Code of Professional Practice

for

Insolvency Professionals

building professional excellence

Approved 14th December 2007

Our Values

- Integrity
- Transparency
- Accountability
- Technical Proficiency

Insolvency Practitioners Association of Australia

building professional excellence

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Approved 14th December 2007

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Foreword

As part of its commitment to building professional excellence, the IPA is proud to release the first part of its Code of Professional Practice. The remaining sections have been issued for comment in a document available from the IPA web site at www.ipaa.com.au

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.

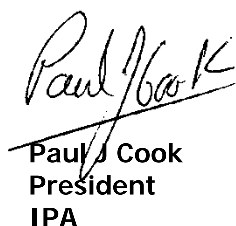
Effective Date

The Code is effective from 31st December 2007. Compliance with the Code will support compliance with the amendments to the Corporations Act which come into effect on 31st December 2007.

Transitional Provision

To the extent that the Code requires Practitioners to implement new systems, such as for remuneration claims, then practitioners will need to have these systems in place by 31st March 2008. This transitional provision does not relieve Practitioners from their legal obligations.

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



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building professional excellence

1. Introduction and Purpose of the Code

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

- educate IPA members as to their professional responsibilities; and
- provide a reference for stakeholders against which they can gauge the conduct of Practitioners.

Members **should** be guided, not merely by the specific terms, but by the spirit of this Code.

This 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 loop holes to justify behaviour by distinguishing the particular situation from those set down in a prescriptive list.

As statements of principle are necessarily general, explanatory guidance is provided. Reference to applicable statute and case law is included in the guidance to promote understanding and to illustrate the origins and varying applications of the principles. The guidance also assists stakeholders in assessing the limits of the principles so that they do not have unreasonable expectations of what Practitioners **should** do.

Practitioners are expected to use their professional and commercial judgement 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 in so far 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 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.

	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	
Members must not acquire directly or indirectly any assets under the administration of the Practitioner	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 and 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 in accordance with the law and consistently with the obligations and duties of fiduciaries.
- are appointed to implement the insolvency regime 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:
    - investigate the reasons for the insolvent's financial failure and
    - report on the results of those investigations to creditors and the regulator;
    - pursue preferences;
    - sue for insolvent trading .
- are required to exercise high level commercial and professional judgments;
- operate in difficult emotional and circumstances, based on deadlines, competing demands, and complexity of 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 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 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 lost out in 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 (preferences).
- 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; and

- have an important role in protecting the public interest, by identifying and reporting on a range of issues such as the misconduct of directors. [Statutory investigatory and reporting obligations are an important aspect of the Practitioner's role 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, (through creditors meetings and committee of inspection);
- directors, debtors and others;
- regulators;
- the courts; and
- the IPA.

2.7 Skill and Judgement

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
- May, if they have received a preference payment, be required to return the preference payment, notwithstanding that they may have additional monies owed

3.2 Employees

- can be more immediately affected by an insolvency of their employer, in terms of immediate loss of wages, and accrued entitlements;
- can rely to an extent on GEERS, and on statutory priorities over other creditors;
- 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, or in receivership, or in a voluntary administration and deed of company arrangement (DOCA);
- 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 of review of the conduct of Practitioners, including to initiate a review by the courts of remuneration claimed;

- are available to assist creditors with complaints and concerns;
- have an obligation to government and the courts;
- 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 in the courts in making decisions in accordance with law and to advance the interests of justice;
- The courts will expect and enforce high standards of conduct;
- The courts are available to Practitioners who can seek guidance and declarations;
- The courts will also offer protection from interference with the Practitioner's powers, providing scope for the Practitioner to exercise his responsibilities and commercial judgment.

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 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;
- 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 the bankrupt or debtor 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 asset, in equity or under family law, which the trustee needs to assess;
- Will often seek to retain that home and can expect that the trustee will negotiate any available option for the spouse to retain the home, consistent with the trustee's duty to creditors.

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 & Interpretation

Construction

MUST	Where it says the Practitioner "**MUST**" take a course of action, the Code is mandatory and the Practitioner **MUST** follow it.
Should	Where it says the Practitioner "**should**" take a course of action, it is appropriate to do so in most circumstances. Where a Practitioner judges it appropriate to do otherwise, the Practitioner **should** document the reasons for his or her decision. If challenged the Practitioner will need to be able justify why they did not follow the course of action. The approach **should** be *"If not then why not?".*
May	Where it says that the Practitioner "may" take a course of action, the Code allows the Practitioner the discretion, based on their professional judgment and experience, to make the relevant decision.

The Code is meant to complement and is to be regarded as additional to any statutory obligations and regulatory requirements that Practitioners may 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 or 5.2 of the *Corporations Act,* different responsibilities under the Code may arise. In those cases, the Code identifies those responsibilities.

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* or the *Corporations Act.* In some cases, there may be corporate insolvency appointments under other legislation such as co-operatives and Aboriginal corporations legislation.
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	in relation to remuneration, 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*.

DEFINITIONS

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* 2001. 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* 1966 and the Bankruptcy Regulations; and the *Corporations Act* 2001 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.

Part A: The Principles

4.1 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.

4.2 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.

4.3 Practice Management

Members MUST implement policies, procedures and systems to ensure effective:

- Quality Assurance
- Compliance and Risk Management
- 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 judgement free from:

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

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

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

Before exercising their judgement, Members **should** take reasonable steps to ascertain the necessary facts to ensure that a sound judgement 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; or
- do not omit, or obscure information required to be included.
- 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. 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 with 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;
- 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 judgement.

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 of 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 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 the threat
- Threat impact assessment
- Design of strategies to manage the threat
- Implementation of threat management program

For Practitioners, the process for identifying risks to independence is simpler. The threat categories 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.

Relationship Independence Heirarchy

COPP S6.5
Information Memorandum

Is it trvial?

Accept Appointment

NO

Corporations Act
Bankruptcy Act

Decline Appointment

YES

Prohibited by law?

COPP Template: S 20

NO

COPP S.6.8, 6.12

Include in Declaration of Relevant relationships and Independence

Prohibited by IPA COPP?

NO

YES

COPP S.6.8.1, 6.9, 6.10

Decline Appointment

NO

Is there exemption?

YES

NOTE: Burden of proof and implications or reckless acceptance

COPP Template S20

Decline Appointment

NO

Are criteria met?

YES

Include in Declaration of Relevant relationships and Independence

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 Declaration of Independence, Relevant Relationships and Indemnities ("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 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, or
- 'spotter's fees', or
- recurring commissions, or
- 'understandings' or requirements that work in the Administration will be given to the referrer, or
- restricting the proper exercise of the Practitioner's judgement and duties.

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

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.

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.

6.8 Professional Relationships within 2 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. 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 statutory 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.

As a minimum 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) 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.

Example

- 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.

b) Investigating Accountant (IA) 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 – see 6.7.1(a).

The following details about the IA MUST be included in the DIRRI.

- who appointed;
- who reported to;
- timeframe; and
- fee.

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

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; and
- 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.

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.

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 has (personally, or through related entities):

- a financial interest in the Insolvent or a related entity, solely or jointly;
- 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;
- other partners or senior employees of his or her firm being, or having recently been, employed by an Insolvent or related entity in a role that involved giving insolvency or strategic or commercial advice
- partners or senior employees of the firm being or having been a Director or Officer or substantial shareholder (>5%);

- a long association with senior personnel of the insolvent or a former Partner of the Firm being a Director or Officer or an employee 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 may do.

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 & 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 Declaration of Independence, Relevant Relationships and Indemnities (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), at the earliest practical opportunity, the Practitioner **MUST** provide to creditors a Declaration of Independence and Relevant Relationships and Indemnities (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 substantially the whole of the insolvent's property;

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;
- 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; and
- the reasons why the acceptance of the appointment by the Practitioner is in the best interest 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).

6.14.1 Timing

The DIRRI MUST:

- be provided with the first communication with 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 with creditors.

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 know 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; and
- has adequate policies, systems and processes; and
- 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; and
- has adequate policies, systems and processes; and
- 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 shall 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
- 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/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 from 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.

INCLUDED IN CONSULTATION DRAFT

The following sections have not been approved by the Board, but have been issued as a separate document for comment. The document for comment is available from the IPA webs site at www.ipaa.com.au.

	Content	Page
8	Communication	Draft 28
9	Timeliness	Draft 31
10	Dealing with Property	Draft 33
11	Competition and Promotion	Draft 34

Pages 28 – 37 have been extracted from this document.

Next page is 38

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.
- 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 judgement 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;
- 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

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 and work 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 remuneration guidance in the Code does not purport to state any position lower than that required by law. 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" (s167 Bankruptcy Act, Schedule 4A 2.13). The requirements of the Code as to claiming remuneration for work that is necessary and proper is to be seen as 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 of 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, reporting to 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 judgement).

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 qualification 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

Disbursement may only be claimed if they were necessarily and properly incurred. Practitioners must use their judgement:

- 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 is a disbursement, or remuneration. Disbursements include those paid from the administration's bank account directly and those paid by the Practitioner and claimed back from the administration.

A Practitioner **should** separate disbursement from the expenses of running their practice which may only be recovered through the charge 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) properly incurred with 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.	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.
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.	A disbursement.
B2 Internal assistance	These are costs that satisfy all the following criteria: (d) they are of an incidental nature; (e) they are not for professional services; (f) they are for goods or services properly provided by the Practitioner or their staff in the administration; and (g) they are not overheads covered in the remuneration claim.	Reasonable costs of: • telephone calls, • postage, • stationery, • photocopying and printing.	• fully and frankly disclose the basis of the charge to creditors • charges **MUST** be reasonable.

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 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 work is better categorised as outsourced insolvency work (which is claimed as remuneration), or general services work (which could be 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?

GUIDANCE – REMUNERATION

Where the task involves standard insolvency skills, the outsourcing costs will be a remuneration claim. Where the task involves skills which are not standard insolvency skills, then the outsourcing costs will be a disbursement.

Example:

- A stock take is required on an administration. The Practitioner could use the firm's staff, or contract out the work to a suitably qualified specialist.
- There is a branch of the business that is in an outlying country area and a stocktake by a local firm would reduce costs in the administration
- 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 disbursements.
- The firm has valuation capacity (chargeable as remuneration) but uses an external valuer (disbursement).

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.

- **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.

- **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 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 the world, 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 the world.

12.9.3 Necessarily and properly incurred

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

- expertise;
- quality;

- timeliness; and
- reasonable and appropriate cost.

Practitioners **MUST** assess each retainer in terms of the interests of creditors and the fiduciary responsibilities involved.

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.

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 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;
- 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, court, committee of inspection).

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
- the 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 category of the work performed (see Remuneration Report Template); and
- details of the work being performed

contemporaneously with the work done 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 Recommended Report 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, a Practitioner may also choose to charge a fixed fee to finalise 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; and
- the independence and objectivity of the Practitioner, even if only as perceived, may be compromised by such an arrangement.
- 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.

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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.

Examples of acceptable fee arrangements are:

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

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.

- Firstly, 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.[statutory requirements]
- 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
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 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 MUST disclose their hourly rates.

Furthermore, Practice Note 20 of the Federal Court of Australia requires all practitioners for all administration types where time based remuneration is proposed, to disclose in their first report to creditors:

- hourly rates; and
- best estimate of the cost of the administration to completion or to a specified milestone identified in the report.

There are similar Practice Notes in most Supreme Courts.

13.3.2 Information to be provided for all remuneration bases

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 external Practitioner intends to use to calculate remuneration in this administration;
- why the external Practitioner considers this method to be suitable for this administration.

Example of reasoning for choosing time based remuneration:

- It ensures that creditors are only charged for work that is performed. Our time is recorded and charged in six minute increments.
- We are required to perform a number of tasks which do not relate to the realisation of assets, for example responding to creditor enquiries, reporting to the ASIC, distributing funds in accordance with the provisions of the Corporations Act.
- We are unable to estimate with certainty the total amount of fees necessary to complete all tasks required in this administration.

If they are intending to use time based remuneration, they MUST also provide:

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

If rates change or the estimate is no longer reliable, the Practitioner MUST notify creditors.

d) Remuneration approval request

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

- Details of the remuneration claimed

  The IPA's Recommended 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

- IPA Creditor information sheet on approving remuneration in external administrations (if not previously provided)

  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 that 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 external practitioner should provide additional information to committee members or creditors at the meeting.

The Practitioner MUST provide creditors the information prescribed 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 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

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 utilized 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 this cap 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 for 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;
- the costs of reporting to the creditors and regulators;
- the 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 information 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 on;
- how achievement of the contingency will be assessed;
- what the Practitioners remuneration will be in the event that the contingency is and 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 or have the capacity or time to understand WIP.

their right to ask questions and have them answered; and that supporting documentation may be viewed if reasonably 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
- clarification of 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 was 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 the IPA Code of Professional Practice: Independence.

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.

INCLUDED IN CONSULTATION DRAFT

The following sections have not been approved by the Board, but have been issued as a separate document for comment. The document for comment is available from the IPA webs site at www.ipaa.com.au.

	Content	Page
15	Practice Quality Assurance	Draft 55
16	Compliance Management	Draft 55
17	Risk Management	Draft 55
18	Complaints Management	Draft 56

Pages 55 & 56 have been extracted from this document

Next Page is 57

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.

19.1 Declaration of Independence, Relevant Relationships and Indemnities

[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

TEMPLATE - DIRRI

Disclose here:
- *the nature of pre-appointment advice (if any);*
- *the nature of work carried out more than two years prior to the appointment (if any);*
- *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; and*
- *the extent and nature of each indemnity, other than statutory indemnities*

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:

1. provide information that is specific to the administration, rather than generic;
2. ensure, where possible, that the level of information is proportionate to the size and complexity of the administration;
3. 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;
4. provide a summary of high-level information;
5. explain that further levels of detail are available at the meeting or on request;
6. make explanations concise and clear; and
7. 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 s439A 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 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 5 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 7 categories. These are:

- **Assets**
- **Creditors**
- **Employees**
- **Trade On**
- **Investigation**
- **Dividend**
- **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 generate reports 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 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 at what rate?

TEMPLATE – REMUNERATION REPORT

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 underway, 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 your remuneration claim, such as the actual resolutions to be put to creditors and presentation of details of your 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 Content of the Recommended Report

Remuneration Report 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
	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

TEMPLATE – REMUNERATION REPORT

Task Area	General Description	Includes *[**SUGGESTION ONLY** - **delete or add** details as appropriate to the work done]*
		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 minutes of meetings with ASIC Respond 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 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 Willis regarding initial and ongoing workers compensation insurance requirements Correspondence with previous brokers
	Other employee issues	Correspondence with Child Support Correspondence with Centrelink

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Task Area	General Description	Includes *[SUGGESTION ONLY - delete or add details as appropriate to the work done]*
Trade On [hours] [$x]	Trade On Management	Liaising with suppliers Liaising with management and staff Attendance on site Authorising purchase orders Maintaining purchase order registry Preparing and authorising receipt vouchers Preparing and authorising payment vouchers Liaising with superannuation funds regarding contributions, termination of employees employment Liaising with OSR regarding payroll tax issues
	Processing receipts and payments	Entering receipt and payments into accounting system
	Budgeting & financial reporting	Reviewing company's budgets and financial statements Preparing budgets Preparing weekly financial reports Finalising trading profit or loss Meetings to discuss trading position
Investigation [hours] [$x]	Conducting investigation	Collection of company books and records Correspondence with ASIC to receive assistance in obtaining reconstruction of financial statements company's books & 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 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

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Task Area	General Description	Includes *[SUGGESTION ONLY - delete or add details as appropriate to the work done]*
Administration [hours] [$x]	Correspondence	
	Document maintenance/file review/checklist	First month, then 6 monthly administration review Filing of documents File reviews Updating checklists
	Insurance	Identification of potential issues requiring attention of insurance specialists Correspondence with Willis 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 & other statutory reporting	Notification of appointment Preparing BAS' Completing group certificates
	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 Remuneration Report 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				x							
TOTAL (including GST)				x							
Average hourly rate				*x*	*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.

5

20.5 Disbursements

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

A disbursements are all externally provided professional services and 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 are charged at a rate which is intended to recoup both variable and fixed costs.

Full details of disbursements on this appointment are provided ....

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.

Remuneration Report 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.

20.6 Remuneration Report 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.

20.7 Remuneration Report 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:

a. 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.

b. 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.

c. Percentage

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

d. 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		$

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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 that the balance of services will be charged on. 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.

20.8 Information Sheet for creditors on approving remuneration in external administrations

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 on remuneration or with the remuneration request.

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

Creditor Information Sheet
Approving remuneration in external administrations

If 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 ind 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 a 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
- valuer's, real estate agent's and auctioneer's fees
- trading costs involved in running the company's business during the administration (e.g. for the purchase of stock)
- 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.

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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.

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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/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

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

Manager National Assessment & 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 (IPA) 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.

INCLUDED IN CONSULTATION DRAFT

The following sections have not been approved by the Board, but have been issued as a separate document for comment. The document for comment is available from the IPA webs site at www.ipaa.com.au.

	Content	Page
21	Creditors' Meetings	Draft 77
22	S439A Reports	Draft 86