IPA

building professional excellence

Code of Professional Practice
for Insolvency Practitioners

Second Edition: January 2011

Our Values | **Integrity** | **Transparency** | **Accountability** | **Technical Proficiency**

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Table of Contents

Foreword

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

We were gratified to see the ready acceptance of the Code by the profession, regulatory bodies and the Courts following its initial release.

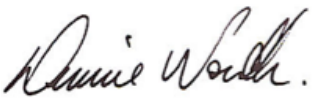
This second edition seeks to take into account the feedback that we have received on the Code's operation since it came into effect and to include other issues that have been identified.

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

Effective Dates

The second edition of the Code will be effective from 1 January 2011.
The first edition of the Code will be withdrawn from that date.
The update to the Code would not have been possible without the extensive input from members, regulatory bodies and the dedicated staff of the IPA.

Mark Robinson
President
IPA



Denise North
Chief Excutive
IPA

Part A: Introduction

1. Introduction and Purpose of the Code

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

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

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

The Code is in four parts:

Part A introduces the Code

Part B sets out the overarching principles.

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

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

1.1 Interaction with Legislation and Regulation

The Code is not a simple restatement of laws, regulations and judicial pronouncements, rather it is a set of principles and guidance based on standards of conduct that are founded in established precedent. Some standards imposed on Members are higher than those existing requirements. Where the law is silent, or ambiguous, the Code introduces principles to clarify understanding of the desired behaviour.

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

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

1.2 Principles based

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

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

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

1.3 Must, should and may

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

- mandatory requirements (must / must not);
- recommended behaviours (should / should not); and
- permissive statements (may).

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

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

1.4 Regulators and courts

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

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

At the same time, the Code remains subject to the views of the courts which may decide not to accept or follow particular requirements or guidance in the Code. In such cases, the Code will be amended to properly reflect the law. Also, a Member may obtain court directions or orders that differ from requirement or guidance in the Code, for example in relation to independence. The Code always remains subject to the law.

1.5 Other professional codes

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

1.6 Application of the Code

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

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

This Code does not apply to Members Voluntary Liquidations.

Examples provided within the Code are for illustrative purposes only and Members need to consider the particular facts of each case when determining how the Code applies to them.

No.	Principle	Controllers	Practitioners	Members
1	Members must exhibit the highest levels of integrity, objectivity and impartiality in all aspects of administrations and practice management.	x	x	x
2	When accepting or retaining an appointment the Practitioner must at all times during the administration be, and be seen to be, independent.		x	
3	Disclosure and acceptance of a lack of independence is not necessarily a cure.		x	
4	Members must communicate with affected parties in a manner that is accurate, honest, open, clear, succinct and timely to ensure effective understanding of the processes, and their rights and obligations.	x	x	x
5	Members must attend to their duties in a timely way.	x	x	x
6	A Practitioner must not acquire directly or indirectly any assets under the administration of the Practitioner.	x	x	x
7	When promoting themselves, or their Firm, or when competing for work, Members must act with integrity and must not bring the profession into disrepute.	x	x	x
8	When dealing with other Members in transitioning or parallel appointments, Members must be professional and co-operative, without compromising the obligations of the Member in their own particular appointment.	x	x	
9	Practitioners must maintain professional competency in the practice of insolvency.	x	x	
10	A Practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed in an Administration.	x	x	
11	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 as to whether the proposed remuneration is reasonable.	x	x	
12	A Practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval.	x	x	

No.	Principle	Controllers	Practitioners	Members
13	When accepting an appointment the Practitioner must ensure that their firm has adequate expertise and resources for the type and size of the administration, or the capacity to call in that expertise and those resources as needed.	x	x	
14	Members must implement policies, procedures and systems to ensure effective quality assurance.	x	x	x
15	Members must implement policies, procedures and systems to ensure effective compliance management.	x	x	x
16	Members must implement policies, procedures and systems to ensure effective risk management.	x	x	x
17	Members must implement policies, procedures and systems to ensure effective complaints management.	x	x	x

2. The Insolvency Profession

2.1 Introduction

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

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

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

2.2 Insolvency practitioners

Insolvency Practitioners:

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

2.3 Powers

Practitioners are given extensive powers, including to:

- secure and realise the assets of the Insolvent for the benefit of creditors (or secured creditor in the case of a Controller);
- compel individuals involved to answer and explain the circumstances of the insolvency;
- investigate and refer breaches of the law to appropriate authorities; and
- decide the claims of the various parties.

2.4 Control of Assets and Activities

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

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

Once that initial appointment occurs, the Practitioner (except where appointed as a Controller) has the authority and responsibility to deal with the competing interests of the various parties.

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

2.5 Duties and Obligations

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

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

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

These combine to create a complex web of fiduciary responsibilities.

Practitioners:

- owe a fiduciary responsibility to the parties involved;
- have a duty to be fair and act without bias in assessing the competing interests of stakeholders;
- have an important role in protecting the public interest, by identifying and reporting on a range of issues such as the misconduct of directors; and

- have important statutory investigatory and reporting obligations they are required to pursue even though the costs of investigation and reporting will reduce the funds available to creditors.

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

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

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

2.6 Supervision and Scrutiny

Practitioners are subject to scrutiny by:

- creditors, (particularly through creditors' meetings and committees of inspection);
- directors, debtors and others associated with the Insolvent;
- regulators;
- the courts; and
- the IPA and other professional bodies.

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

2.7 Skill and Judgment

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

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

3. Stakeholders

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

3.1 Creditors

Creditors:

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

3.2 Employees

Employees:

- can be more immediately affected by the insolvency of their employer, in terms of immediate loss of wages, and accrued entitlements;
- can rely on statutory priorities over other creditors and may have an entitlement pursuant to the government safety net schemes ; and
- can require particular attention and consideration by a Practitioner above and beyond other creditors.

3.3 Suppliers

Suppliers:

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

3.4 Regulators

Regulators (ASIC and the Inspector General in Bankruptcy):

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

3.5 The courts

The Courts:

- may assist the Practitioner in determining complex issues by giving directions, determining and enforcing rights of recovery, and protecting Practitioners as required;
- may determine the rights and responsibilities of all parties, including to review the decisions of Practitioners;
- may review the performance and remuneration of a Practitioner;
- rely upon the honest and competent representation of parties to assist the courts in making decisions in accordance with the law and to advance the interests of justice;
- expect and enforce high standards of conduct; and
- can make orders which override any of the requirements of this Code (for example, to allow an appointment which the Code may otherwise prevent).

3.6 The public

The public:

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

3.7 In corporate insolvency only

3.7.1 Contributories

Contributories:

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

3.7.2 Directors

Directors:

- have obligations under the law with a view to assisting in the proper administration of the Insolvent including in any recoveries for the benefit of creditors;
- can be personally liable for losses to the administration at the suit of the Practitioner, or in some cases the regulator, or the Australian Taxation Office; and
- may also be creditors or contributories and have separate claims in those capacities.

3.8 In personal insolvency only

3.8.1 The Bankrupt or Debtor

The bankrupt or debtor:

- has obligations under the law to assist and co-operate with the trustee; and
- has duties owed to them by the trustee, including to protect them from creditor claims.

3.8.2 The Spouse of the Bankrupt

The spouse of the bankrupt:

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

3.8.3 Official Trustee and the Official Receiver

The Official Trustee:

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

The Official Receiver:

- provides services to registered trustees in relation to the filing of documents, issue of statutory notices, maintenance of the National Personal Insolvency Index and the conduct of examinations.

4. Definitions and Interpretation

4.1 Construction

The meanings of the words must/must not, should/should not and may are explained at 1.3. These words are used throughout the Code and indicate the standard of conduct required of the Practitioner. The Code is meant to complement and be additional to any statutory obligations and regulatory requirements that Practitioners have in carrying out their responsibilities.

The application of the Code to IPA Members is detailed at 1.6.

4.2 Defined Terms

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

Administration	Refers to a Formal Appointment under either the Bankruptcy Act 1966 (Cth) (Bankruptcy Act) or the Corporations Act 2001 (Cth) (Corporations Act). In some cases, there may be corporate insolvency appointments under other legislation such as co-operatives and Aboriginal corporations legislation. Where appropriate, the term applies to a solvent administration under Chapter 5 of the Corporations Act.
Alternate	The Practitioner nominated to replace the Incumbent.
Appointee, Appointment or Formal Appointment	The formal legal appointment of a Practitioner as a trustee in bankruptcy, a trustee appointed under s 50 of the Bankruptcy Act, a debt agreement administrator under Part IX, or a trustee under Part X; or as a liquidator or provisional liquidator, a voluntary administrator or a deed administrator under Part 5.3A of the Corporations Act, or as a controller; or as a scheme manager under Part 5.1. The word "Appointee" has a parallel meaning.
Approving body	The body with authority to approve remuneration or a course of conduct; usually the creditors, the committee or the court.
Associate	For Administrations under the Corporations Act, Associate has the meaning according to that Act. For personal insolvency administrations, Associate is a spouse, dependent or direct relative of the Insolvent, or the spouse or dependant of a direct relative, and any entity with which the Insolvent or any of the persons previously mentioned are associated with (refer 6.10 for further information).
Code	The Code of Professional Practice for Insolvency Professionals as amended from time to time.
Controller	A person appointed as controller or managing controller under Part 5.2 of the Corporations Act.
DIRRI	The Declaration of Independence, Relevant Relationships and Indemnities.
Entity	Means any legal, administrative or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives.
Expenses	Refers to necessary financial outlays incurred or paid by the Practitioner in the administration. The term includes 'costs' and 'disbursements'.

Fiduciary duty	The duty owed by a liquidator or trustee to exercise rights and powers in good faith for the benefit of relevant stakeholders in an insolvency.
Firm	(a) A sole practitioner, partnership, corporation or other entity of professionals; (b) An entity that controls such parties through ownership, management or other means; (c) An entity controlled or influenced by such parties through ownership, management or other means or in which they share in the profits; or (d) Practices operating under the same or substantially the same business name, whatever the financial arrangement (refer 6.4 for further information).
Incumbent	The Practitioner acting as the Appointee.
Indemnity	Refers to any payment made to the Practitioner as well as arrangement whereby payments are promised, either directly or indirectly.
IPA	Refers to the Insolvency Practitioners' Association of Australia.
Insolvent	the entity, either an individual or corporation, who is insolvent, whether they are yet subject to an Administration or not.
Legislation	Refers to the Bankruptcy Act and the Bankruptcy Regulations and the Corporations Act and Corporations Regulations. The term refers to other legislation under which formal insolvency appointments can be made.
Member	Member is used to include IPA professionals who are members in any capacity of the IPA, and, unless otherwise indicated, includes the Member's firm, partners and staff.
Practitioner	Refers to a Member of the IPA who acts under a formal appointment, and, unless otherwise indicated, includes the Practitioner's Firm, partners and managerial employees.
Pre-appointment advice	Any professional advice, whether providing an opinion or not, provided prior to the Appointment.
Professional relationship	Any professional service under which the Appointee or a partner in his or her firm, has given professional advice in accounting, insolvency, financial advice, tax or other such areas for the Insolvent and includes a Formal Appointment.
Professional services	All work undertaken by a Member or a Member's firm.
Remuneration	Refers to the monies claimed by a Practitioner on account of work performed or to be performed by the Practitioner in the administration. Also referred to as 'fees'.

Part B: The Principles

Conduct

Principle 1	Members must exhibit the highest levels of integrity, objectivity and impartiality in all aspects of Administrations and practice management.
Principle 2	When accepting or retaining an Appointment the Practitioner must at all times during the Administration be, and be seen to be, independent.
Principle 3	Disclosure and acceptance of a lack of independence is not a cure.
Principle 4	Members must communicate with affected parties in a manner that is accurate, honest, open, clear, succinct and timely to ensure effective understanding of the processes, and their rights and obligations.
Principle 5	Members must attend to their duties in a timely way.
Principle 6	A Practitioner must not acquire directly or indirectly any assets under the administration of the Practitioner.
Principle 7	When promoting themselves, or their firm, or when competing for work, Members must act with integrity and must not bring the profession into disrepute.
Principle 8	When dealing with other Members in transitioning or parallel appointments, Members must be professional and co-operative, without compromising the obligations of the Member in their own particular appointment.
Principle 9	Practitioners must maintain professional competency in the practice of insolvency.

Remuneration

Principle 10	A Practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed in an Administration.
Principle 11	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 as to whether the proposed remuneration is reasonable.
Principle 12	A Practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval.

Practice Management

Principle 13	When accepting an Appointment the Practitioner must ensure that their Firm has adequate expertise and resources for the type and size of the Administration, or the capacity to call in that expertise and those resources as needed.
Principle 14	Members must implement policies, procedures and systems to ensure effective Quality Assurance.
Principle 15	Members must implement policies, procedures and systems to ensure effective Compliance Management.
Principle 16	Members must implement policies, procedures and systems to ensure effective Risk Management.
Principle 17	Members must implement policies, procedures and systems to ensure effective Complaints Management.

Part C: Guidance

5. Integrity, Objectivity & Impartiality

Principle 1: Members must exhibit the highest levels of integrity, objectivity and impartiality in all aspects of administrations and practice management.

5.1 Integrity

Members are required to show high levels of integrity by:

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

5.2 Objectivity

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

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

5.3 Impartiality

When exercising their judgment Members must be impartial by taking care to ensure that they:

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

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

5.4 Structuring of assets

A Member must not advise an Insolvent (nor, if the Insolvent is a company, its directors) on how to structure its financial affairs to defeat creditors.

A Member is not prevented from providing advice to a solvent entity on the structuring of its financial affairs.

5.5 Confidential information

A Member who acquires confidential or personal information in the course of an Appointment must not use that information for any purpose other than the proper performance of the Administration.

6. Independence

Principle 2: When accepting or retaining an appointment the Practitioner must at all times during the Administration be, and be seen to be, independent.

6.1 The Test of Independence

Independence has two parts. A Practitioner must:

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

A Practitioner must be independent in fact, that is, they should act and conduct the Administration in an independent manner.

A Practitioner must be seen to be independent, that is, they must not accept an appointment, or continue to act under an existing appointment, if:

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

The requirement for independence as described in the Code does not apply to Controllers who are appointed by the secured creditor and have a contractual relationship with the appointor. There may nevertheless be independence issues that arise for Controllers under the law.

6.1.1 Not a State of Mind

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

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

6.1.2 Possible Conflicts - How Real or Perceived?

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

The Practitioner must be proactive in anticipating, identifying and uncovering the circumstances that may give rise to a conflict of interest, and not to simply address the issue when the conflict arises.

6.1.3 Timing

The independence test is to be applied:

- on the facts reasonably available at the time the decision to accept or continue the Appointment is made; and

- not retrospectively with the benefit of hindsight in relation to facts and circumstances that could not reasonably be expected to have been known or discoverable.

6.1.4 Allegations of lack of independence

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

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

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

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

The Practitioner may seek directions from the court.

6.1.5 The Declaration of Independence, Relevant Relationships and Indemnities

Completion of the Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) required under the legislation and the Code is a step that is taken once the Practitioner has determined that he or she is independent and can take the Appointment.

Disclosure of interests or relationships that create a lack of independence, or a perception of a lack of independence, in the DIRRI does not remedy or cure the situation.

The provision of a DIRRI is a process for identifying relationships that are not threats to independence, but need to be disclosed to creditors to ensure transparency.

This chapter of the Code provides guidance to Practitioners on relationships, when a lack of independence may arise and disclosure requirements in situations where there is a relationship that does not result in a lack of independence.

When considering the nature of any relationship, whether set out in this Code or not, Practitioners must always bear in mind the ultimate test – both being, and being seen to be, independent.

6.2 Rationale for the Independence Principle

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

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

The Practitioner must act independently of all stakeholders. The appointment of a Practitioner by a director or creditor does not in itself result in a lack of independence (refer 6.1.1, 6.1.2 and 6.8.1B).

Examples

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

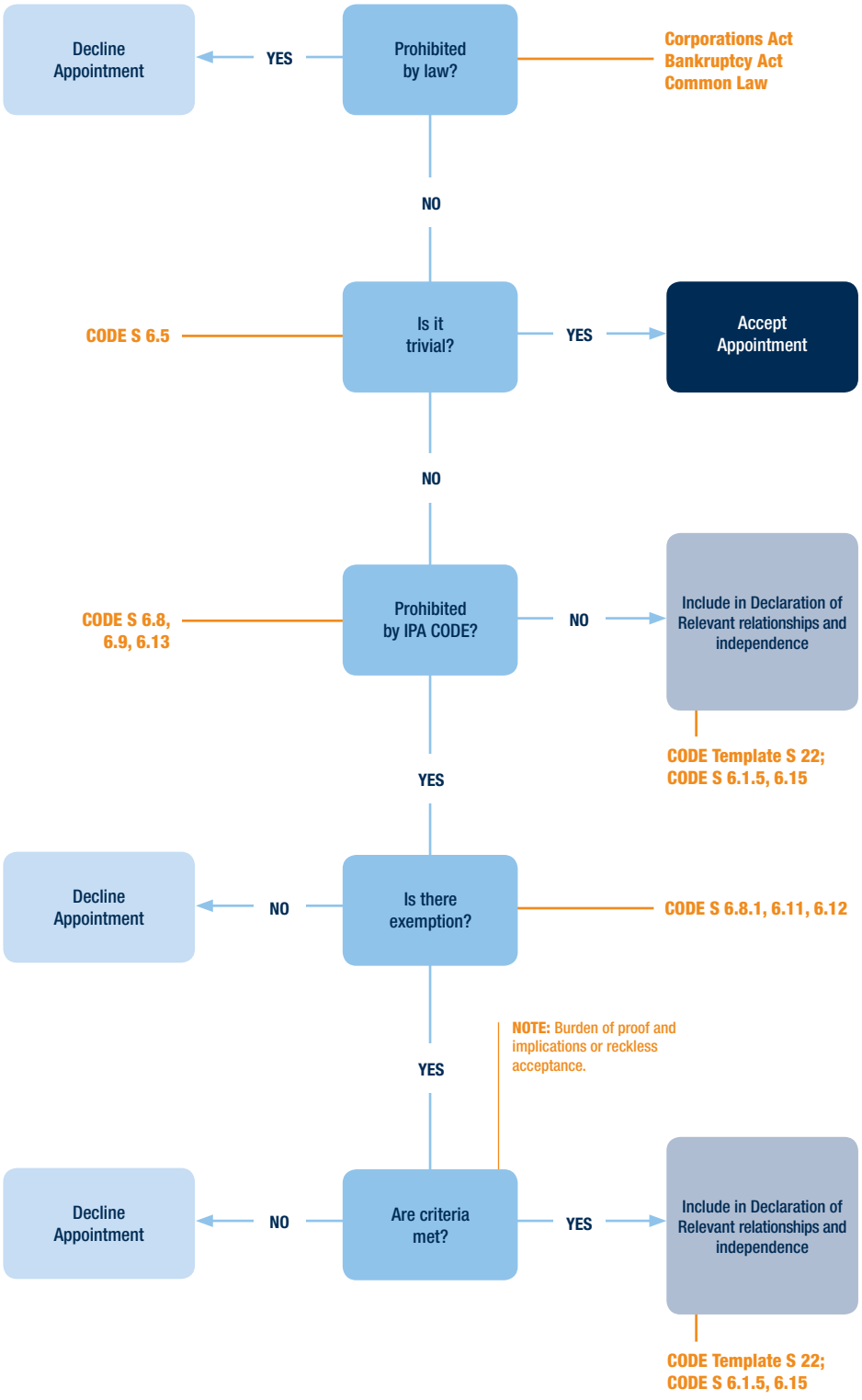
The Practitioner must also be independent of and be seen to be independent of each of the directors, who may have initiated the appointment. All creditors should be able to expect that the Practitioner will properly investigate and report on the causes of the company's failure and inquire into the conduct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

6.3 Threats to Independence

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

The hierarchy is illustrated in the diagram on next page.

Diagram 1: Independence Hierarchy



6.4 Independence of the Firm

When considering the issue of independence, it is not just a matter of whether the individual Practitioner is independent. The Practitioner must also consider the relationships held by his or her partners and Firm.

The definition of Firm in the Code includes:

(a) A sole practitioner, partnership, corporation or other entity of professionals;

(b) An entity that controls such parties through ownership, management or other means;

(c) An entity controlled or influenced by such parties through ownership, management or other means or in which they share in the profits; or

(d) Practices operating under the same or substantially the same business name, whatever the financial arrangement.

Therefore, when completing the DIRRI, the declaration of relevant relationships must include relationships of the Practitioner and their Firm, as defined.

In relation to the definition of Firm, a relevant test is what a reasonable and informed third party would reasonably perceive to be the Practitioner's Firm.

Example:

If a practice enters into a network relationship with a group of other insolvency practices and each of the practices includes on its firm documentation a claim that they are part of the "X network of firms", then the public perception is that they are one firm, and should be treated as such for the purposes of completing the DIRRI and considering the Practitioner's independence to accept the appointment.

If a practice enters into an arrangement to pay a fee for access to training materials and standard documentation, but there is no public statement of cooperation/federation/association, then the practice would not be considered part of the same firm as the practice providing access to the materials.

If a practice establishes a company that provides turnaround services to distressed businesses and the partners in the practice own the shares in the company, any relationships of the turnaround company to the Insolvent would also have to be considered when reviewing independence and disclosed if the Appointment was accepted.

6.4.1 Previous firms

If a Practitioner has moved Firms or two or more firms have merged in the preceding two years, the Practitioner should be cognisant of any relationships that the Insolvent may have had with the previous Firm(s) during the time that the Practitioner was a partner.

Where a Practitioner moves Firms, a Practitioner is not required to request searches of previous Firms. However, if the Practitioner is aware of a relationship or a relationship comes to the Practitioners attention during the course of the Administration, this relationship may need to be disclosed to creditors.

Where two or move Firms merge, the Practitioner must undertake conflict searches of client records of the merged Firm and the previous Firms as part of their conflict checking protocols.

The risk is that during the conduct of the Administration, the Practitioner may need to take action against their previous firm in relation to services provided to the Insolvent at a time when the Practitioner was a Partner. As a result, the Practitioner may also have a liability should such an action be successful. In such a circumstance, the Practitioner cannot be independent.

6.5 Trivial relationships

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

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

Examples of Trivial Relationships

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

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

6.6 Referrals from other Professionals and Creditors

Practitioners may accept a series of appointments from individual creditors, lawyers, accountants or from another Practitioner. However, Practitioners must always have regard to how an ongoing relationship may affect their independence or the perception of independence.

Networks of referrals between professionals are normal and are acceptable provided the referral and relationship are based on the quality of professional service and expertise. This would invariably have been identified through prior experience.

A Practitioner must not accept an appointment if the Practitioner would not be independent in fact, or would not be perceived to be independent. Regard must be had to this when considering whether to accept the referral of an appointment.

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

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

Panel arrangements, ie where a Practitioner is on a panel of practitioners maintained by a creditor for selection for appointment, will not in itself result in a lack of independence, but may need to be included in the DIRRI (for example, disclosure of relationships with secured creditors with security over the whole or substantially the whole of the Insolvent's assets: section 6.7).

Examples

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

The larger the number, size or significance of Appointments referred from a particular source, the greater the likelihood that the Appointment will result in a perceived lack of independence of the Practitioner.

Examples

- *Regular referrals from a director in relation to a number of her companies may be more likely to result in a perceived lack of independence than regular referrals from a law firm.*
- *A larger number of referrals from one source could result in a perception that the Practitioner has become dependent on the workflow and thus is no longer independent.*

6.7 Ongoing relationships with creditors

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

A Practitioner must not accept an appointment if the Practitioner would not be independent in fact, or would not be perceived to be independent. Regard must be had to this when considering whether to accept or continue an appointment considering the relationship with a creditor of the Insolvent.

Where a Practitioner has a relationship, in the prior two years, with a creditor who has a charge on the whole or substantially the whole of the Insolvent's property, that relationship must be disclosed in the DIRRI. The following information must be included:

- the name of the secured creditor;
- type of work that is generally performed for the secured creditor;
- details of any specific dealings with the secured creditor regarding the Insolvent;
- fees received for any work done for the secured creditor in respect of the Insolvent; and
- an explanation as to why the relationship does not result in a conflict of interest or duty.

Example

Name	*Nature of relationship*	*Reasons why no conflict of interest or duty*
ABC Bank – Secured Creditor of the company	*XYZ Insolvency Firm undertakes receivership and investigatory accountant roles for ABC Bank.*	*XYZ Insolvency Firm has never undertaken any work for ABC Bank in respect of the company.* *The work that XYZ Insolvency Firm undertakes for ABC Bank will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the Voluntary Administration of the company in an objective and impartial manner.*

While relationships with unsecured creditors are not defined as a "relevant relationship" (refer to the Corporations Act), it would be possible in some circumstances for a relationship with an unsecured creditor to create an independence issue and Practitioners should be aware of this.

6.8 Professional Relationships within two years

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

6.8.1 Exceptions to the two year rule

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

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

The onus of justifying how independence is preserved when relying on any of these exceptions is on the Practitioner. It is not sufficient for a Practitioner to simply include the relationship in a DIRRI. Such a declaration will not cure a real or perceived lack of independence.

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

If a Practitioner is relying on an exception to the two year rule to be able to accept the Appointment, the details of the exception must still be disclosed in the DIRRI.

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

A. Immaterial Professional Relationship

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

An Immaterial Professional Relationship is an assignment that:

- was of limited scope; and limited time and/or fees; and
- would not normally be subject to review by the Practitioner during the course of the Administration.

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

A Practitioner must disclose to creditors in the DIRRI:

- the nature of the services provided in the prior professional relationship;
- the period or periods over which the services were provided;

- the fees received for those services, the unbilled time costs and outlays, and any amounts written off; and
- an explanation why the relationship does not result in a conflict of interest or duty.

Example

Nature of professional service	*Reasons why no conflict of interest or duty*
The tax division of XYZ Firm prepared and lodged a BAS for the company 18 months ago. After the lodgement of that BAS, the company did not continue to use XYZ Firm. A fee of $2,500 was paid for these services.	*XYZ Firm did not provide ongoing services to the company. Other than preparing and lodging one BAS, XYZ Firm had no other professional relationship with the company.* *The preparation and lodgement of one BAS by XYZ Firm for the company is not a matter that would be subject to review during the liquidation and will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the liquidation of the company in an objective and impartial manner.*

B. Pre-appointment communications and meetings

The need for Insolvents (individuals or companies) to seek prompt and appropriate advice about their financial position is emphasised by the law and by the regulators: see for example ASIC's RG 217. It is common for Practitioners to give such advice or other information to the Insolvent about the insolvency process and options available to the Insolvent prior to taking a formal appointment. Most insolvencies are initiated by the Insolvent – for example, the company, through its directors, appoints a voluntary administrator, or the debtor appoints a controlling trustee – and in such cases, it is necessary for the Insolvent and their adviser to meet with the Practitioner in order to obtain the Practitioner's agreement to be appointed, and for a 'consent to act' to be obtained.

Examples

- *A company will generally need to approach a Practitioner for advice on the insolvency or likely insolvency of their company before the board resolves to appoint a Practitioner as administrator under s 436A of the Corporations Act;*
- *An individual will need to approach a Practitioner for advice on options in personal insolvency, for example between a personal insolvency agreement or bankruptcy.*

Notwithstanding that the Practitioner may meet with the Insolvent and give advice, he or she is a professional with obligations to all stakeholders, and the mere fact of this initial contact having occurred should not be taken to constitute a bias or lack of independence if the

Practitioner is appointed. This is the case provided that any advice or information given by the Practitioner is restricted to:

- the financial situation of the debtor;
- the solvency of the debtor/company;
- consequences of insolvency; and
- alternative courses of action in the case of insolvency.

If the Insolvent is a company, a Practitioner must exercise care when meeting with directors to determine whether he or she is being asked to advise (a) the Insolvent company itself, (b) one or more of its directors in their capacity as directors of the Insolvent company or (c) one or more of the directors of the Insolvent company in their personal capacity.

The provision of advice to the directors in either capacity (b) or (c) creates a risk to independence that will prevent the Practitioner being appointed to the Insolvent company unless that advice is of a general nature providing information about the insolvency process and the consequences of insolvency.

Any advice which involves the Practitioner obtaining a detailed understanding of the directors' financial position or access to their personal documents with a view to addressing the director's own personal solvency, will create a risk to independence in connection with any appointment to the Insolvent company.

In any such meetings, the Practitioner should be mindful of these issues:

- The Practitioner must not give any assurance to the Insolvent, or other parties, about the outcome of the insolvency;
- The Practitioner must explain to the Insolvent that information provided by them to the Practitioner at the meeting may be used by the Practitioner for the purpose of the Administration, unless otherwise stated; and
- The Practitioner should explain to the Insolvent that the Insolvent itself will become subject to demands and claims of the, or any, Practitioner in any formal Appointment.

If it becomes apparent that the director is seeking anything other than general information in either their capacity as a director or their own personal capacity, then if the Practitioner wishes to leave open the prospect of an appointment to the company, the Practitioner should recommend that the director obtain that advice from another Practitioner.

While pre-appointment communications and meetings generally raise no question of independence, a Member must disclose the circumstances whereby they had contact with the Insolvent prior to the appointment. The DIRRI has provisions for those circumstances to be disclosed.

The DIRRI does recognise that there can be instances where there is no contact at all with the Insolvent; for example in court appointments, or bankrupt estates transferred by the Official Receiver.

A Practitioner must disclose to creditors in the DIRRI:

- the number of meetings and time period over which advice was provided to the Insolvent, officers of the Insolvent (if the Insolvent was a company) and/or their advisors prior to the Appointment;
- a summary of the general nature of the issues discussed;

- the amount of any remuneration received for this advice; and
- an explanation why the relationship does not result in a conflict of interest or duty.

A Practitioner should disclose to creditors in the DIRRI:

- the names of the directors attending the meetings.

Example:

Circumstances of appointment

I had two meetings with the company, its directors (Mr A and Mr B) and legal advisor during the month prior to my appointment for the purposes of:

- *obtaining sufficient information about the company to advise the company, its directors and legal advisers on the solvency of the company,*
- *to clarify and explain for the company and its directors the various options available to the company and the nature and consequences of an insolvency appointment, and*
- *for me to provide a consent to act.*

I received no remuneration for this advice.

These meetings do not affect my independence for the following reasons:

- *the Courts and the IPA's Code of Professional Practice specifically recognise the need for practitioners to provide advice on the insolvency process and the options available and do not consider that such advice results in a conflict or is an impediment to accepting the appointment;*
- *the nature of the advice provided to the company is such that it would not be subject to review and challenge during the course of the voluntary administration; and*
- *the pre-appointment advice will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the voluntary administration of the company in an objective and impartial manner*

C. Investigating Accountant leading to formal appointment

A Practitioner may accept an Appointment after acting as an Investigating Accountant (IA), whether the IA role was for a creditor of the Insolvent or the Insolvent itself. However, Practitioners must always have regard to how a prior Investigating Accountant's appointment may affect their independence or the perception of independence.

Where the IA role was for the Insolvent, the restrictions regarding pre-appointment advice apply (refer B above).

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

- who appointed the Practitioner;
- scope of the engagement;
- to whom the Practitioner reported;
- the period of the engagement;
- the fee paid; and
- an explanation why the relationship does not result in a conflict of interest or duty

Example – IA - appointment by the company

Nature of professional service	*Reasons why no conflict of interest or duty*
Prior to my appointment as Voluntary Administrator, I was engaged by the company to provide the company with a report on; • *the financial situation of the debtor;* • *the solvency of the debtor/company;* • *consequences of insolvency; and* • *alternative courses of action available to the company.* • *The engagement occurred over a period of 2 months and I was appointed one week after the report was provided to the company. I was paid a fee of $15,000 for the service provided.*	*The work undertaken during the Investigating Accountant engagement has assisted me in developing an understanding of the company and its activities.* *Much of the investigatory work done during the Investigating Accountant engagement is work that would have been done by myself in order to be able to report to creditors under s439A of the Corporations Act. As such, this information will be made available to creditors when I report to them in due course.* *The nature of the report provided to the company is such that it would not be subject to review and challenge during the course of the voluntary administration. The Investigating Accountant engagement will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the voluntary administration of the company in an objective and impartial manner.*

Example – IA – appointment for the secured creditor

Name	*Nature of relationship*	*Reasons why no conflict of interest or duty*
ABC Bank – Secured Creditor of the company	*XYZ Insolvency Firm undertook an Investigating Accountants engagement for ABC Bank prior to my appointment as Voluntary Administrator. The purpose of the engagement was to consider the company's financial position and the security position of the Bank. I reported to the Bank on the outcome of my investigations. The Investigating Accountants engagement continued for a period of two months and was completed one month prior to my appointment. I was paid $20,000 by ABC Bank for this engagement.* *XYZ Insolvency Firm also undertakes receivership and investigatory accountant roles for ABC Bank.*	*The work undertaken during the Investigating Accountant engagement has assisted me in developing an understanding of the company and its activities. The investigation did not reveal any issues with the validity of ABC Bank's security in respect of the company.* *The report that XYZ Insolvency Firm provided to ABC Bank is not of the nature that it would be subject to review during the Voluntary Administration. The work undertaken by my firm for ABC Bank will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the voluntary administration of the company in an objective and impartial manner.*

Note: *If you are disclosing an IA appointment for a secured creditor, you will also have a relationship with that creditor to disclose.*

D. Transitioning appointments

A Practitioner may accept an Appointment which arises as a result of a transition from one type of Administration to another under the relevant legislation, subject to the terms of that legislation. For example, from an Appointment as a voluntary administrator to a creditors' voluntary liquidator; or a trustee of a personal insolvency agreement to a trustee of the bankruptcy.

A transitioning appointment that occurs in accordance with the relevant legislation does not need to be disclosed in the DIRRI.

6.9 Professional relationships beyond two years

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

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

- is material to the insolvency;
- has real potential for a litigation claim against the Practitioner by a stakeholder; or
- is related to structuring of financial affairs of the entity in order to avoid the consequences of insolvency i.e. the distancing of the assets from creditors in the event of insolvency, even if this advice was provided at a time when the entity was solvent.

Examples

- *A Practitioner's Firm was the auditor of ABC Limited, a large public company, 4 years ago. This professional relationship may be material to the insolvency and/or have real potential for a litigation claim against the Practitioner's Firm. If so, the Practitioner must not take the appointment.*
- *A Practitioner previously advised John Brown 3 years ago, at a time when he was entering into a new partnership arrangement and he was solvent, on structuring of his financial affairs. Such advice would be material to the bankruptcy and as such, the Practitioner must not take the appointment.*
- *A Practitioner's Firm provided due diligence services to XZY Limited in its acquisition of a major manufacturing business 4 years ago. After the acquisition, XZY's performance declined and now the company is seeking the services of an insolvency practitioner. This professional relationship may be material to the insolvency and/or have real potential for a litigation claim against the Practitioner's Firm. If so, the Practitioner must not take the appointment.*
- *A Practitioner's Firm provided a valuation service on assets prior to its sale to a third party 3 years ago. It is unlikely that this would be material to the insolvency or have a real potential for a litigation claim against the Practitioner by a stakeholder. If so, the Practitioner may take the appointment.*

6.10 Relationships with Associates

The Corporations Act and the Code require disclosure of relationships with Associates of the Insolvent. As a result of the requirements of the Code, this disclosure is required on all corporate and personal insolvency appointments, excluding appointments as a Controller.

Whilst a relationship with an Associate of an Insolvent will not necessarily prevent a Practitioner from accepting an Appointment, Practitioners must always have regard to how the relationship may affect their independence or the perception of their independence.

6.10.1 Associate defined

An Associate is a wide concept and is defined in the Code at 4.2.

Under the Corporations Act, an associate is defined as (principally in section 11):

- A director or secretary of the body;
- A related body corporate; and
- A director or secretary of a related body corporate.

A director is defined in section 9 of the Corporations Act to include a person that acts in the position of a director or whom the directors of the company are accustomed to act in accordance with their instructions or wishes (ie. "shadow director").

A "related body corporate" is defined as (section 50 of the Corporations Act):

- A holding company of another body corporate;
- A subsidiary of another body corporate; and
- A subsidiary of a holding company of another body corporate.

For Administrations under the Bankruptcy Act, Associate is a spouse, dependent or direct relative of the Insolvent, or the spouse or dependent of a direct relative, and any entity with which the Insolvent or any of the persons previously mentioned are associated with.

6.10.2 Examples of Associates

Examples of Associates per the definition are:

- In corporate insolvency administrations:
  - Entities that are part of the same corporate group;

    Example: ABC and DEF are both subsidiaries of XYZ Pty Ltd. ABC is an Associate of DEF. You would have to disclose relationships with ABC.

  - Director of a company;

    Example: Mr Brown is a director of ABC Pty Ltd. Mr Brown is an Associate of ABC. You would have to disclose all relationships with Mr Brown (ie. previously acted as liquidator in the winding up of another company that Mr Brown was a director of; or your firm provides taxation services to a company that Mr Brown is a director of)

  - Subsidiary and holding company;

Example: DEF Pty Ltd is a wholly owned subsidiary of ABC. ABC is an associate of DEF. You would have to disclose relationships with ABC.

- In personal insolvency administrations:
  - Director of a company;

    Example: Mr Brown is a director of ABC Pty Ltd. ABC is an Associate of Mr Brown. You would have to disclose relationships with ABC.

  - Trustee of a trust.

    Example: Mr Brown is a director of the trustee of ABC Trust, ABC Pty Ltd. ABC Trust and ABC Pty Ltd are associates of Mr Brown. You would have to disclose relationships with ABC Trust and ABC Pty Ltd.

6.10.3 Information to be provided

Where the Practitioner has a relationship with an Associate of the Insolvent in the two year period prior to the Appointment, the following details about the relationship with the Associate must be included in the DIRRI:

- the name of the Associate;
- the relationship of the Associate to the Insolvent;
- nature of the Practitioner's relationship with the Associate;
- if the relationship between the Practitioner and Associate is professional:
  - the type of work performed;
  - the scope of the engagement;
  - frequency of contact;
  - period over which the work was performed; and
  - if the engagement has been completed, when it was completed;
- if the relationship is not a professional relationship:
  - the nature and period of the relationship (Noting the strict prohibitions on non-professional relationships set down in the Code – refer 6.13); and
- an explanation why the relationship does not result in a conflict of interest or duty.

Example

Name	*Nature of relationship*	*Reasons why no conflict of interest or duty*
Associate Pty Ltd – a subsidiary of the holding company of Insolvent Pty Ltd.	*I have previously acted as voluntary administrator and subsequently liquidator of Associate Pty Ltd. This appointment continued for a period of 3 years and concluded 18 months prior to my appointment to Insolvent Pty Ltd.*	*The voluntary administration of Insolvent Pty Ltd is completely unrelated to the prior insolvency of Associate Pty Ltd. Insolvent Pty Ltd does not operate the same or similar business to that operated by Associate Pty Ltd. The appointment to Associate Pty Ltd occurred 4.5 years ago, and except for the conduct of the insolvency administrations of Associate Pty Ltd, I have had no contact with the holding company, officers or any other entities associated with the corvporate group.* *The role undertaken by me as voluntary administrator and liquidator of Associate Pty Ltd will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the voluntary administration of Insolvent Pty Ltd in an objective and impartial manner.*

6.11 Concurrent Appointments to related parties

6.11.1 Group Company Appointments

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

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

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

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

Notwithstanding the requirement to make suitable enquiries before accepting an appointment, threats to independence stemming from group appointments may often only be identified after acceptance of the appointment. If, after accepting the Group Appointment, a conflict arises, such as disputed inter-company loans or transactions that may result in dispute or litigation putting the Practitioner in effect on both sides of the dispute, then, in order to preserve independence, the Practitioner must:

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

It is not a breach of the Code to have accepted the appointment provided suitable enquiries were made prior to the appointment and the Practitioner takes appropriate action once the threat is identified.

The DIRRI completed for each company in the group must disclose the Practitioners' appointment to the other companies in the group.

Example

Name	*Nature of relationship*	*Reasons why no conflict of interest or duty*
456 Pty Ltd – subsidiary of 123 Pty Ltd	*I was appointed voluntary administrator of 456 Pty Ltd on the same day as my appointment as voluntary administrator to 123 Pty Ltd.*	*123 Pty Ltd and 456 Pty Ltd operate the manufacturing business together. The nature of the business operations mean that the administrations can be conducted more efficiently by one practitioner.* *At the time of my appointment, I was not aware of any conflicts of interest between the two companies. Should such a conflict arise, I will keep creditors informed and take appropriate action to resolve the conflict*

6.11.2 Individual/Company Appointments

There can be circumstances where similar commercial and practical reasons allow a practitioner to be both the liquidator of a director's company and the trustee of that director's bankruptcy. However care is required in taking either appointment after the other because of the risk of both actual and perceived lack of independence. A director will often be either or both a debtor and a creditor of the company; and may have liabilities for insolvent trading or breach of duties. In those cases it would be difficult to avoid a lack of independence or the perception of it.

Each case must be assessed on its merits and the following factors, among others, may be relevant:

- the timing of the second appointment – for example the personal insolvency may arise, unconnected to the company, at the end of the Administration of the company;
- whether there are any real benefits in having joint administrations;
- if there are or there is a likelihood of recoverable transactions or contestable claims between the two administrations.

Threats to independence stemming from such appointments may arise later in which case, in order to preserve independence, the Practitioner must:

- advise creditors on how the issue will be managed; or
- seek directions from the court; or
- seek approval for the continuation of the appointment by the court, or of another trustee or liquidator.

Each case must be assessed on its merits and suitable enquiries must be made to identify any threats to independence prior to accepting such an Appointment. Legal advice or court approval may need to be obtained.

If the subsequent appointment is made by the court, the consent to act must contain full details of the prior appointment.

When the DIRRI is completed, it must include details of the appointment to the other associated Insolvent that the practitioner has been appointed to.

6.11.3 Joint personal insolvency appointments

The Bankruptcy Act contemplates joint appointments in the case of joint debtors, often spouses or business partners, and prescribes how such joint estates are to be administered.

A practitioner can accept such joint appointments. However, this is always subject to the need to be independent and be seen to be independent.

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

- preference payments between the parties or other voidable or contestable transactions;
- there is a claim by the estate of a wife on the estate of her husband, at family law or as a commercial claim; or
- contentious proofs of debt.

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

Notwithstanding the requirement to make suitable enquiries before accepting an appointment, threats to independence stemming from joint appointments usually are only identified after acceptance of the appointment. If, after accepting the Appointment, a conflict arises that may result in dispute or litigation putting the Practitioner in effect on both sides of the dispute, then, in order to preserve independence, the Practitioner must:

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

It is not a breach of the Code to have accepted the appointment provided suitable enquiries were made prior to the Appointment and the Practitioner takes appropriate action once the threat is identified.

The DIRRI completed for each of the Insolvents must disclose the Practitioners' appointment to the other Insolvent.

6.12 Up-front payment of fees

6.12.1 Companies

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

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

Monies held on trust may only be drawn as remuneration in the same manner as normal remuneration claims. Monies must be paid from the Trust account into the Administration bank account prior to being drawn for remuneration.

Example

Name	*Relationship with the company*	*Nature of indemnity or payment*
Mr A	*Director of the company*	*Mr A provided an upfront payment of $10,000 to cover my initial remuneration and expenses associated with the creditors' voluntary liquidation of the company. The money is currently held in my firm's trust account and will not be drawn to meet my remuneration until such time that it is approved by creditors. There are no conditions on the conduct or outcome of the liquidation attached to the provision of these funds.*

6.12.2 Personal Insolvencies

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

The only exception to this rule is if the trustee:

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

Inspector-General in Bankruptcy Practice Direction No 6.1 – Remuneration entitlements of a Registered Bankruptcy Trustee, January 2010 explains the particular requirements in personal insolvency (or any subsequently issued guidance).

6.13 Other Relationships

Other non-trivial relationships include personal or business relationships or interests with the Insolvent that are not professional relationships. A Practitioner must not take an appointment if there are or have been any such relationships with the Insolvent at any time. Unlike professional relationships, the two year time limit does not apply.

Examples of other relationships are set out below.

6.13.1 Family

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

6.13.2 Business

Where the Practitioner has had business dealings with the Insolvent or an Associate of the Insolvent, outside what would be termed a professional relationship, the Practitioner must not consent to act.

Where the Practitioner, in a capacity other than as a Practitioner, has a controlling interest in, or the ability to influence a business operating in the same, or principally the same market as the Insolvent, the Practitioner should consider whether this would lead to a perception of a lack of independence.

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

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

6.13.3 Friendship

Where the Practitioner has a friendship with the Insolvent or an Associate of the Insolvent, the Practitioner must not consent to act.

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

6.13.4 Animosity

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

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

6.14 Actions to be taken to avoid risks materialising

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

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

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

Members must ensure that for every Appointment, a written record is maintained which demonstrates compliance with the firm's independence processes and provides a working paper to support the completed DIRRI.

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

The Practitioner:

- may delegate to staff the task of gathering information on which the decision is based; but
- is responsible for ensuring adherence to the process; and
- cannot delegate the decision on independence.

6.15 Format of the DIRRI

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

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

For all corporate and personal insolvency appointments, excluding appointments as a Controller, at the earliest practical opportunity, the Practitioner must provide a DIRRI to creditors.

The DIRRI comprises three components:

A. Declaration of Independence;

B. Declaration of Relationships, which includes:

   i. Circumstances of appointment;

   ii. Relevant relationships with the Insolvent and others in the previous 24 months;

   iii. Prior professional services with the Insolvent in the previous 24 months;

   iv. A declaration that there are no other relationships to declare; and

C. Declaration of Indemnities and up-front payments.

Any relationships, indemnities or up-front payments disclosed in the DIRRI must not be such that the Practitioner is no longer independent. The purpose of components B and C of the DIRRI is to disclose relationships that, while they do not result in the Practitioner having a conflict of interest or duty, ensure that creditors are aware of those relationships and understand why the Practitioner nevertheless remains independent.

A Practitioner only needs to declare a relationship once in the DIRRI. The Practitioner should select the most appropriate section of the DIRRI for the declaration to appear.

6.15.1 Content of the DIRRI

The Practitioner must include in the DIRRI a statement as to who the declarations in the DIRRI relate to.

A. Declaration of Independence

A declaration that the Practitioner

- has undertaken a proper assessment of risks to independence in accordance with the law, Code and applicable professional standards;
- has determined that the assessment identified no real or potential risks to independence; and
- is not otherwise aware of any impediments to taking the Appointment.

B. Declaration of Relationships

i. Circumstances of Appointment

A declaration setting out the circumstances of the Appointment by way of explaining:

- the number of meetings and time period over which advice was provided to the Insolvent, officers of the Insolvent (if the Insolvent is a company) and/or their advisers prior to the Appointment;
- a summary of the general nature of the issues discussed;
- the amount of any remuneration received for this advice; and
- an explanation as to why such meetings do not result in a conflict of interest or duty.

ii. Relevant Relationships (excluding professional services to the Insolvent)

A Declaration setting out prior relationships the Practitioner, or Firm has had in the preceding 24 months with:

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

As a minimum, the Practitioner must state:

- who the relationship is with;
- the nature of each relationship; and
- the reasons why the relationships disclosed do not result in the Practitioner having a conflict of interest or duty.

The Code provides specific guidance on the information to be disclosed in respect of relationships with:

- secured creditors (section 6.7);
- associates of the Insolvent (section 6.10);
- appointments to related parties (corporate groups, corporate/personal and multiple personal insolvency appointments to related parties) (section 6.11); and
- referrer of the appointment (where considered appropriate by the Practitioner) (section 6.6).

iii. Prior Professional Services to the Insolvent

A declaration setting out any professional services (if any) provided to the insolvent by the Practitioner or Firm, in the preceding 24 months, including:

- the nature of the professional service;
- when the professional service was provided;
- what period the professional service was provided over;
- the fees paid for the professional service; and
- why the professional services disclosed do not result in the Practitioner having a conflict of interest or duty.

The Code provides specific guidance on the information to be disclosed in respect of:

- immaterial professional services (6.8.1A);
- pre-appointment advice (6.8.1B); and
- investigating accountant engagements for the Insolvent (6.8.1C);

iv. No other relevant relationships to disclose

A declaration that there are no other relevant relationships, including personal, business and professional relationships, from the previous 24 months with the Insolvent, an associate of the Insolvent, a former insolvency practitioner appointed to the Insolvent or any person or entity that has a charge over the whole or substantially whole of the Insolvent's property that should be disclosed.

C. Indemnities and up-front payments

A Declaration of Indemnities and up-front payments disclosing:

- the identity (name and relationship with the Insolvent) of each indemnifier or provider of an upfront payment;
- the extent (dollar caps and/or other limitations or conditions) and nature of each indemnity or upfront payment, including what the indemnity or upfront payment may be used for (other than statutory indemnities); and
- a statement about where the funds are being held (if applicable);
- a statement about when and how the funds will be applied (if applicable); and
- a statement that there are no other indemnities or upfront payments to be disclosed.

Because disclosure of indemnities is only required in order to identify relationships that do not in fact create a lack of independence and to ensure transparency, and because disclosure of these confidential arrangements may be contrary to the interests of creditors, Practitioners are not required to disclose indemnities provided in connection with the funding of litigation or investigations, unless in the case of voluntary administration, disclosure is required by s 436DA.

6.15.2 Additional requirements for appointments under Part X of the Bankruptcy Act

Appointees under Part X must comply with the particular disclosure requirements of the Bankruptcy Act.

6.15.3 The nature of explanations / disclosures in the DIRRI

Disclosures in the DIRRI are aimed at providing an explanation to creditors of relationships with the Insolvent and other relevant party and the reasons why these relationships do not result in a lack of independence on the part of the Practitioner.

All declarations and explanations must be clear, concise, meaningful and in terms that the creditors can understand.

Statements such as:

- I do not have a conflict,
- This relationship is allowed under the IPA Code; or
- My firm has a contractual relationship with the secured creditor

do not provide a meaningful explanation of the relationship or why it does not result in a conflict of interest or duty.

Matters that Practitioners may consider when drafting the explanation to creditors may include, but are not limited to:

- whether the relationship is one specifically allowed under professional standards established for the insolvency industry;
- whether the Practitioner has considered and applied applicable professional standards when determining whether they were independent;
- what was the scope / purpose of the engagement / advice – ensure that the scope purpose is outlined in the explanation, was it limited?;
- Whether the engagement would not normally be subject to review by the Practitioner during the course of the Administration;
- whether advice was provided to the directors and the directors were advised to obtain their own professional advice;
- whether the engagement / relationship / advice provided will influence the ability of the Practitioner to fully comply with the statutory and fiduciary obligations associated with the appointment;
- whether the engagement / relationship / advice provided will influence the objectivity, impartiality or judgment of the Practitioner in performing their duties;
- in respect of relationships with secured creditors, whether there is any evidence of issues with the validity of charges held in respect of the company;
- whether any work has ever been conducted in respect of the company on behalf of the entity with which the relationship is held;
- what type of advice was provided and how that may be used or relate to the subsequent administration; and
- whether a group appointment is beneficial and whether any potential intercompany conflicts have been identified.

The explanation must be provided in conjunction with a meaningful explanation of the relationship.

6.15.4 Signing of the DIRRI

In circumstances where two or more Practitioners have been appointed to an Insolvent jointly, each Practitioner must sign the DIRRI as it is a declaration made by the Practitioner in their own individual capacity.

In exceptional circumstances, a DIRRI may need to be issued where all of the Appointees have not been able to sign it. It is considered that this may only occur in exceptional circumstances which must be clearly documented on the file. A record of the co-appointee's consent to the issuance of the DIRRI without his or her signature must also be included on the file.

The DIRRI must also include an explanation to creditors as to why all Appointees were not able to sign the DIRRI.

In a situation where one Appointee signs the DIRRI on behalf of another Appointees, each Appointee is equally responsible for the content of the DIRRI. Due enquiry must be made by both Appointees as to the accuracy of the DIRRI and the completeness of the declarations made.

The co-appointee who has not signed the DIRRI must do so as soon as possible and the Practitioners must ensure that the updated DIRRI is provided to creditors.

6.15.5 Timing

The DIRRI must:

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

The tabling of the DIRRI must be included as an agenda item and in the minutes.

6.15.6 Replacement Appointees

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

All replacement Practitioners must:

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

For additional requirements of replacement administrators, refer to Section 11.7.

6.15.7 New Information

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

6.16 Post Appointment Actions – threat to Independence Identified

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

6.16.1 Non-precluded Relationships

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

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

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

6.16.2 Precluded Relationships

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

A. Immediate Actions

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

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

B. Innocent or Inadvertent Behaviour with Mitigating Factors

If the Practitioner:

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

then this will not be a breach of the Code.

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

- where the Administration is substantially complete;
  - apply to the Court for leave to continue and complete the Administration;

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

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

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

C. Reckless, Negligent or Intentional Behaviour or Behaviour without Mitigating Factors

Where the Practitioner:

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

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

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

The Practitioner should apply to the Court for a replacement Practitioner to be appointed and should only continue as the Appointee if the Court so determines.

7. Limited Value of Disclosure

Principle 3: Disclosure and acceptance of a lack of independence is not a cure.

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

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

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

8. Communication

Principle 4: Members must take care to communicate with affected parties in a manner that is accurate, honest, open, clear, succinct and timely in order to ensure their effective understanding of the processes, and their rights and obligations.

8.1 Need for Effective Communications

Effective communication in insolvency is essential because of the:

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

Accordingly, communications from Members should be:

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

Members should take care to ensure that all communications, including reports, whether issued personally, or by delegation are accurate and free from false or misleading statements; do not omit, or obscure information required to be included; and preserve confidential or private information where necessary.

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

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

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

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

8.2 Plain English

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

8.3 Use of Templates

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

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

However, care should be taken to use templates appropriately. Templates must be tailored for the specifics of each Administration. Use of a template without customisation may result in a Member failing to meet their duties.

> ***Example***
>
> *Use of the example list of tasks in the remuneration report template may result in tasks that have not been completed for a particular Administration being inappropriately included in that Administration's remuneration report, which would mislead creditors as to the work performed in the Administration.*

There is a real risk that slavish or unthinking adherence to templates may result in:

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

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

8.4 Tailoring reports

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

In providing information in a report, the administrator should as a matter of good practice:

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

8.5 Document Construction

Given the diverse nature of stakeholders, particular care should be taken in the structure and layout of documents.

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

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

Documents should:

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

8.6 Modes of Communication

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

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

8.7 Use of Websites

Practitioners should take care when placing information on the website to:

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

8.8 Use of Electronic Communications

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

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

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

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

8.9 Communications Training and Skill Development

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

8.10 Information Sheets for stakeholders

The IPA, ITSA and ASIC produce information sheets which contain useful information for stakeholders.

For corporate Administrations, a list of the information sheets available has been prepared and Practitioners should provide this summary sheet to stakeholders with their first communication. For personal insolvency Administrations, the Practitioner should direct creditors to relevant information sheets on the ITSA website.

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

8.11 Use of specialists

Where a Practitioner engages an industry or other specialist and relies on the advice of that specialist (for example, valuation services), the Practitioner should disclose in relevant reports or other relevant communications the name and qualifications of the specialist and the areas in which specialist advice has been obtained. This obligation does not extend to legal advice in situations where the provision of this information would result in a waiver of legal professional privilege.

8.12 Specific forms of communication

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

9. Timeliness

Principle 5: Members must attend to their duties in a timely way.

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

Timeliness is necessary at many levels, in relation to:

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

9.1 Statutory Time Limits

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

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

9.2 Reduction of Risk

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

Examples

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

9.3 Minimisation of Cost

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

9.4 Minimising Negative Emotion

Insolvency is stressful and traumatic for those involved. Prompt, clear and courteous communications and replies to queries all reduce angst and improve trust in the Practitioner. Many complaints have their origin in the sense of the complainant being ignored rather than in technical or substantive acts or omissions of the Practitioner.

9.5 Failure to meet Deadlines

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

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

9.6 Duty to Advise

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

9.7 Policies, Processes and Education

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

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

Checklists and other such mechanisms must be maintained in a timely manner for every Administration.

9.8 Extensions of Time

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

- apply to the applicable body to approve such an extension; and
- give reasons for the need for additional time e.g. if the issue being addressed is complex.

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

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

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

10. Dealing with Property

Principle 6: A Practitioner must not acquire directly or indirectly any assets under the administration of the Practitioner.

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

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

11. Competition and Promotion

Principle 7: When promoting themselves, or their Firm, or when competing for work, Members must act with integrity and must not bring the profession into disrepute.

11.1 Introduction

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

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

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

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

11.2 Advertising, publicity and solicitation

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

11.2.1 Call Centres

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

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

11.2.2 Internet

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

11.2.3 Statutory Advertisements

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

Statutory advertisements:

- may contain contact details such as Firm name, telephone number, physical address, postal address, email and website.
- may not contain:

- slogans;
- claims about the Firm;
- logos; or
- other promotional materials.

11.2.4 Other Administration Advertisements

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

11.3 Misleading and Deceptive Conduct

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

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

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

11.4 Charge-out Rate and Value Comparison

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

- qualifications; and
- experience of staff levels,

and not simply compare rates by title.

Example

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

11.5 Relationship Marketing - Inducements

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

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

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

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

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

An inducement does not include:

- bonus payments to employees structured as part of their salary package or adjustments to an employee's salary where obtaining referrals of administrations is one of the performance indicators considered;
- benefits of an insignificant value (when considering the significance of the benefit, regard is to be had to the total benefits provided to the third party);
- sponsorship of events or publications open to the public, or members of a professional association; or
- retainer or other payments to marketing consultants engaged by the Firm.

11.6 Sponsorship

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

Examples

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

11.7 Replacing an Incumbent

A Practitioner may be requested by creditors to consent to act as Voluntary Administrator, Liquidator or Trustee, as an alternative ('Alternate') to another practitioner who is already acting ('the Incumbent') in the role. There may be other practitioners also put forward as the Alternate.

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

Any claims made on a Practitioner's behalf by others which are contrary to the Code or to guidance issued by the accounting or regulatory bodies and which are known to the Practitioner at or before the meeting of creditors, must be corrected by the Practitioner at the meeting of creditors or in writing to creditors before the meeting. The fact that such claims may be made not by the Practitioner but by others on the Practitioner's behalf is no excuse. A Practitioner is responsible for the professional behaviour and statements of their staff, consultants or contractors.

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

11.7.1 Notice

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

11.7.2 No Solicitation

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

Practitioners must not, directly or indirectly, solicit proxies from creditors for the purposes of replacing the Incumbent or retaining an existing Appointment.

11.7.3 Conduct at the Meeting

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

The Alternate must provide the meeting with:

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

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

12. Transitioning or parallel appointments

Principle 8: When dealing with other Members in transitioning or parallel appointments, Members must be professional and co-operative, without compromising the obligations of the Member in their own particular appointment.

An Insolvent may be subject to two or more types of insolvency, either in parallel – for example a voluntary administration and a receivership – or in sequence – for example a voluntary administrator replaced with a different liquidator at the second meeting or a bankruptcy trustee being replaced by creditors at a meeting.

In the situation of two parallel appointments, there will be two Practitioners who will be dealing with each other in relation to their respective administrations of the affairs of the Insolvent.

In the situation of transitioning appointments, the first Practitioner will be dealing with the second Practitioner in relation to their on-going administration of the Insolvent.

In both situations, an insolvency administration or administrations will benefit from the experience and knowledge in insolvency law and practice being professionally applied by each Practitioner.

Examples

- *A trustee of the bankruptcy of a director will need to deal with the liquidator of the director's company in relation to the lodgement of a proof of debt in the liquidation. Issues of contest about the proof may usefully be the subject of informed discussion between the two Practitioners.*
- *A liquidator of a company may attend a meeting of creditors of another administration, where the company is a creditor. The conduct of the meeting will be assisted by mutual respect and sharing of knowledge between the two practitioners.*
- *A liquidator may wish to publicly examine a receiver about issues that arose in the receivership. The conduct of the examination will be assisted by mutual respect between the practitioners as to dates for the examination, and service of documents.*
- *A Practitioner who is requested by a creditor to attend a meeting as their representative or adviser should notify the Appointee that they are going to attend.*
- *An incumbent administrator who is replaced by a new appointee should assist with the transfer of records and information, without compromising their own legal position.*

13. Competence

Principle 9: Practitioners must maintain professional competence in the practice of insolvency.

A Practitioners competence is an essential cornerstone to the proper conduct of insolvency Administrations. It is important that not only are Practitioners competent in insolvency at the time of achieving their registration, but that they maintain their knowledge and skills throughout their professional career.

This obligation extends beyond that of Practitioners to all Members to the extent that they are providing supporting services in insolvency Administrations.

A Member should take steps to ensure that those working under the Member's authority in a professional capacity have appropriate training and supervision.

13.1 Continuing professional development

The maintenance of professional competence requires a continuing awareness and an understanding of relevant technical professional and business developments. Continuing professional development develops and maintains the capabilities that enable a Member to perform competently within the professional insolvency environment.

A Member must ensure that they fulfil their relevant professional bodies' obligations, including the IPA, for continuing professional education.

Members are encouraged to take every opportunity to improve and extend their knowledge on insolvency issues, including attending relevant training and conferences offered by the IPA.

Members should also provide opportunities and encouragement to their staff to attend appropriate insolvency training and training on other skills complementary to the practice of insolvency.

13.2 Specialisation

A Practitioner may specialise in a particular aspect of insolvency, for example receiverships. If a Practitioner chooses to specialise in a particular type of Appointment, then the Practitioner should not seek to be appointed to Administrations outside of this specialisation without taking steps to ensure that he or she is still technically competent in the area outside of their specialisation.

This may involve undergoing training to regain competency.

13.3 Use of specialist services

A Practitioner may seek the assistance of experts in situations where the Appointment relates to a business with particular industry issues and the Administration would benefit from the involvement of an expert in that area.

14. Necessary and Proper Remuneration

Principle 10: A Practitioner is entitled to claim remuneration and disbursements, in respect of necessary work, properly performed in an Administration.

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

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

14.1 Necessary Work

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

- connected with the Administration; and
- done in furtherance of the exercise of the powers and performance of the duties of a Practitioner as required by the law, Code and applicable professional standards.

Examples

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

The examination of claims for remuneration will necessarily be made with the benefit of hindsight. However a Practitioner may claim for work that may not have produced a positive outcome provided there was a proper exercise of professional judgment in the Practitioner deciding to do the work at the time the work was undertaken. Refer to section Error! Reference source not found.18.2 for guidance on work papers and maintenance of Administration files.

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

Examples

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

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

Example

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

14.2 Properly performed

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

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

Examples

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

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

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

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

The remuneration requirements of the Code for work that is necessary and properly performed are consistent with, or impose a higher standard than, the law.

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

14.3 Deciding what work to undertake

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

Example

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

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

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

14.4 Outsourcing

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

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

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

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

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

14.5 Work that cannot be remunerated

A Practitioner, other than for Appointments as a bankruptcy trustee, must not seek to be remunerated for work:

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

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

A Practitioner Appointed as a bankruptcy trustee may draw remuneration for pre-appointment work where that work is approved in accordance with the Bankruptcy Act.

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

In a particular case, the Practitioner may seek to be remunerated for work that is not able to be charged for. For example, there may be circumstances where pre-appointment work was

necessary for the Administration and would have had to be undertaken. The Practitioner must seek court approval for any such claim. It is not sufficient in itself to obtain approval from a committee or from the creditors.

14.6 Staff levels and numbers

In time-based charging, the Practitioner must ensure that the number and qualifications of staff allocated to an Administration is appropriate for the nature of the work being performed so that the Administration is completed in the most efficient and effective manner.

Example

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

This will require commercial and professional judgment. While a particular task may be appropriate to a particular level of employee, the Practitioner may consider that, even though charging at a higher hourly rate than the employee, he or she may be able to do the work in one quarter of the time.

Example

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

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

14.7 Setting hourly rates

In time based charging, the Practitioner should ensure that appropriate hourly rates are set for the Administration.

Generally, market forces will ensure that a Practitioner sets appropriate standard hourly rates which are generally applied to Administrations. However, a Practitioner should ensure the appropriateness of these standard hourly rates is specifically considered for each administration. Factors that may result in a variation of the standard hourly rates include:

- complexity of the Administration;
- risk associated with the Administration; and/or
- the specialised nature of the Administration (if any).

14.8 Costs of claiming remuneration

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

If additional costs are incurred because of inadequacies of the Practitioner or Firm's time recording systems, or due to staff not properly recording their time, these costs would not be necessary and proper. It is not appropriate to charge this additional cost to the Administration and it should not form part of the claim for remuneration.

Examples

- *Necessary and proper remuneration costs may include the cost of producing a report for creditors to allow creditors to make an informed decision whether to approve the remuneration or the costs of applying to the court (subject to any order of the court).*
- *Reworking information produced from an inadequate time recording system in order to prepare a remuneration report for creditors is not necessary and proper.*

14.9 Costs of communicating with regulators

A Practitioner should not claim remuneration for time spent:

- communicating with regulators or professional bodies regarding complaints about the Practitioner or the conduct of a particular Administration;
- on regulator surveillance, professional audits or inspection of files, or on peer reviews; or
- unsuccessfully defending a breach of the law or this Code, subject to any order of the court.

14.10 Disbursements

Disbursements may only be claimed if they were necessary and properly incurred.

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

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

14.10.1 What is a disbursement?

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

A Practitioner should separate disbursements from the expenses of running their practice which may only be recovered through remuneration (for example, in the case of time based remuneration by factoring overheads into the hourly charge-out rate and in fixed fees, by factoring overheads into the fixed fee calculation).

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

14.10.2 What are not Disbursements?

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

A. Overheads

An overhead is not a disbursement. It is a cost that can only be charged for and recovered across all the administrations handled by the Practitioner's Firm.

In contrast, an out of pocket expense is an expense actually incurred in respect of that Administration. It can be claimed as a disbursement. The Practitioner must be able to show how the expense:

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

Example

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

B. Internal non-insolvency professional costs

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

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

These items are remuneration.

Example

- *legal advice, tax advice, real estate valuations, auctioneering are examples of internal professional costs.*

C. External insolvency professional costs

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

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

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

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

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

Examples

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

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

D. Late lodgement fees

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

Late lodgement fees imposed by ASIC or ITSA must not be charged to the Administration.

E. Unreasonable Travel Costs

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

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

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

Every Firm should have a policy on travel (including time charged and disbursements), which should be made available to creditors on request. This policy can be Administration specific or a general policy.

Examples

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

14.10.3 Necessarily and properly incurred

A. Professional disbursements

A Practitioner may engage external professional services (refer to the table at section 14.10.1) as disbursements without creditor approval, but only after exercising proper commercial consideration.

The Practitioner should consider issues of:

- expertise;
- quality;
- timeliness; and
- reasonable and appropriate cost.

Practitioners must assess each engagement of a professional service provider in terms of the interests of creditors and their fiduciary responsibilities.

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

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

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

Examples

- *Printing services, the service provided being assessed on quoted price, quality and timeliness;*
- *Legal advice, the service provided being assessed on quoted price or time charges, quality and focus of advice, and timeliness of delivery; and*
- *Agent's sale of property, the service provided being assessed on commission rate, sale price and any quoted expenses.*

B. Non-professional disbursements

A Practitioner may incur non-professional disbursements (refer to the table at section 14.10.1) without creditor approval, but only after exercising proper commercial consideration. While the approval of creditors is not required, creditors are entitled to be informed of and to understand the decision process if the issue is raised.

For internal assistance, or B2 type disbursements, this includes providing to creditors as part of the remuneration report, details of the basis of charging for these types of disbursements.

The Practitioner should consider the reasonableness and appropriateness of the cost of the non-professional disbursement before authorising the disbursement. This is equally applicable to internally provided and externally provided non-professional disbursements.

Practitioners must assess each disbursement for an Administration in terms of the interests of creditors and their fiduciary responsibilities.

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

- the benefit has been provided to the Administration; and
- the quantum of the fee is as agreed or is reasonable.

15. Meaningful disclosure in remuneration claims

Principle 11: 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 as to whether the proposed remuneration is reasonable.

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

- a system of recording that information (refer section 15.1);
- a basis for calculating remuneration (refer section 15.2);
- sufficient detail to justify the amount of remuneration (refer section 15.3); and
- relevant timing of the information being provided (refer section 15.3).

15.1 Recording of Work Done

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

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

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

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

15.2 Bases of calculation

There are several bases by which remuneration can be calculated (refer sections 15.2.1, 15.2.2, 15.2.3, 15.2.4 and 15.2.5). The IPA has no preference as to the method of calculating fees. Practitioners must be transparent and fully explain to creditors the main bases by which remuneration can be calculated, the method proposed to be used in the Administration and the reasons for selecting that particular basis (refer to section 15.3.21.1.1A).

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

15.2.1 Time based charging

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

A Practitioner should ensure that regular reviews of the WIP on an Administration are performed to ensure that only time spent on necessary work, properly performed is retained on the WIP. Such a review should also be performed prior to issuing any remuneration requests for approval.

15.2.2 Prospective Fee Approval

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

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

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

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

If a Practitioner wishes to change the capped amount, or the rate scale other than as agreed, a Practitioner will need to seek Approving body approval and provide the Approving body with an explanation as to the reason for the change in the capped amount.

15.2.3 Fixed fee

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

Once a fee is fixed for an agreed task, set of tasks or the conduct of the Administration, it remains fixed and a Practitioner must not seek further approval if the original estimate is wrong.

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

Examples

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

15.2.4 Percentage

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

15.2.5 Success or Contingency Fees

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

This is based on the principles that:

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

Example

An example of a duty that may not be a required duty is the pursuit of litigation. The decision to pursue litigation is a matter of professional judgment for the Practitioner, particularly in instances where there are no funds on hand in the Administration and no ready source of funding.

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

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

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

When considering whether a contingent fee arrangement might be a suitable fee arrangement in a particular Administration, the Practitioner should consider:

- any restrictions that may apply under the relevant legislation;
- funds available in the Administration;
- funding from alternate sources such as creditors or a litigation funder;
- costs of the alternate source of funds compared to a contingent fee arrangement;
- risk associated with the tasks to be undertaken for the contingent fee; and
- the appropriateness of the possible contingent fee amount considering the nature of the Administration and the risk associated with the task to be undertaken.

Example

An example of an acceptable contingent fee arrangements is:

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

15.3 Information to be disclosed and when

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

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

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

Basis	Soon after appointment	During the administration
Time based	Advice on the basis chosen.	Report on work undertaken and request approval of quantum.
Prospective Fee (time based)	Advice on the basis chosen. Request for approval for time based charging to a capped amount.	Report on work undertaken and request further approvals.
Fixed fee	Advice on the basis chosen. Request for approval of the quantum.	Report on achievement of milestones for the drawing of remuneration.
Percentage	Advice on the basis chosen. Request for approval of the percentage.	Report on the factors underlying the entitlement to claim the remuneration.
Contingency	Advice on the basis chosen.Request for approval of the arrangement.	Report on the achievement of the contingency event or otherwise.

Note: *There will be circumstances where a Practitioner will seek approval for a different basis of remuneration for a particular aspect of an appointment or finalisation of the appointment; the appropriate information will need to be provided at the time of seeking the creditors' approval of that arrangement.*

The remuneration reporting requirements do not apply to Controllers. A Controller should report to their appointor in the manner requested by their appointor. The guidance in this section of the Code may still be of assistance to Controllers when preparing their remuneration reports.

15.3.1 Court requirements

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

15.3.2 Information to be provided for all remuneration bases

A. Initial notification

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

- a brief explanation of the types of methods that can be used to calculate remuneration;

- the particular method that the Practitioner intends to use to calculate remuneration in the Administration; and
- why the Practitioner considers this method to be suitable for the Administration.

Examples of reasoning for choosing time based remuneration:

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

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

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

If rates change or the estimate is no longer reliable, the Practitioner must notify creditors and advise new rates or a new estimate and provide an explanation to creditors as to why previous estimates have changed.

B. Remuneration approval request

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

- **Details of the remuneration claimed**

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

- information on how to access the **Creditor Information Sheet** on approving remuneration in external administrations (if not previously provided)

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

  - the process of determining remuneration; and

  - the rights and responsibilities of Practitioners, committee members and creditors.

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

- **Statement of remuneration claim** – The practitioner should clearly:
  - state the precise terms of the agreement sought from the committee or the resolution(s) sought from creditors including the amount to be approved and when the remuneration will be drawn;

- set out the total remuneration previously determined; and
- indicate whether they will be seeking the determination of further remuneration at some time in the future.

- **A summary of receipts and payments** to and from the Administration bank account must be provided. The receipts and payments summary should be prepared up to a date that is as close as possible to the date on which the notice and report is given to creditors. The summary should be clearly labelled as being prepared 'as at' a particular date. If large or exceptional receipts and payments are received or made after the report is prepared but before the meeting at which the remuneration claim is to be considered, the Practitioner should provide additional information to committee members or creditors at the meeting.

The information provided to creditors must be:

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

Practitioners should always support their remuneration report with a general report providing the creditors with information about the progress of the Administration, detailing matters resolved and those matters still outstanding.

A meaningful general report will assist creditors with understanding:

- matters that may have contributed to the remuneration claim;
- complexities or difficulties that have been faced by the Practitioner;
- goals that have been achieved since the last report;
- outcomes including explanations as to why that outcome was better or worse than originally predicted; and
- future tasks to be undertaken and why they need to be done.

As with all reporting, it is not the quantity of information that is important, but the quality. For more guidance on communication, refer to Chapter 8 and 15.4.

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

A. Time basis – retrospective fees

Where a time based remuneration claim for retrospective fees is being made, the Practitioner will need to report to the relevant Approving body on:

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

B. Time basis – prospective fees

Where a time based remuneration claim for prospective fees is being made, the Practitioner will need to report to the relevant Approving body on:

- a summary description of the major tasks still remaining to be done on the Administration;
- an explanation of the estimated fees remaining to complete the Administration, including the estimated fees for each major task;
- a monetary 'cap' on the remuneration;
- an explanation as to what the monetary capped amount represents; and
- when it is proposed that the fees be drawn (for example, monthly).

Future reporting will include information on remuneration drawn under the prospective approval, comparison of actual fees to the estimated fees provided in the original remuneration approval report, tasks undertaken and tasks remaining to be completed.

If a Practitioner wishes to change the capped amount, or the rate scale other than as agreed, the Practitioner will need to seek Approving body approval and provide the Approving body with an explanation as to the reason for the change in the capped amount.

C. Fixed fee remuneration

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

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

Note: *a Practitioner must not draw fixed fee remuneration up-front.*

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

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

Examples of acceptable exclusions

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

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

Once a fee is fixed for an agreed task, set of tasks or the conduct of the Administration, it remains fixed and a Practitioner must not seek further approval if the original estimate is wrong.

After approval of a fixed fee, remuneration reporting will focus on the progress of the work in the Administration, for example by way of explaining milestone achievements, and the work still to be done.

D. Percentage based remuneration

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

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

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

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

E. Contingency arrangement

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

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

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

15.4 General guidance on reporting

The provision to creditors of voluminous detailed information is not a substitute for a clear and concise report. It is the relevance, quality and focus of the information rather than the

quantity and detail that is important. Creditors and even committees are not necessarily conversant with insolvency issues and processes, nor do they have the capacity or time to understand WIP records. Creditors have the right to ask questions and have them answered and to inspect supporting documentation if requested.

A Practitioner should:

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

Questions from creditors should be anticipated and not discouraged.

Additional information should be provided if requested.

15.5 At the meeting

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

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

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

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

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

Refer to Chapter 24 for further information about meeting requirements.

15.6 Changing basis of remuneration

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

Note the restriction on fixed fees in section 15.2.3.

Example

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

16. Approval before drawing remuneration

Principle 12: A Practitioner is entitled to draw remuneration once it is approved and according to the terms of the approval.

16.1 Drawing of remuneration

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

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

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

If fees have been approved prospectively, in terms that allow them to be drawn at nominated hourly rates, the Practitioner must only draw the remuneration progressively, on completion of the work, unless it is the final remuneration account for the finalisation of the Administration.

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

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

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

16.2 Monies received in advance

If a Practitioner is provided with money in advance for the costs of conducting a formal insolvency Administration, the Practitioner is not entitled to apply those monies against their remuneration until their remuneration is approved by creditors. For details of when it is acceptable to receive monies in advance refer to section 6.12. 9.

16.3 Remuneration drawn inappropriately

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

Remuneration may then only be redrawn on approval being obtained and an explanation as to why the fees were improperly taken must be provided to creditors at that time.

Fees and expenses incurred in rectifying inappropriately drawn fees must be borne by the Practitioner.

17. Resources, expertise and capacity

Principle 13: When accepting an appointment the Practitioner must ensure that their firm has adequate expertise and resources for the type and size of the Administration, or the capacity to call in that expertise and those resources as needed.

Insolvency administrations can range from a straightforward bankruptcy with a residential property as the only asset, and consumer creditors, or a single director trading company that has ceased trading to complex and difficult corporate failures, or personal bankruptcies, involving a wide geographic spread of assets and creditors, including overseas, and involving complex structures and transactions. There can be a large number of creditors, who may include shareholders, and contingent claimants.

In agreeing to accept an appointment, a Practitioner must have regard to whether their firm has the resources and expertise to properly conduct the Administration. This has to be assessed on information reasonably known at the time of consenting to act. The practitioner must try to obtain enough information about the Insolvent before consenting to enable this assessment to be made.

Practitioners should always have regard to their professional indemnity insurance (limits and any exclusions) when deciding whether to accept an Appointment.

Many Practitioners' Firms have networks or alliances that allow the firm to call upon extra resources should the need arise. Such arrangements can be taken into account by the Practitioner in deciding whether to consent.

However a Practitioner must not consent to be appointed to an Administration that the Practitioner knows to be beyond their capacity, based on an expectation that the Practitioner should be able to seek other assistance on an informal basis.

A Practitioner takes a personal appointment as an Appointee. The Practitioner must not take on an Appointment if they do not themselves have adequate capacity to properly oversee the Administration, and to supervise staff assisting them.

18. Practice Quality Assurance

Principle 14: Members must implement policies, procedures and systems to ensure effective quality assurance.

18.1 Policies

Practitioners should apply APES320. A copy of APES320 can be access from the Accounting Professional and Ethical Standards Board website (www.apesb.org.au).

In addition to the requirements of APES 320, Practitioners should develop and implement policies, systems and processes that enable adherence to this Code and in particular the provisions relating to:

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

18.2 Maintenance of Administration files

A Practitioner should prepare and maintain working papers that appropriately document the work performed on the Administration. The documentation prepared by the Practitioner should:

- provide a sufficient and appropriate record of the procedures performed for the Administration, in particular how key issues were dealt with and significant decisions that were made;
- demonstrate that the Administration was conducted in accordance with the law, this Code and regulatory requirements.

A Practitioner may destroy these working papers in accordance with the requirements of the Corporations Act and Bankruptcy Act as applicable.

19. Compliance Management

Principle 15: Members must implement policies, procedures and systems to ensure effective compliance management.

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

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

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

20. Risk Management

Principle 16: Members must implement policies, procedures and systems to ensure effective risk management.

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

The Institute of Chartered Accountants maintains N3 Risk Management Guidelines which may be of some assistance to Members.

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

21. Complaints Management

Principle 17: Members must implement policies, procedures and systems to ensure effective complaints management.

The nature of insolvency work means that Practitioners and their Firms are likely to receive complaints from stakeholders in Insolvency Administrations during the course of their career. In the experience of the IPA, many complaints arise from a lack of knowledge or understanding of the insolvency regime by stakeholders, and/or inadequate attention to the importance of communicating effectively by Practitioners. Notwithstanding this, all complaints must be taken seriously and handled effectively.

An effective complaints management system will ensure that all complaints are properly handled and provides an opportunity to obtain feedback on the quality of work done and if used effectively it is a useful diagnostic for quality assurance.

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

The Australian Standard for Complaints Management AS-ISO-10002-2006provides a useful reference for Members when establishing an appropriate complaints management system.

Key points for an effective complaints management system should include:

- a statement about how stakeholders in an Administration can contact the Firm with queries;
- a clear process for staff to follow when a complaint is received;
- a process to deal with minor complaints by Appointee or Administration staff (providing guidance on what would be a minor complaint);
- a process for escalating complaints or dealing with complaints that are not of a minor nature;
- delegation of an appropriate person ("complaints manager") not involved in the conduct of the Administration to be responsible for handling the complaint. This may be one person in a large firm who is no longer practicing in insolvency (ie Chief Operating Officer) or may rotate to a partner not appointed to the Administration in a small firm;
- establishment and maintenance of a complaints register;
- a process to be followed by the complaints manager in respect of all complaints referred to him or her;
- a process for ensuring that the outcome of complaints are used to improve the Firm policies, procedures and systems; and
- a set of Firm principles relating to complaints handling.

Part D: Practice Notes and Templates

22. Declaration of Independence, Relevant Relationships and Indemnities

A DIRRI must be provided to creditors by Members for all corporate and personal insolvency appointments, excluding appointments as a Controller. This obligation extends to Practitioners who have been invited to replace the Incumbent.

The template provided here is a guide to assist Practitioners with meeting their disclosure requirements.

Full guidance on the DIRRI can be found in Section 6.15 of the Code.

22.1 DIRRI Template

[company/bankrupt name]

[ACN / Estate number]

This document requires the Practitioner/s appointed to an insolvent entity to make declarations as to:

A. their independence generally;

B. relationships, including

   i the circumstances of the appointment;

   ii any relationships with the Insolvent and others within the previous 24 months;

   iii any prior professional services for the Insolvent within the previous 24 months;

   iv. that there are no other relationships to declare; and

C. any indemnities given, or up-front payments made, to the Practitioner.

This declaration is made in respect of myself, my partners, *[firm name]* and *[list any entities covered by the extended definition of firm].*

A. Independence

I/We, *[name, firm]* have undertaken a proper assessment of the risks to my/our independence prior to accepting the appointment as *[liquidator/administrator/trustee]* of *[company/bankrupt]* in accordance with the law and applicable professional standards. This assessment identified no real or potential risks to my/our independence. I am/We are not aware of any reasons that would prevent me/us from accepting this appointment.

B. Declaration of Relationships

i. Circumstances of appointment

I/We had *[number]* meetings with the *[company/bankrupt and its advisers]* during *[time period]* for the purposes of:

- *[Explain relevant issues discussed having regards to the limitations imposed under Principle 2 in respect of pre-appointment advice].*

I/We received [remuneration amount] for this advice.

This/These meeting(s) does/do not affect my/our independence for the following reasons:

- *[detail here the reasons why the meeting(s) does not/do not result in a conflict of interest or duty].*

ii. Relevant Relationships (excluding Professional Services to the Insolvent)

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

or

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

Name	Nature of relationship	Reasons why not an Impediment or Conflict

iii. Prior Professional services to the Insolvent

Neither I/we, nor my/our firm, have provided any professional services to *[company/bankrupt]* in the previous 24 months.

or

I/We, or a member of my/our Firm, have provided the following professional services to *[company/bankrupt]* in the 24 months prior to the acceptance of this appointment:

Nature of Professional Service	Reasons why there is no conflict of interest or duty

iv. No other relevant relationships to disclose

There are no other known relevant relationships, including personal, business and professional relationships, from the previous 24 months with *[company/bankrupt]*, an associate of *[company/bankrupt]*, a former insolvency practitioner appointed to the *[company/bankrupt]* or any person or entity that has a charge on the whole or substantially whole of *[company's/bankrupt's]* property that should be disclosed.

C. Indemnities and up-front payments

I/We have been provided with the following indemnities *[and / or upfront payments for remuneration]* for the conduct of this *[liquidation/administration/bankruptcy]*:

Name	Relationship with [company/bankrupt]	Nature of indemnity or payment

This does not include statutory indemnities. I/We have not received any other indemnities or upfront payments that should be disclosed.

or

I/We have not been indemnified in relation to this administration, other than any indemnities that I/we may be entitled to under statute and I/we have not received any up-front payments in respect of my/our remuneration or disbursements.

Dated:

.....	.....
[signed, Practitioner name]	[signed, Practitioner name]

Note:

1. If circumstances change, or new information is identified, I am/we are required under the Corporations Act and the IPA Code of Professional Practice to update this Declaration and provide a copy to creditors with my/our next communication as well as table a copy of any replacement declaration at the next meeting of the insolvent's creditors.
2. Any relationships, indemnities or up-front payments disclosed in the DIRRI must not be such that the Practitioner is no longer independent. The purpose of components B and C of the DIRRI is to disclose relationships that, while they do not result in the Practitioner having a conflict of interest or duty, ensure that creditors are aware of those relationships and understand why the Practitioner nevertheless remains independent.

*[*** DOES NOT FORM PART OF DIRRI***

Important points for Practitioners to note when preparing a DIRRI:

- *the IPA Code of Professional Practice provides guidance on the completion of the DIRRI and should be referred to when completing this template.*
- *a Practitioner's firm is defined to include*

  (a) A sole practitioner, partnership, corporation or other entity of professionals;

  (b) An entity that controls such parties through ownership, management or other means;

  (c) An entity controlled by such parties through ownership, management or other means or in which they share in the profits; or

  (d) Practices operating under the same, or substantially the same, business name, whatever the financial arrangement.

- *an Associate is defined in the IPA Code of Professional Practice – For Administrations under the Corporations Act, Associate has the meaning according to that Act. For personal insolvency administrations, Associate is a spouse, dependent or direct relative of the Insolvent, or the spouse or dependant of a direct relative, and any entity with which the Insolvent or any of the persons previously mentioned are associated with (refer 6.10 for further information). Therefore, the term Associate includes directors and associated entities of an insolvent corporation.*
- *in joint appointments, each Practitioner must sign the DIRRI. A DIRRI can only be issued without all signatures in exceptional circumstances, which must be documented on the file and a fully signed DIRRI must be provided to creditors as soon as possible.*
- *if the Appointment is under Part X of the Bankruptcy Act, Practitioners must comply with the particular requirements of the Bankruptcy Act.]*

23. Remuneration Report

23.1 Overview and Explanation of the Recommended Report

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

This report may not be suitable for reporting on remuneration for an appointment as a Controller, and Practitioners in those appointments should seek guidance from their appointor as to the required format of their remuneration reporting.

Reports should be tailored to the particular circumstances of each Administration.

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

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

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

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

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

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

23.2 Structure of the Recommended Reports

23.2.1 Initial advice to creditors

This is the suggested format for the initial advice to creditors on remuneration:

Remuneration Methods

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

Time based / hourly rates

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

Fixed Fee

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

Percentage

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

Contingency

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

Method chosen

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

[Provide reasoning for the fee calculation method chosen.]

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

Use the following guidance for time based remuneration:

The rates for our remuneration calculation are set out in the following table together with a general guide showing the qualifications and experience of staff engaged in the administration and the role they take in the administration. The hourly rates charged encompass the total cost of providing professional services and should not be compared to an hourly wage.

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

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

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

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

- *If charging on a fixed fee basis, a fixed amount quote for the cost of the administration, details of what services are included as part of the fixed fee and the basis upon which the balance of services will be charged. If it is intended that some services will be provided on a different basis, the reporting obligations for mixed basis fee arrangements must be complied with.*
- *If using a percentage of realisations method, the percentage to be applied, clearly documenting what the percentage is to be applied to, when the remuneration will be paid and the expected range of possible remuneration outcomes.*
- *If a contingency arrangement within the scope of this Code is proposed, there must be full disclosure of the proposed arrangement and the range of possible remuneration outcomes.]*

23.2.2 Approval requests

A. Structure of the remuneration approval request report

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

Part 1: Declaration

Part 2: Description of Work

Part 3: Calculation of Remuneration

Part 4: Report on Progress of the Administration

Part 5: General Supporting 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: Declaration

This is a declaration by the Practitioner that he or she has reviewed the remuneration claim and it is necessary and proper for the conduct of the Administration.

Part 2: Description of Work

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

a) Assets

b) Creditors

c) Employees

d) Trade On

e) Investigation

f) Dividend

g) Administration

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

The table format should be used for both retrospective and prospective fee approval requests (a separate table for each fee request).

The table included in the report for the particular Administration should properly reflect the work done / to be done on that appointment. Inclusion of the full list for all appointments is not appropriate and is not a proper reflection of the work undertaken /to be undertaken on the appointment.

Proper time recording systems should be able to readily generate reports thus reducing the time taken to prepare this information.

The General Description column is indicative only and should be amended to suit the particular appointment. Use specific details (i.e., detailing specific asset or class of asset realisations).

Where the method of remuneration is time based, dollar value of remuneration attributed to that category of work and hours taken should be included under the task heading for each task category.

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

Part 3: Calculation of Remuneration (Time Basis)

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

Part 4: Report on Progress of the Administration

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

Part 5: General Supporting Information

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

B. Approval Request report pro-forma

Part 1: Declaration

I, *[name, firm]* have undertaken a proper assessment of this remuneration claim for my appointment as *[liquidator/administrator/trustee]* of *[company/bankrupt]* in accordance with the law and applicable professional standards. I am satisfied that the remuneration claimed is in respect of necessary work, properly performed in the conduct of the Administration.

Part 2: Description of work completed / to be completed

Company	Period From	To	
Practitioner	Firm		
Administration Type			

Task Area	**General Description**	**Includes** [**SUGGESTION ONLY - delete or add** details as appropriate to the work done]
Assets [hours] [$ x]	Sale of Business as a Going Concern	Preparing an information memorandum Liaising with purchasers Internal meetings to discuss/review offers received
	Plant and Equipment	Liaising with valuers, auctioneers and interested parties Reviewing asset listings
	Sale of Real Property	Liaising with valuers, agents, and strata agent Attendance at auction
	Assets subject to specific charges	All tasks associated with realising a charged asset
	Debtors	Correspondence with debtors Reviewing and assessing debtors ledgers Liaising with debt collectors and solicitors
	Stock	Conducting stock takes Reviewing stock values Liaising with purchasers
	Other Assets	Tasks associated with realising other assets
	Leasing	Reviewing leasing documents Liaising with owners/lessors Tasks associated with disclaiming leases
Creditors [hours] [$ x]	Creditor Enquiries	Receive and follow up creditor enquiries via telephone Maintaining creditor enquiry register Review and prepare correspondence to creditors and their representatives via facsimile, email and post Correspondence with committee of creditors members
	Retention of Title Claims	Receive initial notification of creditor's intention to claim Provision of retention of title claim form to creditor Receive completed retention of title claim form Maintain retention of title file 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 section 439A report, 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

Task Area	General Description	Includes [SUGGESTION ONLY - delete or add details as appropriate to the work done]
Creditors [hours] [$ x]	Sale of Business as a Going Concern	Preparing an information memorandum Liaising with purchasers Internal meetings to discuss/review offers received
	Meeting of Creditors	Preparation of meeting notices, proxies and advertisements Forward notice of meeting to all known creditors Preparation of meeting file, including agenda, certificate of postage, attendance register, list of creditors, reports to creditors, advertisement of meeting and draft minutes of meeting. Preparation and lodgement of minutes of meetings with ASIC Responding to stakeholder queries and questions immediately following meeting
	Shareholder enquires	Initial day one letters ITAA Section 104-145(1) declarations Responding to any shareholder legal action
Employees [hours] [$ x]	Employees enquiry	Receive and follow up employee enquiries via telephone Maintain employee enquiry register Review and prepare correspondence to creditors and their representatives via facsimile, email and post Preparation of letters to employees advising of their entitlements and options available Receive and prepare correspondence in response to employees objections to leave entitlements
	GEERS	Correspondence with GEERS Preparing notification spreadsheet Preparing GEERS quotations Preparing GEERS distributions
	Calculation of entitlements	Calculating employee entitlements Reviewing employee files and company's books and records Reconciling superannuation accounts Reviewing awards Liaising with solicitors regarding entitlements
	Employee dividend	Correspondence with employees regarding dividend Correspondence with ATO regarding SGC proof of debt Calculating dividend rate Preparing dividend file Advertising dividend notice Preparing distribution Receipting POD's Adjudicating POD's Ensuring PAYG is remitted to ATO
	Workers compensation claims	Review insurance policies Receipt of claim Liaising with claimant Liaising with insurers and solicitors regarding claims Identification of potential issues requiring attention of insurance specialists Correspondence with insurer regarding initial and ongoing workers compensation insurance requirements Correspondence with previous brokers

Task Area	General Description	Includes [SUGGESTION ONLY - delete or add details as appropriate to the work done]
Employees [hours] [$ x]	Other employee issues	Correspondence with Child Support Correspondence with Centrelink
Trade On [hours] [$ x]	Trade On Management	Liaising with suppliers Liaising with management and staff Attendance on site Authorising purchase orders Maintaining purchase order registry Preparing and authorising receipt vouchers Preparing and authorising payment vouchers Liaising with superannuation funds regarding contributions, termination of employees employment Liaising with OSR regarding payroll tax issues
	Processing receipts and payments Budgeting and financial reporting	Entering receipt and payments into accounting system Reviewing company's budgets and financial statements Preparing budgets Preparing weekly financial reports Finalising trading profit or loss Meetings to discuss trading position
Investigation [hours] [$ x]	Conducting investigation	Collection of company books and records Correspondence with ASIC to receive assistance in obtaining reconstruction of financial statements, company's books and records and Report as to Affairs Reviewing company's books and records Review and preparation of company nature and history Conducting and summarising statutory searches Preparation of comparative financial statements Preparation of deficiency statement Review of specific transactions and liaising with directors regarding certain transactions Liaising with directors regarding certain transactions Preparation of investigation file Lodgement of investigation with the ASIC Preparation and lodgement of supplementary 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

Task Area	General Description	Includes [SUGGESTION ONLY - delete or add details as appropriate to the work done]
Dividend [hours] [$ x]	Processing proofs of debt	Preparation of correspondence to potential creditors inviting lodgement of POD Receipt of PODs Maintain POD register Adjudicating PODs Request further information from claimants regarding POD Preparation of correspondence to claimant advising outcome of adjudication
	Dividend procedures	Preparation of correspondence to creditors advising of intention to declare dividend Advertisement of intention to declare dividend Obtain clearance from ATO to allow distribution of company's assets Preparation of dividend calculation Preparation of correspondence to creditors announcing declaration of dividend Advertise announcement of dividend Preparation of distribution Preparation of dividend file Preparation of payment vouchers to pay dividend Preparation of correspondence to creditors enclosing payment of dividend
Administration [hours] [$ x]	Correspondence	
	Document maintenance/file review/ checklist	First month, then six monthly administration review Filing of documents File reviews Updating checklists
	Insurance	Identification of potential issues requiring attention of insurance specialists Correspondence with insurer regarding initial and ongoing insurance requirements Reviewing insurance policies Correspondence with previous brokers
	Bank account administration	Preparing correspondence opening and closing accounts Requesting bank statements Bank account reconciliations Correspondence with bank regarding specific transfers
	ASIC Form 524 and other forms	Preparing and lodging ASIC forms including 505, 524, 911 etc Correspondence with ASIC regarding statutory forms
	ATO and other statutory reporting	Notification of appointment Preparing BAS' Completing group certificates
	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

Additional matters particular to Personal Insolvency Administrations may include:

Task Area	**General Description**	**Includes** [**SUGGESTION ONLY - delete or add** details as appropriate to the work done]
Assets **[hours]** **[$ x]**	Income assessments	Liaising with the Bankrupt during each contribution assessment period in relation to particulars of income derived during the period, including as to number of dependants and circumstances etc Assessing the Bankrupt in accordance with the Bankruptcy Act and serving assessment Monitoring the income of the Bankrupt during the course of the bankruptcy, including as to any change in circumstances Receipting income contributions.
	Non-divisible property	Assessing personal property of the bankrupt Assessing value of car, tools of trade and realising excess
	Family issues	Assessing value of family home and contributions to its purchase etc. Determine security over home and current equity, including current payments under mortgage. Arrange for sale of home including discussions with non-bankrupt spouse as to their equity Arrange for vacant possession and sale Assess possible family law or other claims by spouse.
Investigation **[hours]** **[$ x]**	Collection of books and records, statement of affairs etc of bankrupt	Reviewing books & records Obtain Statement of Affairs from Bankrupt(s) and review and pursue further inquiries, searches Preparation of and issuing of demand notices under the Act to various entities – business partners, family members etc associated with the bankrupt(s). Liaising with Official Receiver as to issue of notices. Analysing books and documents received.
	Searches	Carrying out searches of Land Titles Office, ASIC, REVs. Assess bank accounts and notify banks etc, including as to payment of bankrupt's salary and access to funds for living expenses etc
	Transactions	Review of transactions which may be voidable under the Act, in particular in relation to transfer to family members, or trusts. Assess superannuation of the bankrupt and circumstances of prior and current payments into fund.
	Conduct issues	Assess conduct of bankrupt as to extension of bankruptcy. Lodge Objection to Discharge including preparation of relevant reasons and grounds. Assessing and reporting possible offences to ITSA.
Administration **[hours]** **[$ x]**	ITSA reporting	Preparing of and lodgement of Annual Estate Returns with ITSA Reconciliation and calculation of Realisations Interest Charge Lodgement of Realisation and Interest Charge Return

Part 3: Calculation of Remuneration

Employee[1]	Position	$/hour (ex GST)	Total actual hours	Total ($)	Task Area						
					Assets hrs $	Creditors hrs $	Employees hrs $	Trade on hrs $	Investigation hrs $	Dividend hrs $	Administrationhrs $
TOTAL				$	X	X	X	X	X	X	X
GST				$							
TOTAL (including GST)				$							
Average hourly rate				$	X	X	X	X	X	X	X

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

Future fees

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

- a summary description of the major tasks still remaining to be done on the Administration;
- an explanation of the estimated fees remaining to complete the Administration, including the estimated fees for each major task;
- a monetary cap on the remuneration;
- an explanation as to what this cap represents; and
- when it is proposed that the fees be drawn.

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

The format in which this information is provided should be consistent with that provided for retrospective remuneration approvals.

Disbursements

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

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

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

B2 disbursements are internally provided non-professional costs such as photocopying, printing and postage. B2 disbursements, if charged to the Administration, would generally be charged at cost; though some expenses such as telephone calls, photocopying and printing may be charged at a rate which recoups both variable and fixed costs.

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

You are not required to seek creditor approval for disbursements, but must account to creditors. For internal assistance, or B2 type disbursements, this includes providing to creditors as part of the remuneration report details of the basis of charging for these types of disbursements.

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.

A declaration should be made that the disbursements were necessary and proper.

Part 4: Report on Progress of the Administration

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

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

Part 5: Supporting information

Summary of Receipts and Payments

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

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

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

Statement of remuneration claim

The Practitioner should clearly:

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

Queries

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

Information Sheet

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

24. Creditors' Meetings

Practitioners must call, conduct and report on creditors' meetings in a professional manner.

24.1 Introduction

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

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

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

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

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

- The decision to call a meeting;
- Calling the meeting;
- Conducting the meeting;
- Reporting on the meeting; and
- The conduct of Practitioners that are not the Appointee.

24.2 The decision to call a meeting

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

- be required by statute, for example in voluntary administrations, or Part X agreements; or can be held at the request of a required percentage of creditors;
- allow the Practitioner to explain progress in the Administration and to seek the views of creditors on the further conduct of the Administration;

- give authority to adopt a particular course of action, such as to approve a settlement of a claim by the company; or
- approve the Practitioner's remuneration.

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

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

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

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

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

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

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

24.3 Calling the meeting

24.3.1 Venue and time of meeting

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

- the convenience to the majority of persons entitled to receive notice of the meeting:
  - date;
  - time;
  - geographic location; and
  - the capacity to accommodate those likely to attend.

24.3.2 Notice of the meeting

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

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

24.4 Provision of information prior to creditors' meeting

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

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

24.4.1 List of Creditors

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

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

24.5 Proxies

24.5.1 Form of Proxy

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

- the name of the company/bankrupt/debtor;
- the address, date and time of the meeting;
- space for:
  - the identity of the creditor;
  - the identity of the proxy holder;
  - signature and dating by the creditor;
  - the resolutions;
  - space for the creditor to set out the proxy instructions:
  - the voting instruction on each item; or
  - delegation e.g. name proxy holder or chairman.

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

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

Practitioners must ensure that special proxies include the exact wording of resolutions proposed to be put to the meeting. If resolutions for remuneration are intended to be put to the meeting, the exact wording of the resolutions, including amounts, must be included on the proxy form. It is not acceptable to direct creditors to vote for, against or abstain on a

resolution to pass remuneration without specifying the amounts to be voted on. A proxy that does not contain this information cannot be used by the Practitioner to vote on remuneration.

Information accompanying the proxy form should specify:

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

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

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

24.5.2 Validity of Proxies

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

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

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

24.6 Proofs of debt / Statement of claim

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

Due to the effect that votes by Associates of the Insolvent can have on the outcome of voting, Practitioners must carefully review any proofs of debt or statements of claim received from Associates of the Insolvent to verify the validity of the amount claimed.

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

24.7 Conduct of the meeting

24.7.1 Attendance at the meeting

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

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

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

Creditors and their authorised representatives are entitled to attend any meeting. In addition, a person who holds themselves out as representing a creditor should, in the absence of evidence

to the contrary, be allowed to attend the meeting and to ask questions, but he or she is unable to vote unless a valid proxy is provided.

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

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

24.7.2 Use of technology

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

24.7.3 Information to be provided to the meeting

Information to be tabled at the meeting must include:

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

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

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

24.7.4 Use of the casting vote

Applicable to Voluntary Administrators, Deed Administrators and Liquidators only

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

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

- the Chairperson has discretion whether to exercise the casting vote. The chair 'should proceed to exercise the casting vote and resolve the deadlock (thereby resorting to the power for the purpose for which it exists) unless there is some good reason to refrain from doing so'. Failure to exercise the casting vote for some irrational or irrelevant reason is inconsistent with the person's duty;
- the Chairperson must weigh up all relevant factors and act honestly and according to what they believe to be in the best interests of those affected by the vote; and for a proper purpose;

- the exercise of the casting vote is most appropriate in circumstances where either creditors with a majority in value have such an overwhelming interest that it is inappropriate to allow a majority in number, who do not have the same monetary interest to carry the day, or vice versa. However, there is no presumption in favour of the majority in value, although any large disproportion between the values of the debts of the numerical minority and the numerical majority will be a factor to be taken into account; nor is there any presumption in favour of maintaining the status quo;
- The practitioner is entitled to, and should, bring his or her experience and practical considerations to bear in deciding how to exercise the vote;
- In a Voluntary Administration, the objectives of Part 5.3A must be considered in making the decision.

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

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

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

Except in very limited circumstances, a Practitioner should not use the casting vote in relation to any resolution determining or fixing the Practitioner's remuneration[1].

[1] Refer to the decision in *Krejci as liquidator of Eaton Electrical Services* (2006) 58 ACSR 403 against the use of the casting vote stating it was in breach of the liquidator's fiduciary duties. Contrast with the decision in *Williams as liquidator of C & D Global Protection Pty Ltd (in liquidation) v CD Protective Services Pty Ltd & Ors (No 3)* [2010] QSC 224 which allowed, in very particular circumstances (99.9% of creditors voting voted in favour of remuneration), the use of the casting vote to approve remuneration.

A Practitioner must declare the rationale for:

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

The reasons must be minuted.

24.7.5 Attendance records

Creditors and their representatives attending the meeting are required to sign an attendance list. This list should be made available for inspection to anyone attending the meeting and form part of the minutes (refer section 24.9). This list must be retained as part of the records of the Administration.

24.7.6 Questions at the meeting

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

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

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

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

24.7.7 Chairperson and control

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

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

or may decline to answer it if, for example:

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

The Practitioner should state the grounds for his or her decision.

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

24.8 Committee of Inspection / Creditors

Where creditors/members are entitled to appoint a Committee of Inspection/Creditors, they should be told of its right to appoint a committee and of the nature of the committee's functions.

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

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

24.9 Reporting on the meeting

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

The minutes should include the following information:

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

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

The Practitioner must ensure that the minutes record the tabling of the DIRRI at the meeting.

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

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

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

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

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

24.10 Recording the meeting

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

24.11 Conduct of practitioners that are not the appointee

Where a Practitioner is asked to act as an Alternate appointee in an Administration and attends a meeting of creditors in that capacity, regard must be had to the requirements of the Code of Professional Practice, specifically section 11.7, at all times.

25. Reports under s 439A of the Corporations Act

25.1 Introduction

The purpose of this Practice Note is to:

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

25.2 Definitions

For the purpose of this part of the Code,

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

Section 439A report means:

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

Deed means a Deed of Company Arrangement under Part 5.3A of the Corporations Act.

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

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

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

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

25.3 Professional Judgment

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

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

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

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

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

25.4 Court involvement

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

25.5 Legislative requirement

Subsection 438A requires the Practitioner to investigate the company's business, property affairs and circumstances and form an opinion on the three options available to creditors.

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

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

- such other information known to the Practitioner as will enable the creditors to make an informed decision about each matter covered by subparagraph (i), (ii) or (iii); and
- if a Deed is proposed, a statement setting out details of the proposed Deed.

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

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

25.6 Content of the 439A report

25.6.1 Purpose of the report and Summary

The first section of the report should:

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

This section of the report is essentially an executive summary and should provide creditors with an easy to understand overview of the entire report and the Administrator's recommendation.

25.6.2 Background Information

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

Shareholders, Officers and Charges

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

Books and records

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

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

Financial statements

A company's financial statements are an essential tool in the management of the business conducted by the company. The presence, or absence, of timely financial reporting in a

company may provide an indication of the management capabilities of the company officers. Accordingly, financial statements are considered material to a creditor's decision concerning the company's future.

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

Historical financial performance

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

Administrator's prior involvement

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

Directors' report as to affairs

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

Explanations for difficulties

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

Outstanding winding up applications

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

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

Related entities

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

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

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

The report should also disclose:

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

25.6.3 Offences, voidable transactions and insolvent trading

Offences

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

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

Voidable transactions

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

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

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

Insolvent trading

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

Director's personal financial position

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

The Administrator, due to time constraints, is unlikely to conduct a public examination of the company's directors. Therefore the Administrator will be limited to public information and information provided by the director, or authorised by the director to be disclosed by third parties.

In the section 439A Report, the Administrator should:

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

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

25.6.4 Estimated return from a winding up

All section 439A reports, including those for a company where a Deed is being proposed, must disclose:

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

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

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

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

25.6.5 Effect on employees

The position of employees in a Voluntary Administration differs to that of other unsecured creditors. It is important that specific information targeted at the employees' situation is provided so that they can make a fully informed decision.

In situations where a Deed proposes to alter the statutory priorities, refer to section 25.7 of the Code.

In all other situations, the Practitioner should ensure that the following information is included in the section 439A Report in order to properly inform employees:

- The position of employees as a priority creditor in a liquidation
- The estimated return to employees in a winding up of the company
- The availability of any government safety net scheme for their entitlements and a basic outline of that scheme; and
- if a Deed is proposed:
  - The position of employees as priority creditors in the Deed;
  - The estimated return to employees under the Deed; and
  - The effect of the Deed on the employees' ability to access any government safety net scheme for their entitlements.

25.6.6 Proposal for a deed of company arrangement

Reporting for all proposed Deeds

If a Deed is being proposed, the section 439A report must disclose:

- the key features of the proposed Deed;
- the monitoring and reporting arrangements that are to be put in place to ensure that the terms of the Deed are met and that creditors are fully informed of the progress of the Administration;

- the estimated return to creditors and likely timing of the return to creditors from the proposed Deed;
- how related party creditor claims are being dealt with under the Deed and the effect of related party creditors' claims on the estimated return;
- a comparison of the estimated return to creditors from the proposed Deed to the estimated return to creditors from a winding up of the company and for ease of understanding this information should be provided in a table providing creditors with a direct comparison of the estimated returns and costs in a liquidation and under the Deed;
- a summary of the Administrator's reasoning as to why the Deed will provide creditors with a greater return than in a liquidation;
- in circumstances where a guarantor proposes to retain control of the business pursuant to the proposed Deed, details of the creditors holding the guarantees and the quantum of the debt secured by the guarantees. The report should request that any creditor holding a guarantee which is not disclosed in the report provide details to the Administrator as soon as possible;
- where approval of remuneration for the Voluntary Administration is sought, details of the remuneration claim in accordance with the Code; and
- the basis on which remuneration will be sought by the Administrator of the proposed Deed and an estimate of the total remuneration payable for administering the proposed Deed. If approval of remuneration for administering the Deed is sought prospectively, details of the remuneration claim in accordance with the Code.

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

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

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

Reporting for proposed Deeds including a Creditors' Trust arrangement

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

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

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

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

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

25.6.7 Administrator's Opinion

The Administrator must express:

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

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

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

25.6.8 Other Material Information

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

25.6.9 Incomplete or additional information

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

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

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

Example

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

25.7 Report where Deed alters Statutory Priorities

25.7.1 Legislative requirement

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

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

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

25.7.2 Content of statement

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

- information required to be provided under the Code for the section 439A report:
  - Background Information;
  - Offences, Voidable Transactions and Insolvent Trading;
  - estimated return to employees from the companies monies in a liquidation (excluding payments that employees may be eligible to receive under the any government safety net scheme for their entitlements) and the timing of that return;
- a comprehensive and clear explanation of the proposed alteration. If different groups of eligible employee creditors are affected in different ways, the explanation should provide details for each group of eligible employee creditors;
- estimated return to eligible employee creditors (or each different group of eligible employee creditors) under the proposed Deed and the timing of that return;
- an explanation as to how related party creditor claims are being dealt with under the Deed and the effect of related party creditors' claims on the estimated return;
- details of the government safety net scheme or any replacement scheme, including what entitlements the employees may be entitled to claim under the scheme should the company

go into liquidation, and the effect that the alteration of the statutory entitlements will have on the employees rights under that scheme in the event that the Deed fails and the company proceeds into liquidation.

25.7.3 Administrator's Opinion on Altering Statutory Priorities

The Administrator must express:

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

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

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

25.7.4 Other Material Information

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

25.7.5 Additional information

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

25.8 Sample section 439A report

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

- with information about the company's business, property, affairs and financial circumstances;
- a professional opinion from the Administrator as to each of the options available to the creditors;
- details of any proposed Deed (if one is proposed); and
- such other information known to the Administrator as will enable the creditors to make an informed opinion about their options (section 439A(4)).

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

Report to Creditors under Section 439A of the Corporations Act

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

Introduction

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

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

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

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

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

-
-
-

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

-
-

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

At the meeting of creditors to be held on *[insert date]*, creditors will be asked to make a decision by passing a resolution in respect of options available to them. In this report I have recommended to creditors that [the company enter a deed of company arrangement/the company go into liquidation/control of the company be returned to its members] and detailed why this option is, in my opinion, in creditors' best interests.

Summary

[insert a summary of the report here. The purpose of this summary is to ensure that creditors get a quick overview of the content of the report.]

Background Information

a Shareholders, Officers and Charges

b Books and records

c Financial statements

d Historical financial performance

e Administrator's prior involvement

f Directors' report as to affairs

g Explanations for difficulties

h Directors

i Administrator

j Outstanding or previous winding up applications

Offences, voidable transactions and insolvent trading

a Offences

b Voidable transactions

The law requires an administrator to specify whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B of the Corporations Act. This issue is relevant to creditors if they are being asked to choose between a Deed of Company Arrangement or a liquidation, because voidable transactions are only able to be challenged if a liquidation occurs.

For general information about what voidable transactions are, please refer to the attached information sheet.

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

[Specific information about identified voidable transactions must be included here.]

c Insolvent trading

Information about possible insolvent trading is relevant to creditors when making a decision about the future of a company as directors of a company may generally only be sued for insolvent trading if the company is in liquidation. As with the voidable transaction analysis above, creditors have to assess the advantages to them of a Deed, which cannot include proceeds from insolvent trading actions, compared to the likely return in a liquidation, which could include the proceeds of any successful insolvent trading action.

For general information about insolvent trading, please refer to the attached information sheet.

[Specific information about any potential insolvent trading must be included here]

d Director's personal financial position

Estimated return from a winding up

[There is detailed guidance provided in the Code on what information must be provided in relation to the estimated return from a winding up. This information must be included here.]

Effect on employees

[There is guidance provided in the Code on what information must be provided to employees in situations where there is not a Deed that proposes to alter the statutory priorities. This information should be included here.]

Proposal for a deed of company arrangement

[There is very detailed guidance provided in the Code on what information must be provided to creditors when a Deed is proposed. The required information can vary depending on the type of Deed proposed. This information must be included here if a Deed is proposed.]

Administrator's recommendation

The following options are available to creditors to decide pursuant to s439C of the Corporations Act, being that:

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

My opinion on each option and the reasons for my opinion are set out in the following:

a The company execute the proposed Deed

- *[opinion and reasons]*

b The administration should end

- *[opinion and reasons]*

c The company should be wound up

- *[opinion and reasons]*

d Recommendation

Other Material Information

Remuneration

[Refer to the IPA Code of Professional Practice: Remuneration for the details of what information must be provided to creditors when seeking approval of remuneration].

a Voluntary Administration

b Deed of Company Arrangement

[Delete if a Deed is not proposed]

c Liquidation

Meeting

[Confirm details of the meeting, proofs of debt, proxies etc in this section of the report.]

26. Expert opinions

A Member who gives expert evidence for the purposes of court proceedings must be aware of the obligations imposed by the law and by courts in relation to the giving of evidence and in particular the giving of expert evidence.

Those obligations include owing a paramount duty to the court, and to assist the court on matters relevant to the Member's area of expertise in an objective and unbiased manner.

A Member may give evidence in two separate capacities:

- As an expert witness retained on behalf of a party to litigation to give that evidence.
- As an Appointee who gives evidence about the Insolvent for the purposes of court proceedings.

In the first case, the Member is an expert witness retained on behalf of, and paid by, a party to litigation. The Member is not an Appointee. Court guidelines apply and must be observed by Members giving such evidence.

In the second case, a Member who is also an Appointee will often need to form an opinion about the solvency of the Insolvent, and its timing, for example for the purposes of pursuing a preference. If litigation is commenced, the Appointee may need to prepare and give evidence in court about that insolvency and related issues. This evidence will be based on the Appointee's expertise as an insolvency practitioner and on their knowledge of the Insolvent. Court guidelines apply, to the extent relevant, and must be observed by Members giving such evidence.

In that second situation, the Appointee is giving expert evidence in relation to the Insolvent to which they are appointed, and in relation to which the Appointee may have an interest. For example, successful recovery of a preference claim, based on the Appointee's expert opinion as to the insolvency of the company, may result in the Appointee securing moneys from which remuneration can be drawn.

The fact that the Appointee is related to the Insolvent and may have an interest in the outcome of the evidence given, does not necessarily affect the admissibility of the expert evidence given, although the court will assess the weight that it will give to such evidence in the context of the role of the Appointee. Nor does this alter the duties and obligations of an insolvency appointee in giving objective evidence and providing full disclosure to the court about the extent to which the Appointee may obtain a financial benefit from the outcome of the case by way of payment of remuneration.