



Australian Government

Insolvency and Trustee Service Australia

**OFFICIAL RECEIVER'S PRACTICE STATEMENT
DECLARATION OF INTENTION TO PRESENT A 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](mailto:Andrew.Henderson@itsa.gov.au) (Andrew.Henderson@itsa.gov.au) or by mail addressed to:

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1. INTRODUCTION

1.1 The *Bankruptcy Act 1966* (the Act) enables debtors who are in financial difficulty to get immediate and temporary protection from enforcement action by unsecured creditors pending the debtors' decision on how they wish to deal with their financial circumstances. This temporary stay on enforcement action is for up to a 7 day period, and is available if the debtor presents a *Declaration of Intention* to petition for bankruptcy.

1.2 This provision is generally used by debtors against whom an unsecured creditor has initiated debt enforcement action (eg seizure of goods or garnishee of wages). It gives the debtor the opportunity to come to an arrangement with the creditor thereby avoiding bankruptcy or in the alternative, for the debtor to either present a debtor's petition for bankruptcy or submit a formal proposal to creditors by way of a Debt Agreement or Personal Insolvency Agreement, each of which would permanently stop enforcement action by the creditor.

1.3 This practice statement is a guide to dealing with a Declarations of Intention (DOI) - when and how the Official Receiver will accept or reject a DOI and its practical effects on a debtor and creditors.

Need for urgency

1.4 As noted above, 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.

2. FORM

2.1 The debtor must present a completed [Declaration of Intention](#) form to the Official Receiver. The form contains certain information that is prescribed by legislation, which the debtor should read before signing the declaration.

3. CHECKING THE FORM

3.1. The Official Receiver will check the currency and completeness of the form that is presented.

Currency of the forms

3.2. The current version of the form must be used. You can check the currency of the form by looking at the top left corner of the DOI.

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 form 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, 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 should also be included.

Completeness of the forms

3.6 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); and
- the form is signed and dated.

3.7 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.

3.8 If the debtor cannot be contacted, 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.

3.9 If the DOI 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.

4 ELIGIBILITY CHECK

Australian connection

4.1. Every DOI 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. If the debtor provides an address in Australia on the DOI form, it is generally considered sufficient for the Official Receiver to rely on this information for the purposes of this assessment. However, where other information suggests that the debtor may not have an Australian residential or business connection, further enquiries may be undertaken.

Current Debt Agreement or Personal Insolvency Agreement

4.3 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

4.4 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

4.5 If the debtor has presented a Debtor's Petition which has not yet been accepted or rejected by the Official Receiver, then 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

4.6 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 6 months

4.7 If the debtor has signed a Controlling Trustee Authority within the 6 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 6 months from the date on which he or she signed the Controlling Trustee Authority.

Declaration of Intention presented within 12 months

4.8 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 until the expiry of 12 months.

4.9 If the debtor fails to meet any one or more of the above eligibility tests, 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 of Official Receiver's inability to accept the DOI by letter.

5. EFFECT OF ACCEPTING A DECLARATION OF INTENTION

5.1 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.

Frozen Debts

5.2 Frozen debts are those debts for which the debtor is personally liable and which would become provable in a subsequent bankruptcy. It specifically excludes a debt arising from a maintenance agreement or order. Fines and penalties imposed by a court or a debtor's HELP debt are not provable in bankruptcy and hence would not be frozen, or enforcement action stayed, when a DOI is accepted.

Rights of Secured Creditors

5.3 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

5.4 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 decide to become bankrupt at the end of the stay period, the proceeds from any execution are handed over to the bankruptcy trustee.

Garnishee Orders

5.5 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

5.6 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):

- 7 days from the acceptance of the DOI 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 (s188)
- At the time when a Sequestration Order is made.

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

6.1 Where the Official Receiver is satisfied that the debtor meets the eligibility requirements and the DOI form is current and complete, the debtor is issued with a Notice of Acceptance of a Declaration of Intention. The Notice of Acceptance (refer [Annexure B](#)) bears the electronic signature of the Official Receiver of the issuing bankruptcy district. It also contains a unique system generated reference number which can be used by a creditor to verify the document by calling ITSA.

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

6.3 If in the DOI form the debtor had requested that a copy of the acceptance notice be provided to a creditor, employer, sheriff or other person, the Official Receiver shall send a copy of the notice to the nominated person at the contact details supplied by the debtor.



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/manager; or be a member of a firm/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 – NOTICE OF ACCEPTANCE TEMPLATE

Bankruptcy Act 1966

<Date of form>
Section 54A



Australian Government
Insolvency and Trustee Service Australia

Notice of Acceptance of Declaration of Intention to Present a Debtor's Petition

DOI Matter number	
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A Declaration of Intention to present a Debtor's Petition has been accepted by the Official Receiver from the following debtor pursuant to section 54A of the Bankruptcy Act.

Debtor details

Title		
Family name		
Given names		
Residential address		
		Postcode

TAKE NOTICE THAT:

From 12.01am on	<Date accepted>	to 12.00midnight on	<Date accepted + 7 days>
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- A creditor cannot apply for the issue of enforcement process in respect of a debt or take enforcement action (eg seize goods or attach wages).
- A sheriff, registrar or other court officer cannot
 - take action, or take any further action, to execute or sell property under enforcement process issued in respect of a debt owed by the debtor, or
 - pay to a person proceeds of enforcement process issued in respect of a debt owed by the debtor.
- A person making deductions under a garnishee notice cannot retain or deduct any further money. They cannot pay to a person (other than the debtor), money that was retained or deducted before this declaration was accepted.

This *declaration* does not affect the rights of certain creditors such as secured creditors. Enforcement action can still proceed for certain types of debts (eg. maintenance agreements, court imposed fines, etc). For further information on the types of debts not affected by this declaration, please call ITSA on 1300 364 785 or visit www.itsa.gov.au.

For information concerning this Declaration, contact ITSA using the details below

ITSA Contact officer		
Phone number	Fax	
Email		

<SEAL>

Date: <Date accepted> Delegate for <Name of Official Receiver>
Official Receiver for the Bankruptcy District of <Bankruptcy District>