



Australian Government

Insolvency and Trustee Service Australia

**INSPECTOR-GENERAL
PRACTICE STATEMENT NO 12**

**Statutory Reviews of trustees' decisions
under the *Bankruptcy Act 1966* by the
Inspector-General in Bankruptcy.**

Release Date 1 December 2008

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Introduction

1. The purpose of this document is to explain the approach taken by the Inspector-General in Bankruptcy when carrying out statutory reviews of bankruptcy trustee decisions plus the Inspector-General's expectations with respect to requests to review.
2. In the course of administering a bankrupt estate, a bankruptcy trustee is required to make a number of decisions in order to carry out the duties required by law. Bankruptcy trustees include both private individuals registered to be bankruptcy trustees in Australia and the Official Trustee, the government's bankruptcy trustee.
3. The Bankruptcy Act sets out 4 specific types of decisions which a bankruptcy trustee can make which may be reviewed by the Inspector-General. Delegates within ITSA Bankruptcy Regulation branch ("Bankruptcy Regulation"), an independent branch of ITSA, undertake these reviews on behalf of the Inspector-General. The review areas are:
 - Income Contribution Assessments;
 - Hardship;
 - Supervised account notices; and
 - Objections to automatic discharge.
4. Bankruptcy Regulation does not have the power to review other decisions that may be made by a trustee in the course of administering an estate. However Bankruptcy Regulation deals with complaints concerning bankruptcy trustees and may be able to assist in resolving disputes particularly if the trustee's decision or actions do not comply with the law or the industry standards. The process for lodging a complaint is dealt with in the ITSA Fact Sheet titled "[Resolving Complaints about Trustees and Administrators](#)"

General practice, expectations and requirements

5. Section [139ZA](#) provide a person with a right to ask for a review by the Inspector-General in Bankruptcy of a trustee's decisions regarding income contribution assessments and any decision not to adjust a contribution assessment based on hardship. Section [130ZIO](#) provides the right to seek a review relating to the use of Supervised Accounts by a trustee to collect contributions.
6. In respect to objections lodged to extend the period of bankruptcy the right to seek a review is provided in section [149K](#).
7. The comments in this general section apply to all types of reviews listed.

How an Inspector-General review can be initiated

8. An Inspector-General review can arise:
 - if requested by a bankrupt for reasons that appear to Bankruptcy Regulation to be sufficient to justify such a review;
 - on Bankruptcy Regulation's own initiative; or
 - if requested by the Ombudsman.

Request for review by the bankrupt

9. The trustee is required to advise the bankrupt of their decision, the right of review and that there is a 60 day time limit to request a review, starting from the date the bankrupt is notified of the decision.
10. A bankrupt can request Bankruptcy Regulation to review a trustee's decision. The request must:
 - Be made within 60 days of being notified of the decision; and
 - Be in writing and forwarded to ITSA's Official Receiver in the state where the trustee making the decision is located. The location of the various ITSA offices are found [here](#); and
 - Include the reason for requesting the review and must be accompanied by all relevant information and documentation, including a copy of the trustee's decision on which review is being sought.
11. A valid request is only considered to be received once all of these conditions are met.
12. In determining whether the request is within time Bankruptcy Regulation will require evidence from the trustee as to when the decision and details of the review rights were provided to the bankrupt.
13. A decision which is posted by the trustee is deemed to have been received by the bankrupt when a document would in the due course of post or business practice be delivered. This is by reference to the Australia Post delivery standards posted on the Australia Post website.
14. Once a request for review meeting the prerequisite conditions is received, Bankruptcy Regulation has 60 days to reach a decision. If a decision is not made within this time, for example if further information is not provided on request, the trustee's original decision is deemed to be upheld. ITSA Bankruptcy Regulation will promptly advise the bankrupt of all decisions and the further review options.
15. When the conditions are not met, for example if Bankruptcy Regulation determines that it is out of time, the request is not considered as valid and a review will usually not be made based on the request. Bankruptcy Regulation will provide an explanatory letter to the bankrupt outlining the reasons and any further entitlements of rights of appeal.
16. While the determination of validity of a request is not reviewable in the Administrative Appeals Tribunal (AAT), a bankrupt is entitled to raise concerns with the Commonwealth Ombudsman who may direct the Inspector-General to undertake a review notwithstanding being invalid or if there are sufficient and reasonable grounds Bankruptcy Regulation may undertake a review based on its own initiative. Details of both are provided below..

Note – Transitional Provisions

- (1) In relation to income assessment and objection decisions, the requirement that the bankrupt must make the request for review within 60 days of being notified of the decision, applies to trustee decisions that are made on or after 5 May 2003. For trustee

decisions made prior to this date, no timeframes apply to a bankrupt in respect to requesting a review.

- (2) In relation to hardship reviews, the timeframe requirement for making the request applies to income assessments where the contribution assessment period (“CAP”) being reviewed commenced on or after 5 May 2003.
- (3) The provisions allowing a trustee to issue a supervised account notice came into effect on 18 March 2005.

Review carried out on Bankruptcy Regulation’s initiative

17. Bankruptcy Regulation has the discretion to undertake a review of a trustee’s decision at any time. Bankruptcy Regulation will exercise this discretion reasonably based on the circumstances of each case.
18. This would be the case, for example, if:
 - Intervention is required in order to maintain the credibility of the personal insolvency system. This would be the case for example if it was considered that the decision made was a misuse of power by the trustee.
 - Bankruptcy Regulation considers that the trustee’s decision was a breach of the trustee’s fiduciary duties or that it was considered as contrary to the law.
 - Natural justice should be applied. This would be the case where the request was received by ITSA outside the time frame allowed because the bankrupt had not been advised of their right of review or advised of the time limit within which to make such a request, and it appears there may be some merit in undertaking a review.
19. Bankruptcy Regulation may become aware of trustee’s decisions that should be reviewed using this discretion when performing other regulatory functions, such as during the annual inspection program or during the investigation of a complaint.
20. Bankruptcy Regulation will advise the trustee the basis of any instances where the discretion is exercised and it has decided to review the trustee’s decision.
21. Where the decision to exercise the discretion is based on a request by the bankrupt, Bankruptcy Regulation expect the bankrupt to provide the reason for requesting the review and this should be accompanied by all relevant information and documentation, including a copy of the trustee’s decision on which review is being sought.
22. Although the Act does not specify a timeframe within which such a review decision must be made, Bankruptcy Regulation undertakes to complete the review within 60 days of deciding to carry out the review.

Request for review by the Ombudsman.

23. Bankruptcy Regulation must conduct a review when requested to do so by the Ombudsman.
24. Examples of when this might occur would be if the Ombudsman considers that an administrative error has occurred in the process or that there is an issue of natural justice not previously considered.

25. Although the Act does not specify a timeframe within which a review must be completed in this situation, Bankruptcy Regulation undertakes to complete the review within 60 days of receiving the request from the Ombudsman.

How Bankruptcy Regulation conducts a review

26. When Bankruptcy Regulation determines that a review will be conducted, notification will be sent to both the bankrupt and the trustee and the trustee will be advised either of the basis of the decision to undertake the review or where on request of the bankrupt the basis of the request. Further information will be requested from the bankrupt and/or the trustee where necessary.
27. It is expected that all of the information requested will be provided by either the bankrupt and/or trustee within the time specified in Bankruptcy Regulation's notification.
28. Where additional evidence is provided or where existing evidence has been challenged, parties will be given the opportunity to respond to the fresh evidence or issues raised.
29. Once the review is completed, Bankruptcy Regulation will provide a written determination to the bankrupt, setting out the decision made on the review, the material upon which the decision was based and the reasons for the decision. A copy of the decision will also be provided to the trustee.

Income contribution reviews

30. A trustee is required to undertake periodic assessment of a bankrupt's income to determine if there is a liability to contribute to the bankrupt estate. A decision resulting in a bankrupt's liability to make contributions is reviewable by Bankruptcy Regulation on request by the bankrupt.
31. Bankruptcy Regulation's expectation is that the trustee will conduct a proper enquiry when assessing the bankrupt's contribution liability and disclose the findings and methodology in the contribution assessment notice sent to the bankrupt along with the bankrupt's right of review.
32. Bankruptcy Regulation has the power to review an entire income contribution assessment and is not restricted to considering only the areas of the assessment which the bankrupt disputes.
33. In commencing a review, Bankruptcy Regulation will initially consider the details of the trustee's assessment, take into account information provided by the bankrupt and determine whether the trustee has correctly applied the contribution regime.
34. This process involves a review of the bankrupt's income, the treatment of the liability for income tax and the number of dependants, if any.
35. The possible outcomes of the review are that Bankruptcy Regulation can;
 - a. Confirm the trustee's assessment; or
 - b. Issue a fresh assessment which either increases or decreases the contribution liability.

Hardship reviews

36. Where a bankrupt receives notice of an income contribution assessment, an application can be made by the bankrupt to the trustee if the bankrupt believes that financial hardship will be suffered if the contribution is made.
37. The grounds on which hardship can be claimed are set out in [subsection 139T\(2\)](#) of the Act. These are the only grounds on which hardship can be claimed and neither the trustee nor Bankruptcy Regulation has a general discretion to make an allowance and reduce the contribution liability on any other basis.
38. Where the bankrupt is not satisfied with the decision made by the trustee in relation to the claim for hardship, the bankrupt can ask for that decision to be reviewed by Bankruptcy Regulation.
39. In seeking a review in order to establish hardship it is necessary for a bankrupt to:
 - a. Outline which of the hardship ground(s) in subsection 139T(2) applies; and
 - b. Provide adequate evidence in support of the ground(s); and
 - c. Quantify the amount of hardship relating to the hardship ground(s) being relied on; and
 - d. Demonstrate that financial hardship will be experienced if the contribution assessment is paid.
40. Where Bankruptcy Regulation determines that hardship will be suffered by the bankrupt, after taking into account the matters above, Bankruptcy Regulation will vary the contribution assessment to lower the contribution liability.

Review of supervised account notices

41. Where a bankrupt is issued with an income assessment and fails to voluntarily make the required payments, the trustee can issue a supervised account notice on the bankrupt. The effect of the notice is that the bankrupt will be required to open a bank account into which all of the bankrupt's income is deposited and withdrawals can only be made from the account with the trustee's permission.
42. The main factors which Bankruptcy Regulation will consider when reviewing the Notice are:
 - a. Whether the bankrupt was liable to pay a contribution due;
 - b. Whether amounts due have been paid;
 - c. The bankrupt has failed to pay a lump sum or instalments due by a particular time;
 - d. Whether the bankrupt has been given an opportunity to comply voluntarily; and
 - e. Whether the issue of the Notice was an abuse of power or breach of fiduciary duty to act fairly and impartially.
43. In undertaking a review of a supervised account notice Bankruptcy Regulation can:
 - a. Confirm the decision; or
 - b. Vary the decision; or
 - c. Set aside the decision; or
 - d. Set aside the decision and make a decision in substitution of the decision which is set aside.

44. These provisions do not apply to the situation when the bankrupt disagrees with the contribution assessment on which the supervised account notice is based. A request for review of the contribution assessment should be made as set out above and the conditions outlined above apply. If the conditions are not met, for example the request is out of time, Bankruptcy Regulation may still utilise the discretion provided to review the basis of the contribution assessment alongside the review of the supervised account notice if the circumstances warrant such a decision.

Review of objections to discharge

45. A bankrupt is generally entitled to receive an automatic discharge from bankruptcy 3 years after the date on which the bankrupt's statement of affairs was filed. A bankruptcy trustee must lodge an objection to a bankrupt's automatic discharge from bankruptcy pursuant to section [149B](#) when the trustee believes:
- a. that doing so will help make the bankrupt discharge a duty that the bankrupt has not discharged; and
 - b. that there is no other way for the trustee to induce the bankrupt to discharge any duties that the bankrupt has not discharged.
46. The trustee must also determine that at least one of the grounds of objection, as set out in subsection [149D\(1\)](#) of the Act, applies. The notice must be lodged with one of ITSA's Official Receivers and a copy of the notice provided to the bankrupt.
47. Where an objection is lodged with ITSA on or before the due for date discharge, the period of bankruptcy will be extended to either 5 or 8 years. The period of bankruptcy will be dependant on which ground(s) of objection the objection is based.
48. A ground of objection that results in an 8 year bankruptcy is referred to as a [special ground](#). Ordinary grounds of objection, referred to as non special grounds in the legislation, generally give rise to a five year period of bankruptcy.

Information that a Notice of Objection must contain

49. A notice of objection must include the following:
- Details of the ground(s) that the trustee relies on to lodge the objection and the ground(s) must be specified in subsection 149D(1) of the Act; and
 - The evidence or other material upon which the trustee relies; and
 - Where an ordinary ground is relied on, a statement of the trustee's reasons for filing a notice of objection on that ground. (For special grounds the trustee is not required to state the reason for objecting on that ground in the notice.)
50. Bankruptcy Regulation's expectation is that the trustee will set out clearly, all of the above information in the Notice of Objection and that the copy of the Notice will be given to the bankrupt within 7 days after the lodging of the Notice with ITSA. The bankrupt must also be advised of the review provisions and the timeframe for seeking a review.
51. If the Notice is deficient in any one or more of these requirements, it runs the risk of being cancelled by Bankruptcy Regulation or declared invalid by the Court.

How Bankruptcy Regulation conducts an objection review

52. Bankruptcy Regulation will review the decision to object and the notice of objection to ensure that the requirements of the Act have been complied with. Bankruptcy Regulation can ask the bankrupt and/or the trustee for further information to assist with the review process.
53. When conducting the objection review Bankruptcy Regulation will consider the following:
 - Is the ground(s) of objection on which the objection was made ground(s) specified in subsection 149D(1);
 - Is there sufficient evidence to support the existence of the ground(s) of objection;
 - Where the objection is based on a non special ground, do the reasons given for objecting on that ground(s) justify the making of the objection;
54. If Bankruptcy Regulation is not satisfied as to one or all of the above, the objection must be cancelled.
55. Where additional evidence is provided or where existing evidence has been challenged, parties will be given the opportunity to respond to the fresh evidence or issues raised as a matter of natural justice.
56. Where an objection is cancelled by the Inspector General, the cancellation does not take effect until either:
 - a. the end of 28 days from the date that the bankrupt receives the Inspector General's decision, being the period within which an application can be made for a review of that decision to the Administrative Appeals Tribunal ("AAT"); or
 - b. if such an application is made, the decision of the Tribunal is given.
57. Bankruptcy Regulation will advise the relevant ITSA Official Receiver where an objection has been cancelled so that the public record, called the National Personal Insolvency Index ("NPII") can be updated.
58. Once an objection based on a certain set of circumstances has been cancelled, a trustee is unable to lodge a fresh objection based on the same circumstances.

Considerations for Special Grounds

59. If grounds and evidence exist to support an objection based on a special ground the trustee is not required to state the reason for the objection in the notice.
60. However the Inspector General may still cancel a special ground of objection where:
 - (i) The grounds and/or evidence are not established, or
 - (ii) The grounds and evidence have been established but the bankrupt has satisfied Bankruptcy Regulation that there was a reasonable excuse for the conduct or failure that gave rise to the special ground.
61. Bankruptcy Regulation will consider the information and evidence provided by the bankrupt and will also rely on case law to determine whether or not the excuse offered is 'reasonable'. The trustee will also be given details of the claims and the opportunity to provide comments and evidence refuting the claim to have a reasonable excuse. Consideration will also be given

to the conduct of the bankrupt, and the circumstances of the administration of the bankrupt estate.

62. Clearly if the bankrupt submits that they had a prior reasonable excuse for failing to discharge the duty on which the notice is based, but despite subsequent opportunity is still to remedy the conduct that gave rise to the objection, the excuse provided will be unlikely to be accepted as the reason for the failure to comply.
63. Bankruptcy Regulation has no power to cancel the objection based on special grounds simply because the conduct or circumstances which led to the objection has since been remedied. However, in cases where the conduct which gave rise to the objection has been remedied, it is Bankruptcy Regulation's expectation that the trustee will withdraw the objection unless there is some future benefit in the objection being maintained.

Considerations for Non-Special Grounds

64. Where an objection is lodged on an ordinary ground, the trustee must specify a reason for the making of the objection on that ground. The objection must not be lodged to punish the bankrupt but must set out what purpose it seeks to achieve. It must state how the extension of the period of bankruptcy will provide a future utility not otherwise available were the bankrupt to be discharge from bankruptcy.
65. The Courts have considered the following examples to be valid reasons demonstrating future utility in certain circumstances:
 - a. To provide the bankrupt the opportunity to co-operate more fully with the trustee in the administration of his estate and to more comprehensively meet his obligations to be forthcoming and frank in the information provided to the trustee, particularly when their obligation of full disclosure and duty to assist the trustee to the upmost of their power would be significantly reduced if they were to be discharged for bankruptcy; and
 - b. As a matter of public interest by ensuring that a bankrupt meets their requirements of transparency and candour under the Act so as to assist the trustee to the upmost of their power.

Review of Inspector-General decisions

66. If, after Bankruptcy Regulation's review of the trustee's decision, either the trustee or the bankrupt is not satisfied with the outcome, they can apply to the AAT for a tribunal review of the decision.
67. The AAT appeal process requires an application to be made writing in accordance with the prescribed form. The application must set out a statement of reasons for the application and be made within 28 days of receipt of Bankruptcy Regulation's decision.
68. The role of the AAT in the review process is to make a decision afresh based on the law and the evidence available.
69. The proceedings are not adversarial in nature and Bankruptcy Regulation's role is to assist the AAT by providing the information required to allow the Tribunal to determine the correct decision in the circumstances.

70. Further details of the process involved in making an application to the AAT can be obtained from the [AAT website](#).
71. The AAT does not have the authority to review other administrative decisions made by Bankruptcy Regulation. If a bankrupt is otherwise aggrieved, for example by the refusal of Bankruptcy Regulation to accept an application as a valid request to review a decision, or its refusal to exercise the discretion to review the trustee's decision, a bankrupt has the right to complain to the Commonwealth Ombudsman. They may also be able to apply under the Administrative Decisions Judicial Review Act ("ADJR" Act) for a review of any decision made by an Australian public servant.