



**Australian Government**

**Australian Financial Security Authority**

# OFFICIAL RECEIVER PRACTICE STATEMENT 3

## Bankruptcy by sequestration order

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**PERSONAL  
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## 1. INTRODUCTION

- 1.1. The [Bankruptcy Act 1966](#) permits a creditor who is owed money to apply to the court to make a person who owes the money (“the debtor”) bankrupt. The application to the court is called a **creditor’s petition** and, if the court makes the debtor bankrupt, the order of the court is called a **sequestration order**.

### Scope of this practice statement

- 1.2. This practice statement deals with the role of the Official Receiver<sup>1</sup> in registering creditors’ petitions and sequestration orders, as provided by the Bankruptcy Act and the [Bankruptcy Regulations 2021](#). It also provides an overview of the creditor’s petition process and provides links to the Federal Court of Australia and Federal Circuit Court of Australia websites.
- 1.3. This practice statement has been prepared to provide detailed information about the legislative and practice requirements relating to creditors’ petitions and sequestration orders for debtors, bankrupts, creditors and insolvency practitioners. If you would like more general overview, you may wish to read the information on [AFSA’s website](#).
- 1.4. This practice statement does not deal with petitions for administration of insolvent deceased estates under Part XI of the Bankruptcy Act. Information on these can be found in [Official Receiver Practice Statement 5 – Administration of estates of deceased persons](#).
- 1.5. For more information about the treatment of property and other related topics after a sequestration order has been made, you may wish to refer to the [Official Trustee Practice Statements](#) on AFSA’s website.

## 2. WHEN CAN A CREDITOR PETITION THE COURT FOR A PERSON’S BANKRUPTCY?

### Conditions

- 2.1. There are three conditions a creditor must satisfy before he or she can petition for a person’s bankruptcy:
- the creditor must be owed an amount of \$10,000 or more (or, where the petition is being presented by two or more creditors, the total amount owed to these creditors must be \$10,000 or more)<sup>2</sup>

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<sup>1</sup> A reference to the Official Receiver in this practice statement also refers to a delegate of the Official Receiver

<sup>2</sup> Note that, for the period 25 March 2020 to 31 December 2020, the amount was \$20,000, pursuant to temporary coronavirus changes

- the amount(s) owed is a liquidated sum (i.e. the amount payable is ascertainable and not dependent on the outcomes of other events) and is payable immediately or at a certain future time
  - an “act of bankruptcy” (one of several events defined in section 40 of the Bankruptcy Act that could indicate that the debtor is unable to pay his or her debts) has been committed by the debtor within the six-month period before the presentation of the creditor’s petition. (Most creditors’ petitions are based on non-compliance with a bankruptcy notice. More information about bankruptcy notices is available in [Official Receiver Practice Statement 6 – Applying for a bankruptcy notice.](#))
- 2.2. The \$10,000 minimum is provided for in section 10A of the Bankruptcy Regulations.

### **Petition by a secured creditor**

- 2.3. A secured creditor can petition for a debtor’s bankruptcy (or join one or more other creditors) in accordance with paragraph 2.1 above if:
- the amount owing exceeds the value of the security held by \$10,000 or more, or
  - the amount owed is \$10,000 or more, if the secured creditor states that he or she is willing to surrender the security for the benefit of creditors generally in the event that a sequestration order is made against the debtor.

### **Petition against a partnership**

- 2.4. If a creditor is entitled to present a petition against any one of the members of a partnership, the creditor may present a petition against the partnership itself, or any one or more members of the partnership.

### **Petition against joint debtors**

- 2.5. A creditor who is owed money by two or more joint debtors (whether partners or not) may present a petition against all of the debtors. The court can decide whether to make all the joint debtors, some of the debtors, one debtor or none of the debtors bankrupt.

### **Substitution of a petitioning creditor**

- 2.6. Should a creditor who has initiated a petition not want to proceed with the petition, another creditor or group of creditors may seek the permission of the court to continue with the petition. To seek an order for substitution, the new creditor(s) must show that he or she is due a liquidated sum of \$10,000 or more. A further act of bankruptcy is not required to be shown in this situation, as the original petition already relies on an act of bankruptcy that has been committed by the debtor.

### 3. HOW TO PETITION THE COURT

- 3.1. A creditor can file a petition with either the Federal Circuit Court or the Federal Court. Most creditors' petitions are heard in the Federal Circuit Court. The rules, forms and procedures are virtually the same in both courts.
- 3.2. Information on the court process for making a person bankrupt and the relevant forms are available on the courts' websites:
  - [Federal Circuit Court](#)
  - [Federal Court](#).
- 3.3. If a creditor is unfamiliar with bankruptcy and court processes, it is recommended that he or she seek independent legal advice.

### 4. COPY OF PETITION TO BE GIVEN TO THE OFFICIAL RECEIVER

- 4.1. A creditor who presents a petition to the court must give a copy of the petition to the Official Receiver within 2 business days after the petition is filed by the court (pursuant to section 13 of the Bankruptcy Regulations). This enables the Official Receiver to record the details of the petition on the [National Personal Insolvency Index](#) ("NPII").
- 4.2. The copy of the petition can be filed with the Official Receiver via email sent to [registry@afsa.gov.au](mailto:registry@afsa.gov.au) to prevent potential postal delays and to ensure expediency in having the petition recorded on the NPII.

### 5. OBTAINING AN INTERIM PROPERTY CONTROL ORDER

- 5.1. If a creditor believes that there is a risk of the debtor selling or otherwise disposing of property before the court can hear the creditor's petition, the creditor can apply to the court at any time after a bankruptcy notice is issued or a creditor's petition is presented to have a trustee appointed to take interim control over the debtor's property (pursuant to section 50 of the Bankruptcy Act).
- 5.2. The court can make an interim property control order and appoint a trustee if the court believes that it is in creditors' interests and if it is shown that the debtor has not complied with the bankruptcy notice.
- 5.3. The interim control order is in place for a period fixed by the court or until the debtor becomes bankrupt, whichever occurs first. The trustee's role is to preserve the debtor's property until the period of control ends.

- 5.4. The section 50 order must be filed with the Official Receiver within 2 business days (pursuant to section 14 of the Bankruptcy Regulations) and can be filed via email sent to [registry@afsa.gov.au](mailto:registry@afsa.gov.au).
- 5.5. Further information about section 50 orders is available in [Official Trustee Practice Statement 7 – Section 50 interim control orders](#).

## 6. COURT HEARING AND SEQUESTRATION ORDER

### Requirements

- 6.1. At the creditor's petition hearing, the court requires the creditor to prove:
  - the matters stated in the creditor's petition (evidence of the judgment debt, evidence of the act of bankruptcy etc.)
  - that the debtor was served with the petition at least 5 days before the hearing (pursuant to Bankruptcy Rule 4.05<sup>3</sup>)
  - that the debtor still owes the money.
- 6.2. The court also requires the petitioner to provide an [extract of the NPII](#) showing the debtor's insolvency history at the time of the hearing. The NPII search needs to be performed no earlier than the day before the hearing (pursuant to Bankruptcy Rule 4.06).
- 6.3. If the debtor disputes the creditor's claims, the debtor can oppose the creditor's petition. Common grounds of opposition are:
  - the debt is not owing and/or a set-off exists
  - an act of bankruptcy has not been committed, or the act of bankruptcy relied on by the creditor is deficient
  - the debtor is in fact solvent and able to pay the debt.
- 6.4. The court considers the evidence before it and makes a decision as to whether the debtor ought to be made bankrupt. If the court is not satisfied, based on the evidence before it, that the creditor has met the requirements of the Bankruptcy Act and/or proved that the debt is owed, the court may dismiss the petition.
- 6.5. Where a petition has been dismissed by the court, the creditor must give a copy of the order to the Official Receiver within 2 business days after the court has entered the order (pursuant to section 13 of the Bankruptcy Regulations).
- 6.6. If the court is satisfied that the creditor has met the requirements of the Bankruptcy Act and proved that the debt is owed, the court makes a sequestration order and the debtor becomes bankrupt.

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<sup>3</sup> Bankruptcy Rule refers to the Federal Court (Bankruptcy) Rules 2016 and the Federal Circuit Court (Bankruptcy) Rules 2016

- 6.7. The creditor is required to file a copy of the sequestration order with the Official Receiver before the end of the period of 2 days beginning on the day the order was made (subsection 52(1A) of the Bankruptcy Act).
- 6.8. If there is a delay in obtaining a sealed or endorsed copy from the court, the creditor may file an unendorsed or unsealed copy with the Official Receiver to enable entry of the sequestration order on the NPII. The creditor should subsequently provide the Official Receiver with a sealed or endorsed copy of the order once they have obtained one from the court.
- 6.9. As with the filing of a creditor's petition, the Official Receiver will accept notices of dismissal and sequestration orders via email sent to [registry@afsa.gov.au](mailto:registry@afsa.gov.au).

### Adjournments

- 6.10. Either party can request an adjournment if further time to establish a case is required. Granting of an adjournment is at the court's discretion.
- 6.11. Where an adjournment of the hearing of the petition is granted by the court, the creditor must give a copy of any order to the Official Receiver within two business days after the court has filed the order (pursuant to section 13 of the Bankruptcy Regulations). The filing of the order enables the Official Receiver to update the NPII.
- 6.12. Where the court grants an adjournment but does not issue any order to this effect, the petitioning creditor may advise the Official Receiver by email sent to [registry@afsa.gov.au](mailto:registry@afsa.gov.au). The date of the next hearing must be included in the petitioning creditor's notification to the Official Receiver.

### Lapsing of the petition

- 6.13. A creditor's petition lapses 12 months from the date it was presented to the court, unless an extension is granted by the court.
- 6.14. Where an extension is granted by the court, the creditor must give a copy of the order to the Official Receiver within 2 business days after the court has entered the order (pursuant section 13 of the Bankruptcy Regulations). The filing of the order enables the Official Receiver to update the NPII. If an extension is granted, the creditor's petition will lapse after the expiration of the period of extension.

### Stay of creditor's petition

- 6.15. The court may make an order staying a creditor's petition.
- 6.16. Where a stay of the petition is granted by the court, the creditor must give a copy of the order to the Official Receiver within 2 business days after the court has entered the order (pursuant to section 13 of the Bankruptcy Regulations). The filing of the order enables the Official Receiver to update the NPII.

## Stay of sequestration order

- 6.17. The court may make a sequestration order but stay its operation for a period not exceeding 21 days. The court may decide to stay the operation of the sequestration order for various reasons including, for example, if a debtor claims that he or she is solvent and has produced reasonable evidence to suggest that he or she will be able to pay the debt immediately.
- 6.18. The stay is effective until it lapses or is lifted by the court.
- 6.19. A stay does not have the effect of preventing the change of a person's status to bankrupt. The bankrupt's property will vest in the trustee when the sequestration order is made, but the stay will generally prevent the trustee from dealing with the property or investigating the bankrupt's affairs, subject to any contrary intention in the order itself.
- 6.20. In this situation, the sequestration order will be recorded on the NP11. There is no record of the stay of the sequestration order on the NP11.

## 7. THE PETITIONING CREDITOR'S COSTS

### What are petitioning creditors' costs?

- 7.1. A petitioning creditor's costs are the costs incurred by the creditor in presenting a creditor's petition to the court with a view to having a sequestration order made.
- 7.2. Where a sequestration order is made and sufficient funds realised in a bankrupt estate, the costs of the petitioning creditor will be treated as a priority payment in accordance with subsection 109(1)(a) of the Bankruptcy Act and item 7 of section 25 of the Bankruptcy Regulations, if either:
  - the sequestration order provided for the priority, or
  - if the sequestration order did not provide for the priority, where the petitioning creditor has returned to the court and obtained an amended order providing for the priority.
- 7.3. To avoid the need to return to the court to obtain an amended order providing for the priority or to have the costs taxed, petitioning creditors are encouraged to obtain a sequestration order that fixes the total costs. This is provided for in the courts' sequestration order templates (Form B7).

**The Court orders that:**

1. The estate of [name of debtor] be sequestrated under the *Bankruptcy Act 1966*.
2. [\*Either]The applicant creditor's costs fixed in the sum of \$[amount] be paid from the estate of the respondent debtor in accordance with the *Bankruptcy Act 1966*.  
[\*or]The applicant creditor's costs be taxed and paid from the estate of the respondent debtor in accordance with the *Bankruptcy Act 1966*.

- 7.4. Where the sequestration order requires the petitioning creditor to have its costs taxed, this process is undertaken by the court and does not involve the Official Receiver.

### **A creditor whose petition was afoot when a debtor's petition was presented**

- 7.5. Section 25 of the Bankruptcy Regulations refers to a creditor who applied for a sequestration order, and is not limited to only the creditor whose petition resulted in the making of the sequestration order. This means that, where one petitioning creditor obtained a sequestration order, the taxed costs of a separate creditor who also had a petition on foot can also be paid out of the estate in accordance with the order of payments priorities specified in the legislation where sufficient funds are realised.

### **Petitioning creditor's costs in joint estates**

- 7.6. In the case of a sequestration order made against more than one debtor, unless the sequestration order provides to the contrary, the payment of the petitioning creditor's costs will depend on the nature of the liability of the debtors to the petitioning creditor (i.e. joint and several versus joint).
- 7.7. Where the debt was joint and several, the petitioning creditor will be entitled to recover its costs out of any one or more of the joint and separate estates, where sufficient funds are realised. The only exception to this would be if the sequestration order itself placed a restriction from which estate the costs could be paid.
- 7.8. A petitioning creditor that is owed a debt jointly, as opposed to jointly and severally, will generally be able to recover its costs out of the joint estate where sufficient funds are realised. Although where there are surplus funds in one or more of the separate estates (following payment of all fees, charges, costs, remuneration, debts and interest claims in those estate(s)), that surplus can be used to satisfy the costs.

## Where the costs specified in the order or the taxed costs do not reflect actual costs

- 7.9. Where the taxed costs of the petitioning creditor or the amount specified in the order are less than the total costs the petitioning creditor claims it incurred, the remainder of the costs do not constitute a provable debt in the estate. The amount was not a debt to which the bankrupt was subject and is an amount to be borne by the petitioning creditor (pursuant to section 51 of the Bankruptcy Act).

## Interest on the petitioning creditor's taxed bill of costs

- 7.10. Interest on a petitioning creditor's taxed bill of costs can only be claimed in the estate in the case of a section 153A annulment, unless the court order providing for the costs specifically excludes interest.

## 8. APPOINTMENT OF A TRUSTEE

- 8.1. Once a person is made bankrupt, his or her bankrupt estate must be administered by a bankruptcy trustee. The trustee investigates the bankrupt's affairs, reports to creditors, recovers property (if any is available) and makes a distribution to creditors (if sufficient funds are realised). The extent of investigations can depend on the type of property that forms part of the estate, the value of that property, the complexity of the bankrupt's affairs and other factors. Trustees charge for their services.
- 8.2. A creditor who is petitioning the court to make a debtor bankrupt is able to select a trustee and obtain the trustee's consent to administer the estate in the event that the court makes a sequestration order (pursuant to section 156A of the Bankruptcy Act). AFSA's website contains [contact details for registered trustees](#) in each State and Territory and the [Form 12 – Trustee consent to act declaration](#) for the nominated trustee to complete.
- 8.3. Where a registered trustee has consented to act as trustee in the event that a sequestration order is made, the signed consent must be served on the debtor along with the creditor's petition at least 5 days before the court hearing date (pursuant to Bankruptcy Rule 4.05(d)).
- 8.4. The creditor must file the trustee's consent to act with the Official Receiver **before the day on which the sequestration order is made** (see section 47 of the Bankruptcy Regulations).
- 8.5. If a creditor does not obtain a registered trustee's consent, the Official Trustee becomes the trustee of the estate. Similarly, if a registered trustee consents to act but the consent is not filed with the Official Receiver before the day on which the sequestration order is made, the Official Trustee will become the trustee of the

estate. However, creditors can subsequently appoint another trustee, either on their own initiative or upon the Official Trustee's initiative.

## 9. BANKRUPT'S STATEMENT OF AFFAIRS (BANKRUPTCY FORM)

- 9.1. Where the court has made a sequestration order, section 54 of the Bankruptcy Act requires the bankrupt to complete and file a statement of affairs with the Official Receiver **within 14 days** of being advised of the bankruptcy.
- 9.2. The statement of affairs is contained in a form known as the [Bankruptcy Form](#). Section 54 of the Bankruptcy Act still references the term statement of affairs and references to a statement of affairs in this practice statement can be taken to mean the Bankruptcy Form.
- 9.3. A bankrupt may complete his or her statement of affairs online through [AFSA's Online Services portal](#). Alternatively, if a bankrupt cannot complete the form online, he or she can obtain a paper copy by contacting AFSA on 1300 364 785 or at [info@afsa.gov.au](mailto:info@afsa.gov.au).
- 9.4. It is important that the bankrupt files a statement of affairs as soon as possible as the earliest a bankrupt can be discharged from bankruptcy is three years from when his or her completed statement of affairs has been filed with and accepted by the Official Receiver.
- 9.5. A bankrupt will not be able to submit an online statement of affairs unless all answers to the questions relevant to his or her circumstances are completed. For forms submitted offline (by email or post), the Official Receiver will assess for completeness of the form and determine whether the unanswered question(s) is/are critical to the understanding of the debtor's affairs and whether the information provided is sufficient, for example:
  - an indication that the bankrupt owns property without details of the location or estimated value may not constitute a reasonable attempt
  - an indication by the bankrupt that he or she has creditors other than the petitioning creditor without identifying them may not constitute a reasonable attempt.
- 9.6. In determining whether to accept a statement of affairs that is incomplete, the Official Receiver will also take into account any circumstances that may affect the bankrupt's ability to complete the form without assistance, for example whether the bankrupt has difficulty with English or suffers from an intellectual or physical impairment.
- 9.7. Where a statement of affairs submitted offline (by post or email) is not accepted and is returned to the bankrupt, it is sent by Registered Post (with a requested

delivery confirmation) with information regarding the reason why it was not accepted and the corrective action that need to be taken. Copies of the deficient statement of affairs are retained by the Official Receiver and provided to the trustee, but the statement of affairs is not available for public inspection.

### Filing date of a statement of affairs

- 9.8. Where the Official Receiver accepts a statement of affairs, the date entered on the NPII is the date the statement of affairs was filed or lodged with the Official Receiver.
- 9.9. Where a bankrupt contends the date of filing entered on the NPII is incorrect or misleading and that he or she believes that the statement of affairs was filed on an earlier date, he or she may request a review of the filing date. The bankrupt will need to provide evidence to support the claim.
- 9.10. A person may make an application to the court under section 33A of the Bankruptcy Act to alter the filing date of his or her statement of affairs. If the court is satisfied that the person believed, on reasonable grounds, that the statement of affairs had already been filed at a time before it was actually filed, the court may order that the statement of affairs is to be treated as having been filed at a time before it was actually filed.

## 10. PRESENTATION OF A DEBTOR'S PETITION FOR BANKRUPTCY BEFORE THE HEARING OF THE CREDITOR'S PETITION

- 10.1. A debtor may choose to voluntarily become bankrupt before the court hears the creditor's petition by presenting a debtor's petition to the Official Receiver. It is important that the debtor does not wait until just before the hearing date to present the petition as the Official Receiver may not be able to process the debtor's petition before the court hearing.
- 10.2. The Official Receiver will notify the court and the petitioning creditor (or their solicitor/agent) if a debtor's petition is accepted prior to the hearing of the creditor's petition.
- 10.3. More information about debtors' petitions is available in [Official Receiver Practice Statement 2 – Bankruptcy by debtor's petition](#).

## 11. RESOURCES

- [Bankruptcy Act 1966](#)
- [Bankruptcy Regulations 2021](#)

- [Federal Circuit Court](#)
- [Federal Circuit Court \(Bankruptcy\) Rules 2016](#)
- [Federal Court of Australia](#)
- [Federal Court \(Bankruptcy\) Rules 2016](#)
- [Commonwealth Courts Portal](#)



## ANNEXURE A – DOCUMENTS THAT MUST BE FILED WITH THE OFFICIAL RECEIVER

Document name/ event	Filing time	Reference	Must be filed by
Creditor's petition	Within 2 business days after the court files the petition	Section 13 of the Bankruptcy Regulations	Creditor
Section 50 order	Within 2 business days of the court giving a direction or making an order	Section 14 of the Bankruptcy Regulations	Creditor
Extension of creditor's petition	Within 2 business days after the court enters the order	Subsection 52(5) of the Bankruptcy Act, section 13 of the Bankruptcy Regulations	Creditor
Stay of creditor's petition	Within 2 business days after the court enters the order	Subsection 52(3) of the Bankruptcy Act, section 13 of the Bankruptcy Regulations	Creditor
Dismissal or withdrawal of creditor's petition	Within 2 business days after the court enters the order	Subsections 47(2) and 52(2) of the Bankruptcy Act, section 13 of the Bankruptcy Regulations	Creditor
Adjournment of hearing of creditor's petition	Within 2 business days after the court enters the order	Section 13 of the Bankruptcy Regulations	Creditor
Sequestration order	Before the end of the period of 2 days beginning on the day the order was made	Subsection 52(1A) of the Bankruptcy Act	Creditor
Trustee's consent to act	Before the day on which the sequestration order is made	Section 156A of the Bankruptcy Act, section 47 of the Bankruptcy Regulations	Trustee
Bankruptcy Form (statement of affairs)	Within 14 days of the bankrupt being notified of his or her bankruptcy	Subsection 54(1) of the Bankruptcy Act	Bankrupt