



**Australian Government**

**Insolvency and Trustee Service Australia**

**OFFICIAL RECEIVER'S PRACTICE STATEMENT  
BANKRUPTCY BY DEBTOR'S PETITION**

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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](#) or by mail addressed to:

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## 1. INTRODUCTION

1.1 The *Bankruptcy Act 1966* (the Act) enables a person who is in financial difficulty to present a Petition (i.e. an application) to the Official Receiver for his or her own bankruptcy. The policy underpinning the legislation and ITSA's practice is that a debtor is entitled to seek relief from an unmanageable debt burden through bankruptcy if the debtor is unable to resolve their financial difficulties through other means. It is regarded as a last resort option and carries serious consequences.

1.2 This practice statement is a guide to dealing with a Debtor's Petition for bankruptcy - when and how the Official Receiver will accept or reject a Petition. It does not deal with Petitions for administration of insolvent deceased estates as they are lodged with the Federal Court of Australia or the Federal Magistrates Court.

1.3 Relevant forms are included in this Statement and linked by hyperlink within the document.

1.4 A Debtor's Petition may be presented to an Official Receiver in any Bankruptcy District. It must be on the current approved form and accompanied by an adequately completed statement of the debtor's financial affairs. The debtor must also have read certain information that is prescribed by legislation. This information is contained within the Debtors Petition form.

1.5 Upon receipt of a completed Petition, the Official Receiver must either:

- accept the Petition
- reject the Petition, or
- refer the Petition to the Court for direction in certain circumstances.

## 2. FORMS AND DOCUMENTS

2.1. The debtor must complete the following documents:

- [Debtor's Petition form](#)
- [Statement of Affairs form](#)

2.2 A debtor has the option of choosing a private registered trustee to administer his or her estate. Creditors can appoint a different trustee at a later date. If the estate is to be administered by a Registered Trustee, a properly completed consent form from the trustee ([Form 12](#)) must accompany the Debtor's Petition and Statement of Affairs. Unless a consent form is received from a Registered Trustee, the Official Trustee is initially appointed as trustee of the estate automatically.

2.3 When the documents are received by the Official Receiver, all of the documents are scanned and an electronic image of the documents is created. The paper copy of the document will also be retained if the documents are accepted or returned to the debtor for the reasons discussed below.

### 3. CHECKING THE FORMS

3.1. Once the Official Receiver has received all the documents, the Official Receiver will check:

- currency and completeness of the documents;
- the debtor's eligibility to present a Petition; and
- whether there is a basis on which to exercise the Official Receiver's discretionary powers to reject a Petition.

#### Currency of the forms

3.2. The current version of the forms must be used. You can check the currency of the form by looking at the top left corner of the Debtor's Petition and Statement of Affairs forms.

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

3.4 Where a form is not on the current version, and the debtor cannot be contacted quickly, all of the forms are returned to the debtor with a covering letter explaining the reason why the forms have been returned. A copy of the current version of the form should also be included.

3.5 The Official Receiver will also not accept documents dated more than 28 days prior to receiving them. A Statement of Affairs older than 28 days may not be a current reflection of the debtor's affairs.

3.6 Where a form is returned because it is not presented on the current version or dated more than 28 days prior to its presentation, an administrative record of the presentation of the documents and their return is created. The debtor is not bankrupt and no record is entered on the public register of personal insolvency proceedings (the National Personal Insolvency Index or NPII).<sup>1</sup> The electronic image of the documents returned is retained by the Official Receiver as part of the administrative record.

#### Completeness of the forms

3.7 A Statement of Affairs is not considered to be adequately completed unless:

- the debtor has attempted to answer all questions and provided supporting documents where necessary;
- there is sufficient information to identify the debtor; and
- the form is signed and dated.

3.8 Whether a Statement of Affairs is adequately completed will depend upon the debtor's circumstances as set out in the form. For instance where a debtor does not appear to have

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<sup>1</sup> You can read more about the NPII on ITSA's Fact Sheet [Searching the Public Record](#).

any business involvement, it would not matter if the debtor has not answered all the business related questions. However where information in the form suggests that the debtor may have had a business involvement (eg there are trade creditors listed as creditors) then the form would not be considered to be adequately completed unless the debtor has answered the business related questions.

3.9 A Petition that is presented against a business partnership must be accompanied by more than one Statement of Affairs (see paragraph 4.7 below). Each of the business partners must present a Statement of Affairs which addresses their own personal affairs and a Statement of Affairs for the business partnership must also be presented.

3.10 Where a document/s is considered incomplete, all of the forms are returned to the debtor with a covering letter explaining why the forms have been returned. The letter should provide sufficient information to allow the debtor to understand what further information is required. It will also ask the debtor to ensure that the documents are returned to the Official Receiver within 28 days of their correction.

3.11 If the Petition is filed through a Financial Counsellor, Registered Trustee or other advisor, it is good practice to send them a copy of the letter that has been sent to the debtor.

3.12 An administrative record of the presentation of the documents and their return is created. The debtor is not bankrupt and no record is entered on the NPII. The electronic image of the documents returned is retained by the Official Receiver as part of the administrative record.

## 4 ELIGIBILITY CHECK

### Australian connection

4.1. Every Debtor's Petition is checked to ensure that the debtor has an Australian connection. To satisfy the Australian connection test, a debtor must either:

- (a) be personally present or ordinarily resident in Australia; or
- (b) have a residence in Australia; 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.

[Annexure A](#) contains guidelines on determining whether a person can be considered ordinarily resident in Australia.

4.2. Generally, if the debtor's address on the petition is an address in Australia, it is considered sufficient for the Official Receiver to rely on this information for the purposes of this assessment. However, where other information in the forms suggests that the debtor may not have an Australian residential or business connection, further enquiries may be undertaken.

4.3. Where a debtor is unable to satisfy the Australian connection test, the Official Receiver or delegated officer rejects the Debtor's Petition and the debtor is advised by letter. An administrative record of the presentation of the documents and the reason for their rejection is created. The debtor is not bankrupt and no record is entered on the NPII. The electronic

image of the documents is retained by the Official Receiver as part of the administrative record.

### **Current Debt Agreement or Personal Insolvency Agreement**

4.4. The Official Receiver will check the NPII in relation to every debtor who presents a Debtor's Petition to determine if the debtor is eligible.

4.5 If the NPII discloses that 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 unable to present his or her own Petition unless the debtor has received permission from the court. It is the debtor's responsibility to seek the court's permission.

4.6 The debtor will be advised that they are unable to present a Debtor's Petition while the Debt Agreement or Personal Insolvency Agreement is in force by letter. An administrative record of the presentation of the documents and the reason for the debtor's inability to present a Debtor's Petition is created. The debtor is not bankrupt and no record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

### **Petitions and partnerships**

4.7 The Official Receiver or delegated officer must refer a Debtor's Petition to the Federal Magistrate's Court or Federal Court for direction on whether to accept or reject the Petition if:

- the debtor has lodged a Petition in his or her own name only and is subject to a pending Creditor's Petition along with another person/s (see section 55(3B)); or
- a number of debtors who represent a business partnership have presented a Petition against that partnership and not all partners are a party to the Petition (see section 56C(1)(a)); or
- debtors have presented a Petition against a partnership and one or more (but not all) are subject to a Creditor's Petition (see section 56C(1)(b)); or
- two or more debtors have lodged a Petition in their own name and at least one (but not all) of them is subject to a pending Creditor's Petition (see section 57(3B)).

4.8 Any possible referral should, in the first instance, be discussed with the debtor(s) so that they have the option to withdraw the Petition.

4.9 If the debtor cannot be contacted or the debtor insists on presenting their own Petition, then the formal process of referral to the Court must take place. The court referral procedure is at [Annexure B](#).

### **Pending Creditor's Petition**

4.10 Where a debtor presents a Debtor's Petition, and there is a Creditor's Petition outstanding in their name only, there is no requirement to refer the matter to the Federal Magistrates Court or Federal Court. However, as a matter of good practice, the Official Receiver will write to the Federal Court or Federal Magistrates Court and the solicitors for the petitioning creditor giving notice that a Debtor's Petition has been accepted.

## 5. EXERCISING THE OFFICIAL RECEIVER'S DISCRETION TO REJECT A PETITION

5.1 The Official Receiver or delegated officer has a discretionary power to reject a Petition in certain circumstances. This power is exercised where the Official Receiver is of the opinion that the debtor is possibly abusing the bankruptcy system by using it as a means to avoid paying debts when he or she has the capacity to pay the debts over a reasonable period of time. The discretion is not available where a petition is being presented against a business partnership (see section 56C).

5.2 The Official Receiver is not required to determine whether or not the debtor is insolvent. However, the Debtor's Petition may only be rejected if;

**A.** the debtor is likely to be able to pay all their debts immediately or within a reasonable time if they did not become a bankrupt;

AND

**B.** EITHER the debtor is unwilling to pay a particular creditor or creditors, or is unwilling to pay creditors in general

OR

the debtor has previously been bankrupt on a Debtor's Petition at least 3 times or once in the 5 years prior to the current Petition. (A debtor is considered to have been bankrupt in the prior 5 years if the date of that bankruptcy falls within the 5 years.)

5.3 Prior to acceptance of a Petition the forms and documents submitted by the debtor are assessed for information that may indicate that the debtor is able to pay but unwilling to pay all their debts immediately or within a reasonable amount of time.

5.4 The Official Receiver may request further information from the debtor but cannot seek information/documents directly from other persons. The decision to reject a Petition must be based on the information supplied for the purposes of that Petition. Information from other sources (eg creditors) is unable to be sought or considered. However, reference may be made to the previous bankruptcies and/or previously rejected Petitions.

5.5 Prior to any decision being made for rejection, the debtor should be contacted to discuss the Petition and the likelihood of its rejection. The debtor is given the opportunity to provide further information to show why the Petition should not be rejected. The Official Receiver may suggest to the debtor that the debtor contact a financial counsellor and can provide contact details for this purpose

5.6 The debtor may also choose to withdraw his Petition at this stage. If the debtor chooses to withdraw the Petition an administrative record of the presentation of the documents is created. No record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

5.7 Examples of situations where the Official Receiver may consider exercising his discretionary powers to reject a Petition are set out at [Annexure C](#).

5.8 The debtor is notified of the decision in writing and is provided with the reasons for the rejection. The debtor is also advised of their right to apply to the Administrative Appeals

Tribunal (AAT) for a review of that decision. Only the debtor can apply to the AAT for a review of a decision to reject a Debtor's Petition. Neither a creditor nor anyone else can apply for review of a decision to accept (or reject) a Debtor's Petition.

5.9 An administrative record of the presentation of the documents and the reasons for rejection is created. No record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

## 6. PRESENTATION OF PETITIONS UNDER A POWER OF ATTORNEY OR A GUARDIANSHIP BOARD ORDER

6.1 A situation may arise where a Debtor's Petition is presented on behalf of a person based on a:

- (a) Guardianship Board order (the terminology may differ slightly from State/Territory to State/Territory); or
- (b) Power of attorney.

6.2 Following the decision in [\*Orix Australia Pty Ltd v McCormick\*](#), the ability of the Official Receiver to accept a Debtor's Petition which is presented under a power of attorney or under a Guardianship Board order (or similar) is doubtful and such applications are not accepted.

## 7. ACCEPTANCE OF THE PETITION

7.1 The Official Receiver or delegated officer will check the documents as outlined above. If no reason to return or reject the documents is identified, they will then be accepted. A debtor only becomes bankrupt on the acceptance of their Debtor's Petition by the Official Receiver or a delegated officer. Mere presentation of a Debtor's Petition by a debtor is insufficient to make the debtor bankrupt.

7.2 The acceptance of the Debtor's Petition is recorded electronically and a bankruptcy number is assigned to the debtor's bankrupt estate. The debtor's name (including any aliases), gender, date of birth, date of bankruptcy, address and occupation are entered on the NPII. The trustee's details are also entered.

### Appointment of a Trustee

7.3 Where a registered trustee has consented to act in the matter, a copy of the Debtor's Petition and statement of affairs plus the originals of any attachments to the Statement of Affairs (eg. pay slips, tax assessment notices, contracts, etc) are forwarded to the trustee. The Official Receiver also provides a certificate of appointment for the trustee.

7.4 Where a registered trustee has not consented to act in a matter the Official Trustee is initially appointed as trustee of the estate automatically. This comprises close to 90% of all Debtor's Petitions.

7.5 If at the time the debtor presents a debtors petition which the Official Receiver accepts a creditor's petition is on foot (but not yet determined) in which a registered trustee has consented, the trustee who consented to be the trustee of the debtor's petition becomes the trustee of the estate. If there is no Consent with the debtor's petition, then the Official

Trustee is trustee.

## Joint Administrations

7.6 The Official Receiver will create a joint administration (ie a bankruptcy involving more than one bankrupt debtor) where two or more debtors have presented Debtors' Petitions and:

- indicated on the face of the Petition that they are joint debtors and a review of the Statement of Affairs indicates that there are joint assets that must be dealt with; and/or
- a registered trustee has consented to administer the estates of joint debtors and has asked that a joint administration be created.

## 8. PUBLIC RECORDS AND ADMINISTRATIVE RECORDS

8.1 On the acceptance of a Debtor's Petition by the Official Receiver or delegated officer, details of the debtor and their bankruptcy are entered on the NPII. The NPII is a publicly available electronic register of all insolvency proceedings in Australia maintained by ITSA. Records entered on the NPII are permanent.

8.2 A debtor may apply to have their address and certain details, other than their name, suppressed or not entered on the NPII at the time they present their Debtor's Petition or at a later stage. The process for suppression is addressed in another [Official Receiver Practice Statement](#).

8.3 The original Statement of Affairs (other than Part A of the Statement of Affairs which contains certain personal information of the debtor) is a public document and can be inspected by any member of the public for a fee. Copies of the documents may also be obtained for a fee. There is no examination fee for the debtor or his creditors. The Official Receiver may refuse to allow a person to access particular information in the Statement of Affairs if that access would jeopardise or be likely to jeopardise the safety of any person.

8.4 Documents such as tax returns, invoices, copies of contracts, pay slips etc accompanying the Petition are passed to the trustee of the bankrupt estate. The electronic image of these documents is also retained. These are not available for public inspection.

8.5 All other documents, including the Debtor's Petition form and correspondence with the debtor, are retained by the Official Receiver. These are not available for public inspection.

8.6 More information on documents that are available for public inspection can be found in ITSA's Fact Sheet [Searching the Public Record](#).

## ANNEXURE A – DETERMINING AN AUSTRALIAN CONNECTION

To satisfy the Australian connection test, a debtor must either:

- (a) be personally present or ordinarily resident in Australia; or
- (b) have a residence in Australia, 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.

### **When is a person considered to be ‘ordinarily resident’?**

The term ‘ordinarily resident’ is not defined in the Bankruptcy Act. There is no common list of criteria which 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 a few case laws which assist in deciding whether a debtor can be said to be ordinarily resident in Australia. In general terms, the existing case law provides 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 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.

(see for example [\*Kenneth Dudley Taylor Ex parte: NATWEST Australia Bank Ltd\* \(1992\) 37 FCR 194](#); [\*Re: Ian James Meredith Ex parte: Commonwealth Bank of Australia\* unrep; Fed Ct; 9 March 1993](#); [\*Re: Anthony Ginnane Ex parte: Diner’s Club Ltd\* unrep; Fed Ct; 30 August 1993](#))

The decision-maker 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 of Australia during the period in question (also frequency of visits);
- reason/s for the debtors overseas visit/s;
- the extent to which the debtor has (and could) become attached to their new place/country of residence;
- Residency status of the individual, *ie* 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](#); [Residency - Overview](#)).

## ANNEXURE B - PROCEDURES FOR REFERRAL TO FEDERAL MAGISTRATE'S COURT

Should the Official Receiver or [delegated officer](#) decide to refer a matter to the Court for a decision on whether or not to accept a Petition, the following processes apply:

1. The Petition is not registered on the NPIL.
2. An Application form is completed. ([Federal Magistrate's Court \(Bankruptcy Rules\) 2006](#) or [Federal Court \(Bankruptcy\) Rules 2005](#) – Form 8). This form is signed by the Official Receiver.
3. Copies required:
  - one for each debtor named in the Debtor's Petition
  - one for each debtor named in the Creditor's Petition
  - one for each creditor named in the Creditor's Petition
  - one copy for the Court
  - one copy for the Official Receiver's file.
4. Form 8, a **photocopy** of the Debtor's Petition and statement of affairs and a covering letter to the Registrar of the Federal Magistrate's Court is filed with the Court Registry.
5. The Court will fix a time date and place for the hearing and will note the details on the Forms.
6. Notice of the hearing together with a sealed copy of Form 8 is served by the Official Receiver by post on all relevant parties at least **3 days before the date of the hearing**:
  - a. each debtor named in the Debtor's Petition
  - b. each debtor listed in any relevant Creditor's Petition
  - c. each creditor named in the Creditor's Petition
7. An affidavit must be completed by the person who arranged for service (eg if by post) or served on the people listed in paragraph 6 above.
8. Immediately after the hearing, a draft Order should be prepared which replicates the terms of the order announced by the Court at the hearing. Three copies of the draft Order are filed with the Registry. The drafts are then corrected or sealed and returned.
9. If the Petition is to be accepted by the Official Receiver, the result is entered on the NPIL.

## ANNEXURE C - EXAMPLES OF SITUATIONS WHEN THE OFFICIAL RECEIVER MAY REJECT A PETITION

Following are some instances where the use of the discretionary powers can be considered:

- a. the debtor has an ability to pay **all** his or her debts immediately; eg., from existing cash reserves or by selling an asset;
- b. the debtor appears to have been making payments to some but not all of his or her creditors;
- c. the debtor has incurred debts within a very short period of time prior to lodging the Petition and his or her stated income indicates there may be capacity to pay;
- d. the debtor has not explored the alternatives available to deal with his or her financial difficulties;
- e. the debtor's opinion as to the cause of his or her insolvency;

There may be other factors which may affect the debtor's ability to pay all of his or her debts either immediately or within a reasonable time. The following factors should be taken into account in each case:

- a. the debtor's ongoing commitments (eg., number of dependants);
- b. recent changes in the debtor's circumstances which reduce his or her capacity to pay their debts (eg., loss of a job);
- c. any exceptional circumstances affecting ability to pay (eg., ongoing or sudden serious illness, special needs of dependants, loss of a second income in the household, sudden and unexpected loss of major assets including the debtor's home).