



Australian Government

Insolvency and Trustee Service Australia

## INSPECTOR-GENERAL PRACTICE STATEMENT 18

Issuing of infringement notices  
by the Inspector-General in Bankruptcy

**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.

*Draft updated 20 August 2010*

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## Introduction

1. The *Bankruptcy Act 1966* contains a range of offences provisions, some of which are specifically described as ‘strict liability’<sup>1</sup> offences.
2. Effective 1 October 2010, Division 2 of Part 14 of the *Bankruptcy Regulations 1996* will provide an infringement notice scheme which applies to the strict liability offences that appear in the table in subsection 277B(2) of the Bankruptcy Act. This Inspector-General Practice Statement relates only to those offences.
3. Under the infringement notice regime, the Inspector-General in Bankruptcy is empowered to issue an infringement notice to an alleged offender for the payment of a specified penalty in lieu of criminal prosecution action being instigated. This regime will provide an efficient means of “penalising behaviour which, while relatively minor in criminality, can have significant repercussions for the effective administration of bankrupt estates, integrity of the [National Personal Insolvency Index] or regulation of insolvency practitioners.”<sup>2</sup> The infringement notice regime will not replace the current penalties within the Bankruptcy Act, but will serve as an alternative to prosecution action.<sup>3</sup>

*Importantly, these offences will assist to preserve the integrity of the National Personal Insolvency Index. This index is the public record of bankruptcy and personal insolvency events and is an important tool for business and lenders.*<sup>4</sup>

## Offences covered by the infringement notice scheme

4. Those offences that are subject to the infringement notice regime are detailed in the table listed at section 277B of the Bankruptcy Act. The amount payable by way of penalty under the infringement notice regime varies depending on the alleged offence. The amounts depicted in subsection 277B(2) of the Bankruptcy Act are linked to section 4AA of the *Crimes Act 1914* (Cth), which stipulates that 1 penalty unit equates to \$110.
5. Appendix A lists these offences, their statutory references and provides a description of the offence, the court imposed penalty and the penalty imposed in accordance with the infringement notice regime.
6. The maximum amount payable pursuant to an infringement notice is one fifth of the maximum penalty that can be imposed by a Magistrate should the matter be determined by a Court of Law.

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<sup>1</sup> See section 6.1 of the *Criminal Code Act 1995*

<sup>2</sup> Bankruptcy Legislation Amendment Bill 2009, Explanatory Memorandum, The Parliament of the Commonwealth of Australia, House of Representatives, page 18.

<sup>3</sup> Bankruptcy Amendment Regulations 2010, Explanatory Memorandum, Attorney-General’s Department, page 7.

<sup>4</sup> The Hon Robert McClelland MP, Second Reading Speech Bankruptcy Legislation Amendment Bill 2009, Parliament House, Canberra, 28 October 2009.

Example

*If, within 2 working days after receiving the proposal for a composition or arrangement, the trustee fails to give a copy of the proposal to the Official Receiver pursuant to subsection 73(1A) of the Act, the trustee will be liable to pay an infringement notice in the sum of \$110. That is, one-fifth of the potential maximum court imposed penalty of \$550.*

## **Issuing an infringement notice**

7. The Insolvency and Trustee Service Australia (ITSA) Enforcement business line will have sole carriage and responsibility for the issuing of infringement notices on behalf of the Inspector-General in Bankruptcy.
8. Enforcement's Compliance Team will have primary responsibility for investigating relevant allegations contrary to the Act, issuing infringement notices and preparing prosecution briefs for those who do not pay the fine or opt for the matter to be determined by a Court of Law.
9. Regulation 14.05 provides that once the Inspector-General has reasonable grounds to believe<sup>5</sup> that a person has committed an offence that is subject to the scheme, the Inspector-General may, within 12 months after the alleged commission of the offence, issue the person with an infringement notice. The decision on whether or not to issue an infringement notice is a matter of discretion for the Inspector-General.<sup>6</sup>
10. In accordance with subsection 11(4) of the Bankruptcy Act the Inspector-General has delegated the authority to issue infringement notices to all managers<sup>7</sup> within the Enforcement business line. Subsequent references to the 'Inspector-General' in this Practice Statement also therefore include reference to a delegate of the Inspector-General for these purposes.
11. Areas for consideration before issuing an infringement notice may include:
  - The nature of the alleged breach;
  - The likelihood of an infringement notice being a successful deterrent;
  - Practical considerations, including whether or not there is a history of non-compliance by the alleged offender;
  - Previous warnings;
  - Whether the alleged breach should best be dealt with by a Court of Law on public interest or other grounds; or
  - Is there a more appropriate resolution / sanction that ought to be applied.
12. The above factors are not weighted, nor are they an exhaustive list of considerations to be taken into account before deciding whether or not to issue an infringement notice.
13. When considering whether or not to issue an infringement notice the possible defence of mistake of fact should be considered.<sup>8</sup>

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<sup>5</sup> Reasonable grounds to believe requires a higher standard of knowledge than reasonable grounds to suspect.

<sup>6</sup> See regulation 14.03(2)

<sup>7</sup> Of Australian Public Service (APS) Executive Level 1 classification or above

<sup>8</sup> See section 9.2 of the *Criminal Code Act 1995*

14. Section 6.1 of the *Criminal Code Act 1995* states:

- (1) *If a law that creates an offence provides that the offence is an offence of strict liability:*
- (a) *there are no fault elements for any of the physical elements of the offence; and*
  - (b) *the defence of mistake of fact under section 9.2 is available.*

15. An infringement notice may be issued to a person more than once for the same offence if a person continuously fails to comply with their obligations under the Bankruptcy Act. The issuing of subsequent infringement notices for continued non-compliance remains discretionary as the Inspector-General may decide to refer the matter to the Commonwealth Director of Public Prosecutions for prosecution action.

16. All factors considered in the issuance, or non-issuance of an infringement notice, must be documented in accordance with the Australian Government Investigation Standards and the APS Code of Conduct & Values.

17. **NOTE:** Access to information held by the ITSA is subject to the *Freedom of Information Act 1982*.

Appendix B provides a template infringement notice.

### **Joint Trustees**

18. Where an infringement notice is issued and there are two trustees appointed to the administration then the notice is to be issued in the names of both trustees.

### **Reckoning of time**

19. In accordance with section 36 of the *Acts Interpretation Act 1901* where a document is to be filed or a payment made by a given date, that date will be reckoned exclusive of the day of such an event.

20. Where the last day of the period given for a document to be filed or a payment made falls on a Saturday, on a Sunday or on a day which is a public holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday in that place.

#### *Example*

*If the trustee has 2 days from a Friday to file a document, the document would notionally have to be filed by Sunday. However, the Acts Interpretation Act provides that an act (such as filing a document) that is required to be done on a Saturday, Sunday or public holiday can be done on the next working day - in this case the following Monday (assuming it too is not a public holiday).*

### **Service of an infringement notice**

21. Regulation 14.07 of the Bankruptcy Regulations and Section 28A of the Acts Interpretation Act provides the basis upon which infringement notices may be served.

22. For the purposes of the operation of the regime, an infringement notice may be served on an individual:

- a) personally or by post; or
  - b) by leaving the notice:
    - i) at the last-known place of residence or business of the person; and
    - ii) with a person, apparently over the age of 16 years, who appears to live or work at the place.
23. An infringement notice may be served on a corporation:
- a) by leaving it at, or by sending it by post to, the address of the head office, a registered office or a principal office, of the corporation; or
  - b) by giving it, at an office mentioned in paragraph (a), to someone who is, or who the person serving the notice reasonably believes is, an officer or employee of the corporation.
24. An infringement notice may be served on a registered trustee or a registered debt agreement administrator by sending it by electronic communication to their business email address and which the Inspector-General could reasonably expect the practitioner to access.<sup>9</sup> When email service is undertaken the email will be forwarded from [infringements@itsa.gov.au](mailto:infringements@itsa.gov.au).
25. Where prepaid post is utilised, best practice stipulates that the notices will be sent by Registered Post and be accompanied by a delivery confirmation receipt.

### **Options upon receipt of an infringement notice**

26. If an infringement notice is issued the recipient has four options:
- Pay the infringement notice.
  - Request an extension of time within which to pay the penalty.
  - Request a review, which will result in the infringement notice being withdrawn or upheld, or
  - Elect not to pay the infringement notice, which results in a brief of evidence being submitted to the Commonwealth Director of Public Prosecutions.

Appendix C provides a flow chart of the infringement notice process.

### **Payment options**

27. The recipient of an infringement notice may elect to pay the prescribed penalty within the 28 day period and thereby avoid the matter being referred for prosecution action.
28. If the recipient of an infringement notice requires more time to pay the penalty, they may write to the Inspector-General c/- National Manager Regulation & Enforcement before the 28 day payment period lapses and request an extension of time within which to pay. An extension of up to 28 days may be granted.
29. If the application for a payment extension is made after the 28 day period specified for payment, then the application must include a statement explaining why the recipient could not deal with the notice within that period.<sup>10</sup>

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<sup>9</sup> Section 71 of the *Evidence Act 1995* (C'th) provides an exception to the hearsay rule for documents transmitted by email as far as the representation is to the identity of the sender, date and time the email was sent, the message's destination and the identity of the recipient.

<sup>10</sup> Regulation 14.09(2)

30. The Inspector-General will consider the matter and, within 14 days, advise the referrer in writing as to whether or not an extension has been granted. If an extension is granted, the recipient will have to make payment with the period of extension otherwise the matter will be referred for prosecution action. If the extension is not granted, the recipient will be required to make payment within 7 days of the letter of determination or before the end of the initial 28 day period - whichever is later.
31. Regardless of the decision concerning a request for an extension, the party requesting the extension will be advised of the decision in writing, and the new date for payment compliance will be stipulated within that advice.
32. If a person pays an infringement penalty by cheque made payable to the Insolvency & Trustee Service Australia, payment is not taken to have been made until the cheque has been honoured on presentation.<sup>11</sup>

### **Effect of payment**

33. If the recipient of an infringement notice pays the specified penalty within the period allowed by the regulations:
  - (a) any liability of the person for the offence is discharged; and
  - (b) a prosecution of the offence cannot be brought against the person for the offence; and
  - (c) the person is not regarded as having admitted guilt or liability for the offence; and
  - (d) the person is not regarded as having been convicted of the offence.

### **Disputed infringement notices**

34. Should a recipient dispute the issuing of an infringement notice by ITSA they can request that the matter be reviewed. Any request for a review will require the recipient to write<sup>12</sup> to the Inspector-General c/- National Manager, Regulation & Enforcement within the 28 day payment period outlining the reasons for the review and providing any additional information for consideration by the Inspector-General.
35. The Inspector-General will consider the matter and, within 14 days, advise the recipient of the determination. Before withdrawing, or refusing to withdraw, a notice the Inspector-General must consider:
  - The circumstances of the offence stated in the notice;
  - Whether there are exceptional circumstances to justify the withdrawal; and
  - Any other relevant matter.
36. If the Inspector-General refuses to withdraw the infringement notice the recipient will be required to make payment within 28 days of receiving notification of the determination. If a decision to issue the infringement notice is upheld and the recipient fails to make payment, the matter may be referred for prosecution action.

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<sup>11</sup> See Regulation 14.14

<sup>12</sup> Section 9 of the *Electronic Transactions Act 1999* (Cwth) provides that where an act requires information to be given in writing, electronic communication (i.e. email) is deemed to comply.

37. If the Inspector-General determines the infringement notice ought not to have been issued it may be withdrawn on a without prejudice basis.
38. If an infringement notice is withdrawn after the penalty amount has been paid, the Inspector-General will refund the amount of the penalty to the person who paid it.

### **If payment is not received**

39. When payment is not received within the 28 day time period the Inspector-General may choose to contact the intended recipient of the notice to determine the reason/s for non-payment and, if necessary, offer the recipient the opportunity to take part in an interview to answer the allegation.<sup>13</sup>
40. If the person, or representative from the corporation to whom the notice was issued, claims not to have received the infringement notice, the Inspector-General will consider the circumstances pertaining to this claim and, if necessary, re-issue the infringement notice.

### **Prosecution**

41. All offences subject to the infringement notice regime are offences of strict liability.<sup>14</sup> There is no provision within the Bankruptcy Act that requires an infringement notice to be issued in the first instance. Furthermore, the decision-maker retains the discretion to forward a brief of evidence for prosecution of an alleged offence in the first instance, or following the withdrawal of an infringement notice.
42. Section 4K(1) of the Crimes Act states that where a law of the Commonwealth requires an act or thing to be done within a particular period, or before a particular time, then “the obligation to do that act or thing continues, notwithstanding that the period has expired or the time has passed, until the act or thing is done.” As a consequence, the requirement to comply with the obligations listed in the table (Appendix A) in subsection 277B(2) of the Bankruptcy Act are ongoing and a person may be found guilty of an offence in respect of each day the person refuses or fails to comply with their obligations.
43. It should also be noted that infringement notice regimes will only be effective if they are appropriately enforced. “A scheme is not likely to be effective if persons who do not pay the penalty specified in the notice are routinely not prosecuted”.<sup>15</sup>

## **Appendix A**

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<sup>13</sup> See Division 3 of Part 1C of the *Crimes Act 1914*

<sup>14</sup> see Section 6.1 of the *Criminal Code Act 1995*

<sup>15</sup> Attorney Generals Department, ‘A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers’, December 2007

The table below sets out the relevant offences of strict liability in subsection 277B(2) of the Bankruptcy Act, their penalties and the infringement notice penalty.

Provision	Offence	Relevant time limit <sup>16</sup>	Court imposed penalty	Infringement notice penalty
s52(1A)	If the Court makes a sequestration order, the creditor who obtained the order must, within 2 days of the making of the order, give a copy to the Official Receiver.	2 days	5 penalty units	1 penalty unit
s73(1A)	The trustee must, within 2 working days after receiving the proposal for a composition or arrangement, give a copy of the proposal to the Official Receiver.	2 days	5 penalty units	1 penalty unit
s74(5A)	The trustee must, before the end of the period of 2 days from the passing of a special resolution that annulled the bankruptcy, give the Official Receiver a written notice setting out the name and the bankruptcy number of the former bankrupt, and the date of annulment.	2 days	5 penalty units	1 penalty unit
s153A(2)	The trustee must, before the end of the period of 2 days from the date the bankruptcy is annulled pursuant to s153A, give the Official Receiver a written notice setting out the name and the bankruptcy number of the former bankrupt, and the date of annulment.	2 days	5 penalty units	1 penalty unit
s153B(3)	The trustee must, before the end of the period of 2 days beginning on the day the trustee becomes aware of the order, give to the Official Receiver a written certificate setting out the former bankrupt's name and bankruptcy number and the date of annulment.	2 days	5 penalty units	1 penalty unit

<sup>16</sup> See paragraph 20 of 'Reckoning of time'

s155J(1)	If a person ceases to be registered as a trustee, the person must, within 7 days of ceasing to be registered, give his or her certificate of registration to the Inspector-General.	7 days	5 penalty units	1 penalty unit
s168(1)	A trustee of the estate of a bankrupt shall not pay into a private account any money received by him or her as trustee.	N/A	10 penalty units	2 penalty units
s170A(1)	If, during a financial year, the trustee administered the estate of a bankrupt, the trustee must within the period of 35 days after the end of that year give the Inspector-General a return, in the approved form, in relation to the administration of that estate.	35 days	5 penalty units	1 penalty unit
s173(1)	The trustee of the estate of a bankrupt shall keep such accounts and records as are necessary to exhibit a full and correct account of the administration of the estate and shall permit a creditor of the bankrupt to inspect, at all reasonable times, either personally or by an agent, the accounts and records relating to that estate.	N/A	5 penalty units	1 penalty unit
s175(5)	The trustee shall produce to the person carrying out an audit under s.175(1), as and when required, such books and information as that person requires.	At any time (no date required)	5 penalty units	1 penalty unit
s182(4)	The person administering the deceased estate of a trustee must, within 28 days of becoming aware of the death, notify the Official Receiver, in writing, of the trustee's death.	28 days	5 penalty units	1 penalty unit
s185LEA(1)	If, during a financial year, the DAA administered a debt agreement, the administrator must within the period of 35	35 days	5 penalty units	1 penalty unit

	days after the end of that year give the Inspector-General a return, in the approved form, in relation to the administration of that agreement.			
s185ZA(1)	The person administering the deceased estate of a debt agreement administrator must, within 28 days of becoming aware of the death, notify, in writing, the Official Receiver of the administrator's death.	28 days	5 penalty units	1 penalty unit
s186N(1)	A person who surrenders their registration as a debt agreement administrator must, within 7 days of surrendering the registration, return the certificate of registration to the Inspector-General.	7 days	5 penalty units	1 penalty unit
s186N(3)	A person whose registration as a debt agreement administrator is cancelled by the Inspector-General must, within 7 days of being notified of the cancellation, give their certificate of registration to the Inspector-General.	7 days	5 penalty units	1 penalty unit
s186N(5)	A company, whose registration as a debt agreement administrator is cancelled by the Inspector-General must, within 7 days of being notified of the cancellation, give their certificate of registration to the Inspector-General.	7 days	5 penalty units	1 penalty unit
s186N(6A)	A person whose registration as a debt agreement administrator is cancelled by a Court order must, within 7 days of the cancellation, give their certificate of registration to the Inspector-General.	7 days	5 penalty units	1 penalty unit
s218(2)	The trustee of a Personal Insolvency Agreement (PIA) must, within 2 days after the execution of the agreement by	2 days	5 penalty units	1 penalty unit

	the debtor and the trustee, file a copy of the agreement with the Official Receiver.			
s224A(1)	The trustee must, before the end of the period of 2 days beginning on the day of the termination or variation, file a copy of the resolution or special resolution in relation to termination or variation of the PIA with the Official Receiver.	2 days	5 penalty units	1 penalty unit
s224A(2)	If a PIA is varied in accordance with s.221A(5), the trustee of the agreement must, before the end of the period of 2 days beginning on the day of the variation, file a copy of the variation with the Official Receiver.	2 days	5 penalty units	1 penalty unit
s224A(3)	If a PIA is terminated by any event or occurrence of which the deed provides that it is to terminate, the trustee must before the end of the period of 2 days beginning on the day of the termination notify the Official Receiver in writing of the termination of PIA .	2 days	5 penalty units	1 penalty unit
s224A(4)	If the Court makes an order setting aside or terminating a PIA the registered trustee must give written notice of the order to the Official Receiver before the end of the period of 2 days beginning on the day the trustee becomes aware of the order.	2 days	5 penalty units	1 penalty unit
s224A(5)	If the Court makes an order setting aside or terminating a PIA, or a PIA is terminated otherwise than because of an order of the Court, the trustee of the PIA must give written notice of the order or the termination to each of the creditors within 2 working days of the making of the order or the termination, as the case may be.	2 working days	5 penalty units	1 penalty unit

s244(14)	If the Court makes an order that the estate be administered under Part XI, the creditor who obtained the order must, before the end of the period of 2 days beginning on the day the order was made, give a copy of the order to the Official Receiver.	2 days	5 penalty units	1 penalty unit
s245(3)	If the Court makes an order that the deceased estate be administered under Part XI, the creditor who obtained the order must, before the end of the period of 2 days beginning on the day the order was made, give a copy to the Official Receiver	2 days	No penalty	5 penalty units
s246(1)	The legal personal representative of a deceased person in bankruptcy shall, within 28 days from the day on which he or she is notified of the making of the sequestration order, make out and file with the Official Receiver a Statement of Affairs form.	28 days	25 penalty units	5 penalty units
s247(3)	If the Court makes an order upon hearing the petition, the person administering the estate of the deceased person must, before the end of the period of 2 days beginning on the day the order was made, give a copy of the order to the Official Receiver.	2 days	5 penalty units	1 penalty unit
s252A(2)	The trustee must, before the end of the period of 2 days beginning on the date of annulment give the Official Receiver a written certificate setting out the name and the administration number of the deceased estate and the date of annulment.	2 days	5 penalty units	1 penalty unit

## **Appendix B**



Infringement Notice Number  
[Force No.]

## **INFRINGEMENT NOTICE**

I, [delegate's name], a delegate of the Inspector-General in Bankruptcy, after having regard to Division 2 of Part 14 of the *Bankruptcy Regulations 1996*, have reasonable grounds to believe that the person named below has committed the offence detailed below.

**Name:**  
**Address:**

### **Nature of the alleged offence**

[Populate with details of section contravened]

**Penalty payable: \$**

### **Reasons for serving infringement notice**

[Delegate's reason].

(Signature of the delegate)

.....  
[Delegates name]

Dated / /

If you do not wish this matter to be dealt with by a Court of Law, you may pay the penalty amount in this Infringement Notice to the Inspector-General in Bankruptcy within 28 days of receiving this Infringement Notice. If the penalty is paid within 28 days of service of the Infringement Notice then you cannot be prosecuted for the alleged offence and will not be regarded as having been convicted of the offence.

If the matter is prosecuted, the maximum fine a Court could impose is \$.

#### **Payment of this Infringement Notice is made to:**

**A/C Name:** ITSA Official Administered Receipts Account  
**Bank:** Commonwealth Bank of Australia  
**A/C No:** 1000 1950  
**BSB:** 062-987  
**Reference:** [Invoice No.] (Important: Include this or the payment will not be processed)

Further information about your rights and obligations is attached.

### **What to do if you receive an Infringement Notice**

**What is an Infringement Notice?**

An additional remedy has been introduced to address less serious breaches which can have significant repercussions for the effective administration of personal insolvency estates and the integrity of the National Personal Insolvency Index. Infringement Notices are designed as an alternative to prosecution action and provide a fast and effective remedy that is proportionate and proximate in time to the alleged breach.

### **Do I have to pay the penalty in the Infringement Notice?**

You are **not** obliged to pay the penalty amount specified in the Infringement Notice.

### **What happens if I do pay?**

If within 28 days of service of this Infringement Notice you pay the penalty amount then:

- any liability for the offence is discharged;
- The Inspector-General cannot initiate prosecution action against you for the offence; and
- you are not regarded as having been convicted of the offence.

### **What happens if I don't pay?**

If you do not pay the penalty amount in the Infringement Notice, the Inspector-General may initiate prosecution action against you for the alleged offence. If convicted, a Court could impose the maximum amount for the offence plus any relevant Court costs.

### **Can I contest the Infringement Notice?**

If you elect to have this matter dealt with by a Court of Law, you must within the 28 day payment period advise the Inspector-General of this choice in writing. The Inspector-General will then write to you advising you of the next step.

### **Procedural Fairness - Can I seek the withdrawal of an Infringement Notice?**

You may write to the Inspector-General seeking the withdrawal of an Infringement Notice. All requests for an Infringement Notice to be withdrawn must be accompanied by a detailed statement outlining the reason(s) why the Infringement Notice should be withdrawn.

The Inspector-General will write to you advising whether or not the Infringement Notice has been withdrawn. We will also tell you if the time for payment of the penalty has been extended.

If the Infringement Notice is not withdrawn, you may still pay the penalty. You may also refuse to pay the penalty. If the penalty in this Infringement Notice is paid and the Infringement Notice is subsequently withdrawn, the Inspector-General will repay the amount you paid.

### **How can I get an extension of time to pay?**

You may write to the Inspector-General seeking an extension of time within which to pay. All requests for an extension of time to pay the penalty must be accompanied by a detailed statement outlining the reason(s) why an extension is being sought.

The Inspector-General will write to you telling you whether an extension has been granted. If an extension is granted, one extension period of 28 days will be provided.

### **Contact details**

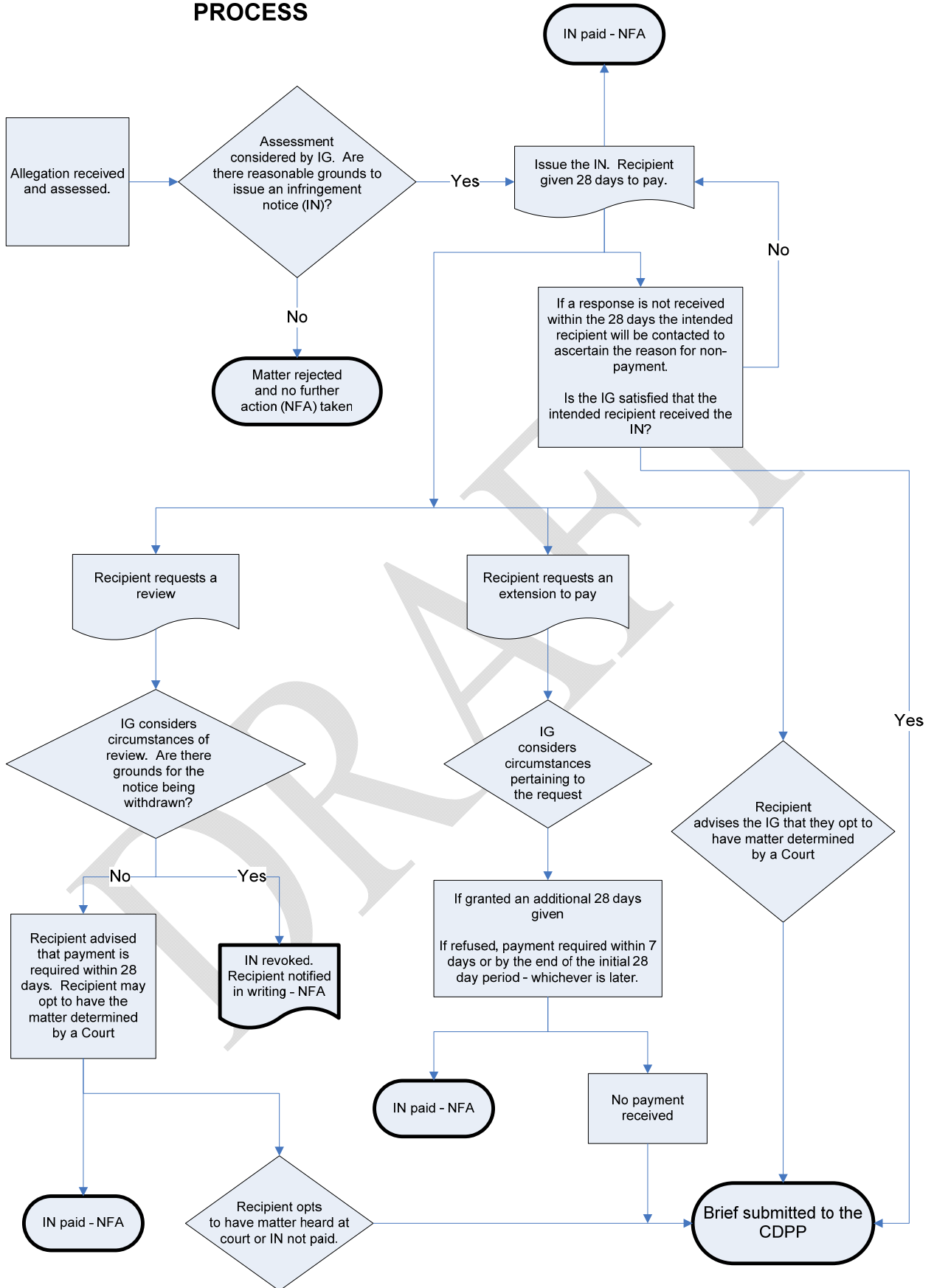
The Inspector-General can be contacted by email at [infringements@itsa.gov.au](mailto:infringements@itsa.gov.au) or by mail addressed c/- Regulation & Enforcement, GPO Box 2851, Melbourne Vic 3001.

**Email correspondence is preferred.**

If you need more information about ITSA's Infringement Notice regime, please contact ITSA's Regulation & Enforcement Branch on 1300 364 785 or email [infringements@itsa.gov.au](mailto:infringements@itsa.gov.au).

## **Appendix C**

# INFRINGEMENT NOTICE PROCESS



<b>Acronym</b>	<b>Description</b>
IN	Infringement Notice
IG	Inspector-General
NFA	No further action
CDPP	Commonwealth Director of Public Prosecutions

DRAFT