Australian Government

Australian Financial Security Authority

ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

CREDITOR INFORMATION SHEET: REMUNERATION

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What is this information sheet about?

This information sheet provides general information to help you understand the process of approving a trustee's remuneration and your rights in this process. It covers the approval of a trustee's remuneration in a bankruptcy or personal insolvency agreement (which, for the purposes of this information sheet, may be referred to as an 'administration' or 'estate'). At the end of this sheet, as annexure A, there is a timeline detailing the order and ways you can become involved in setting a trustee's remuneration.

If you are a creditor in a bankruptcy or personal insolvency agreement, you may be asked to approve the trustee's remuneration. Creditors have the power to determine a trustee's remuneration, including specifying the amount of remuneration, and the method for working out the amount.

Creditors have a direct interest in the amount of a trustee's remuneration and costs, as these will generally be paid from the estate before any payments are made to creditors.

Trustee remuneration and some internal disbursements (i.e. other costs) must be approved in accordance with the Bankruptcy Act 1966 (the Act) before they can be paid.

What is a trustee?

If a person becomes bankrupt or enters a personal insolvency agreement, an independent registered trustee may be appointed to oversee the estate.

The duties of a trustee are specified in legislation and trustees must adhere to certain standards while administering the estate. All trustees are required by law to undertake certain tasks, some of which may not benefit creditors directly (for example, investigating whether any offences have been committed).

What are a trustee's remuneration and costs?

Trustees are entitled to be paid for the necessary work they properly perform in the administration, including to be:

- paid reasonable remuneration for the work they perform, once this remuneration has been approved
- paid for internal disbursements they incur performing their role such as photocopying, and telephone charges (these costs need approval where a related entity to the trustee may obtain a profit or advantage)
- reimbursed for out-of-pocket costs incurred in performing their role including legal costs and valuation expenses (these costs do not need approval).

If there is not enough money received in the administration to pay the trustee's remuneration and costs, and there is no third party payment arrangement for their payment, the trustee remains unpaid.

How is remuneration calculated?

A trustee may propose calculating their remuneration using one of the following methods:

- an hourly rate, on the basis of time spent working on the administration
- a quoted fixed amount, based on an estimate of the costs or
- a set percentage of asset realisations, i.e. money recovered (this percentage is set under the Act and the Insolvency Practice Rules (Bankruptcy) 2016).

Charging on the basis of time spent is by far the most common method used. Trustees have a set of hourly rates that they will seek to charge to cover staff costs at various levels, and overheads.

Ultimately, creditors, acting collectively and in accordance with the requisite meeting procedures, have the power to determine a trustee's remuneration. Please refer to annexure A to learn about the process for doing this.

What role do creditors play?

Creditors play an important role in the remuneration system. Creditors have the power to approve a trustee's remuneration; that is, give the trustee permission to be paid. This can take place in one of two ways:

- At a meeting of creditors: the meeting of creditors provides an opportunity for creditors to ask questions about the trustee's remuneration and to approve remuneration by a vote.
- Alternatively, the trustee may seek approval of remuneration via a proposal without a meeting. This is essentially a postal vote, and is the most common way remuneration is approved. For further information, please refer to the ARITA fact sheet: **proposals without a meeting**.

Whichever method is used:

- the trustee must provide the same report to creditors about their remuneration, and
- the proposed resolution must be passed by a majority of the participating creditors in both value and number of debts.

Creditors may be asked to approve remuneration for work already performed and/or a fee estimate for work not yet carried out. If the work is yet to be carried out, the trustee must set a maximum limit (cap) on the future remuneration approval. If the remuneration for the work exceeds this, the trustee will have to ask the creditors to approve further remuneration, after accounting for the amount already incurred. This only applies if the remuneration method is an hourly rate.

What information will creditors receive?

There are different types of remuneration reports that you may receive from the trustee during the course of an administration. For information about these reports, please refer to **Inspector-General Practice Direction 18**.

The table details the reports and when you might receive them.

Document	Information it contains	When you will receive it
Initial remuneration notice (IRN)	Details the trustee's chosen remuneration calculation method and provides an estimate of the amount.	Within 20 business days after the trustee receives the debtor's statement of affairs (SOA). If the SOA is not received within 60 days, the IRN must be sent within 7 days of the end of the 60-day period.
Remuneration approval report (RAR)	The amount of remuneration that the trustee is seeking to have approved. A summary description of the major tasks performed, or likely to be performed in the administration. Sets out the right to request a remuneration claim notice. The request must be made within 20 business days of receiving the RAR.	It is sent at the same time as the notice to creditors of the meeting at which approval of remuneration will be sought; or the notice to creditors of the proposal without a meeting by which approval of remuneration will be sought.
Remuneration claim notice (RCN)	Details the work performed and the total amount of remuneration claimed. Includes a statement about a creditor's rights to have the remuneration reviewed.	It is sent before finalising the administration to those who elect to receive an RCN.

How do creditors decide if remuneration is reasonable?

If you are asked to approve a trustee's remuneration, your task is to decide if the amount is reasonable given the work carried out in the administration and the results of that work.

You may find the following information from the trustee useful in deciding if the remuneration is reasonable:

- the method used to calculate it
- the major tasks that have been performed, or are likely to be performed
- the remuneration/estimated remuneration (if applicable) for each of the major tasks
- the size and complexity (or otherwise) of the estate
- the amount of remuneration (if any) previously approved
- if the remuneration is calculated, in whole or in part, on a time basis
- the period over which the work was, or is likely to be, performed
- if it is for work that has already been carried out, the time spent by staff on each of the major tasks
- if it is for work that is yet to be carried out, whether the remuneration is capped.

What if creditors think the remuneration is unreasonable?

If you think the remuneration being claimed is unreasonable, you should raise your concerns with the trustee first. It is your decision whether to vote for or against a resolution to approve remuneration. You may also choose not to vote on the resolution (abstain).

You also have the power to put a different resolution to a meeting of creditors. For example, you could put forward a resolution to change the method used to calculate remuneration, the amount of remuneration, or the time(s) when the trustee may withdraw funds. Any amending resolution must occur before the vote to approve the remuneration. If the amended proposal is passed, the resolution is binding on the trustee. However, an amendment may result in the trustee seeking to be removed as trustee by a resolution of creditors, or the trustee resigning from the appointment with the Court's approval. If the trustee ceases to be trustee without another trustee having consented, the estate will be administered by the Official Trustee.

If the trustee is seeking approval of remuneration without a meeting, and more than 25% of the creditors (in value) who respond object to the proposal being resolved without a meeting, the proposal will not pass. In these circumstances, if the trustee wants the proposal passed, a meeting will need to be convened. Any creditor entitled to participate in the meeting has the right to put a resolution to the meeting before the vote is taken.

What if remuneration is not approved by creditors?

If a trustee does not receive creditor approval, the trustee can apply to the Inspector-General in Bankruptcy ("Inspector-General") to determine their remuneration. The Inspector-General will generally approve the trustee's application unless the trustee has not followed the procedure in the Act and Rules including estimating remuneration, adequately describing the work performed or to be performed and notifying creditors. However, as outlined above, if creditors determine a different amount of remuneration to the one proposed by the trustee, the trustee cannot apply to the Inspector-General to have this changed.

When there are limited funds available in the estate, or the trustee's remuneration is below a statutory threshold, a trustee is entitled to draw a one-off amount up to that threshold (plus GST) without creditor approval.

Information about thresholds can be found on the Indexed amounts page on the **AFSA website**.

Do creditors have review rights?

A creditor may apply to the Inspector-General for a review of remuneration and certain disbursements claimed by a trustee. The remuneration review process is explained in **Inspector-General Practice Statement 16**.

A creditor has 20 business days after receiving an RCN from the trustee (if you elected to receive one), or otherwise within 20 business days after the end of the administration, to give written notice to AFSA that you require a claim for remuneration to be reviewed. There is a form for this purpose on the **AFSA website**. AFSA has a discretion to accept out of time applications.

Reimbursement of out-of-pocket costs

A trustee should be very careful incurring costs that must be paid from the estate; as careful as if they were incurring the expenses on their own behalf.

Where these out-of-pocket costs are internal disbursements paid to the trustee's firm (for example, photocopying and phone calls), the trustee will request creditor approval of these amounts. The trustee may also ask for approval of internal disbursements in advance. If they do, creditors will set the rates for those disbursements and a cap on the maximum amount that can be drawn.

Enquiries and complaints about remuneration

You should first raise any enquiries or complaints with the trustee or their firm. If this does not resolve your concerns, including any concerns about their conduct, you can lodge a complaint with AFSA at **afsa.gov.au** or with ARITA at **arita.com.au**. ARITA is only able to deal with complaints about their members.

More information

The ARITA Code of Professional Practice is applicable to all its members and is available at arita.com.au. ARITA also provides general information to assist creditors at **arita.com.au/creditors**.

The AFSA website has information on trustees' obligations in relation to remuneration, including **Inspector- General Practice Statements** 15 and 16 and **Inspector-General Practice Directions** 6 and 18. This information is relevant to all AFSA stakeholders or anyone affected by personal insolvency.

References

Information in this document reflects collectively the requirements of the Bankruptcy Act 1966 (including the Insolvency Practice Schedule (Bankruptcy), Insolvency Practice Rules (Bankruptcy) 2016, Bankruptcy Regulations 2021, Inspector-General Practice Statements, Inspector-General Practice Directions and the ARITA Code of Professional Practice.

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications relevant to your circumstances.

1. Person becomes bankrupt

You will receive an IRN - usually one month from bankruptcy. This will include:

- the calculation method
- Estimate of Amount

Read this document carefully - it can be the best time to influence the trustee's remuneration.

If you have concerns, firstly raise them with the trustee.

2. If you are dissatisfied with the IRN

Options include:

- Propose and pass a resolution fixing the trustee's remuneration at a meeting of creditors **OR**
- Arrange for a different trustee to be appointed to the estate

3. Pass a resolution

To do this, you firstly must request the trustee to convene a meeting of creditors. To convene a meeting your debt must be

- greater than 25% of all debts, **OR**
- between 10% and 25% and agree to cover the cost of the meeting (this can be your debt, or the total of a group of creditors making the request)

4. If a meeting is held:

You may propose a resolution fixing the trustee's remuneration with respect to:

- the calculation method, and
- the amount of remuneration

The proposed resolution must be passed by a majority of the participating creditors.

If passed, the trustee is bound by this resolution and cannot seek IG approval.*

5. Change trustee

Obtain the consent of the alternative trustee.

The same meeting rules apply to changing trustee as they do to passing a remuneration resolution.

Fix the trustee's remuneration as described above.

If passed, the trustee is bound by the resolution and cannot seek IG approval.

6. If you do none of the above, the trustee will remain trustee

The trustee will send an RAR. Review the report carefully and decide how you will vote.

If you want to continue to participate, contact the trustee to find out if the resolution passed.

If the resolution did not pass, it's an opportunity to return to step two above. It is also an opportunity for the trustee to apply to the IG for approval.

7. Final comments

If the trustee applies to the IG for approval, the IG will usually give it.

Importantly, the trustee **cannot** apply to the IG if creditors **have approved** the remuneration.

Once approved, the remuneration can be drawn subject to available funds and chargeable hours.

Creditors may request an IG review.

*Note: this course of action may result in the trustee causing themselves to be removed as trustee of the estate. If no other trustee is appointed, the Official Trustee will become the trustee.