



## Bankruptcy Legislation Amendment (Fees and Charges) Bill 2006

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### Contents

Purpose. . . . .	2
Background. . . . .	2
Cost Recovery Guidelines - background. . . . .	2
ITSA's Cost Recovery review . . . . .	3
General levy on realisations from debt agreements . . . . .	7
Setting of fees and charges . . . . .	8
Main provisions. . . . .	8
Concluding comments . . . . .	9
Endnotes. . . . .	9
Appendix Schedule of Fees and Charges. . . . .	11

## Bankruptcy Legislation Amendment (Fees and Charges) Bill 2006

**Date introduced:** 16 February 2006

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** Schedule 1 Part 1, Schedule 2 and Schedule 3 commence on 1 July 2006. Commencement of Schedule 1 Part 2 is dependent on the *Bankruptcy Legislation Amendments (Anti-avoidance) Act 2006* commencing operation. Schedule 4 commences on Royal Assent.

### Purpose

This Bill amends the *Bankruptcy Act 1966* and related legislation to increase the cost recovery measures of the Insolvency and Trustee Service Australia (ITSA).

### Background

The Insolvency and Trustee Service Australia is the government agency responsible for the administration and regulation of the personal insolvency system in Australia. During 2004-05 ITSA completed a review of its cost recovery arrangements.

Cost recovery has been described by the Productivity Commission in the following terms:

Cost recovery differs from general taxation which raises revenue to fund a wide range of Government activities or products. Cost recovery, on the other hand, recovers some or all of the costs of a particular Government activity or product.....

The most direct forms of cost recovery are where particular users are charged a fee based on the cost of providing the Government product consumed. Less direct forms include special levies or earmarked taxes to fund a specific Government activity. The link between the revenue raised and the funding of a specific activity distinguishes taxes imposed for cost recovery from general taxation. The fact that cost recovery is usually not undertaken with a view to generating a profit distinguishes it from the pricing objectives of government business enterprises.<sup>1</sup>

### Cost Recovery Guidelines - background

ITSA conducted a review of its cost recovery arrangements in accordance with the Commonwealth Cost Recovery Guidelines for Information and Regulatory Agencies, issued by the Department of Finance and Administration.

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The Productivity Commission (PC) inquired into cost recovery arrangements within Government Agencies. Its report, *Cost Recovery by Government Agencies*, was released in March 2002.

In its report the PC noted that 'notwithstanding its increased significance, cost recovery currently lacks the attributes of good policy – namely, a clear rationale, accountability, transparency, performance assessment and review'.<sup>2</sup>

In response to the PC's report the Government, in December 2002, announced that it would introduce a formal cost recovery policy for Government agencies.<sup>3</sup> This cost recovery policy is located on the Department of Finance website at [http://www.finance.gov.au/finframework/docs/Guidelines\\_-\\_Regulatory\\_2\\_Dec.rtf](http://www.finance.gov.au/finframework/docs/Guidelines_-_Regulatory_2_Dec.rtf). The cost recovery policy states that Commonwealth regulatory agencies should apply these Guidelines when a review of cost recovery arrangements is required.

### ITSA's Cost Recovery review

In accordance with the cost recovery guidelines, ITSA reviewed all its fees and charges in 2004 and identified which services should be cost recovered, the type of charge to apply, who should pay and which services would be more appropriately funded through general taxation.

ITSA's portfolio budget statements for 2004-05 state that:

Applying cost recovery policy would result in variations to existing fees and charges in Bankruptcy Act services to ensure they reflect the full cost of the service, and introduction of a new charge – ie extension of the 'realisations charge' – to apply to moneys recovered in debt agreements.

The review concluded that fees and charges should be applied to all Bankruptcy Act services provided by ITSA, other than the processing of debtor's petitions and debt agreement proposals, policy and legislation reform and other support services to the Minister and Parliament, which should be Budget funded.

In connection with ITSA's proceeds of crime activities, costs of controlling and selling property are recovered from the administration when sufficient assets are forfeited. When assets under control are not forfeited, or if their value is insufficient to cover costs, Budget funding of the Official trustee's costs is appropriate.

These measures would increase the proportion of ITSA's costs which are recovered in fees and charges from 58% to 72%. Implementation of cost recovery is estimated to reduce annual net budget funding to ITSA by approximately \$6m per year.<sup>4</sup>

The portfolio budget statements go on to state that:

Implementation of the revised fees and charges will generate an additional revenue of \$6.9m per year once fully implemented. This would be offset by \$0.9m per year to

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meet the cost of changes to existing systems and processes which would be required to deal with new billing and time recording arrangements.<sup>5</sup>

The following table, drawn from the budget statement, sets out the proposed schedule of fees and charges for ITSA at the time of the review as well as the levels of fees and charges that were in place at the time of the review.

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SCHEDULE OF FEES AND CHARGES						
Activity	Method of recovery	Volume of activity	Current price	Cost recovery price	Total cost of activity (\$m)	
1.1	Policy, legislation reform and support to ministers	Budget funded	N/A	Free of charge	Free of charge	0.80
1.2	Indemnity of funding for trustees – Section 305	Budget funded	60 matters	Free of charge	Free of charge	0.60
2.1	◦ Processing of debtor's petitions and debt agreement proposals	Budget funded	20,000 DPs 6000 DAs	Free of charge	Free of charge	6.50
	◦ Processing the filing of a PIA	Fee for service	300 PIAs	\$300 per lodgement	\$400 per lodgement	0.12
2.2	Issue of Bankruptcy Notices	Fee for service	7600 Notices	\$300 per notice	\$400 per notice	3.04
2.3	Issue of Official Receiver notices, eg s77AA, s77C, s139ZQ, s13s9ZL; and OR taxing of costs	Fee for service	675 Notices	\$145 to \$285 per hour depending on level of staff utilised	\$400 per notice + \$200 per hr if time required is in excess of 2 hrs	0.70
2.4	◦ NPII searches at ITSA offices	Fee for service	19,000 searches	\$21 per search	\$22 per search	0.42
	◦ NPII searches via information brokers	Fee for service	193,000 searches	\$10 per search + \$2 per extract	\$14 per search	2.70
	◦ Inspecting documents	Fee for service	900 Inspections	\$20 per inspection + \$2 per copy	\$20 per inspection + \$2 per copy	0.02
	◦ Personal Insolvency Reporting Service	Fee for service	151,000 new records	\$1.62 per record + maintenance charges	\$1.62 per record + maintenance charges	0.24
2.5	Regulation of Trustees: Information and education	Cost of \$0.2m to be recovered through the levy (item 7 below)				
3.1	Regulation of Trustees: Monitoring and Compliance	Cost of \$1.8m to be recovered through the levy (item 7 below)				
3.2	Regulation of Trustees◦ Interviewing registered trustee applicants	Fee for service	12 interviews	\$1,500	\$2000 per application	0.02
	◦ Initial registration of trustee	Fee for service	11 initial registrations	\$1,000	\$1,200 per application	0.01
	◦ Renewal of trustee registration	Fee for service	60 renewals per annum	\$1,000 every three years	\$1,200 every three years	0.07

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Activity	Method of recovery	Volume of activity	Current price	Cost recovery price	Total cost of activity (\$m)	
3.3	Inspector General reviews	Cost of \$0.5m to be recovered through the levy (item 7 below)				
4.1	Administration of estates with potential assets	Cost of \$4.9m to be recovered through the levy (item 7 below)				
4.2	Administration of bankrupt estate and special administrations – Official Trustee	Fee for service	40,000 Hrs	\$4500 flag fall + 16.26% of realisations between \$4500 to \$50,000 +10.84% thereafter	Activity/time based charges with some charges based on value of the estate	7.70
5.1	Investigation of Bankruptcy Act Offences	Cost of \$1.8m to be recovered through the levy (item 7 below)				
6.1	Proceeds of Crime					
	<ul style="list-style-type: none"> <li>◦ matters which realise assets</li> <li>◦ matters which do not realise assets</li> </ul>	Fee for service  Budget funded	Over 150 control and forfeiture matters	\$145 - \$285 per hour  Free of charge	\$200 per hour  Free of charge	0.3  1.1
7	Activities undertaken to maintain creditor confidence in the personal insolvency system: <ul style="list-style-type: none"> <li>• Bankruptcy Regulation</li> <li>• Bankruptcy Fraud Investigation</li> <li>• Official Trustee enquiries into select bankruptcy estates</li> <li>• I-G Reviews</li> <li>• Policy information sessions</li> </ul>	Levy on realisations in bankruptcy, DAs and PIAs	Realisations totalling \$140m pa from bankruptcy, DAs and PIAs	8% of all realisations under bankruptcy and PIAs (DAs currently excluded)	6.5% of all realisations under bankruptcy, DAs and PIAs	9.20
Total fee for service					15.04	
Total levy recovered					9.20	
Total budget funded					9.30	
<b>TOTAL</b>					<b>33.54</b>	

Source: *ITSA Cost Recovery Impact Statement*

As noted above, the proposed changes to fee and charge arrangements will raise an additional \$6.9 million for ITSA. As the table indicates, many of ITSA's functions are currently paid for through fees and charges. The review did not suggest that any new fees and charges should be imposed on ITSA's functions. The review has however recommended that there be an increase in current fees and charges.

Since the time of publishing this information in the budget documents, ITSA has refined the proposed new fee and charge arrangements. The revised fees and charges (current at December 2005) are set out in the appendix.

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## General levy on realisations from debt agreements

The cost recovery review had recommended that a general levy should be imposed on debt agreements. Debt agreements first became available to people in financial difficulties in 1996. As the table below indicates, the use of debt agreements has steadily grown and in the 2004-05 financial year made up 18.6% of all personal insolvency administrations. This rise in the use of debt agreements has taken place at the same time as the share of personal insolvency agreements has fallen to 0.8% and bankruptcies to 80.6%.

**TABLE 1: Debt agreements, personal insolvency agreements and bankruptcies as a proportion of all personal insolvency administrations**

	Debt agreements		Personal insolvency agreements		Bankruptcies		Total	
	No.	%	No.	%	No.	%	No.	%
2000-01	1 234	4.8	424	1.5	23 907	93.7	25 565	100
2001-02	3 294	11.8	454	1.6	24 109	86.6	27 857	100
2002-03	4 550	16.5	405	1.4	22 637	82.1	27 592	100
2003-04	5 487	20.8	302	1.2	20 496	78.0	26 285	100
2004-05	4 738	18.6	207	0.8	20 501	80.6	25 446	100

Source: ITSA Annual Report 2004-05<sup>6</sup>

Currently the realisations from bankruptcies and personal insolvency agreements are subject to an 8% levy. The revised fee and charge arrangements proposed to reduce that levy to 6.5% but to also impose a 6.5% levy on realisations from debt agreements.

Some groups were opposed to imposing such a levy on debt agreements. The Law Council of Australia, for example, argued that:

The sub-committee opposes the implementation of any realisation charges upon Debt Agreements as they would tend to undermine the very purpose for which they were first introduced. Such Agreements are of a low order of magnitude of debts and are intended as an efficient system for keeping bankruptcy numbers down and avoiding the cost which would arise from the administration of these estates as bankruptcies'.<sup>7</sup>

Creditors and debt agreement administrators also argued that the imposition of this levy would place a significant additional cost on debt agreements and would deter people from using them.<sup>8</sup>

At the time of the review, however, ITSA argued that debt agreements do require regulatory and compliance work by ITSA and hence should be subject to a levy.<sup>9</sup>

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More recently, the Government has decided to continue with the levy on personal administrations and bankruptcies but to not impose it on debt agreements. In the Second Reading Speech to the Bill, the Attorney-General stated that:

The government has decided not to apply the realisations charge to money received in debt agreements. This will ensure that debt agreements continue to be available as a viable alternative to bankruptcy for many debtors.<sup>10</sup>

The rate of the levy has yet to be determined however the Bill states that the rate must not be more than 15% of realisations.

The money from this levy will be used to fund ITSA functions such as monitoring and investigating complaints against insolvency practitioners,<sup>11</sup> providing an information service<sup>12</sup>, Inspector General reviews,<sup>13</sup> and investigation of bankruptcy offences.<sup>14</sup>

### Setting of fees and charges

Currently fees and charges are set either through legislation or regulations. The Bill changes this arrangement so that all fees and charges will now be set by way of legislative instrument made by the Minister.

The explanatory memorandum to the Bill explains that this ‘will provide the responsiveness and flexibility required to enable effective and fair cost recovery for services supplied to stakeholders’.<sup>15</sup>

The legislative instruments have not been exempted from the *Legislative Instruments Act 2003* and hence will be ‘disallowable instruments’ for the purposes of that Act.

## Main provisions

**Schedule 1, parts 1 and 2** amend the *Bankruptcy Act 1966* so that fees for different services under the Act can be set by a legislative instrument by the Minister. Currently these fees are set through regulations.

**Schedule 2** amends the *Bankruptcy (Estate Charges) Act 1997* so that the Minister will set the percentage amount of the levy on personal administrations and bankruptcies by legislative instrument under that Act. Currently the amount of the levy is set by way of regulation. Schedule 2 also removes the minimum levy amount of 8% but retains the maximum amount of 15%.

**Schedule 3** repeals the *Bankruptcy (Registration Charges) Act 1997*. Fees that were set under this act will now be set under the *Bankruptcy Act 1966*.

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**Schedule 4** makes some minor technical amendments to the *Bankruptcy Act 1966*. In particular, the amendments will help ITSA deliver their services electronically.

## Concluding comments

This Bill implements cost recovery measures for the Insolvency and Trustee Service Australia. The Bill follows on from a review of the current cost recovery arrangements of ITSA. It is proposed that the new cost recovery arrangements will increase the proportion of ITSA's costs which are recovered in fees and charges from 58% to 72%.

The Bill does not set out what the new fees and charges for ITSA will be. Rather it creates a series of legislative instrument making powers for the Minister to set the fees and charges. Any legislative instruments made by the Minister under these powers will be disallowable by Federal Parliament. The fees and charges will be reviewed every two years in consultation with stakeholders.

## Endnotes

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- 1 Productivity Commission, *Cost Recovery by Government Agencies Inquiry Report*, Report No. 15, 16 August 2001, Ausinfo, Canberra, 2001, p. xxxii.
- 2 *ibid.*
- 3 *Commonwealth Cost Recovery Policy* Media Release, Senator Nick Minchin, Minister for Finance and Administration, 4 December 2002.
- 4 Insolvency and Trustee Service Australia, *Budget Papers 2005-06*, p. 384.
- 5 *ibid.*
- 6 Insolvency and Trustee Service Australia, Annual Report 2004-2005, Canberra, 2005, p. 17.
- 7 Law Council of Australia, 'Submission to the Insolvency and Trustee Service Australia Cost Recovery Review', 24 January 2005.
- 8 Discussions with ITSA, March 2006.
- 9 Insolvency and Trustee Service Australia, *Cost Recovery Impact Statement*, February 2005, p. 19.
- 10 *Bankruptcy Legislation Amendment (Fees and Charges ) Bill 2005 Second Reading Speech*.
- 11 *ibid.*, p. 5–6.
- 12 *Ibid.*, p. 5.
- 13 *ibid.*, p. 6.

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14. *ibid.*, p. 9.
15. *Bankruptcy Legislation Amendment (Fees and Charges) Bill 2005 Explanatory Memorandum*, p. 3.

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## Appendix Schedule of Fees and Charges

1. CR Ref.	2. ACTIVITIES	3. CR Price (\$m)	4. Per unit price (All fees for the Official Trustee attract GST and prices quoted are GST inclusive.)	5. Volume at initial CR review	6. Actual volume during 04/05	7. Estimated volume 05/06	8. Recommended volume	9. Revenue based on recommended volume + adjusted RC & OT fee rate	
	<b>Policy &amp; Legislative Reform</b>							<i>\$m</i>	
1.1	Policy, legislation reform and support to ministers	0.80	N/a	N/a	N/a	N/a	N/a	0.80	Budget
1.2	Funding of trustees - Section 305	0.60	N/a	80	56	60	60	0.60	Budget
		<b>1.40</b>						<b>1.40</b>	
	<b>Bankruptcy Registry &amp; Compliance</b>								
2.1	Processing Debtor Petitions and DA proposals	6.50	N/a	26000	27441	29000	<b>30000</b>	<b>6.50</b>	Budget
2.1	Processing PIAs	0.12	\$400 per proposal	300	206	200	<b>200</b>	<b>0.08</b>	Fee
2.2	Issue of Bankruptcy Notices	3.04	\$400 per notice- cost composition	7600	9100	12000	<b>11000</b>	<b>4.40</b>	Fee
			<i>Cost of processing \$135</i>					1.48	
			<i>Contribution to cost of insolvency system \$265</i>					2.92	
	Extension of Bankruptcy Notices		\$100 per extension		455	600	<b>550</b>	<b>0.06</b>	Fee
2.3	Issue of Official Receiver Notices	0.70	\$400+ \$200/hr if > 2hrs	675	500	870	<b>700</b>	<b>0.28</b>	Fee
2.4	NPII searches at ITSA offices	0.42	\$22 per search	19000	14400	12000	<b>10000</b>	<b>0.22</b>	Fee
2.4	NPII searches - broker service	2.70	\$14 per search	193000	223500	244000	<b>240000</b>	<b>3.36</b>	Fee
2.4	Personal Insolvency Reporting Service	0.24	\$1.62 per record + maintenance charges	151000	167000	170000	<b>170000</b>	<b>0.28</b>	Fee
2.4	Inspection of public documents	0.02	\$20 per inspection + \$2 per copy	900	500	500	<b>500</b>	<b>0.01</b>	Fee

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	Taxation of trustee remuneration & costs		\$200 per hour				15	0.06	Fee
		<b>13.74</b>						<b>15.24</b>	
	<b>Bankruptcy Regulation</b>								
2.5	Regulation of Trustees - information & education	0.20	N/a	205	205	205	205	0.20	RC
3.1	Regulation of Trustees - monitoring, complaints etc	1.80	N/a	N/a	N/a	N/a	N/a	1.80	RC
3.2	Regulation of Trustees - interviewing applicants	0.02	\$2000 per application	12	9	8	8	0.02	Fee
3.2	Regulation of Trustees - registration	0.01	\$1200 per registration	11	7	7	7	0.01	Fee
3.2	Regulation of Trustees - renewal of registrations	0.07	\$1200 every 3 yrs	60	70	70	70	0.08	Fee
3.3	Inspector General reviews	0.50	N/a	98	71	80	80	0.50	RC
		<b>2.60</b>						<b>2.61</b>	
	<b>Estate Administration</b>								
4.1	Administration of fee paying bankruptcies*	7.70	* \$3000 + 20% of realisations	2150	2136	2100	2100	8.65	Fee
4.2	Administration of non fee paying bankruptcies	4.90	N/a	2300	2272	2300	2300	3.00	RC
	Administration of s73 compositions & PIAs	0.00	20% of proposal amount	0	27	24	25	0.02	Fee
	Administration of OT administered DAs	0.00	20% of proposal amount	0	787	750	500	0.01	Fee
	Administration of special estates (eg Child Support)	0.00	\$200 per hour	0	11	15	15	0.01	Fee
	Administration of s188 Authorities & s50 orders	0.00	\$200 per hour	0	0	5	10	0.01	Fee

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		<b>12.60</b>						<b>11.70</b>	
	<b>Bankruptcy Fraud Investigation</b>								
5.1	Investigation of bankruptcy offences	1.80	N/a	697	629	800	<b>800</b>	<b>1.80</b>	RC
		<b>1.80</b>						<b>1.80</b>	
	<b>Proceeds of Crime</b>								
6.1	Proceeds of crime - matters which realise assets	0.30	\$200 per hour	100	120	130	<b>130</b>	<b>0.20</b>	Fee
6.1	Proceeds of crime - matters with no assets	1.10	N/a					<b>1.10</b>	Budget
		<b>1.40</b>						<b>1.30</b>	
		<b>33.54</b>	<b>TOTAL COST OF OUTPUTS</b>					<b>34.05</b>	
			<b>Funding source reconciliation</b>						
		9.20	Realisations Charge @ 6.5% on bankruptcies, s73 & PIAs			(note 2)	\$114M	<b>7.30</b>	
		9.00	Total Budget funded					<b>9.00</b>	
		15.32	Total fee funded					<b>17.75</b>	
1a.	The Official Trustee's fees for the administration of bankruptcies was initially proposed at a flag fall rate of \$4,500 + 16% of realisations up to \$100K and 12% of realisations thereafter. Based on cost data that has now been collected, the \$4,500 flag fall rate appears to be excessive and not reflective of the costs of undertaking preliminary enquiries in estates. It is proposed that the flag fall be set at \$3000 and a flat 20% fee (incl. GST) be imposed on any realisations in that estate. This fee structure is a better reflection of the cost of administering a typical estate.								
1b.	There are occasions where an administration may be transferred between the Official Trustee and a Registered Trustee. In those instances, the Official Trustee's fees will continue to be determined based on an agreement with the Registered Trustee. The fees that the OT will be claiming in those instances will be the value of the work performed up to the date of the transfer.								
1c.	If the administration of a bankrupt estate requires the Official Trustee to manage an ongoing business, it is proposed that an additional fee of \$200/hr (plus GST) will apply for the time that is spent in managing the business.								

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