



Australian Government

Insolvency and Trustee Service Australia

## INSPECTOR-GENERAL PRACTICE STATEMENT No 16

### Reviewing Remuneration of Trustees and Costs of Third Party Service Providers

**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:** August 2010

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## **Acknowledgements**

Sections of this Inspector-General Practice Statement have been written with reference to the guidance given in the Insolvency Practitioners Association of Australia (IPA) [Code](#) of Professional Practice.

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## Introduction

1. The *Bankruptcy Legislation Amendment Act 2010* introduced amendments to the *Bankruptcy Act 1966* (“the Act”) to inter alia, provide a clearer regime for setting and reviewing trustee remuneration. The Inspector-General in Bankruptcy through the Regulation staff of ITSA now has a more effective role and enhanced oversight to ensure that trustees are following rules when claiming remuneration. The regime facilitates the effective and affordable resolution of disputes concerning remuneration or costs.
2. In appropriate, exceptional circumstances, as outlined in the *Bankruptcy Regulations 1996* (“the Regulations”), Regulation and Enforcement staff will conduct a review of a trustee’s remuneration or costs, at no cost to the applicant. The purpose of this statement is to provide information and guidance on the exercise of the Inspector-General review function in respect to trustee remuneration and costs. This practice statement only applies to the Official Trustee in respect to a review of costs, whilst applying to registered trustees for both remuneration and costs.

## Purpose and Application of the Review Process

3. The review process replaces the existing taxation process for all new bankruptcy and personal insolvency agreement matters. The taxation process will continue to apply to all bankruptcies and personal insolvency agreements in respect of which, respectively the date of bankruptcy or the date of execution of the personal insolvency agreement (whichever is the case) is before 1 October 2010. If the date of bankruptcy (or PIA execution) is on or after 1 October 2010 this practice statement and the new regulations referred to in it, apply.
4. Regulation and Enforcement staff have responsibility for conducting reviews under the new regime as well as conducting taxations in respect to pre 1 October 2010 matters. The provisions in respect to taxations under section 167 of Act and Regulations 8.09-8.11A of the Regulations will continue to apply to pre-1 October 2010 matters only.
5. 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 new process is therefore referred to as a ‘review’.
6. The review process is meant to be utilised where the trustee’s remuneration claim or the costs of a third party service provider are disputed. This process is free to the applicant and is flexible by allowing it to be tailored to the particular issues in dispute.

## The Application for Review of Remuneration

7. As reviews of remuneration or costs will be free and may be resource-intensive, they are to occur only in exceptional circumstances which satisfy the criteria outlined in the

Regulations<sup>1</sup>. There is no provision for a remuneration (or costs) review to be conducted on the Inspector-General's own initiative nor is there a provision for a review if requested by the Ombudsman as with other reviews under the Act. All remuneration reviews are therefore by application.

8. The process consists of two stages:

- (a) Determining whether the application should be accepted; and
- (b) If accepted, the conduct of the review.

## **Timing**

- 9. The application by a creditor, bankrupt or debtor (subject to a personal insolvency agreement) must be in writing and must, subject to the power of the Inspector-General to extend the period, be made within 28 days after the applicant receives a Remuneration Claim Notice from the trustee under regulation 8.12C<sup>2</sup>.
- 10. The Inspector-General may extend the 28 day period before or after it expires, to any period considered appropriate if satisfied that the applicant and the trustee have been engaged in an alternative dispute resolution process to try to resolve the matter or it is appropriate, in all the circumstances, to extend the period. The applicant may apply to the Administrative Appeals Tribunal (AAT) for the review of a decision by the Inspector-General to refuse to extend the period in which an application for review may be made, whilst the trustee may apply to the AAT for a review of a decision to extend the period in which an application for review may be made<sup>3</sup>.

## **When the Inspector-General Must or May refuse an Application for Review of Remuneration**

11. Regulation 8.12G provides as follows:

1) *The Inspector-General must refuse to accept an application:*

(a) *unless the Inspector-General is satisfied on reasonable grounds that 1 or more of the following apply:*

(i) *the trustee's remuneration may have been fixed in a manner that is inconsistent with the requirements of the Act and these Regulations;*

(ii) *the trustee may have acted improperly, or without due care and diligence, in the administration of the estate; or*

(b) *if the Inspector-General is satisfied on reasonable grounds that:*

(i) *the applicant does not have an interest in the outcome of the review; or*

(ii) *the applicant has not adequately particularised the issue giving rise to the review; or*

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<sup>1</sup> Regulation 8.12G

<sup>2</sup> Sub-regulation 8.12F(2)

<sup>3</sup> Sub-regulation 8.12F(5)&(6)

(iii) *the application is frivolous or vexatious.*

(2) *However, the Inspector-General may accept an application if the Inspector-General is satisfied that there are exceptional circumstances to justify the review.*

(3) *The Inspector-General may refuse to accept an application if the Inspector-General is satisfied on reasonable grounds that:*

(a) *it was appropriate in all the circumstances for the applicant to attempt to resolve the matter without seeking a review under this subdivision; and*

(b) *the applicant did not do so; and*

(c) *the applicant did not provide any reasonable explanation for not doing so.*

### **“Interest in the Outcome of the Review”**

12. An “interest” in the outcome of the review can be regarded as synonymous with a “realistic expectation” of receiving a dividend from the administration in the case of a creditor, or a surplus in the case of a bankrupt.

### **“Exceptional Circumstances”**

13. An application for review of the trustee’s claim for remuneration will only be appropriate where there are exceptional circumstances.<sup>4</sup> Exceptional circumstances may include but are not limited to:

- When evidence can be provided by the applicant of errors on the part of the trustee or his/her staff in procedures under the Act requiring significant remedial action including work done poorly, or at worst, improperly and needing to be reworked;
- Systemic and justified complaints having been made to Regulation and Enforcement about the trustee’s conduct which indicate that the trustee or his/her staff may have been performing work which is not necessary and/or not properly carried out; and
- Evidence of inefficiency and/or inappropriate billing practices having been found by the applicant, or by Regulation and Enforcement staff as a result of the investigation of a complaint, an inspection, or otherwise. This may include for example inefficient use of staff in the conduct of the administration; employing senior staff to carry out routine tasks which ordinarily would be carried out by more junior staff; charging for communicating with the Regulator (i.e. ITSA Regulation and Enforcement) in respect to other than spurious complaints or inordinate delays without a reasonable explanation, in the distribution of the estate.

### **Form of Application**

14. The application for review must be in writing. A suggested form of application is at Appendix 1. The applicant will need to provide the following information and documentation when applying for the review:

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<sup>4</sup> Discussion Paper “Amendments to the Bankruptcy Regulations 1996” Attorney Generals Department, December 2009 (at paragraphs 3.2 and 6.6) and Regulation 8.12G(2)

- The applicant’s full name, address and contact telephone number
  - The Remuneration Claim Notice received from the trustee and the date the notice was received.
  - In the case of an application by a creditor, the amount claimed to be owed to the creditor and evidence of the creditor’s debt which may include if appropriate, evidence that the creditor’s proof of debt has been admitted by the trustee
  - The reason for the application including the particulars of the specific issue(s) giving rise to the review
  - The period of administration in respect of which the applicant seeks a review
  - The specific aspects of the remuneration that are disputed. It is not sufficient for an applicant to simply state words to the effect “...every item of work is disputed” without offering specific and detailed reasons why.
  - What steps if any the applicant has taken to try to resolve the matter with the trustee and if none were taken, why not
15. When considering an application by a creditor, Regulation and Enforcement staff will take into account the fact that creditors have, under Section 173 of the Act, a right to inspect, at all reasonable times, either personally or by an agent, the accounts and records relating to an estate. This right, if exercised in a timely manner, should mean that the creditor is able to particularise the issue giving rise to the request for the review. A reason given for a review of “*remuneration appears excessive*” or similar would not be a sufficient reason on its own to conduct a review, unless exceptional circumstances were known to Regulation and Enforcement staff. Examples of the type of issues that may be considered sufficient to justify a review are:
- the trustee is a sole practitioner and has charged principal rates for all the tasks carried out in the record of chargeable time that relates to his most recent remuneration claim. Many of the tasks were routine and would be expected to be charged out at a lower rate
  - the trustee in his first report to creditors omitted to mention several important issues that creditors were expecting to read about and after intervention by Regulation and Enforcement staff the trustee issued a supplementary report. The trustee has apparently charged the estate for his time dealing with the Regulator and preparing the supplementary report
  - the trustee has delayed the distribution of the estate for 24 months without explanation and charged the estate for monthly file reviews
  - there are joint and separate estates each with funds and each with creditors and yet the trustee has not sought approval for remuneration in each estate and is claiming one sum for remuneration from all estates
  - the trustee convened a meeting of creditors to consider a proposal for composition but gave insufficient notice to creditors resulting in an adjournment and a

supplementary report to creditors having to be issued – the trustee’s remuneration claim included this extra activity

16. If a “creditor” applicant cannot establish to the satisfaction of Regulation staff that they are a creditor, their application for review will be rejected.
17. Before deciding whether to conduct a review, unless the application is rejected for the reasons already mentioned, Regulation staff may undertake one or all of the following:
  - a) Interview the applicant;
  - b) Interview the trustee; and
  - c) Inspect the trustee’s administration file to gauge the level of complexity, standard of administration and veracity of the applicant’s allegations - particularly where more pervasive or systemic problems are alleged by the applicant.

### **Notification of decision refusing application**

18. Regulation 8.12H provides:

- (1) If the Inspector-General refuses to accept the application, the Inspector-General must give the applicant and the trustee written notice of the refusal.*
- (2) The notice must be given to the applicant and the trustee within 14 days after the day the Inspector-General refuses the application and must include the reasons for the refusal.*

### **Application for Review of Costs**

#### ***Review of bill of costs***

19. Subsection 167 (2) of the Act provides that the Regulations may make provision for the Inspector-General to review a bill of costs for services provided by a third party in relation to the administration of a bankrupt’s estate (applicable also to personal insolvency agreements).

#### ***Application for review — Form and Timing***<sup>5</sup>

20. (1) The trustee of the bankrupt’s estate may apply to the Inspector-General to review a bill of costs for services provided by a third party in relation to the administration of the bankrupt’s estate.

(2) The trustee may make the application on the trustee’s own initiative or after receiving a request from the bankrupt or a creditor of the bankrupt in response to a notice under regulation 8.12D<sup>6</sup>

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<sup>5</sup> This section is based on Regulation 8.12J

<sup>6</sup> Regulation 8.12D requires a trustee to give to the bankrupt and creditors a written notice containing prescribed details in relation to the payment for services provided by another person (the *third party*) in relation to the administration of the bankrupt’s estate. Guidance on the notification requirements is contained in Inspector-General Practice Direction 18.

- (3) The application must be in writing.
- (4) The application must be made within 28 days after the trustee receives the bill of costs from the third party.
- (5) The Inspector-General may, before or after the end of the abovementioned 28 days, extend the period in which an application for review may be made.

21. The application by the trustee should enclose a copy of the bill of costs and an explanation as to why a review is being sought including a copy of any requests received from the bankrupt or creditor(s) giving rise to the application. There is no prescribed format for making this application.

22. If a request is received from a trustee for the review of a bill of costs, it is most likely to be in respect to legal costs. There is a considerable amount of case law relating to the taxation of solicitor client costs and for that reason it is likely that should the amount of the solicitor client costs be very large, a person who is familiar with the assessment of such costs, will be engaged by the Inspector-General to assist in the review.

## **The Powers of the Inspector-General & Conduct of the Review**

23. Regulation 8.12M provides as follows:

*In conducting the review, the Inspector-General may do any of the following:*

- (a) conduct the review:*
  - (i) with the parties present; or*
  - (ii) on the papers; or*
  - (iii) in part with the parties present and in part on the papers;*
- (b) take evidence on oath or affirmation;*
- (c) adjourn or discontinue the review if the Inspector-General considers it necessary or appropriate to do so;*
- (d) engage an expert to assist in the review and arrange for payment to be made to the expert;*
- (e) direct the trustee to provide an itemised invoice in a form, and within the time, specified in the direction for work undertaken by the trustee;*
- (f) direct a third party to give an itemised bill of costs in a form, and within the time, specified in the direction in relation to work undertaken by the third party;*
- (g) interview any party to the review and allow the other party or their representative to question that party;*
- (h) direct a person to give a written statement, in a specified form and signed by the person, about a matter relevant to the review;*
- (i) direct the trustee to produce to the Inspector-General or to a party to the review, all or part of the trustee's files or documents in relation to the administration of the bankrupt's estate;*
- (j) copy documents, or arrange for copies to be made and delivered to the Inspector-General or a party to the review;*
- (k) direct a party seeking inspection, production or copies of documents to comply with conditions (including conditions relating to payment) in relation to the inspection, production or copying;*
- (l) proceed with the review in the absence of a party if the Inspector-General considers it necessary or appropriate to do so;*
- (m) direct the trustee to take particular action for the administration of the estate, including refunding any remuneration not properly claimed or supported.*

24. The extent and formality of the review will depend on the issue(s) particularised by the applicant; whether the issue is a discrete, isolated item in the course of the administration or a more pervasive or systemic problem. The form that the review takes will vary depending on the issues raised by the applicant and the information known to Regulation and Enforcement staff about the trustee and the particular administration; from a brief review of a step taken and the associated remuneration charged where an issue raised is isolated, to a comprehensive review in cases involving systemic problems throughout the course of the administration such as, for example, a sole practitioner with no support staff charging principal rates for routine tasks carried out, throughout the administration.

### ***Non-compliance with directions***

25. If a person to whom the Inspector-General gives a direction under the abovementioned powers does not comply with the direction, the Inspector-General may conduct the review on the basis of the information available to the Inspector-General.

If the trustee does not comply with a direction of the Inspector-General under paragraphs (e), (i) or (m) of regulation 8.12M (set out above), the Inspector-General may direct that the trustee is not entitled to the remuneration, or part of the remuneration, that is the subject of the review.<sup>7</sup>

### **Information Likely to Be Required**

26. The information that is most obviously going to be required of a trustee (assuming use of the time charging method) is the trustee's itemised record of time charged to the estate also known as the detailed WIP (work-in-progress). This record will or should identify:

For each item of work:

- the date the work was carried out
- the name or initials of the staff carrying out the task
- the number of time units spent on the task
- a description of the work carried out
- the charge to the estate for the work carried out

27. The trustee may be asked to self-assess the detailed WIP and eliminate or reduce entries in respect to:

- Charging for re-work arising from staff errors
- Charging for multiple and unnecessary redrafting of documents
- Charging for reviews of files by new staff
- Routine and non complex tasks done by senior staff and charged at senior rates

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<sup>7</sup> Regulation 8.12N

- Charges for interacting with the Regulator except where a repeat unjustified complaint is deemed spurious
- Charges unreasonably high or not commensurate with the corresponding task completed

28. The above are examples only and do not represent an exhaustive list.

**Other information and documents that may be required:**

- The Initial Remuneration Notice required under Regulation 8.12A
- The Remuneration Approval Notice given under Regulation 8.12B
- The Remuneration Claim Notice given under Regulation 8.12C
- Form 2 (Trustee’s Account of Receipts and Payments) and cashbook
- If necessary, the administration file including all records associated with the approval and drawing of remuneration and bank account records
- Time sheets and work diaries of trustee and trustee’s staff in so far as they are necessary

**Guidance**

29. In conducting the review, the Regulation reviewing officer will refer to the following guidance in considering whether remuneration is appropriate:

*Bankruptcy Act 1966 and the Bankruptcy Regulations 1996 and in particular the Performance Standards for Trustees at Schedule 4A of the Regulations*

*Inspector-General Practice Direction No.6 “Remuneration Entitlements of a Registered Bankruptcy Trustee”*

*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”*

*Inspector-General Practice Direction No.18 “Trustee Remuneration Notifications”*

*The Insolvency Practitioners’ Association of Australia “Code of Professional Practice for Insolvency Practitioners” (Chapters 12 & 13)*

**The Regulation reviewing officer will take into account the following principles taken from the above guidance:**

30. Remuneration should be necessary, reasonable and proper. “Necessary” means connected with the administration; and done in furtherance of the exercise of the powers and performance of the duties of a Practitioner as required by insolvency law and practice.

A trustee must not seek to be remunerated for work:

1. outside the scope of the powers of the Practitioner; or
2. carried out before the Practitioner was appointed.

31. These restrictions are a threshold test before applying the ‘*necessary and properly performed*’ test.

32. Before deciding whether it is appropriate to incur a cost, compare the amount of the cost likely to be incurred with the value and complexity of the administration.

### **Rate for tasks undertaken by trustee's staff**

33. The trustee must ensure that time billed for a task undertaken in conducting an administration is charged at the appropriate rate for the level of staff who would be reasonably expected to undertake the task.

### **How review to be conducted**

34. Regulation 8.12L provides:

*(1) The Inspector-General must conduct the review with as little formality and technicality, and with as much expedition, as the Act and the Regulations, and a proper consideration of the matter, permit.*

*(2) In conducting the review, the Inspector-General:*

*(a) is not bound by legal technicalities, legal forms or rules of evidence; and*

*(b) may inform himself or herself on any matter relevant to the review in such manner as he or she thinks appropriate.*

35. Within the above constraints, the review is likely to involve the following steps:

(i) Ascertaining from the application and an interview of the applicant and the trustee (not necessarily in person) the concerns or issues raised by the applicant.

(ii) Compiling the information and documents required for the review

(iii) Checking that remuneration has been validly approved and that the required notices have been given.

(iv) Perusal of the record of time charged to the administration to establish that charges are necessary and reasonable. Refer to Appendix 2 for further guidance in this regard.

### **Outcome of the Review**

36. Subregulation 8.12K(2) provides:

*2) The Inspector-General may:*

*(a) affirm the amount claimed by the trustee or the third party; or*

*(b) disallow all or part of the trustee’s claim for remuneration and substitute another amount for the amount claimed; or*

*(c) disallow all or part of the third party’s bill of costs and substitute another amount for the amount claimed; or*

*(d) dismiss the application.*

## Decision

37. When the Inspector-General's delegate makes his or her decision, that person must prepare a written statement that:

- (a) sets out the decision of the Inspector-General; and
- (b) sets out the reasons for the decision; and
- (c) sets out the findings on any material questions of fact; and
- (d) refers to evidence or other material on which the findings of fact are based; and
- (e) sets out the effect of subsection 167 (6) of the Act in relation to the Inspector-General's decision (which relates to appeals from that decision – see paragraph 40 below).

38. If the trustee's remuneration is reduced upon review, upon being given a copy of the decision, the trustee may be required (in writing) to repay to the estate any excess drawn from the estate by a certain date.<sup>8</sup>

## Timing

39. The Inspector-General must complete the review, and make a decision on the application, within 60 days after the day the Inspector-General accepts the application for review and give a copy of the decision to each party to the review, within 14 days of making the decision.<sup>9</sup> The application will only be accepted for review if and from the time that the applicant provides all necessary information in support of the application.

## Appeal to the Court

40. The trustee, the bankrupt or a creditor of the bankrupt may appeal to the Court from a decision of the Inspector-General in relation to the review. In addition, if the review is of the costs of a third party service provider, the third party may also appeal to the Court from a decision of the Inspector-General in relation to the review.<sup>10</sup>

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<sup>8</sup> Regulation 8.12P

<sup>9</sup> Regulation 8.12O

<sup>10</sup> Sub-section 167(6)

# Appendix 1

## APPLICATION FOR REVIEW OF REMUNERATION

Applicant is (tick one) bankrupt  debtor under Personal Insolvency Agreement  creditor

**1. ALL APPLICANTS TO COMPLETE THIS SECTION – ADMINISTRATOR 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"/>

**If you are the bankrupt/debtor provide your current postal address & contact information**

Postal Address	Postcode	
<input type="text"/>	<input type="text"/>	
Contact Number	Fax Number	Email Address
<input type="text"/>	<input type="text"/>	<input type="text"/>

**2. ALL APPLICANTS TO COMPLETE THIS SECTION – 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"/>

**3. CREDITOR APPLICANTS TO COMPLETE THIS SECTION – CREDITOR DETAILS**

If you have lodged a proof of debt form with the trustee has the trustee admitted your proof of debt? Yes  No  N/A

Please attach a copy of your proof of debt if available. If not available please complete the following details and attach evidence of your debt such as judgements, invoices, contracts, statements of account etc.

**Creditor Details**

Creditor Name

Postal Address  Postcode

Creditor Reference  Creditor ABN

**Contact Information**

Name

Contact Number  Fax Number  Email Address

Do you hold any security? No  Yes  Estimated value of security

Description of security property

Have you obtained a judgment? No  Yes  Judgment amount & costs

Was this a default judgment? No  Yes  Judgment number & court

**Creditor Details**

Date debt/s incurred	Details of debt/description (see note 2)	GST (see note 7)	Total amount (incl of GST)
	Less: Payments received in reduction of debts		
	Less: Estimated value of security		
	<b>Amount claimed</b>		

**4. ALL APPLICANTS – ISSUE(S) CAUSING YOU TO SEEK REVIEW**

On what date did you receive the Remuneration Claim Notice? (attach a copy)

\_\_\_\_/\_\_\_\_/\_\_\_\_

What is the reason for seeking review – particularise the issue(s) causing you to seek a review and indicate whether you dispute the whole claim or only part of the claim and why you dispute it. Comments such as “*Remuneration is excessive*” are not considered sufficient.

Reasons for seeking review

Have you sought to resolve the dispute with the trustee? Yes  No

If “yes”, please provide details of your attempts to resolve the matter attaching copies of any correspondence to the trustee and any details of mediation/alternative dispute resolution. If “No”, is there a reason you have not attempted to resolve the dispute?

Name

Signature

Date (DD/MM/YYYY)

## Appendix 2 – Remuneration Principles from IPA Code and IGPD 6

### First Remuneration Principle – Necessary and Proper

A Practitioner is entitled to claim remuneration and disbursements, in respect of necessary work, properly performed in an administration.

A Practitioner's right to be paid is recognised under the legislation and at general law and is given a high priority of payment from the insolvent's funds.

The entitlement to remuneration exists only in respect of work done that was necessary and was properly performed.

### Necessary Work

A Practitioner is entitled to remuneration only in respect of work done that was necessary for the administration. The term '*necessary*' means work that was done that was:

- connected with the administration; and
- done in furtherance of the exercise of the powers and performance of the duties of a Practitioner as required by insolvency law and practice.

### *Examples*

- *report to creditors;*
- *protection and recovery of assets;*  
*preparing and filing an offence referral with ITSA (even though this may have no direct benefit to creditors);*

The examination of claims for remuneration will necessarily be made with the benefit of hindsight. However a Practitioner may claim for work that may not have produced a positive outcome provided there is a proper exercise of professional judgment by the Practitioner at the time the work was undertaken. Once that is established, the work will remain '*necessary*' for the purposes of a remuneration claim, even if subsequent events show that the work was not necessary.

### *Examples*

- *searches revealing no assets;*
- *Examination of bankrupt resulting in no new information; and unsuccessful claims for preference recovery*

Before a decision is made to claim for remuneration, the Practitioner **must** ensure that work that was done, by him or herself, or by staff members, was necessary.

### Properly performed

In order to claim remuneration for necessary work, the Practitioner will need to establish that the work was properly performed.

Work done poorly, or, at worst, improperly and needing to be reworked **should** not be charged.

### ***Examples***

*It may have been necessary to inquire of all property titles countrywide, but if the staff member doing that work pursued inquiries through the wrong agency because of ignorance or inattention, then that work was not done properly.*

*It may have been necessary for the Practitioner to have convened a meeting of creditors, but if work done in convening that meeting took an inordinate amount of time, through the inexperience of the staff member, it was not done properly. While an allowance is made for junior staff through the lower hourly rate, where activity is redone, care should be taken to ensure that the amount charged reflects the true value of the work.*

*Work performed to convene an invalid meeting would not be properly performed.*

Creditors are entitled to expect that administration funds are not expended on work that was not properly performed. All time spent for necessary work properly performed **should** be recorded against the Appointment using an appropriate system. Before claiming remuneration, the Practitioner **should** identify work and time that should not be claimed.

The legislation does not generally state by what criteria remuneration is to be ‘fixed’ or ‘determined’ by creditors. Under the Corporations Act, on a review of a Practitioner’s remuneration, the Court must have regard to whether the remuneration is reasonable, taking into account various matters including whether the work was ‘reasonably necessary’. In bankruptcy, there is more limited guidance, that costs of services provided to a trustee were ‘reasonable and necessary’ (s 167 of the Bankruptcy Act, Schedule 4A 2.13). The remuneration requirements of the Code for work that is necessary and properly performed are consistent with, or impose a higher standard than, the law.

Prior approval of fees does not remove the obligation to establish that the work was necessary and properly performed. The mere approval does not give the right to draw remuneration if the work is not done.

### **Deciding what work to undertake**

The Practitioner **should** exercise professional and commercial judgment in considering whether work is to be performed. Clearly work that improves the return for creditors should be undertaken.

#### ***Example***

*A judgment will need to be made in relation to the pursuit of unfair preference claims or other voidable transactions in terms of the likely cost and likely return. This may involve consultation with creditors, and, if appropriate, legal advice, or reference to the court.*

Not all work is associated with directly seeking a return for creditors. Many of the general statutory tasks of a Practitioner – for example in reporting to creditors, lodging statutory records with ITSA, and maintaining accounts – are properly performed and charged even though the remuneration charged will not produce a financial return and will reduce the funds available for distribution.

## Outsourcing

A Practitioner may 'outsource' work subject to the restrictions on delegation (e.g. decision making and exercise of judgment).

The decision to outsource is a matter of commercial judgment for the Practitioner, based on such considerations as:

- geography and location (the business may have its operations spread throughout the country and it may be commercially necessary to appoint local agents to deal with particular tasks);
- time constraints; or
- costs considerations (the external source may be able to attend to an urgent task quickly, or more cheaply).

If work is outsourced, the Practitioner's obligations remain the same as if the Practitioner or members of staff had performed the work. Outsourced work may only be claimed as remuneration and not as a disbursement and will be subject to the same test of necessary and properly performed.

### What remuneration cannot be charged for

A Practitioner **must** not seek to be remunerated for work:

outside the scope of the powers of the Practitioner; or  
carried out before the Practitioner was appointed.

These restrictions are a threshold test before applying the '*necessary and properly performed*' test.

### Staff levels and numbers

In time-based charging, the Practitioner **must** ensure that the number and qualifications of staff allocated to an administration is appropriate for the nature of the work being performed.

#### *Example*

*An experienced trustee generally would not attend to more routine tasks – such as preparing notices for a meeting – given that such tasks could be done as well and at a lower charge-out rate by a more junior member of staff.*

This will require commercial and professional judgment. As the Court said in *One.Tel*:

while a particular task may be appropriate to a particular level of employee, it is quite possible that the liquidator (*or trustee in the case of a bankruptcy*) himself charging an hourly rate double or triple that of the appropriate level of employee may be able to do the work in one quarter of the time. That is always a risk in time costing.

#### *Example*

*It may be more cost effective for the Practitioner to prepare and finalise a report for creditors, if the report is required urgently and requires the Practitioner's input.*

Care **should** be taken in allocating the appropriate number of staff to an administration or task, particularly when travel is required. This is a balance between having sufficient staff available to undertake the required tasks and over servicing the administration.

### **Costs of claiming remuneration**

Practitioners **may** claim the costs of record keeping and seeking approval or determination of their claim for remuneration.

#### ***Example***

*This may include the cost of producing a report for creditors to allow creditors to make an informed decision whether to approve the remuneration or the costs of applying to the court (subject to any order of the court).*

### **Costs of communicating with regulators**

A Practitioner **should** not claim remuneration for time spent:

Communicating with regulators regarding complaints about the Practitioner or the conduct of a particular administration, except where the complaint is spurious;

regulator surveillance, professional audits or inspection of files, or on peer reviews; or  
successfully defending a breach of the law or the IPA Code.

### **Disbursements**

Disbursements may only be claimed if they were necessary and properly incurred. Practitioners **must** use their judgment: to determine that the work was necessary; that the fees to be charged were reasonable; and that the work done was properly performed.

In incurring disbursements, a Practitioner **must** use their commercial judgment, adopting the perspective of, and acting with the same care as, a reasonable person exercising care and skill would act in incurring expenses on their own behalf.

While Practitioners **must** account to creditors for disbursements, the reimbursement for the payment of disbursements does not require creditor approval before being drawn. Thus the categorisation of activity as remuneration or disbursement is significant.

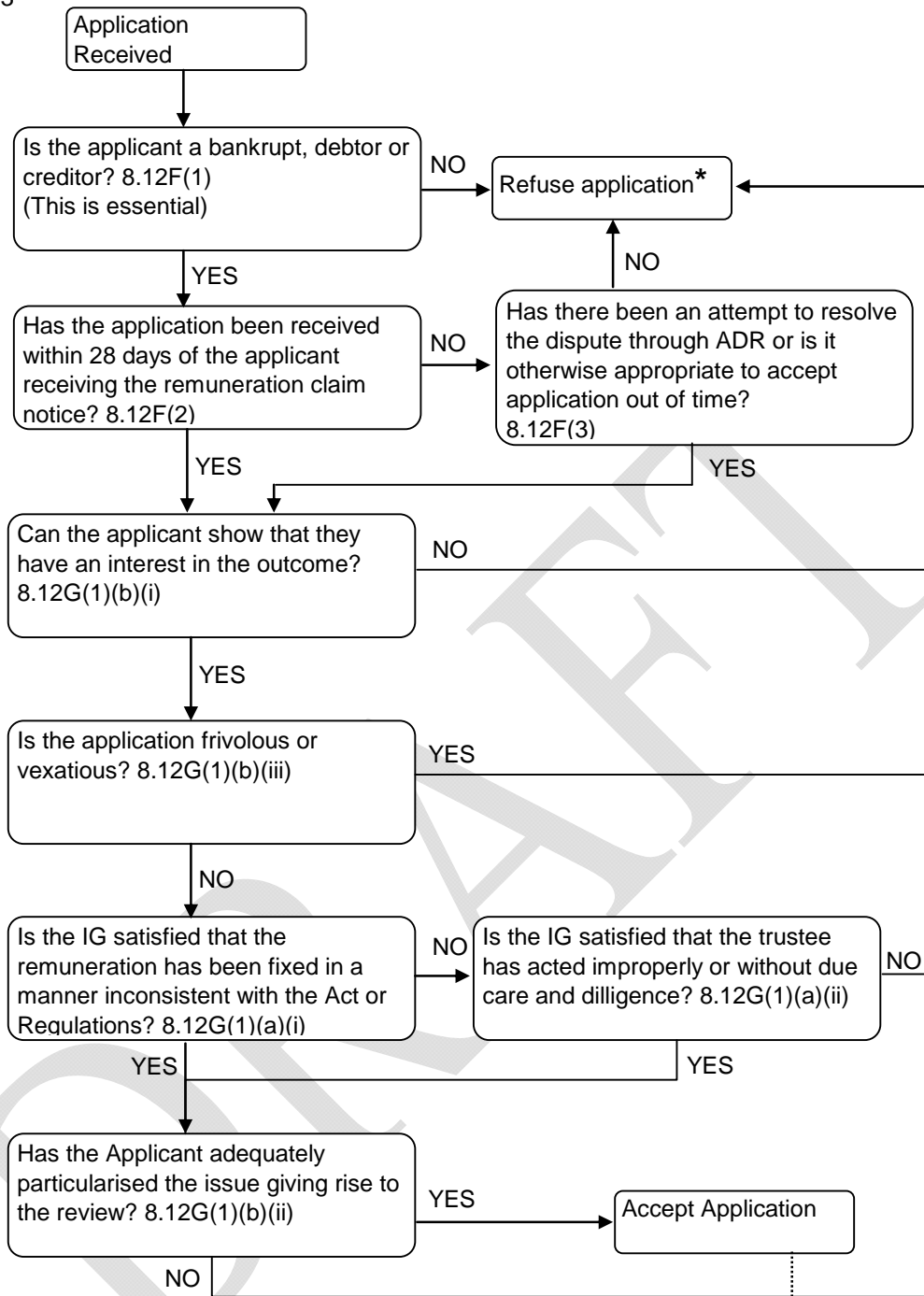
#### **What is a disbursement?**

The Practitioner needs to determine whether the claim for payment is in the nature of a disbursement, or whether it represents remuneration. Disbursements include those costs paid from the administration's bank account directly and those costs paid by the Practitioner and claimed back from the administration.

A Practitioner **should** separate disbursements from the expenses of running their practice which may only be recovered through the charge-out rate.

Disbursement type	Criteria	Examples	Rationale
<b>A. Professional</b>			
External advice, non-insolvency	<p>These are fees that satisfy both the following criteria. They are:</p> <p>(a) for professional services (non-insolvency services) relating to specific tasks required to be done during the administration; and</p> <p>(b) are properly incurred by independent outside consultants engaged by, and not associated with, the Practitioner and their firm.</p>	<ul style="list-style-type: none"> <li>• independent lawyers,</li> <li>• auctioneers, valuers, real estate agents,</li> <li>• tax advisers or accountants.</li> </ul>	<p>This is a disbursement because it involves the Practitioner retaining an external adviser for work to be done in the administration, at an agreed fee or rate.</p>
<b>B. Non-professional</b>			
B1 External assistance	<p>These are costs that satisfy all the following criteria. They are:</p> <p>(a) of an incidental nature;</p> <p>(b) not for professional services; and</p> <p>(c) incurred with a third party in relation to work required to be done during the administration.</p>	<ul style="list-style-type: none"> <li>• administration advertising,</li> <li>• travel and accommodation for staff,</li> <li>• room hire,</li> <li>• document storage,</li> <li>• photocopying and printing,</li> <li>• word processing and secretarial services.</li> </ul>	<p>These are typical disbursements because they involve an outlay in relation to the administration.</p>
B2 Internal assistance	<p>These are costs that satisfy all the following criteria:</p> <p>(a) they are of an incidental nature;</p> <p>(b) they are not for professional services;</p> <p>(c) they are for goods or services properly provided by the practitioner or their staff in the administration; and</p> <p>(d) they are not overheads covered in the remuneration claim.</p>	<p>Reasonable costs of:</p> <ul style="list-style-type: none"> <li>• telephone calls,</li> <li>• postage,</li> <li>• stationery,</li> <li>• photocopying and printing.</li> </ul>	<p>These are also typical disbursements, except they are incurred internally by the firm.</p>

Appendix 3



\*The IG may accept an application if there are exceptional circumstances. 8.12G(2)

the IG still may refuse if the IG is satisfied that:  
 (a) it was appropriate for the applicant to resolve the matter without a review and;  
 (b) The applicant did not do so without giving a reasonable explanation. 8.12G(3)