



**Australian Government**

**Insolvency and Trustee Service Australia**

## **PRACTICE STATEMENT**

### **Exercise of Official Receiver's powers to assist trustees**

Revised 1 July 2010

If you have any comments, suggestions or queries on a matter referred to in this Practice Statement, please contact us at any time by email ([Jerry.White@itsa.gov.au](mailto:Jerry.White@itsa.gov.au)) or by mail addressed to:

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## Introduction

1. The powers of an Official Receiver to obtain entry to premises, direct the production of information and recover assets are far-reaching. The effect on a debtor or an associate may be significant in terms of the disruption to their personal affairs or business.
2. At the same time, the exercise of these powers other than on a sound basis can have an effect on the public perception of the role of the Official Receiver and on the professional reputation of a trustee.
3. The Official Receiver's decision to issue a notice is subject to judicial review by the Federal Court either under the provisions of the Bankruptcy Act or the *Administrative Decisions (Judicial Review) Act 1977*.
4. Accordingly, the decision to issue a notice must be soundly based and directly related to the performance of a trustee's duties under the Bankruptcy Act and at general law.
5. The purpose of this Practice Statement is to explain how the Official Receiver will exercise powers under the *Bankruptcy Act 1966* to assist trustees in the performance of their functions.
6. The powers covered by this Practice Statement are:
  - (a) access by the Official Receiver to books and premises – section 77AA
  - (b) obtaining information and evidence – section 77C
  - (c) requiring a person to pay money to discharge a bankrupt's liability to pay income contributions – section 139ZL
  - (d) requiring a person to pay money where they have received property as the result of a void transaction – section 139ZQ
  - (e) requiring a trustee of an eligible superannuation plan to 'freeze' the interest of a member.
7. This Practice Statement provides:
  - (f) A summary of the principles that apply to the exercise of the Official Receiver's discretion to issue a notice;
  - (g) A brief summary of the practice in relation to withdrawing, amending or accepting conduct as having discharged the requirements of a notice; and
  - (h) A basic structure for an application to issue an Official Receiver notice.
8. These requirements apply equally to registered trustees and the Official Trustee.
9. Any reference to the Official Receiver should be read as including a reference to an officer authorised by the Official Receiver to exercise these powers.

## Access by the Official Receiver to books and premises – section 77AA

10. Section 77AA provides the Official Receiver with full and free access to all premises and books for any purpose of the Act. That would also include a purpose relating to the operation of Part IX (Debt Agreements) and Part X (Personal Insolvency Agreements).

### ***Discretion to access premises***

11. This provides the Official Receiver with a very significant power which must be exercised carefully. Generally, the Official Receiver will exercise this power only where it can be shown that there are no other available options to gain access to the books.
12. The Official Receiver will only exercise the power if satisfied that:
  - (i) access to the books will assist the trustee to perform his or her functions under the Act;
  - (j) there is evidence which suggests that the books are likely to be held on the premises to which access is sought; and
  - (k) the occupier of the premises is not willing to provide the books voluntarily or the trustee demonstrates that making such a request to the occupier would lead to a real risk of the books being removed or destroyed.

### ***Official Receiver's right to remove books***

13. In making application under section 77AA, the trustee should be aware of the operation of the section in relation to the books that are obtained.
14. Subsection 77AA(1C) allows the Official Receiver to remove books from the premises only where:
  - (a) it is not reasonably practicable to make copies of, or take extracts from, the books on the premises; or
  - (b) it would be an unreasonable intrusion on the affairs of the occupier of the premises to remain on the premises to make copies of, or take extracts from, the books.
15. The Official Receiver may obtain the occupier's consent to remove books from the premises.
16. Regardless of whether the occupier consents to the removal of books or not, the Official Receiver will take reasonable steps to determine whether the books are relevant to the bankrupt's examinable affairs prior to removing them from the premises. The Official Receiver will ascertain which books are, or may be, relevant to those examinable affairs rather than take all books which are on the premises.

**Example:** The Official Receiver may decide it is impractical to make copies or, or take extracts from, books on the premises where, for example, the occupier does not have copying facilities or there is no suitable space to set up copying facilities or where the volume of materials to be copied makes it more efficient for this to occur elsewhere.

17. It is for the Official Receiver, and not the trustee, to decide whether books will be removed and will provide the occupier with a receipt for all books removed from the premises.

### **Official Receiver's right to retain books**

18. Where the Official Receiver believes that any books are or may be, relevant to the examinable affairs of a bankrupt, a person who is a party (as debtor) to a debt agreement, a debtor whose affairs are being administered under Part X or a deceased debtor whose affairs are being administered under Part XI, the Official Receiver or officer may keep the books until he or she decides that:
- (a) he or she no longer needs the books; or
  - (b) the books are not relevant to the examinable affairs of any bankrupt, person who is a party (as debtor) to a debt agreement, debtor or deceased debtor.
19. This right to keep books is in addition to the right to remove books from the premises for the purposes of making copies or taking extracts from them.
20. Where the Official Receiver removes books from the premises, the Official Receiver will:
- (a) determine as quickly as possible whether any of them are not needed. The trustee may assist the Official Receiver in making this assessment but it is a matter for determination by the Official Receiver.
  - (b) keep them in the Official Receiver's possession until they are returned to the occupier or provided to the trustee.
  - (c) be responsible for ensuring the books are returned to the occupier in the same condition they were in when removed from the premises.
  - (d) Permit the owner of the books or the occupier of the premises to inspect them at any reasonable time (generally in normal business hours) at the place of business of the Official Receiver (section 77AA(1E)). The Official Receiver will allow this inspection as soon as possible following the person's request.

### **Legal professional privilege**

21. Where the occupier claims that books are subject to legal professional privilege, the owner of the books should, in the presence of the Official Receiver, place them in envelopes or boxes and seal them and give them to the Official Receiver. The Official Receiver cannot determine whether the claim is validly raised.
22. In those circumstances, the Official Receiver will retain the sealed records and make arrangements with the parties for the claim to be determined by a Court. That may take the form of either an application by the Official Receiver or an application by either the trustee or recipient to the Federal Magistrates Court.

### **Returning books and records**

23. As a general rule, the trustee who requested the Official Receiver to access the premises has no right to keep books but will be able to inspect them, make copies and take extracts from them.

24. However, if the books and records obtained belong to the bankrupt (that is, they are the 'property of the bankrupt') they should not be automatically returned to the debtor or occupier. The Act provides that the trustee must take possession of all of the property of the bankrupt including 'deeds, books and documents' (section 129(1)).
25. The Official Receiver will invite the trustee to identify those books which are claimed to be the bankrupt's property and should not be returned.

### **Protection of information – Privacy Act**

26. The Information Privacy Principles (IPPs) contained in the *Privacy Act 1988* apply to the collection and maintenance of information obtained as a result of the exercise of this power. The Official Receiver is obliged to ensure that the information is not disclosed to a third party in a manner contrary to that Act.
27. The information obtained through the exercise of this power will, in the first instance, be available to the trustee on whose application the power was exercised. The template for the Notice to be issued under this section contains specific reference to the disclosure of this information for that purpose.
28. Disclosure of the information to a person other than the trustee must be authorised by the Privacy Act.

### ***Exercising the right to access premises***

#### **Administrative arrangements**

29. Prior to the execution of the Notice, the trustee should alert the Official Receiver to potential difficulties in gaining access prior to the exercise of the power. This may include:
  - (a) the likelihood of any danger to the Official Receiver or accompanying persons during the visit;
  - (b) any practical impediments to gaining access; and
  - (c) an appropriate time to make the visit (for example, if business premises, during opening hours).
30. Where physical obstruction is expected or encountered, the Official Receiver or authorised officer may take whatever steps that are reasonably necessary and appropriate to remove that obstruction and gain access (eg. by forcing open locks on doors). The power to gain full and free access must be used bona fide for the purposes for which it was conferred and should not be excessive in the circumstances of the case (*O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR). The Official Receiver shall restrain from gaining forced access where it is likely to put at risk the safety of the occupants of the premises or the safety of the persons accompanying the Official Receiver.

The Official Receiver may require particular arrangements to be made to address these issues before the visit occurs. The Official Receiver will require the trustee to meet the expenses of any particular requirements deemed necessary to exercise the power effectively.

**Example:** The Official Receiver may request police attendance where any person may be in danger or where forced entry may be required. Where the property is unoccupied or unattended a locksmith may be required. Where the information sought is likely to be available from a computer or database, a person with appropriate qualifications to replicate the database may be required.

31. In addition to potential difficulties to the execution of the Notice, the trustee should also give consideration to other matters:
  - (a) Is it appropriate to bring copying equipment to avoid the need to remove books from the premises?
  - (b) Are arrangements required to remove books from the premises?
32. These arrangements should be made before the visit occurs. The trustee will be required to meet the expense of making these arrangements.

### **Who accompanies the Official Receiver?**

33. Subsection 77AA(1A) provides that the registered trustee who is administering the affairs of the bankrupt or debtor to whose affairs the books relate may accompany the Official Receiver when exercising these powers. The Official Receiver must authorise this in writing.
34. The Official Receiver generally expects the trustee to attend. The Official Receiver will generally refuse to allow the trustee to attend only in exceptional circumstances

**Example:** Where the relationship between the trustee and the bankrupt has deteriorated to such an extent that the trustee's presence may impede the Official Receiver in exercising the right to full and free access, the trustee will be refused permission to attend.

35. Subsection 77AA(1B) allows the registered trustee to bring another person nominated by the trustee. It is not possible for the Official Receiver to be accompanied only by the registered trustee's nominee without the trustee also being personally present. This recognises the significance of the power being exercised at the trustee's request. It is appropriate that the trustee be present personally to support the justification for the Official Receiver exercising the powers.
36. When entering the premises, the Official Receiver or authorised officer must provide to the occupier evidence of the authority under which they are acting and proper photographic identification. Where a registered trustee accompanies the Official Receiver, the Official Receiver must provide to the occupier written authorisation for the trustee to be present. The trustee should also be prepared to provide appropriate identification. It will be helpful if the trustee has explained to the Official Receiver prior to the visit the types of books likely to be held on the premises.
37. At all times during the visit, the trustee will assist the Official Receiver in identifying books to which access is sought. In particular, the trustee will assist the Official Receiver by identifying only those books which are relevant to the performance of the trustee's functions. However, as outlined above, a determination of which books will be removed and retained is a matter for the Official Receiver.

## Requirement to produce books or provide evidence – section 77C

38. Section 77C allows the Official Receiver to issue a notice requiring a person to provide information or attend before the Official Receiver to give evidence or produce books relating to the performance of the Official Receiver's or a trustee's functions under the Act.
39. A notice under section 77C can be issued on any person. However, the Official Receiver will issue a notice only where satisfied that the person has information or can produce evidence or books relating to the affairs of a person whose affairs the trustee is administering.
40. A notice under section 77C can require the person to do any or all of the following:
  - (c) give the Official Receiver information;
  - (d) attend before the Official Receiver to:
    - (i) give evidence relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act; and/or
    - (ii) produce all books in the person's possession relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act.

**Example:** Where a debtor has not filed a Statement of Affairs, a request for information on a Statement of Affairs cannot require the production of a completed Statement of Affairs as it is not a 'book' that can be requested. Accordingly, the Notice should ask for the information sought in the Statement of Affairs form annexed to the Notice rather than asking for a completed Statement of Affairs form. The debtor may choose to provide the information by completing the form, but where the debtor provides that information in another format, he would still comply with the Notice.

41. The Official Receiver will not require a person to do one of these things unless the Official Receiver believes it is necessary in the particular case.

### Conduct of examinations

42. The Official Receiver will preside over the examination. The examination will usually be conducted at an ITSA office or, where this is not possible, another suitable location determined by the Official Receiver.
43. The examination will generally be attended by the Official Receiver, the person being examined and the trustee. Other attendees at the examination are admitted at the discretion of the Official Receiver. The person being examined and the trustee are entitled to legal representation. Where necessary, the Official Receiver will also allow the examination to be attended by interpreters and transcribers.
41. Other parties may be permitted to attend only where there is a clear and compelling reason to conclude that their attendance will assist with the examination. For example, if there is any likelihood of an attendee disrupting or interfering with the examination or otherwise affecting the examination in such a way as to prevent the examinee providing

full and frank answers, they will not be permitted to attend. If there is any likelihood that allowing a party to attend will affect a later examination, they will not be permitted to attend.

**Examples:**

- A trustee applies to examine a bankrupt and her husband about the bankrupt's affairs separately. Allowing the husband to attend the bankrupt's examination may disadvantage the trustee. Any advantage to the trustee of putting the same questions to the bankrupt and her husband without an opportunity for them to discuss their answers will be lost. The Official Receiver would give consideration to excluding the bankrupt's husband from attending the examination
- A trustee applies to examine a bankrupt who was in business with another party. The business did not end amicably. The bankrupt and his business partner have physically threatened one another. The Official Receiver would exclude the bankrupt's business partner from attending the examination.

44. In conducting the examination, the Official Receiver will *inter alia*:
- (a) ensure that the hearing is conducted in an orderly manner and with enough flexibility and informality to ensure full, complete and truthful information to be obtained
  - (b) confine the hearing to the scope of the notice having regard to the performance of the functions of the Official Receiver or the duties of the trustee pursuant to the Act.
  - (c) disallow questions that are outside the scope of the notice or constitute harassment.
45. The Official Receiver may permit an adjournment of the examination either on their own motion or if one is sought by one of the parties to the examination (eg a brief adjournment for personal comfort). The Official Receiver is also entitled to place conditions on the adjournment if required.
46. An audio recording of the examination will be made by the Official Receiver in all cases. A copy of the recording and any notes taken by the Official Receiver will be provided to the examinee and the trustee. Copies are also available to be accessed by a creditor for no fee or a member of the public on the payment of a fee.
47. Transcript will not be provided unless either the trustee or the examinee has arranged for transcription services prior to the examination taking place or a person arranges for the recording to be transcribed after the examination. A copy of the transcript is available to be accessed by a creditor for no fee or a member of the public on the payment of a fee.

**Custody of books**

48. Where a Notice requires the delivery of books, the Official Receiver will:
- (a) issue a receipt for all books at the time they are delivered;
  - (b) retain the books in his or her possession and will allow the trustee access to them to make copies of relevant material; and
  - (c) will return the books to the person as soon as they are no longer required (but see paragraph 45).

## Legal professional privilege

49. Where there is a claim that the books are subject to legal professional privilege, the owner of the books should place them in envelopes or boxes and seal them and deliver them to the Official Receiver. The Official Receiver cannot determine the validity of the claim.
50. In those circumstances, the Official Receiver will retain the sealed records and make arrangements with the parties for the claim to be determined by a Court. That may take the form of either an application by the Official Receiver or an application by either the trustee or recipient to the Federal Magistrates Court.

## Returning books and records

51. If the books and records obtained belong to the bankrupt (that is, they are the ‘property of the bankrupt’) they should not be automatically returned. The Act provides that the trustee must take possession of all of the property of the bankrupt including ‘deeds, books and documents’ (section 129(1)).
52. The Official Receiver will invite the trustee to identify those books which are claimed to be the bankrupt’s property and should not be returned.

## Protection of information – Privacy Act

53. The IPPs contained in the Privacy Act apply to the collection and maintenance of information obtained as a result of the exercise of this power. The Official Receiver is obliged to ensure that the information is not disclosed to a third party in a manner contrary to that Act.
54. The information obtained through the exercise of this power will, in the first instance, be available to the trustee on whose application the power was exercised. This disclosure is consistent with the operation of the IPPs, being a use which is directly related to the purpose for which it was obtained (see IPP10.1). The template for the Notice to be issued under this section also contains specific reference to the disclosure of this information for that purpose.
55. Disclosure of the information to a person other than the trustee must be authorised by the Privacy Act.

**Example:** Section 77C(3) of the Bankruptcy Act provides that a copy of the audio recording or transcript of an examination is available for inspection by a member of the public for a fee. Accordingly, this disclosure is authorised by law (see IPP10.1).

However, books and records obtained as a result of the exercise of this power are not identified as publicly available materials under the Bankruptcy Act. Accordingly, the disclosure of these materials (other than to the trustee) is not authorised by law.

## Requirement to pay money to discharge bankrupt's liability to pay income contributions – section 139ZL

56. Section 139ZL allows the Official Receiver to issue a notice for the recovery of income contributions payable by a bankrupt.

### ***Persons to whom notice may be given***

57. The notice is issued to a third party (that is, someone other than the bankrupt) where that person is someone:
- (d) from whom any money is due or accruing, or may become due, to a bankrupt; or
  - (e) who holds, or may subsequently hold, money for or on account of a bankrupt; or
  - (f) who holds, or may subsequently hold, money on account of some other person for payment to or on behalf of a bankrupt; or
  - (g) who has authority from some other person to pay money to or on behalf of a bankrupt; or
  - (h) who is liable to pay money or transfer property wholly or principally in consideration of personal services supplied by a bankrupt after the commencement of the bankruptcy, whether the services were supplied to the first-mentioned person or to some other person; or
  - (i) who has received money or property wholly or principally in consideration of personal services supplied by a bankrupt after the commencement of the bankruptcy, whether the services were supplied to the first-mentioned person or to some other person.
58. Common examples of such a person are the bankrupt's employer or a bank at which the bankrupt holds money.

### ***Exercising the discretion to issue a notice***

59. The notice may require payment of a lump sum or ongoing periodic payments which will last until the bankrupt's contributions liability is discharged. If the notice requires payment of a lump sum, the sum demanded cannot exceed the total amount due by the bankrupt (paragraph 139ZL(3)(a)).
60. The Official Receiver will issue a notice only where the bankrupt is not complying with his or her obligation to pay assessed income contributions. The trustee will be required to establish the following matters:
- a. the bankrupt has been notified of his or her liability to pay income contributions;
  - b. the bankrupt is in arrears with their contributions payments and has been given an opportunity to negotiate a payment arrangement and has failed to do so or, having made such an arrangement, has failed to comply;
  - c. the person to whom the notice is to be given is a person covered by section 139ZL.
61. The Official Receiver must give a copy of the notice to the bankrupt (subsection 139ZL(6)).

## ***Creation of a charge over property***

62. Section 139ZN provides that the once a person is served with a Notice pursuant to section 139ZL, the property is charged with the liability of the person to make payments as required in the notice. The creation of the charge is automatic by the operation of the section.
63. The charge created generally has priority over any other mortgage or charge unless the mortgagee or chargee can demonstrate that the encumbrance was entered into at arms length and for valuable consideration.
64. The Official Receiver may provide a certificate to the trustee evidencing the charge for the purposes of registering the interest over real property (section 139ZN(4)). The Official Receiver will generally not issue a certificate evidencing the charge unless the time for compliance with the notice has elapsed. At the time the certificate is sought, the trustee must provide proof of service on the recipient.

## Requirement to pay money where a transaction is void against the trustee – section 139ZQ

65. Section 139ZQ allows the Official Receiver to issue a notice to a person who has received money or property as a result of a transaction that is void against the trustee requiring that person to pay to the trustee an amount equal to the money or the value of the property received. Generally, this type of notice applies to transactions which are void against the trustee under:
- section 120 (transfers for less than market value consideration),
  - section 121 (transfers made with the intention to defeat creditors),
  - section 122 (voidable preferences),
  - section 128B (superannuation contributions made to defeat creditors where the contributor is a person who later becomes a bankrupt), and
  - section 128C (superannuation contributions made to defeat creditors where the contributor is a third party).

### ***Exercising the discretion to issue a notice***

66. The minimum requirements which the trustee must meet are:
- (j) detailed description of the transaction which gave the benefit to the person to whom the notice is to be given;
  - (k) detailed description of why this transfer is void; and
  - (l) evidence in support of the trustee's assertion that the transfer is void.
67. The Official Receiver is not required to adjudicate on whether the transfer is actually void. The Official Receiver's role is merely to determine that the trustee has provided evidence of a void transfer sufficient to allow exercise of the discretion to issue a notice. Any determination of whether a transfer is actually void must be made by a Court.
68. Where the trustee claims that a transfer is void under section 120, the Official Receiver will require the following:
- (a) date of the commencement of the bankruptcy (including evidence of the act of bankruptcy on which that date has been determined);
  - (b) evidence that a transfer took place on a particular date;
  - (c) detailed description of the transaction;
  - (d) where the transfer occurred more than two years prior to the commencement of the bankruptcy, evidence that the bankrupt was insolvent at the time of the transfer;
  - (e) evidence that the transferee provided no consideration or provided consideration that was less than market value (this will include an acceptable valuation of the property at the time of the transfer); and
  - (f) evidence of any consideration provided by the transferee and how this has been taken into account in determining the amount the trustee is seeking to recover with the notice.

69. Where the trustee claims that a transfer is void under section 121, the Official Receiver will require the following:
- (a) evidence that a transfer took place on a particular date;
  - (b) detailed description of the transaction;
  - (c) trustee's reasons for claiming that the transfer was made with the intention to defeat creditors;
  - (d) where the trustee is relying on an assumption that the bankrupt was insolvent at the time of the transfer, evidence of insolvency at that time;
  - (e) where the trustee is claiming that the transfer was made to defeat creditors but is not relying on the bankrupt being insolvent at the time, detailed reasons and evidence in support of this claim;
  - (f) evidence of any consideration provided by the transferee and how this has been taken into account in determining the amount the trustee is seeking to recover with the notice; and
  - (g) details of any statements given by the transferee in relation to the transfer (in particular, any statements relating to the matters listed in subsection 121(4)).
70. The Official Receiver is unlikely to issue a notice in relation to a transfer claimed to be void under section 121 where the trustee is unable to provide evidence that the bankrupt was insolvent at the time of the transfer but claims that the transfer was made with the intention to defeat creditors. This would require the Official Receiver to adjudicate on the merits of the trustee's arguments under section 121. The Official Receiver may consider issuing the notice where the trustee produces evidence consisting of clear statements by the bankrupt in relation to his or her intention in making the transfer.
71. Where the trustee claims that a transfer is void under section 122, the Official Receiver will require the following:
- (a) evidence of a payment to a creditor within the required period prior to the period prior to the bankruptcy; and
  - (b) explanation of why this payment had the effect of giving that creditor a preference, priority or advantage over other creditors.
72. Where the trustee claims that a transfer is void under section 128B, the Official Receiver will require the following:
- (a) evidence that the person made a contribution to an eligible superannuation plan on a particular date (which must be on or after 28 July 2006);
  - (b) detailed description of the contribution;
  - (c) trustee's reasons for claiming that the transfer was made with the intention to defeat creditors;
  - (d) where the trustee is relying on an assumption that the bankrupt was insolvent at the time of making the contribution, evidence of insolvency at that time;
  - (e) where the trustee is relying on the bankrupt's history of making superannuation contributions and that the contribution is 'out of character' to assert that it was made

with the intention to defeat creditors, evidence of the bankrupt's history of making superannuation contributions as well as detailed reasons and evidence to demonstrate the bankrupt's intention; and

- (f) where the trustee is claiming that the transfer was made to defeat creditors but is not relying on the bankrupt being insolvent at the time or the bankrupt's history of making superannuation contributions, detailed reasons and evidence in support of this claim.

73. Where the trustee claims that a transfer is void under section 128C, the Official Receiver will require the following:

- (a) evidence that a contribution was made to an eligible superannuation plan on a particular date (which must be on or after 28 July 2006) for the benefit of the bankrupt;
- (b) detailed description of the contribution;
- (c) detailed description of the arrangements (to which the bankrupt must have been a party) under which the person made the contribution for the bankrupt's benefit;
- (d) trustee's reasons for claiming that the transfer was made with the intention to defeat creditors;
- (e) where the trustee is relying on an assumption that the bankrupt was insolvent at the time the bankrupt entered into the arrangement to defeat creditors, evidence of insolvency at that time;
- (f) where the trustee is relying on the bankrupt's history of making superannuation contributions and that the contribution is 'out of character' to assert that it was made pursuant to a scheme entered into by the bankrupt with the intention to defeat creditors, evidence of the bankrupt's history of making superannuation contributions as well as detailed reasons and evidence to demonstrate the bankrupt's intention; and
- (g) where the trustee is claiming that the transfer was made to defeat creditors but is not relying on the bankrupt being insolvent at the time or the bankrupt's history of making superannuation contributions, detailed reasons and evidence in support of this claim.

74. The Official Receiver is unlikely to issue a notice in relation to a superannuation contribution claimed to be void under section 128B or 128C where the trustee is unable to provide evidence that the bankrupt was insolvent at the time the contribution was made but claims that the transfer was made with the intention to defeat creditors. This would require the Official Receiver to adjudicate on the merits of the trustee's arguments under section 128B or 128C. The Official Receiver may consider issuing the notice where the trustee produces evidence consisting of clear statements by the bankrupt in relation to his or her intention in making the contribution or entering an arrangement whereby the contributions were made by a third party. The Official Receiver may also consider issuing the notice where the trustee provides evidence that the contributions was 'out of character' in light of the bankrupt's history of making superannuation contributions and the bankrupt is unable to provide a sound explanation of their purpose in making the contribution.

## ***Creation of a charge over property***

75. Section 139ZR provides that the once a person is served with a Notice pursuant to section 139ZQ, the property is charged with the liability of the person to make payments as required in the notice. The creation of the charge is automatic by the operation of the section. The charge is discharged when payment is made.
76. The charge created generally has priority over any other mortgage or charge unless the mortgagee or chargee can demonstrate that the encumbrance was entered into at arms length, for valuable consideration and is not void as against the trustee.
77. The Official Receiver may provide a certificate to the trustee evidencing the charge for the purposes of registering the interest over real property (section 139ZR(4)). The Official Receiver will generally not issue a certificate evidencing the charge unless the time for compliance with the notice has elapsed. At the time the certificate is sought, the trustee must provide proof of service on the recipient.

## ***Superannuation account freezing notices***

78. Section 128E allows the Official Receiver to issue a notice to the trustee of an eligible superannuation plan ‘freezing’ the interest of a member of the plan where the trustee of the bankrupt estate of the member demonstrates that a contribution or contributions made to that plan are void under section 128B or 128C.
79. The Official Receiver may issue such a notice only where he or she has reasonable grounds to believe that:
  - a transaction is avoid against the trustee under section 128B or 128C; and
  - either:
    - the whole or a part of the member’s superannuation interest is attributable to the transaction; or
    - the trustee has made an application under section 139ZU relating to the transaction and the member’s superannuation interest.
80. The effect of a notice under section 128E is to prevent the member dealing in the superannuation interest and thereby preventing the trustee recovering it for the benefit of creditors. Its purpose is to allow a trustee who has evidence of a void contribution to prevent the bankrupt dissipating an interest in a superannuation plan while investigations are continuing. Although the evidence required for the Official Receiver to issue a section 128E notice is less than that required to issue a section 139ZQ notice to recover the contribution, the trustee will need to satisfy the Official Receiver that there is a reasonable basis for believing that a void contribution has been made to the superannuation plan in question.
81. The Official Receiver will issue a notice under section 128E only where:
  - (a) the trustee provides evidence that a contribution made to the superannuation plan in question is void under section 128B or 128C; and

- (b) the trustee demonstrates that action is underway to apply for a notice under section 139ZQ for recovery of the void contribution.
82. The Official Receiver will also issue a notice under section 128E where the trustee has commenced action under section 139ZU. An application under section 139ZU will identify the superannuation interest from which the trustee is attempting to recover a void contribution. Therefore, the Official Receiver's notice under section 128E will be directed to the trustee of that superannuation plan.
83. A superannuation account-freezing notice is automatically revoked in the following circumstances:
- (a) a section 139ZQ notice is issued within 180 days of the freezing notice being given to the trustee of the superannuation plan and that notice is complied with, revoked or set aside by the Court;
  - (b) a section 139ZU order is made within 180 days of the freezing notice being given to the trustee of the superannuation plan and that order is complied with or set aside on appeal;
  - (c) an application for a section 139ZU order is dismissed by the Court or withdrawn;
  - (d) no section 139ZQ notice is issued within 180 days of the freezing notice being given to the trustee of the superannuation plan; or
  - (e) no section 139ZU order is made within 180 days of the freezing notice being given to the trustee of the superannuation plan.
84. Where a superannuation account-freezing notice is in force, the Official Receiver must consent to dealings in that interest. Under section 128H, the member may apply in writing to the Official Receiver for consent to the cashing, debiting, roll-over, transfer or forfeiture, in whole or in part of the member's interest.
85. Prior to granting such consent, the Official Receiver is required to consult with the trustee of the bankrupt's estate. The Official Receiver is not bound to follow the trustee's wishes but will take these into account in determining whether it is appropriate to grant consent. The purpose of consultation is to determine whether granting consent will result in a risk that the contribution cannot be recovered.
86. The Official Receiver will normally give consent where:
- (a) the consent is only in relation to the amount by which the member's interest exceeds the value of the void contributions;
  - (b) the member wishes to roll-over the interest for investment reasons and advises the Official Receiver of the details of the new fund (which will allow a fresh freezing notice to be issued in relation to that new fund); or
  - (c) it appears that the trustee will be able to pay all creditors' claims without having recourse to the superannuation interest.

## A basic outline of the application

87. An application to issue a Notice must be constituted by:
- (c) A draft notice or notices. Ideally these should be provided electronically to allow for any suggested amendments to be made directly to the Notice.
  - (d) A cheque for \$450 unless an alternative arrangement for payment has been agreed with the Inspector-General or the Official Receiver. The Official Receiver could charge additional disbursements as may be required.
  - (e) A statement setting out the background and purpose of the Notice.
  - (f) Any supporting documentation referred to in the statement which is relevant to the Official Receiver's decision to issue the Notice.
88. The following paragraphs are intended to provide some assistance to trustees in the preparation of the statement in support of the application. This outline is not prescriptive. Neither is it intended to give an indication of what an Official Receiver will accept – each matter will have to be considered on its own facts.

### ***What should be covered?***

89. The statement should provide the name of the bankrupt estate, the bankruptcy number and the name of the recipient (if the notice is being issued to a person other than the bankrupt).
90. The background should also cover the following points.

### **Have the alternatives been considered and/or exhausted?**

91. The trustee must satisfy the Official Receiver that exercise of the power is necessary because other attempts to obtain the books, information or assets have been, or are likely to be, unsuccessful.
92. The statement should indicate whether the recipient has been contacted informally or formally prior to the issue of the Notice to ascertain whether they will voluntarily provide material or cooperate with the trustee. If this has not been done, the statement should explain why not (eg prior statements indicating no intention to cooperate or there is some risk to alerting the recipient to the Notice).

**Example:** In the case of a Notice pursuant to 139ZL, the trustee must demonstrate that the bankrupt has been made aware of their liability to pay income contributions and has not paid all or some of the assessed amounts. (This is covered in greater detail in section 4 above).

93. Where the trustee asserts that it is inappropriate to make a request to the recipient to comply on a voluntary basis because this would lead to a real risk of the books or assets being removed or destroyed, the trustee will need to provide an explanation of the basis of this belief. Difficulty in gaining the bankrupt's co-operation and history of obstruction of the trustee's administration will be relevant.
94. Where appropriate, the statement should indicate whether statutory alternatives have been considered.

**Example:** A trustee may wish to consider whether a Notice issued under section 77A or a demand under section 129 will achieve the same outcome.

95. Within the scope of the Notices available, the trustee will also need to satisfy the Official Receiver that the particular requirements to be included in the notice are necessary in the circumstances. For example, if the trustee requests a notice requiring a person to attend before the Official Receiver, the trustee will need to explain why the person cannot simply be required to provide information in writing.

### **What reason is there to believe that the information or assets sought under the Notice exist?**

96. The trustee will also need to explain to the Official Receiver the reason for believing that the books or assets are in the possession of the recipient (if the recipient is not the debtor) or held on the premises to which access is sought. The Official Receiver will not require the trustee to prove that the books exist but will require something more than a general suspicion.
97. The trustee is not required to establish that the person to whom the notice is to be given has particular evidence or books relevant to performance of the trustee's functions. However, the trustee will need to establish a sound basis for believing that the person has the information or books. This may be based on the relationship between the person and the bankrupt. It may be necessary to provide more supporting information the further removed the bankrupt is from the recipient.

**Example:** It may be sufficient for the trustee to explain that the person was a business associate of the bankrupt at a relevant time or that the person was a family member who has knowledge of the bankrupt's affairs.

### **Why is the notice being reissued (if there is more than one)?**

98. If more than one notice has been issued to the recipient, the statement should explain why previous notices have not been complied with and whether non-compliance has been referred to ITSA's Bankruptcy Fraud Investigation unit.
99. The Official Receiver may choose to reissue a notice at no charge in certain circumstances, depending on the nature of the application.

### **Is the notice being issued in connection with the trustee's role?**

100. The statement should indicate that the trustee has considered whether the Notice, in the form in which it is prepared, is consistent with his or her powers of investigation under section 19AA. That is, does the Notice assist in the investigation of the bankruptcy?
101. The trustee must establish that production of the information, evidence or books is relevant to the performance of his or her functions. The 'functions' of a trustee encompass the general law obligations and duties of a trustee and the specific duties of a trustee imposed under the Act. Generally, the purpose of a notice is to assist the trustee in maximising returns to creditors. Therefore, use of the power to obtain information which may lead to property being recovered for the benefit of creditors (including income contributions) is generally appropriate.

102. Where the notice seeks information concerning an “associated entity” of a bankrupt, it may be appropriate to provide a short table or explanation of how the entity is associated with the bankrupt. The trustee may wish to consider the application of sections 5B to 5E to identify the nature of the relationship.

### **What exactly is required?**

103. The statement should provide an explanation of the information, class of records or assets sought under the notice. The thing sought, and therefore the explanation, should be as specific as possible.
104. At the point at which the Notice is issued, the trustee will have formed a view about what information or assets exist, and how it will assist the investigation, to allow him or her to provide a sufficiently exact description.
105. The capacity or resources of a recipient should be taken into account in identifying what they must do to comply. A Notice should not create an onerous burden. However, what constitutes ‘onerous’ may differ according to the nature of the recipient. For example, a large financial institution may have the capacity to interpret and provide a large volume of materials in response to a Notice. A small business or individual will not have the same capacity.

**Example:** A request for a Notice to be issued pursuant to section 77C for ‘all books and records relating to the affairs of the bankrupt’ does not provide sufficient information for the Official Receiver to determine whether the Notice is properly issued.

### **Additional information for specific notices**

#### *Notices issued pursuant to section 77AA – Persons accompanying the trustee*

106. Paragraphs 30 to 34 outlined the trustee’s ability to nominate persons to accompany them on entering property. In order to ensure that the entitlement is exercised appropriately, and consistent with the nature of the Notice being an exercise of the Official Receiver’s power, the application should be accompanied by a list of persons nominated by the trustee and the reason for their attendance.

#### *Notices issued pursuant to section 77C – Abbreviated process*

107. It is not uncommon for large lending institutions or other organisations bound by the provisions of the *Privacy Act 1988* (Cth) to indicate that while they are willing to cooperate with the trustee and provide the information requested, the provisions of that Act prevent them from doing so unless compelled by law. A trustee may be asked to issue a Notice to the institution pursuant to section 77C to compel the provision of the information.
108. In those circumstances, it is unlikely that Official Receiver will demand a large volume of supporting information. It may be sufficient for the trustee to provide, in support of their application either an account of their discussion with the institution or a copy of a letter or other form of communication outlining the institution’s position.

*Notices issued pursuant to section 77C – Allowances for attendance*

109. Where a person (other than the bankrupt) is required to attend for an examination, section 77D provides that they are entitled to be paid an allowance for their attendance, travel, meals and accommodation. They may also be reimbursed for expenses on the presentation of sufficient documentary evidence. Section 77E provides that allowances must be offered in advance of the travel where required.
110. If a recipient is required to attend for examination, the potential need for allowances should be raised at the time the application for the exercise of the power is made. The allowance is charged as a disbursement for the conduct of the examination.

*Notices pursuant to section 139ZQ – Information to support recovery*

111. Where a Notice is sought pursuant to section 139ZQ, the trustee must also provide additional information supporting the assertion that the transfer of the asset sought be recovered is void. This is covered in more detail in section 5 above.

**Form of the notice**

112. As a general approach, the draft notice must:
- (a) clearly identify the bankrupt and legislative authority allowing the Official Receiver to issue the notice;
  - (b) correctly identify the person to whom it is to be given;

**Example:** The notice must be able to be issued against a nominated, identifiable person by name or by title.

- (c) set out precisely what the person must do to comply;

**Example:** A Notice for a person to attend and give evidence issued pursuant to section 77C must state where and when the person is required to attend.

- (d) set out the consequences of failing to comply with the notice; and

**Example:** Where the notice pursuant to section 139ZL is given to the bankrupt's employer, the notice must advise the employer that it is an offence to dismiss, injure or alter the bankrupt's position to the prejudice of the bankrupt as a result of the notice being given.

- (e) give a reasonable time in which to comply.

**Examples:**

- Where a Notice pursuant to section 139ZL is given to the bankrupt's employer and requires ongoing periodic payments, the Official Receiver will have regard to the regularity with which the bankrupt is paid and the date of the next expected payment. The employer must be given time to implement any necessary payroll adjustments.
- The time and place for a person in a Notice to attend give evidence issued pursuant to section 77C must be reasonable having regard to the person's circumstances (including, for example, whether the person will be required to arrange travel to the appointed place).

## **The Official Receiver's decision**

### **Who can make the decision?**

113. Every Official Receiver is able to delegate their authority to exercise the Official Receiver's powers to an authorised employee of ITSA under the Bankruptcy Act (section 15(4)). However, given the potential effects of the exercise of these powers, the decision to delegate their exercise is considered carefully. The Official Receiver will take into account the experience of the delegate and the extent to which they have received training and/or been assessed as competent in the application of the Act and this Practice Statement.
114. The delegation of these powers must be by written instrument. The original of that instrument for each Bankruptcy District is kept in each relevant ITSA office.
115. Where a delegate of the Official Receiver does exercise the power, the Notice should clearly identify that person as a delegate.

#### **Example:**

Where the Notice is signed by a delegate, the template should:

- (a) name the delegate in and provide that "being an authorised employee duly delegated under s.15(4) of the Act to exercise the powers of the Official Receiver under s(insert relevant Official Power) of the Act ..."; and
- (b) identify any relevant signature as the signature of a delegate of the Official Receiver.

### **Avoiding a conflict of interest**

116. A conflict of interest exists if the decision-maker has a personal interest in the outcome which may, or may appear, to prevent them from making a decision impartially. The decision-maker's personal interest may be financial or personal:

What matters is not the nature of the interest but instead its actual or apparent influence on the [decision-maker's] ability to decide impartially. <sup>1</sup>

117. The Australian Public Service Code of Conduct and Values (contained in the *Public Service Act 1999*) also provide that APS employees must *inter alia*:
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment, and
  - not make improper use of:
    - inside information, or
    - the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employer or any other person.
118. It is impossible to provide detailed rules identifying or governing every situation in which the exercise of the Official Receiver's powers may give rise to a conflict of interest. The

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<sup>1</sup> Administrative Review Council Best Practice Guide No.2 , *Decision Making: Natural Justice*, August 2007 at p 1.

most appropriate approach is to adopt the question suggested by the Administrative Review Council, namely:

The question that should be asked is: would a member of the public who knew about this interest reasonably think that it might influence the decision? It is irrelevant that the decision-maker is personally satisfied that the conflicting interest has been put out of mind in arriving at a decision. The important thing is how the decision might appear to an observer.<sup>2</sup>

119. In order to avoid the most obvious conflicts arising, ITSA has adopted a practice whereby an employee administering a bankrupt estate should not exercise the Official Receiver's powers covered in this Practice Statement in respect of that estate. To the greatest extent possible, delegations to exercise the powers covered in this Practice Statement should not be delegated to ITSA employees engaged predominately in the administration of bankrupt estates.
120. Where a real or apparent conflict does arise, the Official Receiver (or their delegate) must disclose it to the trustee applicant as soon as possible. The Official Receiver will make arrangements for another delegate to determine the application.

### **Reasons for decision**

121. The exercise of the powers is subject to review under the AD(JR) Act and the recipient is entitled to request a statement of reasons. The exercise of the powers can also be the subject of review under the terms of the Bankruptcy Act itself (see section 139ZS). It is consistent with good administrative decision-making practice for written reasons to be prepared that support the exercise of the Official Receiver's powers.
122. The reasons should be prepared at the same time or as soon as possible after the decision has been made to exercise the power. They should, as a minimum, identify the information the Official Receiver has taken into account to form the view that the evidentiary threshold for the power to be exercised has been met.

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<sup>2</sup> Administrative Review Council Best Practice Guide No.2 at p 2.

## Withdrawing, amending and defending notices

### ***Withdrawing and amending Notices***

123. The Official Receiver may, at any time, withdraw a notice. In some cases, that discretion extends to the ability to revoke and amend an existing notice – see sections 139ZL(5) and 139ZQ(4).
124. The Official Receiver will withdraw or revoke a notice if requested to do so by the trustee.
125. The Official Receiver will also withdraw or revoke a notice if satisfied that it should not have been issued or if satisfied that the bankrupt has complied with his or her obligations. The Official Receiver will consider information supplied by both the bankrupt and the trustee in making this decision.
126. Where the trustee amends a contributions assessment and a section 139ZL notice is in place, the trustee should advise the Official Receiver that the amended assessment has been issued. The Official Receiver will then consider whether the section 139ZL notice should be amended or varied.
127. In the case of Notices issued pursuant to section 139ZQ, the Official Receiver will not withdraw a notice unless satisfied that the evidence upon which it was based did not exist. The Official Receiver will not adjudicate on arguments about whether the transfer of property underlying the notice was actually void. In that regard, the Official Receiver will not consider information or evidence provided by the person to whom the notice is given or the bankrupt. The Official Receiver's only concern is to decide whether the trustee provided sufficient evidence upon which the discretion to issue the notice could be based. If there is a dispute about whether a transfer of property is void, the Official Receiver will let the notice stand. The trustee can then take action to enforce the notice and the Courts will decide on the merits of the arguments about the status of the transfer.

### ***Defending Notices***

128. If a dispute over the merits of a Notice is unable to be resolved, the recipient of a Notice is entitled to make application to the Federal Court to have it set aside. This may be by way of ordinary motion (for example, in the case of section 77C) or the Act may provide a specific right of review (for example, sections 139ZM and 139ZS).
129. The decision to issue a Notice is also subject to review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act).
130. The responsibility to defend the Notice will depend on the nature of the Notice, the application and the circumstances on which it has been challenged.
131. Whether it is the Official Receiver or the trustee that is principally responsible for responding to an application should be discussed by the trustee and Official Receiver. However, as a general principle, the Official Receiver will seek to join the trustee as a party to the proceedings, taking into account that the Notice will have issued at the request of the trustee and be based on information provided by the trustee.

## **AD(JR) Act Review**

132. The Official Receiver is the responsible decision maker for the purposes of an application for a statement of reasons, or an application for review of a decision to issue a Notice under the AD(JR) Act. In those circumstances it is the Official Receiver that is principally responsible for responding to this type of application.

## **Applications pursuant to section 139ZS**

133. Given that the basis of a Notice issued pursuant to section 139ZQ is the existence of a transaction which is void as against the trustee, where an application is made to set aside a Notice, the trustee will have principal responsibility for demonstrating the facts advanced in support of the Notice (see *Alden John Halse as trustee of the property of Neville Ross Payne v Michael Norman Norton* [1997] 673 FCA).

## **Applications to set aside other Notices**

134. Ordinarily the Official Receiver will be a party to the proceedings. Whether the Official Receiver is responsible for responding to the application will depend on the nature of the application. If, for example, the applicant were to challenge whether the information sought related to the bankrupt's 'examinable affairs', it may be the Official Receiver's responsibility to demonstrate that link existed. However, the Official Receiver may need to draw on the trustee's assistance to provide details of the estate where necessary to support the contention.