Code of Professional Practice

for Insolvency Practitioners

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Foreword

As part of its commitment to building professional excellence, the Insolvency Practitioners Association (**IPA**) is proud to release this Code of Professional Practice. The Code is the fundamental building block upon which the insolvency profession sets and manages standards of professional conduct.

It is expected that the Code will be used by all stakeholders to better understand the role, powers and obligations of insolvency practitioners.

The Code is a living document. It will be amended from time to time to reflect changes and developments in insolvency law and practice.

Effective Dates

The sections of the Code dealing with Independence and Remuneration were effective from 31 December 2007 with a transition period which expired on1 April 2008.

The balance of the Code is effective immediately from 21 May 2008.

All codes and statements of best practice previously issued by the IPA are withdrawn.

The Code could not have been developed without the extensive input from members and the dedicated staff of the IPA.

Paul J Cook
President
IPA

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1 Introduction and Purpose of the Code

The primary purposes of this Code of Professional Practice (the **Code**) are to:

- set standards of conduct for insolvency professionals;
- inform and educate IPA members as to the standards of conduct required of them in the discharge of their professional responsibilities; and
- provide a reference for stakeholders against which they can gauge the conduct of IPA members.

Members should be guided, not only by the specific terms of the Code but also by the spirit of the Code.

The Code is in three parts:

Part A sets out the overarching principles.

Part B contains detailed guidance and examples to assist in applying the principles

Part C contains templates and practice notes that should be adopted for use in practice.

1.1 Interaction with Legislation and Regulation

The Code is not a simple restatement of laws, regulations and judicial pronouncements, rather it is a set of principles and guidance built on established precedent. The Code does not override the law, but where the law is silent, or ambiguous, the Code introduces principles to clarify understanding of the desired behaviour.

The goal is the creation of a system of professional regulation, which protects the integrity of the insolvency system, and is:

- fair;
- effective;
- practical; and
- readily understood.

1.2 Principles to Manage Complexity

The practice of insolvency is often complex and varied. It is impossible to conceptualise and codify every possible situation or scenario. Accordingly the Code establishes broad principles that can be applied to every situation. The use of principles avoids the prospect of loopholes being used to justify conduct by distinguishing the particular situation from restrictions set down in a prescriptive list. As statements of principle are necessarily general, explanatory guidance is provided.

The guidance will also assist stakeholders in understanding the limits of the principles so that they do not have unreasonable expectations of what Practitioners are required to do.

Practitioners are expected to use their professional and commercial judgment and when they have doubt should seek legal or other advice, or the assistance of the Court, before proceeding.

1.3 Must, should and may

The Code uses a three level hierarchy of wording to describe and explain its requirements:

- mandatory requirements (**must**);
- recommended behaviours (**should**); and
- permissive statements (**may**).

Where a Practitioner decides not to follow a recommendation (**should**), then the practitioner will need to be able to justify why the recommended course of action was not taken and why the course taken was equivalent within the spirit and intent of the relevant principle. In these situations, the Member should:

- record the reasoning used for diverging from the Code;
- the rationale used to determine that the action followed is not proscribed by the Code; and
- be able to explain that the path taken results in an equal or better outcome for stakeholders.

1.4 Regulators and courts

The insolvency profession is regulated by the Australian Securities and Investments Commission (**ASIC**) and the Insolvency and Trustee Service Australia (**ITSA**). The conduct of Practitioners may be the subject of review by the relevant disciplinary tribunals and by the courts.

It is anticipated that the Code will be used by regulators and the tribunals and courts to assist them in understanding acceptable insolvency practice and proper professional standards.

1.5 Other professional codes

Most members are also members of other professional associations. The requirements of other professional associations will in many areas be similar to those in the Code. To the extent that the Code imposes a higher standard on Practitioners than requirements from other associations, the Code will prevail.

1.6 Application of the Code

The Code applies to all members of the IPA insofar as they conduct or are involved in the administration of insolvencies, formal and informal. The Code therefore applies not only to liquidators and trustees, but also to lawyers, accountants, financiers and others who are members of the IPA. These obligations are stated in the Code when it refers to '*members*'. The Code applies to liquidators and trustees as insolvency practitioners in so far as they are formally appointed to administrations. These obligations are addressed in the Code to '*practitioners*'.

Within the definition of Practitioners, the Code refers to, and treats, liquidators, administrators, and controlling/Part X/trustees as broadly within the one category, primarily as fiduciaries responsible to creditors. Receivers, although Practitioners, do not have the same fiduciary responsibilities to all creditors. Where appropriate, the Code makes separate mention of receivers and excludes them from certain requirements of the Code.

This Code does not apply to Members Voluntary Liquidations.

	Controllers	Practitioners	Members
Members **must** exhibit the highest levels of integrity, objectivity and impartiality in all aspects of administrations and practice management.	x	x	x
When accepting or retaining an appointment the Practitioner **must** at all times during the administration be, and be seen to be, independent.		x	
Disclosure and acceptance of a lack of independence is not necessarily a cure.		x	x
Members **must** communicate with affected parties in a manner that is honest, open, clear, succinct and timely to ensure effective understanding of the processes, rights and obligations of the parties.	x	x	x
Members **must** act in a professional manner and maintain their objectivity, independence, integrity and impartiality when competing for work and promoting their business.	x	x	x
Members **must** attend to their duties in a timely way.	x	x	x
Members **must** not acquire directly or indirectly any assets under the administration of the Practitioner.	x	x	x
When promoting themselves, or their firm, or when competing for work, Members **must** act with integrity and **must** not to bring the profession into disrepute.	x	x	x
A Practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed in an administration.	x	x	
A claim by a Practitioner for remuneration **must** provide sufficient, meaningful, open and clear disclosure to the approving body so as to allow that body to make an informed decision.	x	x	
A Practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval.	x	x	
Members **must** implement policies, procedures and systems to ensure effective quality assurance, compliance and risk management and complaints management.	x	x	x

2 The Insolvency Profession

2.1 Introduction

Registered insolvency practitioners in Australia are usually qualified accountants with experience in the administration of insolvencies. Entry criteria are established by law. Registration as a liquidator or trustee is managed by ASIC and ITSA respectively.

Insolvency is a difficult situation for those involved. Every insolvency involves financial loss for creditors including employees who may also lose their source of employment. An individual and their family may lose their home and other assets. The consequent emotional stress often creates a difficult environment.

Insolvency can result in financial and social disorder. The regime of insolvency law seeks to control this disorder, while a process of balancing the respective rights and entitlements of those parties is pursued.

2.2 Practitioners

- are fiduciaries. They are entrusted with property of the insolvent and required to deal with it in accordance with the law and consistently with the obligations and duties of fiduciaries;
- are appointed to implement the insolvency regime and to deal with and determine the rights and entitlements of all the parties involved;
- owe responsibilities to the creditors as a whole, not just to one creditor (except where appointed as a receiver or receiver manager) and other parties;
- are experienced and qualified professionals who are expected to display high degrees of application and professional competence;
- are subject to court and regulatory supervision;
- have specific legal obligations under the law, for example to:
  - investigate the reasons for the insolvent's financial failure;
  - report on the results of those investigations to creditors and the regulator; and
  - pursue preferences and claims for insolvent trading if it is in the interest of creditors to do so.
- are required to exercise a high level of commercial and professional judgment;
- operate in difficult circumstances, often involving distressed parties, competing demands, strict deadlines, and complex legal, financial and factual issues;
- can be personally liable for debts incurred during an administration;
- are legally entitled to be remunerated for the work they do as a priority payment in the administration; and
- from time to time will accept and complete administrations even though there are insufficient funds to pay their remuneration and disbursements.

2.3 Powers

Practitioners are given extensive powers, including to:

- protect and preserve the assets of the insolvent from creditors pursuing their debts;
- compel individuals involved to answer and explain the circumstances of the insolvency;
- investigate and refer breaches of the law to appropriate authorities; and
- decide the claims of the various parties.

2.4 Control of Assets and Activities

The appointment of a Practitioner to the affairs of a person or a company is legally and practically significant.

- On being appointed as a trustee in bankruptcy, all divisible property of the debtor vests in the trustee, who immediately assumes power over and responsibility for that property.
- Similarly, a liquidator or administrator immediately takes control of the company, including responsibility for its assets, employees and other aspects of its business.
- Those creditors who had previously dealt with the individual or the company are required to deal with the Practitioner.

Once that initial appointment occurs, the Practitioner then has the authority and responsibility to deal with the competing interests of the various parties.

- The creditors, who are likely to have suffered from the financial demise of the insolvent, have interests to be protected, to ensure that realisation of assets of the insolvent are made available from which any dividend might be paid.
- At the same time, the Practitioner has to ensure that creditors are controlled, in ensuring that those assets are not seized by one particular creditor to the disadvantage of others.
- Complexities of creditors' interests are compounded further by issues of secured and priority claims, as well as those creditors who may have been paid out of turn (and thus 'preferred').
- In adjudicating on interests, and payment of dividends, the Practitioner will follow the priorities set out in the law.
- Creditors are entitled to expect that a Practitioner will apply expertise, experience and professional judgment when making decisions about the conduct of the administration. The Practitioner can and may seek the views or approval of creditors, and often has to make commercial and professional decisions in situations of creditor conflict or stalemate.

2.5 Duties and Obligations

The standards of conduct expected of Practitioners have their origin in the special position Practitioners occupy. They have:

- extensive power and autonomy;
- control of assets; and
- power to adjudicate on competing, conflicting and often hostile interests.

In corporate appointments Practitioners become '*officers*' of the company and are required to adhere to the obligations and duties of company officers.

These combine to create a complex web of fiduciary responsibilities.

Practitioners:

- owe a fiduciary responsibility to the parties involved;
- have a duty to be fair and act without bias in assessing the competing interests of stakeholders;
- have an important role in protecting the public interest, by identifying and reporting on a range of issues such as the misconduct of directors; and
- have important statutory investigatory and reporting obligations they are required to pursue even though the costs of investigation and reporting will reduce the funds available to creditors.

This distinguishes a Practitioner's position from that of other professionals. Normal professional relationships have:

- an identifiable client who has willingly selected the professional;
- a contract for professional services which can be terminated at any time in accordance with the contract;
- contracted arrangements for remuneration; and
- may or may not have a fiduciary component.

With the exception of receiverships, in insolvency there is no single client. In a receivership the Practitioner's primary responsibility is to maximise the return to the secured creditor who appointed them.

2.6 Supervision and Scrutiny

Practitioners are subject to scrutiny by:

- creditors, (particularly through creditors' meetings and committees of inspection);
- directors, debtors and others;
- regulators;
- the courts; and
- the IPA.

The range and extent of the scrutiny that applies is beyond that of most other professionals.

2.7 Skill and Judgment

Insolvency involves the difficult intersection of accounting, business and law. Skills are needed to handle a complex situation which invariably happens quickly, with immediate impact on a range of parties beyond the insolvent.

There is great divergence in the types of commercial activities. The business of the insolvent company may range from that of a builder with two employees to an airline with several thousand, and the affairs of the insolvent individual may involve contentious family law disputes, or complex personal tax issues. Assets may be at risk of being disposed of, or serious business decisions may need to be made. Quick commercial judgment and business acumen are required, in particular in view of the fact that a positive commercial outcome – by way of a return to creditors – is all the more difficult in circumstances of limited funds.

3 Stakeholders

Part of the complexity of insolvency is the broad range of stakeholders. Each stakeholder group has a unique perspective, expectations, and obligations. Often they have competing, mutually exclusive interests. The Practitioner also has his or her own legitimate interests which were dealt with in the preceding section. The nature of the interests of the various stakeholders are summarised below.

3.1 Creditors

- are parties to whom a debt is owed by the insolvent. A creditor will normally have traded with the entity with an expectation of being paid for services provided, goods sold, or moneys loaned;
- are parties whose rights of payment by their debtor are replaced by a right to a dividend;
- are usually disadvantaged financially;
- are reliant on the Practitioner's experience and skill in having their losses recouped;
- rely on the Practitioner to be informed about the administration;
- have some obligation and interest in informing and otherwise assisting the Practitioner in making decisions where creditor approval is required;
- are parties whose dividend payments are the outcome of work done by the Practitioner in realising or recovering funds;
- have power to approve remuneration; and
- may, if they have received a preference payment, be required to repay the preference, notwithstanding that they may have additional monies owed.

3.2 Employees

- can be more immediately affected by the insolvency of their employer, in terms of immediate loss of wages, and accrued entitlements;
- can rely to an extent on the General Employee Entitlements and Redundancy Scheme (**GEERS**), and on statutory priorities over other creditors; and
- can require particular attention and consideration by a Practitioner above and beyond other creditors.

3.3 Suppliers

- are usually creditors of the insolvent with claims in the insolvency and may be subject to claims by the Practitioner, for recovery of preferences or for disputed retention of title claims;
- are persons whose support (for ongoing supplies or services to the insolvent) is often needed for a trade-on of a company in liquidation, receivership, voluntary administration or a deed of company arrangement; and
- can require particular attention by a Practitioner if such on-going support is required.

3.4 Regulators

- have a statutory interest in the proper administration of the legislation;
- have statutory powers to review the conduct of Practitioners, including powers to initiate a review by the courts of the remuneration claimed;
- are available to assist creditors with complaints and concerns;
- have an obligation to government and the courts; and
- have a role in the registering of Practitioners.

3.5 The courts

- may assist the Practitioner in determining complex issues by giving directions, determining and enforcing rights of recovery, and protecting Practitioners as required;
- may determine the rights and responsibilities of all parties, including to review the decisions of Practitioners;
- may review the performance and remuneration of a Practitioner;
- rely upon the honest and competent representation of parties to assist the courts in making decisions in accordance with the law and to advance the interests of justice;
- expect and enforce high standards of conduct; and
- are available to Practitioners who can seek guidance and declarations.

3.6 The public

- has an interest in ensuring that the law is clear and understood, that it is upheld and also that commercial morality is maintained;
- has an expectation that improper conduct will be investigated and reported to the relevant authorities; and
- and also has an expectation that the insolvency profession is staffed by persons of high competence and integrity.

In corporate insolvency only:

3.7 Contributories

- have an interest in the entity's affairs being properly administered including so as to ensure that surplus funds, if any, are paid to them; and
- may also be creditors and have separate claims in that capacity.

3.8 Directors

- have obligations under the law with a view to assisting in the proper administration of the insolvent, including in any recoveries for the benefit of creditors;

- can be personally liable for losses to the administration at the suit of the Practitioner, or in some cases the regulator, or the Australian Taxation Office; and
- may also be creditors or contributories and have separate claims in those capacities.

In personal insolvency only:

3.9 The Bankrupt or Debtor

- has obligations under the law to assist and co-operate with the trustee;
- has duties owed to them by the trustee, including to ensure that they and their property are protected from creditor claims.

3.10 The Spouse of the Bankrupt

- is often the joint owner of the matrimonial home with the bankrupt or has an interest in that and other joint assets, in equity or under family law, which the trustee needs to assess.

3.11 Official Trustee and the Official Receiver

The Official Trustee:

- undertakes the administration of the majority in number of bankruptcy estates with the remainder handled by Practitioners;
- may transfer the administration of estates to Practitioners.

The Official Receiver:

- provides services to registered trustees in relation to the issue of statutory notices and the conduct of examinations.

4 Definitions and Interpretation

4.1 Construction

The meanings of the words **must**, **should** and **may** are explained at 1.3. These words are used throughout the Code and are indicative of the standard of conduct required of the Practitioner. The Code is meant to complement and be additional to any statutory obligations and regulatory requirements that Practitioners have in carrying out their responsibilities.

The Code applies to '*members*' of the IPA where that term is used. The Code applies to Practitioners in relation to their conduct of formal administrations. Where the formal administration is conducted by a Practitioner under Parts 5.1 (arrangements and reconstructions) or 5.2 (receivers and other controllers) or 5.5 Division 2 (members' voluntary winding up) of the *Corporations Act 2001* (Cth) (Corporations Act), different responsibilities under the Code may arise. In those cases, the Code identifies those responsibilities.

4.2 Defined Terms

The following defined terms are used throughout the Code, shown commencing in capitals. Unless otherwise indicated, the terms have the meanings below.

Administration	Refers to a formal insolvency arrangement under either the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) or the Corporations Act. In some cases, there may be corporate insolvency appointments under other legislation such as co-operatives and Aboriginal corporations legislation. Where appropriate, the term applies to a solvent administration under Chapter 5 of the Corporations Act.
Alternate	The Practitioner nominated to replace the Incumbent.
Appointee, Appointment or formal Appointment	The formal legal appointment of a Practitioner as a trustee in bankruptcy, a trustee appointed under s 50 of the Bankruptcy Act, a debt agreement administrator under Part IX, or a trustee under Part X; or as a liquidator or provisional liquidator, a voluntary administrator or a deed administrator under Part 5.3A of the Corporations Act, or as a controller; or as a scheme manager under Part 5.1. The word "appointee" has a parallel meaning.
Approving body	The body with authority to approve remuneration or a course of conduct; usually the creditors, the committee or the court.
Code	The Code of Professional Practice for Insolvency Professionals as amended from time to time.
Controller	A person appointed as controller or managing controller under Part 5.2 of the Corporations Act.
DIRRI	The Declaration of Independence, Relevant Relationships and Indemnities.
Incumbent	The Practitioner acting as the appointee.
Engagement	All work undertaken by a Member or a Member's firm.
Expenses	Refers to necessary financial outlays incurred or paid by the Practitioner in the administration. The term includes 'costs' and 'disbursements'.
Fiduciary duty	The duty owed by a liquidator or trustee to exercise rights and powers in good faith for the benefit of relevant stakeholders in an insolvency.
Firm	in relation to a Practitioner, has the definition under s 9 of the Corporations Act It also includes federated practices.

Indemnity	Refers to any payment made as well as arrangement whereby payments are promised.
Legislation	Refers to the Bankruptcy Act and the Bankruptcy Regulations and the Corporations Act and Corporations Regulations. The term refers to other legislation under which formal insolvency appointments can be made.
Member	Member is used to include IPA professionals who are members in any capacity of the IPA.
Practitioner	Refers to a member of the IPA who acts under a formal appointment, and, unless otherwise indicated, includes the Practitioner's firm and partners and staff.
Professional relationship	Any engagement under which the appointee has given professional advice in accounting, insolvency, financial advice, tax or other such areas for the insolvent.
Remuneration	Refers to the monies claimed by a Practitioner on account of work performed or to be performed by the Practitioner in the administration. Also referred to as '*fees*'.

Part A: The Principles

Conduct

- Members must exhibit the highest levels of integrity, objectivity and impartiality in all aspects of administrations and practice management.
- When accepting or retaining an appointment the Practitioner must at all times during the administration be, and be seen to be, independent.
- Disclosure and acceptance of a lack of independence is not necessarily a cure.
- Members must communicate with affected parties in a manner that is honest, open, clear, succinct and timely to ensure effective understanding of the processes, rights and obligations of the parties.
- Members must attend to their duties in a timely way.
- A Practitioner must not acquire directly or indirectly any assets under the administration of the Practitioner.
- When promoting themselves, or their firm, or when competing for work, Members must act with integrity and take care not to bring the profession into disrepute.

Remuneration

- A Practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed in an administration.
- A claim by a Practitioner for remuneration must provide sufficient, meaningful, open and clear disclosure to the approving body so as to allow that body to make an informed decision.
- A Practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval.

Practice Management

- Members must implement policies, procedures and systems to ensure effective:
- Quality Assurance;
- Compliance Management;
- Risk Management; and
- Complaints Management.

Part B: Guidance

5 Integrity, Objectivity & Impartiality

Members **must** exhibit the highest levels of integrity, objectivity and impartiality in all aspects of administrations and practice management.

Members are required to be:

- straightforward;
- honest;
- truthful; and
- adhere to high moral and ethical principles in the conduct of their practices and appointments.

Members must be objective. This requires Members to exercise their judgment free from:

- bias;
- conflict of interest; or
- undue influence of others.

When exercising their judgment Members **should** take care to ensure that they:

- are not influenced by personal feelings, or prejudice;
- are making decisions based on the known facts;
- have no direct personal interest; and
- are not favouring one person or side more than another when applying the law.

Before exercising their judgment, Members **should** take reasonable steps to ascertain the necessary facts to ensure that a sound judgment can be made.

Integrity also requires Members to take care to ensure that all communications, including reports, whether issued personally, or by delegation:

- are free from false or misleading statements;
- are not prepared recklessly;
- do not omit, or obscure information required to be included; and
- preserve confidential information.

6 Independence

When accepting or retaining an appointment the Practitioner **must** at all times during the administration be, and be seen to be, independent.

6.1 The Test of Independence

Independence has two parts. A Practitioner **must**:

- be independent in fact; and
- be seen or perceived to be independent.

A Practitioner must not accept an appointment, or continue to act under an existing appointment, if:

- a fair-minded and informed observer (reasonable person);
- on the information available (or which should have been available) at the time;
- might reasonably form the opinion that the Practitioner might not bring an independent mind to the administration and thus may not be impartial or may act with bias;
- because of a lack of independence, or a perception of a lack of independence.

The requirement for independence does not apply to Controllers who are appointed by the secured creditor and have a contractual relationship with the appointor.

6.1.1 Not a State of Mind

While Practitioners may consider that their personal integrity and skill makes them immune to the influences of conflicts, this is not the test. This is not a reflection on the integrity of the Practitioner; it is a consequence of the need to preserve the perception of independence.

It is important to recognise that there is likely to be contact between the Practitioner and the insolvent, directors, creditors or advisers to them before the acceptance of the Appointment. Mere contact does not create a threat to independence. What is important is the nature of the relationship between the Practitioner and the various stakeholders. This is discussed at length in the following sections.

6.1.2 Possible Conflicts - How Real or Perceived?

The mere possibility of a conflict is not a bar to accepting or continuing an appointment. The test is whether a reasonable and informed person on the information reasonably available at the time, forms the view that a conflict was *likely* to arise.

The Practitioner **must** be proactive in anticipating, identifying and uncovering the circumstances that may give rise to a conflict of interest – and not to simply wait for the conflicts to develop over time.

6.1.3 Timing

The independence test is to be applied:

- on the facts reasonably available at the time the decision to accept or continue the appointment is made; and
- not retrospectively with the benefit of hindsight in relation to facts and circumstances that could not reasonably be expected to have been known or discoverable.

6.1.4 Allegations of lack of independence

Allegations of a lack of independence may be made by self-interested parties wishing to improve their position. For example claims may be made:

- that directors, or a debtor, chose a Practitioner because of some perceived reputation for being lenient on insolvents, or less diligent in pursuing matters;
- by insolvents and their associates who are being investigated or sued by the Practitioner; or
- by a creditor being pursued for a preference.

The mere existence of an allegation is not evidence of a conflict. When an allegation of lack of independence is made a Practitioner **should**:

- objectively assess any such claim;
- decide accordingly; and
- advise the claimant of the outcome.

The Practitioner may seek directions from the court.

6.2 Rationale for the Independence Principle

Independence is critical because of the nature of the role of the Practitioner. Tasks such as adjudicating on complex and competing interests, preserving and selling assets and investigating and pursuing claims and adjudicating on what can be complex and competing interests require a high degree of independence.

Stakeholders need to have confidence in the Practitioner's conduct and decision making. They need to be able to regard the Practitioner as fair, unbiased and not acting from self interest when exercising his or her professional and commercial judgment.

The Practitioner **must** act independently of all stakeholders.

Examples
The Practitioner must be independent of and be seen to be independent of each of the creditors, including the creditor who initiated the appointment and in respect of which appointment a perception of bias can often be in issue. A Practitioner may be required to pursue a claim against that creditor for recovery of a preference. Other creditors expect that such a claim will be brought, irrespective of the fact of the initial appointment.

The Practitioner must be independent of and be seen to be independent of each of the directors, who may have initiated the appointment. All creditors should be able to expect that the Practitioner will properly investigate and report on the causes of the company's failure and inquire into the conduct of the directors notwithstanding that the directors or their advisers initiated the appointment. In particular, the Practitioner must secure compliance by the directors with their responsibilities; pursue investigations which may result in civil claims against those directors or their family or associates, or result in criminal prosecution. Parallel responsibilities apply in bankruptcy.

In the pursuit of all these responsibilities, the Practitioner **must** display a high level of independence and objectivity.

6.3 Threats to Independence

The following more detailed guidance will assist Practitioners in applying the test of independence in particular situations.

In the commercial world, the typical application of risk management comprises several steps:

- identification of the threat;
- categorisation of that threat;
- conduct of a threat impact assessment;
- design of strategies to manage the threat; and
- implementation of a threat management program.

For Practitioners, the process for identifying risks to independence is simpler. The threat categories that have been identified and the options once the risk has materialised are more limited.

6.4 Relationship Threats to Independence

The threat to independence through relationships can most easily be seen as a hierarchy of thresholds. At each threshold there will be limited circumstances (exceptions) which permit the acceptance or continuation of the appointment. These are set out in the following sections.

The hierarchy is illustrated in the diagram below.

6.5 Trivial relationships

Trivial relationships are not a bar to acceptance or retention of an appointment. A practitioner is not required to list trivial relationships in the DIRRI.

However, there is no simple definition of what is trivial. Useful indicators would be that the relationships may be considered inconsequential, remote, or coincidental.

Examples of Trivial Relationships

- *A chance meeting at a social event through a mutual acquaintance.*
- *Members of the same club (e.g. Lions, Rotary) or school committee.*
- *Having personal banking relationships with a financial institution that is a creditor.*

The boundaries of what is trivial would be reached once there has been a pattern of interaction that was more personal or continual.

6.6 Referrals from other Professionals and Creditors

Practitioners may accept a series of appointments from individual creditors, lawyers, accountants or from another Practitioner. Networks of referrals between professionals are normal and are acceptable provided the referral and relationship is based on the quality of professional service and expertise. This would invariably have been identified through that prior experience.

A Practitioner **must** not accept any referral that contains, or is conditional upon:

- referral commissions, inducements or benefits;
- '*spotter's fees*';
- recurring commissions;
- '*understandings*' or requirements that work in the Administration will be given to the referrer; or
- any other such arrangements that restrict the proper exercise of the Practitioner's judgment and duties.

Panel arrangements, ie where a practitioner is on a panel of practitioners maintained by a creditor for selection for appointment, are acceptable.

Examples

- *A Practitioner may undertake work from time to time on behalf of a major bank.*
- *A Practitioner may be on a panel of practitioners for a major creditor such as the Australian Taxation Office.*

6.7 Ongoing relationships with creditors

The fact that a Practitioner or the Practitioner's firm has had an ongoing relationship with a creditor of the insolvent will not in itself result in a lack of independence. However, a Practitioner **must** always be aware of the overriding obligation to both be and be seen to be independent.

Where a Practitioner has a relationship with a person who has a charge on the whole or substantially the whole of the insolvent's property, that relationship must be disclosed in the DIRRI.

6.8 Professional Relationships within two years

Practitioners must not take an appointment if they have had a Professional Relationship with the insolvent during the previous two years. The purpose of this restriction is to avoid any perception of a lack of independence of the Practitioner. This is referred to as the 'two year rule'.

6.8.1 Exceptions to the two year rule

A number of exceptions to the two year rule have been created because the exceptions may, in the specific circumstances, be in the interests of creditors, or the professional relationship was of such a nature as to have no material bearing on the independence of the Practitioner.

The Practitioner **must** examine the particular circumstances carefully and document clearly the reasons why and how the decision to accept the appointment was reached.

The onus of justifying how independence is preserved when relying on any of these exceptions is on the Practitioner.

It is not sufficient for a Practitioner to simply include the relationship in a DIRRI or a declaration under the legislation, or in other advice to creditors. Such a declaration will not cure a real or perceived lack of independence.

Practitioners **must** be able to explain the circumstances that give rise to the potential conflict and the reasons for believing the exception can be applied in the circumstances. This **should** be recorded in writing on the relevant file.

At a minimum the creditors **must** be fully informed so that they understand the situation. The Practitioner should also consider seeking legal advice to determine whether court approval of such appointments should be sought.

a) Immaterial Professional Relationship

Where the Practitioner has had a prior professional relationship with the insolvent, or an associate of the insolvent, within a period of two years before the proposed appointment, the Practitioner **may** accept the appointment if the prior professional relationship was an 'Immaterial Professional Relationship'.

An Immaterial Professional Relationship is an assignment or series of assignments that:

- was or were of very limited scope;
- would not normally be subject to review by the Practitioner during the course of the administration;
- will not influence the ability of the Practitioner to fully comply with the statutory and fiduciary obligations associated with the proposed appointment; and
- will not influence the objectivity, impartiality or judgment of the Practitioner in performing those duties.

When determining whether the prior professional relationship was an Immaterial Professional Relationship, the Practitioner **must** consider whether a fully informed reasonable person would be of the same view.

A Practitioner **must** disclose to creditors in the DIRRI:

- the nature of the services provided in the prior professional relationship;
- the period or periods over which the services were provided;
- the fees received for those services, the unbilled time costs and outlays, and any amounts written off; and
- an explanation why the relationship does not result in a lack of independence.

b) Pre-appointment advice

It is common for Practitioners to give advice to the insolvent (individual or company) about the insolvency process and options available to the insolvent prior to taking a formal appointment.

Examples

- *A company will generally need to approach a Practitioner for advice on the insolvency or likely insolvency of their company before the board resolves to appoint a Practitioner as administrator under s 436A of the Corporations Act;*
- *An individual will need to approach a Practitioner for advice on options in personal insolvency, for example between a Part X agreement or bankruptcy.*
- *Notwithstanding that a Practitioner may be engaged by either a creditor or the debtor, he or she is a professional with obligations to all stakeholders, and the mere fact of this initial contact having occurred should not be taken to constitute a bias or lack of independence.*

This will not be a risk to independence, providing that the advice given by the Practitioner is restricted to:

- the financial situation of the debtor;
- the solvency of the debtor/company;
- consequences of insolvency;
- alternative courses of action in the case of insolvency; and
- in the case of companies, the advice must be to the company.

c) Investigating Accountant leading to formal appointment

A Practitioner may accept an Appointment after acting as an Investigating Accountant (**IA**), whether the IA role was for a creditor of the company or the company itself.

Where the IA role was for the company, the restrictions regarding pre-appointment advice apply.

The following details about the IA **must** be included in the DIRRI:

- who appointed the Practitioner;
- to whom the Practitioner reported;
- the timeframe of the report; and
- the fee paid.

6.9 Group Company Appointments

There are sound commercial and practical reasons to appoint a Practitioner to a group of related companies. For example, a group appointment can result in cost savings, data sharing, and a more complete and accurate picture of the group activities and its financial position.

Practitioners need to be aware of possible conflicts that could arise as a result of group appointments. These include circumstances where there are:

- preference payments between the group or other voidable or contestable transactions;
- insolvent trading liabilities of the parent company; and
- contentious proofs of debt.

There may be no lack of independence where there is no real dispute as to the facts, or as to the validity of transactions between companies in the group.

Threats to independence stemming from group appointments usually are only identified after acceptance of the appointment. If, after accepting the Group Appointment, a conflict arises, such as disputed inter-company loans or transactions that may result in dispute or litigation putting the Practitioner in effect on both sides of the dispute, then, in order to preserve independence, the Practitioner **must**:

- advise creditors on how the issue will be managed; or
- seek directions from the court; or
- seek approval for the appointment by the court of a special purpose administrator or liquidator.

It is not a breach of the Code to have accepted the appointment provided the Practitioner takes appropriate action once the threat is identified.

6.10 Up-front payment of fees

a) Companies

Practitioners may accept monies to meet the costs of the administration, prior to the acceptance of the appointment, provided that:

- the monies are held on trust;
- there are no conditions on the conduct or outcome of the Administration attached to the monies (i.e. achieving a certain outcome); and
- full disclosure is made to the creditors in the DIRRI.

Monies held on trust may only be drawn as remuneration in the same manner as normal remuneration claims.

b) Personal Insolvencies

A trustee in bankruptcy **must** not ask for a payment up-front from the debtor prior to accepting a debtor's petition.

The only exception to this rule is if the trustee:

- informs the debtor:
  - of the income contribution regime; and
  - that any payment or surety are purely voluntary; and
  - of alternative choices of trustees, including the Official Trustee, should the debtor not be prepared to voluntarily make the payment; and
- reports to creditors on the source and basis of the funds; and
- does not make or suggest any contract concerning liability for or recovery of the payment, (other than is as available to the trustee under section 161B); and
- takes remuneration in accordance with s 162 of the Bankruptcy Act.

6.11 Professional relationships beyond two years

A Practitioner may take an appointment if the professional relationship occurred more than two years prior to the date of the Appointment.

Nevertheless, the Practitioner **must** not take the appointment if the prior relationship:

- has real potential for a litigation claim against the Practitioner by a stakeholder; or
- is material to the insolvency; or
- is related to structuring of assets in order to avoid the consequences of insolvency i.e. the distancing of the assets from creditors in the event of insolvency.

6.12 Other Relationships

Other' non-trivial relationships include all relationships or interests with the Insolvent that are not within the Practitioner's role as an accountant or insolvency professional. A Practitioner **must** not take an appointment if there are or have been other relationships with the insolvent. Unlike professional relationships, the two year time limit does not apply.

Examples of other relationships are set out below.

6.12.1 Family

In family (or close personal) relationships, the potential for conflict is so great that the appointee **must** not consent to act. These relationships include close or immediate family relationships with the insolvent or a director or officer of the insolvent, or with an employee or adviser of the insolvent who is in a position to exert direct and significant influence.

6.12.2 Business

Where the Practitioner has had business dealings outside what would be termed a professional relationship the appointee **must** not consent to act.

***Examples** of business dealings include where a Practitioner (personally, or through related entities):*

- *has a financial interest in the Insolvent or a related entity, solely or jointly;*

- *is involved in partnerships, joint ventures, co-investments;*
- *received from or made a loan to an insolvent or related entity or any of its Directors, officers or senior employees;*
- *has partners or senior employees of his or her firm that are, or have recently been, a director, officer or substantial shareholder or employed by the Insolvent or related entity in a position to exert direct and significant influence.*

6.12.3 Friendship

There is necessarily no test for friendship and regard **should** be had to how the reasonable person would view the friendship. A trivial friendship creates no lack of independence, for example a casual acquaintance, but longer term relationships and friendships will.

6.12.4 Animosity

Animosity is a threat to Independence as it may bias the behaviour of the Practitioner against the Insolvent, or be perceived to do so. If there is a history of '*bad blood*' then the Practitioner **should** carefully consider whether to take the appointment.

It is not unusual for the insolvent or some creditors to dislike or disagree with the Practitioner, particularly if there has been vigorous prosecution for recovery of funds or tracing of assets. This is not a ground for a claim of breach of independence based on animosity.

6.13 Actions to be taken to avoid risks materialising

Practitioners **must** actively seek to identify any risks to independence before accepting an Appointment.

As a minimum, every firm **must** document and implement policies and processes that:

- recognise the importance of independence;
- establish clear criteria to identify and categorise threats;
- standardise the steps of investigation, enquiry, reporting and resolution;
- require education of Principals and staff on the process;
- include a process of consultation with senior staff for difficult cases;
- provide guidance as to courses of action to be taken if a threat to independence is identified after an Appointment is accepted; and
- monitor adherence to the process.

An effective process will help to embed in the firm culture an understanding that independence issues are significant and important. It will also provide a consistency in approach and adherence reducing risk.

The Practitioner:

- may delegate to staff the task of gathering information on which the decision is based; but
- is responsible for ensuring adherence to the process; and

- cannot delegate the decision on independence.

6.14 Declaration of Independence and Relevant Relationships and Indemnities (DIRRI)

Disclosure of interests or relationships that create a lack of independence, or a perception of a lack of independence, does not remedy or cure the situation. The provision of a DIRRI is a process for identifying relationships that are not threats to independence, but need to be disclosed to creditors to ensure transparency. Declarations of relevant relationships and declarations of indemnities are required under the Corporations Act in certain instances. It is intended that the provision of a DIRRI in the template prepared by the IPA meets, and goes beyond, those statutory requirements.

In the case of personal insolvency, the DIRRI template will need to be amended to address the nomenclature and relationships of bankruptcy. For Part X agreements, Practitioners **must** also complete the particular statutory requirements under the Bankruptcy Act.

For all corporate and personal insolvency appointments (excluding receiverships and members' voluntary liquidations), at the earliest practical opportunity, the Practitioner **must** provide to creditors a DIRRI comprising:

a) A Declaration of Independence that the Practitioner

- has undertaken a proper assessment of risks to independence;
- has determined that the assessment identified no real or potential risks to independence; and
- is not otherwise aware of any impediments to taking the Appointment.

b) A Declaration setting out prior personal and business relationships of the Practitioner, or Firm with

- the insolvent;
- an associate of the insolvent;
- a former Practitioner of the insolvent;
- a person who has a charge on the whole of or substantially the whole of, the insolvent's property in the preceding 24 months.

The schedule **should** contain a concise summary of each relationship.

The Practitioner **must** state:

- why the relationships disclosed do not preclude acceptance of the appointment i.e. they are not excluded by law or by the Code; and
- that there are no other known prior professional or other relationships that require disclosure.

c) A Declaration of professional relationships of the Practitioner with the insolvent

This declaration **should** describe the nature of work carried out during that professional relationship (if any).

Where the relationship comes within one of the exceptions permitted by the Code, for example pre-appointment advice, then the declaration **should** contain sufficient detail so that creditors can understand:

- the nature of the relationship;
- the reasons why the acceptance of the appointment by the Practitioner is in the best interests of creditors and the administration; and
- why there would be no conflict of interest or duty.

d) A Declaration of Indemnities disclosing

- the identity of each indemnifier and the extent and nature of each indemnity, (other than statutory indemnities); and
- any payment made by or for the insolvent on account of the Practitioner's remuneration and disbursements.

6.14.1 Timing

The DIRRI **must**:

- be provided with the first communication to creditors;
- be provided no later than with the notice of the first meeting of creditors; and
- be tabled at the first meeting of creditors.

6.14.2 Replacement Appointees

These requirements also apply to any Practitioner accepting a replacement appointment.

All replacement Practitioners **must**:

- table a copy of the DIRRI at the meeting prior to the casting of the vote regarding their appointment; and
- if they are appointed, provide a copy of their DIRRI to all creditors with their next communication to creditors.

For additional requirements of replacement administrators, refer to section 11.8.

6.14.3 New Information

If a Practitioner becomes aware that the DIRRI has become out of date or there is an error, then a Practitioner **must** update the DIRRI and provide it to creditors with the next communication with creditors and table the DIRRI at the next meeting of creditors.

6.15 Post Appointment Actions – threat to Independence Identified

If information comes to light about relationships and threats to independence that were not known at the time of the acceptance of the Appointment, or the circumstances materialised after the Appointment commenced, then the following applies.

6.15.1 Non-precluded Relationships

Where the relationship or threat to independence is identified and was one that would not have precluded the acceptance of the appointment, then, if the Practitioner:

- followed the requirements of the Code;
- has adequate policies, systems and processes;
- the situation was a result of inadvertence; and
- it was not reasonable to know or anticipate the situation at the time of accepting the appointment;

then the omission is not a breach of this Code and the Practitioner may continue with the Administration subject to amending the DIRRI and sending the amended DIRRI to creditors.

6.15.2 Precluded Relationships

Where a relationship, or conflict of interest is identified and the relationship or conflict was one where the Appointment should not have been accepted if the circumstances had been known at the time, then the following applies.

a) Immediate Actions

As soon as practicable after the circumstances or facts are identified the Practitioner **must** prepare and deliver a report for creditors, and as appropriate, ASIC, ITSA, the Court, and/or the IPA setting out:

- the nature of the relationship and conflict;
- the key facts and origin;
- reasons why the issue was not detected prior to acceptance of the appointment;
- the potential impact on perceived independence;
- the status of the Administration – work done, work in progress and work to complete the Administration;
- the costs of stepping down and transferring the appointment; and
- fees taken and outstanding.

b) Innocent or Inadvertent Behaviour with Mitigating Factors

If the Practitioner:

- followed the requirements of the Code;
- has adequate policies, systems and processes;
- the situation was a result of inadvertence; and
- it was not reasonable to know or anticipate the situation at the time of accepting the appointment;

then this will not be a breach of the Code.

Notwithstanding the innocent behaviour with all the mitigating factors in place the Practitioner **must**:

- where the Administration is substantially complete;
  - apply to the Court for leave to continue and complete the Administration;
- where the Administration is not substantially complete:
  - expeditiously resign from the Appointment;
  - apply to the Court to transfer the administration; and
  - bear his/her costs of the transfer of the administration.

The Practitioner may, unless ordered by the Court, retain fees for work necessarily and properly done until the identification of the threat to independence. The Practitioner may not charge for transferring the Appointment and **must** ensure that the new Appointee is provided with all materials as expeditiously as possible.

The Court may determine that it is acceptable in the circumstances for a Practitioner to continue, notwithstanding the breach of the Code.

c) Reckless, Negligent or Intentional Behaviour or Behaviour without Mitigating Factors

Where the Practitioner:

- has wilfully or negligently taken the Appointment; or
- has not followed the requirements of the Code; or
- does not have adequate systems and processes to assure independence,

then this will be a serious breach of this Code. In this situation the Practitioner **must** not be permitted to benefit or profit from his or her behaviour.

It is not a defence to say the work done in the Administration was necessary and properly performed. The intention of this sanction is to deprive the Practitioner of any potential benefit. This will act as a deterrent, reducing the benefit of Practitioners taking the risk of detection.

7 Limited Value of Disclosure

Disclosure and acceptance of a lack of independence is not a cure.

In many financial relationships, disclosure and consent, often involving partitioning of information such as '*Chinese Wall*' arrangements, is accepted as a cure for many types of conflicts of interest.

The independence obligations of Practitioners are greater. Where there is a threat to independence as identified in the previous section, then disclosure, even with consent will not cure the problem and the appointment **must** not be taken.

While a court may permit the acceptance or continuation of the Administration, the defence of '*full disclosure to creditors who gave their approval*' will not be accepted as a defence for breach of the Independence provisions of the Code.

8 Communication

Members must communicate with affected parties in a manner that is honest, open, clear, succinct and timely to ensure effective understanding of the processes, rights and obligations of the parties.

8.1 Need for Effective Communications

Effective communication in insolvency is essential because of the:

- legal and commercial complexity of the insolvency processes;
- legal and commercial implications of letters and reports;
- high emotions surrounding financial loss and loss of livelihood; and
- lack of knowledge and expertise in the insolvency process, and its language and terminology, by most stakeholders.

Accordingly, communications from members **should** be:

- clear and concise and written where possible in lay terms (except when communicating with sophisticated creditors and advisers);
- objective;
- responsive;
- timely; and
- given in a professionally courteous tone and manner.

Practitioners **should** carefully exercise their professional judgment when balancing the needs of individuals for information or responses to inquiries with the overall efficiency and costs of the administration.

Practitioners **should** display sensitivity in dealing with individual creditors who will have suffered a financial loss that may be small in the broader context, but may be significant to them. Clarity in explaining the various rights, obligations, processes and timeframes can diffuse feelings of animosity wrongly directed to the Practitioner.

The timely reply by the Practitioner to inquiries from creditors and debtors will assist in diffusing animosity and concern that they are not being heard.

Communicating with debtors, directors and others involved in the insolvency may require firm and forthright communication, particularly in situations where there is a refusal to co-operate, and belligerence, or where examinations or litigation are involved.

8.2 Plain English

The use of jargon **should** be avoided. Simple language **should** be used wherever possible. Practitioners **should** be aware that terms with which they are familiar on a daily basis may mean little to a creditor with no experience in insolvency.

8.3 Use of Templates

Templates provide a cost effective way to prepare standard letters and reports. Properly constructed they:

- reduce costs;
- reduce drafting risk;
- reduce legal risk;
- prompt for inclusion of material; and
- prompt for the exercise of professional judgment.

However, care should be taken to use templates appropriately. There is a real risk that slavish or unthinking adherence to templates may result in:

- overly long documents;
- incorrect or irrelevant statements;
- inappropriate application;
- obscurity of the real purpose of the document;
- failure to make conscious decisions about what should be included; and
- lack of attention to detail.

The objective is to ensure that all communication is relevant, clear and concise.

8.4 Document Construction

Given the diverse nature of stakeholders it is recommended that particular care be taken in the structure and layout of documents.

It should never be assumed that creditors and other stakeholders understand:

- the process;
- the impact of the document;
- the steps they need to take; and
- references to prior events or issues.

Documents **should**:

- clearly state the purpose and import of the document – i.e. why is this document being sent;

- have a summary which clearly sets out what the recipient of the document should/may do next;
- use headings, bullet lists, short sentences to improve readability; and
- include the use of tables where appropriate e.g. the comparison of scenarios in a section 439A report, declarations of relevant relationships, assessment of creditor claims.

8.5 Modes of Communication

Subject to the specific legal requirements, practitioners **should** use the most appropriate means of communication including by:

- website;
- email;
- teleconference;
- as well as the more traditional communications of telephone, mail and facsimile.

8.6 Use of Web Sites

Practitioners **should** take care when placing information on the web site to:

- ensure the minimum paper based communication requirements are met;
- comply with the privacy laws; and
- restrict access to those entitled to view it (for example, by the use of passwords).

8.7 Use of Electronic Communications

Electronic communications, such as email and SMS, have the same force and effect as other forms of written communication and their preparation **should** be treated with the same care and attention. Certain notices are required to be sent by post.

Electronic communications, while efficient and cost effective, have the potential to be undertaken without full regard to the content and may be hastily prepared and dispatched.

Electronic communications have the potential to be easily sent to the wrong recipient. This has the potential to void privilege and breach confidentiality, among other consequences.

Disclaimers on the footer of emails are wise, but may not offer the protection needed.

8.8 Communications Training and Skill Development

Communication skills are critical and Practitioners **should** ensure that they and their staff are properly trained both in formal and informal communications.

8.9 Information Sheets for stakeholders

The IPA, ITSA and ASIC produce information sheets which contain useful information for stakeholders. A list of the information sheets available has been prepared and Practitioners **should** provide this summary sheet to stakeholders in their first communication.

This summary of the information sheets available **must** have been provided to creditors before the holding of a creditors meeting or the payment of a dividend. It need only be provided once.

8.10 Specific forms of communication

For detailed guidance on communicating via creditors' meetings and s 439A Reports in Voluntary Administrations, refer to Part C of the Code.

9 Timeliness

Members must attend to their duties in a timely way.

The insolvency of a company or individual has an immediate effect on the rights of the insolvent, the creditors and other stakeholders. There is an inherent need to have those rights resolved as quickly as possible. It is therefore important that the insolvency process is managed as quickly as is commercially and reasonably possible.

Timeliness is necessary at many levels, in relation to:

- statutory based time limits;
- reduction of risk;
- minimisation of cost; and
- minimising negative emotion.

9.1 Statutory Time Limits

To ensure that statutory requirements are met, Practitioners **should** use and maintain a checklist or other systems which alert the Practitioner to critical dates such as:

- statutory obligations and notifications;
- meetings; and
- reporting.

9.2 Reduction of Risk

The timely attention to tasks on an administration will reduce the risk to the Practitioner.

Examples

- *One of the primary duties of Practitioners is to promptly secure the assets and funds of the insolvent. A failure to act promptly could see the dissipation of assets.*
- *When appointed to an administration the Practitioner may not know what assets are owned by the insolvent, however, it is important to promptly arrange appropriate insurance cover so that all assets are insured. A failure to arrange such insurance could expose the Practitioner in the event of an uninsured incident.*

9.3 Minimisation of Cost

Administrations which are conducted in a timely manner will generally be more efficient and effective. In the interests of minimising costs, administrations **should** be conducted in a timely manner.

9.4 Minimising Negative Emotion

Insolvency is stressful and traumatic for those involved. Prompt, clear and courteous communications and replies to queries all reduce angst and improve trust in the Practitioner. Many

complaints have their origin in the sense of the complainant being ignored rather than in technical or substantive acts or omissions of the Practitioner.

9.5 Failure to meet Deadlines

The failure to meet time limits has a number of consequences including:

- the cost of seeking extensions of time;
- rights of the Practitioner are lost which can involve a financial loss to the administration;
- personal liability for the practitioner; and
- creating an issue of the fitness of the member to practise.

9.6 Duty to Advise

Practitioners **must** ensure that stakeholders are clearly advised of time limits that impact on them and the consequences of not meeting those time limits.

9.7 Policies, Processes and Education

Practitioners **should** implement policies and processes, and educate staff, to minimise the risk of failing to meet deadlines. The process should include:

- checklists or other systems;
- training; and
- auto-reminder schedules (software).

Checklists **must** be maintained in a timely manner for every Administration.

9.8 Extensions of Time

If an extension of time is required, the Practitioner will need to:

- apply to the Approving body; and
- give reasons for the need for additional time e.g. if the issue being addressed is complex.

A Practitioner may claim remuneration and costs of applying for an extension of time from the administration, subject to any order from the court.

A Practitioner may not claim remuneration and costs for applying for an extension of time if the reason for the failure to meet the deadline was attributable to the poor conduct of the Practitioner such as:

- inattention to the passage of time;
- lack of knowledge of the time limits;
- poor processes; or
- inadequately trained or supervised staff.

10 Dealing with Property

A Practitioner must not acquire directly or indirectly any assets under the administration of the Practitioner.

A Practitioner, his or her partners, associates, staff and their respective households **must** not acquire directly or indirectly in any manner whatsoever any assets under the administration of the Practitioner, subject to the following exemptions:

- from a retail operation under administration of the Practitioner where those assets are available to the general public for sale and where no special treatment or preference over and above that granted to the public is offered to or accepted by the Practitioner, his partners, his associates, his staff and their respective households; or
- with the approval of the Court or the creditors to whom full facts must be disclosed.

11 Competition and Promotion

When promoting themselves, or their firm, or when competing for work, members must act with integrity and take care not to bring the profession into disrepute.

11.1 Introduction

Insolvency is a competitive profession. The flow of work to practitioners is dependent on referrals from creditors such as financial institutions and from advisers to companies and individuals such as accountants and lawyers. Work is also referred directly in response to practitioner marketing and advertisements.

The standards of competition and promotion that apply in the wider community may not be acceptable in a profession that must be seen to have high levels of integrity and independence.

Practitioners will be held responsible for the form and content of any advertisement, publicity or solicitation:

- where expressly or impliedly authorised by the practitioner; or
- which is placed or undertaken personally, or by another person on behalf of a practitioner or their firm.

11.2 Advertising, publicity and solicitation

Practitioners may promote their business through general and targeted advertising using the full range of media and marketing techniques including through web sites, print, direct mail and brochures.

11.2.1 Call Centres

Practitioners **must** ensure that follow up communications, including calls by third parties and call centres under the direction of the Practitioner, are terminated when the recipient has so requested either directly to the Practitioner, a third party working on behalf of the Practitioner, or through the IPA, other professional body or regulatory body. Any continued contact is a breach of this Code.

Advice on insolvency matters **must** not be given by inappropriately experienced call centre staff.

11.2.2 Internet

This Code applies equally to advertising on the internet and includes websites operated by or on behalf of the practitioner or the practitioner's firm.

11.2.3 Statutory Advertisements

Advertisements required to be placed by law which are paid for from funds in the administration are not an appropriate place to promote the Practitioner or the Practitioner's firm.

Statutory advertisements:

- may contain contact details such as firm name, telephone number, physical address, postal address, email and website.
- may not contain:
  - slogans;
  - claims about the firm;
  - logos; or
  - other promotional materials.

11.2.4 Other Administration Advertisements

Advertisements for the administration, other than statutory advertisements (ie. to sell the company's assets or business) **must** comply with the same restrictions as statutory advertisements; however, they may include the firm's logo.

11.3 Misleading and Deceptive Conduct

The provisions of the *Trade Practices Act 1974* (Cth) or Fair Trading legislation may apply to statements by practitioners regarding their service offering, competence and any comparative claims.

In addition to the general legal prohibitions, Practitioners **must** not:

- make claims in marketing material and then substantially change the arrangement unless there is fully informed consent;
- make negative remarks about fellow practitioners or their firms as to their competence, professional practices or fees charged;
- claim endorsement of the IPA except as may be permitted from time to time under the Constitution and Rules;
- create false or unjustified expectations of favourable results in an administration;
- imply the ability to influence any court, tribunal, regulatory agency or similar body or official; or
- make self-laudatory statements that are not based on verifiable facts or which contain unidentified testimonials or endorsements or contain representations that would be likely to cause a reasonable person to misunderstand or be deceived.

11.4 Charge-out Rate and Value Comparison

When comparing charge-out rates, practitioners **must** provide adequate disclosure of the:

- qualifications; and
- experience of staff levels,

and not simply compare rates by title.

Example:

- *the experience and competence of a '**manager**' can vary from firm to firm. In relevant cases, creditors should be advised, for example, that 'the majority of staff by grade have the skills and experience as described. However, there are staff employed at particular grades who have alternative skills and experience that warrant their title and charge out rate'*

11.5 Fixed Fee

When advertising fixed fees, the practitioner **must** not exclude from the fixed fee amount:

- any statutory communication, investigation and reporting costs;
- outsourcing costs for work that would normally be understood to be undertaken by a practitioner or firm; or
- items that are defined in this Code as office overheads, such as insurance, rent, and equipment hire.

Disbursements, as defined in this Code, **should** be identified to the extent they are known, or can be estimated.

The remuneration associated with litigation such as the pursuit of preferences or insolvent trading claims may be excluded from the Fixed Fee.

Any exclusion **must** be clearly identified and explained so that stakeholders have a clear understanding of what is included, what is excluded and the potential and impact for work on excluded items to materialise.

For further information about fixed fees and other remuneration charging methods, refer to sections 12, 13 and 14 of the Code.

11.6 Relationship Marketing - Inducements

Practitioners must not provide any inducements to any person or entity:

- with a view to securing the person's own appointment or nomination; or
- to securing or preventing the appointment or nomination of some other person.

This prohibition extends to all forms of formal insolvency appointment, both corporate and personal.

In this context, an inducement is any benefit, whether monetary or not, given by a practitioner, or an employee, agent, consultant or contractor of the practitioner, to a third party which may, in the view of a reasonable person, influence that person's decision to refer, or to make, a formal insolvency appointment.

Care **should** be taken, when marketing services to potential referral sources, to ensure that the Independence provisions are adhered to. Particular care **should** be taken to limit relationship development activity to prevent the impression of a conflict of interest.

An inducement does not include:

- bonus payments to employees structured as part of their salary package or adjustments to an employee's salary where obtaining referrals of administrations is one of the performance indicators considered;
- benefits of an insignificant value (when considering the significance of the benefit, regard is to be had to the total benefits provided to the third party);

- sponsorship of events or publications open to the public, or members of a professional association; or
- retainer or other payments to marketing consultants engaged by the firm.

11.7 Sponsorship

Sponsorship of an event, venue, industry body or interest group as a means of a practitioner promoting their business is acceptable on the proviso that that sponsorship does not create any obligations to or by those who are responsible for making appointments or referring engagements.

Examples

- *sponsorship of an industry body's event for a determined dollar value amount is acceptable.*
- *sponsorship of an event based on a percentage of fees obtained as a result of referrals from members of that industry body would not be acceptable.*

11.8 Replacing an Incumbent

A practitioner may be requested by creditors to consent to act as Voluntary Administrator, Liquidator or Trustee, as an alternative ('*alternate*') to another practitioner who is already acting ('*the incumbent*') in the role. It is possible that there may be other practitioners also put forward as the alternate.

Practitioners **must** not make negative statements about other practitioners, make false comments, nor directly or indirectly request solicitors, creditors or their own staff to make such statements, or laudatory comments in support of a practitioner's election as the alternate.

Any claims made on a practitioner's behalf by others which are contrary to the IPA's Code of Professional Practice or guidance issued by the Accounting or regulatory bodies, which are known to the Practitioner at or before the meeting of creditors, **must** be corrected by the Practitioner at the meeting of creditors or in writing to creditors before the meeting. The fact that such claims are made not by the Practitioner but by others will not be acceptable behaviour. A Practitioner is responsible for the professional behaviour of their staff, consultants or contractors.

There will be instances where other stakeholders for their own reasons may wish to replace an appointed Practitioner. Creditors who may be asked to vote on the issue of replacing the appointee should examine the motives of and ask for reasons from, those proposing the change.

11.8.1 Notice

The alternate **must** provide the incumbent with not less than one business day's notice in writing of the alternate's consent to act, except where the request to consent occurs within one business day before the meeting. In this circumstance, notice to the Incumbent **must** be given immediately the request is received.

11.8.2 No Solicitation

Practitioners **must** not, directly or indirectly, solicit nominations from creditors in order to replace an incumbent.

Practitioners **must** not solicit proxies from creditors for the purposes of replacing the incumbent or retaining an existing appointment.

11.8.3 Conduct at the Meeting

The Incumbent **must** allow any Alternate(s) the right to address the meeting.

The Alternate **must** provide the meeting with:

- a DIRRI;
- the remuneration basis as set out in the Code eg. a schedule of the hourly rates or details of an alternative method of charging fees; and
- full details of their relationship with the creditor, if any, nominating them as an alternate.

The Alternate, or those speaking on the Alternate's behalf, when addressing the meeting of creditors, **must** remain factual and avoid making any statements that cannot be fully substantiated, or may be considered false, misleading or deceptive.

12 First Remuneration Principle – Necessary and Proper

A Practitioner is entitled to claim remuneration and disbursements, in respect of necessary work, properly performed in an administration.

A Practitioner's right to be paid is recognised under the legislation and at general law and is given a high priority of payment from the insolvent's funds.

The entitlement to remuneration exists only in respect of work done that was necessary and was properly performed.

12.1 Necessary Work

A Practitioner is entitled to remuneration only in respect of work done that was necessary for the administration. The term '*necessary*' means work that was done that was:

- connected with the administration; and
- done in furtherance of the exercise of the powers and performance of the duties of a Practitioner as required by insolvency law and practice.

Examples

- *report to creditors;*
- *investigations of conduct of directors;*
- *protection and recovery of assets;*
- *preparing and filing a S533 report to ASIC (even though this may have no direct benefit to creditors);*
- *if the company has trading operations throughout Australia, it will generally be necessary for the Practitioner to make relevant searches of property titles in all States and Territories;*
- *if the company is a small local operation only, it would not be necessary to make international enquiries; and*
- *reconstruction of financial statements.*

The examination of claims for remuneration will necessarily be made with the benefit of hindsight. However a Practitioner may claim for work that may not have produced a positive outcome provided there is a proper exercise of professional judgment by the Practitioner at the time the work was undertaken.

Once that is established, the work will remain '*necessary*' for the purposes of a remuneration claim, even if subsequent events show that the work was not necessary.

Examples

- *searches revealing no assets;*
- *examination of directors resulting in no new information; and*
- *unsuccessful claims for preference recovery or insolvent trading.*

Before a decision is made to claim for remuneration, the Practitioner **must** ensure that work that was done, by him or herself, or by staff members, was necessary.

Example

In a provisional liquidation, there are limits on the work required to be done. If work is done beyond those limits it may not be regarded as necessary.

12.2 Properly performed

In order to claim remuneration for necessary work, the Practitioner will need to establish that the work was properly performed.

Work done poorly, or, at worst, improperly and needing to be reworked **should** not be charged.

Examples

- *It may have been necessary to inquire of all property titles countrywide, but if the staff member doing that work pursued inquiries through the wrong agency because of ignorance or inattention, then that work was not done properly.*
- *It may have been necessary for the Practitioner to have convened a meeting of creditors, but if work done in convening that meeting took an inordinate amount of time, through the inexperience of the staff member, it was not done properly. While an allowance is made for junior staff through the lower hourly rate, where activity is redone, care should be taken to ensure that the amount charged reflects the true value of the work.*
- *Work performed to convene an invalid meeting would not be properly performed.*

Creditors are entitled to expect that administration funds are not expended on work that was not properly performed.

All time spent for necessary work properly performed **should** be recorded against the Appointment using an appropriate system.

Before claiming remuneration, the Practitioner **should** identify work and time that should not be claimed.

The legislation does not generally state by what criteria remuneration is to be '*fixed*' or '*determined*' by creditors. Under the Corporations Act, on a review of a Practitioner's remuneration, the Court must have regard to whether the remuneration is reasonable, taking into account various matters including whether the work was '*reasonably necessary*'. In bankruptcy, there is more limited guidance, that costs of services provided to a trustee were '*reasonable and necessary*' (s 167 of the Bankruptcy Act, Schedule 4A 2.13). The remuneration requirements of the Code for work that is necessary and properly performed are consistent with, or impose a higher standard than, the law.

Prior approval of fees does not remove the obligation to establish that the work was necessary and properly performed. The mere approval does not give the right to draw remuneration if the work is not done.

12.3 Deciding what work to undertake

The Practitioner **should** exercise professional and commercial judgment in considering whether work is to be performed. Clearly work that improves the return for creditors should be undertaken.

Example

A judgment will need to be made in relation to the pursuit of unfair preference claims or other voidable transactions in terms of the likely cost and likely return. This may involve consultation with creditors, and, if appropriate, legal advice, or reference to the court.

Not all work is associated with directly seeking a return for creditors. Many of the general statutory tasks of a Practitioner – for example in reporting to creditors, lodging with ASIC, and maintaining accounts – are properly performed and charged even though the remuneration charged will not produce a financial return and will reduce the funds available for distribution.

In a liquidation, a Practitioner is not obliged to do work unless there are funds available for their remuneration, except for certain statutory tasks that must be undertaken regardless of available funds.

12.4 Outsourcing

A Practitioner may 'outsource' work subject to the restrictions on delegation (e.g. decision making and exercise of judgment).

The decision to outsource is a matter of commercial judgment for the Practitioner, based on such considerations as:

- geography and location (the business may have its operations spread throughout the country and it may be commercially necessary to appoint local agents to deal with particular tasks);
- time constraints; or
- costs considerations (the external source may be able to attend to an urgent task quickly, or more cheaply).

If work is outsourced, the Practitioner's obligations under this Code remain the same as if the Practitioner or members of staff had performed the work.

Outsourced work may only be claimed as remuneration and not as a disbursement and will be subject to the same test of necessary and properly performed.

12.5 What remuneration cannot be charged for

A Practitioner **must** not seek to be remunerated for work:

- outside the scope of the powers of the Practitioner; or
- carried out before the Practitioner was appointed.

These restrictions are a threshold test before applying the '*necessary and properly performed*' test.

12.5.1 Court Approval

Remuneration **must** not be claimed for work that results in, or is the result of, a breach of the Practitioner's duties.

Although remuneration **must** not be claimed for work done before the Practitioner was appointed, there may be circumstances where the pre-appointment work was necessary for the administration and would have had to be done in any event. The Practitioner **must** seek court approval for any such claim. It is not sufficient in itself to obtain approval from a committee or from the creditors. Whilst a court will generally require creditors' approval for remuneration to be sought first, claims for remuneration in these circumstances require court approval.

12.6 Staff levels and numbers

In time-based charging, the Practitioner **must** ensure that the number and qualifications of staff allocated to an administration is appropriate for the nature of the work being performed.

Example

An experienced liquidator generally would not attend to more routine tasks – such as preparing notices for a meeting – given that such tasks could be done as well and at a lower charge-out rate by a more junior member of staff.

This will require commercial and professional judgment. As the Court said in *One.Tel:*

> while a particular task may be appropriate to a particular level [of] employee, it is quite possible that the liquidator himself charging an hourly [rate] double or triple that of the appropriate level [of] employee may be able to do the work in one quarter of the time. That is always a risk in time costing.

Example

It may be more cost effective for the Practitioner to prepare and finalise a report for creditors, if the report is required urgently and requires the Practitioner's input.

Care **should** be taken in allocating the appropriate number of staff to an administration or task, particularly when travel is required. This is a balance between having sufficient staff available to undertake the required tasks and over servicing the administration.

12.7 Costs of claiming remuneration

Practitioners **may** claim the costs of record keeping and seeking approval or determination of their claim for remuneration.

Example

This may include the cost of producing a report for creditors to allow creditors to make an informed decision whether to approve the remuneration or the costs of applying to the court (subject to any order of the court).

12.8 Costs of communicating with regulators

A Practitioner **should** not claim remuneration for time spent:

- communicating with regulators regarding complaints about the Practitioner or the conduct of a particular administration, except where the complaint is spurious;
- on regulator surveillance, professional audits or inspection of files, or on peer reviews; or
- unsuccessfully defending a breach of the law or this Code.

12.9 Disbursements

Disbursements may only be claimed if they were necessary and properly incurred. Practitioners **must** use their judgment:

- to determine that the work was necessary;

- that the fees to be charged were reasonable; and
- that the work done was properly performed.

In incurring disbursements, a Practitioner **must** use their commercial judgment, adopting the perspective of, and acting with the same care as, a reasonable person exercising care and skill would act in incurring expenses on their own behalf.

While Practitioners **must** account to creditors for disbursements, the reimbursement for the payment of disbursements does not require creditor approval before being drawn. Thus the categorisation of activity as remuneration or disbursement is significant.

12.9.1 What is a disbursement?

The Practitioner needs to determine whether the claim for payment is in the nature of a disbursement, or whether it represents remuneration. Disbursements include those costs paid from the administration's bank account directly and those costs paid by the Practitioner and claimed back from the administration.

A Practitioner **should** separate disbursements from the expenses of running their practice which may only be recovered through the charge-out rate.

Disbursement type	Criteria	Examples	Rationale
A. Professional			
External advice, non-insolvency	These are fees that satisfy both the following criteria. They are: (a) for professional services (non-insolvency services) relating to specific tasks required to be done during the administration; and (b) are properly incurred by independent outside consultants engaged by, and not associated with, the Practitioner and their firm.	• independent lawyers, • auctioneers, valuers, real estate agents, • tax advisers or accountants.	This is a disbursement because it involves the Practitioner retaining an external adviser for work to be done in the administration, at an agreed fee or rate.
B. Non-professional			
B1 External assistance	These are costs that satisfy all the following criteria. They are: (a) of an incidental nature; (b) not for professional services; and (c) incurred with a third party in relation to work required to be done during the administration.	• administration advertising, • travel and accommodation for staff, • room hire, • document storage, • photocopying and printing, • word processing and secretarial services.	These are typical disbursements because they involve an outlay in relation to the administration.
B2 Internal assistance	These are costs that satisfy all the following criteria: (a) they are of an incidental nature; (b) they are not for professional services; (c) they are for goods or services properly provided by the practitioner or their staff in the administration; and (d) they are not overheads covered in the remuneration claim.	Reasonable costs of: • telephone calls, • postage, • stationery, • photocopying and printing.	These are also typical disbursements, except they are incurred internally by the firm.

12.9.2 What are not Disbursements?

Given the significance of a claim for payment by a Practitioner being classified as a disbursement, it is useful to list what are not disbursements:

a) Overheads

The right to reimbursement for out of pocket expenses is limited to actual expenses incurred in respect of that administration. The Practitioner **must** be able to show how the expense:

- is uniquely and directly attributable to the administration; and
- was calculated and allocated to the Administration.

Costs which can only be recovered as a general fixed amount charged across all administrations are overheads.

Examples of Overheads

- *rent, insurance, professional indemnity insurance, professional memberships, staff costs, training, depreciation.*

b) Internal non-insolvency professional costs

A Practitioner may engage internal non-insolvency related professional services only after proper commercial consideration to that decision has been given that such an engagement is in the interests of creditors and the efficient conduct of the administration. This includes non-insolvency professional services provided by another practice within a federated practice structure or associated practice.

The point to consider is whether the benefit of the engagement fee will be received by the Practitioner, the Practitioner's firm or an entity related to the Practitioner or perceived to be related to the Practitioner.

These items are remuneration.

Examples of Internal Professional Costs

Legal advice, tax advice, real estate valuations, auctioneering.

c) External insolvency professional costs

If a Practitioner outsources insolvency tasks, the fees charged to the Practitioner may only be claimed as remuneration, notwithstanding that the fees may be payable before the claim for remuneration can be made. The necessary and properly performed test applies.

It is not always clear whether the out-sourced work is better categorised as insolvency work (which is claimed as remuneration), or general non-insolvency work (which is classified as a disbursement).

Factors to be taken into account when making this assessment include:

- was the contractor an insolvency firm?
- was there a regular resource sharing/provision arrangement?
- would the Practitioner have done the work if there had been sufficient resources?

Where the task involves standard expertise and skills of an insolvency practitioner, the outsourced costs will be a remuneration claim of the Practitioner. Where the task involves more general or particular skills that are not insolvency specific, then the outsourcing costs will be a disbursement.

Examples

- *A stocktake is required in a company administration. It is a matter for the Practitioner's judgment either to use his or her own firm's staff, or contract out the work to a suitably qualified specialist; or*
- *There is a branch of the company's business that is in an outlying country area. The Practitioner may choose to have the stocktake done by a local firm because it would be cheaper than sending the Practitioner's staff to do the stocktake;*
- *In that country area, the Practitioner considered using a professional stocktaking firm to undertake the stocktake, but selected a local accounting firm. In this instance there are arguments both ways for the costs of the local accountant to be remuneration or a disbursement.*
- *Similarly, the Practitioner's firm **may** have valuation expertise (chargeable as remuneration) but the Practitioner may choose to engage an external valuer (disbursement). This will be a matter for the practitioner's professional judgment having regard to the interests of creditors.*

When a Practitioner make a decision that an expense of this nature is a disbursement rather than remuneration, the invoices received for the services **should** detail the work performed and it **should** be clear from the description that the services were not insolvency services.

d) Late lodgement fees

Any late fee or penalty imposed by a court or agency for late lodgement or other default **should** be borne by the Practitioner.

e) Unreasonable Travel Costs

Travel **should** be bought on the best commercial terms and the style of travel and accommodation should be appropriate for the trip being undertaken.

Care **should** be taken in claiming the costs of travel by the Practitioner between offices of his or her firm for the purposes of a particular administration.

Where there are geographically spread locations for a particular administration, consideration **should** be given to the retention of local staff or agents to carry out tasks which are appropriate and capable of delegation, in order to minimise the costs to the administration. However, it may well be appropriate for the Practitioner and/or his or her staff to attend at these locations and incur the relevant travel costs.

Examples

- *Travel to and from an administration's place of business is normal and chargeable;*
- *If the administration's business is conducted around Australia, or internationally, it may be appropriate for the Practitioner to attend at each location, depending on the size and nature of the business, even if the practitioner has offices around Australia or internationally.*

12.9.3 Necessarily and properly incurred

A Practitioner may engage external professional or non-professional services as disbursements without creditor approval, but only after exercising proper commercial consideration. The Practitioner **should** consider issues of:

- expertise;
- quality;

- timeliness; and
- reasonable and appropriate cost.

Practitioners **must** assess each engagement in terms of the interests of creditors and their fiduciary responsibilities.

Unless the disbursement is insignificant, the Practitioner **should** document the decision making process identifying why the work was necessary and why the particular firm or professional was engaged. While the approval of creditors is not required, creditors are entitled to be informed of and to understand the decision process if the issue is raised.

Before authorising payment of disbursements, the Practitioner **must** ensure:

- that the task has been properly performed; and
- that the quantum of the professional service fee is as agreed or is reasonable.

Examples

- *Printing services, the service provided being assessed on quoted price, quality and timeliness;*
- *Legal advice, the service provided being assessed on quoted price or time charges, quality and focus of advice, and timeliness of delivery; and*

Agent's sale of property, the service provided being assessed on commission rate, sale price and any quoted expenses.

13 Second Remuneration Principle - meaningful disclosure

A claim by a Practitioner for remuneration must provide sufficient, meaningful, open and clear disclosure to the approving body so as to allow that body to make an informed decision.

A remuneration claim requires information to be conveyed to the approving body (creditors, committee of creditors, committee of inspection, or the court). That information encompasses a number of elements:

- a system of recording that information;
- a basis for calculating remuneration;
- sufficient detail to justify the amount of remuneration; and
- relevant timing of the information being provided.

13.1 Recording of Work Done

Regardless of the remuneration method to be applied, the Practitioner **must** maintain a proper record of work that was done on an administration in order to:

- claim remuneration; and
- report to creditors on the progress of the administration.
- The Practitioner **should** maintain a system that requires staff to record:
- the period of time spent;
- the categories of the work performed (see Remuneration Report Template); and
- details of the work being performed;
- contemporaneously at the time the work is done in order to maximise accuracy.

Time recording provides good practice management information, even though time data will not be required for reporting to creditors in claims for fixed fee or percentage based remuneration.

The IPA's Remuneration Report Template provides a description of some common work categories that **should** be used.

13.2 Basis of calculation

There are several bases by which remuneration can be calculated. The IPA has no preference as to the method of calculating fees. Practitioners **must** be transparent and fully explain to creditors the method proposed and the implication for creditors.

The terms of that remuneration are a matter for creditors, upon full disclosure of the arrangement being explained to them by the Practitioner.

13.2.1 Time based charging

Time based is the most common form of charging. Practitioners calculate remuneration by reference to the hourly or time unit rate provided which is applied to the time spent on necessary work properly performed.

13.2.2 Prospective Fee Approval

A Practitioner may seek approval from creditors for time based remuneration to be determined in advance of the work to be performed. The approved amount **must** be capped to a nominated limit.

The claim for remuneration will subsequently be calculated on a time basis for necessary work properly performed and can be drawn without further approval of creditors up to the capped amount.

The hourly rate to be applied may be escalated by an agreed formula where the escalation factors are objectively and independently determinable.

The escalation does not apply to the capped total, only to the hourly charge rate.

If the Practitioner wishes to change the capped amount, or the rate scale other than as agreed, he will need to seek creditor approval.

13.2.3 Fixed fee

A Practitioner may claim remuneration based on a quoted fixed amount. A fixed fee arrangement provides certainty to creditors about how much the remuneration claim will be. The risk of excessive time spent is transferred to the Practitioner.

It is unlikely that a fixed fee will be quoted for large or complex administrations.

Examples

- *In a small administration, where the issues can reasonably be anticipated, the Practitioner may wish to have remuneration approved for a fixed amount.*
- *Towards the end of an administration where remuneration has been based on a time basis, a Practitioner may choose to charge a fixed fee for work to be done in finalising the administration, rather than obtaining prospective approval on an hourly basis to a capped amount.*

13.2.4 Percentage

A Practitioner may claim remuneration based on a percentage of a particular factor, usually assets disclosed, or assets realised.

13.2.5 Success or Contingency Fees

A Practitioner **must** not seek remuneration on the basis that they will receive a specified bonus, success fee, super-profit or additional percentage as remuneration, in the event that a specified contingent future event occurs or particular circumstances arise, if that arrangement would place the Practitioner in a position of conflict, or generate a perception of a lack of independence.

This is based on the principles that:

- no additional incentive **should** be required or offered in order to have the Practitioner perform duties that are required;
- the independence and objectivity of the Practitioner, even if only as perceived, may be compromised by such an arrangement; and
- the arrangement **must** not be inconsistent with the fiduciary obligations of a Practitioner.

When considering whether a proposed fee arrangement is acceptable, the Practitioner **must** consider whether the arrangement could be perceived as the Practitioner acting in his or her own interests rather than the interests of the creditors.

If a Practitioner is intending to use this type of fee arrangement, full disclosure of the terms of the proposed arrangement **must** be made to creditors and the consent of the creditors obtained.

If an arrangement is in breach of this Code, the arrangement will still constitute a breach even if creditors have approved the arrangement.

*An **example** of an acceptable fee arrangements is:*

- *Discounting standard hourly rates until a certain objective is achieved. If that objective is achieved, standard hourly rates will then be charged.*

13.3 Information to be disclosed and when

Information on the particular basis of remuneration claimed **should** be provided to creditors at two main points of time in an administration.

- First, soon after the appointment, in order to advise creditors of the proposed basis upon which remuneration will be claimed. This will generally be at the first meeting of creditors in a voluntary administration or a creditors' voluntary liquidation, or a Part X agreement; or by including it in the first circular sent to creditors in other administrations.
- Second, before any meeting is held at which approval for the remuneration is to be sought. The information **should** be sent to creditors in the normal course with any reports and other documents required for the conduct of that meeting in the time frames required by the legislation.

The table below summarises the timing of the provision of information for each remuneration basis.

Basis	Soon after appointment	During the administration
Time based	Advice on the basis chosen.	Report on work undertaken and request approval of quantum.
Prospective Fee (time based)	Advice on the basis chosen. Request for approval for time based charging to a capped amount.	Report on work undertaken and request further approvals.
Fixed fee	Advice on the basis chosen. Request for approval of the quantum.	Report on achievement of milestones for the drawing of remuneration.
Percentage	Advice on the basis chosen Request for approval of the percentage	Report on the factors underlying the entitlement to claim the remuneration.
Contingency	Advice on the basis chosen Request for approval of the arrangement.	Report on the achievement of the contingency event or otherwise.
Note: There will be circumstances where a Practitioner will seek approval for a different basis of remuneration for a particular aspect of an appointment or finalisation of the appointment; the appropriate information will need to be provided at the time of seeking the creditors' approval of that arrangement.		

13.3.1 Court requirements

In addition, where an application is made to the Court for an order that a company be wound up or for an official liquidator to be appointed as a provisional liquidator of a company, regard **must** be had to any additional requirements of the courts. For example, with the Consent to Act, Practitioners are required to disclose their hourly rates. The same applies in relation to Part X agreements under the Bankruptcy Act.

13.3.2 Information to be provided for all remuneration bases

a) Initial notification

A Practitioner **must** provide the following information to creditors regarding remuneration in their first communication with creditors:

- a brief explanation of the types of methods that can be used to calculate remuneration;
- the particular method that the Practitioner intends to use to calculate remuneration in the administration;
- why the Practitioner considers this method to be suitable for the administration.

Examples *of reasoning for choosing time based remuneration:*

- *It ensures that creditors are only charged for work that is performed.*
- *The Practitioner is required to perform a number of tasks which do not relate to the realisation of assets, for example responding to creditor enquiries, reporting to ASIC, distributing funds in accordance with the provisions of the Corporations Act or the Bankruptcy Act.*
- *The practitioner is unable to estimate with certainty the total amount of fees necessary to complete all tasks required in the administration.*

If a Practitioner is intending to use time based remuneration, they **must** also provide:

- the scale of rates that will be used; and
- a best estimate of the costs of the administration to completion, or to a specific milestone.

If rates change or the estimate is no longer reliable, the Practitioner **must** notify creditors and advise new rates or a new estimate.

b) Remuneration approval request

In addition to the reporting obligations for each particular basis of remuneration, which are detailed below, the Practitioner **must** send to creditors:

- Details of the remuneration claimed

  The IPA's Recommended Remuneration Report, as adapted for the facts and circumstances of the particular administration, is suggested as a means of giving creditors the information they need to make an informed decision at the meeting. It is a guide for time based remuneration claims and may assist with other bases of remuneration claims. If broadly followed, the proposed format constitutes good practice;

- the IPA Creditor Information Sheet on approving remuneration in external administrations (if not previously provided)

The IPA Creditor Information Sheet is designed to fully inform creditors about:

- the process of determining remuneration; and
- the rights and responsibilities of Practitioners, committee members and creditors.

The Information Sheet (or advice as to how creditors can access this information sheet online) **must** be provided to creditors before approval of remuneration is sought. It may be provided to creditors at the time of advising them of the basis on which remuneration will be charged.

The report to creditors sent prior to a request for the approval of remuneration for all remuneration bases, **must** include the following:

- Statement of remuneration claim – The practitioner **should** clearly:
  - state the precise terms of the agreement sought from the committee or the resolution(s) sought from creditors;
  - set out the total remuneration previously determined; and
  - indicate whether they will be seeking the determination of further remuneration at some time in the future.
- **A summary of receipts and payments** to and from the administration bank account **must** be provided. The receipts and payments summary should be prepared up to a date that is as close as possible to the date on which the notice and report is given to creditors. The summary should be clearly labelled as being prepared 'as at' a particular date. If large or exceptional receipts and payments are received or made after the report is prepared but before the meeting at which the remuneration claim is to be considered, the Practitioner **should** provide additional information to committee members or creditors at the meeting.

The Practitioner **must** provide creditors the information set out in this Code to allow creditors to decide whether to approve remuneration sought. That information **must** be:

- Sufficient – be in enough detail for the purposes for which it is prepared and in the context of the work done in the administration;
- Meaningful - be presented in a way that allows creditors to understand what was done and why it was done;
- Clear - use non-technical terms so that what is being claimed is readily understandable;
- Relevant - limited to what is needed; and
- Concise.

13.3.3 Information to be provided for each specific remuneration basis for remuneration approval requests

a) Time basis – retrospective fees

- the amount of time spent;
- a description of work performed on an administration, broken down into the broad categories of work performed;
- the classification of staff engaged on the appointment for each broad category of work; and

- the remuneration incurred for each broad category of work.

b) Time basis - prospective fees

- a summary description of the major tasks still remaining to be done on the administration;
- an explanation of the estimated fees remaining to complete the administration, including the estimated fees for each major task;
- a monetary 'cap' on the remuneration; and
- an explanation as to what the monetary capped amount represents.

c) Fixed fee remuneration

Where a fixed fee is claimed, the Practitioner will need to report on:

- the amount of the fixed fee proposed;
- the basis upon which the fee has been calculated (work to be undertaken and the costs for each category of work and scope of work) in the same manner as for prospective fees;
- the services to be provided for the fixed fee amount in sufficient detail for the decision making body to make an informed decision about why the fee is reasonable;
- what services will not be included in the fixed fee and the basis of charging for these excluded services; and
- the milestones as to when remuneration will be drawn from the administration.
- Note: a Practitioner **must** not draw fixed fee remuneration up-front.

A Practitioner seeking a fixed fee basis for remuneration **must** include in the quote for the fixed fee the:

- costs of all statutory investigations;
- costs of reporting to the creditors and regulators;
- cost of issuing letters of demand for preferences; and
- costs of meeting all statutory obligations.

***Examples** of acceptable exclusions*

- *litigation for recovery of preference payments.*
- *litigation for insolvent trading.*

If a Practitioner is intending to make a claim for remuneration on a fixed fee basis, this **must** be done at the first opportunity after the Practitioner is appointed. The only exceptions to this are where a Practitioner chooses to make a claim for a fixed fee to enable finalisation of the administration, or for a specific aspect of the administration.

Once a fixed fee is approved, reporting will focus on the progress of the work in the administration, for example by way of explaining milestone achievements, and the work still to be done.

d) Percentage based remuneration

Where a percentage based claim is made, information **must** be provided to the relevant decision making body to enable it to make an informed assessment of whether the percentage is reasonable. The following information **must** be provided:

- the percentage proposed;
- the nature and estimated value of the individual assets realised or to be realised (or if the percentage is to be applied to another factor, the value of that factor);
- the formula to be applied for calculation of the remuneration;
- what services are to be provided for this percentage amount and the tasks that will comprise this work;
- what work has been, or is intended to be outsourced that would normally be carried out by the Practitioner or their staff and whether this outsourced work will be billed separately or included in the percentage based remuneration claim;
- the milestones for when the remuneration will be drawn from the administration; and
- the expected range of possible remuneration outcomes.

Full disclosure of the terms of the arrangement, and the expected remuneration outcome, or range of possible outcomes **must** be made clear to creditors to minimise any perception of conflict of interest.

Future reporting to creditors will need to focus on the factors underlying the entitlement to claim the remuneration, for example by way of reporting on asset realisations and the percentage taken from those realisations to pay remuneration.

e) Contingency arrangement

If a contingency arrangement within the scope of this Code is proposed, there **must** be full disclosure of the proposed arrangement, including:

- exactly what the arrangement is contingent upon;
- how achievement of the contingency will be assessed;
- what the Practitioner's remuneration will be in the event that the contingency is or is not achieved;
- why a contingency arrangement is in the best interests of creditors; and
- when the remuneration will be drawn.

Future reporting to creditors will need to include information on whether the Practitioner has achieved the contingency and the effect on the calculation of the Practitioner's remuneration.

13.4 General guidance on reporting

The provision to creditors of voluminous detailed information is not a substitute for a clear and concise report. It is the *relevance, quality* and *focus* of the information rather than the quantity and detail that is important. Creditors and even committees are not necessarily conversant with insolvency issues and processes, nor do they have the capacity or time to understand WIP records. Creditors have the right to ask questions and have them answered and to inspect supporting documentation if requested.

A Practitioner **should**:

- provide information that is specific to the administration, rather than generic;

- try and ensure that the level of information is proportionate to the size and complexity of the administration;
- try to assist committee members or creditors by highlighting the key components of the remuneration claim and any areas that committee members or creditors are likely to view as contentious; and
- provide a summary of relevant information.

Questions from creditors **should** be anticipated and not discouraged.

Additional information should be provided if requested.

13.5 At the meeting

At a meeting at which a request for approval of remuneration is being considered, a Practitioner **must**:

- table the information provided to creditors/the committee in support of the remuneration request; and
- ask creditors whether there are any questions before putting the resolutions for approval of remuneration to the meeting.

It is not acceptable to wait until the meeting to provide the required information to creditors. Additional information provided at the meeting **should** be limited to:

- responding to creditors' questions; or
- clarifying information that has already been provided.

Introducing new information at the meeting disadvantages creditors who did not attend the meeting, or who provided proxies for the meeting based on the information provided prior to the meeting.

13.6 Changing basis of remuneration

The basis for claiming remuneration may be changed with creditor consent, however changing the basis to time based is only possible if proper records have been kept of time and activity.

Example

- *a percentage of realisations basis does not require time recording. To change to a time basis would only be possible if proper records had been kept.*

14 Third Remuneration Principle – approval before drawing

A Practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval.

A Practitioner is entitled to draw remuneration, subject to the terms of the approval.

Evidence of the approval **must** be recorded. In the case of a resolution of a meeting of creditors, or of the committee, the minutes should be prepared and lodged (with ASIC for corporate administrations). In the case of court-approved remuneration, the court order **should** be obtained.

If a Practitioner draws remuneration in accordance with the default provisions under the Corporations Act or Bankruptcy Act, this **must** be clearly documented on the administration file.

If fees have been approved prospectively, in terms that allow them to be drawn at nominated hourly rates, the Practitioner **should** only draw the remuneration progressively, on completion of the work.

In respect of percentage-based remuneration, it is acceptable for the Practitioner to draw his or her remuneration from each nominated realisation, provided that there are sufficient funds available to meet higher-ranking priority debts.

In respect of a contingency arrangement, fees may be drawn on the basis approved by creditors. Any conditions imposed by creditors when approving a contingency arrangement, (for example, independent assessment of the achievement of a result) **must** be satisfied before remuneration is drawn.

14.1 Payment of fixed fees

In respect of fixed fees, the terms approved by creditors **should** be that the fixed amount may be drawn only at the conclusion of the administration; or in specified amounts at nominated milestones in the administration. Practitioners **must** not draw fixed fee remuneration 'up-front'.

14.2 Monies received in advance

If a Practitioner is provided with money in advance for the costs of conducting a formal insolvency administration, the Practitioner is not entitled to apply those monies against their remuneration until their remuneration is approved by creditors. For details of when it is acceptable to receive monies in advance refer to section 6.10.

14.3 Remuneration drawn inappropriately

If a Practitioner becomes aware that fees have been improperly taken, because, for example, the correct process has not been followed, the Practitioner **must** immediately repay the amount in question into the administration account.

Remuneration may then only be redrawn on approval being obtained.

15 Practice Quality Assurance

Members must implement systems, policies and procedures to ensure effective quality assurance.

Practitioners **should** apply APES Standard 320. I n addition to the requirements of APES 320, Practitioners **should** develop and implement policies, systems and processes that enable adherence to this code and in particular the provisions relating to:

- Independence;
- Remuneration; and
- Competition and Promotion.

16 Compliance Management

Members must implement systems, policies and procedures to ensure effective compliance management.

Insolvency is a highly regulated profession and compliance with the law, fiduciary obligations and the requirements of this Code is essential.

Practitioners have extensive powers and privileges and have commensurate duties and obligations. The cost of compliance is real, but the potential impact of non-compliance on public confidence is unacceptable for the profession and the insolvency regime.

The Australian Standard for Compliance AS 3806 provides a useful template for Practitioners when establishing or reviewing their compliance framework.

17 Risk Management

Members must implement systems, policies and procedures to ensure effective risk management.

Every appointment contains a range of risks to be managed. While liability insurance provides a degree of protection, it cannot be relied upon as the sole risk management strategy. Insurance cannot protect against risks associated with breaches of independence or failure to lodge documents, or take action on time.

The Australian Standard for Risk Management AS 4360 provides a useful template for Practitioners when establishing an appropriate risk management program.

18 Complaints Management

Members must implement systems, policies and procedures to ensure effective complaints management.

The nature of insolvency renders it more vulnerable to complaints. An effective complaints management system provides feedback on the quality of work done and if used effectively it is a useful diagnostic for quality assurance.

An effective complaints management system will also allow for a more effective disposition of:

- complaints arising from a lack of understanding of the insolvency processes; and
- vexatious and unwarranted complaints.

The failure to effectively manage complaints may result in their escalation to regulatory authorities which can be costly and time consuming to manage and may damage reputation unnecessarily.

The Australian Standard for Complaints Management AS 4269 provides a useful template for Practitioners when establishing an appropriate complaints management program.

Part C: Practice Notes and Templates

19 Declaration of Independence, Relevant Relationships and Indemnities

This document **must** be completed for all formal insolvency appointments except for appointments as Receiver, Receiver and Manager or some other form of Controller. This obligation extends to practitioners who have been invited to replace the incumbent.

19.1 DIRRI Template

[company/bankrupt name]
[ACN / Estate number]

Independence

I, *[name, firm]* have undertaken a proper assessment of the risks to my independence prior to accepting the appointment as *[liquidator/administrator/trustee]* of *[company/bankrupt]*. This assessment identified no real or potential risks to my independence. I am not aware of any reasons that would prevent me from accepting this appointment.

Relevant Relationships

Neither I, nor my firm, have, or have had within the preceding 24 months, any relationships with the *[company/bankrupt]*, an associate of the *[company/bankrupt]*, a former insolvency practitioner appointed to the *[company/bankrupt]* or any person or entity that has a charge on the whole or substantially whole of the *[company's/bankrupt's]* property.

or

I, or a member of my firm, have, or have had within the preceding 24 months, a relationship with:

Name	Nature of relationship	Reasons why not an Impediment or Conflict

Disclose here any relevant relationships with:

- the company/bankrupt;
- an associate of the company/bankrupt;
- a former Practitioner of the company/bankrupt; or
- a person who has a charge on the whole of substantially the whole of the company's/bankrupt's property.

There are no other prior professional or personal relationships that should be disclosed.

Prior Engagements with the Insolvent

Neither I, nor my Firm, have undertaken any prior engagements for *[company/bankrupt].*

or

I, or a member of my Firm, have undertaken the following engagements for *[company/bankrupt]* prior to the acceptance of this appointment:

Name	Nature of engagement	Reasons why not an Impediment or Conflict

Disclose here:

- the nature of pre-appointment advice (if any), including any immaterial professional relationship;
- the nature of work carried out more than two years prior to the appointment (if any); and
- the nature of any other work undertaken which fits within any of the exclusions included in the Code.

There are no other prior professional relationships or engagements that **should** be disclosed.

Indemnities

I have been provided with the following indemnities for the conduct of this *[liquidation/administration/bankruptcy]*:

Name	Nature of indemnity

Disclose here:

- each indemnifier;
- the extent and nature of each indemnity, other than statutory indemnities; and
- the receipt or agreement to receive any upfront fees.

This does not include statutory indemnities.

or

I have not been indemnified in relation to this administration, other than any indemnities that I may be entitled to under statute.

Dated:

.....
[signed, Practitioner name]

Note: If circumstances change, or new information is identified, I am required under the IPA Code of Professional Practice to update this Declaration and provide a copy to creditors with my next communication as well as table a copy of any replacement declaration at the next meeting of the company's creditors.

20 Remuneration Report

20.1 Overview and Explanation of the Recommended Report

The recommended format for a report to creditors **should** be used by Practitioners seeking retrospective and/or prospective determination of remuneration on a **time basis**, although aspects of the report may be useful for other remuneration bases.

Reports **should** be tailored to the particular circumstances of each administration.

In providing information in a report, the external Practitioner **should** as a matter of good practice:

- provide information that is specific to the administration, rather than generic;
- ensure, where possible, that the level of information is proportionate to the size and complexity of the administration;
- try to assist committee members or creditors by highlighting the key components of the remuneration claim and any areas that committee members or creditors are likely to view as contentious;
- provide a summary of high-level information;
- explain that further levels of detail are available at the meeting or on request;
- make explanations concise and clear; and
- provide disclosure that is meaningful, clear, succinct and appropriate overall.

The courts expect a Practitioner to exercise their **professional judgment** when putting together a report to committee members or creditors.

The remuneration report may also be combined with a general report that the Practitioner is preparing for committee members or creditors. For example, where a voluntary administrator is seeking the determination of remuneration at the meeting to consider the company's future and the Practitioner is already under an obligation to prepare a s 439A report.

Committee members or creditors may or may not be familiar with insolvency procedures and are not being remunerated for their time. Therefore, providing more information does not necessarily inform creditors in a more effective manner than providing less: **it is the relevance and quality of the information, rather than the quantity, that is the key.**

At the meeting, it is good practice for committee members or creditors to be made aware **that all supporting documentation may be viewed if requested, provided sufficient notice is given to the Practitioner**.

20.2 Structure of the Recommended Report

The recommended report is divided into five parts with the first two being remuneration specific.

Part 1: Description of Work

Part 2: Calculation of Remuneration

Part 3: Report on Progress of the Administration

Part 4: General Supporting Information

Part 5: Initial Advice to Creditors

In practice the report **should** form a coherent narrative where an overview and status report is followed by the substantive claims and then general explanatory information.

Report part	**Timing**	
	Commencement of Administration	Remuneration approval request
Part 1		X
Part 2		X
Part 3		X
Part 4		X
Part 5	X	

Part 1: Description of Work

The tasks which Practitioners undertake can be broadly divided into seven categories. These are:

a) Assets

b) Creditors

c) Employees

d) Trade On

e) Investigation

f) Dividend

g) Administration

Information on the seven categories is to be set out in tabular form making it easy for creditors to understand the type and purpose of work being undertaken. A typical list of tasks is included as guidance. The narrative provided must be sufficient, meaningful, open and clear and provide specifics of the work done for this particular appointment.

- The table included in the report for the particular administration **should** properly reflect the work done on that appointment. Inclusion of the full list for all appointments is not appropriate and is not a proper reflection of the work undertaken on the appointment.
- Proper time recording systems **should** be able to readily generate reports thus reducing the time taken to prepare this information.
- The General Description column is indicative only and **should** be amended to suit the particular appointment. Use specific details (i.e., detailing specific asset or class of asset realisations).
- Where the method of remuneration is time based, dollar value of remuneration attributed to that category of work and hours taken **should** be included under the task heading for each task category.

- Further details and particulars may be required for large administrations (i.e more or different sub-categories) or where the remuneration claimed relates to a lengthy period of time (i.e., may need to be divided into time periods).

Part 2: Calculation of Remuneration (Time Basis)

The suggested format provides all the information necessary to allow a creditor to understand the calculations for the claim for remuneration. Who did what for how long and at what rate?

Part 3: Report on Progress of the Administration

It is common practice to include a progress report with the remuneration report. While not forming part of the remuneration claim, it provides context for creditors to understand the stage of the administration – work completed, work under way, work still to be undertaken. This part of the report may be incorporated as part of a more general report to creditors.

Part 4: General Supporting Information

This is information that needs to be provided in support of the remuneration claim, such as the actual resolutions to be put to creditors and presentation of details of receipts and payments. These items may be incorporated into the general report to creditors if one is being provided.

Part 5: Initial Advice to Creditors

This information is standard and **should** be provided to creditors at the commencement of the administration. Creditors **must** have received this information before being asked to approve remuneration.

20.3 Part 1: Description of Work Completed

Company		Period From		To	
Practitioner		Firm			
Administration Type					

Task Area	**General Description**	**Includes** [**Suggestion Only** - delete or add details as appropriate to the work done]
Assets [hours] [$ x]	Sale of Business as a Going Concern	Preparing an information memorandum Liaising with purchasers Internal meetings to discuss/review offers received
	Plant and Equipment	Liaising with valuers, auctioneers and interested parties Reviewing asset listings
	Sale of Real Property	Liaising with valuers, agents, and strata agent Attendance at auction
	Assets subject to specific charges	All tasks associated with realising a charged asset
	Debtors	Correspondence with debtors Reviewing and assessing debtors ledgers Liaising with debt collectors and solicitors
	Stock	Conducting stock takes Reviewing stock values Liaising with purchasers
	Other Assets	Tasks associated with realising other assets

Task Area	General Description	**Includes** [**Suggestion Only** - delete or add details as appropriate to the work done]
	Leasing	Reviewing leasing documents Liaising with owners/lessors Tasks associated with disclaiming leases
Creditors [hours] [$x]	Creditor Enquiries	Receive and follow up creditor enquiries via telephone Maintaining creditor enquiry register Review and prepare correspondence to creditors and their representatives via facsimile, email and post Correspondence with committee of creditors members
	Retention of Title Claims	Receive initial notification of creditor's intention to claim Provision of retention of title claim form to creditor Receive completed retention of title claim form Maintain retention of title file Meeting claimant on site to identify goods Adjudicate retention of title claim Forward correspondence to claimant notifying outcome of adjudication Preparation of payment vouchers to satisfy valid claim Preparation of correspondence to claimant to accompany payment of claim (if valid)
	Secured creditor reporting	Preparing reports to secured creditor Responding to secured creditor's queries
	Creditor reports	Preparing 439A, investigation, meeting and general reports to creditors
	Dealing with proofs of debt	Receipting and filing POD's when not related to a dividend Corresponding with OSR and ATO regarding POD's when not related to a dividend
	Meeting of Creditors	Preparation meeting notices, proxies and advertisements Forward notice of meeting to all known creditors Preparation of meeting file, including agenda, certificate of postage, attendance register, list of creditors, reports to creditors, advertisement of meeting and draft minutes of meeting. Preparation and lodgement of minutes of meetings with ASIC Responding to stakeholder queries and questions immediately following meeting
	Shareholder enquires	Initial day one letters ITAA Section 104-145(1) declarations Responding to any shareholder legal action
Employees [hours] [$x]	Employees enquiry	Receive and follow up employee enquiries via telephone Maintain employee enquiry register Review and prepare correspondence to creditors and their representatives via facsimile, email and post Preparation of letters to employees advising of their entitlements and options available Receive and prepare correspondence in response to employees objections to leave entitlements
	GEERS	Correspondence with GEERS Preparing notification spreadsheet Preparing GEERS quotations Preparing GEERS distributions
	Calculation of entitlements	Calculating employee entitlements Reviewing employee files and company's books and records

Task Area	General Description	**Includes** [**Suggestion Only** - delete or add details as appropriate to the work done]
		Reconciling superannuation accounts Reviewing awards Liaising with solicitors regarding entitlements
	Employee dividend	Correspondence with employees regarding dividend Correspondence with ATO regarding SGC proof of debt Calculating dividend rate Preparing dividend file Advertising dividend notice Preparing distribution Receipting POD's Adjudicating POD's Ensuring PAYG is remitted to ATO
	Workers compensation claims	Review insurance policies Receipt of claim Liaising with claimant Liaising with insurers and solicitors regarding claims Identification of potential issues requiring attention of insurance specialists Correspondence with insurer regarding initial and ongoing workers compensation insurance requirements Correspondence with previous brokers
	Other employee issues	Correspondence with Child Support Correspondence with Centrelink
Trade On [hours] [$x]	Trade On Management	Liaising with suppliers Liaising with management and staff Attendance on site Authorising purchase orders Maintaining purchase order registry Preparing and authorising receipt vouchers Preparing and authorising payment vouchers Liaising with superannuation funds regarding contributions, termination of employees employment Liaising with OSR regarding payroll tax issues
	Processing receipts and payments	Entering receipt and payments into accounting system
	Budgeting and financial reporting	Reviewing company's budgets and financial statements Preparing budgets Preparing weekly financial reports Finalising trading profit or loss Meetings to discuss trading position
Investigation [hours] [$x]	Conducting investigation	Collection of company books and records Correspondence with ASIC to receive assistance in obtaining reconstruction of financial statements, company's books and records and Report as to Affairs Reviewing company's books and records Review and preparation of company nature and history Conducting and summarising statutory searches Preparation of comparative financial statements Preparation of deficiency statement Review of specific transactions and liaising with directors regarding certain transactions Liaising with directors regarding certain transactions Preparation of investigation file Lodgement of investigation with the ASIC Preparation and lodgement of supplementary

Task Area	General Description	**Includes** [**Suggestion Only** - delete or add details as appropriate to the work done]
		report if required
	Examinations	Preparing brief to solicitor Liaising with solicitor(s) regarding examinations Attendance at examination Reviewing examination transcripts Liaising with solicitor(s) regarding outcome of examinations and further actions available
	Litigation / Recoveries	Internal meetings to discuss status of litigation Preparing brief to solicitors Liaising with solicitors regarding recovery actions Attending to negotiations Attending to settlement matters
	ASIC reporting	Preparing statutory investigation reports Preparing affidavits seeking non lodgements assistance Liaising with ASIC
Dividend [hours] [$x]	Processing proofs of debt	Preparation of correspondence to potential creditors inviting lodgement of POD Receipt of PODs Maintain POD register Adjudicating PODs Request further information from claimants regarding POD Preparation of correspondence to claimant advising outcome of adjudication
	Dividend procedures	Preparation of correspondence to creditors advising of intention to declare dividend Advertisement of intention to declare dividend Obtain clearance from ATO to allow distribution of company's assets Preparation of dividend calculation Preparation of correspondence to creditors announcing declaration of dividend Advertise announcement of dividend Preparation of distribution Preparation of dividend file Preparation of payment vouchers to pay dividend Preparation of correspondence to creditors enclosing payment of dividend
Administration [hours] [$x]	Correspondence	
	Document maintenance/file review/checklist	First month, then six monthly administration review Filing of documents File reviews Updating checklists
	Insurance	Identification of potential issues requiring attention of insurance specialists Correspondence with insurer regarding initial and ongoing insurance requirements Reviewing insurance policies Correspondence with previous brokers
	Bank account administration	Preparing correspondence opening and closing accounts Requesting bank statements Bank account reconciliations Correspondence with bank regarding specific transfers
	ASIC Form 524 and other forms	Preparing and lodging ASIC forms including 505, 524, 911 etc Correspondence with ASIC regarding statutory forms
	ATO and other statutory reporting	Notification of appointment Preparing BAS' Completing group certificates

Task Area	General Description	**Includes** [**Suggestion Only** - delete or add details as appropriate to the work done]
	Finalisation	Notifying ATO of finalisation Cancelling ABN / GST / PAYG registration Completing checklists Finalising WIP
	Planning / Review	Discussions regarding status of administration
	Books and records / storage	Dealing with records in storage Sending job files to storage

20.4 Part 2: Calculation of Remuneration

Employee [1]	**Position**	**$/hour** (ex GST)	**Total actual hours**	**Total ($)**	**Task Area**						
					Assets hrs $	Creditors hrs $	Employees hrs $	Trade on hrs $	Investigation hrs $	Dividend hrs $	Administration hrs $
Total				$	x	x	x	x	x	x	x
GST				$							
Total (Incl GST)				$							
Average hourly rate				$	x	x	x	x	x	x	x

Note 1: The inclusion of Employee names is not mandatory, but some form of coding **should** be used e.g. Employee A. The name of the Appointee and Co-appointees **must** be identified.

20.5 Disbursements

Disbursements are divided into three types: **A, B1, B2.**

A disbursements are all externally provided professional services. These are recovered at cost. An example of an A disbursement is legal fees.

B1 disbursements are externally provided non-professional costs such as travel, accommodation and search fees. B1 disbursements are recovered at cost.

B2 disbursements are internally provided non-professional costs such as photocopying and document storage. B2 disbursements are charged at cost except for photocopying, printing and telephone calls which can be charged at a rate which is intended to recoup both variable and fixed costs.

Information about disbursements can be provided here or as part of the administration's receipts and payments.

You are not required to seek creditor approval for disbursements, but must account to creditors.

Creditors have the right to question the incurring of the disbursements and can challenge disbursements in court. It is recommended that the above text be included in the narrative explanation for creditors.

20.6 Part 3: Report on Progress of the Administration

While not strictly part of the remuneration request, it is important that Practitioners provide progress reports to place the claim in context. This narrative should normally preface the remuneration claim.

It may well be that this information has already been incorporated into a general report to creditors. If so, it is not necessary to repeat this information as part of the remuneration request.

20.7 Part 4: Supporting information

Future fees

If the Practitioner is intending to request approval of prospective remuneration, the Practitioner must provide the following information to the approving body:

- *a summary description of the major tasks still remaining to be done on the administration;*
- *an explanation of the estimated fees remaining to complete the administration, including the estimated fees for each major task;*
- *a monetary cap on the remuneration; and*
- *an explanation as to what this cap represents.*

The Practitioner may also choose to estimate the time to be spent by the staff at different levels.

Summary of Receipts and Payments

A summary of receipts and payments to and from the external administration bank account must be provided.

The receipts and payments summary should be prepared up to a date that is as close as possible to the date on which the notice and report is given to creditors. The summary should be clearly labelled as being prepared 'as at' a particular date.

If large or exceptional receipts and payments are received or made after the report is prepared but before the meeting at which the remuneration claim is to be considered, the external Practitioner should provide additional information to committee members or creditors at the meeting.

Statement of remuneration claim

*The Practitioner **should** clearly:*

- *state the precise terms of the agreement sought from the committee or the resolution(s) sought from creditors;*
- *set out the total remuneration previously determined; and*
- *indicate whether they will be seeking the determination of further remuneration at some time in the future.*

Queries

Creditors need to be informed of their right to obtain further information and they can request that information.

Information Sheet

Creditors must be provided with the remuneration information sheet (or instructions on how to access it) before creditors are requested to approve a remuneration claim.

20.8 Part 5: Initial advice to creditors

Remuneration Methods

There are four basic methods that can be used to calculate the remuneration charged by an insolvency Practitioner. They are:

Time based / hourly rates

This is the most common method. The total fee charged is based on the hourly rate charged for each person who carried out the work multiplied by the number of hours spent by each person on each of the tasks performed.

Fixed Fee

The total fee charged is normally quoted at the commencement of the administration and is the total cost for the administration. Sometimes a Practitioner will finalise an administration for a fixed fee.

Percentage

The total fee charged is based on a percentage of a particular variable, such as the gross proceeds of assets realisations.

Contingency

The practitioner's fee is structured to be contingent on a particular outcome being achieved.

Method chosen

Given the nature of this administration we propose that our remuneration be calculated on *[insert basis]*. This is because:

Provide reasoning for the fee calculation method chosen.

Explanation of [Hourly Rates/Fixed fee/Percentage/Contingency]

The rates for our remuneration calculation are set out in the following table together with a general guide showing the qualifications and experience of staff engaged in the administration and the role

they take in the administration. The hourly rates charged encompass the total cost of providing professional services and **should not** be compared to an hourly wage.

Title [2]	Description [3]	Hourly Rate (excl GST)
Appointee		$
Director / Consultant		$
Senior Manager		$
Manager		$
Supervisor		$
Senior		$
Intermediate		$
Secretary		$
Clerk		$
Junior		$

[Notes:

1. *Each firm **should** develop a table which is appropriate for their firm using the columns set down in the above table.*
2. *These are example titles only. Each firm **should** use the titles appropriate to their firm.*
3. *Information that **should** be incorporated in the description column includes years of experience, qualifications, education, staff supervised.]*

For time based remuneration claims, the Practitioner must also include his or her best estimate of the costs of the administration to completion or to a specified milestone.

If fixed fee, percentage of realisations or contingency arrangements are proposed, use the following guidance for this section of the initial advice to creditors.

Guidance for reporting for fixed fee claims

If charging on a fixed fee basis, a fixed amount quote for the cost of the administration, details of what services are included as part of the fixed fee and the basis upon which the balance of services will be charged. If it is intended that some services will be provided on a different basis, the reporting obligations for mixed basis fee arrangements must be complied with.

Guidance for reporting for percentage of realisation claims

If using a percentage of realisations method, the percentage to be applied, clearly documenting what the percentage is to be applied to, when the remuneration will be paid and the expected range of possible remuneration outcomes.

Guidance for reporting for contingency arrangements

If a contingency arrangement within the scope of this Code is proposed, there must be full disclosure of the proposed arrangement and the range of possible remuneration outcomes.

20.9 Information Sheet for Creditors - approving remuneration

This information sheet, or information about how to access this information sheet, must be provided to creditors before they are requested to approve remuneration. It can either be provided with the initial advice on the basis of remuneration or with the remuneration request.

A separate PDF document is available on the IPA website to download, print or refer creditors to.

Creditor Information Sheet

Approving remuneration in external administrations

If a company is in financial difficulty, it can be put under the control of an independent insolvency administrator. Such a person is called a 'liquidator' or a 'voluntary administrator' or an 'administrator of a deed of company arrangement' depending on the type of administration involved. For the purposes of this guide, we use the collective word 'administrator'.

This information sheet gives general information for creditors on the approval of an administrator's fees in a liquidation, a voluntary administration or a deed of company arrangement (other forms of insolvency administration are beyond the scope of this information sheet). It outlines the rights that creditors have in the approval process.

Work undertaken by administrators

The work undertaken by administrators depends on the type of administration concerned and the issues that need to be resolved. Some issues are straightforward, while others are more complex.

However, what is common amongst all administration types is that an administrator is, by law, required to undertake a number of tasks which may not directly benefit creditors (for example, the preparation of reports to the Australian Securities and Investments Commission or the preparation of six monthly receipts and payments). An administrator is still entitled to remuneration for undertaking these statutory tasks.

For more information on the tasks involved in different administrations, see ASIC's information sheets: 'Liquidation: a guide for creditors' and 'Voluntary administration: a guide for creditors'.

Entitlement to fees and costs

An administrator is entitled:

- to be paid reasonable *fees*, or remuneration, for the work they perform, once these fees have been approved by a creditors' committee, creditors or the court; and
- to be reimbursed for out-of-pocket *costs* incurred in performing their role (these costs do not need creditors' committee, creditor or court approval).

Administrators are entitled to an amount of fees for the necessary work that they and their staff properly perform in the administration.

Out-of-pocket costs that are commonly reimbursed include:

- legal fees;
- valuers', real estate agents and auctioneers fees;
- trading costs involved in running the company's business during the administration (e.g. for the purchase of stock, rent of premises);
- stationery, photocopying, telephone and postage costs;
- retrieval costs for recovering the company's computer records; and
- storage costs for the company's books and records.

Creditors have a direct interest in the level of fees and costs, as the administrator will, generally, be paid from the company's available assets before any payments to creditors are made. If there are

not enough assets, the administrator may arrange for a third party, for example another creditor, to pay any shortfall. As a creditor, you **should** receive details of such arrangements.

If there are not enough assets to pay the fees and costs, and there is no third party payment arrangement, any shortfall is not paid and the administrator is in effect '*out of pocket*'.

Calculation of fees

Fees of an administrator may be calculated using one of a number of different methods, such as:

- on the basis of **time** *spent* by the administrator and their staff, according to hourly rates;
- a quoted **fixed fee**, based on an estimate of the costs; or
- a **percentage**, usually of asset realisations.

Charging on the basis of time spent is the most common method. Administrators have a scale of hourly rates, with different rates for each category of staff working on the administration, including the administrator.

If the administrator intends to charge on a time basis, you **should** receive a copy of these hourly rates before the administrator requests approval of their fees.

The administrator and their staff will record the time taken for the various tasks involved, and a record will be kept of the nature of the work performed.

It is important to realise that administrators are professionals who are required to have accounting qualifications and maintain up-to-date knowledge of accounting, business and legal issues. They have serious responsibilities under the law. Their hourly rates and those of their qualified staff reflect this.

The hourly rates do not represent an hourly wage for the administrator and their staff. The administrator is running a business—an insolvency practice—and the hourly rates will be based on the cost of running the business, including overheads such as rent for business premises, utilities, wages and superannuation for staff who are not charged out at an hourly rate (such as personal assistants), information technology support, office equipment and supplies, insurances, and taxes with allowance then made for profit.

Many of the costs of running an insolvency practice are fixed costs that **must** be paid, even if there are insufficient assets available to pay the administrator for their services.

These are all matters that committee members or creditors **should** be aware of when considering the fees presented. However, regardless of these matters, creditors have a right to question the administrator about the fees and whether the rates are negotiable.

It is up to the administrator to justify why the method chosen for calculating fees is an appropriate method for the particular administration. As a creditor, you also have a right to question the administrator about the calculation method used and how the calculation was made.

Report on proposed fees

In order to seek approval of fees, the administrator **must** hold a meeting of the members of any committee of creditors, or, if there is no committee, the creditors themselves. A report **must** be sent, with the notice of meeting, setting out:

- information that will enable the committee members/creditors to make an informed assessment of whether the proposed fees are reasonable;

- a summary description of the major tasks performed, or to be performed; and
- the costs associated with each of these tasks.

The report **should** also provide a summary of out-of-pocket costs incurred or expected to be incurred.

Committee members/creditors may be asked to approve fees for work already performed or fees based on an estimate of work yet to be carried out.

If the work is yet to be carried out, it is advisable for creditors to set a maximum limit ('cap') on the amount that the administrator may receive. For example, 'future fees are approved calculated on hours worked at the rates charged (as set out in the provided rate scale) up to a cap of $X'. If the work involved then exceeds this figure, the administrator will have to ask the creditors' committee/creditors to approve a further amount of fees, after accounting for the fees already incurred.

Who may approve fees

Who may approve fees depends on the type of external administration: see Table 1. The administrator **must** provide sufficient information to enable the creditors' committee, the creditors or the court to make an informed assessment as to whether the fees are reasonable.

*Table 1: Who **may** approve fees*

	Creditors' committee	Creditors	Court
Administrator in a voluntary administration	✓[1]	✓[2]	✓[3]
Administrator of a deed of company arrangement	✓[1]	✓[2]	✓[3]
Creditors' voluntary liquidator	✓[1]	✓[4]	✗[5]
Court-appointed liquidator	✓[1, 6]	✓[2, 6]	✓[3]

1 If there is one.

2 If there is no creditors' committee or the committee fails to approve the fees.

3 If there is no approval by creditors.

4 If there is no creditors' committee.

5 Unless an application is made for a fee review.

6 If insufficient creditors turn up to the meeting called by the liquidator to approve fees, the liquidator is entitled to be paid up to a maximum of $5,000, or more if specified in the *Corporations Regulations 2001*.

Creditors' committee approval

If there is a creditors' committee, members are chosen by a vote of creditors as a whole. In approving the fees, it is important that the members realise that they represent all the creditors, not just their own individual interests.

A creditors' committee will generally only be set up where there are a large number of creditors. If there is one, then they will ask the committee to approve their fees.

A creditors' committee makes its decision by a majority in number of its members present in person at a meeting, but it can only act if a majority of its members attend.

If you would like to know more about creditors' committees and how they are formed, see ASIC's information sheets: 'Liquidation: a guide for creditors', 'Voluntary administration: a guide for creditors' and 'Insolvency: a glossary of terms'.

Creditors' approval

Creditors approve fees by passing a resolution at a creditors' meeting. The vote requires a simple majority of creditors present and voting, in person or by proxy, indicating that they agree to the resolution. Unlike committee members, creditors may vote according to their individual interests.

If a 'poll' is taken at the meeting (that is, rather than a vote being decided on the voices or by a show of hands, a count of each vote and its value is taken), a majority in number and value of creditors present and voting **must** agree. A poll requires the votes of each creditor to be recorded.

A proxy is a document whereby a creditor appoints someone else to represent them at a creditors' meeting and to vote on their behalf. A proxy can be either a general proxy or a special proxy. A general proxy allows the person holding the proxy to vote how they want on a resolution, while a special proxy directs the proxy holder to vote in a particular way.

A creditor will sometimes appoint the administrator as a proxy to vote on the creditor's behalf. An administrator, their partners or staff **must** not use a general proxy to vote on approval of their fees; they **must** hold a special proxy in order to do this. They **must** vote all special proxies as directed, even those against approval of their fees.

Deciding if fees are reasonable

If you are asked to approve an amount of fees either as a committee member or by resolution at a creditors' meeting, your task is to decide if that amount of fees is reasonable, given the work carried out in the administration and the results of that work.

The IPA's Code of Professional Practice: Remuneration outlines the steps administrators **should** take to make sure they fulfil their responsibilities to creditors when asking creditors to approve fees, including when those creditors are acting in their capacity as committee members. This guide is available on the IPA website at ***www.ipaa.com.au***.

If you need more information about fees than is provided in the administrator's report, you **should** let them know before the meeting at which fees will be voted on.

What can you do if you think the fees are not reasonable?

If you do not think the fees being claimed are reasonable, you **should** raise your concerns with the administrator. It is your decision whether to vote in favour of, or against, a resolution to approve fees.

Generally, if fees are approved by a creditors' committee or creditors and you wish to challenge this decision, you **may** apply to the court and ask the court to review the fees. Special rules apply to court liquidations.

You **may** wish to seek your own legal advice if you are considering applying for a court review of the fees.

Reimbursement of out-of-pocket costs

An administrator **should** be very careful incurring costs that **must** be paid from the administration—as careful as if they were incurring the expenses on their own behalf. Their report on fees sent to creditors **should** also include information on the out-of-pocket costs of the administration.

If you have questions about any of these costs, you **should** ask the administrator and, if necessary, bring it up at a creditors' committee/creditors' meeting. If you are still concerned, you have the right to ask the court to review the costs.

Queries and complaints

You **should** first raise any queries or complaints with the administrator. If this fails to resolve your concerns, including any concerns about their conduct, you can lodge a complaint with the IPA at ***www.ipaa.com.au*** or write to:

Complaints Manager

IPA
GPO Box 3921
SYDNEY NSW 2001

or ***complaints@ipaa.com.au***

You can also contact ASIC at ***www.asic.gov.au***, or write to:

Manager National Assessment and Action

ASIC
GPO Box 9827
in your capital city

Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through ***infoline@asic.gov.au***, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'.

For more on insolvency administration, see ASIC's related information sheets at ***www.asic.gov.au/insolvencyinfosheets***:

- Voluntary administration: a guide for creditors
- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors

These are also available from the Insolvency Practitioners Association website at ***www.ipaa.com.au***.

The IPA website also contains the IPA's Code of Professional Practice that is applicable to its members.

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 that are relevant to your circumstances.

21 Creditors' Meetings

Practitioners must call, conduct and report on creditors' meetings in a professional manner consistent with the importance of meetings in the conduct of an administration.

21.1 Introduction

Creditors' meetings (meetings) are an essential part of the communication and decision process of administrations. Meetings:

- enhance accountability and transparency;
- provide an opportunity for the practitioner to explain:
  - the Practitioner's role;
  - the insolvency process;
  - the general rights and obligations of creditors;
  - administration reports;
  - the progress, status and future of the administration;
- provide a forum for creditors to ask questions and for answers to be provided;
- have statutory support giving creditors the power to:
  - approve the compromise of a debt;
  - approve the entry into an agreement extending beyond three months;
  - approve remuneration claims;
  - replace an appointed practitioner; and
  - make a decision about a company's future under Part 5.3A.

The informed co-operation and assistance of creditors will assist the Practitioner in the proper conduct of the administration. A practitioner **should** have regard to the views of creditors and **must** act on directions given by creditors if legally required to do so.

A major factor in the conduct of meetings, and in insolvency communications generally, is the varying levels of sophistication of creditors. Many will have little to no understanding of the insolvency processes and in particular the role of meetings. Practitioners have an asymmetry of knowledge, power and resources and **should** take particular care to ensure that the communications in relation to meetings are clear and concise, that the role of the parties at the meeting and the impact of the meeting are easily understood.

There are five guidance areas for practitioners in respect of meetings:

- The decision to call a meeting;
- Calling the meeting;
- Conducting the meeting;
- Reporting on the meeting; and

- The conduct of practitioners that are not the appointee.

21.2 The decision to call a meeting

Meetings are convened by the practitioner for a number of reasons. Meetings can:

- be required by statute, for example in voluntary administrations, or Part X agreements; or can be held at the request of a required percentage of creditors;
- allow the practitioner to explain progress in the administration and to seek the views of creditors on the further conduct of the administration;
- give authority to adopt a particular course of action, such as to approve a settlement of a claim by the company; or
- approve the practitioner's remuneration.

The cost of convening a meeting is an important consideration as the costs are charged to the administration. The major costs are:

- professional time;
- communications (including postage of notice of meeting); and
- venue hire.

Where the practitioner has discretion to hold a meeting, an assessment **should** be made of the costs and benefits of holding the meeting. The practitioner **should** use the cost reduction processes permissible under the legislation to reduce costs and improve efficiency:

- the use of proxies;
- '*mail-out*' facilities; or
- telephone attendance.

Convening a meeting to discuss a number of on-going issues and resolve them promptly at the meeting may be a cost saving measure.

In addition, the practitioner **should** be aware of provisions in the legislation whereby an indemnity can be sought from a particular party for the cost of calling a meeting.

In some cases, it may be appropriate to obtain court dispensation of some requirements of the meeting process, for example by way of an order under s 447A of the Corporations Act in a Voluntary Administration as to how creditors may be notified, or how the meeting is to be held.

21.3 Calling the meeting

21.3.1 Venue and time of meeting

In addition to the legal requirements, when selecting a venue, the practitioner should consider:

- the convenience to attendees of the:
  - date;
  - time;

- geographic location; and
- the capacity to accommodate those likely to attend.

21.3.2 Notice of the meeting

Apart from the need for Practitioners to comply with the various statutory notice requirements, practitioners **should** despatch notices of meeting as early as possible having regard to the circumstances of the particular administration.

It is recognised that in Voluntary Administrations, and Part X agreements, extra notice is unlikely to be possible due to tight timeframes imposed by the legislation.

21.4 Provision of information prior to creditors' meeting

Unless previously provided, in addition to statutory notices required to be sent to creditors when convening a first meeting, practitioners **must** provide to creditors and other eligible recipients:

- A Declaration of Independence, Relevant Relationships and Indemnities (**DIRRI**);
- A copy of the IPA/ASIC co-branded list of insolvency information sheets or similar document subsequently issued by ASIC and/or the IPA;
- Information prescribed under the IPA Code of Professional Practice: Remuneration to be sent to creditors in the administrator's first communication with creditors; and
- If approval of remuneration is being sought, information in accordance with the IPA Code of Professional Practice: Remuneration.

21.4.1 List of Creditors

Apart from the statutory requirements to provide a list of creditors, a schedule of creditors (name and amount) **should** also be made available on the request of any creditor. The information is publicly available from the Report as to Affairs lodged with ASIC or Statement of Affairs filed with ITSA.

To minimise costs, where possible the schedule **should** be provided electronically (PDF recommended). Hard copy **should** be provided only where the creditor does not have electronic access.

21.5 Proxies

21.5.1 Form of Proxy

Proxy forms accompanying the notice **must** conform strictly to the law containing:

- the name of the company/bankrupt/debtor;
- the address, date and time of the meeting;
- space for:

- the identity of the creditor;
- the identity of the proxy holder;
- signature and dating by the creditor;

- the resolutions;
- space for the creditor to set out the proxy instructions:
  - the voting instruction on each item; or
  - delegation e.g. name proxy holder or chairman.

Proxy forms **must** not be pre-completed. They **must** not contain:

- the name of the creditor;
- the instructions on how the vote is to be cast; or
- the name of the proxy holder.

Information accompanying the proxy form **should** specify:

- the date by which the completed proxy must be returned; and
- the address for return of proxy (post, fax, email).

Given the convenience for many creditors in voting by proxy, and the significance of the power given to a Practitioner under a proxy, practitioners **must** ensure that all legal requirements as to the form of the proxy and instructions as to its completion are complied with.

Returned proxies **should** be carefully checked to ensure that they are valid.

21.5.2 Validity of Proxies

A practitioner **must** not accept a form of proxy that is incorrectly completed in a way that the practitioner considers renders it invalid or of doubtful validity. If time permits, the creditor **should** be asked to rectify any deficiencies in the proxy.

However, a practitioner **should** not reject a proxy simply because of a minor error in its completion provided that:

- the form of proxy sent with the notice of the meeting (or a substantially similar form) has been used;
- the identity of the creditor and the proxy holder are clear; and
- the nature of the proxy holder's authority and any instructions given to the proxy holder are also clear.

21.6 Proofs of debt / Statement of claim

Practitioners may accept creditors' proofs of debt/statement of claim at any time before voting, even during the course of the meeting itself.

The admission or rejection of proofs/claims for voting purposes is the responsibility of the chairperson of the meeting.

21.7 Conduct of the meeting

21.7.1 Attendance at the meeting

The Practitioner as the appointee **should** be physically present at all meetings of creditors.

Practitioners **should** request at least one director or the bankrupt/debtor be present at the first meeting of creditors in order to have them answer any questions that creditors may have in relation to the affairs of the company/bankrupt/debtor. There may be instances where it is not appropriate to have them attend. For example, where there is concern for their safety.

In respect of a Voluntary Administration, Practitioners **should** request at least one director to be present at the second meeting of creditors.

Creditors and their authorised representatives are entitled to attend any meeting. In addition, a person who holds themselves out as representing a creditor **should**, in the absence of evidence to the contrary, be allowed to attend the meeting and to ask questions, but he or she is unable to vote unless a valid proxy is provided.

The chairperson of the meeting **must** decide whether to allow any third parties, such as shareholders, the press or the police, to attend, after taking into account the views of the creditors present. In some cases a representative from the IPA may ask permission to attend.

Regulators (ASIC and ITSA) **must** be allowed to attend meetings. Their presence at a meeting **must** be announced at the meeting.

21.7.2 Use of technology

Practitioners **should** consider the use of technology to assist in the conduct of creditors' meetings, subject to any limitations imposed under statute, to improve the quality of the communication and explanation for creditors. Useful technology includes tele- and video-conferencing and digital projection.

21.7.3 Information to be provided to the meeting

Information to be tabled at the meeting **must** include:

- a copy of the Declaration of Independence, Relevant Relationships and Indemnities (**DIRRI**);
- if approval of remuneration is being sought, information in accordance with the Code of Professional Practice: Remuneration; and
- any other documents as are required by the statutory provisions applicable to the relevant insolvency procedure.

If it is a first meeting of creditors, a brief history of the company/bankrupt/debtor and its current financial position **should** be provided to the meeting. If it is a second or subsequent meeting, any significant changes circumstances or the financial position **must** be explained.

All decisions required of creditors at the meetings **should** be based on information provided prior to the meeting, unless that information is immaterial. Decisions based on information not previously provided may disadvantage creditors. Creditors would have made their decision to not attend, or in how they allocated their proxy based on only part of the information. It is recognised that there will be occasions where this is not possible as developments may have occurred in the time between issue of the notice of meeting and the holding of the meeting.

21.7.4 Use of the casting vote

Applicable to Voluntary Administrators, Deed Administrators and Liquidators only

The casting vote provides to the appointee a very powerful tool. Practitioners **must** exercise the casting vote according to law using their professional judgment in the circumstances of the particular administration.

The legal principles that govern the exercise of the casting vote are explained in the case law and texts and are summarised below:

- the Chairperson has discretion whether to exercise the casting vote. The chair '**should** proceed to exercise the casting vote and resolve the deadlock (thereby resorting to the power for the purpose for which it exists) unless there is some good reason to refrain from doing so'. Failure to exercise the casting vote for some irrational or irrelevant reason is inconsistent with the person's duty;
- the Chairperson **must** weigh up all relevant factors and act honestly and according to what they believe to be in the best interests of those affected by the vote; and for a proper purpose;
- the exercise of the casting vote is most appropriate in circumstances where either creditors with a majority in value have such an overwhelming interest that it is inappropriate to allow a majority in number, who do not have the same monetary interest to carry the day, or vice versa. However, there is no presumption in favour of the majority in value, although any large disproportion between the values of the debts of the numerical minority and the numerical majority will be a factor to be taken into account; nor is there any presumption in favour of maintaining the status quo;
- The practitioner is entitled to, and **should**, bring his or her experience and practical considerations to bear in deciding how to exercise the vote;
- In a Voluntary Administration, the objectives of Part 5.3A **must** be considered in making the decision.

Some matters for consideration when exercising a casting vote are, but not limited to:

- Do creditors with a majority in value however not in number have an overwhelming interest over those in number?
- What opinion, if any, was proffered by the Practitioner in support or opposition of the resolution in any report to creditors or otherwise?
- Has any information come to the Practitioner's attention since the Practitioner formed his or her opinion that might require a change in support of that opinion?
- Do any of those creditor(s) voting have a motive that serves their own interests, which may not be in the best interests of all creditors and/or contrary to the purpose and objectives of the appointment?
- Are those creditors opposing the Practitioner's opinion making an informed and unbiased decision?
- Can the purpose for exercising the casting vote be substantiated by independent, objective and impartial reasoning?
- Will any unfair advantages accrue to the directors by exercising a casting vote in a particular way?

- Should the Practitioner seek to adjourn the meeting for the purpose of further consideration or taking advice?
- What proxies have been given on the basis that the practitioner would vote in accordance with his or her recommendation?

A Practitioner **must** not be influenced by any direct or indirect opportunity of financial benefit that he or she may receive in deciding how to exercise the casting vote; for example, the fact that remuneration will be higher if a deed is entered into. Practitioners should also be aware of the need to avoid any negative perception of self interest swaying the decision.

A practitioner **must** not use the casting vote in relation to any resolution determining or fixing the practitioner's remuneration.

A Practitioner **must** declare the rationale for:

- exercising his or her casting vote (whether for or against a particular resolution), or
- choosing not to exercise, his or her casting vote.

The reasons **must** be minuted.

21.7.5 Attendance records

Creditors and their representatives attending the meeting are required to sign an attendance list. This list **should** be made available for inspection to anyone attending the meeting. This list must be retained as part of the records of the administration.

21.7.6 Questions at the meeting

The practitioner **should**, at the beginning of the meeting, or at an early stage, invite creditors and their representatives to make statements or to ask questions.

Any creditor or creditor's representative wishing to speak, ask questions, or make a nomination, **should** be asked to identify themselves and the creditor they represent.

Practitioners **should** assess the range of types of creditors who are attending the meeting, and ensure they understand the issues being discussed and that they are able to ask questions and seek clarification as necessary. Practitioners **should** not be dismissive or curt with what to others may be basic or uninformed questions. There is usually a need for sensitivity in any explanations or discussions or answers given at a meeting.

A Practitioner **should** appreciate that many creditors wish to have the issues resolved promptly and that extensive debate may not be productive. Where there is apparent understanding by most of the attendees at the meeting, but where a small number may not fully appreciate all the detail, the practitioner may suggest to the individual(s) that explanation of the matter be deferred till immediately after the formal meeting in order to avoid unnecessary delay or diversion of the meeting.

21.7.7 Chairperson and control

The Practitioner who chairs the meeting is in control. The Practitioner **should** be prepared to make rulings on issues in order to ensure a productive and properly conducted meeting. For example, the practitioner may decline to allow a question to be put if, for example:

- the questioner refuses to give the name of the creditor they represent and their own name or that of their firm;
- the questioner does not claim to be or to represent a creditor;

or may decline to answer it if, for example:

- the answer may prejudice the successful outcome of the administration or the creditors' interests;
- the answer may be construed as slanderous if subsequently proved incorrect.

The practitioner **should** state the grounds for his or her decision.

Creditors are entitled to information on the causes of the company's failure/debtor's bankruptcy. The level of detail provided should be commensurate with the circumstances of the Administration.

21.8 Committee of Inspection / Creditors

Where creditors are entitled to appoint a Committee of Inspection/Creditors and one has not already been appointed, the meeting **should** be told of its right to appoint a committee and of the nature of the committee's functions.

If the Practitioner is of the opinion that a committee is not required for the administration, the practitioner **should** explain their reasoning to the meeting.

A Practitioner **should** ensure that a committee is properly convened under the legal requirements, is representative of the body of creditors, is aware of its rights and responsibilities and that it acts within its authority.

21.9 Reporting on the meeting

Minutes **must** be kept of all meetings of creditors, committees of creditors/inspection, or contributories.

The minutes should include the following information:

- the title of the proceedings;
- the date, time and venue of the meeting;
- the name and description of the chairperson and any other person involved in the conduct of the meeting;
- a list, in the format prescribed under law, of the creditors, members or contributories attending or represented at the meeting;
- the name of any officer or former officer of the company attending the meeting if not attending in one of the above capacities;
- the exercise of any discretion by the chairperson in relation to the admissibility or value of any claim for voting purposes;
- the resolutions taken and the decision on each one and, in the event of a poll being taken, the value or number (as appropriate) of votes for and against each resolution;
- if the casting vote is exercised, details and the reasons for how it was cast;

- where a committee is established, the names and contact details of the members; and
- such other matters as are required by the statutory provisions applicable to the relevant insolvency procedure.

The minutes **should** record sufficient detail about matters discussed at the meeting to enable an understanding of the business conducted. This does not require recording of the meeting word for word, unless the Practitioner considers this to be necessary.

If confidential matters are discussed at the meeting, the Practitioner **should** exercise their discretion when deciding what level of detail is to be recorded in the public record.

Where a meeting has been asked to approve a Practitioner's remuneration, the information provided to the meeting in support of that request **should** form part of, or be retained with, the minutes of the proceedings.

The minutes **should** be signed by the chairperson, retained on the administration files and, where applicable, lodged with either ASIC or ITSA.

Where a Practitioner is the appointee, but has not acted as chairperson of the meeting, they **should** endeavour to ensure that the record is signed by the chairperson and complies with the above principles.

If the Practitioner is not satisfied that the record signed by the chairperson is an accurate record of the proceedings, they **should** either prepare their own record for the files or prepare a note for the files explaining in what respects they disagree with the chairperson's record.

21.10 Recording the meeting

If the Practitioner wishes to make an audio recording of the conduct of the meeting, the meeting **must** be advised beforehand and creditors' permission obtained.

21.11 Conduct of practitioners that are not the appointee

Where a Practitioner is asked to act as an alternate appointee in an administration and attends a meeting of creditors in that capacity, regard must be had to the requirements of the Code of Professional Practice: Competition and Promotion at all times.

22 Reports under s 439A of the Corporations Act

22.1 Introduction

The purpose of this Practice Note is to:

- provide guidance to an administrator of a company in fulfilling their statutory responsibilities in preparing the 439A report on the company's business, property, affairs, financial circumstances and any proposal for a deed of company arrangement;
- provide guidance on reporting to eligible employee creditors where a Deed of Company Arrangement proposes to alter the statutory priorities under sections 556, 560 and 561;
- promote transparency in respect of the company's affairs, the relationship between the administrator and creditors and the relationship between the company and the administrator.

22.2 Definitions

For the purpose of this part of the Code,

'**Administrator**' means a voluntary administrator of a company appointed under Part 5.3A of the Act.

'**Section 439A report**' means:

- a report on the company's business, property, affairs and financial circumstances required to be given to creditors pursuant to subsection 439A(4) of the Act; and
- a statement pursuant to paragraph 439A(4)(b) of the Act, setting out the administrator's opinion and reasons as to each of the options available under section 439C in respect of the company's future.

'**Eligible employee creditor**' has the meaning given by s 9 of the Act.

'**Prospective financial information**' means financial information based on assumptions about events that may occur in the future and possible actions by an entity. It is highly subjective in nature and its preparation requires the exercise of considerable judgment. Prospective financial information can be in the form of:

- a forecast, that is, prospective financial information prepared on the basis of reasonable assumptions as to future events expected to take place or outcomes to occur as at the date the information is prepared; or
- a projection. A projection is prospective financial information based on hypothetical assumptions about future events and management actions which are not necessarily expected to take place – for example, when an entity is in a start-up phase or is considering a major change in the nature of its operations. A projection can also be a mixture of best estimate and hypothetical assumptions, which illustrates the possible consequences, as at the date the information is prepared, if the events and actions were to occur (a '*what-if*' scenario); or
- or a combination of both, for example a one year forecast plus a five year projection;

'**Statutory priorities**' means the priority for the payment of unsecured creditor claims set down in ss 553, 560 and 561 of the Act.

22.3 Professional Judgment

Companies to which administrators are appointed vary in size, type of business, structure and type of creditors. The extent of investigations performed by a Practitioner is dependent on many factors. These factors include the limited and strict timeframes prescribed by Part 5.3A of the Act; the nature of the proposal, if any, for the future of the company; as well as the size, business conducted and structure of the company. Accordingly, the administrator **must** exercise professional judgment in the preparation of the reports required by ss 439A(4) of the Act taking into account all factors.

The administrator of a company in Voluntary Administration has a statutory duty to investigate the company's business, property and affairs. Section 545 of the Act does not apply to Part 5.3A. The statutory duty to investigate the company's business, property and affairs cannot be contractually restricted or limited by the practitioner.

However, the law does recognise the Administrator **must** maintain a balance between speed and accuracy in attending to the duties expected under Part 5.3A and the obligation to provide a report to creditors.

The Administrator **should** exercise judgment to decide if additional time is needed. In these circumstances the Administrator **should**:

- seek an extension of the convening period; or
- the creditors **should** be asked if the meeting may be adjourned.

22.4 Court involvement

An administrator **should** keep in mind that circumstances may arise where an application to the Court is required during the course of a Part 5.3A administration. For example, there may be difficulties in obtaining information or books and records from directors, or the information provided may be known to be false; there may be related parties claiming to act as creditors. In such cases, legal advice may need to be obtained to assess whether directions from the court **should** be sought.

22.5 Legislative requirement

Subsection 439A(4) of the Act requires the practitioner to include with the notice convening the second meeting of creditors in a Voluntary Administration a copy of:

- a report by the administrator about the company's business, property, affairs and financial circumstances;
- a statement setting out the practitioner's opinion about each of the following matters:
  - whether it would be in the creditors' interests for the company to execute a deed of company arrangement;
  - whether it would be in the creditors' interests for the administration to end;
  - whether it would be in the creditors' interests for the company to be wound up;
  - his or her reasons for those opinions; and

- such other information known to the practitioner as will enable the creditors to make an informed decision about each matter covered by subparagraph (i), (ii) or (iii); and

- if a deed of company arrangement is proposed, a statement setting out details of the proposed deed.

Regulation 5.3A.02 also requires the administrator to specify in the report whether there are any transactions that appear to the administrator to be voidable transactions.

The practitioner's role in a Part 5.3A administration is best described as that of an impartial expert. The practitioner's primary duty is owed to the company's creditors who are entitled to rely upon the expert opinion of the administrator. In reporting, the administrator **must** investigate the company's business, property and affairs. The administrator **must** also form an opinion as to whether it would be in the creditors' interest, about each of the three alternative outcomes to the administration.

22.6 Content of the 439A report

22.6.1 Purpose of the report and Summary

The first section of the report **should**:

- clearly inform creditors as to the report's purpose; and
- provide creditors with a summary of the investigation's undertaken; and
- include the Administrator's recommendation.

22.6.2 Background Information

The 439A report **must** contain sufficient information to provide creditors with an understanding of the history of the company and the circumstances leading up to and the need for the appointment of a Voluntary Administrator.

a) Shareholders, Officers and Charges

The 439A report **should** incorporate details of the company's existing shareholders and officers and details of registered charges. Relevant changes in these details that have occurred within twelve months before the administrator's appointment **should** also be disclosed.

b) Books and records

The 439A report **should** incorporate an opinion as to whether the company's books and records are maintained in accordance with s 286 of the Act.

Failure by the company to maintain books and records in accordance with s 286 provides a rebuttable presumption of insolvency of the company. This presumption can be relied upon by a liquidator in an application for compensation for insolvent trading and other actions for recoveries pursuant to Division 2 of Part 5.7B of the Act from related entities. Accordingly, the state of the company's books and records is considered material to a creditor's decision concerning the company's future.

c) Financial statements

A company's financial statements are an essential tool in the management of the business conducted by the company. The presence, or absence, of timely financial reporting in a company may provide an indication of the management capabilities of the company officers. Accordingly, financial statements are considered material to a creditor's decision concerning the company's future.

The 439A report **should** disclose the date to which the company's financial statements were prepared prior to the administrator's appointment.

d) Historical financial performance

The 439A report **must** incorporate a summary of the company's historical financial results and a preliminary analysis and commentary from the administrator.

e) Administrator's prior involvement

Whilst it is acknowledged that the administrator **must** detail his or her prior involvement with the company at the first meeting of creditors, the 439A report **must** reiterate any relationships that were disclosed in the DIRRI provided with the notice of first meeting. For further information about disclosure of relevant relationships, refer to the Code of Professional Practice section on Independence.

f) Directors' report as to affairs

The 439A report **should** outline the content of the directors' report as to affairs and include the administrator's comments as to the administrator's estimate of realisable value of assets and liabilities. If directors have failed to provide a report as to affairs, this **must** be disclosed.

g) Explanations for difficulties

The s 439A report **should** include the directors' explanation for the company's difficulties and the administrator's opinion of the reasons for the company's difficulties.

h) Outstanding winding up applications

A creditor incurs substantial costs in making an application to have a company wound up. The timing of a company's decision to appoint an administrator, relative to the date on which the application was to be heard, may be a material factor to creditors in deciding the company's future.

The s 439A report **should** disclose any winding up applications filed against the company prior to the appointment of the administrator and the petitioning creditor in such applications.

i) Related entities

A creditor of the company may apply to the court to set aside or modify a resolution authorising the execution of a deed of company arrangement if the resolution was carried as a consequence of a related entity casting a vote. Similarly, a defeated resolution for the company to be wound up may be declared to have been carried, if it was defeated because of the vote cast by a related entity.

The s 439A report **must** disclose to the best of the Practitioner's knowledge:

- those creditors of the company who are related entities;
- the quantum of their claims; and
- the process taken by the administrator to verify the claims made by related entities.

The report **should** also disclose:

- when the debt was incurred; and
- how the debt was incurred.

22.6.3 Offences, voidable transactions and insolvent trading

a) Offences

An administrator is required to complete and lodge a report pursuant to section 438D of the Act with ASIC where it appears to the administrator that a past or present officer of the company may have been guilty of an offence in relation to the company; and in other limited circumstances.

Where any such identified offences appear materially relevant to the creditors' decision on the company's future, these alleged offences **should** be disclosed.

b) Voidable transactions

The s 439A report **must** disclose whether there appears to the administrator to have been any voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator. If able to be ascertained, the s 439A report **should** disclose the quantum of any voidable transactions identified, the beneficiaries of those transactions and the likelihood and estimated cost of recovery.

Voidable transactions include unfair preferences (s 588FA), uncommercial transactions (s 588FB), insolvent transactions (s 588FC) and unfair loans (s 588FD).

To reduce the amount of generic information included as part of the s 439A report, an information sheet with explanations about offences, voidable transactions and insolvent trading has been prepared and **should** be provided to creditors as an attachment to the s 439A report.

c) Insolvent trading

The s 439A report **must** include comment regarding whether the company engaged in insolvent trading and **should**, if possible, provide an estimate of the loss incurred by the company as a result.

d) Director's personal financial position

Where voidable transactions against a company director or a potential insolvent trading claim are identified, the administrator **should** comment on the likelihood of recovering monies from the directors in the event that the company were to proceed into liquidation. In forming an opinion, the administrator **should** make reasonable enquiries to establish the directors' capacity to pay any judgment obtained.

The administrator, due to time constraints, is unlikely to conduct a public examination of the company's directors. Therefore the administrator will be limited to public information and

information provided by the director, or authorised by the director to be disclosed by third parties.

In the 439A Report, the administrator **should**:

- detail the enquiries undertaken; and
- include, as appropriate, the results of these enquiries.

When a director does not provide this information, or authorise its disclosure by third parties, this **must** be disclosed in the report.

22.6.4 Estimated return from a winding up

All s 439A reports, including those for a company where a Deed of Company arrangement is being proposed, **must** disclose:

- the estimated return to creditors from a winding up of the company;
- the effect of related party creditor claims on the estimated return;
- likely timing of the return to creditors from a winding up of the company;
- the basis on which remuneration will be sought by the liquidator if the company is placed into liquidation and the administrator is appointed liquidator; and
- an estimate of the likely costs of administering the winding up of the company.

It may not be possible to quantify the estimated return from a winding up of the company. In such circumstances, the Administrator **should** provide a range of possible outcomes and the factors that influence each outcome.

If approval of remuneration for administering the liquidation is sought prospectively, details of the remuneration claim **must** be provided in accordance with the Code.

Where a Deed is proposed, the 439A Report **should** include a table providing creditors with a direct comparison of the estimated returns and costs in a liquidation and under the Deed.

22.6.5 Proposal for a deed of company arrangement

a) Reporting for all proposed Deeds

If a Deed of Company Arrangement is being proposed, the 439A report **must** disclose:

- the key features of the proposed Deed;
- the monitoring and reporting arrangements that are to be put in place to ensure that the terms of the Deed are met and that creditors are fully informed of the progress of the administration;
- the estimated return to creditors and likely timing of the return to creditors from the proposed Deed;
- how related party creditor claims are being dealt with under the Deed and the effect of related party creditors' claims on the estimated return;
- a comparison of the estimated return to creditors from the proposed Deed to the estimated return to creditors from a winding up of the company and for ease of

understanding this information should be provided in a table providing creditors with a direct comparison of the estimated returns and costs in a liquidation and under the Deed;

- a summary of the administrator's reasoning as to why the Deed will provide creditors with a greater return than in a liquidation;
- in circumstances where a guarantor proposes to retain control of the business pursuant to the proposed Deed, details of the creditors holding the guarantees and the quantum of the debt secured by the guarantees. The report **should** request that any creditor holding a guarantee which is not disclosed in the report provide details to the administrator as soon as possible;
- where approval of remuneration for the Voluntary Administration is sought, details of the remuneration claim in accordance with the Code; and
- the basis on which remuneration will be sought by the administrator of the proposed Deed and an estimate of the total remuneration payable for administering the proposed Deed. If approval of remuneration for administering the Deed is sought prospectively, details of the remuneration claim in accordance with the Code.

b) Reporting for proposed Deeds with contributions by the company from on-going trading

In addition to the general reporting requirements, if the Deed of Company Arrangement is proposing that the company make contributions to the Deed fund from trading, the 439A report **must** also include the following information:

- how the intended trading will enhance the return to creditors given the trading position of the Company prior to the administrator's involvement;
- subject to commercial confidentiality, a summary of the prospective financial information relied upon for the proposed deed of company arrangement and the assumptions relied upon in the preparation of the prospective financial information. Commercial confidentiality must not be used as a reason to not provide any information about the prospective information relied upon;
- if the prospective financial information was prepared by a third party, a comment on the validity of the assumptions relied upon in the preparation of the prospective financial information;
- if the prospective financial information was prepared by the administrator, the administrator should summarise the key assumptions relied upon in the preparation of the prospective financial information; and
- a comment by the administrator as to the likelihood of the company being able to achieve the proposed contributions.

c) Reporting for proposed Deeds including a Creditors' Trust arrangement

In addition to the general reporting requirements, if the Deed of Company Arrangement is proposing the establishment of a Creditors' Trust, the administrator **should** be aware of the guidance provided in ASIC's Regulatory Guide 82 *'External administration: Deeds of company arrangement involving a creditors' trust*'.

d) Reporting for proposed Deeds including a payment by a party other than the company

In addition to the general reporting requirements, if the Deed of Company Arrangement is proposing payment into the Deed fund from a party other than the company, the s 439A report **must** also include the following information:

- the arrangements that are to be put in place to ensure that the third party is bound by the Deed;
- the steps to be taken should the third party fail to make the proposed payments.

The administrator **must** also consider and comment upon the capacity of the third party to make the proposed payments.

22.6.6 Administrator's Opinion

The administrator **must** express:

- an opinion as to whether the option is in the creditors' interests; and
- reasons for the opinion;

for each of the options available to the creditors to decide pursuant to section 439C of the Corporations Act, being that:

- the company execute the proposed Deed;
- the administration end; and
- the company be wound up.

22.6.7 Other Material Information

The 439A report **must** include any other information that is materially relevant to creditors being able to make an informed decision on the company's future.

22.6.8 Incomplete or additional information

Where the administrator needs more time in which to obtain information and complete investigations in order to give the opinion required under s 439A, the administrator **should**, where appropriate, apply to court for an extension of time within which to hold the second meeting.

Example

An administrator is appointed to a large administration with complex and numerous assets and liabilities. The administrator may apply to the court for an extension of the convening period in order to gain more time to complete investigations and give an opinion.

Where a report containing an opinion is given to creditors within time and the administrator receives further information about the company, then the administrator **should** advise creditors before, or at the second meeting, that, in light of this further information, the creditors may decide to adjourn the meeting in order to allow the further information to be investigated or considered.

Example

An administrator sends a report to creditors with an opinion that the company enter into a deed of company arrangement. Immediately after the report is sent, a creditor provides the administrator information about non-disclosed assets of the company. If time permits, the administrator should send a supplementary report to creditors as to the new information. At the meeting the administrator will explain the new information and may suggest to creditors that the meeting be adjourned for up to 45 business days in order to allow further investigations to be made. Ultimately it is a matter for the creditors whether to adjourn the meeting or vote on the three options available.

22.7 Report where Deed alters Statutory Priorities

22.7.1 Legislative requirement

Where it is proposed that the Deed alter the statutory priorities, eligible employee creditors **must** pass a resolution agreeing to this alteration at a meeting of eligible employee creditors convened for this purpose under s 444DA of the Act. This meeting **must** be held prior to the meeting of creditors under s 439A.

Written notice **must** be provided to eligible employee creditors at least five business days before the meeting and the notice of meeting **must** be accompanied by a statement setting out:

- the administrator's opinion whether the alteration of the statutory priorities would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company;
- his or her reasons for that opinion; and
- such other information known to the administrator as will enable the eligible employee creditors to make an informed decision.

22.7.2 Content of statement

Where it is proposed that a Deed will alter the statutory priorities, the administrator **must** provide to eligible employee creditors the following:

- information required to be provided under the Code for the s 439A report:
  - Background Information;
  - Offences, Voidable Transactions and Insolvent Trading;
  - estimated return to employees from the companies monies in a liquidation (excluding payments that employees may be eligible to receive under the General Employee Entitlements and Redundancy Scheme, (**GEERS**) and the timing of that return;
- a comprehensive and clear explanation of the proposed alteration. If different groups of eligible employee creditors are affected in different ways, the explanation **should** provide details for each group of eligible employee creditors;
- estimated return to eligible employee creditors (or each different group of eligible employee creditors) under the proposed Deed and the timing of that return;
- an explanation as to how related party creditor claims are being dealt with under the Deed and the effect of related party creditors' claims on the estimated return;

- details of the GEERS or any replacement scheme, including what entitlements the employees may be entitled to claim under the GEERS should the company go into liquidation, and the effect that the alteration of the statutory entitlements will have on the employees rights under that scheme in the event that the Deed fails and the company proceeds into liquidation.

22.7.3 Administrator's Opinion on Altering Statutory Priorities

The administrator **must** express:

- whether the alteration of the statutory priorities would be likely to result in the same or a better outcome for eligible employee creditors as a whole than would result from an immediate winding up of the company;
- his or her reasons for that opinion.

Where there are groups of eligible employee creditors that will be affected by the alteration in different ways, when making his or her recommendation, the practitioner **must** consider the position of the eligible employee creditors as a whole.

This recommendation **should** be accompanied by a comparison of the estimated return in a liquidation and the estimated return under the proposed Deed in a table format. The possible entitlements that employees may be able to claim under the GEERS in a liquidation **should** also be included.

22.7.4 Other Material Information

The statement **must** include any other information that is materially relevant to the eligible employee creditors' decision on the company's future.

22.7.5 Additional information

The administrator **should** advise eligible employee creditors in writing, if practicable, of any additional matter that comes to the administrator's attention after the dispatch of the statement that a reasonable person would consider to be material to the eligible employee creditors' decision.

22.8 Sample 439A report

This sample report is a suggested report format that meets the **minimum** standard expected of members under the IPA Code of Professional Practice: Section 439A Reports. Additional information may be required on particular administrations (for example, an explanation of the ongoing trading of the company during the administration if that has occurred; if significant Retention of Title issues have arisen, how they are being dealt with; if a Committee of Inspection is proposed, how that will occur; etc). Members **must** ensure that this report provides creditors:

- with information about the company's business, property, affairs and financial circumstances;
- a professional opinion from the administrator as to each of the options available to the creditors;
- details of any proposed deed (if one is proposed); and

- such other information known to the administrator as will enable the creditors to make an informed opinion about their options (section 439A(4)).

A full explanation of the information to be included under each heading is available in the Practice Note on Section 439A reports. Information in blue text and square brackets is additional guidance. Clear text is suggested wording for use in the report.

Report to Creditors under Section 439A of the Corporations Act

Company Name	
ACN	
Trading Names	
Administrator	
Contact for queries	
Contact phone number	

Introduction

I was appointed Administrator of the company under Part 5.3A of the Corporations Act on [insert date] by [directors, chargee etc].

The purpose of the appointment of an administrator is to allow for an independent insolvency practitioner to take control of and investigate the affairs of an insolvent company. During that time creditors' claims are put on hold. At the end of that period I am required to provide creditors with information and recommendations to assist creditors to decide upon the company's future.

The purpose of this report is therefore to provide creditors with sufficient information for them to make an informed decision about the future of the company, including:

- background information about the company;
- the results of my investigations;
- the estimated returns to creditors;
- details of the proposed Deed of Company Arrangement [delete if one not offered]; and
- the options available to creditors and my opinion on each of these options.

In the time available to me, I have undertaken the following investigations to prepare this report and formulate my opinion:

-
-
-

Due to the time constraints imposed under the Voluntary Administration regime there was insufficient time to undertake the following:

-
-

However, in my opinion the above matters have not prevented me from being able to provide sufficient, meaningful information in this report or from being able to form an opinion on what is in the creditors' best interests.

At the meeting of creditors to be held on **[insert date]**, creditors will be asked to make a decision by passing a resolution in respect of options available to them. In this report I have recommended to creditors that [the company enter a deed of company arrangement/the company go into liquidation/control of the company be returned to its members] and detailed why this option is, in my opinion, in creditors' best interests.

Background Information

a Shareholders, Officers and Charges

b Books and records

c Financial statements

d Historical financial performance

e Administrator's prior involvement

f Directors' report as to affairs

g Explanations for difficulties

h Directors

i Administrator

j Outstanding or previous winding up applications

Offences, voidable transactions and insolvent trading

a Offences

b Voidable transactions

The law requires an administrator to specify whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B of the Corporations Act. This issue is relevant to creditors if they are being asked to choose between a Deed of Company Arrangement or a liquidation, because voidable transactions are only able to be challenged if a liquidation occurs.

For general information about what voidable transactions are, please refer to the attached information sheet.

[To assist members and to reduce the amount of generic information included as part of the s 439A report, an information sheet with explanations about voidable transactions and insolvent trading has been prepared and should be provided to creditors as an attachment to this report.]

[Specific information about identified voidable transactions must be included here]

c Insolvent trading

Information about possible insolvent trading is relevant to creditors when making a decision about the future of a company as directors of a company may generally only be sued for insolvent trading if the company is in liquidation. As with the voidable transaction analysis above, creditors have to assess the advantages to them of a Deed, which cannot include proceeds from insolvent trading actions, compared to the likely return in a liquidation, which could include the proceeds of any successful insolvent trading action.

For general information about insolvent trading, please refer to the attached information sheet.

[Specific information about any potential insolvent trading must be included here]

d Director's personal financial position

Estimated return from a winding up

[There is detailed guidance provided in the Code on what information must be provided in relation to the estimated return from a winding up. This information must be included here.]

Proposal for a deed of company arrangement

[There is very detailed guidance provided in the Code on what information must be provided to creditors when a Deed is proposed. The required information can vary depending on the type of Deed proposed. This information must be included here if a Deed is proposed.]

Administrator's recommendation

The following options are available to creditors to decide pursuant to s439C of the Corporations Act, being that:

- the company execute the proposed Deed;
- the administration should end; or
- the company be wound up.

My opinion on each option and the reasons for my opinion are set out in the following:

a The company execute the proposed Deed

- [opinion and reasons]

b The administration should end

- [opinion and reasons]

c The company should be wound up

- [opinion and reasons]

d Recommendation

Other Material Information

Remuneration

[Refer to the IPA Code of Professional Practice: Remuneration for the details of what information must be provided to creditors when seeking approval of remuneration].

a Voluntary Administration

b Deed of Company Arrangement

[Delete if a Deed is not proposed]

c Liquidation

Meeting

[Confirm details of the meeting, proofs of debt, proxies etc in this section of the report.]

22.9 Information sheet for creditors - 439A report

This information sheet is to be provided to creditors with the s 439A report in a Voluntary Administration. A separate PDF document will be available on the IPA website to download, print or refer creditors to.

Creditor Information Sheet

Offences, Recoverable transactions and Insolvent Trading

Offences

A summary of offences that may be identified by the administrator:

180	Failure by officer to exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties.
181	Failure to act in good faith.
182	Making improper use of position as an officer or employee, to gain, directly or indirectly, an advantage.
183	Making improper use of information acquired by virtue of his position.
184	Reckless or intentional dishonesty in failing to exercise duties in good faith for proper purpose. Use of position or information dishonestly to gain advantage or cause detriment.
206A	Contravening an order against taking part in management of a corporation.
206A, B	Taking part in management of corporation while being an insolvent under an administration.
206A, B	Acting as a director or promoter or taking part in the management of a company within five years after conviction or imprisonment for various offences.
209(3)	Dishonest failure to observe requirements on making loans to directors or related companies.
254T	Paying dividends except out of profits.
286	Failure to keep proper accounting records.
312	Obstruction of auditor.
314-7	Failure to comply with requirements for financial statement preparation.
437C	Performing or exercising a function or power as officer while a company is under administration.
437D(5)	Unauthorised dealing with company's property during administration.
438B(4)	Failure by directors to assist administrator, deliver records and provide information.
438C(5)	Failure to deliver up books and records to administrator.
590	Failure to disclose property, concealed or removed property, concealed a debt due to the company, altered books of the company, fraudulently obtained credit on behalf of the company, material omission from Report as to Affairs or false representation to creditors.

Voidable Transactions

Preferences

A preference is a transaction such as a payment between the company and one or more of its creditors, in which the creditor receiving the payment is preferred over the general body of creditors. The relevant time period is six months before the commencement of the liquidation. The company must have been insolvent at the time of the transaction, or become insolvent as a result of the transaction.

Where a creditor receives a preferred payment, the payment is voidable as against a liquidator and is liable to be paid back to the liquidator subject to the creditor being able to successfully maintain any of the defences available to the creditor under either the Corporations Act.

Uncommercial Transaction

An uncommercial transaction is one that it may be expected that a reasonable person in the company's circumstances would not have entered into having regard to:

- the benefit or detriment to the company;
- the respective benefits to other parties; and,
- any other relevant matter.

To be voidable, an uncommercial transaction must have occurred during the two years before the liquidation. However, if a related entity is a party to the transaction, the time period is four years and if the intention of the transaction is to defeat creditors, the time period is ten years.

The company must have been insolvent at the time of the transaction, or become insolvent as a result of the transaction.

Unfair Loan

A loan is unfair if and only if the interest was extortionate when the loan was made or has since become extortionate. There is no time limit on unfair loans – they only have to have been entered into any time on or before the day when the winding up began.

Arrangements to avoid employee entitlements

If an employee suffers loss because a person (including a director) enters into an arrangement or transaction to avoid the payment of employee entitlements, the liquidator or the employee may seek to recover compensation from that person. It will only be necessary to satisfy the court that there was a breach on the balance of probabilities. There is no time limit on when the transaction occurred.

Unreasonable payments to directors

Liquidators have the power to reclaim '*unreasonable payments*' made to directors by companies prior to liquidation. The provision relates to transactions made to, on behalf of, or for the benefit of, a director or close associate of a director. To fall within the scope of the section, the transaction must have been unreasonable, and have been entered into during the 4 years leading up to a company's liquidation, regardless of its solvency at the time the transaction occurred.

Voidable charges

Certain charges are voidable by a liquidator:

- Floating charge created within six months of the liquidation unless it secures a subsequent advance;
- Unregistered charges;
- Charges in favour of related parties who attempt to enforce the charge within six months of its creation.

Insolvent Trading

In the following circumstances, directors may be personally liable for insolvent trading by the company:

- a person is a director at the time a company incurs a debt;

- the company is insolvent at the time of incurring the debt or becomes insolvent because of incurring the debt;
- at the time the debt was incurred, there were reasonable grounds to suspect that the company was insolvent;
- the director was aware such grounds for suspicion existed; and
- a reasonable person in a like position would have been so aware.

The law provides that the liquidator, and in certain circumstances the creditor who suffered the loss, may recover from the director, an amount equal to the loss or damage suffered. Similar provisions exist to pursue holding companies for debts incurred by their subsidiaries.

A defence is available under the law where the director can establish:

- there were reasonable grounds to expect that the company was solvent and they actually did so expect;
- they did not take part in management for illness or some other good reason; or
- they took all reasonable steps to prevent the company incurring the debt.

The proceeds of any recovery for insolvent trading by a liquidator are available for distribution to the unsecured creditors before the secured creditors.

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 that are relevant to your circumstances.