

## **Guidelines relating to the provision of funding for trustees under section 305 of the *Bankruptcy Act 1966* (the Act)**

### Purpose of Section 305

1. Section 305 of the Act is intended to facilitate the proper carrying out of the trustee's statutory and fiduciary duties.
2. Section 305 allows the Minister to direct that the Commonwealth underwrite the cost of:
  - (a) inquiries in relation to the estate or examinable affairs of a bankrupt, a debtor under Part X, or deceased person whose estate is being administered under Part XI;
  - (b) instituting, continuing or defending legal proceedings relating to the estate or examinable affairs of a bankrupt, a debtor under Part X, or deceased person whose estate is being administered under Part XI
  - (c) participation by the trustee in proceedings before the Administrative Appeals Tribunal reviewing a decision or determination by the trustee, or reviewing a decision of the Inspector-General on a review of such a decision or determination.
3. The Minister has delegated the power to make a direction under section 305 to the Inspector-General-in-Bankruptcy, the Executive Director, Secretariat Branch, Insolvency and Trustee Service Australia and the Principal Legal Officer, Legal and Practice Support, Secretariat Branch, Insolvency and Trustee Service Australia.

## Scope of Funding

4. Section 305 funding approval covers costs and expenses to be incurred in the future – funding cannot be provided for actions or inquiries that have been completed. Funding cannot be provided in relation to administrations under Part IX of the Act.
5. Funding may only be approved if the Minister or his delegate is satisfied that the moneys in the estate of the bankrupt, the debtor or deceased person are or may be insufficient to meet the costs of proposed proceedings or inquiries.
6. An approval for Commonwealth funding of an activity may be subject to any conditions the Minister or delegate thinks fit (including conditions as to taxation, amount of counsel fees and reimbursement).
7. Funding may be approved where:
  - (a) either:
    - (i) the trustee has reasonable prospects of a successful outcome in proceedings initiated, or proposed to be initiated, by the trustee in the Court or the Administrative Appeals Tribunal; or
    - (ii) the trustee should defend an application for a review of a decision by the trustee in the Court or the Administrative Appeals Tribunal; or
    - (iii) a party other than the bankrupt has instituted proceedings in the Court or the Administrative Appeals Tribunal that the trustee should defend;

and the creditors have insufficient financial resources to put the trustee in funds or to indemnify the trustee against an award of costs;

or

- (b) the actions of the bankrupt or debtor give rise to the inference that the bankrupt or debtor is intentionally breaching their obligations or duties under the Act; or
- (c) a significant question of law has arisen that requires resolution.

8. Funding will ordinarily not be approved for instituting proceedings unless:

- (a) the trustee has approached creditors to provide cash advances or indemnities in respect of costs, or exhausted alternative opportunities for litigation funding (funding will generally not be provided merely on the basis that creditors have refused to provide cash or indemnities); and
- (b) the delegate is satisfied that undertaking the litigation is consistent with the Performance Standards for Trustees in Schedule 4A of the *Bankruptcy Regulations*, particularly in relation to standards 2.4 and 2.13 concerning the realisation of assets and incurring only necessary and reasonable costs; and
- (c) the delegate is satisfied that it would be appropriate for the trustee to commence the litigation.

9. Funding for inquiries to locate a bankrupt who cannot be located will ordinarily be limited to \$500 for local inquiries and \$800 for Australia wide inquiries (inclusive of GST). A direction will not ordinarily be given unless the trustee has taken reasonable steps to locate the bankrupt.

10. Funding will be provided to a trustee under Part X of the Act only in exceptional circumstances, due to the voluntary and commercial nature of personal insolvency agreements, the disclosures required by the debtor, and the

preliminary investigations that need to be made by controlling trustees prior to creditors voting on the proposal.

## Applications for funding

11. Applications for funding should include the following:
  - (a) evidence that the moneys in the estate of the bankrupt, the debtor or deceased person are, or may be, insufficient to meet the cost of the proceedings or inquiries: for example, a statement of the estate's financial position, including the amount of indebtedness, the names of the creditors, the trustee's assessment of whether the bankrupt is liable to contribute from income and is contributing, an account of receipts and disbursements in the estate up to the date of the application, the funds (if any) that are available in the estate, and the trustee's assessment of the cause of the bankruptcy. A copy of the statement of affairs should be enclosed with the application.
  - (b) a statement setting out the proposed activity: for example, obtaining an opinion from counsel, commencing litigation, defending an application made against the trustee, or conducting an examination of a person in relation to the bankrupt's affairs. In relation to the proposed activity, the statement should set out the reasons for undertaking it, the expected outcome, the reasons for considering the proposed activity to be the most economical and cost effective method of achieving the expected outcome, and why it is not considered appropriate for the trustee to personally undertake the activity (in relation to activities that may be undertaken by the trustee, such as taking part in an examination under section 81 of the Bankruptcy Act).
  - (c) an estimate of the likely costs of the proposed activity.

- (d) an estimate of when the proposed activity would be commenced and completed.
- (e) where there appears to be some delay in progressing the administration, the reasons for this.
- (f) an estimate of the likely return to creditors from undertaking the proposed activity (taking account of any reimbursement of Commonwealth funding), or if no financial return is anticipated, how the proposed activity might ultimately lead to the recovery of funds for the benefit of creditors.
- (g) in the case of proposed litigation, a copy of any legal advice relating to the matter, a statement outlining any significant question of law that it is considered the proposed litigation would resolve, an estimate of the costs likely to be awarded against the trustee if the litigation were to be unsuccessful, a copy of the minutes of any meeting at which the creditors resolved not to put the trustee in funds or grant an indemnity in respect of costs, and a statement outlining any attempts that have been made to secure funding from other sources and the reasons why any such attempts have proved unsuccessful, or alternatively, a statement indicating that no attempts have been made to securing funding from other sources and the reason why it was not considered appropriate to attempt to secure funding from other sources. If a meeting of creditors has not been held, the trustee should provide a statement as to why it was not considered necessary or appropriate to hold a meeting.

### Conditions on funding

12. The following are among the conditions which will usually attach to funding:

- (a) the trustee must commence the activity covered by the approval within 6 months of the date of the direction, otherwise the direction will lapse. The trustee must report to the Minister or the delegate on the activities undertaken in connection with the direction, within 9 months of the date of the direction.
- (b) no payment will be provided in relation to activities undertaken more than 18 months after the date of the direction.
- (c) a claim for payment will only be met if the claim is made within 24 months of the date of the direction.
- (d) claims for payment must be accompanied by relevant receipts and vouchers. In the case of solicitor's costs, the trustee must provide an itemised account.
- (e) reasonably incurred legal professional fees not exceeding \$2750 (inclusive of GST) will be paid in full. Where fees exceed \$2750, the first \$2750 will be paid in full and an amount equal to 80% of the balance will be paid. Reasonable disbursements incurred by the legal services provider will ordinarily be paid in full. No payment will be made in respect of consultations between solicitors acting for trustees and delegates, in respect of possible funding decisions.
- (f) counsel must be engaged on terms consistent with the Attorney-General's direction on the engagement of counsel issued in the Legal Services Directions pursuant to section 55ZF of the *Judiciary Act 1901*. A copy of the Attorney-General's legal services direction is available from [www.ag.gov.au](http://www.ag.gov.au). The directions currently require approval in advance to pay senior counsel and junior counsel in excess of \$2,400 and \$1,600 per day respectively (inclusive of GST), or an hourly rate exceeding \$400 and \$267 respectively (inclusive of GST).

- (g) the Minister or delegate may at any time request the trustee to provide documents or information relating to the inquiries or proceedings in respect of which a funding direction has been given, and the trustee must furnish the requested documents or information as soon as reasonably practicable after receiving the request.
- (h) funding will be limited to the amount estimated by the trustee in the application. If it appears likely that the costs will exceed the amount of the original estimate, the trustee must immediately inform the delegate.
- (i) claims for payment will be met only in respect of activities that have been specifically approved by the Minister or delegate. If the trustee has any doubt concerning whether a proposed step falls within the approved activity, the trustee should seek clarification from the delegate.
- (j) in the case of litigation that is being funded, the trustee must advise the delegate before settling or discontinuing, and must provide the trustee's view concerning the likely cost consequences of the discontinuance or settlement.
- (k) the trustee will be required to reimburse the Commonwealth for all of any amount advanced to the trustee under an approval given under section 305 as though the amount provided is an expense incurred by the trustee by way of an advance made to the trustee for payment of properly incurred expenses of the estate (other than remuneration of the trustee).

13. It should be noted that the Minister or delegate can impose any other conditions that they think fit, and it may be that in particular cases, additional

conditions to those outlined above are imposed, or that the conditions are varied. In some circumstances, fewer or different conditions may be imposed.

14. Although generally funding will only be provided for trustee's out of pocket expenses and legal costs, approvals can be made for funding to cover other matters (including the trustee's remuneration) in special cases. Any applications which seek financial assistance beyond out of pocket expenses and legal costs must be supported by a statement in writing by the trustee setting out in detail the reasons for making the application, the trustee's view of why the application is justified, the likely benefits to the estate concerned, and the extent, if any to which the Commonwealth would be reimbursed. Any application which does not address these issues will not be considered.

15. A further direction may be made under section 305 if the amount approved is exhausted, or the time has expired for undertaking an approved activity or submitting a claim for payment.

16. All applications for section 305 funding should be addressed to:

Inspector-General in Bankruptcy  
Insolvency and Trustee Service, Australia  
GPO Box 821  
CANBERRA ACT 2601