

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No xxx

Issued by the authority of the Attorney-General

Bankruptcy Act 1966

Bankruptcy Amendment Regulations 2010

COMMENCEMENT

Schedules 1 and 2 to the Bankruptcy Legislation Amendment Bill 2009 (the Bill) include the enabling provisions for the regulations. The regulations have been drafted so that they will commence on the same day as the Bill.

TRANSITIONAL

Amendments to the remuneration provisions in item 2 of Schedule 1 of the regulations apply to bankruptcies for which the date of bankruptcy is on or after the day on which the regulations commence. The regulations in force before the commencement of the amendments will continue to apply to bankruptcies if the date of bankruptcy is before the day the regulations commence.

The transitional provision does not apply to the infringement notice provisions in item 3 of Schedule 1 of the regulations. The infringement notice regime does not include any new offences under the *Bankruptcy Act 1966* (the Act) and does not penalise behaviour that did not constitute an offence prior to the commencement of the regulations. The infringement notice regime serves as an administrative means of addressing an offence that existed before the commencement of the amending regulations, as an alternative to prosecution.

TRUSTEE'S REMUNERATION

The Bill includes amendments to improve the process for fixing and reviewing remuneration of registered trustees. The amendments are designed to:

- reinforce the primary role of creditors in fixing a trustee's remuneration,
- give trustees certainty concerning their remuneration, and
- provide a more accessible and flexible mechanism for resolving disputes about remuneration.

The Bill itself sets out general principles with much of the detail being incorporated into regulations.

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The amendments have been developed following an extensive review and significant consultation with all key stakeholders. The review was prompted by a number of factors including:

- difficulties experienced by some trustees in getting creditors to approve remuneration,
- the outdated scheme for default remuneration in the absence of creditor approval (based on an obsolete scale of fees abandoned many years ago by the Insolvency Practitioners Association of Australia (IPA)),
- concerns about the inadequacy of the minimum entitlement to remuneration and the fact that the trustee can pursue the bankrupt for payment of this, and
- the cost and complexity of the current regime for taxation of remuneration claims.

The key amendments to be introduced by the Bill are:

- increasing the minimum remuneration entitlement to \$5000 and removing the trustee's right to pursue the bankrupt to recover this amount,
- repeal of the current regulation 8.08 which allows a trustee to rely on the now obsolete scale of professional fees previously used by the IPA,
- introduction of a new process allowing the Inspector-General in Bankruptcy to approve a trustee's remuneration in certain circumstances, and
- introduction of a new process for review of remuneration claims which is free to the applicant and more flexible than the current taxation process.

Default remuneration

Subsection 162(4) of the Act currently provides that, where the trustee's remuneration is not fixed by creditors, the trustee is entitled to be remunerated as prescribed by the regulations. Regulation 8.08 provides that, in these circumstances, the trustee is entitled to be paid at the rate of 85% of the rate set out in the IPA Guide to Hourly Rates. Those rates have not been updated since 1998, as they were abandoned by the IPA on the basis that they stifled competition.

The default remuneration provisions were intended to be used where the trustee is unable to obtain creditor approval but, in practice, they have often been used as an alternative to obtaining creditor approval.

These provisions are being repealed because there is no longer an industry standard on which to base default remuneration, and to reinforce the principle that creditors should generally approve remuneration.

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However, there are circumstances in which it is impractical or not cost effective to seek creditor approval. Therefore, the amendments will introduce a new process for the Inspector-General in Bankruptcy to approve remuneration in certain circumstances.

Remuneration approval process – regulations 8.09 to 8.11

The regulations will allow the trustee to apply to the Inspector-General for approval of remuneration in the following circumstances:

- creditors have failed to vote on, or have rejected, a motion relating to the trustee's remuneration,
- it is not cost effective to seek the approval of creditors, or
- it is not practicable to seek the approval of creditors.

The trustee will need to establish that one of these conditions is met. The Inspector-General will issue further guidance as to when it might be appropriate to approve a trustee's remuneration. For example:

- it may not be cost effective to seek the approval of creditors if the value of the assets in the estate is so small that the expense of holding a creditors' meeting cannot be justified, and
- it may not be practicable to seek the approval of creditors where the bankruptcy is annulled and there are no longer any creditors to vote on a remuneration proposal.

The trustee will also need to explain:

- why any work already performed by the trustee was necessary,
- why any work proposed to be performed by the trustee will be necessary, and
- why the proposed remuneration for the work, or proposed work, is appropriate for the particular administration.

The Inspector-General's role in this process is to determine whether the trustee has followed the correct procedures in relation to approval of remuneration (including giving the required notices to creditors which adequately described the work to be performed and why it is necessary). In addition, the Inspector-General will consider whether, taking into account the nature and complexity of the work, the proposed remuneration is commensurate with the work already performed or to be performed. The Inspector-General's decision will not be directed at the hourly rates charged by the trustee and other staff for doing the work.

The remuneration approval process is designed to apply to prospective remuneration claims as well as claims for work already performed.

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There is no mechanism to review the Inspector-General's decision to approve or not approve the trustee's remuneration. It will be open to the trustee to prepare another proposal where the Inspector-General refuses to approve the first one. It will be open to creditors to seek to review the claim using the remuneration review process once the trustee draws up to the amount approved or, if appropriate, to consider replacing the trustee.

Notices relating to remuneration – regulations 8.12 to 8.12D

Subsection 162(6A) of the Act requires the trustee to give such notices to the bankrupt and creditors as are required by the regulations.

The regulations will require the following notices to be given:

- the trustee must give the bankrupt and creditors notice of the method by which the trustee seeks to be remunerated and the rate of remuneration as well as an estimate of the expected amount of the trustee's remuneration – this is already required by regulation 8.12 but the amendments will provide that this notice must be given within 28 days after the trustee is appointed,
- where the trustee is seeking creditor approval of remuneration, the trustee must give the creditors a notice describing the work undertaken or likely to be undertaken, details of the number of hours to be charged by the trustee and other staff and the proposed total remuneration for the work – this notice must also include a statement that the costs incurred are necessary and reasonable having regard to the value and complexity of the administration and a report on work completed, in progress and still to be undertaken – this notice must be given at the same time as the trustee sends a proposal to creditors seeking approval of remuneration,
- when the remuneration claimed by the trustee reaches the amount fixed by creditors or approved by the Inspector-General, or where the trustee is finalising the estate without the remuneration having reached that amount, the trustee must give the bankrupt and creditors a notice setting out the total remuneration claimed and details of the work performed and explaining any variation from the amounts set out in the notice given when the trustee sought creditor approval – this is the notice which will trigger the right of the bankrupt or a creditor to apply for a review of the trustee's remuneration, and
- where the trustee is required to make payments to third party service providers, the trustee must give the bankrupt and the creditors a notice describing the work performed by the third party and the amount to be paid – this notice must be given within 7 days of receiving the claim and advise the bankrupt and creditors that they may, within 14 days after receiving the notice, request the trustee to request the Inspector-General to review the amount of the payment – this requirement does not

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apply where the services provided by the third party are routine or the proposed payment does not exceed \$100.

Remuneration review process – regulations 8.12E to 8.12P

The Act and regulations currently allow the bankrupt or a creditor to request taxation of a trustee's bill of costs. It is also open to the trustee to request taxation of a third party's bill of costs. This process is expensive and does not always allow the taxing officer to focus on the real issues in dispute. For example, a bankrupt may apply for taxation on the basis that the trustee has been heavy-handed in pursuing certain lines of inquiry and it is not possible for a taxing officer to resolve this issue when they are required to focus on whether costs have been properly incurred.

The taxation process will be replaced with a new review process, applicable to remuneration and third party costs, with the following features:

- reviews will be conducted by the Inspector-General in Bankruptcy,
- the applicant will not be required to pay for the review – the costs will be recovered in the same way as other regulatory functions performed by the Insolvency and Trustee Service Australia (ITSA) (ie through the realisations charge),
- the review process will be as informal and flexible as possible and will facilitate alternative ways of resolving disputes.

The Inspector-General already regulates the conduct of trustees and has extensive investigative powers. It is therefore considered appropriate that resolving disputes about remuneration should be seen as part of that regulatory function.

An application must be made within 28 days of receiving the notification of the trustee's claim, or, for third party costs, within 28 days of the trustee receiving the third party's bill of costs. The Inspector-General will have the power to extend this time in appropriate circumstances (for example, where the applicant and the trustee, or the trustee and third party, have been attempting to resolve the matter by other means).

The Inspector-General will have wide-ranging powers to determine the appropriate process for conducting a review. This will allow the process to be tailored to suit the particular circumstances having regard to the issues in dispute and the complexity of the matter. For example, these powers include:

- conducting the review on the papers or with the parties present,
- taking evidence on oath or affirmation,
- adjourning or discontinuing the review if appropriate (for example, where the parties are able to use other means to resolve the matter),

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- obtaining information from relevant sources or obtaining written statements or documents,
- interviewing any party and allowing the other party or their representative to question that party, and
- proceeding with the review in the absence of any party if necessary or appropriate.

The Inspector-General will also have the power to give directions to a person as part of the review process. For example, the Inspector-General may:

- direct the trustee to provide an itemised invoice,
- direct a third party to provide an itemised bill of costs,
- direct the trustee to produce files, or
- direct a person to give a written statement about a matter relevant to the review (such as a direction to the bankrupt to provide further information about the matters in dispute).

Where a person fails to comply with such a direction, the Inspector-General may conduct the review on the basis of the information available. Where the trustee fails to comply with a direction to provide an itemised invoice, produce files or take particular action in relation to the administration of the estate, the Inspector-General may direct that the trustee is not entitled to all or part of the remuneration that is the subject of the review. Where a third party fails to comply with a direction to provide an itemised bill of costs, the Inspector-General may order that the trustee can declare and distribute a final dividend without regard to any claim of that third party.

Where the Inspector-General accepts an application for review, the Inspector-General may:

- affirm the amount claimed,
- disallow all or part of the claim and substitute another amount, or
- dismiss the application.

The Inspector-General will be required to make a decision within 60 days after accepting the application and provide written reasons for the decision. The written decision must be given to the parties within 14 days after making the decision.

Where the Inspector-General decides that the amount claimed exceeds the amount to which the trustee is entitled, the Inspector-General will be empowered to require the trustee to repay the excess to the estate.

Only the Court will be able to review the Inspector-General's decision on a remuneration or third party costs review application.

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In relation to reviews of trustee remuneration, there have been concerns that making the process free to the applicant will encourage frivolous and vexatious applications particularly from bankrupts. However, in relation to those reviews, the Inspector-General will not be obliged to accept an application unless it meets certain requirements. In particular, the Inspector-General must refuse to accept an application unless satisfied:

- that the trustee's remuneration may have been fixed in a manner that is inconsistent with the requirements of the Act and regulations, or
- that the trustee may have acted improperly, or without due care and diligence, in the administration of the estate.

The applicant will need to more than simply assert that one of these conditions is met – in effect, the applicant will need to make out a *prima facie* case to support the application. In addition, even if one of these conditions is met, the Inspector-General must also refuse to accept an application where:

- the applicant does not have an interest in the outcome of the review (for example, where the application is made by the bankrupt and there would be no surplus returned to the bankrupt even if the remuneration was reduced),
- the applicant has not adequately particularised the issue giving rise to the review, or
- the application is frivolous or vexatious.

Finally, the Inspector-General will have a discretion to refuse to accept an application where it was appropriate in the circumstances for the applicant to attempt to resolve the matter in another way and the applicant has, without reasonable explanation, not attempted to do so.

INFRINGEMENT NOTICES

The Bill includes amendments to provide for the establishment of an infringement notice regime within the regulations. Such a regime would provide an efficient means of penalising behaviour which, while relatively minor in criminality, can have significant repercussions. The issuing of a notice would not replace the current penalties existing within the Act, but would serve as an alternative to prosecution.

The amendments have been developed after consultation with key stakeholders in 2006 and seek to provide for:

- the effective administration of bankrupt estates,
- the regulation of insolvency practitioners, and
- maintaining the integrity of information contained on the National Personal Insolvency Index (NPII).

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Schedule 2 of the Bill deals with offences and provides for the establishment of an infringement notice regime for certain offences of strict liability. Offences which can be dealt with by the issue of an infringement notice appear in the table in subsection 277B(2).

Effect and purpose of the regime – regulation 14.03

The infringement notice regime is discretionary and does not require that a notice must be issued where there is an identified breach. Prosecution remains an option for dealing with offences and infringement notices merely provide for an administrative means of addressing a breach within shorter timeframes.

Infringement notices may be issued to a person more than once for the same offence if a person continuously fails to comply with their obligations under the Act. The issuing of more than one notice is discretionary and a matter may alternatively be pursued in the Courts if that is deemed to be the most appropriate course of action. Prosecution may be preferred if a person frequently breaches the provisions of the Act and has a history of non-compliance.

When an infringement notice can be issued – regulation 14.05

The regulations will provide that the Inspector-General in Bankruptcy may issue an infringement notice. Before issuing a notice the Inspector-General must have reasonable grounds to believe that a person has committed an offence. As explained above, the Inspector-General's discretion to issue a notice is included within the regulations so that the option to prosecute an offender remains available if the circumstances are appropriate to pursue that course of action.

The regulations do not require the Inspector-General to give consideration to any specific criteria in making a decision to issue an infringement notice. The discretion is broad and the Inspector-General may give consideration to a person's general conduct and any other background information. This may include earlier convictions under the Act or other infringement notices previously issued, which may give an indication of whether or not the person is likely to re-offend.

The regulations will provide that the Inspector-General may issue an infringement notice within 12 months of the alleged offence being committed. Section 15B of the *Crimes Act 1914* concerns the time limit for prosecuting an offence and provides that prosecution should not take place in excess of one year after the date of the alleged offence. It would not be practical for the infringement notice regime to operate under a timeframe that is less than that imposed under the *Crimes Act 1914*. Should the timeframe for issuing a

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notice expire under a shorter timeframe, the Commonwealth would only be left with the option of prosecution and the purpose of the infringement regime would be overridden.

There is no delegation of power to issue an infringement notice included within the regulations due to the operation of subsection 11(4) of the Act, which provides that the Inspector-General has the power to delegate all or any of the powers and functions of the Inspector-General under the Act. ITSA has guidelines for the delegation of functions and powers of the Inspector-General and these will provide that the authority to issue an infringement notice is delegated to officers with relevant skills and expertise.

The infringement notice regime will apply to both individuals and companies. Infringement notice penalties for individuals and companies will not vary, as the penalties applicable to a specific offence are provided for under subsection 277B(2) of the Bill.

Contents of an infringement notice – regulation 14.06

The regulations will provide for a minimum amount of content, which must be included on the infringement notice form that is served on the recipient. The mandatory content ensures that the recipient has sufficient information to understand the nature of the notice and the provision within the Act that they have allegedly breached. The infringement notice form will also ensure that the recipient is informed of certain particulars relating to:

- the amount of the penalty,
- the due date, and
- methods of payment.

The infringement notice form will advise the recipient that if the person pays the penalty in time any liability of the person for the offence is discharged and they will not be prosecuted. This information also makes the recipient aware that they may choose not to pay the penalty and instead have the matter heard before a Court. The higher penalties associated with prosecution must also be disclosed on the form so that the recipient is fully aware of the consequences of any alternative action they may wish to proceed with.

The notice form will include information advising the recipient that they may choose to apply to the Inspector-General to have the notice withdrawn. This internal review mechanism has been included within the regime to ensure that a recipient of a notice has an effective means of contesting the grounds on which the notice is issued. The withdrawal process is discussed in greater detail below.

Method of serving an infringement notice – regulation 14.07

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The regulations will provide for a method of serving an infringement notice on an individual and a corporation. The method of service is outlined within the regulations to reduce any confusion about when a person is deemed to have been served. Service is an important concept to the infringement notice regime, as due dates for payment are calculated according to the day on which the notice is served.

Time for payment and extensions – regulations 14.08 and 14.09

The regulations will provide for a 28 day period in which an infringement notice must be paid by the recipient. The time allowed for payment is appropriate, as it balances the need for a fair amount of time to pay the penalty with the requirement for prompt enforcement. An extended period of time to pay the penalty beyond 28 days would undermine a key objective of the regime relating to the integrity of the information contained on the NPII.

A recipient of a notice may apply for an extension of time in which to pay the penalty. The process of receiving an application for an extension of time to pay and making a decision to grant or refuse a withdrawal is governed by timeframes so that each of the parties is aware of their obligations and the matter is dealt with promptly.

Withdrawal of infringement notice – regulations 14.10 to 14.12

The regulations will provide for the recipient of an infringement notice to apply to the Inspector-General to have it withdrawn. The Inspector-General must give consideration to several elements before withdrawing or refusing to withdraw a notice, as part of the decision-making process. The Inspector-General must consider:

- the circumstances of the offence,
- whether the facts support the issue of the notice, but there are exceptional circumstances, and
- any other relevant matter.

Infringement notice offences are strict liability offences and they are only issued if the facts support that an event has occurred or has not occurred. Therefore, the withdrawal of an infringement notice must require the Inspector-General to consider whether or not the evidence of fact is flawed.

The regulations will also provide that the Inspector-General must give consideration to exceptional circumstances in a decision to grant or refuse withdrawal. This is meant to encompass scenarios where the facts are correct but the recipient of the notice is able to provide a reason or excuse for the offence having been committed. These situations may occur where a person is aware of their obligations under the Act, but is unable to comply due

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to circumstances outside of their control. A possible example may be that a person could not comply due to illness or an absent member of staff.

The Inspector-General must be able to consider any other relevant matter in making the decision. These types of scenarios may include situations where a person is unaware of their obligations under the Act. A possible example might be that since breaching the Act a person has taken reasonable and prompt steps to prevent such a breach from occurring in the future.

Similar to applications for extensions of time to pay, the process of requesting a withdrawal is governed by timeframes so that each of the parties is aware of their obligations and the matter is dealt with promptly, preserving the integrity of the information contained on the NPII.

Lastly, the infringement notice provisions require that a person must be refunded if an infringement notice is withdrawn and the person who received the infringement notice has already paid.

Effect of payment of an infringement notice – regulation 14.13

Payment of an infringement notice discharges any liability of a person and that person cannot be prosecuted for the same offence. Additionally, payment of the infringement notice cannot be considered as an admission of guilt. The purpose of proposed regulation 14.13 is to ensure that payment of the infringement notice results in the conclusion of the matter and no other consequences will arise as a result of the identified breach.

Evidentiary certificates – regulation 14.15

The Inspector-General may sign a certificate that states that:

- an infringement notice penalty was not paid in time,
- an extension of time to pay an infringement notice was refused or granted,
- an infringement notice penalty was not paid within the extension period, or
- an infringement notice was withdrawn.

The purpose of a certificate is that it may be used as evidence if the Commonwealth prosecutes a person for an offence that is mentioned in an infringement notice. The certificates cannot be used as evidence in prosecuting another infringement notice offence.