

Inspector-General Practice Statement 8

IGPS 8 – Involuntary cancellation of trustee registration

1. Introduction

1.1 This document outlines the process involved when the Inspector-General considers taking steps that may lead to the cancellation, or suspension of, or the placement of conditions on the registration of a registered trustee under the [Bankruptcy Act 1966](#) (the Act). The Act incorporates, as Schedule 2 to the Act, the Insolvency Practice Schedule (Bankruptcy) (“the Schedule”) which contains the disciplinary provisions.

1.2 This document also outlines the independent committee processes and the basis of the Inspector-General’s decision making.

2. Overview of bankruptcy trustees' duties

2.1 Registered trustees are required to maintain the utmost professionalism, independence, impartiality, honesty and ethics in their dealings. They are considered officers of the court and, in exercising powers and discretion and making decisions, no lesser standard is to be expected of them than of a court or judge. They play a central role in the administration of estates and are under a general duty to exercise the powers in such a fashion that the objects of the Act, including those of equality between creditors and fairness to bankrupts and debtors, are served.

2.2 Registered trustees also have statutory duties set out in the Act. They have a fundamental duty when administering an estate to carry out certain investigations and undertake certain tasks and functions as set out in section 19 of the Act. Trustees are also required to maintain proper accounts and records, have proper money handling processes and assist when required with inquiries or investigations conducted by the Inspector-General.

2.3 Registered trustees are also required to comply with the legislative standards set out in Division 42 of the *Insolvency Practice Rules (Bankruptcy) 2016* (“Practice Rules”).

3. Disciplinary sanctions

3.1 Disciplinary action may be taken where, for example, a breach of the Act or a performance standard is identified or where a direction to a trustee by the Inspector-General under the Schedule is not complied with. In deciding what action is appropriate, the Inspector-General’s delegate takes into account:

- a. the nature of the breach
- b. the seriousness of the effect of a failure to comply, including the impact on a particular estate or individual
- c. a trustee's performance history and whether the trustee has previously failed to comply when able to.

3.2 There is a range of sanctions or actions which the Inspector-General’s delegate can take when it considers breaches of duty or non-compliance have occurred. Involuntary cancellation of registration is generally a sanction of last resort. Sanctions that the Inspector-General’s delegate may consider prior to initiating action to de-register a trustee include:

a. guidance – making trustees aware of problem areas and the correct practise or law individually and collectively

b. individual counselling – by far the most effective means to achieve timely remedial action

~~c. changing the risk classification of a trustee. This will lead to a larger sample of files being selected for future annual inspections and a more detailed inspection being undertaken, particularly in areas of prior non-compliance~~

~~dc.~~ formal investigation and reporting under section 12 of the Act. Such reports may be supplied to creditors, police and other regulator or disciplinary bodies such as the Australian Restructuring Insolvency and Turnaround Association (ARITA), CAANZ, CPA or Law Councils and Societies

~~ed.~~ audit of a trustees accounts under section 70-15 of The Schedule ~~175 of the Act~~

~~fe.~~ imposition of penalties for realisations and interest charge breaches

~~gf.~~ issue of 'show cause' letters requiring a trustee to explain both their actions and why they should continue to be registered

~~hg.~~ referral to other investigation units or law enforcement bodies

~~he.~~ provide a direction to a trustee to comply with a requirement of the Act (e.g. lodgment of documents); correct inaccuracies; or convene a meeting of creditors

~~ih.~~ provide a direction to the trustee not to accept further appointments (if (g) not complied with)

~~kji.~~ suspend the registration of a trustee

Classification of non-compliance

3.3 AFSA Regulation and Enforcement utilises a classification system to describe areas of non-compliance and assist it to decide on the appropriate action to take subject to the seriousness and impact:

Category A

Fundamental breaches and lack of controls that are likely to bring into question the integrity of the system. This includes cases where there are repeat non-compliance occurrences of Category B type previously identified and reported on.

These matters will generally give rise to either legal action, referral to ~~fraud~~ investigators Enforcement or “show cause” action under section 40-40 of the Schedule or determination of ineligibility (in the case of solicitor controlling trustees (SCT)).

Category B

Serious or systemic issues that will have a material impact on the administration and require timely action.

In these cases the trustee or SCT will be counselled and timely remedial action is expected to be taken. Failure to take timely remedial action will give rise to reclassification to a Category A and appropriate action.

Category C

One-off practice or procedural non-compliance that is not systemic and doesn't have a significant impact on the administration, dividends or creditors, debtors' rights or system integrity but should be brought to the attention of the trustee.

Further identification of errors of this nature through complaints or later inspections would see the escalation of the error to a Category B and counselling of the trustee.

3.4 This provides a structured process that will see the escalation of a matter if it is not resolved by the trustee. Most matters are resolved quickly and amicably upon intervention by AFSA Regulation and Enforcement.

3.5 Hence breaches or non-compliance with the Act or a performance standard may give rise to a simple query by the Inspector-General's delegate on the reasons why there has been a deviation, and where ~~repetitive-repeat~~ repeated or serious breaches have occurred ~~or, in the case of a serious breach, may~~ result in action which may ultimately result in the suspension or cancellation ~~suspend or~~ of a trustee's registration.

4. Disciplinary Action

4.1 Usually a trustee will be well informed of issues of concern raised by the Inspector-General's delegate, during investigations or inspections and will have been provided the opportunity to state their position.

Disciplinary Action wWithout a Committee

4.2 The Inspector-General may automatically cancel the registration of a registered trustee if the registered trustee dies or becomes an insolvent under administration. The cancellation will take effect on the day of either event occurring.

4.3 The Inspector-General may suspend or cancel the registration of a registered trustee if:

- the trustee is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*, or under a law of an external Territory or a law of a foreign country; or
- the trustee ceases to have adequate and appropriate professional indemnity or fidelity insurance against the liabilities that the person may incur working as a registered trustee; or
- the trustee's registration as a liquidator under the *Corporations Act 2001* has been cancelled or suspended, other than in compliance with a written request by the trustee to cancel or suspend the registration; or
- the trustee owes more than the prescribed amount of notified estate charges; or
- if the Court has made an order under section 90-15 of the Schedule that the trustee repay remuneration, and the trustee has failed to repay the remuneration; or
- the trustee has been convicted of an offence involving fraud or dishonesty; or
- the trustee lodges a request with the Inspector – General in the approved form to have their registration suspended.

4.4 The Inspector-General also from 1 September 2017, will ~~has~~ have the power to give a direction to a registered trustee not to accept further appointments. The direction given will be in writing for a period specified if:

- the trustee has failed to comply with a direction given to the trustee under section 40-5 of the Schedule – a direction to remedy failure to lodge documents, or give information or documents;
- the trustee has failed to comply with a direction given to the trustee under 40-10 of the Schedule – a direction to correct inaccuracies in information given to the Inspector-General;
- the trustee has failed to comply with a direction given to the trustee under section 70-70 of the Schedule – a direction to give relevant material
- the trustee has failed to comply with a direction given to the trustee under subsection 75-20(1) or (2) of the Schedule – a direction to convene a meeting of creditors or comply with requirements in relation to such a meeting.

Disciplinary Action with a committee process

4.5 Division 40-40 of the Schedule provides that the Inspector-General may ask a registered trustee to give the Inspector-General a written explanation why the trustee should continue to be registered, if the Inspector-General believes that:

- (a) the trustee no longer has the qualifications, experience, knowledge and abilities prescribed by the Practice Rules; or
- (b) the trustee has committed an act of bankruptcy within the meaning of the Act or a corresponding law of an external Territory or a foreign country; or
- (c) the trustee is disqualified from managing corporations under Part 2D.6 of the [Corporations Act 2001](#), or under a law of an external Territory or a law of a foreign country; or
- (d) the trustee has ceased to have:
 - (i) adequate and appropriate professional indemnity insurance; or
 - (ii) adequate and appropriate fidelity insurance;
 against the liabilities that the person may incur working as a registered trustee; or
- (e) the trustee has breached a current condition imposed on the trustee; or
- (f) the trustee has contravened a provision of the Act; or
- (g) the trustee's registration as a liquidator under the [Corporations Act 2001](#) has been cancelled or suspended, other than in compliance with a written request by the trustee to cancel or suspend the registration; or
- (h) the trustee owes more than the prescribed amount of notified estate charges; or
- (i) if the Court has made an order under section 90-15 of the Schedule that the trustee repay remuneration, and the trustee has failed to repay the remuneration; or
- (j) the trustee has been convicted of an offence involving fraud or dishonesty; or

(k) the trustee is permanently or temporarily unable to perform the functions and duties of a trustee because of physical or mental incapacity; or

(l) the trustee has failed to carry out adequately and properly (whether in Australia or in an external Territory or in a foreign country):

(i) the duties of a trustee; or

(ii) any other duties or functions that a registered trustee is required to carry out under a law of the Commonwealth or of a State or Territory, or under the general law; or

(m) if the trustee is or was the administrator of a debt agreement--the trustee has failed to carry out adequately and properly (whether in Australia or in an external Territory or in a foreign country) the duties of an administrator in relation to a debt agreement; or

(n) the trustee is not a fit and proper person; or

(o) the trustee is not resident in Australia or in another prescribed country; or

(p) the trustee has failed to comply with a standard prescribed by the Practice Rules.

4.6 If the Inspector-General's delegate, then forms the belief that a ground set out in section 40-40 of the Schedule is established and other sanctions are either inappropriate or have had no positive effect, the delegate will formally write to the trustee outlining the breaches in detail, seeking the trustee's formal response as to why their registration should not be cancelled. The trustee is given 20 business days to respond in writing.

4.7 If the delegate does not receive an explanation within 20 business days or is not satisfied by the explanation, the delegate may convene a committee to consider whether the trustee should continue to be registered.

Committee process

4.8 The committee must consist of the Inspector-General in Bankruptcy or delegate, a person appointed by the Minister and a registered trustee ~~(, registered for more than five years and, nominated by the ARITA)~~. To ensure impartiality no delegate of the Inspector-General involved in decisions up to the point of referral to a committee will act as delegate of the Inspector-General on the committee.

4.9 The committee is required to make inquiries that are reasonable for the purpose of making an informed decision or that the chairperson believes are appropriate in order for the committee to have sufficient information to make the decision.

4.10 A committee must observe natural justice. This is explained in more detail below.

4.11 A committee is not bound by any rules of evidence but may inform itself on any matter as it sees fit. This means that the committee will not hear submissions on whether information provided is admissible in a court of law or not. Similarly there is no right of "objection" to the questions being asked by the committee. Questions will be asked of the trustee and the trustee can choose either to answer or not. The committee may proceed with its consideration of the matter irrespective of any refusal to answer.

4.12 While it will usually consider all the supporting documents that formed the basis of decisions of the Inspector-General's delegate and the trustee's responses, the committee is not limited to just that information or the information that formed the basis of the prior decision to issue a show cause letter. The committee can consider any information and form its own view in the matter.

4.13 The committee will interview the trustee. Details of the interview process are provided below.

4.14 Once the committee has considered all the information it needs it will decide firstly whether one or more of the circumstances set out in section 40-40 of the Schedule exist and, if so, whether this is serious enough to impose conditions on, suspend or cancel the registration of the trustee or take other action allowed under section 40-55 of the Schedule (see paragraph 5.2).

4.15 The committee must provide reasons for its decision to both the trustee and the Inspector-General. The Inspector-General must give effect to the committee's decision.

4.16 The Schedule contains offences for improper use or disclosure by a committee member, of information obtained during the committee process.

The interview process and natural justice

4.17 Once the Inspector-General or delegate has determined the makeup of the committee, the committee will meet either in person or by phone conference to preliminarily consider the matter and how to proceed.

4.18 The interview date, time and place will be arranged to meet the needs of the committee and the trustee.

4.19 The trustee may choose to have legal representation at any point in the process.

4.20 The interview is an inquisitorial process, not an adversarial one. The process is both to provide the trustee with an opportunity to further rebut or comment on the issues raised previously by the Inspector-General's delegate and to allow the committee to seek clarification on issues and ask questions concerning the trustee's administrations and practices.

4.21 The trustee may make submissions both on the issue of the prior delegate's decision concerning the circumstances set out in section 40-40 of the Schedule and on appropriate sanctions that should be imposed by the committee, in the event that the committee also finds the relevant circumstances exist.

4.22 Time will be allowed for such submissions and the trustee may introduce any further information either in writing or orally and this includes any other parties who would like to put submissions on the trustee's behalf. The trustee should advise the committee prior to the interview if there are any other people s/he wishes to call to put information to the committee at that time.

4.23 Usually prior to the interview, the trustee will be provided with all the information the committee has been provided with and may rely upon, to allow the trustee to prepare a response. However, as some information may not become available until the interview or afterwards this will not always be possible.

4.24 The committee will before making its decision provide advice on the information it will rely upon and provide any subsequent information to the trustee obtained during or after interview and allow a reasonable time for the trustee to consider and respond.

4.25 Should assertions be made as to the character of the trustee by any party and the assertions form part of the information on which the committee will rely, the trustee will have a right under natural justice principles to cross examine the person who made the assertion.

The decision

4.26 The committee is required to keep minutes recording their meetings and decisions made and must use its best endeavours to make a decision within 60 days of the matter being referred to it.

4.27 The committee has various decision options as set out in section 40-55 of the Schedule:

- (a) that the trustee should continue to be registered;
- (b) that the trustee's registration should be suspended for a period, or until the occurrence of an event, specified in the decision;
- (c) that the trustee's registration should be cancelled;
- (d) that the Inspector-General should direct the trustee not to accept any further appointments as trustee, or not to accept any further appointments as trustee during the period specified in the decision;
- (e) that the trustee should be publicly admonished or reprimanded;
- (f) that a condition specified in the decision should be imposed on the trustee;
- (g) that a condition should be imposed on all other registered trustees that they must not allow the trustee to carry out any of the functions or duties, or exercise any of the powers, of a trustee on their behalf (whether as employee, agent, consultant or otherwise) for a period specified in the decision of no more than 10 years;
- (h) that the Inspector-General should publish specified information in relation to the committee's decision and the reasons for that decision.

4.28 The courts have historically held trustees' registrations in high regard and have been reluctant to de-register trustees unless the most serious breaches have occurred. Committees, whose decisions are reviewable in the AAT, will consider any legal precedents which may provide guidance, in arriving at their decision.

4.29 The committee report, to be provided to the trustee and Inspector-General in Bankruptcy will outline the basis of the decision, detail the issues considered and the information and law relied upon.

4.30 If the decision is to cancel registration, the trustee will not be entitled to a refund of all or part of any registration fee that has been paid. The trustee would not be entitled to re-apply for registration for a period of 10 years.

4.31 The Inspector-General is required by law to record certain disciplinary action on the Register of Trustees (which is publicly accessible) such as, but not limited to:

- a) the suspension of the trustee's registration
- b) conditions being placed on the registration of a trustee
- c) a direction by the Inspector-General not to accept further appointments
- d) a committee decision that the trustee should be publicly admonished or reprimanded

Controlling Trustee Ineligibility

4.32 Where a solicitor acting as a controlling trustee fails to carry out their duties or fails to co-operate with an inquiry or investigation, the Inspector-General can declare this person as ineligible to act. Should this occur, the Official Trustee^T will assume all control of the administrations until a new controlling trustee is appointed.

4.33 If a solicitor controlling trustee is declared ineligible they will be provided with reasons for the decision and details of the right of review to the Administrative Appeals Tribunal.

5. Right of review

5.1 If the trustee is dissatisfied with the Inspector-General's or committee's disciplinary decision, they may appeal to the Administrative Appeals Tribunal (the AAT). An application to the AAT for a review of the committee's decision must be in writing, set out the reasons for the application and must be made within 28 days of the date the committee's report is received by the trustee. Full information about applications to the AAT can be obtained from the local AAT Registry or from the internet at www.aat.gov.au.