



**Australian Government**

**Insolvency and Trustee Service Australia**

**OFFICIAL RECEIVER'S PRACTICE STATEMENT 1  
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 by [email](mailto:info@itsa.gov.au) (info@itsa.gov.au) or by mail addressed to:

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## 1. INTRODUCTION

1.1 The *Bankruptcy Act 1966* (the Act) enables debtors with unmanageable debt to get immediate and temporary protection from enforcement action by unsecured creditors until the debtor has fully considered his/her options. This temporary stay on enforcement action is for up to a **21 day period**, and is available if the debtor presents a *Declaration of Intention* (DOI) to petition for bankruptcy.

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

1.3 This practice statement explains 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 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 includes a statement of the debtor's affairs which requires details about the debtor's income, assets and liabilities.

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

## 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. The debtor can check the currency of the form by looking at the bottom left corner of the DOI before presenting it to the Official Receiver. ITSA's website will have the latest version of the form.

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

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

debtor's completion and return.

## Completeness of the forms

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

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.

## 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.

4.3. In addition, if the debtor fails to meet any one of the following eligibility tests (discussed in detail below)

- the debtor is a party to a current Debt Agreement or Personal Insolvency Agreement (ie, the agreement has not been set aside, terminated or completed)
- the debtor has been served with a Creditor's Petition that has been presented to the Court and that Petition has not been withdrawn by the creditor, dismissed by the Court or lapsed
- the debtor is subject to a current Controlling Trustee Authority that has not lapsed
- the debtor has signed a Controlling Trustee Authority within the 6 months prior to the presentation of the DOI
- the debtor has signed a Controlling Trustee Authority within the 6 months prior to the presentation of the DOI
- the Official Receiver has previously accepted a DOI from the debtor within the previous 12 months

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

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

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.

## **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. A creditor may commence a legal proceeding or take a fresh step in such a proceeding, provided it is not in connection with enforcing a judgment. For the special status of secured creditors in regards to enforcing a judgment, refer 5.3 and 5.4 below.

### **Frozen Debts**

5.2 Frozen debts are those debts for which the debtor is personally liable and which would be provable if the debtor had become bankrupt when his or her DOI was accepted by the Official Receiver. 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 become bankrupt during, or at the end of, the stay period, the proceeds from any execution are handed over to the bankruptcy trustee.

### **Garnishee Orders**

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):

- **21 days** inclusive of the day the DOI is accepted by the Official Receiver

- At the time when a Creditor's Petition is presented against the debtor
- At the time when the debtor presents a Debtor's Petition
- At the time when the debtor signs a Controlling Trustee Authority (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 Official Receiver sends out a notification of the acceptance of the DoI to the debtor, his/her authorised representative, and all creditors who have been listed on the DOI by the debtor. A copy of the DOI, as endorsed by the Official Receiver, is also attached to the notification.

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

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

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

## **7. ACCURACY OF INFORMATION ON THE DOI FORM**

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

7.2 Where the debtor inadvertently omits to include a creditor, the creditor will not be notified of the stay period. Should the debtor subsequently advise the Official Receiver of additional creditors in writing, a notice will be provided to those additional creditors. Additional notices may not be sent where the stay is expected to end within 3 business days.

7.3 Where a debtor has inadvertently omitted any other material particular in relation to their income or assets, the debtor may advise the Official Receiver in writing of such an omission and a revised notification may be sent to all creditors. A revised notification may not be sent where, in the opinion of the Official Receiver, the omission is not material and is unlikely to affect the general body of creditors, or if the stay is expected to end within 3 business days.

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

7.4 It is an offence for a debtor to knowingly provide false information regarding their affairs on the DOI form. If prosecuted and convicted, a debtor could face imprisonment up to 12 months.

## 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 or place of business 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 is case law which assists 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](#)).