Australian Government

Australian Financial Security Authority

OFFICIAL RECEIVER PRACTICE STATEMENT 1

DECLARATION OF INTENTION TO PRESENT A DEBTOR'S PETITION

Date issued October 2007
Date last updated 25 November 2014

If you have any comments, suggestions or queries about an issue referred to in this practice statement, please contact the National Manager, Insolvency and Trustee Services, at registry@afsa.gov.au.

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1. INTRODUCTION

1.1. The *Bankruptcy Act 1966* ("the Act") enables a debtor with unmanageable debt to get immediate and temporary protection from enforcement action by unsecured creditors until the debtor has fully considered his or her options.

1.2. **The temporary stay on enforcement action is for a period of up to 21 days and is available if the debtor presents a declaration of intention ("DOI") to petition for bankruptcy.**

1.3. The debtor may wish to negotiate payment arrangements with creditors during this stay period or alternatively consider formal insolvency options, including bankruptcy.

1.4. This practice statement explains when and how the Official Receiver[1] will accept or reject a DOI and its practical effects on a debtor and creditors.

2. NEED FOR URGENCY

2.1. A debtor who presents a DOI is usually the subject of current debt enforcement action. The Official Receiver will assess and (if the debtor is eligible) accept the DOI as a matter of urgency to prevent an unsecured creditor, sheriff or bailiff from taking any further action. If the debtor is ineligible, the Official Receiver will contact the debtor as quickly as possible to explain the reasons for their ineligibility.

3. FORMS

3.1. The debtor must present a completed declaration of intention form to the Official Receiver. The form includes a statement of the debtor's affairs that requires details about the debtor's income, assets and liabilities.

3.2. The form also contains information, prescribed by legislation, which explains the effect of bankruptcy, its alternatives and sources of further information. The debtor must read this information before signing the declaration.

[1] A reference to the Official Receiver in this paper also refers to a delegate of the Official Receiver

4. CHECKING THE FORMS

Currency of the forms

4.1. The current version of the form must be used. The debtor can check the currency of the forms by looking at the month and year in the bottom left corner of the DOI before presenting it to the Official Receiver. AFSA's website will have the latest versions of the form.

4.2. If an old version of a form is presented, the debtor is advised that old forms cannot be accepted and that a new form must be used. The debtor is contacted by telephone if possible.

4.3. Where an old version of the form has been used and the debtor cannot be contacted quickly, the form is returned to the debtor with a covering letter explaining the reason why the form has been returned. A copy of the current version of the form is also included for the debtor's completion and return.

Completeness of the forms

4.4. A DOI is not considered to be adequately completed unless:

- there is sufficient information to identify the debtor (name, date of birth, current occupation and a contact point)
- the debtor has provided sufficient details about his/her financial affairs (income, assets, liabilities)
- the creditor's addresses and account numbers (where available) are included
- any person authorised by the debtor to represent him/her with creditors has agreed to act in that capacity and has signed the declaration to this effect
- the form is signed and dated by the debtor.

4.5. Where a document(s) is considered incomplete, the Official Receiver will endeavour to contact the debtor by telephone in the first instance to explain the deficiencies in the document(s) and provide an opportunity to the debtor to address them.

4.6. If the debtor cannot be contacted by telephone, the DOI will be returned to the debtor with a covering letter explaining why the form has been returned. The letter should provide sufficient information to allow the debtor to understand what further information is required.

5. ELIGIBILITY CHECK

Australian connection

5.1. Each DOI is checked to ensure that the debtor has an Australian connection. To satisfy the Australian connection test, a debtor must:

a. be personally present or ordinarily resident in Australia
b. have a residence in Australia that they use or have used and may use as their residence, and to which they may "repair at their whim at any time"[2], or
c. have a business connection with Australia (ie 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.

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

5.3. Where a debtor is unable to satisfy the Australian connection test, the Official Receiver will reject the DOI.

NPII check

5.4. If the debtor falls into one of the following categories, which are discussed in more detail below, they will be ineligible to present a DOI:

- the debtor is a party to a current debt agreement or personal insolvency agreement (ie the agreement has not been set aside, terminated or completed)
- the debtor has been served with a creditor's petition that has been presented to the court and that petition has not been withdrawn by the creditor, dismissed by the court or lapsed
- the debtor is subject to a current controlling trustee authority that has not lapsed
- the debtor has signed a controlling trustee authority within the six months prior to the presentation of the DOI
- the debtor has signed a controlling trustee authority within the six months prior to the presentation of the DOI
- the Official Receiver has previously accepted a DOI from the debtor within the previous 12 months.

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

5.5. The Official Receiver will endeavour to contact the debtor by telephone in the first instance to explain the debtor's ineligibility. The debtor will also be informed by letter of the Official Receiver's inability to accept the DOI.

Current debt agreement or personal insolvency agreement

5.6. If the debtor is a party to a current debt agreement or personal insolvency agreement (ie the agreement has not been set aside, terminated or completed) the debtor is ineligible to present a DOI unless the debtor has obtained the leave of the court. It is the debtor's responsibility to obtain the court's permission.

Pending creditor's petition

5.7. If the debtor has been served with a creditor's petition that has been presented to the court and that petition has not been withdrawn by the creditor, dismissed by the court or lapsed (ie after the expiry of 12 months from its presentation), the debtor is ineligible to present a DOI.

Pending debtor's petition

5.8. If the debtor has presented a debtor's petition that has not yet been accepted or rejected by the Official Receiver, the debtor is unable to present a DOI pending the Official Receiver's decision on the acceptance of the debtor's petition.

Current controlling trustee authority

5.9. If the debtor is subject to a current controlling trustee authority that has not lapsed, the debtor is ineligible to present a DOI.

Controlling trustee authority within six months

5.10. If the debtor signed a controlling trustee authority within the six months prior to the presentation of the DOI, the debtor is ineligible to present a DOI. The debtor will be eligible to present a DOI on the expiry of six months from the date on which he or she signed the controlling trustee authority.

Declaration of intention presented within 12 months

5.11. If the Official Receiver has previously accepted a DOI from the debtor within the previous 12 months, the debtor is ineligible to present another DOI.

When a declaration of intention is not accepted

5.12. When the Official Receiver rejects a DOI, an administrative record of the presentation of the documents and the reason for their rejection is created and the electronic image of the documents is retained by the Official Receiver as part of the administrative record.

5.13. The debtor is not afforded protection from creditors in the situation where a DOI is not accepted.

6. EFFECT OF ACCEPTING A DECLARATION OF INTENTION

Upon acceptance

6.1. Upon the acceptance of a DOI by the Official Receiver and upon production of the Official Receiver's signed notice of acceptance, certain debts are frozen and enforcement action by unsecured creditors is suspended for the stay period. A creditor may commence a legal proceeding or take a fresh step in such a proceeding, provided it is not in connection with enforcing a judgment. For the special status of secured creditors in relation to enforcing a judgment, refer to paragraphs 6.3 and 6.4 below.

Frozen debts

6.2. Frozen debts are those debts for which the debtor is personally liable and which would be provable if the debtor had become bankrupt when his or her DOI was accepted by the Official Receiver.

Debts that are not frozen

6.3. Debts that are not frozen include debts arising from a maintenance agreement or order, fines and penalties imposed by courts or HELP debts. These debts are not provable in bankruptcy and hence would not be frozen, or enforcement action stayed, when a DOI is accepted.

Rights of secured creditors

6.4. The rights of secured creditors are not affected by the acceptance of a DOI and there is nothing preventing a secured creditor from continuing to realise or otherwise deal with their security.

Duties of sheriff and court registrar upon notification

6.5. A sheriff must refrain from executing any enforcement process in respect of the debtor's property (unless the sheriff is acting on behalf of a secured creditor and enforcement is on the secured property). Where the sheriff has already executed on the enforcement process but has not paid the proceeds to the creditor/court, the sheriff and/or court registrar is prevented from disbursing those proceeds until the expiry of the stay period. Should the debtor become bankrupt during, or at the end of, the stay period, the proceeds from any execution are handed over to the bankruptcy trustee.

Garnishee orders

6.6. If a person is required to deduct or retain money owing to the debtor based on a garnishee order, then upon receiving notification of the acceptance of a DOI, that person must not deduct or otherwise apply the money that is due to the debtor. Typically this applies to employers who have received garnishee orders from a creditor of the bankrupt.

Stay period

6.7. The stay period commences from the beginning of the day on which the DOI is accepted by the Official Receiver and ends on the occurrence of any of the following events (whichever occurs first):

- 21 days inclusive of the day the DOI is accepted by the Official Receiver
- at the time when a creditor's petition is presented against the debtor
- at the time when the debtor presents a debtor's petition
- at the time when the debtor signs a controlling trustee authority (section 188)
- at the time when a sequestration order is made.

7. RECORDING THE ACCEPTANCE OF A DOI AND ISSUING A NOTICE OF ACCEPTANCE

7.1. Where the Official Receiver is satisfied that the debtor meets the eligibility requirements and the DOI form is current and complete, the Official Receiver sends out a notification of the acceptance of the DOI to the debtor, his/her authorised representative, and all creditors who have been listed on the DOI by the debtor. A copy

of the DOI, as endorsed by the Official Receiver, is also attached to the notification.

7.2. Where a debtor has nominated another person such as their employer or sheriff to receive the notification so that pay deductions or other enforcement action is stopped, a copy of the notification is also sent to such nominated persons.

7.3. The notification contains a unique system generated reference number which can be used by a creditor to verify the document by calling AFSA.

7.4. The fact that the Official Receiver has accepted a DOI is not recorded on the National Personal Insolvency Index.

8. ACCURACY OF INFORMATION ON THE DOI AND STATEMENT OF AFFAIRS

8.1. It is important that the debtor provides correct information about their creditors on the DOI form. The Official Receiver sends out notices to creditors based on the information provided.

8.2. Where the debtor inadvertently omits to include a creditor, the creditor will not be notified of the stay period. Should the debtor subsequently advise the Official Receiver of additional creditors in writing, a notice will be provided to those additional creditors. Additional notices may not be sent where the stay is expected to end within three business days.

8.3. Where a debtor has inadvertently omitted any other material particular in relation to their income or assets, the debtor may advise the Official Receiver in writing of such an omission and a revised notification may be sent to all creditors. A revised notification may not be sent where, in the opinion of the Official Receiver, the omission is not material and is unlikely to affect the general body of creditors, or if the stay is expected to end within three business days.

8.4. The Official Receiver does not verify the information provided by the debtor on the DOI. It is in the debtor's interest to provide correct information about their income, assets and liabilities so that creditors are able to assess the debtor's financial circumstances and consider appropriate settlement/repayment arrangements.

8.5. It is an offence for a debtor to knowingly provide false information regarding their affairs on the DOI form.

8.6. **If prosecuted and convicted of providing false information, a debtor could face imprisonment up to 12 months.**

ANNEXURE A – AUSTRALIAN CONNECTION

Subsection 55(2A) of the 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 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 drivers 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 (ie 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, DOCS* [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).

A summary of *Gainsford v Tannenbaum* can be found in AFSA's December 2012 Personal Insolvency Regulator.

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 (eg 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 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 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)[3]).

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.

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.

[3] 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 Act

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.

A further summary of the Australian connection issue of "carrying on a business" can be found in AFSA's December 2009 Personal Insolvency Regulator.