title                     | Given Name/s         | Surname              |                      |
| <input type="text"/>      | <input type="text"/> | <input type="text"/> |                      |
| Business Address          |                      |                      |                      |
| <input type="text"/>      |                      |                      |                      |
| Business Address (line 2) |                      |                      | Postcode             |
| <input type="text"/>      |                      |                      | <input type="text"/> |
| Contact Number            | Mobile Number        | Email Address        |                      |
| <input type="text"/>      | <input type="text"/> | <input type="text"/> |                      |

### 2. ADMINISTRATION DETAILS:

|                               |                      |                                     |  |
|-------------------------------|----------------------|-------------------------------------|--|
| <b>Debtor Details:</b>        |                      |                                     |  |
| <b>Bankrupt/Debtor name/s</b> |                      |                                     |  |
| Title                         | Given Name/s         | Surname                             |  |
| <input type="text"/>          | <input type="text"/> | <input type="text"/>                |  |
| Title                         | Given Name/s         | Surname                             |  |
| <input type="text"/>          | <input type="text"/> | <input type="text"/>                |  |
| Trading Name                  |                      |                                     |  |
| <input type="text"/>          |                      |                                     |  |
| Administration Number         |                      | Date of Administration (DD/MM/YYYY) |  |
| <input type="text"/>          |                      | <input type="text"/>                |  |

### 3. BASIS FOR TRUSTEES APPLICATION

- Creditors or the committee of inspection rejected a motion relating to remuneration put forward by the trustee at a meeting of creditors;
- Creditors or the committee of inspection rejected a proposal relating to remuneration put to creditors under section 64ZBA;
- Creditors or the committee of inspection failed to vote on a resolution or proposal relating to remuneration put forward by the trustee;
- Creditors or the committee of inspection failed to respond to a proposal relating to remuneration put to creditors under section 64ZBA;
- It is not cost-effective to seek creditor approval

#### 4. DOCUMENTATION RELIED UPON TO SUPPORT APPLICATION

Set out details of the documents being relied upon and attach a copy \*

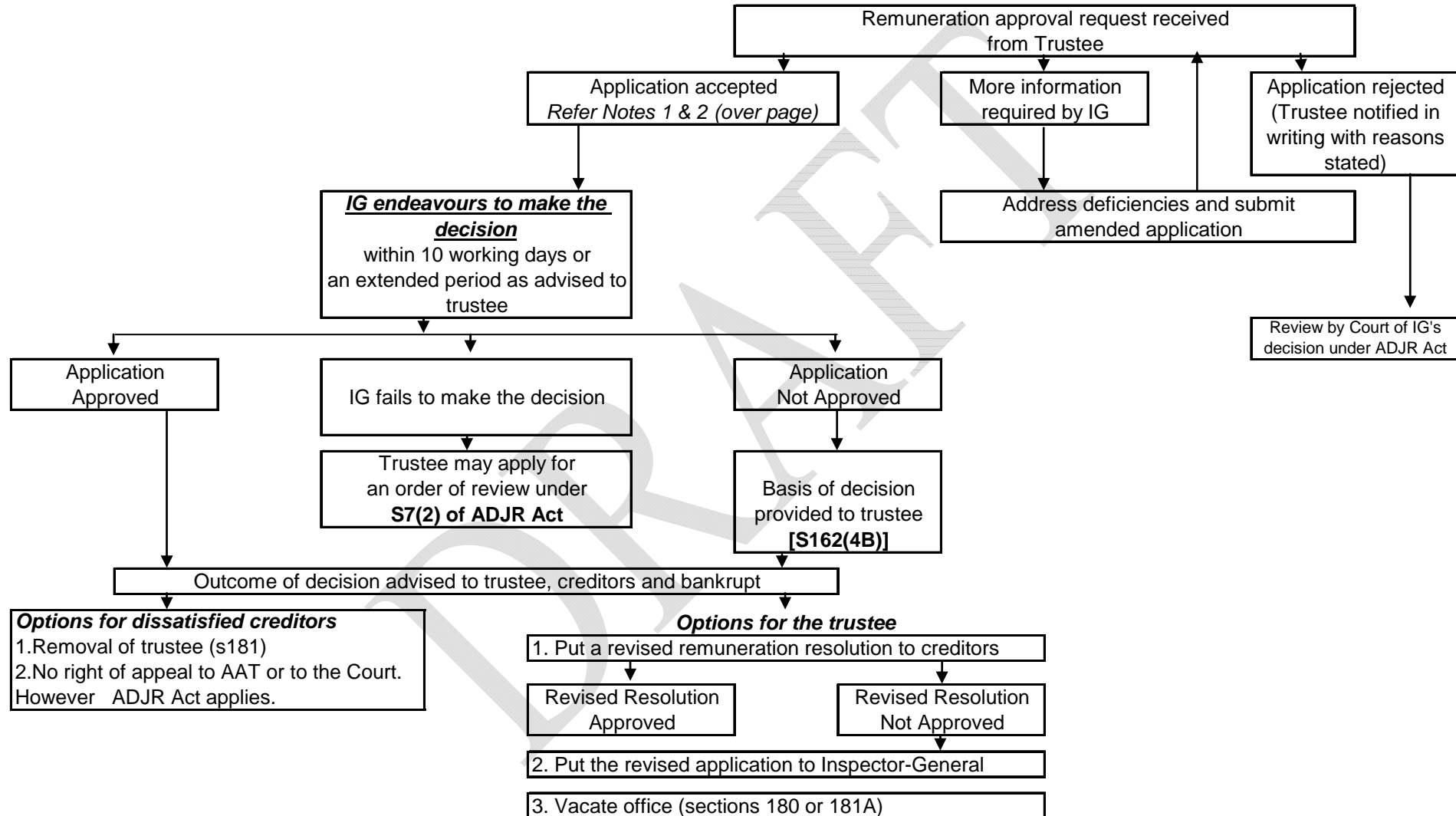
- i.
- ii.
- iii.
- iv.
- v.
- vi
- vii
- viii
- ix
- x.

(\* The following documents must be included

- A single proposal concerning the trustee's proposed remuneration
- Information required by subsections 64U(5) and (5A) of the Act about the trustee's statement
- A statement which explains:
  - (a) Why any work already performed was necessary
  - (b) Why any work proposed to be performed by the trustee will be necessary
  - (c) Why the proposed remuneration for the work, or proposed work, is appropriate for the particular administration
- Copy of any notices issued by the trustee to the bankrupt and creditors under subsection 162(6A) or another provision in subdivision 3 of Division 4 of the bankruptcy regulations (i.e. regulations 8.12 – 8.12C)



**Trustee Remuneration Approval Process by Inspector- General**  
**[Subsection 162 (4)]**





**Note 1**

**Compliance requirements for trustee's application**

1. Contain a single proposal
2. Application must contain information specified in S64U(5) & S64U(5A) if applicable.
3. Include copies of notices issued to creditors & bankrupt under S162(6A).
4. Trustee's statement regarding prescribed reason(s) for approval application under Regulation 8.09 (refer note 2).

**Note 2**

**Circumstances where trustee may make application to IG for fees approval**

- # Remuneration resolution rejected by creditors/committee of inspection at the creditors' meeting.
- # Rejection of remuneration approval sought under S64ZBA by the creditors.
- # The creditors' fail to vote at the meeting or failed to respond to proposal under S64ZBA.
- # Not cost effective to seek approval of remuneration through any other alternative processes.
- # Not practical to seek creditors' approval (eg there are no longer creditors to vote for remuneration incurred after bankruptcy annulment).

DRAFT