



**Australian Government**

**Insolvency and Trustee Service Australia**

## **INSPECTOR-GENERAL PRACTICE STATEMENT 8**

### **Involuntary Cancellation of Trustee Registration**

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## Introduction

1. In the past Courts decided on whether to cancel a trustee's registration. On 16 December 1996 this became an administrative decision made by a committee convened by the Inspector-General in Bankruptcy.
2. This document outlines the process involved when the Inspector-General considers taking steps that may lead to cancellation of the registration of a registered trustee under the Bankruptcy Act. This document also outlines the independent committee processes and the basis of the Inspector-General's decision making.

## Overview of a bankruptcy trustee's duties

3. Registered trustees are required to maintain the utmost professionalism, independence, impartiality, honesty and ethics in their dealings. They are considered officers of the Court and in exercising powers and discretions and making decisions no lesser standard is to be expected of them than of a court or judge. They play a central role in the administration of estates and are under a general duty to exercise the powers in such a fashion that the objects of the Act, including those of equality between creditors and fairness to bankrupts and debtors are served.
4. Registered trustees also have statutory duties set out in the Bankruptcy Act. They have a fundamental duty when administering an estate to carry out certain investigations and undertake certain tasks and functions as set out in [section 19](#) of the Bankruptcy Act. Trustees are also required to maintain proper accounts and records, have proper money handling processes and assist the Inspector-General in his investigations when required.
5. Registered trustees are also required to comply with the legislative standards set out in [Schedule 4A](#) of the Act.

## Disciplinary sanctions

6. As described in the Schedule 4A Trustee Performance Standards, there is an expectation that trustees who, without reasonable explanation, regularly fail to comply with the Bankruptcy Act and Regulations, or who diverge from acceptable standards of practice or whose behaviour or conduct brings the integrity of the insolvency system into disrepute will be subject to disciplinary action.
7. Disciplinary action may be taken where a breach of the Act or a performance standard is identified. In deciding what action is appropriate Bankruptcy Regulation takes into account:
  - (a) the nature of the breach;
  - (b) the seriousness of the effect of a failure to comply, including the impact on a particular estate or individual; and
  - (c) a trustee's performance history and whether the trustee has previously failed to comply when able to.

8. There is a range of sanctions or actions which Bankruptcy Regulation can take when it considers breaches of duty or non compliance have occurred. Involuntary cancellation of registration is generally a sanction of last resort. Sanctions that Bankruptcy Regulation may consider prior to initiating action to de-register a trustee include:
- (a) Education – making trustees aware of problem areas and the correct practice or law individually and collectively;
  - (b) Individual counselling – by far the most effective means to achieve timely remedial action;
  - (c) Changing in the risk classification of a trustee. This will lead to a larger sample of files being selected for future annual inspections and a more detailed inspection being undertaken, particularly in areas of prior non-compliance;
  - (d) Formal investigation and reporting under section 12 of the Bankruptcy Act. Such reports may be supplied to creditors, police and other regulator or disciplinary bodies such as ICAA, CPA or Law Councils and Societies;
  - (e) Audit of a trustees accounts - section 175;
  - (f) Imposition of penalties for Realisation and Interest Charge breaches;
  - (g) Issue of “show cause” letters requiring a trustee to explain both their actions and why they should continue to be registered; and
  - (h) Referral to other investigation units or law enforcement bodies.

### ***Classification of Non-Compliance***

9. Bankruptcy Regulation utilises a classification system to describe areas of non-compliance and assist it to decide on the appropriate action to take subject to the seriousness and impact.

#### ***Category A***

*Fundamental breaches and lack of controls that are likely to bring into question the integrity of the system. This includes cases where there are repeat non-compliance occurrences of Cat B type previously identified and reported on.*

*These matters will give rise to either legal action, referral to fraud investigators or section 155H action concerning deregistration.*

#### ***Category B***

*Serious and systemic issues that will have a material impact on the administration and require timely action.*

*In these cases the trustee will be counselled and timely remedial action is expected to be taken. Failure to take timely remedial action will give rise to reclassification to a Cat A and appropriate action.*

### ***Category C***

*One off practice or procedural non compliance is not systemic and doesn't have a significant impact on the administration, dividend or creditors, debtor's rights or system integrity but should be brought to the attention of the trustee.*

*Further identification of errors of this nature through complaints or later inspections would see the escalation of the error to a category B and counselling of the trustee.*

10. This provides a structured process that will see the escalation of a matter if it is not resolved by the trustee. Most matters are resolved quickly and amicably on Bankruptcy Regulation intervention.
11. Hence breaches or non-compliance with the Act or a performance standard may give rise to a simple query by Bankruptcy Regulation on the reasons why there has been a deviation and where repetitive breaches occur or, in the case of a serious breach, result in action to cancel a trustee's registration.

### **Disciplinary and committee process**

12. Usually a trustee will be well informed of issues of concern raised by Bankruptcy Regulation as delegate for the Inspector-General in Bankruptcy during investigations or inspections and will have been provided the opportunity to state their position.

### ***Legislative Basis***

13. Section 155H provides that the Inspector-General may ask a registered trustee to give the Inspector-General a written explanation why the trustee should continue to be registered, if the Inspector-General believes that:
  - (a) the trustee no longer has a qualification or ability that is prescribed by the regulations made for the purposes of paragraph 155A(2)(a); or
  - (aa) the trustee no longer has the ability (including knowledge) to perform satisfactorily the duties of a registered trustee; or
  - (b) the trustee has been convicted of an offence involving fraud or dishonesty since registration as a trustee; or
  - (c) the trustee is not insured against liabilities that the trustee may incur, or has incurred, working as a registered trustee; or
  - (d) the trustee is no longer practising as a registered trustee; or
  - (e) the trustee has contravened any conditions imposed by the committee on the trustee's practice; or
  - (f) the trustee has failed to exercise powers of a registered trustee properly or has failed to carry out the duties of a registered trustee properly; or
  - (fa) if the trustee is or was the administrator of a debt agreement—the trustee has failed to properly carry out the duties of an administrator in relation to a debt agreement; or

- (g) the trustee has failed to comply with a standard prescribed for the purposes of subsection (5).
- 14. If Bankruptcy Regulation as delegate of the Inspector-General then forms the belief that a ground set out in section 155H is established and other sanctions are either inappropriate or have had no positive effect, Bankruptcy Regulation will formally write to the trustee outlining the breaches in detail, seeking the trustee's formal response as to why their registration should not be cancelled. The trustee is given 28 days to respond in writing.
- 15. If the Inspector-General or delegate does not receive an explanation within a reasonable time, or is not satisfied by the explanation, the Inspector-General or delegate must convene a committee to consider whether the trustee should continue to be registered.

### ***Committee Process***

- 16. The committee must consist of the Inspector-General in Bankruptcy or delegate, an officer of the Australian Public Service (APS) and a registered trustee, registered for more than five years, nominated by the Insolvency Practitioners Association (IPA). To ensure impartiality no delegate involved in decisions to this point will act as delegate of the Inspector-General on the committee.
- 17. The committee is required to make inquiries that are reasonable for the purpose of making an informed decision or that the chairperson believes are appropriate in order for the committee to have sufficient information to make the decision.
- 18. A committee must observe natural justice. This is explained in more detail below.
- 19. A committee is not bound by any rules of evidence but may inform itself on any matter as it sees fit. This means that the committee will not hear submissions on whether information provided is admissible in a court of law or not. Similarly there is no right of "objection" to the questions being asked by the committee. Questions will be asked of the trustee and the trustee can choose either to answer or not. The committee may proceed with its consideration of the matter irrespective of any refusal to answer.
- 20. Whilst it will usually consider all the supporting documents that formed the basis of Bankruptcy Regulation's decisions and the trustee's responses the committee is not limited to just that information or the information that formed the basis of the prior decision to issue a show cause letter. The committee can consider any information and form its own view in the matter.
- 21. The committee will interview the trustee. Details of the interview process are provided below.
- 22. Once the committee has considered all the information it needs it will decide firstly whether there was a breach set out in section 155H, and if so whether that breach or breaches were serious enough to either impose conditions on the registration or to cancel the trustee's registration.

23. It must provide reasons for its decision to both the trustee and the Inspector-General. The Inspector-General must accept the committee's decision and give effect to the decision.
24. Pursuant to regulation 8.32 a committee must take all reasonable measures to protect from unauthorised use or disclosure information given to it in confidence in, or in connection with the performance of its functions or the exercise of its powers.

### ***The interview process and natural justice***

25. Once the Inspector-General or delegate has determined the makeup of the committee, the committee will convene to consider the matter. The date of convening will usually be the first time the committee meets and as timeframes commence from this date, the trustee will be advised.
26. The interview date, time and place will be arranged to meet the needs of the committee and the trustee.
27. Should the trustee fail to attend the interview and fail to give a reasonable excuse for non attendance within 7 days, the committee may proceed with its consideration of the matter. If a reasonable excuse for failure to attend is provided within 7 days, the committee must arrange another interview date, time and place.
28. The trustee may choose to have legal representation at any point in the process.
29. The interview is an inquisitorial process not an adversarial one. The process is both to provide the trustee with an opportunity to further rebut or comment on the issues raised previously by the Bankruptcy Regulation delegate and to allow the committee to seek clarification on issues and ask questions concerning the administrations and practices.
30. The trustee may make submissions both on the issue of the prior delegates decision concerning breaches set out in sub-section 155H(1) of the Bankruptcy Act and on appropriate sanctions that should be imposed by the committee, in the event that the committee also finds breaches occurred.
31. Time will be allowed for such submissions and the trustee may introduce any further information either in writing or orally and this includes any other parties who would like to put submissions on the trustee's behalf. The trustee should advise the committee prior to the interview if there are any other people he wishes to call to put information to the committee at that time.
32. Usually prior to the interview, the trustee will be provided with all the information the committee has been provided with and may rely upon, to allow the trustee to prepare a response. However as some information may not become available until the interview or afterwards this will not always be possible.
33. The committee will before making its decision provide advice on the information it will rely upon and provide any subsequent information to the trustee obtained during or after interview and allow a reasonable time for the trustee to consider and respond.

34. Should assertions be made as to the character of the trustee by any party and the assertions form part of the information on which the committee will rely, the trustee will have a right under natural justice principles to cross examine the person who made the assertion.

## **The decision**

35. The committee is required to keep minutes recording their meetings and decisions made and must make a decision within 60 days of first convening, which is usually the day of the interview.
36. The committee has 14 days from the date of reaching a decision to provide a report of its decision to the trustee and the Inspector-General.
37. The committee has three decision options:
- Cancel the trustee’s registration;
  - Allow the trustee to remain registered unconditionally; or
  - Allow the trustee to remain registered but with conditions imposed.
38. It is important to note that the decision on whether to remove a trustee’s registration lies with the committee and not the Inspector-General. The committee decision is also independent to Bankruptcy Regulation’s investigations and decisions.
39. The Courts have historically held trustees’ registrations in high regard and have been reluctant to de-register trustees unless the most serious breaches have occurred. Committees, whose decisions are reviewable in the AAT, will consider any legal precedents which may provide guidance, in arriving at their decision.
40. Committees cannot suspend a trustee’s registration. However a conditional registration could be made where the trustee remains registered but may be restricted from practicing for a certain period or restricted in some other way.
41. The committee report, to be provided to the trustee and Inspector-General in Bankruptcy within 14 days of reaching its decision, will outline the basis of the decision, detail the issues considered and the information and law relied upon.
42. If the decision is to cancel registration, the trustee will be required to return their Certificate of Registration unless they have a reasonable excuse not to do so. The trustee will not be entitled to a refund of all or part of any registration fee that has been paid. The trustee would not be entitled to re-apply for registration for a period of 10 years.
43. The Inspector-General is required by law to record the cancellation of the trustee’s registration on the National Personal Insolvency Index, a publicly accessible database. The Inspector-General is also required to report to Parliament on activities under the Bankruptcy Act. This means that, while the decision in detail is not made publically available, the name of the trustee whose registration has been cancelled will be made public as will the general nature of the breaches involved.

## Right of Review

44. If the trustee is dissatisfied with the committee's decision, they may appeal to the Administrative Appeals Tribunal (the AAT). An application to the AAT for a review of the committee's decision must be in writing, set out the reasons for the application and must be made within 28 days of the date the committee's report is received by the trustee. Full information about applications to the AAT can be obtained from the local AAT Registry or from the internet at [www.aat.gov.au](http://www.aat.gov.au).