



Australian Government

Insolvency and Trustee Service Australia

**Official Receiver's Practice Statement
Insolvent Deceased Estates
(Part XI of the Bankruptcy Act)**

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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 info@itsa.gov.au or by mail addressed to:

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Introduction

It is a basic tenet of bankruptcy law that if an insolvent person becomes bankrupt it is appropriate that any assets available to the trustee in bankruptcy should be realised and the proceeds be divided equitably amongst the bankrupt's creditors.

Part XI of the *Bankruptcy Act 1966* (the Act) contains provisions enabling the insolvent estates of deceased persons to be administered in bankruptcy. It provides for both the administration of deceased estates for persons who are insolvent at the date of death and those deceased estates that subsequently become insolvent because of debts incurred by the legal personal representative of the deceased estate. [see s. 244 (1) (b) of the Act].

It should be noted that as an alternative, insolvent deceased estates can be administered under State and Territory laws and accordingly, do not have to be administered under the Bankruptcy Act. Each State and Territory has legislation for the ordered administration of deceased estates whether solvent or insolvent (for example, the *Probate and Administration Act 1898* (NSW) section 46C). There are similarities between the Bankruptcy Act and the various State and Territory laws for the administration of deceased estates as each provides for the ordered and rateable distribution to creditors.

However, administering a deceased estate under Part XI of the Bankruptcy Act enables a trustee to recover property that may not otherwise be available to the general pool of creditors if such property was transferred for less than market value and/or due to preferential payments to one or more creditors before the start of the administration (that is, the 'antecedent transaction' provisions in s120 – 122 of the Act apply to Part XI administrations).

Application Process

The Official Receiver or ITSA is not involved in the application process. An order for the administration of a deceased insolvent estate can only be made by the Federal Magistrate's Court or the Federal Court (the Court).

Who may apply?

A creditor or the legal personal representative of a deceased debtor may apply to the Court for an order that the deceased estate be administered under Part XI of the Act (commonly referred to as an "administration order"), by presenting a petition to the Court. (ss. 244 & 247 of the Act).

If a creditor is seeking an administration order, the application is very similar to presenting a creditor's petition against a living debtor except there does not need to be an "act of bankruptcy".

- [Federal Court form - Part XI application by creditor](#)

If the application is being made by the legal personal representative of a deceased debtor, the process is similar to the presentation of a debtor's petition except that the applicant presents the petition to the Court in lieu of the Official Receiver

- [Federal Court form - Part XI application by administrator](#)

It should be noted that where proceedings have already commenced in a State or territory Court for the administration of a deceased person's estate under a State or Territory law, a petition cannot be presented under Part XI of the Bankruptcy Act without the leave of the Federal Court or the Federal Magistrates Court and on such terms and conditions as the Court thinks fit (see s. 244 of the Act).

Creditor's Petitions: s. 244

Section 244 of the Act prescribes the requirements a petitioning creditor must satisfy in order to obtain an administration order. These requirements are similar to the those that apply in relation to creditors' petitions against living debtors. However there are differences, for example there is no need for an act of bankruptcy by either the deceased debtor or the legal personal representative of the deceased debtor (*Re Paravicini (1931) 3 A.B.C. 15.*)

The requirements of s. 244 are:

- a debt of not less than \$5,000 was owed to the creditor by the deceased at the time of death of the deceased debtor or debts amounting to not less than \$5,000 were owed by the deceased debtor to any 2 or more creditors at the time of death. [s.244 (1)(a)], and
- the debt, or each of the debts, in respect of which the petition is presented:
 - Is a liquidated sum due at law or in equity or partly at law and partly in equity; and
 - Is payable immediately or at a certain future time, and
- the deceased had a territorial connection with Australia at the time of his or her death. Such territorial connections are the same as required for a creditor's petition against a living debtor, namely:
 - the deceased was personally present or ordinarily resident in Australia; or
 - the debtor had a dwelling house or place of business in Australia; or
 - the deceased was carrying on business in Australia either personally or through an agent or manager; or
 - the deceased was a member of a firm or partnership carrying on business by means of a partner(s) or agent /manager: (see s.247 (2)).

Note. A secured creditor may also present a petition against a deceased estate and the procedures in respect of their security are the same as if the debtor were alive. [ss. 244(2),(3),(4) & (7)]

If there is a legal personal representative ("LPR") of the deceased debtor a sealed copy of the petition must be served on the LPR [s. 244 (9)]. However if there is no LPR the Court may dispense with service of the petition either unconditionally or conditionally [s. 244 (10)].

Choosing a trustee

If the creditor desires a registered trustee to administer the deceased estate under Part XI of the Act, a duly completed Form 12 “Consent to Act and Trustee Declaration” is to be attached to the petition prior to its presentation the Court.

The Administration Order

At the hearing of the petition, the Court may make an order that the estate be administered under Part XI if the applicant proves the following:-

- the matters stated in the petition (this will generally be proved by way of affidavit filed with the petition); and
- service of the petition unless the Court has dispensed with the need for service; and
- the debt or debts to which the petition relates are still owing (see s. 244(11))

The Court may dismiss the petition if the applicant fails to prove the elements above (s. 244 (12))

Administrator’s Petition: s. 247

A person administering the estate of a deceased person may present a petition under Part XI of the Act provided the deceased had a territorial connection with Australia at the time of his or her death. Such territorial connections are the same as required for a creditor’s petition against a living debtor, namely:

- (a) the deceased was personally present or ordinarily resident in Australia; or
- (b) the debtor had a dwelling house or place of business in Australia; or
- (c) the deceased was carrying on business in Australia either personally or through an agent or manager; or
- (d) the deceased was a member of a firm or partnership carrying on business in Australia by means of a partner or partners, or of an agent or manager: [see s.247(2)].

The administrator would make such an application when it became apparent that the deceased estate was insolvent and the provisions of the deceased’s will could not be given effect to.

The administrator’s application to the court must be accompanied by a [statement of the deceased’s affairs](#) (Form 4).

Choosing a trustee

If the administrator desires a registered trustee to administer the deceased estate under Part XI of the Act, a duly completed Form 12 “Consent to Act and Trustee Declaration” is to be attached to the petition prior to its presentation to the Court.

The Administration Order

Subsection 247(1A) of the Act provides that on the hearing of the administrator’s petition, the Court may make, or refuse to make, the order sought as it thinks fit.

DOCUMENTS APPLICANTS MUST FILE WITH THE OFFICIAL RECEIVER

Application by creditor (s.244)

- (i) **Petition:** The petitioning creditor must give a copy of the court application (along with the registered trustee consent, if applicable) to the Official Receiver within 2 working days of the petition being endorsed by the Court [subregulation 11.01A (1)].
- (ii) **Administration Order:** Subsection 244(14) of the Act requires the creditor to give the Official Receiver a copy of the administration order. The creditor is required to give the Official Receiver a copy of the administration order within 2 working days of the order being endorsed by the Court [subregulation 11.01A(2)].
- (iii) **Statement of Affairs:** Where there is a legal personal representative of the deceased person (LPR), s.246 of the Act requires the LPR to complete a statement of the deceased person's affairs and of his or her administration of the deceased estate ([Form 4](#)), and give a copy of it to the Official Receiver within 28 days of being notified of the making of the administration order. (see later under "**Filing of a Statement of Affairs**" for the situation where there is no LPR)

Note: Should the Official Receiver receive a copy of the administration order and the Petitioning Creditor has **not** previously given a copy of the petition to the Official Receiver, then he/she will be requested to do so to enable details of the petition to be recorded on the NPIL.

Application by administrator (s247)

- (i) **Petition:** The administrator must give a copy of the court application (along with the registered trustee consent, if applicable, and the statement of the deceased's affairs) to the Official Receiver within 2 working days of the petition being endorsed by the Court [subregulation 11.01A (1)].
- (ii) **Administration Order:** The administrator is required to give the Official Receiver a copy of the administration order within 2 working days of the order being endorsed by the Court [subregulation 11.01A(2)].

ACTIONS BY THE OFFICIAL RECEIVER

Registering the petition

When a copy of the court application is filed by the petitioning creditor or the administrator, the event is recorded on the NPII.

Registering the Court Order

Where the Court makes an order for the administration of the estate, the Official Receiver registers the administration based on the order that is filed and updates the NPII to reflect that the application was successful and that an order has been made to administer the estate under Part XI of the Act.

Note: If the Court orders that the application be dismissed and the order is filed with the Official Receiver, the NPII is updated to show that the petition has been dismissed.

Appointment of a trustee

Where a Registered Trustee had consented to act in the matter (duly executed Form 12 should have been filed with the Official Receiver with the copy of the court application), the trustee is appointed to the administration and a Certificate of Appointment is issued.

Where no consent had been filed with the court application, the Official Trustee is appointed to the administration.

Filing of a Statement of Affairs

Creditor's Petition The legal personal representative (LPR) if any, is required by s.246 of the Act to file a Statement of Affairs ([Form 4](#)) with the Official Receiver within 28 days of being notified of the administration order. The LPR is generally notified of this obligation by the appointed trustee. If there is no LPR, the trustee may encourage the relatives or (former) legal representatives of the deceased debtor to obtain Letters of Administration which will include the appointment of a LPR. If such action is not taken, the trustee may need to consider whether it is economically viable to apply to obtain Letters of Administration (viz: are there any known realisable assets that would generate a dividend to creditors?).

On receipt of the completed Statement of Affairs, the Official Receiver records the filing on the NPII and provides a copy of the filed document to the appointed trustee.

Administrator's Petition The administrator completes the deceased's Statement of Affairs when lodging the petition with the Court [s247(1)]. When a copy of the court application is given to the Official Receiver [under subregulation 11.01A(2)], administrators should ensure that the Statement of Affairs is included. The NPII is updated to show that the Statement of Affairs was filed and a copy of the document is provided to the appointed trustee.

Other issues

Bankruptcy Notice served on a debtor prior to death

Where a Bankruptcy Notice is served on a debtor who subsequently dies prior to being served with the creditor's petition, the creditor is required to proceed under Part XI of the Act (viz. present the petition to the Court under s.244 of the Act)

Creditor's Petitions presented and served before the death of the Debtor: s. 245

Where a creditor has presented a creditor's petition against a debtor but the debtor dies **prior** to being served with the creditor's petition, the proceedings lapse and fresh proceedings must be commenced under Part XI of the Act.

However, if a creditor's petition has been served on the debtor and the debtor subsequently dies **prior** to the hearing of the petition for a sequestration order, the Court can make an order that the estate be administered under Part XI of the Act on that petition. The Court can also make an administration order on a creditor's petition that has been dismissed. ie. the creditor is not required to present a fresh petition under s.244 of the Act.

Death of undischarged bankrupt

Section 63 of the Act provides that where a bankrupt dies prior to his or discharge, the administration of the bankrupt estate is to continue, so far as it is capable of being continued, as if the bankrupt were alive.