



Australian Government

Attorney-General's Department

**AMENDMENTS TO THE BANKRUPTCY
REGULATIONS 1996:**

**REMUNERATION OF REGISTERED
TRUSTEES**

DISCUSSION PAPER

DECEMBER 2009

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Submissions

Submissions on this discussion paper are invited and can be posted to:

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Submissions must be received by close of business on 29 January 2010.

Note: Submissions may be put on the Attorney-General's Department website and will not be treated as confidential unless specifically requested. Persons who want their submission to remain confidential should make this clear in the submission.

1 Background

- 1.1 In May 2008 the Attorney-General released a paper outlining proposed changes to the provisions of the *Bankruptcy Act 1966* ('the Act') and the *Bankruptcy Regulations 1996* ('the Regulations') relating to the remuneration of registered trustees. Following public consultation those proposals were refined and legislative amendments to the Act to implement the changes are included in the Bankruptcy Legislation Amendment Bill 2009 ('the Bill').
- 1.2 The Act itself will set down the broad framework of the remuneration regime. It is intended that much of the detail—including in relation to proposed remuneration arrangements and resolution of disputes relating to claims for remuneration—will be contained in the Regulations and in Practice Statements issued by the Inspector-General in Bankruptcy ('the IG').
- 1.3 The changes to the Act and the Regulations are aimed at clarifying and simplifying certain aspects of the process for fixing the remuneration of registered trustees in bankruptcy, and for dealing with situations where remuneration arrangements are not approved by creditors, or remuneration claimed by a trustee is disputed by a creditor or the bankrupt.
- 1.4 In summary, the current remuneration regime provides for:
- Trustee remuneration to be fixed by creditors or a committee of inspection under subsection 162(1) of the Act. Where remuneration is not fixed by creditors or a committee of inspection, the trustee is remunerated as prescribed by the Regulations, in accordance with subsection 162(4) which allows trustees to claim remuneration linked to a scale of charges previously published by the Insolvency Practitioners Association of Australia ('the IPA') (see regulation 8.08).
 - A statutory minimum remuneration entitlement under section 161B (which is indexed and may be recovered by the trustee as a debt from the bankrupt if there are insufficient assets in the estate).
 - Taxation of a trustee's remuneration and costs in the event that a creditor or the bankrupt wishes to dispute a remuneration claim (see regulations 8.09 to 8.11A). There is also provision for taxation of the costs of a person other than the trustee who provides services relating to the administration of an estate (see section 167).
- 1.5 The new arrangements will provide for:
- Remuneration to be approved by creditors, with no ability to access the scale of fees referred to in regulation 8.08 (which will be repealed).
 - A revised minimum entitlement in section 161B, no longer indexed but capable of variation by regulation, and only able to be recovered from the estate (not directly from the bankrupt).
 - A process for fixing remuneration where there is no creditors' resolution (in cases where it is not practical or cost-effective for remuneration to be approved by creditors, or where creditors have not responded to or have rejected a proposal from the trustee relating to remuneration).

- A process administered by the IG at no cost to the applicant providing a means for resolving disputes relating to remuneration claims (replacing the current taxation process).

1.6 Division 2.4 of Schedule 4A of the Regulations sets out the Performance Standards relating to Remuneration. Those standards remain unchanged.

2 Proposed changes

2.1 The proposed changes to the Act involve:

- Amending subsection 161B(1) to increase the statutory minimum to \$5,000 and to provide that the amount may be varied by regulation made for the purposes of that subsection (although no such regulation is proposed at present). Subsections 161B(2) and (3) will be repealed.
- Repealing subsection 162(4) and replacing it with provisions stating that where the remuneration of the trustee is not fixed by the creditors or the committee of inspection, the trustee may apply to the IG to decide the remuneration in accordance with regulations made for the purposes of those provisions (the remuneration approval process).
- Amendments (involving substantial modification of section 167) to provide for the IG to review a claim or a bill of costs on the application of:
 - the bankrupt or a creditor, where the trustee of the estate of a bankrupt claims remuneration; or
 - the trustee (either on the trustee's own initiative or at the request of the bankrupt or a creditor) where a person other than the trustee who has provided services in relation to the administration of the estate lodges with the trustee a bill of costs (the remuneration review process).
- A person who applies to the IG for a review and the person whose claim is the subject of the review application will have the right to appeal to the Court from any decision of the IG relating to either the application or the review itself.
- The new section 167 stipulates that the Regulations may make provision in relation to:
 - the IG reviewing decisions of the trustee to withdraw or to propose to withdraw funds from the estate for payment of the trustee's remuneration, and the bankrupt or a creditor applying for such a review
 - the IG reviewing a bill of costs for services provided by a third party in relation to the administration of an estate, and the trustee applying for such a review
 - the process of review by the IG including the powers available to the IG, provision of information and documents by the trustee or third party, the decisions open to the IG and the notification of decision by the IG, and
 - repayment of any amounts of remuneration which the IG decides are excessive.

- 2.2 Amendments to the Regulations will be required to:
- Set out more detailed requirements regarding the notices to be provided to the bankrupt and creditors throughout the bankruptcy.
 - Require the trustee to notify the bankrupt and creditors regarding payment for services provided by a third party in relation to the administration of the estate.
 - Remove regulation 8.08 as it will no longer be possible for trustees to claim remuneration based on the scale of charges mentioned in that regulation. Instead, trustees may be able to use the remuneration approval process detailed below.
 - Set out the procedure for a trustee to apply to the IG to decide remuneration in situations where remuneration is not fixed by the creditors or committee of inspection (the remuneration approval process).
 - Set out the procedure for the bankrupt or creditor to apply to the IG for a review of a claim for remuneration by the trustee and for the trustee to apply to the IG for a review of the bill of costs of a third party who provides services in relation to the administration of a bankrupt estate (the remuneration review process).
 - Make any necessary consequential changes.

3 General principles in relation to remuneration

- 3.1 A trustee's right to remuneration is limited to payment in respect of necessary work, properly performed in an administration. 'Necessary work, properly performed' means the work was reasonably and bona fide undertaken for the purpose of administering the estate and includes performing any public duty imposed by the Act, conformably with the trustee's duty to perform the work with reasonable care and skill and in an efficient and economical way. A trustee is entitled to remuneration that is just and proper or reasonable in all the circumstances having regard to the value added to the administration of the bankrupt estate.¹ This will include remuneration for work undertaken by a trustee to comply with the trustee's duties under the Act and other regulatory requirements. Furthermore, a trustee is entitled to claim remuneration for work that may not have produced a positive outcome, provided there was a proper exercise of professional judgment by the trustee at the time the work was undertaken.
- 3.2 Creditors (as the ordinary cost bearers) should have primary control over the remuneration and other costs that will be paid for the administration of the bankruptcy and it is ordinarily a matter for creditors to determine how much remuneration the trustee should receive. Assuming that the correct processes have been followed at the time that the trustee's proposed remuneration is approved, instances of a challenge to the trustee's claim for remuneration should be rare and generally the creditors' decisions regarding remuneration ought to stand. Ordinarily, it would only be in situations where there has been some flaw in the process of approving remuneration, or where the trustee has acted in a manner inconsistent with their duties and obligations, that grounds for review (under the new regime) might arise.

¹ *The Bankruptcy Regulator* (November 2005), Volume 4, Issue 2.

4 Notification

- 4.1 Subsection 162(6A) of the Act requires the trustee to give notices to the bankrupt and creditors relating to remuneration. Provision of notices ensures the bankrupt and creditors are kept informed throughout the bankruptcy process. This supports the general proposition that creditors should have control over remuneration and other costs. Currently regulation 8.12 sets out the requirements for the notices that must be given. This regulation will be amended to clarify when notification needs to be given and what information the notification is to include.
- 4.2 Initial remuneration notice: The creditors (and the bankrupt) would benefit from early notification of the trustees' rates. If the creditors are aware of the trustees' rates early on in the administration, they will be in a stronger position to maintain control over remuneration and other costs. Currently, the Regulations do not prescribe a time frame for such notification to be given and in practice, the first notice of the trustees' rates is given at or shortly before the first meeting of creditors (in accordance with section 64U). The trustee will ordinarily have incurred some costs by that stage.
- 4.3 The amended Regulations should require the trustee to notify the bankrupt and creditors of the method and rate of remuneration, within 28 days of being appointed. The trustee should provide this notice even if they do not intend to have the creditors approve their remuneration (see part 5 of this paper). The notice should give a brief explanation of the types of methods that can be used to calculate remuneration; specify the particular method that the trustee intends to use to calculate remuneration in the administration; and explain why the trustee considers this method to be suitable for the administration. If the trustee intends to charge on a time basis, the notice should provide information about the rates of all grades of staff who may undertake work on the case.
- 4.4 The initial remuneration notice will duplicate to some extent, the information that must be contained in a statement made under section 64U at the first meeting of creditors. However given neither the Act nor the Regulations impose a timeframe in which the first meeting of creditors must be called, the requirement to provide the information within 28 days of appointment will enhance the creditors' ability to control costs from the outset and give trustees increased certainty in respect of their fees.
- 4.5 If the 28 day timeframe is considered to be too short, the Regulations could require the trustee to provide the initial notice regarding the method and rate of remuneration within three months of the date of the bankruptcy. This timeframe is in line with the trustee's duty under subsection 19(1)(c) of the Act to report to creditors within three months of the date of the bankruptcy on the likelihood of creditors receiving a dividend before the end of the bankruptcy. The primary disadvantage of the longer timeframe is the increased time during which the trustee may be incurring costs whilst the bankrupt and creditors remain unaware of basic information such as the rates being charged. As a further alternative, the timeframe for providing the initial remuneration notice could be aligned with regulation 4.14 which requires a

trustee to provide creditors a notice within 28 days after the trustee receives a statement of affairs from the bankrupt. Although consistency would simplify the trustee's obligations in relation to notification requirements, this approach will be problematic in an administration where the bankrupt fails to comply with their obligation to provide a statement of affairs in accordance with section 54 of the Act.

- 4.6 The obligation placed on the trustee to provide this notice will not be onerous given the notification is likely to be a standard form letter. For this reason, it is proposed that the initial remuneration notice be required within 28 days of the trustee being appointed. Early notification will place the creditors in an informed position so that if they are dissatisfied with the rate or method that the trustee proposes, they are able to take steps to appoint a new trustee before the first appointed trustee has incurred a large amount of costs.
- 4.7 Remuneration approval notice: Under the amended Regulations, when seeking approval of their proposed remuneration the trustee will need to give the bankrupt and creditors, or the IG, notice of the estimated amount of remuneration along with the breakdown of how that estimate has been calculated. A notice under the Regulations for this purpose would ordinarily incorporate the requirements of a statement made under section 64U or a notice given under section 64ZBA of the Act.
- 4.8 The trustee must provide sufficient, meaningful, open and clear disclosure to the creditors about the work that will be undertaken so as to allow the creditors to make an informed decision regarding the trustee's remuneration. The Regulations will specify the types of matters to be covered in the notice, including a description of the work that is likely to be undertaken (a breakdown of the tasks and a description of what those tasks involve), calculation of the remuneration (identification of each person who may perform particular tasks, that person's category and expertise, how long the task may take, and the rate that applies to each person), report on the progress of the administration to date (covering what work has been already completed, is under way or is yet to be undertaken), general supporting information and initial advice to creditors.
- 4.9 In accordance with Division 2.4 of the Performance Standards for Trustees, the trustee should seek approval for only those costs that are likely to be necessary and reasonable, having compared the amount likely to be incurred with the value and likely complexity of the administration. The information provided in the notice should demonstrate to the creditors that the amount proposed by the trustee satisfies these requirements.
- 4.10 A Practice Statement issued by the IG may provide more in depth guidance regarding what would be considered sufficient compliance with this aspect of the Regulations. For example, the IG may decide to adopt the IPA's recommended remuneration report (found at Chapter 20 of the Code of Professional Conduct) as best practice for trustees.
- 4.11 Remuneration claim notice: Once the trustee has had their remuneration approved (either by the creditors or by the IG under the new remuneration

approval process), the trustee will be entitled to draw funds from the estate for payment of their remuneration. The drawing of funds by the trustee for remuneration is referred to in this paper as a ‘claim’ for payment. The current regulation 8.12(b) requires a notice to be given ‘if the trustee claims remuneration calculated by reference to an hourly rate’ however that regulation does not specify when or how often such a notice is required and the regulation is silent on whether notice is required if the trustee claims remuneration by a method other than by hourly rate.

- 4.12 The proposed amendments to the Regulations could require either (a) the trustee gives notice each time they wish to draw funds or (b) the trustee gives notice at less frequent intervals, for example once they have drawn up to the approved amount. The frequency of a remuneration claim notice under the amended regime will be significant as it will be that notice which triggers the start of the 28 day period during which the bankrupt or creditors may make an application for a review of the trustee’s claim.
- 4.13 Currently trustees do generally give notice each time they withdraw funds from the estate, up to the approved amount. It is sufficient compliance with regulation 8.12 if notification occurs at least once, usually towards the conclusion of the administration.² If the amended Regulations required trustees to provide a notice each time they wished to draw funds, trustees who chose to make regular claims for payment will incur additional costs. However, regular notices would ensure the bankrupt and creditors are better informed throughout the administration and would enable the bankrupt and creditors to exercise their right of review at the time the issue arises. Such a review is likely to be more focussed than a review made some years after a claim for payment was made. If trustees are required to give notice more than once in an administration, it will only be in exceptional circumstances that the IG will accept an application for review where the issue arose out of an earlier notice and the bankrupt or creditors should reasonably have made a review application earlier. This will provide the trustees with an increased level of certainty regarding their entitlement to the remuneration that has been drawn. An exceptional circumstance may arise where an issue does not become apparent until the trustee has notified the bankrupt and creditors of subsequent claims.
- 4.14 In the alternative, if the amended Regulations required trustees to provide notice of their claims less frequently (for example, annually or one notice at the completion of the administration), the trustee’s obligation would be less onerous. However given the creditor or bankrupt will be able to request a review of any or all claims made during the period to which the notice relates, the trustee will have less certainty about their entitlement to funds that may have been drawn some time in advance.
- 4.15 On balance, it is considered preferable for the trustee to provide a notice to the bankrupt and creditors each time they make a claim for payment of some or all of their remuneration so that the bankrupt and creditors remain well informed

² *The Bankruptcy Regulator* (May 2005) Volume 4, Issue 1.

throughout the administration and so that the trustee can have an increased level of certainty about their entitlement to funds that have been drawn.

- 4.16 The Regulations should specify that the trustee must provide the notice to bankrupt and creditors no later than 14 days after making the claim (drawing remuneration). The notice must describe in detail the work that has been performed and by whom (along with their rates), and the total amount of remuneration drawn to date. The notice should refer back to the notice provided when approval was sought. The notice should advise the bankrupt and creditors of their right to request a review of the claim within 28 days of receiving notice of the claim. The proposed new review process is set out in more detail below.
- 4.17 Notice of payment to third party: The Bill will insert a new section 166 into the Act to require trustees to give notices to the bankrupt and creditors in relation to the payment for services provided by a third party service provider. The content of these notices will be set out in the Regulations. The Regulations may specify that notices are not required in certain circumstances for example, if services are routine, for a fixed amount or at a low cost as it may not be necessary or beneficial to require trustees to give the bankrupt and creditors notice of, for example, a \$20 search by ITSA or a \$100 valuation by an estate agent.
- 4.18 The amended Regulations should require a notice under section 166 give a description of the work performed by the third party service provider, the amount of the payment to be made to the third party (attaching the invoice if applicable) and should be given by the trustee to the bankrupt and creditors within 7 days of the trustee receiving the invoice/claim. The notice must advise the bankrupt and creditors that they may, within 14 days of receiving the notice, ask the trustee to seek a review of the claim by the IG. However, the notice should specify that the trustee is not obliged to seek a review of the claim despite receiving a request from the bankrupt or a creditor.
- 4.19 The Regulations should also provide that the notice may be given to the bankrupt and creditors together with any notice advising of the trustee's claim for remuneration under the amended regulation 8.12.

5 Remuneration approval process

- 5.1 A basic principle of the bankruptcy regime is that creditors (as the ordinary cost bearers) should have primary control over remuneration and other costs that will be paid for the administration of the bankruptcy. However, there are circumstances in which it may not be practical or cost effective for the trustee to seek creditor approval of their remuneration and furthermore, there may be cases in which the trustee and creditors disagree about the amount of remuneration sought.
- 5.2 Statutory Minimum Entitlement: The provision of a minimum entitlement recognises that every trustee is required to undertake certain basic tasks in administering an estate (for example, the preliminary inquiries and actions listed in Division 2.2 of Schedule 4A of the Regulations–Performance

Standards for Trustees). Upon appointment, the trustee becomes entitled to the amount specified in subsection 161B(1)(a) or prescribed by the Regulations for the purposes of subsection 161B(1). These funds may be drawn from the estate without approval by creditors.

- 5.3 The Bill proposes the statutory minimum amount be increased to \$5,000. There has been some concern that this increase will mean that trustees will claim \$5,000 in cases where the work performed by the trustee is insufficient to justify that amount. The statutory minimum represents a nominal amount which reasonably reflects the essential tasks that must be carried out, in even a relatively straight forward administration. An effective insolvency system requires trustees of a high calibre who are willing to undertake the work and therefore, it is important that the minimum entitlement is set at a reasonable amount.
- 5.4 If the trustee wishes to draw remuneration above the statutory minimum, the trustee must have the proposed remuneration fixed pursuant to subsection 162(1) or, approved by the IG under the new regime pursuant to the proposed subsection 162(4). Amendments to the Regulations will set out the process for making such an application to the IG.
- 5.5 Circumstances in which the trustee may make an application to the IG: For the purposes of subsection 162(4), the Regulations will prescribe that the trustee will be able to make an application to the IG if the trustee is seeking more than the statutory minimum and where:
- creditors or the committee of inspection reject a resolution relating to remuneration put forward by the trustee at a meeting of creditors (section 64U sets out the procedure for consideration of a remuneration resolution at a meeting of creditors)
 - creditors or the committee of inspection reject a proposal relating to remuneration put to creditors under section 64ZBA (this section provides a mechanism for trustees to put proposals to creditors without the need for a meeting)
 - creditors fail to vote on a resolution or proposal relating to remuneration put forward by the trustee (for example, because there is no quorum at a creditors' meeting, or there is no response to a proposal put forward under section 64ZBA)
 - it is not cost-effective to seek creditor approval (for example, it may not be cost-effective where the value of the assets in the estate is so small that the expense of holding a creditors' meeting or putting forward a proposal under section 64ZBA cannot be justified); or
 - it is not practical to seek creditor approval (for example, it may not be practical to seek creditor approval where the bankruptcy is annulled and there are no longer any creditors to vote on a remuneration proposal – trustees sometimes need to perform 'tidying up' tasks after an annulment and/or may have done some limited work before annulment for which they have not yet sought creditor approval).
- 5.6 The trustee will need to satisfy the IG that one of the above situations exists and, to do so, the trustee may need to provide supporting evidence. For

example, the trustee may need to provide evidence that a creditors' meeting was called and no quorum was present; or show that the value of assets do not justify calling a creditors' meeting or putting forward a remuneration proposal. It is not proposed that the Regulations will go into detail about the type or amount of evidence required—this is something that can be detailed in Practice Statements issued by the IG.

- 5.7 Form of the trustee's application: An application to the IG to decide remuneration must be made in writing and should include supporting evidence if necessary. The application should contain the information that must be provided in a statement made under subsection 64U(5), along with the details required under subsection 64U(5A). The application should include copies of any notices issued to the bankrupt and creditors pursuant to subsection 162(6A) and all notices regarding remuneration that are required under the Regulations (see Part 4 above). The application should contain a single proposal, capable of being approved by the IG.
- 5.8 Factors to be considered by the IG in deciding the trustee's remuneration: For the purposes of subsection 162(4A), the Regulations will prescribe the factors the IG may have regard to in deciding the trustee's remuneration. It is proposed that the IG may take into account the following factors:
- Whether the trustee has followed the process contained in section 64U or 64ZBA for estimating remuneration, including adequately describing to creditors the work performed³ or to be performed.
 - Whether the trustee has given the required notice to creditors concerning the remuneration proposal as contained in section 64U, 64ZBA and the Regulations (nb. section 64U and 64ZBA are being amended by the Bill and proposed amendments to the Regulations in relation to notices are detailed above in Part 4).
 - Whether the trustee has explained why the work performed or to be performed is likely to be reasonably necessary.
 - Whether the proposed remuneration is commensurate with the work already performed, or whether the estimate of remuneration is likely to be commensurate with the work to be performed, taking into account the complexity (or otherwise) of the work.⁴
 - Any other relevant matters.
- 5.9 The matters considered by the IG in a specific case will vary depending on the circumstances under which the application is made. For example, if the trustee has satisfied the IG that it is not cost-effective or practical to seek creditor approval, it will not be necessary for the IG to consider whether the trustee has followed the processes contained in section 64U or 64ZBA. It is expected however that in such a case the trustee will provide the IG with the information the trustee would have otherwise been required to provide to the creditors.

³ In some cases the IG may be deciding the trustee's remuneration where the trustee has already performed some work (for example in a situation where work has been performed before the first creditors meeting or post annulment).

⁴ The nature of the property to be dealt with and the number of creditors involved may be relevant in considering the complexity of the work.

- 5.10 Essentially, the IG will be concerned to ensure that the trustee has followed the correct processes in estimating their remuneration and explaining the basis of the estimate, along with the correct processes for notifying creditors of the rates and methods of the proposed remuneration. It will not be within the IG's remit to consider the reasonableness of the trustee's hourly rate. Also, the IG should be satisfied that the trustee's proposal includes only those costs that are likely to be necessary and reasonable and, before deciding to incur a cost, the trustee has compared the amount of cost likely to be incurred with the value and complexity of the administration. It will not be within the IG's remit to consider whether the amount of remuneration claimed is proportionate to the size of the estate. There are many circumstances in which the trustee's proposal will not be proportionate to the size of the estate- for example, in a large estate where the administration is likely to be very straight forward or in a relatively small estate where the trustee considers it will be necessary to investigate a number of potentially voidable transfers.
- 5.11 Outcome of the trustee's application: The IG may reject an application if the trustee has not satisfied the IG that one of the situations described above in Part 5.5 exists (for example, if the trustee has failed to adequately demonstrate that it is not practical or cost-effective to obtain creditor approval). The IG will need to inform the trustee of the basis of a decision to reject the application. If an application is rejected on this basis, the trustee may seek to address the deficiencies in the original application and make an amended application to the IG for approval.
- 5.12 If the IG is satisfied of one of the circumstances listed in Part 5.5, it will be open to the IG to approve or not approve the application, or to seek further information before deciding the application. Section 12 of the Act allows the IG to make such inquiries and investigations as the IG thinks fit with respect to the administration of, or the conduct of a trustee, in relation to (among other things), a bankruptcy. This function will enable the IG to seek from the trustee any information required to decide the trustee's application.
- 5.13 The IG will be required to make a decision on the trustee's application within 10 working days, although the Regulations will make provision for the time frame to be extended by a specified period if the IG requires further information from the trustee. A decision made by the IG will be notified to the trustee in writing as required by subsection 162(4A). If the application is not approved, the IG will need to provide the trustee with reasons for the decision however the IG will not be able to substitute another amount. The trustee may choose to put a revised remuneration resolution/proposal to creditors, make a revised application to the IG, or seek to vacate the office by the methods provided in Division 5 of Part VIII of the Act (resignation under section 180 or release by the Court under section 183). Similarly, creditors who are dissatisfied with a decision of the IG to approve an application may remove the trustee by resolution and may at the same or subsequent meeting, appoint another registered trustee (under section 181 of the Act). It is considered that these rights obviate the need for review by the AAT or appeal to the Court from the IG's decision and no such right of appeal is proposed.

However, the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) will apply.

- 5.14 If the IG fails to make a decision within the 10 working-day period (or the specified extended period) it would be open to the trustee to apply for an order of review in accordance with subsection 7(2) of the ADJR Act, in respect of the IG's failure to make the decision within the prescribed time period.
- 5.15 The trustee is entitled to draw remuneration once it is approved and according to the terms of the approval. Trustees should be aware however that the amount that they are entitled to claim from the estate may be reduced following a review by the IG, even if the total amount claimed is within the amount prospectively approved by creditors or the IG.⁵ This is consistent with the general principle that trustees are only entitled to remuneration for work that is proper or reasonable in the circumstances and the obligation that trustees must incur only those costs that are necessary and reasonable. The amount approved prospectively by creditors or by the IG may turn out to be greater than the amount that is necessary and reasonable for the trustee to incur in the circumstances. Furthermore, in the event of a review by the IG, the trustee will need to justify their whole claim for remuneration, not only the portion in excess of the minimum entitlement.

6 Remuneration review process

- 6.1 The remuneration review process will replace the current taxation regime contained in the Act and Regulations. At present, taxation is conducted by taxing officers appointed by the IG for the purposes of section 167 of the Act. Criticism has arisen from time to time that taxation officers do not appreciate the nature and potential complexity of bankruptcy estate administration and conduct taxations in the same way as they would the taxation of a solicitor's bill of costs, which may not be appropriate. There has also been criticism of the inflexibility of the taxation process.
- 6.2 More generally, referring to the process as 'taxation' gives rise to perceptions of the nature of the process that do not necessarily reflect its purpose. The proposed new process is referred to as a 'review' to distinguish it from the current taxation process. The new regime is directed at enabling disputes relating to remuneration to be more focussed and resolved with less cost.
- 6.3 The Regulations will detail the process for reviews. As far as possible, the same process will apply where:
- a creditor or the bankrupt wishes to dispute a remuneration claim made by the trustee—currently governed by regulations 8.09 to 8.11A; or
 - a trustee (either of their own initiative or at the request of a creditor or the bankrupt) wishes to dispute a bill of costs for services provided by a third party service provider in relation to the administration of the estate—currently governed by section 167 of the Act.

⁵ Similarly, under the previous taxation regime the trustee's remuneration could be reduced to an amount under that which had previously been fixed by creditors - *The Bankruptcy Regulator* (November 2005) Volume 4, Issue 2.

- 6.4 It is proposed that all reviews will be conducted by the IG (with this power being delegated to Insolvency and Trustee Service Australia (ITSA) officers who have the appropriate experience).
- 6.5 Significantly, there will be no fee to apply for a review under the new regime. The costs of the review will be funded by the Government, on the basis that it is essentially part of the regulatory function of the IG. It is intended that the costs will be recovered through the realisations charge as part of the broader cost recovery arrangements applying to ITSA.
- 6.6 The parties to the review will be required to cover their own costs of preparing for or attending the review. Although there are some concerns that the absence of an application fee will leave the process open to abuse and therefore it may prove to be costly and time consuming for trustees, the Regulations will set out a regime with strict entry criteria to ensure that only legitimate claims for review are accepted and progressed. The Regulations will aim to strike a balance between disallowing frivolous claims for review and providing access to review mechanisms. As discussed in part 3.2 above, an application for review of the trustee's claim for remuneration will only be appropriate where there the applicant can demonstrate a flaw in the approval process, improper conduct by or on behalf of the trustee or similarly exceptional circumstances.
- 6.7 Time limits: Where the bankrupt or creditors wish to apply for a review of a trustee's claim for remuneration, an application must be made in writing to the IG within 28 days of the bankrupt or creditors receiving notification of the claim from the trustee. The notice requirements set out in the amended Regulations will inform the bankrupt and creditors of this time limit (see part 4 above). As outlined above (4.13), the bankrupt and creditors will be expected to make an application for review at the first reasonable opportunity after the issue arises. While it is accepted that there may be situations where an issue does not become apparent until subsequent remuneration claim notices are issued, the IG will be entitled to reject an application for review that should have reasonably been made earlier.
- 6.8 Where a trustee seeks to make an application for a review of a bill of costs of a third party service provider, an application must be made in writing to the IG within 28 days of the trustee receiving the bill of costs from the third party service provider. Review of a bill of costs may be sought by the trustee either on the trustee's own initiative or at the request of the bankrupt or creditors. The notice requirements detailed above require the trustee to issue notice to the bankrupt and creditors of a bill of costs of a third party service provider within 7 days of the trustee receiving the bill of costs. Following this notice, the bankrupt or creditors have 14 days in which to advise the trustee in writing if they wish to have the bill of costs reviewed by the IG. Therefore, the trustee should have a minimum of seven days in which to make an application within the 28 day time limit.
- 6.9 The IG will have the power to grant an extension of time in certain circumstances, for example where the applicant has been attempting to resolve the dispute using alternative means. While not explicitly requiring use of

alternative dispute resolution (ADR) which may not be appropriate in all circumstance, this power ensures that parties who do choose to explore ADR options are not penalised.

- 6.10 Criteria for making an application for a review: There is no automatic entitlement for the bankrupt or creditors to have the trustees' claim reviewed.
- 6.11 The Regulations will set out a two step process of review whereby the application must first be accepted by the IG and if accepted, a substantive review will proceed. In relation to the first step, the applicant will need to satisfy a number of qualifying criteria before the IG will accept the application for review. The Regulations will provide that an application for review may be rejected by the IG unless the applicant can demonstrate that they have an interest in the outcome of the review. For example, the IG will reject an application from a creditor who, even if the trustee's claim is reduced, has no prospect of receiving a dividend or from a bankrupt where, even if the trustee's claim was reduced, there is no prospect of a surplus accruing to the bankrupt. Furthermore, in relation to an application for a review of a trustee's claim for remuneration, the Regulations will provide that the IG will reject an application for review unless the applicant can demonstrate one or more of the following.
- There was a flaw in the approval process (for example, where the creditors were not provided with all of the relevant information).
 - The trustee acted improperly (for example, if the trustee failed to perform work with reasonable care and skill and in an efficient and economical way). This might include cases where the trustee has undertaken work that was not necessary and reasonable, having compared the likely cost of the work with the value and complexity of the administration (Division 2.4, Performance Standards for Trustees).
 - There are some other exceptional circumstances (to be decided by the IG on a case by case basis).
- 6.12 One of the aims of the new regime is to allow the review process to be more focussed and, as such, the Regulations should prescribe that the IG will reject an application for review unless the applicant has adequately particularised the issue in dispute. It would not be sufficient for the bankrupt or creditor/s to seek a review of the claim in its entirety unless the applicant can demonstrate that the dispute relates to all aspects of the claim.
- 6.13 The threshold that the applicant must meet before an application is accepted by the IG will be set quite high which will allow the IG to reject an application for review that is frivolous or vexatious. A high threshold is essential to uphold the basic tenet that creditors should have primary control over remuneration and other costs and therefore it should only be in rare cases that the IG would accept an application to review a claim for remuneration where the trustee's remuneration has been approved in accordance with the proper processes.
- 6.14 If the IG rejects an application, the parties to the review must be notified in writing of the IG's reason for rejecting the application.

- 6.15 The Regulations will also provide that when considering whether to accept the application for review, the IG may take into account whether the applicant has sought to resolve the dispute via other means prior to seeking a review. The IG may issue Practice Statements giving further details regarding when the use of ADR may be appropriate.
- 6.16 The IG's powers on review: If the IG is satisfied that the applicant/s has met the threshold criteria specified in the Regulations, the IG will proceed to the second step, that is, a review of the remuneration claim. For the purposes of the proposed amended subsection 167(3)(a), the Regulations will provide for the IG to have broad powers to determine how a review is conducted and the outcome of the review. Without limiting the generality of these powers, the Regulations may provide the IG with specific power to:
- Extend the time limit within which an application for review may be made.
 - Determine whether to conduct the review in person or by written correspondence, or by a combination of those methods.
 - Determine whether a bill of costs is required to be submitted by a trustee or third party service provider and, if so, the form and timeframe in which it must be submitted. The IG may provide additional guidance in a Practice Statement regarding the form of a bill of costs.
 - If a trustee does not comply with a direction to deliver a bill of costs in a specified form and/or within a specified time the IG may decide that the trustee forfeits his or her right to claim all or a part of the remuneration which is the subject of the review.
 - If a third party service provider does not comply with a direction to deliver a bill of costs in a specified form and/or within a specified time the IG may decide that the trustee can declare and distribute a final dividend in the bankruptcy without regard to any claim of the third party service provider that is the subject of the review. If the IG so decides, the estate of the bankrupt is not under any further liability in respect of the claim.⁶
 - Engage an expert (such as a cost assessor) to assist in the review and pay the expert for their assistance. This would be most relevant to third party claims where the IG does not possess relevant expertise.
 - Disallow all or part of an item in a bill of costs if the bill of costs is unclear or lacks sufficient detail to identify the nature of work performed or how the work was reasonably necessary.
 - Interview any party to the review. For the purpose of any such interview the IG may allow any party or their representative to question the interviewee.
 - Require a person to provide a written signed statement in respect of specified matters and specify the form that statement should take.
 - Make directions in respect of the production of all or part of a trustee's file(s) relating to an administration to either the IG or another party to the review. This would include requiring production of documents which are subject to a claim for legal professional privilege. The IG would not be permitted to disclose privileged documents to other parties without the

⁶ This power does not impact on any right the third party service provider may have to recover the funds from the trustee.

- consent of the trustee. Production of privileged documents to the IG would not waive privilege.
- Copy documents or require copies to be made and delivered to the IG or a party to the review.
 - Impose conditions upon a party seeking inspection, production or copies of any documents. This might include directions as to the payment of reasonable costs to the person holding the records, or the maintenance of confidentiality.
 - Proceed with the review in the absence of a party (for example, if a party repeatedly fails to attend scheduled meetings or exhibits unruly behaviour).
 - Adjourn or discontinue the review.
 - Direct the trustee to take remedial action including any refund of remuneration not properly taken or supported. This may lead to counselling or in serious cases, to either litigation or disciplinary action being initiated.
- 6.17 These powers are designed to ensure that there is flexibility in the review process, such that it focuses on issues in dispute, and the cost (in time and money) involved in finding a resolution is minimised.
- 6.18 Provision of information: For the purposes of the proposed amended subsection 167(3)(b), the Regulations will create an obligation on third party service providers to provide such information or documents as may be requested by the IG.
- 6.19 As mentioned in part 5.12 above, Section 12 of the Act allows the IG to make such inquiries and investigations as the IG thinks fit with respect to the administration of, or the conduct of a trustee, in relation to (among other things), a bankruptcy. This function will enable the IG to seek from the trustee any information required to conduct the review.
- 6.20 Outcome of the review: For the purposes of subsection 167(3)(c), the Regulations will allow the IG up to 60 days after the application is lodged—if the IG decides to review the decision—to make his or her decision on the review. The IG will be required to notify the applicant and the party whose claim has been reviewed. The IG must set out the decision on the application, refer to the evidence or other material on which the decision was based and give reasons for the decision. It will be open to the IG to affirm the amount claimed or to substitute a different amount.
- 6.21 In relation to a review of a trustee’s claim, proposed amended subsections 167(4) and 167(5) give the IG powers to require the trustee to pay an excess amount to the estate and to take court action to recover the amount if necessary.
- 6.22 Appeals: A party aggrieved by a decision of the IG will be able to appeal to the Court. This will apply not only in relation to the substantive decision on the review itself (that is, confirming or reducing the amount of remuneration claimed by a trustee or the bill of costs of a third party service provider) but also other decisions such as rejecting an application or extending the time limit

for accepting an application. This right of appeal will be contained in the proposed amended subsection 167(6).