



Our Ref: JC:AW

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16 April 2009

Mr David Bergman
Adviser, Policy and Legislation - Bankruptcy
Attorney-General's Department
Central Office
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Mr Bergman

Re: Payment of Fees to an Official Receiver (Bankruptcy Regulation 16.06)

One of the objectives of the Law Society of New South Wales is to consider, originate and promote reform and improvements in the law.

In this regard the Law Society's Business Law Committee has had brought to its attention issues concerning the operation of the *Bankruptcy Regulations 1996* (the "Regulations"). The views expressed are those of the Committee alone.

1. The Issue

- 1.1 Regulation 16.06 provides that if a fee is payable in respect of making a request or application to an Official Receiver the request or application must not be dealt with unless the fee has been paid. Sub-regulation 16.06(3) provides that prior payment of a fee is not required if the person who is to pay the fee has an alternate arrangement with the Inspector General about the method of payment, for example an arrangement under which fees payable by a registered trustee are paid monthly in arrears.
- 1.2 A notice issued under section 77C of the *Bankruptcy Act 1966* (the 'Act') by the Official Receiver is often the only cost effective way to obtain crucial information for the investigation and administration of the bankrupt estate from entities not associated with the bankrupt. Another very expensive, (both in delay and money), option is to obtain information from an examination before the Federal Court under section 81 of the Act.



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- 1.3 Often a bankrupt estate is without funds to meet the costs of the application fees for the Official Receiver to issue a notice under section 77C. However the information obtained pursuant to the section 77C notice can mean that funds will become recoverable.
- 1.4 As the Regulations currently stand the Official Receiver has no power to defer payment of the fees pending funds coming into the bankrupt estate.
- 1.5 A trustee may apply to the Attorney General for funding under section 305 of the Act to pay the fees to the Official Receiver. This can be relatively costly and also requires the trustee to first seek funding from creditors. This results in a significant delay in obtaining information and also can jeopardise investigations as the line of enquiry would have to be explained to creditors which may mean that this information becomes available to the bankrupt or their associated entities.

2. Suggested Amendments to the Regulations

- 2.1 The Committee recommends that Regulation 16.06 be amended to permit the Official Receiver to defer payment of the fees until funds are realised in the bankrupt estate sufficient to pay all or part of the deferred fees. If there is an insufficient amount to pay all the fees the balance will remain deferred.
- 2.2 The decision to defer the fees would be at the discretion of the Official Receiver and a practice note could be issued as to the basis of the exercise of the discretion by the Official Receiver. It would be expected that reasonable grounds for believing that the information sought will lead to a recovery would be one of the considerations.
- 2.3 The deferred fees will continue to be a liability of the trustee. The priority of the payment of these fees from the bankrupt estate could be further protected by including a reference to the deferred fees in Schedule 3 of the Regulations which deals with the order of payment of first priority debts.
- 2.4 If insufficient funds are realised in the bankrupt estate it will then be the responsibility of the trustee to seek remission of the outstanding fees by the Inspector General. Accordingly regulation 16.11 will need to be amended to include the deferred fees in the definition of fees in sub-regulation 16.11(5)

3. Practical Applications and Advantages of the Suggested Amendments

- 3.1 These proposals will assist trustees in identifying assets and the scope for recovery for an improved return to creditors and the more effective administration of the bankruptcy system.
- 3.2 The ability of the Official Receiver to exercise their discretion to defer fees should reduce the scope for any adverse impact on revenue because it would be expected that the Official Receiver will only defer fees if there is sufficient merit. The possibility of increased recoveries may actually increase revenue through receipts for the Commonwealth from the asset realisation charge.

Should you have any further queries, please do not hesitate to contact Mr Andrew Wilson Executive Member of the Business Law Committee on (02) 9926 0333 or by email to awilson@lawsocnsw.asn.au

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joseph Catanzariti', written over a horizontal line.

Joseph Catanzariti
President