



**Australian Government**

**Australian Financial Security Authority**

# OFFICIAL RECEIVER PRACTICE STATEMENT 5

## Administration of estates of deceased persons

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**PERSONAL  
INSOLVENCY**

**Our vision:** To be a firm and fair regulator and world-class government service provider that delivers improved and equitable financial outcomes for consumers, business and the community.

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## 1. INTRODUCTION

- 1.1. Part XI of the [Bankruptcy Act 1966](#) contains provisions enabling the insolvent estates of deceased persons to be administered in bankruptcy. It provides for both the administration of deceased estates for persons who are insolvent at the date of death and those deceased estates that subsequently become insolvent because of debts incurred by the legal personal representative of the deceased estate (see paragraph 244(1)(b) of the Bankruptcy Act).
- 1.2. It should be noted that, as an alternative, insolvent deceased estates can be administered under State and Territory laws and, accordingly, do not have to be administered under the Bankruptcy Act. Each State and Territory has legislation for the ordered administration of deceased estates whether solvent or insolvent (for example, the *Probate and Administration Act 1898* (NSW), section 46C). There are similarities between the Bankruptcy Act and the various State and Territory laws for the administration of deceased estates as each provides for the ordered and rateable distribution to creditors.
- 1.3. However, administering a deceased estate under Part XI of the Bankruptcy Act enables a trustee to recover property that may not otherwise be available to the general pool of creditors if such property was transferred for less than market value and/or due to preferential payments to one or more creditors before the start of the administration (that is, the “antecedent transaction” provisions of the Bankruptcy Act apply to Part XI administrations).

## 2. APPLICATION PROCESS

### Who may apply for a Part XI order?

- 2.1. The Official Receiver and AFSA are not involved in the application process. An order for the administration of a deceased insolvent estate can only be made by the Federal Circuit Court or the Federal Court (“the court”).
- 2.2. A creditor or the legal personal representative of a deceased debtor may apply to the court for an order that the deceased estate be administered under Part XI of the Bankruptcy Act (commonly referred to as an “administration order”) by presenting a petition to the court (refer to sections 244 and 247).
- 2.3. It should be noted that, where proceedings have already commenced in a State or Territory court for the administration of a deceased person’s estate under the applicable State or Territory law, a petition cannot be presented under Part XI of the Bankruptcy Act without the leave of the court and on such terms and conditions as the court thinks fit (see section 244).

### 3. APPLICATION PROCESS – SECTION 244 CREDITOR'S PETITION

- 3.1. Section 244 of the Bankruptcy Act prescribes the requirements a petitioning creditor must satisfy in order to obtain an administration order. These requirements are similar to those that apply in relation to creditors' petitions against living debtors. However, there are some differences; for example, there is no need for an act of bankruptcy by either the deceased debtor or the legal personal representative of the deceased debtor (refer *Re Paravicini* [1931] 3 A.B.C. 15).
- [Federal Court Form B14 – Applicant creditor's petition for administration](#)
- 3.2. The requirements of section 244 are:
- a debt of not less than \$10,000 was owed to the creditor by the deceased debtor at the time of death (or debts totalling not less than \$10,000 were owed by the deceased debtor to any two or more creditors at the time of death)<sup>1</sup>
  - the debt, or each of the debts, in respect of which the petition is presented:
    - is a liquidated sum due at law or in equity or partly at law and partly in equity
    - is payable immediately or at a certain future time
  - the deceased had an Australia connection at the time of his or her death.
- 3.3. Australian connections are referred to in subsection 247(2) and are the same as those required for a creditor's petition against a living debtor, namely:
- the deceased debtor was personally present or ordinarily resident in Australia
  - the deceased debtor had a dwelling house or place of business in Australia
  - the deceased debtor was carrying on business in Australia either personally or through an agent or manager, or
  - the deceased debtor was a member of a firm or partnership carrying on business by means of a partner(s) or agent/manager.
- 3.4. A secured creditor may present a petition against a deceased estate and the procedures in respect of their security are the same as if the debtor was alive (pursuant to subsections 244(2), (3), (4) and (7)).
- 3.5. If there is a legal personal representative ("LPR") of the deceased debtor, a sealed copy of the petition must be served on the LPR (pursuant to subsection 244(9)). However, if there is no LPR, the court may dispense with service of the petition either unconditionally or conditionally (pursuant to subsection 244(10)).

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<sup>1</sup> Note that, for the period 25 March 2020 to 31 December 2020, the amount was \$20,000, pursuant to temporary coronavirus changes

## Choosing a trustee

- 3.6. If the creditor desires a registered trustee to administer the deceased estate under Part XI of the Bankruptcy Act, a duly completed [Form 12 – Trustee consent to act declaration](#) is to be attached to the petition prior to its presentation to the court.

## The administration order

- 3.7. At the hearing of the petition, the court may make an order that the estate be administered under Part XI if the applicant proves, pursuant to subsection 244(11), the following:
- the matters stated in the petition (this will generally be proved by way of affidavit filed with the petition)
  - service of the petition unless the court has dispensed with the need for service
  - the debt or debts to which the petition relates are still owing.
- 3.8. The court may dismiss the petition if the applicant fails to prove the elements above (as per subsection 244(12)).

## 4. DOCUMENTS APPLICANTS MUST FILE WITH THE OFFICIAL RECEIVER – SECTION 244 CREDITOR’S PETITION

### Petition

- 4.1. The petitioning creditor must give a copy of the court application (along with the registered trustee consent, if applicable) to the Official Receiver within two working days of the petition being endorsed by the court (as per subregulation 11.01A(1)).

### Administration order

- 4.2. Subsection 244(14) of the Bankruptcy Act requires the creditor to give the Official Receiver a copy of the administration order. The creditor is required to give the Official Receiver a copy of the administration order within two working days of the order being endorsed by the court (as per subregulation 11.01A(2)).
- 4.3. Should the Official Receiver receive a copy of the administration order when the petitioning creditor has **not** previously given a copy of the petition to the Official Receiver, the creditor will be requested to do so to enable details of the petition to be recorded on the [National Personal Insolvency Index](#) (“NPII”).

### Statement of affairs

- 4.4. Where there is a legal personal representative of the deceased person (“LPR”), section 246 of the Bankruptcy Act requires the LPR to complete a [Form 4 – Statement of affairs under Part XI](#), and give a copy of it to the Official Receiver within 28 days of being notified of the making of the administration order (see

paragraph [7.5](#) below regarding the filing of a statement of affairs when there is no LPR).

## 5. APPLICATION PROCESS – SECTION 247 ADMINISTRATOR’S PETITION

- 5.1. A person administering the estate of a deceased person may present a petition under section 247 of the Bankruptcy Act. The process is similar to the presentation of a debtor’s petition except that the applicant presents the petition to the court in lieu of the Official Receiver.
  - [Federal Court Form B15 – Administrator’s petition](#)
- 5.2. For the person administering the deceased estate to present a petition, the deceased had an Australian connection at the time of his or her death. Australian connections are referred to in subsection 247(2) and are the same as required for a creditor’s petition against a living debtor, namely:
  - the deceased was personally present or ordinarily resident in Australia
  - the deceased had a dwelling house or place of business in Australia
  - the deceased was carrying on business in Australia either personally or through an agent or manager
  - the deceased was a member of a firm or partnership carrying on business by means of a partner(s) or agent/manager.
- 5.3. The administrator would make such an application when it became apparent that the deceased estate was insolvent and the provisions of the deceased’s will could not be given effect to.
- 5.4. The administrator’s application to the court must be accompanied by a completed [Form 4 – Statement of the affairs under Part XI](#).

### Choosing a trustee

- 5.5. If the administrator desires a registered trustee to administer the deceased estate under Part XI of the Bankruptcy Act, a duly completed [Form 12 – Trustee consent to act declaration](#) is to be attached to the petition prior to its presentation to the court.

### The administration order

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

## 6. DOCUMENTS APPLICANTS MUST FILE WITH THE OFFICIAL RECEIVER – SECTION 247 ADMINISTRATOR’S PETITION

### Petition

- 6.1. The administrator must give a copy of the court application (along with the registered trustee consent, if applicable, and the statement of the deceased’s affairs) to the Official Receiver within two working days of the petition being endorsed by the court (as per subregulation 11.01A(1)).

### Administration order

- 6.2. The administrator is required to give the Official Receiver a copy of the administration order within two working days of the order being endorsed by the court (as per subregulation 11.01A(2)).

## 7. ACTIONS BY THE OFFICIAL RECEIVER

### Registering the petition

- 7.1. When a copy of the court application is filed by the petitioning creditor or the administrator, the Official Receiver<sup>2</sup> records the event on the NPII.

### Registering the court order

- 7.2. Where the court makes an order for the administration of the estate, the Official Receiver registers the administration based on the order that is filed. The NPII is updated to reflect that the application was successful and that an order has been made to administer the estate under Part XI of the Bankruptcy Act.
- 7.3. If the court orders that the application be dismissed and the order is filed with the Official Receiver, the NPII is updated to show that the petition has been dismissed.

### Appointment of a trustee

- 7.4. Where a registered trustee had consented to act in the matter and the duly executed [Form 12 – Trustee consent to act declaration](#) was filed with the court and also with Official Receiver when application was filed, the trustee is appointed to the administration and a certificate of appointment is issued. Where no consent had been filed with the court application, the Official Trustee is appointed.

### Statement of affairs – section 244 creditor’s petition

- 7.5. The legal personal representative, if there is one, is required by section 246 of the Bankruptcy Act to file a [Form 4 – Statement of affairs under Part XI](#) with the

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<sup>2</sup> A reference to the Official Receiver in this paper also refers to a delegate of the Official Receiver

Official Receiver within 28 days of being notified of the administration order. The LPR is generally notified of this obligation by the appointed trustee. If there is no LPR, the trustee may encourage the relatives or (former) legal representatives of the deceased debtor to obtain letters of administration, which will include the appointment of a LPR. If such action is not taken, the trustee may need to consider whether it is economically viable to apply to obtain letters of administration (for example, after considering whether there are any known realisable assets that would generate a dividend to creditors).

- 7.6. On receipt of the completed statement of affairs, the Official Receiver records the filing on the NPII and provides a copy of the filed document to the appointed trustee.

### **Statement of affairs – section 247 administrator’s petition**

- 7.7. The administrator is required by subsection 247(1) to complete the deceased’s statement of affairs when lodging the petition with the court. When a copy of the court application is given to the Official Receiver (pursuant to subregulation 11.01A(2)), the administrator should ensure that the statement of affairs is included.
- 7.8. The NPII is updated to show that the statement of affairs was filed on the day that it was filed with the court (pursuant to items 31 and 32 of Schedule 8 to the Bankruptcy Regulations) and a copy of the document is provided to the appointed trustee.

## **8. OTHER ISSUES**

### **Bankruptcy notice served on a debtor prior to death**

- 8.1. Where a bankruptcy notice is served on a debtor who subsequently dies prior to being served with the creditor’s petition, the creditor is required to proceed under Part XI of the Bankruptcy Act (that is, present the petition to the court under section 244).

### **Creditor’s petition presented and served before the death of the debtor**

- 8.2. Where a creditor has presented a creditor’s petition against a debtor but the debtor dies prior to being served with the creditor’s petition, section 245 states that the proceedings lapse and fresh proceedings must be commenced under Part XI of the Bankruptcy Act.
- 8.3. However, if a creditor’s petition has been served on the debtor and the debtor subsequently dies prior to the hearing of the petition for a sequestration order, the court can make an order that the estate be administered under Part XI of the Bankruptcy Act on that petition. The court can also make an administration order

on a creditor's petition that has been dismissed (that is, the creditor is not required to present a fresh petition under section 244).

### Death of undischarged bankrupt

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

## 9. RESOURCES

### Official Receiver Practice Statement

- [ORPS8 – The National Personal Insolvency Index](#)

### Forms

- [Form 4 – Statement of affairs under Part XI](#)
- [Form 12 – Trustee consent to act declaration](#)
- [Federal Court Form B14 – Applicant creditor's petition for administration](#)
- [Federal Court Form B15 – Administrator's petition](#)
- [Federal Court of Australia](#)
- [Federal Circuit Court](#)