

## Chapter 8: What Happens Now? Part 3

*Updated: 15 April 2025*

### Content

- Part 1: Life in Bankruptcy
- Part 2: The light at the end of the tunnel – getting out of bankruptcy
- **Part 3: Challenging Trustees' Fees**

### Part 3: Trustee's fees

Generally, the creditors have primary control over the Trustee's remuneration because they are the cost bearers. However, there are two circumstances where the level of fees and charges becomes critical to the debtor/bankrupt:

- where there is an attempt to set aside a sequestration order made pursuant to a Creditor's Petition (see **Chapter 10**); and
- where the bankruptcy is to be annulled because the debts and costs of the administration of the estate have been paid.

The trustee's fees depend on whether they are a **Registered Trustee** (ie a privately appointed trustee), or the **Official Trustee**. Registered Trustees' remuneration (including other costs such as valuations, searches, legal fees etc) can amount to **very large sums of money**. Bankrupts are often shocked when they are told the cost to annul the bankruptcy.

Where the Official Trustee is appointed, the estate is administered by officers within AFSA. [The Official Trustee's fees and charges are published on the AFSA website](#). As at 15 April 2025, the Official Trustee's fees for the administration of a bankruptcy are \$4,000 + 20% of money received, with an additional fee of \$62.50 per 15 minutes for time spent in managing the debtor's business. No money is charged to the bankrupt personally – it is only recovered from the estate. However, if the bankrupt wishes to annul the bankruptcy, the Official Trustee's full fee must be paid along with the debts (including interest) and costs of the administration.

The rest of this chapter applies to estates administered by Registered Trustees. It briefly sets out the process for setting the Registered Trustee's remuneration, the notices the parties should receive, and the process for seeking a review of the Trustee's fees and charges. The Official Trustee rates cannot be used as a guide to determine what a Registered Trustee should charge because their rates are calculated by different methods.

## What can a Registered Trustee charge?

The Registered Trustee's remuneration and other costs of administering the estate (plus the costs of the petitioning creditor) are **priority debts**. They are paid out of the estate before any other creditor is paid (s 109(1) *Bankruptcy Act*; reg 25(1) Bankruptcy Regulations).

Division 60 of Schedule 2 (Insolvency Practice Schedule (Bankruptcy)) of the *Bankruptcy Act* concerns the Registered Trustee's remuneration. Sections 161B and 162 of the *Bankruptcy Act*, despite being repealed in 2016, still apply to a Registered Trustee appointed (or who consented to act) before 1 September 2017.

The Registered Trustee is entitled to receive remuneration for 'necessary work properly performed' in administering the estate (s 60-5(1) *Bankruptcy Act*). If the Trustee was appointed (or consented to act) after 1 July 2017, [the Trustee is permitted to claim reasonable remuneration \(s 60-5\(2\) \*Bankruptcy Act\*\) up to \\$5,000, indexed from the previous financial year \(s 60-15 \*Bankruptcy Act\*\)](#) without prior approval. If the Trustee's claim is above this threshold, their remuneration will be in accordance with a **remuneration determination** made by resolution of the creditors, or by the committee of inspection (s 60-10 *Bankruptcy Act*).

The determination may specify that the Registered Trustee is entitled to receive a fixed amount, or an amount calculated on a time-cost basis, or a percentage of money received by the Registered Trustee in respect of the debtor's estate (60-12 *Bankruptcy Act*). If remunerated on a time-cost basis (eg an hourly rate), the determination must include a cap on the amount (s 60-12(2) *Bankruptcy Act*). If remunerated on a percentage basis, the determination must specify the money to which the percentage applies and the percentage must not exceed the prescribed maximum (s 60-12(3) *Bankruptcy Act*; r 60-20 Insolvency Rules). The bankrupt has no say over the rate of remuneration.

The remuneration determination may be the subject of an application to the Inspector-General, for example where the creditors or committee of inspection have rejected a remuneration determination proposal, or it is not cost effective or practicable to seek a determination by the creditors or committee of inspection (s 60-11 *Bankruptcy Act*; rr 60-5 and 60-10 Insolvency Rules).

Registered Trustees are also entitled to claim remuneration for costs incurred that are 'necessary and reasonable' (r 42-60 Insolvency Rules). Registered Trustees should 'handle the assets with a view to achieving the maximum return from the assets to satisfy the claims of the creditors and to provide the best surplus possible for the bankrupt' (Inspector-General Practice Direction (IGPD) No 6: *Remuneration entitlements of a Registered Bankruptcy Trustee* at 5.2, quoting Smithers J in *Mannigel v Aitken* [1983] FCA 183). The Trustee is entitled to a full indemnity of their properly incurred costs, charges and expenses from the estate and will not be penalised for 'mere errors in judgment which fall short of negligence or unreasonableness' (IGPD No. 6 at 5.4, citing Northrop, Wilcox and Cooper JJ in *Adsett v Berlouis & Ors*

[1992] FCA 368 at [32], itself quoting Bowen LJ in *Re Beddoe; Downes v Cottam* (1893) 1 Ch 547 at 562).

Additionally, the Registered Trustee is entitled to remuneration for certain tasks required by law, despite the fact that those tasks do not generate any additional funds for the estate (for example, reporting to creditors, lodging statutory records with AFSA and maintaining accounts).

Where the bankrupt is solvent or has the resources to pay out all debts, the Inspector-General expects the Registered Trustee to identify this early and give the bankrupt an opportunity to pay and take advantage of s 153A (annulment of the bankruptcy on payment of debts) before incurring any unnecessary expense. AFSA has previously undertaken reviews of Registered Trustees to ensure that the s 153A annulments only incurred necessary expenses and that the outcomes were achieved expeditiously.

### **What information must the bankrupt receive in relation to Trustee's remuneration and other costs?**

**Warning:** The following process only applies to bankruptcies on or after 1 December 2010. For older bankruptcies the old taxation system still applies. Contact AFSA for more details.

The bankrupt is entitled to receive three documents: an **initial remuneration notice**, a **remuneration approval report**, and a **remuneration claim notice**.

#### **Initial remuneration notice (r 70-35 Insolvency Rules)**

The Registered Trustee must send the bankrupt an initial remuneration notice within 20 days of receipt of the bankrupt's **statement of affairs**. If no statement is provided within 60 days of the date of the bankruptcy, the Registered Trustee must send the initial remuneration notice within 7 days of the end of the 60-day period.

The notice must contain:

- a brief explanation of the types of methods that could be used to calculate remuneration;
- the method or rate the Registered Trustee proposes to use to calculate remuneration and disbursements;
- an explanation of why this method is appropriate;
- an estimate of the Registered Trustee's total remuneration; and
- the Registered Trustee's preferred payment method.

If the Trustee proposes to charge on a time-cost basis, the notice must include details about the respective rates at which the remuneration of the Trustee and the other persons who will

be assisting (or are likely to assist) the Trustee to be calculated.

### Remuneration approval report (r 70-45 Insolvency Rules)

The remuneration approval report is a prerequisite for the approval of a remuneration determination. Although the Trustee has some flexibility as to when to issue the report, if the determination will be made by the creditors then the report must be given to the creditors and regulated debtor at the relevant determination meeting or with the relevant determination proposal, as the case may be.

The report must contain:

- a list of major tasks to be performed and associated costs, along with the method of calculation of the costs;
- an indication of when the Trustee proposes to withdraw the funds from the regulated debtor's estate to satisfy remuneration;
- an estimate of the total remuneration amount to be claimed; and
- if relevant, an explanation of the impact of the remuneration on dividends.

### Remuneration claim notice (r 70-47 Insolvency Rules)

The Registered Trustee must give a remuneration claim notice if:

1. a **regulated debtor** (a bankrupt or a debtor in a personal insolvency agreement: s 5-15 *Bankruptcy Act*) or creditor has elected to receive the notice;
2. the election was made within 20 business days of the regulated debtor's or creditor's receipt of the remuneration approval report; and
3. the amount of remuneration claimed exceeds the maximum default amount (in accordance with s 60-15(1) *Bankruptcy Act*).

If required, the notice must be given before the Registered Trustee **finalising the administration**, meaning the trustee of the estate of a bankrupt has realized all the property of the bankrupt, or so much of it that can, in his or her opinion, be realized without needlessly protracting the trusteeship (s 145(1) of the *Bankruptcy Act*).

A person is a **regulated debtor** if the person is:

1. a bankrupt; or
2. a person whose property is subject to control under Division 2 of Part X; or
3. a debtor under a personal insolvency agreement; or
4. a deceased person whose estate is being administered under Part XI.

The remuneration claim notice must contain:

- the total remuneration claimed;

- details of the work performed, the value of disbursements claimed, the method of calculating the remuneration and disbursements, and an explanation of any variation from the amounts (or other details) set out in the initial remuneration notice; and
- a statement advising the regulated debtor that they may, within 20 business days after receiving the notice, request the Inspector-General to **review** the amount of remuneration claimed.

### The review process

An application for review can be made by a regulated debtor or a creditor to the Inspector-General (s 90-21(2)(b) *Bankruptcy Act*).

- A person subject to a Section 188 authority or in a Personal Insolvency Agreements (PIA). See **Chapters 5 and 12** in relation to PIAs.
- The application for review must be lodged within 20 business days of receiving a remuneration claim notice from the Registered Trustee (r 90-5(1)(b) Insolvency Rules), or otherwise within 20 business days after the end of the administration of the estate (r 90-5(1)(c) Insolvency Rules).

The Inspector-General may extend this period if it is satisfied that the applicant and the Registered Trustee have been engaged in an alternative dispute resolution process to try to resolve the matter, or it is otherwise appropriate, in all the circumstances, to extend the period (r 90-5(2) Insolvency Rules).

### Application threshold

The Inspector-General must refuse an application if (r 90-10(2)(b) Insolvency Rules):

- the applicant has no **interest in the outcome** of the review (eg the applicant is the debtor and the bankruptcy is not being annulled);
- the applicant has not adequately particularised the issue giving rise to the review; or
- the application is frivolous or vexatious.

In this context, an 'interest in the outcome of the review' means a 'realistic expectation' of receiving a dividend (in the case of a creditor) or a surplus (in the case of a bankrupt) (IGPS No. 16: *Reviewing remuneration of trustees and costs of third party service providers* at [3.8]). Where there is no hope of a surplus even if the remuneration is reduced, the application will be rejected.

Likewise, the Inspector-General must refuse an application unless satisfied that (r 90-10(2)(a) Insolvency Rules):

- the Registered Trustee's remuneration may have been fixed in a manner inconsistent with the Act and Regulations; or
- the Trustee may have acted improperly or without due care and diligence in the administration of the estate.

Despite the above, the Inspector-General may accept an application for review if satisfied that there are **exceptional circumstances** which would justify the review (r 90-10(3) Insolvency Rules). Exceptional circumstances may include but are not limited to (IGPS No. 16 at [3.9]):

- evidence of errors by the Trustee or their staff requiring remedial action, including work done poorly;
- systemic and justified complaints made to AFSA about conduct which indicates the Trustee or their staff have been performing unnecessary work, or work has not been properly executed; and
- evidence of inefficiency or inappropriate billing practices, for example routine work given to expensive senior staff, charging for the Trustee's communication with the regulator, or inordinate delays without explanation.

The Inspector-General may nevertheless refuse to accept an application if satisfied that it was appropriate for the applicant to attempt to resolve the matter without seeking a review, but the applicant did not do so without reasonable explanation (r 90-10(4) Insolvency Rules).

The applicant or the Trustee can ask the Administrative Appeals Tribunal to review the Inspector-General's decision whether to approve the application for review (r 90-5(4)-(5) Insolvency Rules).

### **Form of application**

The application must be in writing (r90-5(1)(a) Insolvency Rules). [Form 28 Application for Review of Trustee Remuneration is available on the AFSA website.](#)

The claim must be particularised to a fair level of detail. Claims that include only general phrases like 'remuneration appears excessive' or 'every item of work is disputed' will not be considered adequate to justify a review. For guidance on the sort of content required, see Annexure A of IGPS No. 16 (which includes some principles and examples from the Australian Restructuring Insolvency and Turnaround Association's *Code of Professional Practice* (ARITA Code) and IGPD No. 6) and Division 42 of the Insolvency Rules (which includes the Standards for Registered Trustees).

The application will only be accepted once all the relevant supporting information has been provided. The Inspector-General may, before making a decision to reject or accept an application, interview the applicant or Trustee, or inspect the Trustee's administration file.

If the Inspector-General refuses to accept the application, the applicant and the Trustee



must be given written notice of the refusal, with reasons, within 10 business days of the decision (r 90-10(5)-(6) Insolvency Rules).

### **What will be taken into account in the review?**

The Inspector-General must conduct the review expeditiously and with as little formality and technicality as permissible (r 90-55(1) Insolvency Rules). The Inspector-General has broad powers of investigation (r 90-55(3) Insolvency Rules). Amongst other things, the Inspector-General can direct that an uncooperative Registered Trustee have their remuneration withheld (r 90-60(2) Insolvency Rules).

The Inspector-General will have regard to the Bankruptcy Act (including Schedule 2: Insolvency Practice Schedule (Bankruptcy)), the Insolvency Rules (including the Standards for Registered Trustees in Division 42), the Bankruptcy Regulations, as well as IGPD No. 6, IGPS No. 15: *Determination of a trustee's remuneration*, IGPD No. 18: *Trustee remuneration notifications*, and the ARITA Code.

The Inspector-General will generally consider whether:

- the work performed was within the scope of the Trustee's powers
- the work was performed prior to the appointment of the Trustee
- the Trustee undertook a proper assessment of whether a particular cost was reasonable, given the value and complexity of the administration
- there were instances of double billing for essentially the same tasks
- the Trustee behaved appropriately and properly managed any conflicts of interest
- the Trustee properly recorded the work done and costs incurred
- the Trustee delayed the administration unnecessarily (incurring additional costs) once the bankrupt indicated a willingness and ability to pay out all debts and expenses.

### **Outcome of review and right of appeal**

The Inspector-General must complete the review and make a decision within 60 days of accepting the application for review (r 90-65(1)(a) Insolvency Rules). At the conclusion of the review the Inspector-General may (r 90-65(2) Insolvency Rules):

- affirm the amount claimed by the Trustee
- disallow some or all of the claim
- substitute another amount some or all of the amount claimed.

If the Inspector-General finds that the Trustee has overcharged, the amount in excess of the appropriate amount is a debt due to the bankrupt estate (r 90-65(3) Insolvency Rules). When the Trustee receives the statement setting out the outcome of the review, any amount owing as a result will be required to be repaid to the bankrupt estate by a certain date. Inspector-General can, if necessary, recover this debt in a court of competent jurisdiction.

Within 10 business days of making the decision the Inspector-General must provide the applicant and the Trustee a written statement setting out the decision, the reasons for the decision, the findings on any material question of fact, and evidence for these findings (rr 90-65(4)-(5) Insolvency Rules).

The trustee, regulated debtor or a creditor may apply for judicial review of, and orders relating to, the Inspector-General's decision (ss 90-21(3)-(4) *Bankruptcy Act*). For a third party costs review, the third party may also appeal to the Court under s 30 of the Act. Whilst there is no specified time limit for making an application to the court, such an application should be made sooner rather than later.

**Important Note:** Clients should be made fully aware that where a bankrupt does not co-operate with a Registered Trustee and the Trustee is required to spend additional time and resources to obtain the requisite information and/or realise assets, then the Trustee's legitimate remuneration will increase substantially. Likewise, if they engage in excessive communications with the Registered Trustee and/or make unsubstantiated/unwarranted complaints about the Trustee to the Inspector-General which the Trustee will have to defend, the Trustee's legitimate remuneration will increase accordingly.