



**Australian Government**

**Insolvency and Trustee Service Australia**

## **INFORMATION & REGISTRY**

# **Official Receiver's Practice Statement Bankruptcy Notices**

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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 to [info@itsa.gov.au](mailto:info@itsa.gov.au) or by mail addressed to:

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## 1. What is a Bankruptcy Notice?

- 1.1 A Bankruptcy Notice is a formal notice of demand requiring a debtor to pay a judgment debt.
- 1.2 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”) if a debtor has committed an “act of bankruptcy” in the preceding six months.
- 1.3 The *Bankruptcy Act 1966* defines a number of events as acts of bankruptcy. One of these is the failure of a debtor to comply with a Bankruptcy Notice.
- 1.4 Most creditors’ petitions are based on the debtor’s failure to comply with a Bankruptcy Notice. More information in relation to creditor petition bankruptcies is available on ITSA’s website [www.itsa.gov.au](http://www.itsa.gov.au).

## 2. Official Receiver’s role

- 2.1 The Official Receiver’s role in issuing Bankruptcy Notices involves:
  - (a) Providing information on the procedure and forms for obtaining the issue of a Bankruptcy Notice;
  - (b) Assessing whether to issue a Bankruptcy Notice upon application by the creditor;
  - (c) Issuing a Bankruptcy Notice or returning it with suggested amendments
  - (d) Making amendments to a previously issued Bankruptcy Notice upon application by the creditor; and
  - (e) 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 Bankruptcy Notice application to ensure that there are no obvious or immediately apparent defects that would render it invalid.

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

- the approved form has been used and there are no *ad hoc* modifications made to it;
- all of the information required by the form has been included;
- it is based on 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) to avoid misleading the debtor;
- the requirements for the debtor to comply with the Notice are clear; and
- the basis on which interest has been charged (if included) is clear.

## 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 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 note that it may be prudent to conduct an NPII search before applying for the issue of a Bankruptcy Notice. The Official Receiver will not conduct an NPII search to determine whether the debtor named in the Bankruptcy Notice application is already bankrupt or subject to a Debt Agreement or Personal Insolvency Agreement.

## 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 is a matter for the creditor.
- 2.6 Where 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 those circumstances, correspondence with the creditor and notes of communication with the creditor concerning defects in the Bankruptcy Notice will be retained by the Official Receiver.

### 3. Processing a Bankruptcy Notice application

#### Application for a Bankruptcy Notice

- 3.1 An application for a Bankruptcy Notice can be made by the creditor or the creditor's solicitor/duly authorised agent. Where a solicitor/agent is applying for the Bankruptcy Notice on behalf of a client this should be indicated on the application form. The solicitors/agents need to satisfy themselves that they have the requisite authority to apply for the Bankruptcy Notice to be issued. The Official Receiver will generally not require evidence of such authority.
- 3.2 The application for issue of a Bankruptcy Notice should include the following:
- (a) A completed Bankruptcy Notice application in the approved form
  - (b) Two copies of the draft Bankruptcy Notice together with any annexure
  - (c) Two copies of any one of the following documents in relation to the final judgment or final order:
    - (i) a copy of the sealed or certified judgment or order;
    - (ii) a certificate of the judgment or order sealed by the court or signed by an officer of the court;
    - (iii) a copy of the entry of the judgment or order certified as a true copy of that entry and sealed by the court or signed by an officer of the court.
  - (d) The appropriate [filing fee](#).
- 3.3 The application can be made at an ITSA registry. Addresses and [contact information of ITSA's registries is available on \[www.itsa.gov.au\]\(http://www.itsa.gov.au\)](#).
- 3.4 Creditors who frequently require a Bankruptcy Notice to be issued may wish to apply for an alternative payment arrangement with ITSA and lodge applications by email. Further information can be obtained by contacting [bankruptcynotice@itsa.gov.au](mailto:bankruptcynotice@itsa.gov.au).

#### The Filing Fee

- 3.5 A creditor applying for the issue of a Bankruptcy Notice must pay the [filing fee](#) at the time of lodging the application (unless an alternative payment arrangement has been agreed with ITSA – see 3.4 above). The fee may be paid by cash, bank cheque or credit card.
- 3.6 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.

- 3.7 The filing fee cannot be waived or refunded where a creditor later discovers that there was an error in the Notice submitted to the Official Receiver and/or the attachments to the Notice were deficient in any respect.

### **Reviewing whether the form has been properly completed**

- 3.8 The Bankruptcy Notice is a prescribed form under the Bankruptcy Act. Templates are available on ITSA's website which provide for single or multiple debtors/creditors to be included in the same notice.
- 3.9 Applicants using their own templates should ensure that they comply with Bankruptcy Regulation 4.02 which prescribes the form of the notice.
- 3.10 When completing a 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.

### **Schedule of Interest**

- 3.11 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.
- 3.12 The schedule of post-judgment interest calculation must be completed if interest after the date of the issue of the judgment is claimed. The interest claim period should be shown, as well as the statutory provision under which the post-judgment interest is claimed, the principal on which the interest is claimed, the rate of interest and the interest amount claimed.
- 3.13 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 is likely to apply for each judgment. 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 arithmetic calculation is a matter entirely for the creditor.
- 3.14 The Official Receiver may 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**

- 3.15 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 \$5,000; or

- (b) 2 or more final judgments or final orders that taken together are for an amount of at least \$5,000.

3.16 Applicants should ensure that one of the following documents in relation to the final judgment or final order is attached to the application:

- (i) a copy of the sealed or certified judgment or order;
- (ii) a certificate of the judgment or order sealed by the court or signed by an officer of the court;
- (iii) a copy of the entry of the judgment or order certified as a true copy of that entry and sealed by the court or signed by an officer of the court.

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 Five Thousand Dollar (\$5,000) Minimum*

3.18 The amount of the judgment(s) *at the time of issue* must be at least \$5,000.

**Example 1:** A judgment for \$4,900 plus \$100 of pre-judgment interest plus \$100 of costs is a judgment for \$5,100 and will meet this requirement.

**Example 2:** A judgment for \$4,900 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 \$4,900 plus \$200 of post judgment interest.

**Example 3:** A judgment for \$4,900 plus costs to be taxed will meet this requirement if the taxed costs equal or exceed \$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 need not individually be at least \$5,000, cumulatively they must be at least \$5,000.

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 should have the final judgment and the other orders attached.

*Judgments more than 6 years old*

3.20 Paragraph 41(3)(c) of the 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. 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. Pending appeal the creditor cannot rely on the judgment for the issue of Bankruptcy Notice. However, the appeal action (by itself) does not automatically suspend the judgment.

3.22 A judgment may also automatically be stayed or suspended pending some prerequisite being satisfied. A judgment, subject to a precondition being satisfied to effect enforcement, 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 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 taxation or assessment of the bill is likely to constitute a “final order” without the requirement to provide a copy of the original judgment or order directing payment of costs. However, that will depend on the terms of legislation or other statutory instrument (usually the relevant Rules of Court) that governs taxation or assessment of costs 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. Where however, the creditor chooses not to present the original judgment or order, the creditor

should provide in writing 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 solely on the balance of the judgment (provided the balance exceeds the \$5,000 statutory minimum).

#### *Foreign judgments*

- 3.27 A Bankruptcy Notice can be issued on 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.

- 3.28 The Official Receiver will require the judgment or order to have been registered in an Australian Court. The Official Receiver may also seek information about the undertaken process of registration.

#### *Assigned debts*

- 3.29 Where a creditor (assignee) 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.
- 3.30 In those States that have adopted the Uniform Civil Procedure Rules, an assignee may require the leave of the Court before enforcement of 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 issue of the Bankruptcy Notice it is executed by a delegate of the Official Receiver and a Bankruptcy Notice registration number is inserted with the date and signature of the Official Receiver.
- 3.33 A copy is retained by the Official Receiver and the other copy is returned to the applicant to serve on the debtor. The applicant may make additional copies of the endorsed Bankruptcy Notice for their own records and/or if the notice is required to be given to more than one debtor.

## 4. Service of a Bankruptcy Notice on the debtor

- 4.1 The Bankruptcy Notice must be served on the debtor within 6 months of the issue of the notice.
- 4.2 Given the significance of the potential consequences of non compliance with a Bankruptcy Notice including subsequent bankruptcy proceedings in the Court, a creditor should consider personal delivery to the debtor.
- 4.3 Note 2 of Bankruptcy Regulation 4.02A provides a Bankruptcy Notice may be served by any of the methods mentioned in Bankruptcy Regulation 16.01 and such methods include: post, courier, fax, email, etc. As the effectiveness of service may be challenged in any subsequent bankruptcy proceedings, it is recommended that creditors seek independent legal advice on use of these alternative service methods.

## 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 agent explaining why an extension is required which will be taken into account by the Official Receiver.
- 5.4 The statement should 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 considered 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 outlined at paragraph 5.4:

- a clear explanation of why the application was not made earlier; and
- reasons 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 the Official Receiver. However, a second (and any subsequent) extension will only be granted in exceptional circumstances.

**Example:** An application for a second (or subsequent) extension of time within which to serve a Bankruptcy Notice should include, in addition to the information 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 delegate of the Official Receiver. The form of the Extension Notice is at Annexure A.

## 6. Amendment of an issued Notice

- 6.1 Prior to service of a Bankruptcy Notice on the debtor, an amendment can be made to a Notice by the Official Receiver upon the creditor's request. No fee is payable for an amendment. An amendment cannot be made after the Bankruptcy Notice has been served.
- 6.2 A Notice will not be amended by the Official Receiver if the amendments sought are extensive and the debtor is likely to be confused or misled by the amended Notice.
- 6.3 The creditor is required to return the endorsed copy of the Bankruptcy Notice previously issued noting the changes required by neatly striking through the relevant original text and inserting the replacement text by hand.

- 6.4 The first page of the amended Bankruptcy Notice is then endorsed by the Official Receiver or delegate with the date the amended notice was issued.

## **7. Inspection of a Bankruptcy Notice**

- 7.1 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.
- 7.2 Parties to a Bankruptcy Notice may inspect the notice at the ITSA office from which the Notice was issued. Adequate identification is required.

## ANNEXURE A

*Bankruptcy Act 1966*

# EXTENSION OF TIME FOR THE SERVICE OF A BANKRUPTCY NOTICE

*Pursuant to sub-regulation 4.02A (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(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.

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

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