Code of Professional Practice

for

Insolvency Professionals

Part1

DRAFT for COMMENT

building professional excellence

3rd September 2007

Our Values

- Integrity
- Transparency
- Accountability
- Technical Proficiency

Insolvency Practitioners Association of Australia

building professional excellence

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3rd September 2007

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1. Commenting on the Draft

The effective development of this code requires input from all stakeholder groups – not just Insolvency Professionals. Your feedback is important and we expect to receive several hundred submissions.

To facilitate the assessment of all feedback we ask that you use the word template that can be downloaded from our web site at www.ipaa.com.au. The link to the template is clearly visible on the home page. Please feel free to make comments, ask questions and pose solutions.

Example

First Line Number	Issue or Question	Proposed Solution (if any)
150	The phrase "if not why not" should be expanded to be more meaningful	If a practitioner decides not to follow a recommended course of action, then he/she will need to explain why they chose a different course of action.
1560	Are the items in the third column mandatory? Can we reduce the number, or in simple jobs, not use this table at all and just use the table at line 1720?	

What we need from you:

- Soft copy only – using the word template. If you send a PDF or hard copy, we will ask for you to resubmit in word
- First line number only (so we can collate comments). Please do not do the following
  - line 123, l123
  - 123 - 126
- General observations are fine. Simply insert the word **general** instead of using a line number.

Submissions by email to: code@ipaa.com.au

Closing Date **5 October 2007**

Target Release Date **3 December 2007**

The development of additional sections of the code is continuing and drafts for comments will be released progressively. We strongly encourage you to submit your comments.

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President
IPA

Mike Lotzof
CEO
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building professional excellence

2. Introduction and Purpose of the Code

Stakeholders in the insolvency system, including the community generally, are entitled to demand a system of regulation in which insolvency practitioners[1] are held to standards of loyalty, avoidance of conflicts, independence and impartiality that are:

- fair;
- effective to preserve the insolvency system as one that depends on compliance with proper standards;
- realistic and practical, and therefore achievable on a day-to-day basis, without undue compliance costs;
- comprehensible, so that Practitioners (and those impacted by them) can ascertain what is required of them in any given situation, or at least understand the reasoning process that will be applied to assess their compliance.

For those reasons, practitioners who are members of the IPA work to written standards set out in this Code of Professional Practice for Insolvency Professionals ('Code').

There are several objectives underlying the development and implementation of the Code. The Code:

- educates members as to their professional responsibilities
- provides supplementary mandatory rules requiring members to do things not required by the law, or not to do things that the law permits; and
- provides a reference for stakeholders impacted by the actions of the Practitioner, by which they can gauge the expected standard of professional conduct of the Practitioner.

2.1 Interaction with Legislation and Regulation

The Code is not a restatement of laws, regulations and judicial pronouncements; rather it is a set of universal principles with supplementary guidance supported by worked examples. The Code does not purport to override the law, nor could it do so. If anything, the Code will extend obligations where the law is silent, or ambiguous. In a speech to the IPA in Sydney on 22 August 2007, the **Hon Chris Pearce, Parliamentary Secretary to the Treasurer** said:

> *"It is in this context that the insolvency reforms acknowledge but also seek to lift the general standards of the insolvency practitioner profession.*
>
> *But we have very deliberately also left space for the IPA to provide specific guidance on the detail of these standards. That is because we recognise that it is those who are in practice who are best able to provide this type of guidance.*
>
> *And we recognise that guidance about "good practice" needs to be flexible so that it can move with the market.*
>
> *So, I am therefore very pleased to hear that the IPA has stepped up to this challenge, and that it has begun working in earnest on the revision of your code of conduct.*
>
> *I welcome the IPA's undertaking to issue one consolidated code, addressing each of the various ethical, remuneration and practice issues for the profession."*

1 The word 'practitioner' means liquidator, practitioner, deed practitioner etc under the Corporations Act; and trustee and controlling trustee under the Bankruptcy Act.

2.2 Complexity in the nature of work

The practice of insolvency, turnaround and restructuring is complex and infinitely varied. It is impossible to conceptualise and then codify every situation. Any attempt to do so would provide avenues for endless attempts to circumnavigate prescriptions through claims of contextual or factual differences.

The Code is intended to allow Practitioners to exercise ***professional judgment***. The exercise of professional judgment on the facts available is fundamental to the quality of work performed.

Where a practitioner adopts a course of action that is against that which is recommended under the Code, the Practitioner will need to be able to clearly establish the reasons for not following the recommended course of action. ***If not, why not.***

2.3 Educating Members

Most members are also members of other professional associations. The requirements of other professional associations will in many areas be similar to those in this Code; however, the nature of insolvency is such as to require additional and more restrictive obligations. The exemptions available to "excuse" proscribed behaviour of other professionals – for example by disclosure - may not be available to Practitioners. To the extent that the Code imposes a higher standard on Practitioners than other regulatory requirements, the Code will prevail.

2.4 Reference by Stakeholders

As set out in Section 2, there are numerous stakeholders in the insolvency system with different and often competing interests. The publication of this Code is intended to more clearly establish standards of behaviour and conduct of practitioners that can be expected by those stakeholders. To some extent, certain standards of stakeholders that practitioners are entitled to rely upon are also explained.

2.5 Use by Regulators and Courts

It is expected that the Code will be used by Regulators and Courts to assist them in understanding current good insolvency practice. In this regard it is anticipated that the Code will be referred to by the Australian Securities and Investments Commission (ASIC) and the Insolvency and Trustee Service Australia (ITSA), the key regulatory bodies, because the Code reflects the profession's considered view of good insolvency practice.

This Code is also likely to assist a court whose responsibility it is to exercise discretions under relevant statutory provisions, and occasionally to clarify uncertain points of law.[2]

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[2] Justice R P Austin IPAA 2006 National Conference: " … when resolving matters relating to a practitioner's duty of loyalty, the court might be expected to have regard to rules and best practice statements of the professional body for practitioners, if that material is presented in a useful form. In *Bovis v Wily* (at [163]) it was held to be permissible for a court to take the IPAA Code into account as a useful guide to common practice within the insolvency Practitioners' profession, and an indication of the profession's view of proper professional standards, on the question whether a prior relationship with the director of the company should present an insolvency Practitioner from accepting appointment as the company's practitioner".

In *Dean-Willcocks v CALDB* the Federal Court said that the language of s 1292(2)(d)(ii) of the *Corporations Act*

"directs attention to the question of whether there has been a failure to **adequately** and **properly** carry out or perform the duties or functions required to be performed by a registered liquidator. The emphasis is on the adequacy level or sufficiency of performance of the function or role by the registered liquidator. In this case, the function to be performed is that of a practitioner. To evaluate the level of performance is a question of fact and degree which calls for the application of a standard. It is not a qualitative consideration whether there has been performance, but rather calls for consideration as to the sufficiency of the acts or omissions of the administration. This is a task which calls for some acquaintance with professional standards applicable to the role of a practitioner"

It is in that legal context that this Code may be applied in determining proper standards.

2.6 General Application

Compliance with this Code is mandatory for all IPA Members. Non-compliance may lead to disciplinary proceedings by professional bodies to which the Member belongs.

Members should be guided, not merely by the terms, but also by the spirit of this Code. Members should be prepared to justify, if called upon, any apparent departure from any of the provisions and spirit of this Code.

This Code is in two parts. Part A establishes the principles of professional conduct for Members.

Members are required to comply with the principles in their conduct as a practitioner and to identify threats to compliance with the principles, to evaluate their significance and, if such threats are, other than clearly insignificant, to apply safeguards to eliminate them or reduce them to an acceptable level such that compliance with the principles is not compromised.

Part B provides a broader conceptual framework and guidance to illustrate how the principles are to be applied in specific situations. The guidance notes include examples of safeguards that may be appropriate to address threats to compliance with the principles and also provide examples of situations where safeguards are not available to address the threats and consequently the activity or relationship creating the threats should be avoided.

The fact that a Member is performing an assignment in an honorary capacity should in no way compromise their adherence to the standards required by this Code.

2.7 Legislation versus self regulation

Insolvency is not an area where there is an "all or nothing" choice between self-regulation and statutory regulation. There is legislation in place, and it gives the courts powers which they exercise having regard to the fiduciary principles of the law, and often to be exercised according to judicial discretion. But there is a need to supplement the courts' responsibilities by adopting regulatory strategies to secure compliance with the fiduciary standards.

The IPA strongly advocates that self-regulation is better than a system based solely on public regulation in developing professional obligations and compliance strategies that are realistic, practical, cost-effective and comprehensible. This is especially so because of the dynamic variation in size from small sole Practitioners to large multi-state and even multi-national partnerships. A "one size fits all" approach will not work.

Self-regulation has the advantage that the IPA is best placed to understand the industry and the profession, and the modus operandi of the participants, better than public regulators who must operate within relatively inflexible modes and who may be more removed from day to day practice.

It is recognised that:

- in the past there have been concerns that self-regulation may not have been effective;
- self-regulation will not be preferred unless the alternative to legislation and regulatory intervention is manifestly credible;
- to be treated as sufficient by governments and regulators our actions will need to be perceived as pro-active with demonstrable outcomes;

The Court said that a person is entitled to have regard to professional standards and codes when deciding whether the standard of performance of a practitioner is proper and adequate.

- The development of the case law in relation to the practitioner's duties of loyalty, avoidance of conflicts, and maintenance of independence and impartiality will continue, and the courts will explain and give further illustrations of the application of the fiduciary obligations, in ways that may or may not be palatable to the profession. It is important to understand that the Code does not purport to override the Member's legal duty of loyalty to the general body of creditors.

2.8 Structure of the Code

The Code will contain five elements divided into two parts (principles and guidance). The elements addressed are:

1. principles;
2. mandatory requirements that extend or clarify the law and regulations
3. guidance
4. practical examples
5. a summary of the current state of the law (to be developed progressively)

2.9 Principles Based versus Mandatory

The objective of helping Practitioners understand their professional conduct requirements cannot be achieved by mandatory rules that imperfectly track the contents of the law.

To the extent that the Code provides guidance to assist Practitioners to carry out their professional responsibilities, the statements of principles stated in the Code are set out as general propositions, rather than specified or enumerated requirements. As statements of principle are necessarily very general, specific guidance, by case studies or illustrations, is provided rather than by additional prescriptions.

To assist Practitioners, where these principles are dealt with in the law, the requirements of the law and references to leading cases are made.

To the extent that specific behaviours are mandated or proscribed, they are done so only where there is a specifically identified need to add to the requirements of the law, or to provide a foundation for some disciplinary or investigatory jurisdiction of the IPA Board.

Where mandatory statements are included to add particular requirements to the law or to provide a foundation for disciplinary or investigatory jurisdiction for the Board, the statements have been, where practical, clearly identified and separated from statements of principle or guidance and the mandatory nature of the provision is clearly established.

2.10 Working Examples and Suggested Practice Templates

Wherever possible, practical, hypothetical, factual situations accompanied by a statement of what the Code requires are set out for each Principle. Working examples provide a particularly good way of explaining to Members the practical operation of the principles.

2.11 If not why not?

If the Member has not followed all of the recommendations or guidelines set out in the Code, the Member should keep contemporaneous file notes of the reasoning why they have diverged from the Code, or the rationale used to determine that the action followed is not proscribed by the Code.

For non-mandatory elements, a member is free to depart from the Code, but where an alternate course of action or practice is adopted, the Member will need to be able to explain the rationale for the departure and that the path taken is of an equal or greater quality.

3. The Insolvency Profession

3.1 Introduction

The insolvency profession comprises individuals qualified in accounting and often other disciplines who are capable and experienced in the administration of insolvencies. By definition, under the relevant legislation, only those experienced and qualified in insolvency are entitled to practise. The tasks that are expected and the experience that is required are higher than the formal requirements to practise in accounting or law.

An insolvency – involving an inability to pay all debts as and when they fall due – is in itself a difficult circumstance. It can result in circumstances of financial and social disorder which the regime of insolvency law seeks to control while a process of balancing the respective rights and entitlements of those parties is pursued.

An insolvency practitioner is a person who is in effect delegated the task by the legislature of implementing that regime and dealing with, and deciding upon, those rights and entitlements.

3.2 Taking Control

The practitioner is given extensive powers to deal with those circumstances – to protect and preserve the assets of the insolvent from powerful creditors pursuing their debts, to have the individuals involved answer and explain the circumstances of the insolvency, to investigate and refer issues of breaches of the law, and to decide – to adjudicate upon - the claims of the various parties.

The initial impact of the appointment of an insolvency practitioner to the affairs of a person or a company is legally and practically significant. On being appointed a trustee in bankruptcy, all 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 trade. Those creditors who had previously dealt with the individual or the company are required to then deal with the insolvency practitioner.

Once that initial appointment occurs, the practitioner then has the authority and responsibility to deal with the competing interests of the various parties. They each have to be both controlled and protected by the practitioner. The creditors, who have lost out in the financial demise of the insolvent, have interests to be protected, to ensure that 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. In addition, the practitioner can and should seek the views or approval or creditors, and often has to make commercial and professional decisions in situations of creditor conflict or stalemate. Creditors are entitled to expect that a practitioner gives them the benefit of his or her experience and training in making decisions about the conduct of the insolvency administration. Complexities of creditors' interests are compounded further by issues of secured and priority claims, as well as those creditors unfairly preferred.

3.3 Duties and Obligations

Necessarily, in light of the various interests to be balanced and pursued, a practitioner owes fiduciary responsibilities to the parties involved. As well, and significantly and importantly, practitioners have an important role to play in protecting the public interest, with a similar role to the regulators and the courts.

In this process of dealing with creditors, and other parties, a high level of training and experience is required and expected of a practitioner.[3]

The practitioner is therefore entrusted with the responsibility to exercise significant power and authority under the legislation in dealing with these competing and complex issues. With those powers of practitioners come both serious obligations and duties, where the law tries to ensure that the powers are exercised properly, and with due regard to the competing interests of the stakeholders involved. Practitioners are subject to scrutiny not only by the parties – the creditors, directors and others - but also by the regulators and the courts. Whilst the courts will accord due respect and deference to the responsibilities and commercial judgment of a practitioner, and offer protection from interference with the practitioner's powers, the courts will also expect high standards of conduct that will be enforced in circumstances of breach.

Whilst any finance professional – in law, accounting, auditing – has serious professional obligations to their individual clients, an insolvency professional clearly has a broader range of interested and affected parties and interests to answer to and deal with. The handling of competing and conflicting and often hostile interests in insolvency, with complex fiduciary responsibilities owed, distinguishes a practitioner's position from that of other professionals.

3.4 Skill and Judgement

As well, in practical terms, the practice of insolvency involves the "hard" end of accounting, business and law, where skills are needed to handle a situation which invariably happens quickly, with immediate impact on a range of parties beyond the insolvent, with the practitioner in immediate control. 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. Skills in 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.

In this process, practitioners have an entitlement to be fairly remunerated for the work that they do. They are entitled to be paid in priority to creditors from the assets of the insolvent and at rates that recognise the expertise and training required.

3.5 The Courts' views of Practitioners' Duties and Powers

There are legislative statements of the duties and powers of practitioners in the *Corporations Act* and the *Bankruptcy Act*. In addition, those powers and duties have been explained by the courts.

The following comments, from *ASIC v Edge*,[4] usefully set out the liquidator's role, duties and powers:

> A liquidator is an officer of the Court, through whom the Court itself notionally conducts compulsory liquidations. In that context, although a liquidator is not an employee of the Court:
>
> "the nature of the appointment makes him a representative of it … The winding up is *by* the Court which for the purposes the liquidator is. As such he is entrusted with the reputation of the Court for impartial and proper despatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court or a judge."
>
> The liquidator's essential functions are to identify, take possession of and realise the company's assets, to investigate and determine the claims against the company and to

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[3] A practitioner's determination of creditors' claims is in fact required to be made at standards expected of a judge: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332

[4] [2007] VSC 170; footnoted citations from judgment omitted.

apply the assets to the satisfaction of those claims in accordance with the statutory scheme of priority.

While there is frequently a shortfall of assets with which to satisfy creditors' claims against a company wound up in insolvency, where there is any surplus the liquidator must distribute it to members and carry out the necessary steps to implement the company's dissolution.

The liquidator's functions, which are performed in the fiduciary capacity of agent of the company, necessitate the conferral of wide and extensive powers currently embodied in s.477 of the Act, including the power to carry on the company's business for the purpose of beneficial disposal or winding up, pay creditors, bring and defend proceedings in the company's name, enter agreements and (subject to some restrictions) compromise claims, sell and dispose of the company's property, make purchases and execute documents on its behalf. The company's books and records must be delivered to the liquidator, who has extensive powers to obtain information and is entitled to the assistance of the company's officers.

In *Commissioner for Corporate Affairs v Harvey ("Harvey")*, Marks J recognised that "*the balance of authority favours the liquidator being treated not as a trustee* stricto sensu *but as an agent of the company*". It is clear, however, that a liquidator occupies a fiduciary position in relation to the company, its creditors and contributories. Although not a trustee in the sense, for example, that the property of the company is vested in him or her, the liquidator "*is in a position of trust*".

The extensive powers vested exclusively in the liquidator entail a corresponding vulnerability in the creditors, members and the public. The liquidator is a fiduciary on whom high standards of honesty, impartiality and probity are imposed both by the Act and the general law. As an officer of the company, the liquidator has a statutory duty of care, diligence and good faith.

In *Harvey,* Marks J stated that the liquidator's fundamental duty is to:

"administer the estate strictly in accordance with the duties and obligations specifically imposed on him by the Companies Act and its Rules. It is obvious that everything to be done in a competent administration is not and cannot be specifically prescribed. Preserving the assets, giving proper attention to the administration, acting with due despatch and ensuring adequate knowledge and understanding of the affairs of the companies are matters of common sense."

It is recognised that a liquidator must meet high standards of skill and competence. As "*a chartered accountant skilled and versed in the performance of the duties of such an office*" and acting "*for remuneration and for profit to himself*", the liquidator properly bears the burden and risks of decision-making in that capacity and "*common sense and judgment*" may reasonably be expected of such an officer.

In *Pace v Antlers Pty Ltd (in liq)* Lindgren J stated that:

"The liquidator's duty to exercise reasonable care and skill has been the subject of some debate. The following propositions, however, appear to have gained acceptance in Australia:

- The court should not be quick to condemn a person in the difficult position of a liquidator, and, in particular, should not judge his or her conduct with wisdom born of hindsight: *Re Windsor Stream Coal Co Ltd* [1929] 1 Ch 151 (*Windsor Steam Coal*); *Maelor Jones Investments (Noarlunga) Pty Ltd v Heywood-Smith* (1989) 54 SASR 285 (Olsson J) (*Maelor Jones*) at 287; it is not every error of judgment that will be accounted negligence: *Re George Bond & Co Ltd* (1932) 32 SR (NSW) 301 at 306.
- At the same time, a high standard of care and diligence is to be expected of a liquidator as a professional person who is being paid for his or her services: *Windsor Steam Coal* at 165, per Lawrence LJ; *Maelor Jones* at 288-9; McPherson's *The Law of Company Liquidation*, p 218;
- A liquidator is under a duty to complete the administration of the assets within a reasonable time and not to protract the liquidation unduly: *Re House Property &*

Investment Co [1954] Ch 576 at 612; McPherson's *The Law of Company Liquidation*, p 218; he or she must act with 'due despatch': *Cmr for Corporate Affairs v Harvey* [1980] VR 669 (*CCA v Harvey*) at 691; *Maelor Jones* at 288;

If there is a difficulty at any stage of the administration, it is the liquidator's clear duty to inform the court and seek directions: *CCA v Harvey* at 691; *Windsor Steam Coal* at 159, 161; *Maelor Jones* at 288."

His Honour further observed:

"a liquidator must exhibit care (including diligence) and skill to an extent that is reasonable in all the circumstances. 'All the circumstances' will include the facts that a liquidator is a person practising a profession, that a liquidator holds himself or herself out as having special qualifications, training and experience pertinent to the liquidator's role and function, and that a liquidator is paid for liquidation work. 'All the circumstances' will also include the fact that some decisions and courses of action which a liquidator is called upon to consider will be of a business or commercial character, as to which competent liquidators acting with due care, but always without the benefit of hindsight, may have differences of opinion."

Similar comments and principles are made and relied upon in the case of bankruptcy trustees.[5]

Practitioners are therefore governed by two sets of standards: the statutory and fiduciary obligations that exist under the law, and the obligations under this Code. Necessarily, this Code cannot and does not purport to override legal obligations, rather to explain and supplement them. Generally, where a particular standard of obligation exists both under this Code and under law, the more onerous standard applies.

The standards of conduct expected of practitioners emanate from the special position they occupy. Practitioners are entrusted with considerable power and authority, whether derived by legislation, court appointment or agreement. These unique powers are balanced by duties and obligations that are in addition to those expected of professionals generally.

5 For example, see *Adsett v Berlouis* (1992) 37 FCR 201

4. Stakeholders

The range of interests in an insolvency administration with which a practitioner has to deal have been discussed. The individual stakeholders now need to be explained from a particular perspective, in terms of their own expectations, and what may be expected of them.

As we have explained, practitioners have the role of dealing with and resolving the competing interests in an insolvency administration. Those interests are represented by the various parties – the practitioner, the creditors,[6] the directors and shareholders (in the case of a corporate insolvency), and the individual (in the case of a personal insolvency), the courts, the regulators,[7] and the public. The practitioner also has his or her own legitimate interests. These are summarised in the following outlines.

4.1 Practitioners

- are experienced and qualified professionals who are expected to display high degrees of application and professional competence;
- must generally take appointments as ordered by the court, and in any event are subject to court supervision;
- owe responsibilities to the creditors as a whole[8], and other parties;
- have serious legal obligations under the law, as well as responsibilities to exercise their commercial and professional judgments in a sound way, with a view to ensuring the proper administration of the entity's insolvency;[9]
- are often required to attend to those obligations in difficult circumstances, based on deadlines, competing demands, and complexity of issues;
- can be personally liable for losses to the administration;
- are legally entitled to be remunerated for the work they do as a priority payment in the administration;
- are entitled to be fairly remunerated; and
- from time to time will accept and complete administrations even though there are insufficient funds to pay their remuneration and disbursements.

4.2 Creditors

- are parties who have traded with the entity with an expectation of being paid for services provided or goods sold;
- are parties whose rights of payment by their debtor are replaced by a mere right to share pari passu (i.e. rateably) along with other unsecured creditors from the assets of the entity;
- are therefore as a consequence disadvantaged financially;

6 Including secured creditors and employees.

7 Being ASIC and ITSA.

8 *National Australia Bank Ltd v Market Holdings Pty Ltd (in liq)* (2001) 37 ACSR 629: "199. There was some debate as to whom the liquidator owes his or her duties. Clearly one of the beneficiaries is the Court and through the Court the public and the creditors generally. … The duty is to the creditors as a whole, though, sometimes a single creditor may be able to complain to the Court that that duty is not being carried out".

9 *Bankruptcy Act* s 19; *Corporations Act* s 479(4)

- are able to rely on the practitioner's experience and skill in having their losses recouped;
- rely on the practitioner to be informed about the administration but also themselves have some obligation or interest in informing and otherwise assisting the practitioner in making decisions where their approval is required;
- are parties whose dividend payments are the outcome of work done by the practitioner in realising or recovering funds.

4.3 Regulators

- have a statutory interest in the proper administration of the legislation[10];
- have statutory powers of review of the conduct of practitioners, including to review or initiate a review of remuneration claimed;
- are available to assist creditors with complaints and concerns;
- have an obligation to government and the courts.

4.4 The Courts[11]

- may assist the practitioner in determining complex issues;
- may determine the rights and responsibilities of all parties, including on review of decisions of practitioners;
- more particularly may review the performance of a practitioner, and order that defaults be remedied; and may assist the practitioner, in giving directions, determining and enforcing rights of recovery, and protecting practitioners as required.

4.5 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;[12]
- and that the insolvency profession is staffed by persons of high competence and integrity.

In corporate insolvency only:

4.6 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.

4.7 Directors

- have serious legal obligations under the law with a view to assisting in the proper administration of the entity's insolvency, including in any recoveries for the benefit of creditors;

10 *Bankruptcy Act* s 12; Australian Securities and Investments Commission Act *2001* s 1(2).

11 In the case of personal insolvency, the Federal Court of Australia, the Federal Magistrates Court, and the Family Court of Australia. In the case of corporate insolvency, the Federal Court of Australia, the Supreme Courts of the states and territories, and the Family Court of Australia.

12 Bankruptcy Act s 19. National Australia Bank Ltd v Market Holdings Pty Ltd (in liq) (2001) 37 ACSR 629: "199 There was some debate as to whom the liquidator owes his or her duties. Clearly one of the beneficiaries is the Court and through the Court the public and the creditors generally".

- 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 have interests as creditors and shareholders.

5. Definitions & Interpretation

Construction

May	Where it says that the practitioner "may" take a course of action, the Code is simply intended to be helpful and the practitioner has full discretion to follow it or not
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 consider the advisability of documenting 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. *If not then why not.*
Must	Where it says the practitioner "must" take a course of action, the Code is mandatory and the practitioner must follow it.

The Code is meant to complement and should be regarded as additional to any statutory obligations and regulatory requirements that practitioners may have in carrying out their responsibilities.

This Code applies to all **Formal Appointments** to which the legislation applies.

Provisions similar to those in the Legislation may be incorporated in the Code.

Defined Terms

'appointment' or 'formal appointment'	the formal legal appointment of a practitioner as a trustee, liquidator etc by the court, the debtor, the directors etc under the legislation;
'practitioner'	refers to a member who acts under a formal legal appointment as a trustee in bankruptcy or a registered or official liquidator, and, unless otherwise indicated, their staff;
'administration'	refers to a formal insolvency arrangement under either the *Bankruptcy Act* or the *Corporations Act;*
'approval'	refers to the process under the legislation that gives a practitioner lawful authority to take remuneration from an administration;
Approving body	the body with authority to approve remuneration or a course of conduct; usually the creditors, the committee or the court.
Board	National Committee – governing authority of the IPA
Code	the Code of Professional Practice for Insolvency Professionals as amended from time to time
Compliance culture	the values, ethics and beliefs that exist throughout an organisation and interact with the organisation's structures and control systems to produce behavioural norms that are consistent with the compliance outcomes.
creditors	refers to those persons who are creditors under the legislation and who have authority to give approval as permitted, for example, to approve remuneration.
Constitution	
expenses	refers to necessary financial outlays incurred or paid by the practitioner in the administration. The term includes 'costs';
fiduciary	

firm

	IPA	the Insolvency Practitioners Association of Australia
	legislation	refers to the *Bankruptcy Act* 1966 and the *Corporations Act* 2001 ;
445	Member	Member is used to include IPA professionals acting as liquidator, practitioner, trustee, legal adviser.
	'remuneration'	refers to the moneys claimed by a practitioner on account of work performed by the practitioner in the administration.

6. PART A: The Principles

NOTE: there will be a number of principles added progressively. Some of the areas that will be addressed include communications and reporting, competition, complaints management, practice management, conduct of meetings,

6.1 Conduct

- **Practitioners 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 seen to be, independent.**
- **Disclosure and acceptance of a lack of independence is not a cure**

6.2 Remuneration

- **A practitioner may 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**

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

7. Integrity, Objectivity & Impartiality

The requirement for integrity imposes an obligation to be straightforward and honest in professional and business relationships. Integrity also implies fair dealing and truthfulness. It calls for "an adherence to moral and ethical principles" and "a soundness of moral character"..

Practitioners must not be associated with reports, returns, communications or other information where they believe that the information:

- Contains a materially false or misleading statement;
- Contains statements or information furnished recklessly; or
- Omits or obscures information required to be included where such omission or obscurity would be misleading.

The requirement for objectivity imposes an obligation not to compromise professional or business judgment because of bias, conflict of interest or the undue influence of others.

A practitioner must form an objective unbiased opinion about issues based on the facts known at the time.

PART B: Guidance

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

8. Independence

8.1 The Test of Independence

8.1.1 General Issues

The law requires a practitioner to not only be independent, but to be seen to be independent. There must be the reality of independence and a relevant perception of independence.

The overall test by which a practitioner should apply in complying with this principle is:

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

- a fair-minded and informed observer;
- on the information available (or which should have been available) at the time;
- might reasonably apprehend 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 lack of a perception of independence.

It is not to the point that the Practitioner considers that their personal integrity and skill makes them immune to the influences of conflicts and proscribed relationships such that those influences will not impact on the Practitioner's decision making. The legal restrictions exist because the law has determined that the proscribed relationships and conflicts create a ***perception*** of bias, no matter how high a level of personal integrity may renderthe Practitioner immune from such influences.

The test will often be about perception, rather than reality. [13] It will also involve the consideration of situations that may not yet have crystallised, but which may crystallise in time. It is no reflection on the integrity of a Practitioner that a perceived lack of independence must be acknowledged and this perception will exclude the Practitioner from accepting or continuing with the Appointment.[14]

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[13] Re Allebart Pty Ltd (in Liq) [1971] 1 NSWLR 24 at 30: "It is essential that the independence and impartiality of a liquidator should at all times exist in point of substance, and be manifestly seen to exist." The Court had warned, in relation to the situation of a creditor encouraging and funding courses of action by a liquidator: "This involves, however, the ever-present risk that the liquidator may either yield or appear to yield to partisan considerations in submitting to the urgings of a creditor in conjunction with accepting financial assistance from a creditor" – at 28.

14 'One of the more obvious situations where a liquidator ought not to continue to act is when a conflict of interest and duty arises or appears to have arisen ... a liquidator must have no interest in and be, and be seen to be, independent of, any matter which the liquidator's duties require him or her to investigate': City & Suburban Pty Ltd v. Smith as liq. of Conpac (Aust) Pty Ltd (in liq) (1998) 28 ACSR 328. A trustee in bankruptcy "must be scrupulously careful to ensure that he never allows himself to be placed in a position of conflict between various duties or between duty and interest; nor must he ever allow the situation to arise where he may be seen to be in that position of conflict or potential conflict. A registered trustee must not only be impartial; he must be seen to be impartial": In Re Partridge (unreported, FCA, Lockhart J, 22
September 1982).

8.1.2 Timing

The test is to be applied as 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 be known or discoverable. Nevertheless, a Practitioner should constantly be aware of the possibility of a circumstance leading to a perceived lack of independence.

8.1.3 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 an extension of the general test on independence, that is, would a reasonable and informed person on the information reasonably available at the time form the view that a conflict was *likely* to arise.

There is a requirement for the Practitioner to be proactive in uncovering and identifying and anticipating conflicts or circumstances - not to simply wait for them to develop over time.

As with the general test of independence, the test is to be applied as at the time the decision is made and not retrospectively with the benefit of hindsight with facts and circumstances that could not reasonably be expected to be known.

8.1.4 Group Company Appointments

The appointment of a single administrator to a group of companies is of itself not barred. It generally will be in the interest of creditors to have one appointee managing all the issues across the group. Independence can still be maintained where there is no real dispute as to the facts, validity of transactions between companies in the group.

There are, however, circumstances which may arise that may require the appointee to vacate one or more appointments. These include situations where there are inter-company loans and transactions that may be the subject of dispute or litigation and the appointee is in effect on both sides of the dispute. Even in those cases, in order to resolve any conflict, a practitioner may refer discrete matters for adjudication to another practitioner, or for major matters, seek approval for the appointment by the court of a special purpose administrator or liquidator to act.[15]

There is a risk of a lack of independence in such cases. For example, the circumstances could be that there are inter-company dealings and loans leading to one company being a creditor of another and taking proceedings against that company.

8.1.5 Allegations of lack of independence

Due to the range of competing interests, allegations of a Practitioner's lack of independence will often be made from self-interested parties. For example:

- it may be claimed that directors or a debtor chose a Practitioner because of some perceived reputation for being "softer" on insolvents, or less diligent in pursuing matters.
- insolvents and their associates who are being investigated by the Practitioner, or a creditor being pursued for a preference, may wish to remove a Practitioner who is digging too hard with a view to securing a replacement of the Practitioner.

The mere existence of an allegation is not evidence of a conflict and may often be expected in the situations described. Nevertheless a Practitioner should objectively assess any such claim and decide accordingly.

One of the objectives of this Code is to assist creditors in determining if there is a real breach of independence and to avoid the situation where unreasonable perceptions are formed because of a lack of understating.

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15 Handberg, re Greight Pty Ltd (2006) 24 ACLC 323

8.2 Rationale for the Independence Principle

All professionals must generally be aware of and respond to any identified independence issues in the performance of their duties. Insolvency Practitioners have a particular need to focus on the need for independence. This arises from the general nature of the role of the Practitioner in an insolvency which involves a myriad of competing interests putting a Practitioner in a unique position of trust which imposes on them complex statutory and fiduciary duties. It is essential that a Practitioner must act fairly and impartially in attending to those duties. The range of duties and scope of power have a commensurate high level of responsibility to ensure independence.

The drivers behind this high level of responsibility include:

1. The Practitioner immediately assumes control of the company with both a responsibility owed to creditors and a responsibility to protect the company from the claims of creditors. Preferred creditors may be the subject of claims by the Practitioner, and investigations into their conduct, for the benefit of other creditors; that may include the creditor who initiated the appointment of the Practitioner who itself may provide a regular source of appointments to the Practitioner. In that role the Practitioner acts as a fiduciary with responsibilities to *all* classes of creditors. There is a clear need for the Practitioner to be independent of all creditors, but at the same time responsible to all. The Practitioner must adjudicate fairly and impartially on competing interests. The Practitioner has responsibilities to investigate the causes of the company's failure and to inquire into the conduct of the directors. At the same time, the directors and their advisers may have initiated the appointment. The Practitioner must both secure compliance by the directors with their responsibilities, and obtain their co-operation. At the same time the Practitioner must pursue investigations which may result in civil claims against the directors, or their family or associates, or in criminal prosecution.

2. The Practitioner has responsibilities to attend to reporting, investigative, accounting and other statutory requirements. In particular, the Practitioner has to investigate and report to ASIC, or ITSA; there may be a need to report to the court; and there is generally a requirement to report generally to creditors and the public on the progress and outcome of an administration. In all these responsibilities, a high level of independence and objectivity is required. Practitioners are liable to be the subject of scrutiny in the performance of their tasks. Their independence and perceived independence must be beyond reproach.

3. There is an inherent need for Practitioners to balance the need to both rely upon their professional judgment and skill in insolvency, and on their commercial judgement and skill;

4. Practitioners frequently deal with situations of extreme stress and distress for the parties involved, including both the bankrupts or directors, and the creditors. There is a need for all parties to have a confidence in the independence of the Practitioner's conduct. Difficult decisions made by the Practitioner in that complex environment are more likely to be accepted if all parties know that decisions concerning their interests are made by a person with an independent mind.

Given such a complex role, where interests of the directors or the bankrupt can often differ from those of the creditors, and the interests between secured, priority and unsecured creditors are to be determined and balanced; the perception of, and confidence in, the Practitioner's independence is fundamental.

8.3 Threat to Independence and Risk Assessment

The following more detailed guidance will assist Practitioners in applying the test of independence in any particular situation. This guidance is presented in terms of the risks that need to be assessed when they arise. Major risks to independence fall into three broad

categories which can overlap and which are therefore not mutually exclusive. Nor do they necessarily fully cover the range of risks with which a Practitioner will be confronted.

- Improper relationships or associations
- Interests
- Conduct
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All or any of these may generate a lack of independence. However it is not the categorisation of the risk that is important. It is the consequence of the risk being or becoming a threat to independence that is critical.

In a typical application of risk management, there are several steps that need to be undertaken:

- Identification of the risk
- Categorisation and risk impact assessment
- Design of strategies to manage the risk
- Implementation of risk management program

For Practitioners, the process for managing risks to independence is different because the treatment options are limited.

If there is a risk of breach of independence or of perception of independence, then the Practitioner must not take the appointment. There are no "risk management strategies" applicable such as "Chinese walls" or disclosure and consent of affected parties.

If there is no risk then there are no barriers based on independence that would preclude appointment. There are other relevant, non-trivial relationships, that while not resulting in a lack of independence or perception of lack of independence will need to be listed in the Declaration of Relevant Relationships and Independence.

The following sections set out examples of threats or risks to independence that must be considered.

8.3.1 Relationships or Associations

There may be an apprehension of lack of independence arising out of some direct or indirect relationship, experience or contact with a particular person or entity. There are a number of categories of such relationships that preclude the taking of appointments: family, friends, business associates, professional relationships, as well as relationships of animosity. These categories include circumstances where a practitioner accepts a series of insolvency appointments from the same director or where a substantial part of a practitioner's referrals come from the same source.

a. Family

In close family (or 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[16] with the insolvent or a director or officer, or with an employee or adviser who is in a position to exert direct and significant influence.

16 Within the definition of 'relative' in the Corporations Act.

b. Business

Where the Practitioner has had business dealings outside what would be termed a professional relationship, or in the capacity as Practitioner, the potential for perceived bias[17] is so great that the appointee must not consent to act.

Examples of business dealings are when a practitioner has

- a financial interest in the Insolvent or a related entity, solely or jointly
- a close business relationship – as in partnerships, joint ventures, co-investments
- received from or made a loan to an insolvent or related entity or any of its Directors, Officers or senior employees.
- other partners or senior employees of his or her firm being, or having recently been, employed by an Insolvent or related entity
- 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.

c. Friendship

Friendships are difficult to define. There is no test for friendship and regard would be had to what the reasonable person would surmise. Friendships that have existed over a number of years preclude appointment.

Mere acquaintances are not proscribed relationships. Longer term relationships and friendships will be.[18] "When does an acquaintance become a friend" is not always clear and depends on the circumstances. It is clear that there is no requirement to declare trivial connections and acquaintances.

d. Animosity

Negative bias is a threat to Independence. If there is a history of "bad blood" then the Practitioner must not take the appointment.

e. Prior Professional Relationship

Practitioners must not accept an appointment if any person in the Firm has had a professional relationship with the insolvent during the previous two years.[19]

The intention behind this principle is to prevent the perception (and of course the reality) that the Practitioner:

- May need to investigate his/her own work
- May not be independent because of a financial fee relationship

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17 "So far as the question of bias is concerned, it goes without saying that an officer of the court, appointed to act as provisional liquidator of a company, should be above suspicion. There must not be any bias, and there must not be any appearance of bias. Where there are circumstances which might predispose a person to favour particular interests, those circumstances must be taken into account, and the possibility of unconscious partiality should not be overlooked": Re West Australian Gem Explorers Pty Ltd (1994) 13 ACSR 104 at 106.

18 Commonwealth v Irving (1996) 65 FCR 291

19 'Unquestionably there is a risk that an accountant may, however subconsciously, tend to favour those who have originally consulted him and may, the more readily, fall in with arrangements already made prior to the filing of an application for winding up.... [T]he appearances need to be considered: Re Stadbuck Pty Ltd (FCA, 18 May 1993, unreported). There are exemptions shown in 8.3.2.

- Has built a personal relationship with Directors and/or stakeholders.

Some examples of proscribed relationships[20]

- Having prepared the original data used to generate financial records
- Having been threatened with litigation in relation to prior work
- Performing a service that directly affects the subject matter of the insolvency
- Acting as an advocate on behalf of the company in litigation or disputes with third parties.
- Having been involved in decision making by the board of the company.
- Advising directors in the personal capacity or the company regarding structuring assets etc in anticipation of (potential) insolvency.

A practitioner must comply with the spirit of this Code when assessing independence. For example, it would be against the spirit of the Code for a practitioner to say that an involvement with a particular director/company over a long period of time is not a "professional relationship" because each assignment where advice was given was a discrete engagement.

In addition to the lack of independence that may arise from relationships, a Practitioner must not accept an appointment where the Practitioner, partner, or employee of the Practitioner's firm, engaged by the Practitioner, has in relation to the Insolvent or related entity:

- accepted gifts or preferential treatment unless the value is clearly insignificant; or
- been offered and accepted inducements.

f. Special Situations

There are a number of situations where it may be in the interests of creditors for a practitioner to accept and retain their appointment notwithstanding a lack of independence. These situations need to be examined very carefully on a case by case basis with the appointee documenting clearly the reasons why and how the decision to accept the appointment was reached.

- where the appointee is acting as trustee of the estate of one of the directors in bankruptcy or under an arrangement under the *Bankruptcy Act* and accepts an appointment under the *Corporations Act* over the director's company, or the reverse;
- if there is a real risk that the appointee will be on both sides of the litigation for recovery of funds such as loans, preferences or claims for insolvent trading;
- Where the practitioner or his or her firm has a role as investigating accountants undertaking a credit appraisal or monitoring on behalf of a creditor. The knowledge gained in the pre-appointment work may be valuable in the administration and be of benefit to creditors. However, it is important that full disclosure of the relationship is made so that the creditors can make an informed decision and that there is no perceived bias or risk to independence.

The practitioner should consider in all cases, and seek advice as appropriate, whether court approval of such appointments should be sought.

g. Referrals

It is recognised that networks between professionals do exist, based on quality of service and prior experience with Practitioners. However, any method of referral must ensure that there are no:

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20 There are prohibitions or restrictions under the Corporations Act (sections 418, 448C, 532) and Bankruptcy Act (sections 156A(4), 215).

- referral commissions, inducements or benefits,
- 'spotter's fees',
- recurring commissions, or
- 'understandings' or requirements that work in the Administration will be given to the referrer.[21]

h. Interests

This category refers to the existence of some direct or indirect interest of the practitioner in the administration, whether pecuniary or otherwise, and whether personal or otherwise that results in a lack of independence. This category will often arise out of relationships and associations, but an interest may exist independently.

A lack of personal interest or benefit is not sufficient. There can be a lack of independence where no interest of the Practitioner is at stake.[22] The fact that the practitioner will have an interest in being remunerated is NOT a precluding interest.

i. Conduct

This category refers to a lack of independence that may arise from the personal or professional conduct of the Practitioner that is scurrilous, offensive or otherwise displays some bias or prejudice. It may arise from statement made in the conduct of the administration displaying some prejudice against the directors based on their background or race; or the nature of operations of their business. If a Practitioner were to say that persons who failed to pay their creditors should be punished more than the law allowed, the Practitioner may need to resign. Conversely, the Practitioner may by conduct display undue and overt support or favouritism or sympathy to an entity or person. Conduct may extend to published statements of the practitioner that, for example, were reported in the press.

8.3.2 Some limited exemptions

a. Pre Appointment Advice.

Pre-appointment advice may be in certain circumstances be given by a Practitioner to the company, but not to the Directors in their personal capacity. and not give rise to a breach of independence.. In practical and legal reality, a Practitioner will generally need to be consulted before the formal appointment. For example, a company will generally need to approach a Practitioner for advice on the insolvency or likely insolvency of their company before resolving to appoint a Practitioner under s 436A of the *Corporations Act*. A director served with a penalty notice will often need to seek advice on the relevant options under s 222AOB of the *Income Tax Assessment Act.* In both cases the potential personal liability position of the directors may need to be addressed.

Therefore, there is no lack of independence if the Practitioner gives advice regarding:

- Solvency
- Consequences of insolvency
- Alternative courses of action in the case of insolvency.

This should not prevent a Practitioner giving advice on a company's operations in the context of deciding whether it should enter a formal insolvency arrangement.

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21 This prohibition does not extend to commission or percentage of assets realised, when such risk sharing arrangements are clearly disclosed in the remuneration proposals, whether under the terms of the appointment or the subsequent management of any Deed.

22 Bovis Lend Lease Pty Ltd v Wily (2003) 45 ACSR 612

There is no stated time period in which pre-appointment advice may be offered,, however, the Appointee will need to Declare the extent and nature of advice and in particular the actions taken pursuant to that advice and why there is no conflict or potential conflict.

b. Work carried out more than two years before the Appointment date.

Such work or relationship will not be a risk to independence if it has:

- no potential for any claim against the Firm by the Insolvent
- no materiality on the insolvency
- no relationship to assets of the Administration or
- is not related to structuring of assets etc in anticipation of (potential) insolvency

All other professional relationships preclude appointment.

8.4 Actions to be taken to avoid risks materialising

Practitioners should be proactive in ensuring that risks to independence are detected. This involves emphasis on:

- Systems and processes
- Knowledge; and
- Culture

The nature of the profession requires the development and operation of systems, processes and culture that together create a dynamic system that *proactively* reduces the risk of breach. Because of the pervasive and sometimes difficult to define nature of Independence, it is not possible to prescribe specific systems, rather each firm will need to develop its own approach. (Principles on Practice Management are yet to be developed. They will address these issues)

As a minimum, every firm will implement policies, processes and systems that:

- Identify and Evaluate Conflicts of Interest both in the Pre-appointment process and Post appointment during the course of the Administration; and
- Provide assurance as to the integrity of any prescribed Declaration of Relevant Relationships and Independence; and
- Provide guidance as to courses of action to be taken should a conflict be identified after an Appointment is accepted.

These should be dealt with by internal firm processes for making conflict of interest searches based on search criteria broad enough in the circumstances. Those processes will need to be understood and applied by Practitioners and their staff with an overlay of firm culture that ensures that independence issues are elevated in significance and importance. There must be internal office conflict guidelines, including access to senior staff that can assess difficult cases. Consistency in approach and adherence to any such guidelines is important.

The practitioner must not delegate the decision on independence. He or she may delegate to staff the task of gathering information on which the decision is based but should take responsibility for ensuring that those staff are knowledgeable and trained in the issues.

8.4.1 Declaration of Relevant Relationships

For all appointments, disclosure of relevant interests or associations will not mean that a lack of independence is avoided. Where such a disclosure does assist, the following applies.

At the earliest practical opportunity the Practitioner must provide to creditors a Declaration of Relevant Relationships and Independence.

Where a practitioner discloses any relationships, the practitioner must state that the relationships disclosed do not result in the practitioner having a conflict of interest or duty and

do not preclude acceptance of the appointment. The practitioner must also provide his or her reasons for that statement. The practitioner must make a statement that there are no other prior professional or personal relationship that should be disclosed.

The declaration must contain:

1. A Declaration of Independence that the Practitioner:
    - Has undertaken a proper assessment of risks to independence
    - The assessment identified no real or potential risks to independence
    - Is not aware of any impediments to taking the Appointment
2. A Declaration of Relevant Relationships and Independence which details prior relationships by the Practitioner, or Firm[23] with:
    - the company; or
    - an associate of the company;
    - a former Practitioner of the company;
    - a person who is entitled to enforce a charge on the whole of substantially the whole of the company's property.

The Practitioner must state that:

- the relationships disclosed do not preclude acceptance of the appointment
- there are no other prior professional or personal relationships that should be disclosed

3. Declaration of Past Work where the Practitioner must briefly describe:
    - the nature of work carried out more than two years prior to the appointment (if any)
    - the nature of pre-appointment advice (if any)

If the Practitioner wishes to consent, he or she should fully disclose and explain why there would be no conflict of interest or duty in these circumstances.

All Practitioners must also provide a Declaration of Indemnities which must disclose the identity of each indemnifier and the extent and nature of each indemnity, other than statutory indemnities.

These Declarations must be provided at the earliest practical time and no later than the notice of the first meeting of creditors. The Declarations must also be tabled at the first meeting of creditors.

These requirements specifically apply to any Practitioner accepting a replacement appointment. All replacement Practitioners must table a copy of the Declaration of Relevant Relationships and the Declaration of Indemnities at the meeting prior to the casting of the vote regarding their appointment. Should they be appointed Practitioner, the replacement Practitioner must provide a copy of their Declarations to all creditors in their next communication with creditors.

Should a Practitioner become aware that the Declaration of Relevant Relationships or Indemnities has become out of date or there is an error, the Practitioner must update the relevant declaration(s) and provide them to creditors with the next communication with creditors and table them at the next meeting of creditors.

[23] The word "firm" includes reference to other partners and employees, including both those presently part of the firm as well as those who have recently departed the firm

8.5 Post Appointment Actions - Independence Breach or Conflict of Interest

8.5.1 Non-precluded Appointments

As a general rule, where a relationship, or conflict of interest is identified and the conflict was one that would not preclude an 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 "breach" is not a breach of this code and the Practitioner may continue with the Administration subject to disclosure of the relevant relationship to the creditors through the provision of an updated Declaration of Relevant Relationships and Independence.

8.5.2 Precluded Appointments

Where a relationship, or conflict of interest is identified and the conflict was one that **would have precluded the appointment** then the following applies.

a. Immediate Actions

As soon as practicable after the breach is identified the Practitioner must prepare a report for creditors, ASIC, IPA, Court, and ITSA (as the case may be) as appropriate setting out:

- The nature of the conflict or breach of independence
- 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
- 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:**

- Except where the Administration is substantially complete, expeditiously resign from the Appointment. The cost of transfer is no bar to replacement[24]. Independence is paramount.
- Apply to the Court to put the transfer into effect
- Bear the costs of transfer

The Practitioner may, unless ordered by the Court, retain fees for work necessarily and properly done until the identification of "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.

c. Reckless, Negligent or Intentional Behaviour or 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; or
- The Firm does not have an appropriate culture;

then this will be a serious breach of this Code. In this situation the Practitioner should not be permitted to profit from his/her behaviour and should:

- Repay all fees taken; and
- Pay all disbursements where the Practitioner has contracted part of the Practitioner's functions; and
- Pay all costs of transfer.

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 and "gaming" the system.

24 See Domino Hire Pty Ltd v Pioneer Park Pty Ltd (In Liq) [1999] NSWSC 1046 where the Court concluded: "I am thus faced with the situation that there will be some detriment to creditors from substitution of liquidators at this stage, but it is impossible to say how much, and I do not conclude that it will be great. On the other hand, it is my view that the appearance of lack of independence flowing from the liquidators' actions as the Bank's investigating accountants, particularly when coupled with the events since that time, is quite real. ... The occurrence of any detriment to the creditors is unfortunate, but, on the other hand, the courts have emphasised the importance of the reality and appearance of the independence of liquidators and, if reality is to be given to those principles, must be prepared to act when they are breached. In all the circumstances, I have formed the view that the appropriate resolution in this case is that the liquidators should cease to hold that office. ... Mr Cuming did not act as investigating accountant, but he is Mr Hall's partner in PWC and has acted in concert with him as administrator and liquidator, and should not remain in office".

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

9. Limited Value of Disclosure

In many financial relationships and under APES 110, disclosure and consent (often involving partitioning of information - 'Chinese Wall' arrangements) is a cure for many types of conflicts of interest. This is the general commercial rule, and is assumed to be the default position.

The burden on Practitioners is greater. Where there is a proscribed relationship, or a conflict of interest as identified above, then disclosure, even with consent *will not cure* the problem and the appointment must not be taken, or if on foot, the appointment should be expeditiously terminated.

Remuneration

Introduction

This is a statement by the IPA of the general principles which should guide practitioners in relation to the issues concerning their remuneration for work done on an insolvent administration. These principles are supported by guidelines issued by the IPA that include working examples as to how the principles are to be applied in particular cases.

There are particular issues about remuneration that need to be addressed. The practitioner is entitled to remuneration for work done and remuneration is necessarily linked to the work done. There are processes whereby that remuneration needs to be approved by the approving body. . The practitioner must attend to certain work in an administration that may not be of any direct benefit to creditors; for example, to prepare and lodge documents with ASIC. Such work must be done whether or not there are funds available from which to claim remuneration in respect of that work.[25] If no funds are available, the practitioner is unremunerated. If there are funds, the practitioner is entitled to claim remuneration in respect of that work.

Creditors look to funds in an administration in order to recoup their losses by way of a dividend payment. However, the practitioner is entitled to first priority of access, over the creditors, to those funds. Hence, the amount of funds drawn by the practitioner for remuneration will have a direct impact on the dividend payment, if any, to creditors. However, the work done, for which remuneration is claimed, may also increase the dividend payment to creditors, for example by way of recovery of assets. Creditors who offer an indemnity to the practitioner for remuneration may be entitled to recoup that payment from any successful recovery.

These issues will arise further in the guidance notes that follow the principles, which are set out below:

- ***A practitioner may 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***

25 See s 545(3) Corporations Act with a similar position applying in bankruptcy.

A practitioner may claim remuneration, and disbursements, in respect of necessary work, properly performed in an administration.

10. First Remuneration Principle

A practitioner is entitled to be paid for work done. This is recognised under the legislation and at general law. The entitlement is accorded a high priority of payment from the company's funds.

As a threshold issue, a claim made by a practitioner for remuneration presupposes that there has been work done on which that claim is based. The focus therefore has to initially be on the work done by the practitioner. The entitlement to remuneration exists only in respect of work done that was necessary and that was properly performed.

This requires guidance as to the meaning of the terms 'necessary' and 'properly performed'.

10.1 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, that is, if it was done in furtherance of the exercise of the powers and performance of the duties of a practitioner as required by insolvency law and practice. In most cases, there will be no issue with the fact that the work that was done was necessary. The work will clearly be necessary if it is required by law.

For example, in a liquidation, a practitioner is required to prepare and send a section 533 report to ASIC and to report 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; if the company is a local operation, that countrywide inquiry may not be required.

In the case of 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.[26] The practitioner should ensure that work that was done, by him or herself, or by staff members, was necessary before a decision is made to claim for that remuneration. In practical terms, that will be done simply by the practitioner ensuring that there is no component of a remuneration claim for work that was done unnecessarily.

While the determination of whether work was necessary is often made in retrospect, a practitioner need not limit that determination by applying the benefit of hindsight. That is, if at the time the work was done it was considered necessary, it will generally remain 'necessary' for the purposes of a remuneration claim even if subsequent events showed it not to have been necessary.

10.2 Properly performed

Work that in general terms was necessary to do may in fact have been done poorly, or, at worst, improperly. 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, that work was not done properly. It may also have been necessary for the practitioner to have convened a meeting of creditors; but if work done in convening that meeting that took an inordinate amount of time, through the inexperience of the staff member, it was not done properly. The remuneration for the convening of an invalid meeting should not be claimed.[27]

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26 See for example Re Reiter Brothers Exploratory Drilling Pty Ltd (1994) 12 ACLC 430

27 See for example Touzell v Cawthorn (1995) 18 ACSR 328

The practitioner should ensure that the administration of an entity is not only conducted properly, but also that remuneration is only claimed for necessary work performed properly. In practical terms, the practitioner should focus on whether, during the period of time for which remuneration is claimed, any work was not done properly. Creditors are entitled to expect that no funds are expended on work that was not properly performed.

The practitioner should have systems in place whereby work not necessary, or not properly performed, should not be claimed for the purposes of remuneration.

Practitioners should refer to the section on "Ethics and Personal Standards".

10.3 Deciding what work to undertake

As earlier explained, the necessary work performed properly by a practitioner and the consequential quantum of a practitioner's remuneration necessarily impacts upon funds in the administration, and hence on the funds available for creditors. That may be a negative impact, by way of the necessary work performed properly (and hence the remuneration) producing no financial return and at the same time depleting available funds. That work may also have a positive impact, by way of the necessary work performed properly producing a return that not only covers the amount of remuneration claimed but also provides a return for creditors.

The practitioner should exercise professional and commercial judgment in considering whether work is to be performed. For 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. A practitioner should make a decision about such work in consultation with creditors, and based, if appropriate, on legal advice. For example, creditors may be asked to decide whether company funds available should be used to pay for certain recovery work, or whether those funds should simply be paid as a dividend to creditors instead.

Again, it is emphasised, and must be recognised, that not all of the work of a practitioner is associated with directly seeking a return for creditors. Many of the general law and statutory tasks of a practitioner – for example in reporting to creditors, and reporting to ASIC, and maintaining accounts – are properly performed and charged even though the remuneration charged will not produce a financial return and will have a net negative impact on funds.

Conversely, a practitioner is not obliged to do work unless there are funds available for their remuneration; save that certain statutory tasks must be undertaken regardless.[28]

10.4 Outsourcing

A practitioner may 'outsource' work to an external source subject to the restrictions on delegation by a practitioner.[29] Whether to outsource is a matter of commercial judgment for the external 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 his or her staff had in fact performed the work.

28 Section 545 Corporations Act.

29 Ah Toy v Registrar of Companies for the Northern Territory (1986) 4 ACLC 483

10.5 What remuneration cannot be charged for

In general terms a practitioner must not seek to be remunerated for work:

- outside the scope of the powers of the practitioner;
- before the practitioner was appointed.[30]

These restrictions represent a threshold test which, once met, nevertheless requires the assessment discussed earlier that work must have been ***necessary and properly*** done.

Remuneration must not be claimed for work that results in, or is the result of, a breach of the practitioner's duties (for example, acting despite a conflict of interest). An exception will be that if a practitioner wishes to seek remuneration for work performed in one or more of these circumstances, the practitioner may seek a determination of the entitlement to that remuneration from the court, not from a committee or from the creditors. Whilst a court will generally require creditors' approval for remuneration to be sought first, claim for remuneration in these circumstances are of a level of seriousness that requires court approval.

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 creditor/court approval for any such claim. In company insolvency, this requirement does not apply in situation where the pre-appointment advice has been paid or where the amount is less than $5,000. In the latter situation the practitioner will need to lodge a proof of debt.

10.6 Staff levels

Although the work may have been necessary, and may have been done properly, there is a remaining obligation, in time-based charging, of the practitioner ensuring that staff members at an appropriate level are allocated for the nature of the work being performed. Thus an experienced liquidator would not herself 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. This will require commercial and professional judgment. As the Court said in *One.Tel,*[31]

> *"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".*

Thus, it may be more cost effective for the practitioner to prepare and finalise an urgent report for creditors, if the report is required urgently and requires the practitioner's own professional input.

Similarly, the practitioner should ensure that an appropriate number and level of experience of staff are allocated.

30 Skafcorp v Jarol (2002) 44 ACSR 138

31 One.Tel in the matter of application by Liquidators [2005] NSWSC 1104

10.7 Costs of claiming remuneration

Because the determination of remuneration is a statutory requirement, practitioners may include in a remuneration claim the costs of record keeping and seeking determination of their remuneration. This may include for example the cost of producing a report for creditors to allow creditors to make an informed decision whether to approve the remuneration or of applying to the court (subject to any order of the court).

10.8 Costs of responding to inquiries, challenges

Generally a remuneration claim can be made for work associated with responding to regulator enquiries about the administration. A practitioner must exercise judgment in claiming remuneration if the regulator's inquiries relate to concerns about the conduct of the administration. Particular care should be taken in relation to remuneration claimed in defending allegations of misconduct, or in responding to a complaint by a creditor or other party. Care should also be exercised in relation to defending a claim of lack of independence. Where court proceedings are brought, the practitioner must necessarily abide any order of the court as to whether remuneration can be claimed in litigating the matter.

10.9 Success or contingency fees

Apart from circumstances of a percentage based method of calculating remuneration, a practitioner must not seek remuneration on the basis that they will receive a specified bonus, success fee / premium / uplift, 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, partiality, or lack of independence. This is based on the principle that no additional incentive should be required or offered in order to have the practitioner perform duties that are required; the independence and objectivity of the practitioner, even if only as perceived, may be compromised by such an arrangement. However, in respect of work done where independence and objectivity are not required, for example in selling nominated assets, such fee arrangements may be appropriate. Any such arrangement must not be inconsistent with the fiduciary obligations of a practitioner.

10.10 Prospective fees

A practitioner will often find it necessary to seek approval from creditors for remuneration to be determined in advance of the work to be performed, that is, prospectively. In that respect the practitioner is claiming remuneration for necessary and proper work to be performed.

The legislation requires that remuneration be fixed or determined.[32] Remuneration may be fixed or determined prospectively as long as it is determined by reference to a formula based upon time, provided that the formula is objective.[33] A 'cap' on the amount of prospective remuneration must be approved by creditors. Further details as to how such remuneration is claimed are discussed below.

10.11 Disbursements

Disbursements are an element of the remuneration claim of the practitioner. The entitlement to reimbursement is qualified in the same way as remuneration itself, by the requirement for the item related to the disbursement to have been necessary, and to have been properly incurred.

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32 Corporations Act s 473, 449E; Bankruptcy Act s 162

33 Gidley Re Aliance Motor Body Pty Ltd (2006) 150 FCR 345; see also Pattison v Bellin (2000) 103 FCR 590.

10.12 What is a disbursement?

As a threshold issue, the practitioner needs to determine whether the claim is in fact a disbursement. The significance for the practitioner, and the creditors, is that a disbursement does not require creditor approval[34] but a practitioner must account to creditors for the expenditure. A prudent practitioner will seek approval from, or inform creditors of, significant disbursements. That will often be a consequence of creditors approving a course of action, for example to bring a legal claim, with legal expenses (disbursements) being necessarily incurred.

A practitioner should therefore be careful to correctly classify an expense as either remuneration or a disbursement.

Even if an expense is a disbursement, it needs to be categorised properly in order to ensure that the correct approval processes are followed. The following table summarises the issues.

Disbursement type	Criteria	Examples	Creditor consent required?	Rationale
A. Professional				
A External advice, non-insolvency	These are fees that satisfy both the following criteria: (a) they are for professional services (non-insolvency services) relating to specific tasks required to be done during the administration; and (b) they are properly incurred with independent outside consultants engaged by, and not associated with, the practitioner and their firm.	Examples of such outside consultants are independent lawyers, auctioneers, valuers, real estate agents, tax advisers or accountants.	No	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: (a) they are of an incidental nature; (b) they are not for professional services; and (c) they are incurred with a third party in relation to work required to be done during the administration.	Examples of external non-professional services are administration advertising, travel and accommodation for staff, room hire, document storage, photocopying and printing, word processing and	No	A disbursement.

1.1.1 34 Venetian Nominees v Conlan (1998) 20 WAR 96; Diploma Construction Pty Ltd v Windslow Corporation Pty Ltd [2007] WASC 168

Disbursement type	Criteria	Examples	Creditor consent required?	Rationale
		secretarial services.		
B2 Internal assistance	These are costs that satisfy all the following criteria: (a) they are of an incidental nature; (b) they are not for professional services; (c) they are for goods or services properly provided by the practitioner or their staff in the administration; and (d) they are not overheads covered in the remuneration claim.	Examples of these goods or services are telephone calls, postage, stationery, photocopying and printing, IT services, word processing or secretarial services.	No	Basis of charge must be fully and frankly disclosed to creditors and must be reasonable.

Generally, a practitioner may engage internal non-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. These must be billed as remuneration.

Generally, a practitioner may engage external professional or non-professional services without creditor approval but only after proper commercial consideration to that decision has been given.

In respect of the decision to engage an external professional, practitioners should focus on the need to seek out services based on comparative considerations of expertise, quality and timeliness of advice, and cost. While good professional relationships with other professionals will exist, a practitioner must assess each engagement in terms of the interests of creditors and the fiduciary responsibilities involved.

10.13 What are not Disbursements

Given the significance of an expense being a disbursement, it is useful to list what are not disbursements:

Basic fixed and running costs: that is, general office overheads such as rent, insurance, staff costs, depreciation etc the cost of which is included in the remuneration claimed.

Internal insolvency professional costs: staff costs, training, professional memberships

External insolvency professional costs: In this category, if a practitioner sees it necessary (for example because of his or her own limited resources) to outsource insolvency tasks to another firm, which firm then bills the practitioner an amount, that amount is not a disbursement. The amount involved must be properly explained to creditors and their approval obtained, as if for any time based, fixed fee, or percentage based claim. In determining whether a remuneration claim fits within this category, it is useful to ask whether the work that is outsourced to another insolvency firm was work the practitioner could have done if he or she had the resources; if so, it is to be classified as remuneration.

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 should be appropriate for the trip being undertaken. If the practitioner were to choose to fly business class in circumstances not warranting it (and it may be warranted over long distances or if preparatory work can be done on the journey) then that extra cost component is not a disbursement.

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, consideration should be given to the engagement of local staff or agents to carry out tasks in order to minimise the costs to the administration.

10.14 Necessarily and properly incurred

Once the threshold issue is determined, that is, that a disbursement is being claimed, and assuming that the disbursement was incurred within the scope of the appointment, the focus is then on the need for the disbursements to have been both necessary and properly incurred. This means that they are expenses that are necessary for the conduct of the administration; for example, search fees; and that they were incurred properly, that is, in a correct manner.

In authorising payment of professional services disbursements, the practitioner must ensure that the task has been properly performed and that the quantum of the professional service fee is reasonable. These are matters for the professional and commercial judgment of the practitioner.

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.

In incurring disbursements, a practitioner must use his or her 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.

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

11. Second Remuneration Principle

A remuneration claim requires information to be conveyed to the persons with the authority to approve that claim, that is, the creditors.

That 'information' encompasses a number of elements:

- a system of recording that information;
- a basis for calculating remuneration;
- details then being provided in order to justify the amount of remuneration; and
- the timing of the information being provided.

11.1 Recording

Independently of the need to substantiate remuneration claimed, the practitioner must have a proper record of what work was done on an administration in order to be able to report to creditors on the progress of the administration. Regardless of the method of its calculation, the work records should be sufficient to enable the practitioner to track particular categories of work performed in order to allow the preparation of a meaningful remuneration report to creditors.

Time recording provides good practice management information, even though time data will not usually be required for reporting to creditors in claims for fixed fee or percentage based remuneration. Time based recording of work done and the claiming of remuneration based on the time spent is generally the most common method. The practitioner should maintain a system that involves the staff member recording the period of time spent on an administration in whatever units of time are applicable (for example, six or ten minute units); and with the staff member recording details of the work being performed in relation to a particular category of work (for example, 'preparing for creditors' meeting'), or more particular detail (for example, 'discussion with the lawyers advising ...'), as is appropriate. Refer to the Recommended Report for suggested categories of work.

Such recording should occur contemporaneously with the work done, by such a regime that allows accurate, detailed recording of time and tasks undertaken.

For time-based remuneration claims, the recording system should allow to be produced a hard copy document, in long or summary form, showing the amount of time spent and work performed by each staff member on an administration, broken down into the categories of work performed and /or level of staff classification over a particular period.

The IPA's Recommended Report provides a description of some common work categories that should be used, with time spent against those categories being recorded by named personnel at various levels.

11.2 Basis of calculation

There are a variety of bases by which remuneration can be calculated for the purposes of accounting for the remuneration and seeking creditors' approval. These include but are not limited to calculations based on hourly rates of staff working on an administration, commission

rates based on a percentage of an achieved financial result, or a fixed amount based on the completion of the administration. Remuneration may be based on a combination of these.

The IPA expresses no preference as to what method of calculating fees is adopted, as long as the method is transparent and fully explained to creditors and otherwise complies with the requirements of this Code.

11.3 Time based charging

A practitioner may seek to have remuneration calculated by reference to an hourly or time unit rate based on necessary work properly performed by the practitioner. Thus, if in a given month, the practitioner spends 6 hours of work on a matter, and charges at $400 per hour, the claim would be for $2400.

11.3.1 Prospective fees

A practitioner will often find it necessary to seek approval from creditors for remuneration to be determined in advance of the work to be performed, that is, prospectively, on a time basis. This may only be for an amount up to a nominated 'capped' limit.

The legislation requires that remuneration be 'fixed' or 'determined'. Remuneration may be fixed prospectively as long as it is determined by reference to a formula based upon time, provided that the formula is objective. A resolution for prospective remuneration approval should generally not refer to a changeable rate scale, for example at hourly charge out rates expressed to be subject to "changes in rates that occur from time to time"; unless that change is linked to some externally calculated percentage, such as the CPI.

If a practitioner otherwise intends to change the rate scale, or has done so in anticipation of creditor approval, the practitioner must notify creditors and obtain the appropriate approval.

11.4 Fixed fee

A practitioner may legitimately claim remuneration based on a quoted fixed amount for the conduct of the administration. In certain circumstances, the creditors may agree that this is appropriate. One advantage is that it gives creditors certainty about how much the remuneration claim will be.

As an example, in a small administration, where the issues that are anticipated to arise can reasonably be anticipated, the liquidator may wish to have remuneration approved for a fixed amount, say $10,000. A practitioner may also choose to charge a fixed fee for the remainder of an administration, rather than obtaining prospective approval on an hourly basis to a capped amount.

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

11.5 Percentage

A practitioner may also claim for remuneration based on a percentage of a figure. That figure may be the amount of assets disclosed, or assets realised. As an example, a practitioner may claim a percentage of the amount of assets realised in an administration, which amount would be drawn from funds realised, prior to the payment of a dividend to creditors.

It is a matter for creditors to make a decision whether to approve such a basis of remuneration. The practitioner must provide full details to creditors of how the percentage based remuneration will be claimed in order to allow them to make an informed decision.

Given the potential for contingency fees to place the practitioner in a position of conflict, partiality, or lack of independence, but accepting that they may be appropriate in certain cases, full disclosure of the terms of the arrangement, and the expected remuneration outcome of the practitioner, should be made to creditors.

11.6 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.

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.

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, an official liquidator must consent in writing to be appointed. The consent must be in accordance with Form 8 to the Rules. Form 8 requires disclosure of the hourly rates currently (as at the signing of the consent) charged in respect of work done by the person signing the consent, and by that person's partners and employees who may perform work in the administration in question. Practice Notes of the various courts (for example Practice Note 20 of the Federal Court of Australia) explains further disclosure requirements with which practitioners must comply. [35]

11.7 Initial notification of the basis of remuneration

As to the first point in time when information on remuneration is to be provided to creditors, a practitioner must initially decide on, and propose to creditors, what basis remuneration is to be claimed. In most cases a time based charging arrangement will be proposed. However a practitioner should allow creditors to understand what other bases are available. A practitioner should therefore provide the following information to the creditors:

- 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; and
- the following information, as appropriate:
  - if charging on a fixed fee basis, a fixed amount quote for the total cost of the administration;
  - if charging on a time basis, the rate scale the practitioner will use if calculating remuneration on a time basis and their best estimate of the costs of the administration to completion or to a specified milestone; or
  - if using a percentage of realisations method, how the external practitioner will calculate remuneration.

The IPA has prepared a Recommended Report Format for reporting to creditors in relation to remuneration. Part 4 of this Recommended Report provides information about the different ways remuneration may be calculated in a format suitable to fulfil the requirements of this Principle. The report should be tailored to the individual circumstances of the particular administration.

35 Federal Court of Australia: Practice Note No 20: 'Guidelines - Disclosure by Insolvency Practitioners of Fees to be Charged'.

11.8 Remuneration approval request

At the second point in time, the practitioner will need to send a report to creditors before any meeting is held at which approval for the remuneration is to be sought. 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.

IPA has also prepared an Information Sheet that is designed to fully inform creditors about the process of determining remuneration in an external practitioner and the rights and responsibilities of practitioners, committee members and creditors in this process. This 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.

11.9 Changing basis of remuneration

Generally, once a method has been approved by creditors, neither the practitioner, nor the creditors, will be able to revert to another arrangement; for the reason that different reporting and recording arrangements apply to each. For example, if a percentage of realisations is the approved basis, the practitioner will not, unless for his or her own internal purposes, need to record time spent on the administration. It would therefore not be feasible or permitted that creditors could revoke the approval for a percentage-based remuneration with a view to changing to time-based charging; or for the practitioner to seek creditor approval for such a change.

11.10 Reporting

The practitioner is legally obliged to present to creditors certain information to allow creditors to decide whether to approve remuneration sought. Apart from that legal obligation, in practical terms the creditors will only give consideration to a claim if the claim is substantiated by way of relevant information.

That information should be sufficient – that is, it must be in enough detail for the purposes for which is prepared and in the context of the work done in the administration. In the same vein, the information must be meaningful, that is, it must be presented in a way that allows creditors to understand what was done and why it was done. And the information should be clear, that is, the information provided should use non-technical terms that give a readily understandable explanation of what is being claimed.

11.11 Time based remuneration

11.11.1 Retrospective fees

For time-based remuneration claims for work done, creditors should be provided with a report showing:

- the amount of time spent
- a description of work performed by each staff member on an administration, broken down into the broad categories of work performed;
- the classification of staff utilized on the engagement for each broad category of work; and
- the remuneration incurred for each broad category of work.

11.11.2 Prospective fees

If the practitioner is intending to request approval of prospective remuneration, that is, for work to be done, the practitioner must provide the following information to the approving body:

- an explanation of the estimated fees remaining to complete the administration
- work still remaining to be done on the administration
- a monetary 'cap' on the remuneration[36]
- what this cap represents.

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

Even if prospective fee approval is not sought, if the practitioner's hourly rates change or the practitioner has reason to believe that the estimate given to creditors is no longer reliable, the practitioner should report to creditors on the new hourly rates and/or the revised estimate.

11.11.3 Recommended report

The IPA's Recommended Report should be used as a guide for time based remuneration claims. That Report is intended to be a standard template that should be followed in most circumstances. Any report would need to be tailored to the individual circumstances of the particular external administration. However, if broadly followed, the proposed format constitutes good practice.

11.12 Fixed fee remuneration

Where a fixed fee is claimed, the practitioner will need to report on the services to be provided for the fixed fee amount in sufficient detail for the decision making body to make an informed decision about the reasonableness of the fixed fee claimed.

It is suggested that if a practitioner is intending to make a claim for remuneration on a fixed fee basis that this be done at the first opportunity after the practitioner is appointed.

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.

The IPA Recommended Report may assist the practitioner in providing suitable information to creditors for fixed fee claims.

11.13 Percentage based remuneration

Where a percentage based claim is made, information will still need to be provided to the relevant decision making body to enable it to make an information assessment of whether the percentage is reasonable. It is suggested that the following information be provided:

- 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;
- The nature and 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).

Once the percentage is approved, reporting will need to focus on the factors underlying the entitlement to claim the remuneration, for example by way of reporting on asset realisations.

The IPA Recommended Report may assist the practitioner in providing suitable information to creditors for percentage based claims.

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36 The Federal Court in Gidley Re Aliance Motor Body Pty Ltd (2006) 150 FCR 345 said that a monetary cap on remuneration was not mandatory, but having a cap approved is good practice. See also Pattison v Bellin (2000) 103 FCR 590.

11.14 General guidance on reporting

The provision to creditors of more volume or detail of information, or more precise terms, does not necessarily inform creditors in a more effective manner than providing less or more general information. It is the *relevance* and *quality* and *focus* of the information rather than the quantity and detail that is important. This is so in particular given that creditors and even committees are not necessarily conversant with insolvency issues and processes.

The information must be presented openly, that is, with as much disclosure of the issues as is necessary, and with further inquiries or explanations reasonably sought by creditors being given. Questions from creditors should be anticipated and not discouraged, even if they are ill informed or show that they have not read the written reports provided to them as creditors. The report should alert creditors to their right to ask questions and have them answered; and to be made aware that supporting documentation may be viewed if reasonably requested.

Some broad guidelines follow that will assist a practitioner in preparing their remuneration reports in accordance with the Code. A practitioner should:

- provide information that is specific to the administration in hand, 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 high-level information.

A practitioner is entitled to draw remuneration once it is approved

12. Third Remuneration Principle

The end result of the process outlined in this part of the Code is that, having attended to the obligations to determine the basis of remuneration, to then report on and explain the remuneration claimed, and to obtain creditor approval, the practitioner is then entitled to draw that remuneration. This will invariably be a transfer of moneys from the administration account to the firm's account.

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) before any drawing is made. In the case of court-approved remuneration, the court order should be obtained.

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

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. It is generally not appropriate for a practitioner to be permitted to draw fixed fee remuneration 'up-front'.

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.

If a practitioner becomes aware that his or her 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.

RECOMMENDED REMUNERATION REPORT

12.1 Overview and Explanation of the Recommended Report

The recommended format for a report to creditors is for practitioners seeking retrospective and/or prospective determination of remuneration on a ***time basis***. The recommended format is not mandatory, but the principle of *sufficient, meaningful, open and clear reporting* must be adhered to. Reports should be tailored to the particular circumstances of each administration. However, if broadly followed by practitioners, the proposed format constitutes good practice.

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 into a report that the practitioner is preparing for committee members or creditors where for example a voluntary administrator is seeking the determination of remuneration at the meeting to consider the company's future (the 'second meeting') 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.***

12.2 Structure of the Recommended Report

The recommended report is divided into 4 sections. The first two parts provide substantive and quantitative information on remuneration. Part 3 is a supplementary narrative and Part 4 provides general support information.

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.

PART 1: DESCRIPTION OF WORK

The tasks which Practitioners undertake can be broadly divided into 7 categories. These are:

a) Assets
b) Creditors
c) Employees
d) Trade On
e) Investigation
f) Dividend
g) Administration

Information on the seven categories is to be set out in tabular form making it easy for creditors to understand the type and purpose of work being undertaken. A list of tasks is included for additional guidance. It is important to ensure the narrative you provide is sufficient, meaningful, open and clear and provides specifics of the work done for this particular engagement.

- The table included in the report for the particular administration should properly reflect the work done on that engagement. ***Inclusion of the full list for all engagements is not appropriate and is not a proper reflection of the work undertaken on the engagement.***
- Proper time recording systems should be able to generate reports limiting the time taken to prepare this information.
- The General Description column is indicative only and should be amended to suit the particular engagement providing 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 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?

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.

1525 **PART 4: ATTACHMENTS AND EXPLANATION**

Most of this information is standard information and may have been provided to creditors at the commencement of the administration. However, creditors must have received this information at some point in the administration before being asked to approve remuneration

12.3 Remuneration Report Part 1: Description of Work Completed

Company		Period From		To	
Practitioner		Firm			
Administration Type					

Task Area	General Description	Includes *[**delete or add** details as appropriate to the work done]*
Assets [$ 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 [$x]	Creditor Enquiries	• Receive and follow up creditor enquiries via telephone • Maintaining creditor enquiry register • Review and prepare correspondence to creditors and their representatives via facsimile, email and post • Correspondence with committee of creditors members
	Retention of Title Claims	• Receive initial notification of creditor's intention to claim • Provision of retention of title claim form to creditor • Receive completed retention of title claim form • Maintain retention of title file • Meeting claimant on site to identify goods • Adjudicate retention of title claim • Forward correspondence to claimant notifying outcome of adjudication • Preparation of payment vouchers to satisfy valid claim • Preparation of correspondence to claimant to accompany payment of claim (if valid)
	Secured creditor reporting	• Preparing reports to secured creditor • Responding to secured creditor's queries
	Creditor reports	• Preparing 439A, investigation, meeting and general reports to creditors
	Dealing with proofs of debt	• Receipting and filing POD's when not related to a dividend • Corresponding with OSR and ATO regarding POD's when not related to a dividend
	Meeting of Creditors	• Preparation meeting notices, proxies and advertisements • Forward notice of meeting to all known creditors • Preparation of meeting file, including agenda, certificate of postage, attendance register, list of creditors, reports to creditors, advertisement of

		meeting and draft minutes of meeting. • Preparation and lodgement 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 [$x]	Employees enquiry	• Receive and follow up employee enquiries via telephone • Maintain employee enquiry register • Review and prepare correspondence to creditors and their representatives via facsimile, email and post • Preparation of letters to employees advising of their entitlements and options available • Receive and prepare correspondence in response to employees objections to leave entitlements
	GEERS	• Correspondence with GEERS • Preparing notification spreadsheet • Preparing GEERS quotations • Preparing GEERS distributions
	Calculation of entitlements	• Calculating employee entitlements • Reviewing employee files and company's books and records • Reconciling superannuation accounts • Reviewing awards • Liaising with solicitors regarding entitlements
	Employee dividend	• Correspondence with employees regarding dividend • Correspondence with ATO regarding SGC proof of debt • Calculating dividend rate • Preparing dividend file • Advertising dividend notice • Preparing distribution • Receipting POD's • Adjudicating POD's • Ensuring PAYG is remitted to ATO
	Workers compensation claims	• Review insurance policies • Receipt of claim • Liaising with claimant • Liaising with insurers and solicitors regarding claims • Identification of potential issues requiring attention of insurance specialists • Correspondence with Willis regarding initial and ongoing workers compensation insurance requirements • Correspondence with previous brokers
	Other employee issues	• Correspondence with Child Support • Correspondence with Centrelink
Trade On [$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 [$x]	Conducting investigation	• Collection of company books and records • Correspondence with ASIC to receive assistance in obtaining company's books & records and Report as to Affairs • Reviewing company's books and records • Review and preparation of company nature and history • Conducting and summarising statutory searches • Preparation of comparative financial statements • Preparation of deficiency statement • Review of specific transactions and liaising with directors regarding certain transactions • Liaising with directors regarding certain transactions • Preparation of investigation file • Lodgement of investigation with the ASIC • Preparation and lodgement of supplementary report if required
	Examinations	• Preparing brief to solicitor • Liaising with solicitor(s) regarding examinations • Attendance at examination • Reviewing examination transcripts • Liaising with solicitor(s) regarding outcome of examinations and further actions available
	Litigation / Recoveries	• Internal meetings to discuss status of litigation • Preparing brief to solicitors • Liaising with solicitors regarding recovery actions • Attending to negotiations • Attending to settlement matters
	ASIC reporting	• Preparing statutory investigation reports • Preparing affidavits seeking non lodgements assistance • Liaising with ASIC
Dividend [$x]	Processing proofs of debt	• Preparation of correspondence to potential creditors inviting lodgement of POD • Receipt of PODs • Maintain POD register • Adjudicating PODs • Request further information from claimants regarding POD • Preparation of correspondence to claimant advising outcome of adjudication
	Dividend procedures	• Preparation of correspondence to creditors advising of intention to declare dividend • Advertisement of intention to declare dividend • Obtain clearance from ATO to allow distribution of company's assets • Preparation of dividend calculation • Preparation of correspondence to creditors announcing declaration of dividend • Advertise announcement of dividend • Preparation of distribution • Preparation of dividend file • Preparation of payment vouchers to pay dividend • Preparation of correspondence to creditors enclosing payment of dividend
Administration [$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

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12.4 Remuneration Report Part 2: Calculation of Remuneration

Employee	**Position**	**$/hour** (ex GST)	**Total actual hours**	**Total ($)**	**Task Area**						
					Assets	Creditors	Employees	Trade on	Investigation	Dividend	Administration
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*

12.5 Disbursements

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

A disbursements are all externally provided professional services and are recovered at cost. An example of an A1 disbursement is legal fees.

B1 disbursements are external 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 engagement are provided in Section XX of this report.

You are not required to seek creditor approval for disbursements but 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.

12.6 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 would normally preface the remuneration claim. An overview would include:

- an explanation of the nature of the assignment;
- the practitioner's own initial assessment of the administration (including the anticipated return to creditors); and
- the outcome (if known, or able to be anticipated).
- work completed, underway and outstanding

For retrospective determination, the practitioner would explain:

- the strategy pursued in the assignment ;
- how this strategy was decided and reviewed;
- the staffing profile used;
- the decision to outsource work (if applicable);
- any events that occurred that required a change of strategy; and
- the results obtained from trading the business of the insolvent company (if applicable).

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.

12.7 Remuneration Report Part 4: General Guidance Material

(Supporting Information in your Reports to Creditors)

Explanation of Remuneration and Disbursements charging policies

Remuneration Methods

There are three 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 engagement and is the total cost for the engagement. Sometimes a practitioner will finalise an administration for a fixed fee.

c. Commission

The total fee charged is based on a percentage scale of the gross proceeds of assets realisations.

d. Method chosen

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

[GUIDANCE: Provide reasoning for the fee calculation method chosen].

Explanation of Hourly Rates

[suggested text for time based remuneration claims]

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. The hourly rates charged encompass the total cost of providing professional services, and should not be compared to an hourly wage.

The additional expenses being recovered in the hourly rate include:

a) Rental of premises and other infrastructure

b) Insurances including professional indemnity insurance – all registered liquidators are required to maintain professional indemnity insurance or a performance bond

c) Continuing professional development and education of staff – our staff must be aware of the latest changes relating to insolvency law

d) Maintaining a full staff complement – given the nature of our work we require a full highly skilled staff complement at all times.

e) Burden of risk – in many circumstances we are personally liable for any debts incurred whilst trading the business

f) Legal obligations – there are many ongoing reporting requirements which we must comply with regardless of the amount of assets within an administration. There are many instances where we do not recover our full fees or disbursements incurred in attending to an administration.

Having regard to the factors detailed above we believe that the hourly rates listed below are reasonable.

Title	Description	Hourly Rate (excl GST)
Appointee	Registered Liquidator, Official Liquidator and/or Trustee, bringing his or her specialist skills to the insolvency administration	$
Director/ Consultant	Minimum of twelve years insolvency experience, at least 5 years at manager level	$
Manager 1	More than 7 years experience, at least five years at manager level, qualified accountant and capable of controlling all aspects of an administration, maybe appropriately qualified to take appointments in his/her own right	$
Manager 2	6 – 7 years experience, qualified accountant, with well developed technical and commercial skills, controls 2 – 4 staff	$
Supervisor	4 – 6 years experience, qualified accountant, will have had conduct of minor administrations and experience in control of 1 – 3 staff, assists planning and control of medium to larger jobs	$
Senior 1	2 – 4 years experience, undertaking professional qualification, assists planning and control of small to medium sized jobs as well as performing some of the more difficult work on larger jobs	$
Senior 2	1 – 2 years experience, commenced professional qualification, required to control the fieldwork on small jobs and is responsible for assisting complete fieldwork on medium to large jobs	$
Intermediate 1	0 – 2 years experience, university graduate with little or no professional experience, required to assist in day-to-day fieldwork under supervision of more senior staff	$
Intermediate 2	0 – 1 years experience, trainee undertaking an university degree with an accountancy major, required to assist in day-to-day fieldwork under supervision of more senior staff	$
Secretary/ WPO	Appropriate skills including machine usage	$
Computer Operator	Appropriate skills including machine usage	$
Clerk	Non-qualified but completed HSC; classification would depend on experience, salary and complexity of work to be conducted.	$
Typist	Appropriate skills	$
Junior	Completed HSC and plans to undertake at least part-time degree/diploma, required to assist in administration and day-to-day fieldwork under supervision of more senior staff	$

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The Titles Appointee, Director and Manager must not be used unless the minimum criteria are satisfied. The misuse of Titles has the potential to be regarded as misrepresentation.

Future fees

If creditors are being requested to approve future fees, the practitioner must provide creditors with:

- an explanation of the estimated fees remaining to complete the administration;
- work still remaining to be done on the administration;
- whether a cap is proposed; and
- 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.

Disbursements

Some disbursements may appear in the summary of receipts and payments above. Although committee members and creditors will not be required to approve disbursements, the practitioner still has a duty to justify, and account to the creditors for, the payment of disbursements.

The practitioner should consider whether creditors should receive further explanation of large disbursements being incurred or paid, particularly legal costs. The practitioner should advise creditors whether they have requested or intend to request that the legal costs be taxed.

The practitioner must provide creditors with a full explanation of any A disbursements they have, or are intending, to incur.

Internal disbursements cannot be incurred without the consent of creditors. Any consent obtained from creditors must be express and fully informed.

Statement of remuneration claim

The practitioner should clearly:

a) state the precise terms of the agreement sought from the committee or the resolution(s) sought from creditors;

b) set out the total remuneration previously determined; and

c) indicate whether they will be seeking the determination of further remuneration at some time in the future.]

Supporting documents

Any other material and relevant supporting documents should be attached. A list of those documents should be provided in the report so that committee members or creditors know that they have received all relevant information. As a general rule, the provision of WIP statements is not appropriate, unless requested.

More detailed information should be provided if requested.