



Australian Government

Australian Financial Security Authority

OFFICIAL RECEIVER PRACTICE STATEMENT 1

Temporary debt protection

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Contact: practice@afsa.gov.au



**PERSONAL
INSOLVENCY**

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1. INTRODUCTION

Background

- 1.1. The [Bankruptcy Act 1966](#) enables a debtor with unmanageable debt who meets certain eligibility criteria to get immediate and temporary protection from enforcement action by unsecured creditors until the debtor has fully considered his or her options. The temporary stay on enforcement action is for a period of up to 21 days.¹
- 1.2. The debtor may wish to negotiate payment arrangements with creditors during this stay period or consider formal insolvency options, including bankruptcy.
- 1.3. A debtor who presents a temporary debt protection form is usually the subject of current debt enforcement action. The Official Receiver will assess the form and, if the debtor is eligible to present it, accept it as a matter of urgency to prevent an unsecured creditor, sheriff or bailiff from taking any further action until the stay period expires. If the debtor is ineligible, the Official Receiver will contact the debtor as quickly as possible to explain the reason(s) for his or her ineligibility.

Terminology

- 1.4. Division 2A of Part IV of the Bankruptcy Act provides for the presentation of a declaration of intention to present a debtor's petition. For ease of reference, the form has been renamed the temporary debt protection form.

Scope of this practice statement

- 1.5. This practice statement explains when and how the Official Receiver² will accept or reject a temporary debt protection form and the practical effects of acceptance on a debtor and his or her creditors.

2. PRESENTING A TEMPORARY DEBT PROTECTION FORM AND ELIGIBILITY CONSIDERATIONS

Completing and submitting the form

- 2.1. The debtor must present a completed temporary debt protection form. Debtors are encouraged to submit the form online through AFSA's Insolvency Services portal, with those who are unable to submit it online able to request a paper copy by contacting AFSA on 1300 364 785 or at info@afsa.gov.au.

¹ Note that, for temporary debt protection forms accepted between 25 March 2020 to 31 December 2020, the stay period was six months, pursuant to temporary coronavirus legislative changes

² A reference to the Official Receiver in this paper also refers to a delegate of the Official Receiver

- 2.2. Only the approved form may be used.
- 2.3. The form includes a statement of the debtor's affairs that requires details about the debtor's income, assets and debts.
- 2.4. The form also contains information, set by legislation, explaining the effect of bankruptcy, its alternatives and sources of further information. The debtor must read this information before submitting the form.

Accuracy and completeness of information on the form

- 2.5. The debtor must provide correct information about his or her creditors. If the application is accepted, the Official Receiver will send notification to them based on the information provided by the debtor.
- 2.6. The form must be completed to enable it to be submitted online. If a paper form is used, it must be completed and signed for it to be processed.
- 2.7. The Official Receiver does not verify the information provided by the debtor on the temporary debt protection form.
- 2.8. **It is an offence for a debtor to knowingly provide false information regarding their affairs on the temporary debt protection form. If prosecuted and convicted of providing false information, a debtor could face imprisonment for up to 12 months.**

Australian connection

- 2.9. Each temporary debt protection form is checked to ensure that the debtor has an Australian connection. Having an Australian connection means that the debtor satisfies at least one of the following:
 - a. is personally present or ordinarily resident in Australia, or
 - b. has a residence in Australia that he or she uses or has used and may use as his or her residence, and which he or she may "repair at their whim at any time"³, or
 - c. has a business connection with Australia (i.e. carries on business in Australia, either personally or by means of an agent or manager) or is a member of a firm or partnership that carries on business in Australia.
- 2.10. [Annexure A](#) contains guidelines to assist a debtor in determining whether he or she satisfies the Australian connection requirement.
- 2.11. Where a debtor is unable to satisfy the Australian connection test, the Official Receiver will reject the temporary debt protection form.

³ The phrase is derived from *Mathai v Kwee* [2005] FCA 932 per Graham J. See [annexure A](#) for more details about this case

National Personal Insolvency Index check

- 2.12. If the debtor falls into one of the following categories, he or she is not able to present a temporary debt protection form:
- the debtor is a party to a current debt agreement or personal insolvency agreement (i.e. 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, has not been dismissed by the court or has not lapsed
 - the debtor is subject to a current controlling trustee authority that has not lapsed
 - the debtor signed a controlling trustee authority within the six months prior to the presentation of the temporary debt protection form
 - the Official Receiver has previously accepted a declaration of intention to present a debtor’s petition/temporary debt protection form from the debtor within the past 12 months.
- 2.13. The Official Receiver will endeavour to contact the debtor by telephone in the first instance to explain the debtor’s ineligibility. The Official Receiver will notify the debtor in writing why the form could not be accepted.

3. ACCEPTANCE OF A TEMPORARY DEBT PROTECTION FORM

Upon acceptance

- 3.1. Upon acceptance of a temporary debt protection form, the Official Receiver will send a copy of the endorsed (signed) form to the debtor and to creditors listed on the form. Certain debts will be frozen and unsecured creditors will not be able to take enforcement action during 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 relation to enforcing a judgment, refer to paragraphs 3.6 and 3.7 below.

Stay period

- 3.2. The stay period commences from the beginning of the day on which the temporary debt protection form 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 form is accepted by the Official Receiver) after the form is accepted
 - the time when a creditor’s petition is presented against the debtor
 - the time when the debtor presents a debtor’s petition
 - the time when the debtor signs a controlling trustee authority (section 188)

- the time when a sequestration order is made.

Frozen debts

- 3.3. Debts that the debtor is personally liable to pay and that are provable in bankruptcy are frozen once the Official Receiver has accepted the form.
- 3.4. A provable debt is one that entitles the creditor to participate in dividends paid in the bankrupt estate. Section 82 of the Bankruptcy Act outlines which debts are provable and sections 83 to 107 provide further detailed information about provable debts.

Debts that are not frozen

- 3.5. Debts that are not frozen include debts arising from a maintenance agreement or order, fines and penalties imposed by courts or HELP debts. These debts are not provable in bankruptcy and hence are not frozen, nor is enforcement action stayed, when a temporary debt protection form is accepted.

Rights of secured creditors

- 3.6. The rights of secured creditors are not affected by the acceptance of a temporary debt protection form and there is nothing preventing a secured creditor from continuing to realise or otherwise deal with its security.

Duties of sheriff and court registrar upon notification

- 3.7. 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 to be remitted to the bankruptcy trustee.

Garnishee orders

- 3.8. If a person is required to deduct or retain money owing to the debtor in accordance with a garnishee order, upon receiving notification of the acceptance of a temporary debt protection form that person must not deduct or otherwise apply the money that is due to the debtor. This situation typically applies to an employer who has received a garnishee order(s) from a creditor(s) of the debtor.
- 3.9. Where the Australian Taxation Office has a statutory garnishee in place, it is able to continue to recover the debt during the stay period.

Notifying creditors and/or employers and/or sheriffs

- 3.10. Where the Official Receiver is satisfied that the debtor meets the eligibility requirements and the temporary debt protection form is current and complete, the Official Receiver sends out a notification of the acceptance of the form to the debtor, his or her authorised representative and all creditors who have been listed on the form. A copy of the form, as endorsed by the Official Receiver, is attached to the notification.
- 3.11. Where a debtor has nominated another person(s), such as his or her employer or the sheriff, to receive the notification so that pay deductions or other enforcement action is stopped, a copy of the notification is also sent to this person(s).
- 3.12. The notification contains a unique reference number that creditors may quote to AFSA to verify the acceptance of the debtor's temporary debt protection form.

Where information was omitted from the form

- 3.13. If the debtor subsequently advises the Official Receiver in writing of an additional creditor that was not included on his or her form, a notice will be provided to that creditor. An additional notice may not be sent where the stay is expected to end within one week.
- 3.14. Where the debtor has inadvertently omitted any other material particular in relation to his or her 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 creditors in general, or if the stay is expected to end within three business days.

No NPII record created

- 3.15. Acceptance of a temporary debt protection form is not recorded on the National Personal Insolvency Index. However, an administrative record of the lodgment and acceptance of the form is created.

4. WHEN A TEMPORARY DEBT PROTECTION FORM IS NOT ACCEPTED

- 4.1. When the Official Receiver rejects a temporary debt protection form, an administrative record of the presentation of the documents and the reason for their rejection is created. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.
- 4.2. The debtor is not afforded protection from creditors in the situation where a temporary debt protection form is not accepted.

No NPII record created

- 4.3. The fact that the Official Receiver has rejected a temporary debt protection form is not recorded on the National Personal Insolvency Index. However, an administrative record of the lodgment and non-acceptance of the form is created.



ANNEXURE A – AUSTRALIAN CONNECTION

Subsection 55(2A) of the Bankruptcy Act provides information regarding an Australian connection, which is applicable to declarations of intention/temporary debt protection. This provision states:

“The Official Receiver must reject a debtor’s petition unless, at the time when the petition is presented, the debtor:

- (a) was personally present or ordinarily resident in Australia; or*
- (b) had a dwelling-house or place of business in Australia; or*
- (c) was carrying on business in Australia, either personally or by means of an agent or manager; or*
- (d) 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.”*

When is a debtor considered to be “ordinarily resident”?

The term “ordinarily resident” is not defined in the Bankruptcy Act. There is no common list of criteria that 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 case law decisions that assist in deciding whether a debtor can be said to be ordinarily resident in Australia and, in general terms, these cases provide 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 or she 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.

The requirement to have both “a place where in the ordinary course of a person’s life he regularly or customarily lives” and “some element of permanence, to be contrasted with a place he stays only casually or intermittently” was outlined in the case [Mathai v Kwee \[2005\] FCA 932](#), where the court found that there is a difference between simply being “resident” in Australia and being “ordinarily resident” and that being “ordinarily resident” connotes more than just owning a house in Australia. The court ruled that Mr Mathai was ordinarily resident in Australia at the time of his act of bankruptcy, notwithstanding that he:

- held a Malaysian drivers licence
- held a Malaysian identity card
- held both Malaysian and Australian passports
- did not hold an Australian Medicare card
- was a Malaysian taxpayer
- was involved in the affairs of the Cathedral of St John in Kuala Lumpur
- spent much of each year living overseas (in accommodation owned by friends).

The court found that, even when the above points were considered, Mr Mathai also had an element of permanence to his residency in Australia that was evidenced by:

- his keeping of a wardrobe of clothes at his Australian address was strongly indicative of an ordinary residence
- a spontaneous response from Mr Mathai where he named his Australian residence as “home”
- having unrestricted access to a property in Australia and paying for the maintenance of that property
- while absent from Australia, there was an intent to return to the relevant residence (i.e. the property had not been abandoned).

In [Gainsford v Tannenbaum \[2012\] FCA 904](#), the court examined the closely-related concept of “habitual residence”. The court relied on [LK v Director-General, DOCS \[2009\] HCA 9 \(11 March 2009\)](#), in which the High Court considered that “the ordinary meaning of the composite expression” is to be regarded as a question of fact. The High Court accepted that “[h]abitual residence...identifies the centre of a person’s personal and family life as disclosed by the facts of the individual’s activities” (paragraph 25).

Other case law

Other relevant case law includes:

- [Re Kenneth Dudley Taylor v Natwest Australia Bank Limited \[1992\] FCA 505 \(16 October 1992\)](#)
- [Re Ian James Meredith Ex Parte: Commonwealth Bank of Australia \[1993\] FCA 101 \(19 March 1993\)](#)
- [Anthony Ginnane Ex Parte: Diners Club Limited \[1993\] FCA 413 \(30 August 1993\)](#).

The Official Receiver 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 Australia during the period in question and also the frequency of visits
- the reason(s) for the debtor travelling overseas
- the extent to which the debtor has (and could) become attached to his or her new place/country of residence
- residency status of the individual (for example 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: Income Tax: Residency – Permanent place of abode outside Australia](#)).

When is a debtor considered to have a “dwelling-house”?

The term “dwelling-house” is not defined in the Bankruptcy Act. Although there are some similarities between having a dwelling-house and being ordinarily resident in Australia, the issue of whether a debtor has a dwelling-house in Australia should be considered on its own because, if a debtor does have a dwelling-house, he or she will have met the requirements of the Bankruptcy Act.

The main difference between being ordinarily resident in Australia and having a dwelling-house is that having a dwelling-house focuses on the rights that an individual has to occupy or otherwise use a house if he or she wants to. For example, if an individual is away from his or her dwelling-house for a temporary purpose but has an intention to return, he or she may still have a dwelling-house. However, if an individual has the right to reoccupy a dwelling-house but has abandoned its use as a residence, it is likely that he or she will not have a dwelling-house.

There is no common list of criteria that can be used to determine whether a debtor has a dwelling-house. Each situation needs to be assessed based on the debtor’s individual circumstances.

In the case of [Mathai v Kwee \[2005\] FCA 932](#) (discussed above), the court ruled that the debtor had a dwelling-house because:

- he was involved in the purchase and finance of the relevant house
- the house was a nominated as his intended address
- he declared that he “lived” in Victoria and intended to return
- he maintained a wardrobe at the home
- it was undoubtedly his wife’s “home”, he was in frequent contact with her in relation to family matters and he did not need permission to stay there
- he used the house as his residence when in Australia.

When is a debtor considered to be “carrying on business”?

One of the more difficult decisions for the Official Receiver can be whether to accept a debtor’s petition where the debtor’s only connection with Australia is “carrying on a business”. This is not a particularly unusual situation – affordable air travel and modern communications technology make it possible for Australians to conduct business here while residing offshore. Such arrangements can be further complicated if a debtor conducts business through a company or multiple companies (see [Commonwealth Bank of Australia, in the matter of Oswal v Oswal \[2013\] FCA 391 \(13 April 2012\)](#)⁴).

Where a debtor conducts business through a company structure, it can be difficult to know whether it is the company or the debtor who is carrying on a business in Australia. This is because, at law, a company is an entity in its own right and hence debtors relying upon company structures to conduct business may not have the requisite connection with Australia to

⁴ In this case, the question considered was the jurisdictional foundation for the making of a sequestration order and whether this would arise under subparagraph 43(1)(b)(iii) of the Bankruptcy Act

declare bankruptcy by a debtor's petition.

However, even if a reasonable degree of information is provided in the debtor's petition, it still may not be obvious whether the debtor is carrying on a business and is utilising a company or companies to do so. Fortunately, Australian courts have given some guidance.

Australian courts have followed a line of authority commenced in 1978 in the English Court of Appeal decision *Re Brauch; ex parte Britannic Securities & Investments Ltd* [1978] Ch 316. This decision established a company's actions are not acts of the debtor, but can form part of a debtor's overall business activity. The court bankrupted a property developer who resided in the Channel Islands but frequently stayed in English hotels to engage in property speculation. The developer used a separate company structure for each property purchase (90 of them). The court decided it was not sufficient to show the developer simply controlled the companies by being the director or owner – what was important was whether the developer was applying the companies toward an overall business purpose of his own. In this instance, the developer was applying the multiple companies toward an overall business of purchasing and developing property.

In summary, it is not a simple process to confirm whether a debtor is carrying on a business where company structures are employed. Decision-makers need to assess the debtor's petition to determine whether it shows a debtor carrying on business in his or her own right – even where a company or companies are used. Or, to put it another way, whether the information in the debtor's petition shows the company's business is actually part of an overarching business conducted by the debtor. If the information included in the debtor's petition is too scant or incomplete to base a decision upon, then the petition must be rejected.

However, each case needs to be considered on its own merits and there are exceptions which can come in to play. Some of these exceptions are:

- where a debtor receives a salary from a corporate structure as an employee, he or she is not carrying on a business for the purpose of accepting a debtor's petition
- if the corporate structure which the debtor was operating, still owes money and a winding up order has been made, then there may not be sufficient business activity to say the debtor is carrying on a business for the purpose of accepting a debtor's petition.

Evidence Australian courts have considered when deciding whether a debtor is carrying on a business includes whether the debtor:

- held director, secretary or other company officer positions
- was a sole shareholder in the company
- offered financial guarantees to the company.

ANNEXURE B – *BANKRUPTCY ACT 1966* – RELEVANT PROVISIONS

Part IV	Proceedings in connexion with bankruptcy
Division 2A	Declaration of intention to present debtor's petition
54A	Presentation of declaration
54B	When debtor disqualified from presenting declaration
54C	Acceptance or rejection of declaration
54D	Official Receiver to give information to debtor
54E	Enforcement suspended during stay period
54F	Duties of sheriff
54G	Duty of court registrar
54H	Duties of person entitled to deduct money owing to declared debtor
54J	Extension of time where this Division prevents the doing of an act
54K	Section 33 not to apply to this Division
54L	Secured creditor's rights under security not affected