



Australian Government

Australian Financial Security Authority

OFFICIAL TRUSTEE PRACTICE STATEMENT 7

Section 50 interim control orders

Date last updated: 26 August 2020
Contact: practice@afsa.gov.au



**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.

CONTENTS

1.	INTRODUCTION	3
	Orders under section 50 of the Bankruptcy Act	3
	Appointment of a trustee.....	3
2.	THE LEGISLATION	4
	Application to Part XI of the Bankruptcy Act	5
3.	WHAT THE ORDER WILL NEED TO INCLUDE	5
	Identification of property	5
	Nominated trustee	5
	Provision for remuneration.....	6
	Examination.....	6
	End date of the control period.....	7
	Debtor’s passport	7
4.	INDEMNITY FOR FEES, EXPENSES AND REMUNERATION	7
5.	THE CREDITOR’S PETITION	8
	Dismissal	8
	Sequestration order	8
6.	OTHER CONSIDERATIONS.....	8
	National Personal Insolvency Index record	8



1. INTRODUCTION

Orders under section 50 of the Bankruptcy Act

- 1.1. Section 50 of the [Bankruptcy Act 1966](#) provides for a creditor, after the issue of a bankruptcy notice or creditor's petition and before a debtor becomes bankrupt, applying to the court for an order that the debtor's property be placed under the control of a trustee.
- 1.2. The creditor applying for a section 50 order must have a debt that would be provable in bankruptcy, if the debtor was bankrupt.
- 1.3. The purpose of a section 50 order is to prevent the debtor from dealing with his or her property before sequestration to ensure that the property remains available to the trustee of the bankrupt estate in the event that a sequestration order is made. The purpose of section 50 was outlined in *Deputy Commissioner of Taxation v Clyne*:¹

“The section is clearly a provision in aid of the creditors of a debtor who has already committed an act of bankruptcy and has a creditor’s petition pending against him. It is a necessary and ancillary provision designed to enable appropriate steps to be taken to preserve and protect the property of a debtor so that, in the event of a sequestration order being made, that property will be available for distribution equitably amongst them in accordance with the statutory provisions contained elsewhere in the Bankruptcy Act 1966. That this is its purpose is reinforced by consideration of the provisions contained in s 50(2) with their emphasis on obtaining information concerning the debtor or his trade dealings, property and affairs.”
- 1.4. Any action by the debtor to deal with property that is the subject of the order will constitute contempt of court.

Appointment of a trustee

- 1.5. The trustee appointed to take control of the debtor's property may be a registered trustee or the Official Trustee in Bankruptcy.
- 1.6. A creditor contemplating an application to the court for a section 50 interim control order is strongly encouraged to discuss the matter with their preferred trustee before the order is obtained. In circumstances where a trustee is appointed without prior knowledge of the matter, there could be concerns with the terms of the order being deficient and risks associated with the identification of property and establishing which property does come under the trustee's control. Consequently, having the trustee's input into the order can ultimately benefit the creditor.

¹ [Re Deputy Commissioner of Taxation v Peter Leopold Clyne \[1983\] FCA 189 \(17 August 1983\)](#)

- 1.7. The trustee does not have an interest in the property or better title to it than the debtor.
- 1.8. The role of the trustee does not extend to realising the property. Rather, the trustee's role is to preserve and protect the property to ensure that it is not dissipated to the detriment of creditors. If extraordinary measures are deemed necessary, an application should be made to the court.

2. THE LEGISLATION

- 2.1. Section 50 of the Bankruptcy Act states:

Taking control of debtor's property before sequestration

- (1) *At any time after a bankruptcy notice is issued, or a creditor's petition is presented, in relation to a debtor, but before the debtor becomes a bankrupt, the Court may:*
 - (a) *direct the Official Trustee or a specified registered trustee to take control of the debtor's property; and*
 - (b) *make any other orders in relation to the property.*
- (1A) *The Court may give a direction or make an order only if:*
 - (a) *a creditor has applied for the Court to make a direction; and*
 - (b) *the Court is satisfied that it is in the interests of the creditors to do so; and the debtor has not complied with the bankruptcy notice.*
- (1B) *If the Court directs a trustee to take control of the debtor's property, the Court must specify when the control is to end.*
- (2) *Without limiting the generality of subsection (1), the Court may, at any time after giving a direction under subsection (1), summon the debtor, or an examinable person in relation to the debtor, for examination under this section in relation to the debtor.*
- (3) *A summons to a person under subsection (2) shall require the person to attend:*
 - (a) *at a specified place and at a specified time on a specified day; and*
 - (b) *before the Court, the Registrar or a magistrate, as specified in the summons; to be examined on oath under this section about the debtor and the debtor's examinable affairs.*
- (4) *A summons to a person under subsection (2) may require the person to produce at the examination books (including books of an associated entity of the debtor) that:*
 - (a) *are in the possession of the first-mentioned person; and*
 - (b) *relate to the debtor or to any of the debtor's examinable affairs.*
- (5) *For the purpose of the examination under this section of a person summoned under subsection (2), subsections 81(2) to (17), inclusive, apply, with any modifications prescribed by the regulations, as if:*
 - (a) *a sequestration order had been made against the debtor when the Court gave the direction under subsection (1) of this section;*

- (b) *the examination were being held under section 81; and*
- (c) *a reference in those subsections to a creditor were a reference to a person who has a debt that would be provable in the debtor's bankruptcy if a sequestration order had been made as mentioned in paragraph (a) of this subsection.*

2.2. Bankruptcy Regulation 4.06 places obligations on the relevant creditor following the making of a section 50 order.

Control of debtor's property before sequestration

- (1) *Where the Court makes a direction or other order under subsection 50(1) of the Act, the creditor who applied for the direction or other order must, within 7 days, serve the following documents in accordance with subregulation (2):*
 - (a) *a copy of the application;*
 - (b) *a copy of any affidavit filed in support of the application;*
 - (c) *a certified copy of the direction or other order.*
- (2) *The documents must be served:*
 - (a) *on the trustee who the Court has directed to take control of the debtor's property; and*
 - (b) *except where that person is the Official Trustee--on the Official Receiver.*

Application to Part XI of the Bankruptcy Act

2.3. Section 248 of the Bankruptcy Act provides for the application of some provisions of Parts IV, V, VI and VIII to Part XI administrations. Section 50 is one such provision that does apply to Part XI administrations.

3. WHAT THE ORDER WILL NEED TO INCLUDE

Identification of property

3.1. The order will need to specify the property that is to come under the trustee's control. In some cases, this will involve all of the property of the debtor, whereas other cases may involve only specified property.

Nominated trustee

3.2. The order will need to specify the trustee who is appointed to take control of the debtor's assets. As mentioned [above](#), the creditor is strongly encouraged to seek the assistance of a trustee before applying for a section 50 order to ensure that the terms of the order are unambiguous and achievable.

Provision for remuneration

- 3.3. The order will need to make provision for the payment of the trustee’s fees and remuneration. If it does not, the trustee may request that the creditor return to court to obtain an amended order prior to continuing and that this be done as a matter of urgency. If the creditor does not comply, the trustee may seek an order pursuant to subsection 30(1) of the Bankruptcy Act requiring payment.
- 3.4. Clause 3.03 of the Fees Determination provides for remuneration at the rate of \$62.50 per 15 minutes or part thereof for work performed when the Official Trustee:
- takes control of the property of a debtor under a direction of the court under section 50 of the Bankruptcy Act
 - having been directed to take control of the property of a debtor under section 50 of the Bankruptcy Act, carries on the business of the debtor.

Examination

- 3.5. Subsection 50(2) of the Bankruptcy Act provides for the court issuing a summons to the debtor or another “examinable person” to require him or her to attend for an examination and subsection 50(4) provides for a summons requiring the person to produce books in his or her possession or that relate to the debtor’s examinable affairs. Subsection 50(5) provides that a section 50 examination will be held in accordance with section 81, subject to the modifications contained in Bankruptcy Regulation 4.09.
- 3.6. “Examinable person” is defined in section 5 of the Bankruptcy Act:

“examinable person, in relation to a person (in this definition called the relevant person), means:

- (a) *if the relevant person is a debtor and property of the debtor is known or suspected to be in the possession of a person--that person;*
- (b) *if the relevant person has become a bankrupt and any of the property of the bankrupt is known or suspected to be in the possession of a person --that person;*
- (c) *in any case--a person who is believed to be indebted to the relevant person;*
- (d) *if a person, including:*
 - (i) *a person who is an associated entity of the relevant person; or*
 - (ii) *a person with whom an associated entity of the relevant person is or has been associated;**may be able to give information about the relevant person or any of the relevant person’s examinable affairs--that person; or*
- (e) *if books (including books of an associated entity of the relevant person):*
 - (i) *are in the possession of a person, including a person of a kind referred to in subparagraph (d)(i) or (ii); and*

(ii) may relate to the relevant person or any of the relevant person’s examinable affairs; that person.”

3.7. If the creditor wishes to have an examination of the debtor conducted, this should be included in the application.

End date of the control period

3.8. A sequestration order being made or a creditor’s petition being dismissed does not make the section 50 order void, only voidable.² It must either come to an end pursuant to a term in the original order (or an amended order, if applicable) or be set aside by the court.

3.9. To prevent the need for an amended order, the creditor should include an end date in the application.

Debtor’s passport

3.10. The courts have found that section 30 of the Bankruptcy Act, which allows the court to make such orders as the court thinks necessary for the purposes of carrying out or giving effect to the Bankruptcy Act, does provide the court with power to make an order requiring the debtor to deliver his or her passport to the trustee.³

3.11. If the creditor wishes to have the court require the debtor to deliver his or her passport to the trustee, such an application must be made with the application for the section 50 order or a separate order obtained.

4. INDEMNITY FOR FEES, EXPENSES AND REMUNERATION

4.1. Regulation 4.07 provides that the Official Trustee may request from the creditor who obtained the section 50 order payment upfront of an amount sufficient to cover its fees and expenses or apply to the court for an order that the creditor pay the amount. “Fees and expenses” in this context includes the Official Trustee’s remuneration.

4.2. As noted above, clause 3.03 of the Fees Determination provides for remuneration at the rate of \$62.50 per 15 minutes or part thereof for work performed when by the Official Trustee in taking control of property and/or carrying on the business of a debtor.

4.3. Where the creditor does forward an advance to cover the trustee’s fees and expenses and there are funds remaining at such time as one of the following

² [Re Deputy Commissioner of Taxation v Peter Leopold Clyne \[1983\] FCA 189 \(17 August 1983\)](#)

³ [Talacko v Talacko \[2010\] FCA 239 \(17 March 2010\)](#)

events occurs, the funds must be refunded:

- the debtor enters a personal insolvency agreement
- a Part XI order is made in the debtor's estate
- the court orders that any property under the Official Trustee's control be transferred to another person
- the debtor becomes bankrupt by sequestration order
- a creditor's petition lodged against the debtor is dismissed by the court
- the debtor becomes bankrupt by debtor's petition, or
- a debt agreement proposal from the debtor is accepted by creditors.

- 4.4. Item 4 of Schedule 3 to the [Bankruptcy Regulations 1996](#) provides for a priority payment from a bankrupt estate to creditors who gave the trustee advances for the costs of meetings. Although not all debtors whose property has been subject to an interim control order do ultimately become bankrupt, this priority must be noted in those bankruptcies that do occur.

5. THE CREDITOR'S PETITION

Dismissal

- 5.1. If the creditor's petition is dismissed, regulation 4.08 allows the debtor to apply to the court within 21 days for compensation for loss suffered as a result of the section 50 order having been made. If such an application is made, the court has the power to determine the quantum.

Sequestration order

- 5.2. If the creditor's petition is heard and a sequestration order is made, the trustee of the bankrupt estate may or may not be the Official Trustee. If not the Official Trustee, consideration will need to be given as to how the Official Trustee will recover its remuneration.

6. OTHER CONSIDERATIONS

National Personal Insolvency Index record

- 6.1. A section 50 order is recorded on the National Personal Insolvency Index ("NPII") forever.
- 6.2. Any person can, for a fee, gain access to the information recorded on the NPII. Information about conducting a search of the NPII is contained on [AFSA's website](#) and in [Official Receiver Practice Statement 8 – The National Personal Insolvency Index](#).