



Australian Government

Insolvency and Trustee Service Australia

**INSPECTOR-GENERAL
PRACTICE DIRECTION No 6**

**Remuneration entitlements of a
Registered Bankruptcy Trustee**

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Contents

Page no.

Introduction	1
Properly “Fixed” by Resolution	1
Remuneration based on Commission not Time	2
Remuneration based on Regulation 8.08	2
Reasonable Remuneration and Costs	2
<i>Schedule 4A Performance Standards relating to Remuneration</i>	3
<i>Litigation for self interest</i>	4
<i>Other work not in the capacity of trustee</i>	4
<i>When further action by the trustee is not warranted</i>	5
Dealing with ITSA Regulation Branch	6
Documentation required to be maintained	7
Payment of trustee’s remuneration by debtor or related third party	7
<i>Treatment of Funds if Voluntarily Paid</i>	9
ITSA Regulation Branch Involvement	10
Conclusion	10



Introduction

1. The purpose of this document is to outline the position of the Inspector-General in Bankruptcy, in her regulatory role, in regard to the principles on which a private registered trustee in bankruptcy is entitled to draw remuneration, the different methods available and what constitutes reasonable remuneration. This does not include the Official Trustee whose remuneration is set out within the Bankruptcy Act and detailed in the fact sheet "[ITSA's Fees and Charges](#)" published on the ITSA internet.
2. The *Bankruptcy Act 1966* sets out the legislative framework for trustee remuneration. This framework provides an entitlement for the trustee to be paid for work done in administering the estate. However, this does not automatically entitle the trustee to be remunerated for every hour of work undertaken in an administration. Sections 140, 145 and 162 and the taxation provisions in section 167 indicate that trustees are entitled to take remuneration and disbursements that are:
 - o properly fixed, on a commission basis or based on regulation 8.08;
 - o reasonable and necessary;
 - o incurred legally; and
 - o supported by documentation.
3. A trustee has no entitlement for remuneration other than prescribed by the Bankruptcy Act. There is no entitlement to be remunerated for work other than in their capacity as the trustee, nor for work undertaken illegally.

Properly “Fixed” by Resolution

4. Two recent cases provide some insights as to what is needed under Bankruptcy law although it should be noted that neither case are Bankruptcy Act cases.
5. In the *Stockford*¹ decision Finkelstein J indicated (without deciding the issue) that prospective setting of fees on a time basis may not amount to "fixing" for the purposes of the Corporations Act.
6. In the *Aliance*² matter Gyles J decided that prospective fee setting on a time basis was not impermissible per se. Gyles J concluded that it was possible to have a formula that could later be relied on to calculate the remuneration provided that the formula was objective enough. Both *Stockford* and *Aliance* support the proposition that fees cannot be set with reference to charge out rates of classes of practitioners if those classes are insufficiently defined.
7. There are significant differences in the fee setting regimes for corporate and personal insolvency. In the *Bellin*³ matter for example at paragraph 27 Goldberg J indicated that the court might have no role at all in setting trustee remuneration in a bankruptcy context. The meaning of "fix" may also differ.

¹ *Korda in the matter of Stockford Limited* [2004] FCA 1682 (21 December 2004)

² *Gidley in the matter of Aliance Motor Body Pty Ltd* [2006] FCA 102 (16 February 2006)

³ *Pattison (Trustee), In the matter of Bellin (Bankrupt) v Bellin* [2000] FCA 1167 at para 27

8. With these in mind the Inspector-General accepts remuneration can be “fixed” pursuant to sub-section 162(1) prospectively provided it identifies each person doing the work, that person’s category and expertise and the one relevant rate that applies to each person who does any work. Further the expectation both from the Insolvency Practitioners Association of Australia (“IPA”) and the Inspector-General is for the capping of the remuneration, with the period that the capping relates to also being stated. This provides greater clarity to creditors as to what the reasonable remuneration will be and flexibility to trustees in circumstances where the administration extends beyond the estimated period.

Remuneration based on Commission not Time

9. Whilst the Act allows for this method of remuneration it is rare for trustees other than the Official Trustee to seek to be remunerated on a commission basis. A commission fee may well better reflect the results obtained and the value contributed by a trustee, particularly in low debt, high asset estates.

Remuneration based on Regulation 8.08

10. The entitlement to remuneration at the prescribed rate arises by operation of sub-section 162(4) when work is done for which no remuneration is fixed, rather than by an election on the part of the trustee (see *Doolan v Dare*⁴).
11. Regulation 8.08, allowing a trustee to be remunerated at 85% of the IPA hourly rates, should generally be limited to those cases when a trustee is unable to obtain the resolution of creditors. The Inspector-General acknowledges that there will be some instances when it is not cost effective to seek a creditor resolution (such as when only a small fund is available). In such cases, it is appropriate for a trustee to rely on Regulation 8.08.
12. In the *Doolan v Dare* case, the Full Federal Court also stated that a trustee cannot utilize Regulation 8.08 to be paid fees in excess of the quantum fixed by resolution unless the resolution capped the remuneration for a limited period only. Where a trustee’s fees are capped for a set period and further fees are sought but a further resolution is not able to be obtained, the trustee is able to utilize Regulation 8.08 relating to work **undertaken after the period** of capping covered by the resolution. If no set period is specified in the initial resolution then the capped amount fixes the remuneration for the entire trusteeship unless the Court determines otherwise.

Reasonable Remuneration and Costs

13. A trustee plays a central role in the administration of estates under the Act and is under a general duty to exercise the powers committed to him in such a fashion that the objects of the Act, including those of equality between creditors and fairness to bankrupts and debtors are served, (see *Re Lamb*⁵).
14. The minimum standard required of the trustee is that he shall handle the assets with a view to achieving the maximum return from the assets to satisfy the claims of the creditors and to provide the best surplus possible for the bankrupt, (see *Mannigel v Aitken*⁶).

⁴ *Dare v Doolan* [2005] FCAFC 69

⁵ *Re Lamb; Ex parte Registrar in Bankruptcy* (1984) 1 FCR 391

⁶ *Mannigel v Aitken* (1983) 77 FLR 406 at 408-409

Schedule 4A Performance Standards relating to Remuneration

15. Division 2.4 of the Performance Standards for Trustees set out the following requirements:

“Remuneration and costs

2.13 Costs incurred to be necessary and reasonable

In conducting an administration, the trustee must:

- (a) incur only those costs that are necessary and reasonable; and*
- (b) 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.*

2.14 Receipt of moneys as trustee’s remuneration

- (1) If the trustee receives moneys from a debtor, bankrupt, legal personal representative of a deceased person, creditor or third party that are intended to cover the trustee’s remuneration, the moneys must be:
 - (a) included in the trustee’s remuneration fixed in accordance with section 162 of the Act; and*
 - (b) properly accounted for in accordance with sections 168 and 169 of the Act.**
- (2) Subclause (1) does not apply to moneys recovered by the trustee under subsection 161B (2) of the Act.*

2.15 Rate for tasks undertaken by trustee’s staff

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.”

16. In the often quoted *Adsett* case⁷ the Full Bench of the Federal Court considered how the proper sum payable to a trustee was to be determined referring to the following principles.
- A trustee must exercise judgment so as to save the estate unnecessary expenditure of money.
 - The remuneration to which the trustee is entitled is to be **just and proper or reasonable remuneration** in all the circumstances for the work carried out by the trustee. The right to payment is only lost for a specific reason, as, for examples, if no work was done or needed to be done or misconduct by the trustee.
 - A trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses **properly incurred**. The words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred'" and 'properly' means reasonably as well as honestly incurred.
 - Trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness.

⁷ *Adsett v Berlouis* (1992) 37 FCR 201

17. Against this background it is the Inspector-General's view that it is not reasonable to charge for fees or costs relating to work undertaken by the trustee:
- when litigating based on self interest;
 - when work undertaken is not in their capacity as trustee;
 - in continuing to administer an estate that should have been finalised particularly when a surplus of assets over debts has existed and the trustee has not had due regard to the wishes of the bankrupt; or
 - relating to an ITSA Regulation annual inspection, in responding to an ITSA Regulation investigation into a complaint lodged pursuant to section 12 of the Act where the complaint is substantially justified or relating to a section 155H investigation.
18. Each of these points is discussed in more detail below. There are other circumstances outlined in this document where the trustee has no entitlement to be remunerated as trustee.

Litigation for self interest

19. The *Adsett* test as to whether a trustee was entitled to remuneration in connection with litigation was "whether the expenditure was reasonably as well as honestly incurred". This reflects the principle stated in *Adsett* that trustees must not act recklessly in instigating litigation and that the costs of unnecessary litigation will be payable by the trustee personally and not from the estate. The Court in that case also stated that, in the case of a small and easily dissipated fund, all litigation should be avoided unless the chance of success is such as to render it desirable in the interests of the estate that the necessary risk should be incurred. Finally, the Court stated that, where the resources applied to litigation are extravagant, the expenses would not be regarded as proper and must be borne by the trustee personally.
20. This view was further supported in the *Swain*⁸ matter where Wilcox J had to determine whether the trustee became involved in litigation on behalf of the estate or on behalf of himself. Wilcox found that the action was of self interest and therefore the trustee was personally liable for costs and not entitled to be remunerated from the estate. This self interest view was further supported in the two *Doolan v Dare*⁹ and the *Wenkart*¹⁰ decisions.

Other work not in the capacity of trustee

21. In the *Re: Ide* NSW Supreme Court case¹¹ a receiver went to a rural property. The grazier appeared with a rifle, which he fired. The bullet ricocheted and struck the grazier's sister, who later died. The receiver spent some time assisting the police with their inquiries,

⁸ [RE Swain; Commissioner of Taxation v. William Edward Aandrew as Trustee of the Estate of John Philip Swain, Angus Bartley and Cameron Thorburn No. NX 247 of 1988 FED No. 1001/95 Bankruptcy](#)

⁹ [Dare v Doolan \[2004\] FCA 461 \(20 April 2004\)](#) and [Doolan v Dare \[2004\] FCA 682 \(27 May 2004\)](#)

¹⁰ [Wenkart v Pantzner \[2005\] FCA 1572](#)

¹¹ [Ide v Ide \[2004\] NSWSC 751 \(17 August 2004\)](#)

airing:

“one does not indemnify the receiver for loss, one looks to the value of the work to the partnership. In the present case the value of assisting the police with their enquiries to the partnership must be close to nil.”

22. At 59, Young CJ concluded that:

“I think it is important to note that assisting police with any enquiry falls into a greater civic duty that surpasses all professional duties. That the receivers’ representative was a witness to the shooting and unfortunate killing of Ms Fallon places on them a civic responsibility to ensure that justice is done by assisting police in any way they can, for the greater benefit of the community.”

When further action by the trustee is not warranted

23. The Inspector-General’s expectations are that where the bankrupt is solvent or has resources to pay out all the debts, the trustee should identify this early and give the bankrupt an opportunity to pay and take advantage of section 153A before incurring any unnecessary expense, adopting a minimalist approach to the administration, safeguarding assets and working with the bankrupt.
24. In the *Townsend* case¹³ the Court considered appropriate trustee remuneration in an annulment application. The creditors had been paid and the bankrupt had attempted to pay the trustee’s remuneration relatively early in the administration. The trustee had refused to give a section 153A annulment believing that the investigation of a complaint made by the bankrupt to the regulator and the possibility of her litigating would increase his remuneration. He could therefore not say that all the debts were paid.
25. In the primary decision Coker FM considered that the fees were excessive because the trustee had failed *“to bring this matter to a successful conclusion”* and ruled the trustee was only entitled to remuneration and costs up to the point when he knew all creditors had been paid and the bankrupt had sought to pay his fees. On appeal the Court noted that ITSA had taxed the remuneration and costs of the trustee and held that those taxed costs were therefore reasonable.
26. The recent *Phillips* case¹⁴ involved similar issues. The bankrupt, shortly after being informed of his bankruptcy, sought to have his sequestration order set aside. The trustee argued that orders annulling the bankruptcy were more appropriate which would have entitled him to indemnity for his fees from the assets. The trustee sought to be remunerated for over 50 hours of work, totalling more than \$14,000, while the sole creditor’s debt was \$4,888. The debt and the petitioning creditor’s costs had been paid shortly after the sequestration order was made.
27. The Court raised concerns about the action taken by the trustee and expressed the view that the minimum fee the trustee could recover from the bankrupt pursuant to section

¹² *Mirror Group Newspapers v Maxwell* (No 2) [1998] 1 BCLC 638

¹³ *Townsend v Brake* [2005] FMCA 533 (22 April 2005)

¹⁴ *Vauluse Hospital Pty Ltd v Phillips & Anor* [2006] FMCA 44 (20 January 2006)

161B (\$1,388) was more representative of the work that should have been performed. The Court also expressed the view that trustees should adopt a more cautionary approach in those cases where:

- the sequestration order is made with respect to a relatively small debt;
- the sequestration order is made in the absence of the bankrupt;
- the debt is not incurred in the course of business or commercial dealings; and
- the bankrupt appears to have a significant asset, such as a home.

Dealing with ITSA Regulation Branch

28. Pursuant to section 12 the Inspector-General may inquire into or investigate the conduct of a bankruptcy trustee or administration. The trustee is required to provide a report on request of the Inspector-General on matters under inquiry or investigation by the Inspector-General if requested and the Inspector-General may require the production of any books kept a trustee and require a trustee to answer an inquiry made.
29. Enquiries and investigations by the Inspector-General can take a number of forms. It may be an annual inspection of the trustees systems, practices and estates; and issue arising from the inspection; an enquiry following a complaint received or an investigation pursuant to section 155H. The duty to respond and assist is a general duty of a trustee not relating to an estate but relating to their ongoing registration as a trustee.
30. For some time the Inspector-General has taken issue with registered trustees charging the estate for time spent in corresponding with ITSA Regulation. It has been the Inspector-General's position that in the ordinary course the estate should not bear this cost. This issue has been addressed in the [IPA Code of Professional Practice](#) where at page 45 paragraph 12.8, the code states:

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;*
 - *on regulator surveillance, professional audits or inspection of files, or on peer reviews; or*
 - *unsuccessfully defending a breach of the law or this Code.*
31. This practice imposes an obligation on ITSA Regulation to ensure that trustees are not put to unnecessary time and costs in responding to what might be considered as spurious complaints. It follows that ITSA Regulation, not the trustee, should decide when this is the case. If ITSA Regulation has completed an investigation of a complaint, and a further complaint is made which does not raise new issues, the onus is on ITSA Regulation to respond to the complainant without putting the trustee to further unnecessary time. In some circumstances, for example if a complainant is persistent and ITSA Regulation is required to approach a trustee again in relation to the same issues, the complaint may be regarded as spurious and it may be appropriate for remuneration to be claimed from the estate. In such cases ITSA Regulation will advise the trustee.

Documentation required to be maintained

32. Paragraph 2.16 in Division 2.4 of the Performance Standards for Trustees sets out the following requirement:

“Records

The trustee must ensure that proper records are kept that:

- (a) provide evidence of the time spent on work done in conducting an administration; and*
 - (b) adequately describe the nature of the work; and*
 - (c) state whether the trustee has had to recover moneys under subsection 161B (2) of the Act.”*
33. Trustees not able to verify their remuneration by reference to these records will be required to refund any related remuneration.

Payment of trustee’s remuneration by debtor or related third party

34. In 2004 the Inspector-General outlined how trustees were to treat third party payments in Part X administrations (see Bankruptcy Regulator newsletter [Volume 3 Issue 1](#) June 2004). It is worthy of repeating this direction here:

“Instances have occurred in Part X matters and in some bankruptcies where arrangements have been made for the controlling trustee’s or trustee’s remuneration to be paid by a third party without that amount being properly authorized. Such arrangement for payments constitute a failure to comply with the provision of section 162 which provides the mechanism by which a trustee can be remunerated, either by a resolution passed at a meeting of creditors or in accordance with regulation 8.08.

Pursuant to section 210 of the Act, sections 162 and 165 apply to Part X administrations as well as to bankruptcies, subject to the modifications in Schedule 6.

There are serious implications if unauthorized amounts are accepted. Such arrangements are in breach of paragraph 165(1)(a) which provides:

A trustee of the estate of a bankrupt shall not:

(a) make an arrangement for receiving, or accept, from the bankrupt or any other person, in connection with the bankruptcy, any gift, remuneration or pecuniary or other consideration or benefit beyond the remuneration fixed in accordance with this Act;

The serious nature of such a breach is reflected in sub-section 165(2) which provides that a trustee who contravenes subsection (1) is guilty of contempt of court. Trustees should ensure that the provisions of section 162(4) are applied when remuneration is taken regardless of the source of the funds, including those provided by third parties.”

35. Similarly, in the administration of Part IV estates an issue of concern is the appropriateness or otherwise of a trustee arranging with the debtor to be remunerated or indemnified by the debtor or related third party in return for consenting to act as trustee on a debtor’s petition bankruptcy.
36. Some trustees have provided feedback suggesting that requesting surety or an up front payment from the debtor or related third party is consistent with the principle already set out in section 161B, which provides a personal enforceable right for a trustee to recover the minimum prescribed fee directly from the bankrupt when assets or income

contributions are not forthcoming. It has also been suggested that a trustee should have some ability to be paid for the work undertaken when divisible property or contributions are doubtful and that these funds assist a trustee in better performing their duties.

37. It remains my view that unless certain conditions are met, and I will cover these shortly (see paragraph 40 below), this practice is inappropriate and contrary to bankruptcy law and practice. A fundamental principle in bankruptcy administration is that a trustee is entitled to be indemnified for their reasonable remuneration and costs **from trust funds**¹⁵. Only once it is determined that such funds are not available is a trustee entitled to utilise section 161B to pursue the bankrupt for the minimum approved fee.
38. It has been recognised by the Courts that a trustee cannot expect to recover all their costs and remuneration in every bankruptcy and that the scale of fees set by a trustee for themselves and their staff reflect this risk. In *Vaocluse Hospital Pty Ltd v Phillips*¹⁶ Riethmuller FM said:
- “...it must also be borne in mind that undertaking the role of trustee is a function that a trustee embarks upon aware of the inherent risk that he or she may not be remunerated. If an estate contains no assets that can be realised then the trustee will remain without remuneration, unless creditors are prepared to fund investigations. Prescribed remuneration rates are higher than the scale fees for similar work carried out in the course of litigation, presumably (at least in part) to recompense trustees for the risk inherent in the function.*
- The result is that a lack of remuneration ‘may be an incident of the risk associated with the performance of the trustee’s duties in the period between the sequestration order and the expiry of the 21 days’: see Garrett v Deputy Commissioner of Taxation [2005] FMCA 19 at [34] per Lindsay FM. It is certainly a well accepted incident of the risk inherent in the performance of the trustee’s duties in assetless estates.”*
39. In supporting these conclusions I cannot accept the argument of cost recovery as rationalising the practice of asking the debtor for funds where there is a risk of no assets.
40. The only circumstances where I might accept such a payment as valid is where the trustee has:
- informed the debtor of the income contribution regime and that any other payments or surety is purely voluntary; **and**
 - informed the debtor of alternative choices of trustees, should the debtor not be prepared to voluntarily make the payment; **and**
 - reports to creditors on the source and basis of the funds; **and**
 - does not endeavour to execute legally enforceable contracts concerning the payment and does not pursue the debtor for any payment other than as prescribed in section 161B.; **and**
 - takes remuneration in accordance with section 162.
41. This position has been endorsed in the [IPA Code of Professional Practice](#) at pages 22-23, paragraph 6.10(b).

¹⁵ *Adsett v Berlouis* (1992) 37 FCR 201 paragraphs 53-54

¹⁶ *Vaocluse Hospital Pty Ltd v Phillips & Anor* [2006] FMCA 44

Treatment of Funds if Voluntarily Paid

42. Voluntary payments that meet the conditions (in paragraph 40 above) made by the debtor or by a related third party to the trustee must be banked into the estate account, if taken as remuneration then remuneration must comply with section 162 and the funds attract the realisation charge.
43. Recently there has been suggestion that the words in sub-section 6(1) of the Bankruptcy (Estate Charges) Act 1997 (“BEC Act”) “received by a person” should be read as “realisations by the trustee” relating to divisible property and contributions. I do not support this proposition.
44. The guiding principle in determining liability to pay the charge is whether the relevant amount was “**received**” by a person mentioned in section 6(1) of the BEC Act, and that the amount was received “**by the person in that capacity**” as required by section 8(2) of the BEC Act during the charge period (less certain exclusions).¹⁷
45. Accordingly, in considering whether a trustee is liable to pay the charge in relation to a particular receipt, it is necessary to determine whether the amount was received by the person *in their capacity as trustee* of the estate of a bankrupt under the Bankruptcy Act.¹⁸
46. The Bankruptcy Act includes a number of machinery provisions relating to the BEC Act.¹⁹ The BEC Act and the Bankruptcy Act should be read together as part of the same scheme for the regulation of bankrupt estates. Expressions used in the BEC Act ordinarily have the same meanings as in the Bankruptcy Act, subject to a contrary intention.²⁰ The Bankruptcy Act includes a number of provisions concerning amounts received by a person in their capacity as trustee of the estate of a bankrupt.
47. Hence provisions in the Bankruptcy Act concerning the receipt of money by a person in their capacity as the trustee of a bankrupt estate should be read as referring to the same amounts received by the person in their capacity as trustee of a bankrupt estate under the BEC Act.
48. It has also been suggested that payments by third parties taken as fees pursuant to the Bankruptcy Act can be paid directly to the private or firm’s account operated by the trustee avoiding the realisations charge. Sub-section 168(1) of the Bankruptcy Act provides that a registered trustee ‘shall not pay into a private account any moneys received by him or her as trustee’ and sub-sections 169(1) and 169(1A) provide that a trustee ‘must pay all money received by him or her on account of the estate to the credit of a single interest bearing account’, and ‘must only pay into the account money received by the trustee on account of the estate of a bankrupt’.
49. Further trustees should be aware that payments made to them directly, and this includes to the firm accounts, that relate to remuneration, and hence outside of the provisions of the Bankruptcy Act, could breach the prohibition on receiving additional benefits outlined in

¹⁷ BEC Act section 8

¹⁸ *Wenkart v Pantzer* (No 7) [2003] FCA 1211 (30 October 2003), per Lindgren J. at paragraphs 16 and 21: http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/1211.html

¹⁹ See Bankruptcy Act, Part XV entitled ‘Provisions relating to the Bankruptcy (Estate Charges) Act 1997

²⁰ BEC Act section 4(2)

paragraph 165(1)(a), giving rise to a Contempt of Court and likely registration cancellation proceedings being commenced.

50. Hence the second principle in applying the BEC Act is that the money that must be paid into a single interest bearing account and not mixed with other money under the Bankruptcy Act is the same money that for the purposes of the BEC Act is received by the person in their capacity as trustee of the estate of a bankrupt under the Bankruptcy Act, and to which the charge imposed by section 6(1)(a) of the BEC applies (subject to any specific exclusion from the charge).
51. As a corollary, money that does not have to be paid into a separate single interest bearing bank account, is not subject to the charge imposed by section 6(1)(a) of the BEC Act. An example is the minimum fee pursuant to section 161B which is a personal right of the trustee and not in their capacity as trustee.
52. With the exception of the BEC Act sub-section 8(2) exclusions, when a trustee receives compliant voluntary payment from the bankrupt or third party and applies then in payment of remuneration and costs, they receive the funds **in the capacity as trustee** of the estate. The funds must be deposited into the appropriate interest bearing account on behalf of the estate and realisations charge is payable on the funds.

ITSA Regulation Branch Involvement

53. ITSA Regulation Branch has a number of key roles concerning remuneration. While there is the option for resolution of disputes concerning remuneration through taxation of costs or litigation, these are usually expensive options. Regulatory intervention in disputes can and will occur where considered appropriate. Section 12 provides ITSA Regulation with the power to investigate and where there are issues of concern either during the annual inspection program or through a complaint being made, ITSA Regulation will examine the remuneration claimed by reference to these stated principles and the Schedule 4A Performance Standards.
54. Where breaches of the law, including these performance standards, or lack of record keeping are identified a trustee will be asked to take remedial action including any refund of remuneration not properly taken or supported. This may also may lead to counselling or in serious cases to either litigation or disciplinary action being initiated.

Conclusion

55. This article outlines the Inspector-General position on some of the vexed questions relating to remuneration. Most of these are non-contentious and will come as no surprise to registered trustees. It will be against these principles and the standards contained in Schedule 4A that a trustee's conduct of an administration will be assessed by ITSA Regulation.
56. When there are other specific issues where clarification is required, following consultation with the IPA, the Inspector-General will continue to develop policy and practice statements to assist practitioners.