Australian Government
Australian Financial Security Authority

OFFICIAL RECEIVER PRACTICE STATEMENT 4

Setting up a personal insolvency agreement

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PERSONAL INSOLVENCY

Our vision: To be a firm and fair regulator and world-class government service provider that delivers improved and equitable financial outcomes for consumers, business and the community.

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INTRODUCTION

What is a personal insolvency agreement?

A personal insolvency agreement ("PIA") under Part X of the *Bankruptcy Act 1966* is a flexible way for a debtor to come to an agreement with his or her creditors to settle debts without becoming bankrupt.

A PIA may involve:

- a lump sum payment to creditors via the trustee either from the debtor's own money or money from a third party or parties (for example, from family or friends)
- an assignment to the trustee of assets to be sold, with the net proceeds distributed to creditors or the payment of the sale proceeds of assets paid to the trustee for distribution to the creditors
- periodic payments to the trustee to be distributed to creditors.

Insolvency

A debtor must be insolvent to propose a PIA. Section 5 of the Bankruptcy Act provides the following information regarding solvency and insolvency:

*"(2) A person is **solvent** if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.*

*(3) A person who is not solvent is **insolvent**."*

No income, asset or debt limits

Unlike debt agreements, there are no income, asset or debt limits applicable to debtors who wish to propose PIAs.

Disqualification from managing corporations

A debtor who enters into a PIA is precluded from managing a corporation until compliance with all of the terms of the agreement has been satisfied, except with the leave of the court (see subsection 206B(3) of the *Corporations Act 2001*). A debtor may therefore put forward a proposal that can be accepted and complied with in a short term to limit the period of ineligibility.

Cost of setting up a PIA compared with a debt agreement

Generally, the cost of setting up a PIA is much more than that of setting up a debt agreement under Part IX of the Bankruptcy Act. This is due to the extensive nature of enquiries, investigations and actions that have to be undertaken in a very short period of time in order to report to creditors on the proposed agreement.

Forms

The forms required in the personal insolvency agreement process are available in the Personal insolvency agreement and instructions pack available on AFSA's website. The forms are available individually on the PIA forms page of AFSA's website.

Scope of this practice statement

This practice statement sets out the process followed by the Official Receiver in registering the initiating documents for a PIA and updating the National Personal Insolvency Index ("NPII") as the administration progresses. It has been prepared to provide detailed information for debtors, creditors and insolvency practitioners. If you would like more general overview of the process, you may wish to read the PIA information on AFSA's website.

This practice statement is set out in four sections. The first three sections set out the three basic stages of a PIA and the fourth section deals with various exceptions/problems that may arise during the life of a PIA, as well as variation or termination of a PIA.

Filing requirements

The documents required to be filed during the various stages of the PIA process are sequentially noted **a)** through to **n)** within the document.

Role of the Inspector-General in Bankruptcy

The Inspector-General in Bankruptcy has the power to monitor the progress of PIA proposals and may attend creditors' meetings. Relevant information about the role of the Inspector-General, which is performed by AFSA's Enforcement and Practitioner Supervision division, has been published in Inspector-General Practice Statement 11 – Monitoring and inspection of bankruptcy trustees and debt agreement administrators.

1. STAGE ONE

Debtor appoints a controlling trustee and gives a proposal

1.1. The PIA process commences when the debtor appoints a controlling trustee by signing a controlling trustee authority form and provides the controlling trustee with a statement of affairs and a draft PIA that details the proposal for settling his or her debts. By appointing a controlling trustee, the debtor effectively hands control over his or her property to the trustee.

1.2. The control over the debtor's property becomes effective once the controlling trustee accepts the appointment by signing the controlling trustee authority form.

1.3. It is recommended that a debtor talk to a controlling trustee before completing any of the documents. A controlling trustee can provide guidance on completing the forms and drafting a PIA and can inform the debtor of his or her rights and obligations.

Forms and documents that must be filed with the Official Receiver at stage one

1.4. Subsection 188(5) of the Bankruptcy Act and subsection 61(2) of the Bankruptcy Regulations 2021 prescribe that, within 2 business days after signing the consent, the controlling trustee must file with the Official Receiver:

a) the completed controlling trustee authority form (which includes the trustee's consent to exercise the powers given by the authority)

b) the debtor's completed statement of affairs form. The Form 3 is the approved form for use.

1.5. The controlling trustee to give to the Official Receiver at the time of calling the meeting of creditors:

c) a copy of the draft PIA proposal (subsection 61(3) of the Bankruptcy Regulations)

d) the PIA proposal checklist, which is designed as an aid to the debtor and the controlling trustee in ensuring that the proposed PIA contains all the elements that are prescribed by legislation, must be filed.

1.6. A fee is payable to the Official Receiver upon lodgment of the above forms/ documents. See the fees and charges page of AFSA's website for the current fee.

Official Receiver's role in registering a PIA proposal

1.7. The Official Receiver may refuse to register the above forms/documents if:

a. the required forms are incomplete and/or an incorrect form(s) has been used
b. the debtor is ineligible to propose a PIA
c. the person appointed as controlling trustee is ineligible
d. the registration fee has not been paid.

Checking eligibility of the debtor – previous proposals

1.8. A debtor cannot give a controlling trustee authority within 6 months of giving an effective controlling trustee authority (pursuant to subsection 188(4) of the Bankruptcy Act). The 6 months begins from the date the debtor signed the authority (the "date of authority").

1.9. The Official Receiver will advise the debtor by letter that he or she is unable to present a controlling trustee authority. The controlling trustee that consented to act under the authority will also be advised.

Checking eligibility of the debtor – Australian connection

1.10. A debtor may only give a controlling trustee authority if he or she has an Australian connection. To satisfy the Australian connection test, a debtor must:

i. be personally present or ordinarily resident in Australia
ii. have a residence in Australia that he or she uses or has used and may use as a residence, and to which he or she may "repair at their whim at any time",[1] or
iii. have a business connection with Australia (i.e. the debtor carries on business in Australia, either personally or by means of an agent or manager) or be a member of a firm or partnership that carries on business in Australia.

1.11. Annexure A contains guidelines regarding determining whether a person can be considered ordinarily resident in Australia, to have a "dwelling-house" in Australia or to be operating a business in Australia.

1.12. Where a debtor is unable to satisfy the Australian connection test, the debtor is ineligible to sign a controlling trustee authority. In this situation, the authority is ineffective and no record is entered on the NPII. An administrative record of the presentation of the documents and the reason for the debtor's inability to present an authority is created, and an electronic image of the documents is retained by the Official Receiver as part of the administrative record.

Checking eligibility of the controlling trustee

1.13. The controlling trustee can be a registered trustee, an eligible solicitor or the Official Trustee.

- **REGISTERED TRUSTEE**: any registered trustee can be appointed as a controlling trustee.
- **SOLICITOR:** pursuant to section 49 of the Bankruptcy Regulations, a solicitor is required to be a full member of the Australian Restructuring Insolvency and Turnaround Association or to have satisfactorily completed a course in insolvency approved by the Inspector-General in order to be eligible to be a controlling trustee. If the proposed solicitor controlling trustee is unknown to

[1] The phrase is derived from *Mathai v Kwee* [2005] FCA 932 per Graham J. See annexure A for more details about this case

the Official Receiver, a statement of eligibility and evidence is required before the proposal can be registered.

- **OFFICIAL TRUSTEE:** the Official Receiver (or delegate) is required to sign the controlling trustee authority form where the Official Trustee is to be appointed as the controlling trustee. However, the Official Receiver does not normally consent to such an appointment and debtors are requested to seek the consent of a registered trustee or eligible solicitor.

1.14. If the controlling trustee is ineligible, the authority is ineffective and no record is entered on the NPII. The debtor and ineligible party will be advised in writing. An administrative record of the presentation of the documents is created and the electronic image of the documents is retained by the Official Receiver as part of the administrative record.

Pending creditor's petition

1.15. Where there is a creditor's petition on foot in the Federal Court or Federal Circuit Court ("the court") and a controlling trustee authority given by the debtor becomes effective, all proceedings in respect of the creditor's petition are stayed (pursuant to section 189AAA of the Bankruptcy Act) until a meeting of creditors called under the authority is concluded or adjourned, whichever is sooner.

1.16. The Official Receiver will notify the court and the petitioning creditor of the lodgment of an effective controlling trustee authority.

1.17. Note that the 12-month life of a creditor's petition (see subsection 52(4)) is not affected by section 189AAA of the Bankruptcy Act. Therefore, if the 12-month period expires while the stay under section 189AAA is in operation, the creditor's petition still lapses. Further, section 189AAA precludes the petitioning creditor from applying to the court for an extension of the life of the creditor's petition while the stay is in place.

Filling of vacancy in office

1.18. The Official Trustee is automatically appointed as controlling trustee in certain limited circumstances (for example, if the previous trustee dies or otherwise becomes ineligible, as per subsection 192(1) of the Bankruptcy Act).

2. STAGE TWO

Controlling trustee makes enquiries and prepares a report

2.1. The controlling trustee makes extensive enquiries into the debtor's affairs and then compiles a comprehensive report to creditors. The report includes a comparison of the return that creditors can expect from the proposed PIA and the return they could expect to receive if the debtor became bankrupt.

2.2. The controlling trustee is required to inform creditors whether the trustee believes that creditors' interests would be better served by accepting the debtor's proposed PIA or by the bankruptcy of the debtor. The courts have held that the report should specify an approximate rate of return to creditors, for example 60 cents in the dollar. The controlling trustee normally makes a recommendation to creditors in the report concerning the merits or otherwise of the proposed PIA.

Controlling trustee convenes a creditors' meeting

2.3. A creditors' meeting must be held not more than 30 business days from the date the controlling trustee accepted the appointment (pursuant to Insolvency Practice Rule 75-27). Not less than 10 business days' notice of the meeting must be given (Insolvency Practice Rule 75-20).

2.4. The controlling trustee must send creditors a copy of each of the following documents (Insolvency Practice Rule 75-27):

- the debtor's statement of affairs
- the controlling trustee's report and declaration of relationships required by section 189A of the Bankruptcy Act
- the controlling trustee's statement required by section 189B of the Bankruptcy Act about special resolutions reasonably expected to be passed at the meeting.

2.5. At the meeting, creditors vote whether to accept the debtor's PIA proposal. For the proposal to be accepted, it must be passed by a special resolution – that is, a majority in number and at least 75 per cent in debt value of the voting creditors must vote in favour (pursuant to subsection 204(1) of the Bankruptcy Act).

2.6. If the creditors vote by special resolution to accept the proposal, they must appoint a trustee to administer the terms of the agreement. This trustee is usually the same person who was appointed as the controlling trustee by the debtor (where the controlling trustee was a registered trustee) but creditors may appoint another trustee. Only a registered trustee or the Official Trustee can be the trustee of a PIA.

2.7. If the creditors decide not to accept the PIA proposal they can, by special resolution, decide to either hand back control of the debtor's property to the debtor or require him or her to present a debtor's petition within 7 days from the date the

special resolution is passed (see subsection 204(1) of the Bankruptcy Act). It is important to note that, unless the creditors resolve to hand back control of the property to the debtor, the property of the debtor remains under the control of the controlling trustee until:

- the expiry of 4 months from the date the controlling trustee authority became effective
- until the debtor becomes bankrupt
- until the debtor dies
- until the court releases the property from control,

whichever event happens sooner.

Forms and documents that must be filed with the Official Receiver at stage two

2.8. The controlling trustee is required to give to the Official Receiver the following:

e) a copy of the controlling trustee's report and declaration of relationships required under section 189A

f) a copy of the controlling trustee's statement under section 189B in relation to special resolutions expected to be passed at the meeting.

Following the creditors' meeting

2.9. If a special resolution is passed at the meeting of creditors, the controlling trustee must give to the Official Receiver within 7 days after the date on which the resolution was passed:

g) notice of special resolution(s) passed at a meeting of creditors (with copies of the resolution(s)) (see section 62 of the Bankruptcy Regulations)

h) consent of the PIA trustee (only applicable if creditors resolve to accept the proposal) (see section 215A of the Bankruptcy Act).

2.10. If a special resolution is passed requiring the debtor to execute a PIA, the resolution must specify the provisions to be included in the agreement (see subsection 204(2) of the Bankruptcy Act). Creditors must also resolve to nominate a trustee or trustees to be trustee(s) of the agreement (see subsection 204(3)).

2.11. If the creditors' meeting is adjourned, the controlling trustee should notify the Official Receiver of the date of the subsequent meeting. It is also recommended practice that the controlling trustee inform the Official Receiver if there was no outcome from the meeting.

Upon ending of the control period

2.12. Within 7 days of a trustee becoming aware of an event that causes the control period to end, the trustee must file with the Official Receiver:

i) written notification that the control has ended (subsection 189(1B) of the Bankruptcy Act).

3. STAGE THREE

A trustee administers the terms of the agreement

3.1. The newly-appointed trustee has the responsibility to ensure that the debtor complies with the terms of the PIA. The trustee receives moneys from the sale of property and/or payments from the debtor or third parties and makes a distribution(s) to creditors. The administration of the agreement can be short or can span several years, depending on the terms of the agreement.

3.2. The PIA must be in the form of a deed and be executed (i.e. signed by the debtor, signed by the trustee and witnessed) within 21 days from the day the special resolution requiring the debtor to execute a PIA was passed (see subsection 216(1) of the Bankruptcy Act). As noted earlier in this practice statement, only a registered trustee or the Official Trustee can be the trustee of a PIA.

Forms and documents that must be filed with the Official Receiver at stage three

3.3. Within 2 days from the execution of the PIA, the trustee must lodge:

j) a copy of the executed PIA (see paragraph 218(1)(b) of the Bankruptcy Act).

Completion of the PIA

3.4. Upon completion of the terms of the PIA and/or finalisation of the administration the trustee must lodge:

k) a Form 19 – Notice of completion, variation, termination or setting aside of a PIA (Part X), composition or scheme of arrangement (Part IV) (see section 53 of the Bankruptcy Regulations).

3.5. If the debtor has requested a certificate relating to realisation of divisible property and non-availability of a dividend, or in relation to the discharge of obligations, the trustee must lodge with the Official Receiver within 5 business days (see section 70 of the Bankruptcy Regulations):

l) a certificate relating to realisation of divisible property and non-availability of dividend

m) a certificate relating to discharge of obligations.

Failure to complete the PIA

3.6. If the debtor defaults under the agreement or fails to execute the agreement, there are legislative provisions for bringing the administration to an end. See part 4 below regarding problems, terminations and variations.

4. PROBLEMS, VARIATIONS AND TERMINATIONS

Failure of trustee to execute PIA

4.1. If the PIA is not executed by the nominated registered trustee, a meeting of creditors can be called by any creditor or the debtor to nominate a replacement registered trustee. The meeting must be called for that purpose and a resolution passed (section 217).

Filling of vacancy in office

4.2. Where a vacancy occurs in the office of the trustee of a PIA, the Official Trustee becomes trustee (subsection 231(5) and section 160 of the Bankruptcy Act and Part 3 of Schedule 3 to the Bankruptcy Regulations). In such instances, the Official Trustee will normally transfer the matter to another registered trustee under section 181A of the Bankruptcy Act.

Debtor fails to attend meeting, execute PIA etc.

4.3. The Inspector-General, a creditor or the controlling trustee may apply to the court to make a sequestration order against the debtor (see section 221 of the Bankruptcy Act) in the following instances:

- the debtor has failed, without sufficient cause, to attend meeting of creditors
- the debtor contravenes subsection 189(2) (that is, removes, disposes of or deals with property without the trustee's consent, does not give trustee information that trustee requires or does not comply with a trustee direction)
- the debtor has failed, without sufficient cause, to execute the PIA within the specified time
- the meeting has not passed one of the special resolutions under subsection 204(1) within 4 months from date the meeting was called.

4.4. If the court makes a sequestration order, the applicant must file the order with the Official Receiver within 2 business days of the order being made (pursuant to section 66 of the Bankruptcy Regulations).

Variation of PIA by resolution of creditors

4.5. The terms of a PIA can be varied during the life of the PIA by a special resolution at a meeting of creditors called for that purpose. Variation of a PIA is provided for by section 221A of the Bankruptcy Act. Normally, the debtor contacts the trustee seeking a variation of the terms and, if the trustee considers the variation to be reasonable, the trustee seeks the approval of creditors. As an alternative to a formal meeting of creditors to consider the variation, the trustee can notify the creditors that the proposed variation to the PIA will take effect on a specified date and inform them that, if they wish to object to the variation, they are required to do so in writing at least 2 days before the specified date. If there are no objections by

creditors, the variation takes effect on the specified date. If a creditor objects, the trustee may hold a meeting for creditors to consider the proposed variation.

Setting aside of PIA by the court

4.6. There are various situations under which the court may set aside a PIA on the application of the Inspector-General, the trustee, a creditor or the debtor. These situations include:

- the terms of the agreement are unreasonable or are not calculated to benefit the creditors generally
- the agreement does not comply with the requirements of the legislation
- the agreement is based on false or misleading information.

4.7. The application for an order to set aside a PIA can only be made before all the obligations that the PIA created have been discharged.

4.8. The application to set aside the PIA may also include an application for a sequestration order.

Termination by the trustee

4.9. The trustee may terminate a PIA by written notice to the creditors if the trustee is satisfied that the debtor is in default (see section 222A of the Bankruptcy Act). The notice must include a statement of the reasons for the termination and its impact on creditors and specify a date on which the termination is to take effect (not less than 14 days after the notice is given).

4.10. The PIA is terminated if the debtor is in default and creditors have not lodged a written notice of objection to the termination at least 2 days before the proposed termination takes effect.

Termination by creditors

4.11. The creditors may terminate a PIA by resolution at a meeting called for that purpose if the debtor is in default and the trustee tabled, before the resolution, a written declaration that the trustee is satisfied the debtor is in default (see section 222B of the Bankruptcy Act).

Termination by the court

4.12. The trustee, a creditor, the debtor or, if the debtor has died, the person administering the estate of the debtor may apply to the court to terminate a PIA (see section 222C of the Bankruptcy Act). The court may make an order terminating the PIA if it is satisfied that:

- the debtor or, where the debtor had died, the person administering the estate has failed to carry out or comply with a term of the PIA
- the PIA cannot be proceeded with without injustice or undue delay
- for any other reason the PIA ought to be terminated.

4.13. The application to terminate the PIA may include an application for a sequestration order against the debtor.

4.14. Should a sequestration order be made, it is required to be filed with the Official Receiver.

4.15. The making of an application for a sequestration order is taken to be equivalent to the presentation of a creditor's petition (but the requirements relating to creditors' petitions in subsections 43(1), 52(1) and 52(2) and sections 44 and 47 of the Bankruptcy Act do not apply).

Termination by occurrence of a terminating event

4.16. A PIA is "automatically" terminated if it includes a provision for termination on the happening of a specified event (for example, loss of employment for a period exceeding 3 months, death of the debtor etc.) and the event occurs.

Forms and documents that must be filed with the Official Receiver

4.17. Upon variation, termination or setting aside of a PIA, the trustee must lodge:

n) a Form 19 – Notice of completion, variation, termination or setting aside of a PIA (Part X), composition or scheme of arrangement (Part IV) notifying the Official Receiver of the variation/termination/ setting aside of the PIA.

4.18. Where a PIA is terminated or set aside by the court, the Official Receiver must be given a copy of the court order by the person who applied to the court within 2 business days of the making of the order (see section 66 of the Bankruptcy Regulations). The notification requirement does not apply where the applicant to the court was the Official Trustee or Inspector-General in Bankruptcy. The notification is used to update the status of the administration on the NPII.

ANNEXURE A – AUSTRALIAN CONNECTION

Subsection 55(2A) of the Bankruptcy Act states:
"The Official Receiver must reject a debtor's petition unless, at the time when the petition is presented, the debtor:
(a) was personally present or ordinarily resident in Australia; or
(b) had a dwelling-house or place of business in Australia; or
(c) was carrying on business in Australia, either personally or by means of an agent or manager; or
(d) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager."

When is a debtor considered to be "ordinarily resident"?

The term "ordinarily resident" is not defined in the Bankruptcy Act. There is no common list of criteria that can be used to determine whether a person is ordinarily resident. Every case needs to be assessed based on the debtor's individual circumstances.

There are case law decisions that assist in deciding whether a debtor can be said to be ordinarily resident in Australia and, in general terms, these cases provide that:

- the concept of "ordinarily resident" cannot be stated in definite terms
- each case must be determined on its facts and after taking into account all relevant matters
- the concept of "ordinary residence" connotes a place where in the ordinary course of a person's life he or she regularly or customarily lives and there must be some element of permanence (contrasted with a place where the debtor stays only casually or intermittently)
- a person may be "ordinarily resident" in more than one country at a given time.

The requirement to have both "*a place where in the ordinary course of a person's life he regularly or customarily lives*" and "*some element of permanence, to be contrasted with a place he stays only casually or intermittently*" was outlined in the case *Mathai v Kwee* [2005] FCA 932, where the court found that there is a difference between simply being "resident" in Australia and being "ordinarily resident" and that being "ordinarily resident" connotes more than just owing a house in Australia. The court ruled that Mr Mathai was ordinarily resident in Australia at the time of his act of bankruptcy, notwithstanding that he:

- held a Malaysian driver's licence
- held a Malaysian identity card
- held both Malaysian and Australian passports
- did not hold an Australian Medicare card
- was a Malaysian taxpayer
- was involved in the affairs of the Cathedral of St John in Kuala Lumpur
- spent much of each year living overseas (in accommodation owned by friends).

The court found that, even when the above points were considered, Mr Mathai also had an element of permanence to his residency in Australia that was evidenced by:

- his keeping of a wardrobe of clothes at his Australian address was strongly indicative of an ordinary residence
- a spontaneous response from Mr Mathai where he named his Australian residence as "home"
- having unrestricted access to a property in Australia and paying for the maintenance of that property
- while absent from Australia, there was an intent to return to the relevant residence (i.e. the property had not been abandoned).

In *Gainsford v Tannenbaum* [2012] FCA 904, the court examined the closely-related concept of "habitual residence". The court relied on *LK v Director-General, Department of Community Services* [2009] HCA 9 (11 March 2009), in which the High Court considered that "the ordinary meaning of the composite expression" is to be regarded as a question of fact. The High Court accepted that "[h]abitual residence…identifies the centre of a person's personal and family life as disclosed by the facts of the individual's activities" (paragraph 25).

Other case law

Other relevant case law includes:

- *Re Kenneth Dudley Taylor v Natwest Australia Bank Limited* [1992] FCA 505 (16 October 1992)
- *Re Ian James Meredith Ex Parte: Commonwealth Bank of Australia* [1993] FCA 101 (19 March 1993)
- *Anthony Ginnane Ex Parte: Diners Club Limited* [1993] FCA 413 (30 August 1993).

The Official Receiver can look at a range of relevant factors to determine whether or not the person was "ordinarily resident", at the relevant time, according to the ordinary meaning of that term. Some of these factors include:

- the nature and scope of a person's ties to Australia (friends/relatives)
- the amount of time the debtor has spent within and outside Australia during the period in question and also the frequency of visits
- the reason/s for the debtor travelling overseas
- the extent to which the debtor has (and could) become attached to his or her new place/country of residence
- residency status of the individual (e.g. immigrant, work permit periods and conditions, study visa etc.)
- the nature and scope of any continued business dealings or commitments within Australia
- whether the debtor has retained any property in Australia (particularly places of residence).

Some useful advice can also be obtained from other agencies' residency material including the Australian Taxation Office (Taxation Ruling IT 2650: Income Tax: Residency – Permanent place of abode outside Australia).

When is a debtor considered to have a "dwelling-house"?

The term "dwelling-house" is not defined in the Bankruptcy Act. Although there are some similarities between having a dwelling-house and being ordinarily resident in Australia, the issue of whether a debtor has a dwelling-house in Australia should be considered on its own because, if a debtor does have a dwelling-house, he or she will have met the requirements of the Bankruptcy Act.

The main difference between being ordinarily resident in Australia and having a dwelling-house is that having a dwelling-house focuses on the rights that an individual has to occupy or otherwise use a house if he or she wants to. For example, if an individual is away from his or her dwelling-house for a temporary purpose but has an intention to return, he or she may still have a dwelling-house. However, if an individual has the right to reoccupy a dwelling-house but has abandoned its use as a residence, it is likely that he or she will not have a dwelling-house.

There is no common list of criteria that can be used to determine whether a debtor has a dwelling-house. Each situation needs to be assessed based on the debtor's individual circumstances.

In the case of *Mathai v Kwee* [2005] FCA 932 (discussed above), the court ruled that the debtor had a dwelling-house because:

- he was involved in the purchase and finance of the relevant house
- the house was a nominated as his intended address
- he declared that he "lived" in Victoria and intended to return
- he maintained a wardrobe at the home
- it was undoubtedly his wife's "home", he was in frequent contact with her in relation to family matters and he did not need permission to stay there
- he used the house as his residence when in Australia.

When is a debtor considered to be "carrying on business"?

One of the more difficult decisions for the Official Receiver can be whether to accept a debtor's petition where the debtor's only connection with Australia is "carrying on a business". This is not a particularly unusual situation – affordable air travel and modern communications technology make it possible for Australians to conduct business here while residing offshore. Such arrangements can be further complicated if a debtor conducts business through a company or multiple companies (see *Commonwealth Bank of Australia, in the matter of Oswal v Oswal* [2013] FCA 391 (13 April 2012)[2]).

Where a debtor conducts business through a company structure, it can be difficult to know whether it is the company or the debtor who is carrying on a business in Australia. This is because, at law, a company is an entity in its own right and hence debtors relying upon company structures to conduct business may not have the requisite connection with Australia to declare bankruptcy by a debtor's petition.

[2] In this case, the question considered was the jurisdictional foundation for the making of a sequestration order and whether this would arise under subparagraph 43(1)(b)(iii) of the Bankruptcy Act

However, even if a reasonable degree of information is provided in the debtor's petition, it still may not be obvious whether the debtor is carrying on a business and is utilising a company or companies to do so. Fortunately, Australian courts have given some guidance.

Australian courts have followed a line of authority commenced in 1978 in the English Court of Appeal decision *Re Brauch; ex parte Britannic Securities & Investments Ltd* [1978] Ch 316. This decision established a company's actions are not acts of the debtor, but can form part of a debtor's overall business activity. The court bankrupted a property developer who resided in the Channel Islands but frequently stayed in English hotels to engage in property speculation. The developer used a separate company structure for each property purchase (90 of them). The court decided it was not sufficient to show the developer simply controlled the companies by being the director or owner – what was important was whether the developer was applying the companies toward an overall business purpose of his own. In this instance, the developer was applying the multiple companies toward an overall business of purchasing and developing property.

In summary, it is not a simple process to confirm whether a debtor is carrying on a business where company structures are employed. Decision-makers need to assess the debtor's petition to determine whether it shows a debtor carrying on business in his or her own right – even where a company or companies are used. Or, to put it another way, whether the information in the debtor's petition shows the company's business is actually part of an overarching business conducted by the debtor. If the information included in the debtor's petition is too scant or incomplete to base a decision upon, then the petition must be rejected.

However, each case needs to be considered on its own merits and there are exceptions which can come in to play. Some of these exceptions are:

- where a debtor receives a salary from a corporate structure as an employee, he or she is not carrying on a business for the purpose of accepting a debtor's petition
- if the corporate structure which the debtor was operating, still owes money and a winding up order has been made, then there may not be sufficient business activity to say the debtor is carrying on a business for the purpose of accepting a debtor's petition.

Evidence Australian courts have considered when deciding whether a debtor is carrying on a business includes whether the debtor:

- held director, secretary or other company officer positions
- was a sole shareholder in the company
- offered financial guarantees to the company.