



Australian Government

Insolvency and Trustee Service Australia

Official Receiver's Practice Statement

Bankruptcy Notices

Revised 27February 2009

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:

Functional Leader – Bankruptcy Registry & Compliance
Insolvency & Trustee Service Australia
GPO Box H536
PERTH WA 6841

CONTENTS

1.	What is a Bankruptcy Notice?	3
2.	Official Receiver's role.....	3
	Defects the Official Receiver will identify	4
	Defects the Official Receiver will not identify	4
	Decision to issue the Bankruptcy Notice	5
3.	Processing a Bankruptcy Notice application	5
	Application for a Bankruptcy Notice.....	5
	The Filing Fee	6
	Reviewing whether the form has been properly completed	6
	Schedule of Interest	6
	Judgments	7
	Execution & Issue of the Bankruptcy Notice	10
4.	Inspection of a Bankruptcy Notice	10
5.	Extension of time within which to serve a Bankruptcy Notice	11
6.	Amendment of an issued Notice	12
	ANNEXURE A.....	13

1. What is a Bankruptcy Notice?

- 1.1 A Bankruptcy Notice is a formal notice of demand for payment of a judgment debt.
- 1.2 In certain circumstances a creditor may apply (referred to as a “creditor’s petition”) to the Federal Court or Federal Magistrates Court for an order that a debtor be made bankrupt (referred to as a “sequestration order”). In order to convince the Court to make a sequestration order the creditor must prove to the Court a number of things. One of these facts is that the debtor has committed an “act of bankruptcy” in the six months prior to the date the creditor filed their creditor’s petition with the Court.
- 1.3 Section 40 of the *Bankruptcy Act 1966* defines a number of events as constituting acts of bankruptcy. One of these is failing to comply with a Bankruptcy Notice.
- 1.4 Most creditors’ petitions are based on the act of bankrupt that the debtor has failed to comply with a Bankruptcy Notice.
- 1.5 In brief, the ordinary process to bankrupt a person involving the use of a Bankruptcy Notice is as follows:
 - (a) Creditor obtains a judgment or judgments;
 - (b) Creditor applies to the Official Receiver for issue of a Bankruptcy Notice;
 - (c) Creditor serves the Bankruptcy Notice on the debtor;
 - (d) Debtor fails to comply with the Bankruptcy Notice by paying the amount claimed in the Notice or coming to some arrangement with the creditor - an act of bankruptcy occurs;
 - (e) Creditor files a petition with the Court seeking the debtor’s bankruptcy (which must occur within 6 months of the act of bankruptcy);
 - (f) Creditor serves debtor with filed copy of creditor’s petition;
 - (g) Creditor and Debtor attend Court;
 - (h) Creditor establishes to the Court that all the prerequisites to sequestration are made out;
 - (i) Court makes a sequestration order, declaring the debtor bankrupt.

2. Official Receiver’s role

- 2.1 The Official Receiver’s role in the Bankruptcy Notice process is:
 - (a) Issuing a Bankruptcy Notice upon application by the creditor;
 - (b) Providing information on the procedure and forms required for obtaining the issue of a Bankruptcy Notice;

- (c) Making amendments to a previously issued Bankruptcy Notice upon application by the creditor; and
- (d) Extending the period for service of a Bankruptcy Notice upon application by the creditor.

Defects the Official Receiver will identify

- 2.2 The Official Receiver will assess the draft Bankruptcy Notice to ensure that there are no obvious or immediately apparent defects that would render it invalid.

Example: The Official Receiver will review a draft Bankruptcy Notice to ensure that:

- the correct Gazetted form has been followed and there have been no *ad hoc* modifications made to it;
- all of the information required by the form as been included;
- it is based on what appears to be a final judgment or order for the statutory minimum amount;
- it is based on a judgment or order that is less than 6 years old;
- the debtor and creditor have been adequately and accurately described (by reference to the judgment or order) so as to avoid misleading the debtor;
- the requirements for the debtor to comply with the Notice have been made clear; and
- the basis on which interest has been charged (if included) is clear and the amount of interest claimed is not so disproportionate to the judgment as to suggest the calculation must be incorrect.

Some of these examples are discussed in greater detail below.

Defects the Official Receiver will not identify

- 2.3 The issue of a Bankruptcy Notice does not represent a certification of all aspects of the Bankruptcy Notice or a guarantee that it will support the valid issue of a creditor's petition. The Official Receiver will not identify defects that are not obvious or immediately apparent on the face of the draft Bankruptcy Notice.

Example: The Official Receiver will not:

- go behind the order or judgment to ensure there is no counter-claim, set-off or cross-demand;
- certify that the judgment or order is 'final', that is, there is nothing which would prevent the creditor issuing execution on it (eg statutory barriers or a stay of execution);

- recalculate any interest claimed to ensure that the amount is correct;
- certify that the section under which interest is claimed is the correct section in the circumstances of the judgment; or
- conduct a search of the National Personal Insolvency Index (NPII) to ensure that the debtor named in the Bankruptcy Notice is not already the subject of an insolvency proceeding.

2.4 Creditors should be informed that it may be prudent to conduct an NPII search before applying for the issue of a Bankruptcy Notice. An NPII search will highlight whether the debtor has already been made bankrupt or has filed his/her own petition.

Decision to issue the Bankruptcy Notice

2.5 The Official Receiver will not issue a Bankruptcy Notice if there is an obvious or immediately apparent defect. The creditor will be contacted and informed of the defect and invited to amend the Notice. The decision whether to amend the Bankruptcy Notice, however, is entirely a matter for the creditor.

2.6 If the creditor chooses not to amend the Bankruptcy Notice, and provides an explanation as to why it should issue, the Official Receiver may choose to issue the Notice in any event. In those circumstances, correspondence with the creditor and notes of communication with the creditor concerning defects in the Bankruptcy Notice will be retained.

3. Processing a Bankruptcy Notice application

Application for a Bankruptcy Notice

3.1 An application for a Bankruptcy Notice should include the following:

- (a) The draft Bankruptcy Notice in the approved [form](#) prescribed by the Bankruptcy Regulations together with annexures and an original sealed judgment (or copy certified by the relevant Court).¹
- (b) At least 3 copies of the draft Bankruptcy Notice and all its annexures and attachments; and
- (c) The appropriate [filing fee](#).²

3.2 When the Notice is issued, the original is retained by the Official Receiver; one copy is for service on the debtor; one copy to be filed in the Creditor's Petition

¹ See paragraphs 3.14 *et seq* for more information concerning judgments.

² Where an application to issue a Bankruptcy Notice is being made electronically, the applicant creditor should be asked to contact their closest ITSA office before making the application.

proceedings and one copy for the practitioner's records. Two additional copies are required for each additional debtor named in the Notice.

Example: Three joint debtors are named on the Bankruptcy Notice. The creditor should file the original Bankruptcy Notice and eight copies (2 Notices x 3 debtors).

(Note: Although the Bankruptcy Act uses wording indicating that Bankruptcy Notices are issued against a debtor, the reference to the singular (“a debtor”) is interpreted as also referring to the “plural” (multiple joint debtors).)

- 3.3 Whether the debtor named in the Bankruptcy Notice is already bankrupt, or subject to some other insolvency proceeding, does not affect whether it is a valid Bankruptcy Notice. In that context, the Official Receiver will not provide a free search, or any advice, on whether the debtor named in the Bankruptcy Notice is already bankrupt or otherwise appears on the NPII. A creditor should be encouraged to conduct a search of the NPII either prior to, or at the time, of their application for a Bankruptcy Notice.

The Filing Fee

- 3.4 A creditor requesting the issue of a Bankruptcy Notice must pay the [filing fee](#) at the time of lodging the draft Notice, unless a client holds an approved account facility with ITSA, The fee may be paid by cash, bank cheque or credit card.
- 3.5 The filing fee for a Bankruptcy Notice is GST Exempt. A GST invoice is therefore not issued to the person applying for the Bankruptcy Notice.
- 3.6 The filing fee cannot be waived or refunded where a creditor later discovers that there was an error in the draft Notice submitted to the Official Receiver and/or the attachments to the draft Notice were deficient in any respect.

Reviewing whether the form has been properly completed

- 3.7 When completing a draft Bankruptcy Notice, the pre-existing text should not be altered or “tailored” to better suit individual preferences/circumstances as this may result in the Bankruptcy Notice being invalid.
- 3.8 Drafting instructions appearing in the prescribed form may be removed by the applicant without affecting the validity of the Notice.

Schedule of Interest

- 3.9 Interest on the judgment amount can only be claimed if allowed by the terms of the judgment or the rules of the Court in which judgment was given. An amount must be specified.

- 3.10 The Notice must have an annexure attached to it if interest after the date of the issue of the judgment is claimed. The annexure should show the process of how the figure claimed was calculated. It should also specify the relevant sections of the legislation on which the creditor relies to claim post judgment interest.
- 3.11 A creditor may choose not to claim interest rather than calculate the amount. If more than one judgment is used, a separate interest commencement date will apply for each judgement. The Official Receiver may review the interest calculation to ensure that there is no obvious or immediately apparent defect in it. For example, the Official Receiver may query a calculation that could not on any reasonable or objective assessment be correct. However, the Official Receiver will not verify the calculation of the interest claimed. Correct mathematical calculation is a matter entirely for the creditor.
- 3.12 The Official Receiver will review the legislative or regulatory basis on which the interest is sought to be charged and calculated. If the basis is not clear or does not appear to be correct, the creditor may be asked to reconsider the Notice.

Judgments

- 3.13 A precondition to the issue of a Bankruptcy Notice is the existence of either:
- (a) A final judgment or final order which is for an amount of at least \$2,000; or
 - (b) 2 or more final judgments or final orders that taken together are for an amount of at least \$2,000.
- 3.14 A single original sealed judgment (or a copy certified by the Court) must accompany the draft Bankruptcy Notice. A copy certified by a solicitor, Justice of the Peace or Commissioner for Declarations will not suffice.
- 3.15 Ordinary copies of the original judgment must be annexed to each service-copy of the Bankruptcy Notice provided to the Official Receiver.
- 3.16 An original final judgment may be uplifted from a previously issued Bankruptcy Notice. The creditor should request the uplifting in writing to the Official Receiver at the same time as the latter draft Notice is lodged and quote the earlier Bankruptcy Notice's number.
- 3.17 Some jurisdictions provide for the "extraction" of judgments electronically, rather than in paper. Whether a judgment which is extracted electronically will be sufficient to support a Bankruptcy Notice will depend on State based legislation in respect of electronic judgments.

The Two Thousand Dollar Minimum

- 3.18 The amount of the judgment *at the time of its issue* must be at least \$2,000.00.

Example 1: A judgment for \$1,900.00 plus \$100.00 of prejudgment interest plus \$100.00 of costs is a judgment for \$2,100.00 and will meet this requirement.

Example 2: A judgment for \$1,900.00 will not meet this requirement even if at the time of seeking the issue of the Bankruptcy Notice the amount owing pursuant to that judgment may be \$1,900.00 plus \$200.00 of post judgment interest.

Example 3: A judgment for \$1,900.00 plus costs to be taxed will meet this requirement if the taxed costs equals or exceeds \$100. It does not matter that the costs were not taxed at the time of judgment. If more than one judgment is relied upon, though they may not individually be at least \$2,000, but cumulatively they must be at least \$2,000.

- 3.19 On occasions a judgment may be issued by a Court which refers to a number of other orders/judgments and directs their payment. (eg. A number of orders for costs are made during an action. A final judgment is made which refers to the previous costs orders and directs their payment.) A Bankruptcy Notice based on this judgment could attach the other orders along with the final judgment.

Judgments more than 6 years old

- 3.20 Section 41(3)(c) Bankruptcy Act prohibits the issue of a Bankruptcy Notice based on a judgment more than 6 years old.

Stayed and suspended judgments

- 3.21 A Court may order that a judgment is stayed or suspended. A judgment that is stayed or suspended cannot support the issue of a Bankruptcy Notice. That is, the creditor must be in a position to issue immediate execution on the judgment.

Example: A judgment debtor appeals a judgment and applies for and obtains a stay of the judgment pending appeal (The mere fact that a person has instituted an appeal does not automatically suspend the judgment against them.)

- 3.22 A judgment may also automatically be stayed or suspended pending some prerequisite being satisfied. A judgment that cannot be enforced unless some precondition is satisfied cannot support the issue of a Bankruptcy Notice unless that precondition has been satisfied.

Example 1: The terms of a judgment may explicitly state that it is to be suspended for a set period.

Example 2: In those States that have adopted the Uniform Civil Procedure Rules, the leave of the Court is required before a person who is assigned a judgment debt can enforce that debt.

Example 3: Section 21B of the *Crimes Act 1914* (Cth) provides that a certificate specifying certain details of a reparation order made in Commonwealth criminal proceedings must be filed in a civil Court before it becomes a “final judgment”.

Costs included in judgments

- 3.23 A Court may order the payment of costs “to be taxed”. A bare order for costs without specifying an amount is an order for taxed costs. The order cannot be enforced (or a Bankruptcy Notice based upon it issued) until the formal process of taxation by the Court or assessment by an assessor has occurred and a sealed bill of costs or certificate is issued.
- 3.24 In most jurisdictions, the sealed bill of costs or certificate issued following the taxation or assessment of the bill is likely to constitute a “final order” without the need to present a copy of the original judgment or order which directed that one party pay the costs of another. However, that will depend on the terms of legislation or other statutory instrument (usually the relevant Rules of Court) that governs the process of taxation or assessment in that jurisdiction.
- 3.25 If a Bankruptcy Notice is based wholly or in part on an order for taxed costs then a copy of the original judgment (or copy certified by the Court) should accompany an original of the sealed bill or certificate. If, however, the creditor chooses not to present the original judgment or order, the creditor should provide a reference in any covering letter to the legislative authority which directs that the bill or certificate is to be treated as a “final order”.
- 3.26 If a portion of a judgment directs the payment of costs to be taxed then the creditor may elect not to have the costs taxed and may seek the issue of the Bankruptcy Notice just on the balance of the judgment.

Foreign judgments

- 3.27 A Bankruptcy Notice can be issued on the basis of a judgment or order obtained from a Court outside Australia. However, as with all other Bankruptcy Notices, the creditor must be in a position to issue immediate execution on it.
- 3.28 The Official Receiver will require the judgment or order to have been registered in an Australian Court. The Official Receiver may also ask for an indication of the process of registration that has been undertaken.

Assigned debts

- 3.29 Where a creditor has been assigned the debt by another, the Official Receiver will require proof of the assignment to be lodged with the application for the Bankruptcy Notice to issue to ensure that the Notice can be validly issued on the application of the creditor as assignee.

3.30 Creditors who have been assigned a debt are also reminded that in those States that have adopted the Uniform Civil Procedure Rules, they may also require the leave of the court before they can enforce the debt. As noted in paragraph 2.3 above, the issue of the Bankruptcy Notice is not certification that there are no barriers that would prevent the enforcement of a debt.

Tribunal orders

3.31 A Bankruptcy Notice may be issued based on an order of a tribunal. Where the legislation establishing the relevant tribunal allows for the registration of orders/decisions with a court, the onus is on the applicant creditor to do so before applying for the Bankruptcy Notice.

Execution & Issue of the Bankruptcy Notice

3.32 Upon acceptance of the Bankruptcy Notice for filing, the Registry copy and service copies are executed by a delegate of the Official Receiver for the relevant Bankruptcy District. A signature by the appropriate officer is sufficient.

3.33 The name of the issuing officer is printed underneath the signature with details of the basis for their authority to execute the document. The Notice is executed on the last page in the box marked 'For Official Use Only'.

3.34 A Bankruptcy Notice registration number is inserted on the top right of the front page of the Notice. Service copies are returned to the creditor together with a receipt for the filing fee.

Issue of additional copies

3.35 In the event that a creditor requires additional service copies of the Bankruptcy Notice that have been provided to them, the Official Receiver can provide additional copies on request.

3.36 If more copies are sought after the Bankruptcy Notice is issued, the creditor will need to provide sufficient information to identify the relevant Bankruptcy Notice to ensure that a new Notice is not being issued.

4. Inspection of a Bankruptcy Notice

4.1 A Bankruptcy Notice is not available for public inspection unless and until a Creditor's Petition based upon its non compliance is issued. It can however be inspected prior to the issue of a Creditor's Petition by the parties to the Notice and their agents.

4.2 Parties to a Bankruptcy Notice may inspect it at the ITSA office from which the Notice was issued. Adequate identification would be required.

5. Extension of time within which to serve a Bankruptcy Notice

- 5.1 Creditors have 6 months from the date of issue to serve the Notice on the debtor. Where the creditor is unable to serve the Notice on the debtor within this time, the creditor can apply for an extension. The application to the Official Receiver may be made either before or after the initial 6 months have expired.
- 5.2 A [fee](#) is payable when lodging a request for an extension.
- 5.3 The Official Receiver's power to extend the time for service of the Notice on the debtor is discretionary. A request must be accompanied by a statement by the creditor or the creditor's solicitors explaining why an extension is required which the Official Receiver will take into account in the exercise of the discretion.
- 5.4 The statement should, at the very least, outline what attempts have been made to serve the Bankruptcy Notice within the original 6 month period.

Example: An application for extension of time within which to serve should include details of:

- the number of attempts by a process server or other agent to serve the Notice;
- the number of locations at which service has been attempted;
- the attempts made to locate the debtor other than at known addresses; and
- the likelihood that the Notice will be successfully served if an extension is granted.

- 5.5 The Official Receiver is entitled to extend the time for service of the Bankruptcy Notice for any period they consider appropriate. However, periods of extension will generally only be granted in blocks of up to 6 months from the original date of expiry of the Bankruptcy Notice.
- 5.6 An application to extend the time within which to serve the Bankruptcy Notice that is made more than 6 months after the Bankruptcy Notice was originally issued will ordinarily only be granted in exceptional circumstances.

Example: An application to extend the time for the service of a Bankruptcy Notice made more than 6 months after it was originally issued must include, in addition to the information which should be included in an application as outlined at paragraph 5.4:

- a clear explanation of why the application was not made earlier; and
- why an extension is to be preferred over the issue of a fresh Notice.

A comparison of the cost of an extension to the cost of issuing a fresh Notice will be insufficient to meet the latter requirement.

- 5.7 More than one extension can be granted by an Official Receiver. However, a second (and any subsequent) extension will only be granted in exceptional circumstances.

Example: An application for a second (or later) extension of time within which to serve a Bankruptcy Notice should include, in addition to the information that should be included in an application as outlined at paragraph 5.4:

- what further attempts to locate and serve the debtor have been made in the period since the previous extension was granted; and
- the likelihood of successfully serving the Notice if another extension is granted taking into account the failure to serve in the period since the previous extension was granted (that is, why service is more likely now than in the previous extended period).

- 5.8 An extension is given by way of an Extension Notice signed by a delegated officer. The form of the Extension Notice is at Annexure A.

6. Amendment of an issued Notice

- 6.1 Prior to service of the Notice, an amendment can be made to a Notice by the Official Receiver upon the creditor's request. No fee is payable for an amendment.
- 6.2 An application to amend a Bankruptcy Notice must be made before it is served on the debtor. No amendment can be made after the Bankruptcy Notice has been served.
- 6.3 A Notice should not be amended if the amendments sought are so extensive that the debtor is likely to be confused.
- 6.4 The creditor is required to return all copies of the Bankruptcy Notice previously issued together with specific details of the amendment sought.
- 6.5 Any part of the Notice being removed should have a single horizontal red line ruled through it. Any inserted text should be neatly written in red pen in the appropriate place. The delegated officer's initials must be inserted beside any amendment.
- 6.6 The face of the amended Bankruptcy Notice must be endorsed:

“This Notice amended by *First Name Surname* , Delegate of the Official Receiver for the Bankruptcy District of *State* on *xx/yy/zz*.

Signature ”

ANNEXURE A

Bankruptcy Act 1966

**EXTENSION OF TIME FOR THE SERVICE OF A
BANKRUPTCY NOTICE**

Pursuant to sub-regulation 4.02A(2)(b)

Bankruptcy Notice No.: **<Bankruptcy Notice Number>**
Debtor: **<Debtor's Name>**
Creditor: **<Creditor's Name>**
<Creditor's Address Line 1>
<Creditor's Address Line 2>
Date Bankruptcy Notice issued: **<Date of issue>**

Pursuant to sub-regulation 4.02A(2)(b) of the Bankruptcy Regulations, I hereby allow the time in which the above Bankruptcy Notice can be served, to be extended to **<Date to which service is extended>**

Dated: **<Date>**

This was issued by the Official Receiver (or delegate or an officer authorised by the Official Receiver) for the Bankruptcy District of **<name of District>**.

.....
<Name of Official Receiver or delegate>

Note: A copy of this Notice should be served on the debtor with the Bankruptcy Notice.