



**Australian Government**  
**Australian Financial Security Authority**

## OFFICIAL RECEIVER PRACTICE STATEMENT 2

# BANKRUPTCY BY DEBTOR'S PETITION

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If you have any comments, suggestions or queries about an issue referred to in this practice statement, please contact the National Manager, Insolvency and Trustee Services, at [registry@afsa.gov.au](mailto:registry@afsa.gov.au).

## CONTENTS

1.	INTRODUCTION.....	3
2.	DEBTOR’S PETITION AND STATEMENT OF AFFAIRS FORMS.....	4
	Currency and completeness of the forms.....	4
3.	APPOINTMENT OF A TRUSTEE .....	5
4.	AUSTRALIAN CONNECTION.....	6
5.	NATIONAL PERSONAL INSOLVENCY INDEX.....	6
6.	WHEN THE DEBTOR APPEARS ABLE TO PAY HIS OR HER DEBTS.....	6
7.	PROCEDURE FOR REJECTION OF A DEBTOR’S PETITION.....	8
8.	CURRENT DEBT AGREEMENT OR PERSONAL INSOLVENCY AGREEMENT .....	8
9.	DEBTORS’ PETITIONS AND PARTNERSHIPS.....	9
10.	PRESENTATION OF A PETITION UNDER A POWER OF ATTORNEY OR A GUARDIANSHIP BOARD ORDER .....	10
11.	UNLIQUIDATED DAMAGES.....	10
12.	ACCEPTANCE OF THE PETITION .....	11
	Joint administrations.....	11
	Appointment of a trustee .....	11
13.	PUBLIC RECORDS AND ADMINISTRATIVE RECORDS .....	12
	ANNEXURE A – AUSTRALIAN CONNECTION .....	13
	ANNEXURE B – PROCEDURE FOR REFERRAL TO THE FEDERAL CIRCUIT COURT .....	18
	ANNEXURE C – THE DUBOW CASE.....	19
	ANNEXURE D – EXAMPLES OF SITUATIONS WHEN THE OFFICIAL RECEIVER MAY REJECT A PETITION .....	21

## 1. INTRODUCTION

- 1.1. The [Bankruptcy Act 1966](#) (“the Act”) enables a person who is in financial difficulty to present a petition (that is, an application) to the Official Receiver for his or her own bankruptcy.
- 1.2. The policy underpinning the legislation and the Official Receiver’s practice is that a debtor is entitled to seek relief from an unmanageable debt burden through bankruptcy if the debtor is unable to resolve his or her financial difficulties through other means. It is regarded as an option of last resort and carries serious consequences.
- 1.3. This Practice Statement is a guide to dealing with debtors’ petitions for bankruptcy, in terms of when and how the Official Receiver<sup>1</sup> will accept or reject petitions.
- 1.4. This Practice Statement does not deal with petitions for administration of insolvent deceased estates, as they are lodged with the Federal Court or the Federal Circuit Court. More information about these is contained in [Official Receiver Practice Statement 5 – Insolvent deceased estates \(Part XI of the Bankruptcy Act 1966\)](#).
- 1.5. A debtor’s petition submitted to the Official Receiver must be on the current approved form and must be accompanied by an adequately-completed statement of affairs. The debtor must also have read certain information that is prescribed by legislation, which is contained within the debtor’s petition form. Relevant forms are referred to and hyperlinked in this practice statement.

In summary, a person who is in financial difficulty who wishes to become bankrupt will need to:

- be eligible to lodge a debtor’s petition
- complete a debtor’s petition
- read the prescribed information and acknowledge that he or she has done so
- complete and file a statement of affairs with the debtor’s petition.

The debtor may also:

- obtain a consent to act and lodge it with his or her debtor’s petition and statement of affairs, if he or she wishes to have a registered trustee appointed to administer the estate.

- 1.6. Upon receipt of a completed petition and a completed statement of affairs, the Official Receiver must either:

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

- accept the petition
- reject the petition
- in certain circumstances, refer the petition to the court for direction.

## 2. DEBTOR’S PETITION AND STATEMENT OF AFFAIRS FORMS

- 2.1. The debtor must complete [a debtor’s petition and a statement of affairs](#).
- 2.2. When the documents are received by the Official Receiver, they are scanned and electronic images are created. The paper copies of the documents will also be retained if the debtor’s petition is accepted.
- 2.3. Once the Official Receiver has received the debtor’s petition and statement of affairs, the following will be checked:
  - the debtor’s eligibility to present a petition
  - the currency and completeness of the documents
  - whether the petition should be accepted.
- 2.4. By force of section 55 of the Act, the Official Receiver must reject a debtor’s petition in certain circumstances, has discretion to reject a petition in other circumstances or, if not rejecting it, must accept it.

### Currency and completeness of the forms

- 2.5. Subsection 55(2) of the Act requires a debtor to use the “approved form” when submitting a debtor’s petition and to complete and file a statement of affairs with the petition.
- 2.6. Subsection 55(3) of the Act allows the Official Receiver discretion to reject a debtor’s petition if:
  - a. the petition does not comply substantially with the approved form
  - b. the petition is not accompanied by a statement of affairs
  - c. the Official Receiver thinks that the statement of affairs accompanying the petition is inadequate.
- 2.7. If the debtor does not use the current version of the debtor’s petition and/or statement of affairs, the Official Receiver will reject the petition. The debtor will be advised that his or her petition has been rejected because the current version(s) of the approved form(s) was not used. Copies of the current versions of the forms should be sent with the correspondence outlining the rejection of the debtor’s petition.
- 2.8. The currency of the forms can be checked by looking at the month and year in the bottom left corner of the debtor’s petition and statement of affairs and ensuring that they match the latest versions available on AFSA’s [website](#).

- 2.9. The Official Receiver will not accept documents dated more than 28 days prior to receiving them. A statement of affairs older than 28 days is inadequate as it may not be a current reflection of the debtor's affairs. As the Official Receiver will not accept such a petition, it must therefore be rejected.
- 2.10. A statement of affairs is not considered to be adequately completed unless:
- the debtor has attempted to answer all questions and provided supporting documents where necessary
  - there is sufficient information to identify the debtor
  - it is legible
  - the form is signed and dated.
- 2.11. Whether a statement of affairs is adequately completed will depend upon the debtor's circumstances as set out in the form. For instance, where a debtor does not appear to have any business involvement, it would not matter if the debtor has not answered all the business-related questions. However, where information in the form suggests that the debtor may have had a business involvement (for example, there are trade creditors listed), the form would not be considered adequately completed unless the debtor has answered the business-related questions.
- 2.12. A debtor's petition or statement of affairs form that is illegible and that cannot be reliably used to enter the debtor's information on the National Personal Insolvency Index ("NPII"), to identify and notify creditors or to alert the trustee to potential issues will be deemed inadequate and will be rejected.
- 2.13. When a debtor's petition is rejected because it or the statement of affairs is not presented on the current version of the approved form, it is dated more than 28 days prior to its presentation, it has not been adequately completed and/or it is illegible, an administrative record of the rejected debtor's petition and the reason for its rejection is created. Electronic images of the documents are retained by the Official Receiver as part of this administrative record.

### 3. APPOINTMENT OF A TRUSTEE

- 3.1. A debtor has the option of choosing a private registered trustee to administer his or her estate. Creditors can appoint a different trustee at a later date. If the estate is to be administered by a registered trustee, a properly-completed trustee consent to act declaration ([Form 12](#)) must accompany the debtor's petition and statement of affairs. Unless a completed consent to act form is received from a registered trustee, the Official Trustee is automatically appointed as trustee of the estate initially.
- 3.2. Contact details for registered trustees in each State and Territory may be found on AFSA's [website](#).

## 4. AUSTRALIAN CONNECTION

- 4.1. Each debtor’s petition is checked to ensure that the debtor has an Australian connection. To satisfy the Australian connection test, a debtor must:
  - a. be personally present or ordinarily resident in Australia, or
  - b. have a residence in Australia that he or she uses or has used and may use as a residence, and to which he or she may “repair at their whim at any time”<sup>2</sup>, or
  - c. have a business connection with Australia (ie carries on business in Australia, either personally or by means of an agent or manager) or be a member of a firm or partnership that carries on business in Australia.
- 4.2. [Annexure A](#) contains guidelines regarding determining whether a person can be considered ordinarily resident in Australia, to have a “dwelling-house” in Australia or to be operating a business in Australia.
- 4.3. Where a debtor is unable to satisfy the Australian connection test, the Official Receiver or delegated officer **must**, pursuant to subsection 55(2A) of the Act, reject the debtor’s petition. The debtor will be advised by letter of the rejection. An administrative record of the presentation of the documents and the reason for rejection is created. The electronic images of the documents are retained by the Official Receiver as part of the administrative record.

## 5. NATIONAL PERSONAL INSOLVENCY INDEX

- 5.1. When a petition is accepted, it will be entered on the NPPI, which is the public register of all insolvencies.
- 5.2. The rejection of a debtor’s petition is not recorded on the NPPI.
- 5.3. More information about the NPPI is contained on AFSA’s [website](#) and in [Official Receiver Practice Statement 8 – The National Personal Insolvency Index](#).

## 6. WHEN THE DEBTOR APPEARS ABLE TO PAY HIS OR HER DEBTS

- 6.1. Pursuant to subsection 55(3AA) of the Act, the Official Receiver has a discretionary power to reject a debtor’s petition when of the opinion that the debtor is possibly abusing the bankruptcy system by using it as a means to avoid paying debts, while in fact having the capacity to pay those debts over a reasonable period of time. The discretion is not available where a petition

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<sup>2</sup> The phrase is derived from *Mathai v Kwee* [2005] FCA 932 per Graham J. See [Annexure A](#) for more details about this case

- is being presented against a business partnership (section 56C).
- 6.2. The Official Receiver is not required to determine whether or not the debtor is insolvent. However, the debtor's petition may only be rejected if:
- A. the debtor is likely to be able to pay all their debts immediately or within a reasonable time if he or she did not become a bankrupt, AND
  - B. EITHER
    - the debtor is unwilling to pay a particular creditor or creditors, or is unwilling to pay creditors in general
- OR
- the debtor has previously been bankrupt on a debtor's petition at least three times overall or once in the five years prior to the current petition. (A debtor is considered to have been bankrupt in the prior five years if the date of that bankruptcy falls within the five years.)
- 6.3. When a petition and statement of affairs are received, the forms and attachments are assessed for information that may indicate that the debtor is able to pay but unwilling to pay all his or her debts immediately or within a reasonable amount of time.
- 6.4. The Official Receiver may request further information from the debtor but cannot seek information/documents directly from other persons (including creditors). If any such information is received from other sources, is unable to be considered.
- 6.5. The decision to reject a petition must be based on the information supplied for the purposes of that petition. However, reference may be made to the previous bankruptcies and/or previously rejected petitions.
- 6.6. Prior to any decision being made to reject a petition when it appears that the debtor will be able to pay his or her debts within a reasonable time period, the debtor should be contacted to discuss the petition and the likelihood of its rejection. The debtor is given the opportunity to provide further information to show why the petition should not be rejected. The Official Receiver may suggest to the debtor that he or she contact a financial counsellor and can provide [contact details](#) for this purpose.
- 6.7. The debtor may also choose to withdraw his or her petition at this stage. If this option is exercised, an administrative record of the presentation of the petition is created. No record is entered on the NPII. Electronic images of the documents are retained by the Official Receiver as part of the administrative record.
- 6.8. Examples of situations where the Official Receiver may consider exercising discretionary powers to reject a petition are contained in [Annexure D](#).
- 6.9. The debtor is notified of the decision in writing and is provided with the reasons for the rejection. The debtor is also advised of his or her right to



apply to the [Administrative Appeals Tribunal](#) (“AAT”) for a review of the decision. Only the debtor can apply to the AAT for a review of a decision to reject a debtor’s petition – neither a creditor nor anyone else can apply for a review.

- 6.10. An administrative record of the presentation of the petition and the reasons for rejection is created. No record is entered on the NP11. Electronic images of the documents are retained by the Official Receiver as part of the administrative record.

## 7. PROCEDURE FOR REJECTION OF A DEBTOR’S PETITION

- 7.1. When a petition is rejected, a letter will be provided explaining the basis for the decision to reject it. The letter should provide sufficient information to allow the debtor to understand what further information is required if the debtor should choose to submit a fresh petition and statement of affairs.
- 7.2. If a petition is filed through a financial counsellor, registered trustee or other advisor, it is good practice to send them a copy of the rejection letter that has been sent to the debtor.
- 7.3. Pursuant to Schedule 8 to the Bankruptcy Regulations 1996, the rejection of a debtor’s petition is not recorded on the NP11.

## 8. CURRENT DEBT AGREEMENT OR PERSONAL INSOLVENCY AGREEMENT

- 8.1. Section 55 of the Act states in part:
  - “(5A) A debtor who is a party (as debtor) to a debt agreement must not present a debtor’s petition unless the Court gives the debtor permission to do so.
  - (6) A debtor who has executed a personal insolvency agreement is not, except with the leave of the Court, entitled to present a petition against himself or herself unless:
    - (a) the agreement has been set aside; or
    - (b) the agreement has been terminated; or
    - (c) all the obligations that the agreement created have been discharged.”
- 8.2. The Official Receiver will check the NP11 in relation to every debtor who presents a debtor’s petition to determine the debtor’s eligibility.
- 8.3. If the NP11 discloses that the debtor is a party to a current debt agreement or personal insolvency agreement (ie the agreement has not been set aside, terminated or completed), the debtor is unable to present his or her own



petition unless the debtor has received permission from the court. It is the debtor's responsibility to seek the court's permission.

- 8.4. Subsection 55(7) of the Act states:  
*“Where a petition is presented by a debtor against himself or herself in contravention of subsection (5A), (6) or (6A), the debtor does not become a bankrupt by virtue of its presentation.”*

This means that the Official Receiver does not need to “reject” a debtor's petition in these circumstances.

- 8.5. An administrative record of the lodgment of the debtor's petition is created. The debtor is not bankrupt and no record is entered on the NPII. Electronic images of the documents are retained by the Official Receiver as part of the administrative record.

## 9. DEBTORS' PETITIONS AND PARTNERSHIPS

- 9.1. A petition that is presented against a business partnership must be accompanied by more than one statement of affairs. Each of the business partners must present a statement of affairs that addresses his or her personal affairs and a statement of affairs for the business partnership must also be presented.
- 9.2. The Official Receiver must refer a debtor's petition to the Federal Court or Federal Circuit Court for direction on whether to accept or reject the petition if:
- the debtor has lodged a petition in his or her own name only and is subject to a pending creditor's petition along with another person(s) (subsection 55(3B))
  - a number of debtors who represent a business partnership have presented a petition against that partnership and not all partners are a party to the petition (paragraph 56C(1)(a))
  - debtors have presented a petition against a partnership and one or more (but not all) are subject to a creditor's petition (paragraph 56C(1)(b))
  - two or more debtors have lodged a petition in their own names and at least one (but not all) of them is subject to a pending creditor's petition (subsection 57(3B)).
- 9.3. Any possible referral should, in the first instance, be discussed with the debtor(s) so that he or she has the option to withdraw the petition.
- 9.4. If the debtor cannot be contacted or the debtor insists on presenting his or her own petition, the formal process of referral to the court must take place. The court referral procedure is at [Annexure B](#).
- 9.5. Where a debtor presents a debtor's petition and there is a creditor's petition

outstanding in his or her name only, there is no requirement to refer the matter to the Federal Court or Federal Circuit Court. However, as a matter of good practice, the Official Receiver will write to the court and the solicitors for the petitioning creditor giving them notice that a debtor's petition has been accepted.

## 10. PRESENTATION OF A PETITION UNDER A POWER OF ATTORNEY OR A GUARDIANSHIP BOARD ORDER

- 10.1. A situation may arise where a debtor's petition is presented on behalf of a person based on a:
  - a. Guardianship Board order (the terminology may differ slightly from State/Territory to State/Territory)
  - b. power of attorney.
- 10.2. In [\*Orix Australia Corporation Limited v McCormick\* \[2005\] FCA 1032 \(28 July 2005\)](#), the court considered the scope of an enduring power of attorney under Queensland law and found that it is not wide enough to enable the presentation of a debtor's petition by the attorney. In practice, this means that the ability of the Official Receiver to accept a debtor's petition that is presented under a power of attorney or under a Guardianship Board order (or similar) could be doubtful and such applications may not be accepted.
- 10.3. Some jurisdictions may have power of attorney or Guardianship Board legislation that specifically allows for bankruptcy proceedings to be taken, or a particular situation may involve there being an order that may be an order specifically mentions the power to take bankruptcy proceedings, in which case the principles of *Orix Australia Corporation Limited v McCormick* may not strictly apply.
- 10.4. The Official Receiver will need to give consideration to each debtor's position presented on behalf of a person when there is a Guardianship Board order or power of attorney in place and make reference to the relevant appointment and/or court documents in order to determine whether a petition can be accepted.

## 11. UNLIQUIDATED DAMAGES

- 11.1. The term "unliquidated damages" refers to a liability to pay an amount (for example, by way of compensation for a wrong done to a person or breach of a contract) that has not yet been fixed by a court or by an agreement between the parties involved.
- 11.2. The most common situation presented to the Official Receiver is where the debtor has been involved in a motor vehicle accident and will need to

compensate another party, but there has not yet been a judgment or an agreement as to how much compensation is payable.

- 11.3. Pursuant to subsection 82(2) of the Act, unliquidated damages (unless they arose from a contract, promise or breach of trust) are not provable in bankruptcy. **This means that the amount will still be payable by the debtor even if he or she becomes bankrupt and the creditor can still pursue payment.**

## 12. ACCEPTANCE OF THE PETITION

- 12.1. The Official Receiver will check the documents as outlined above. If no reason to reject the petition is identified, the petition will be accepted. A debtor becomes bankrupt on the acceptance of his or her debtor's petition by the Official Receiver or a delegated officer. Mere presentation of a debtor's petition by a debtor is insufficient to make the debtor bankrupt.
- 12.2. The acceptance of the debtor's petition is recorded electronically and a bankruptcy number is assigned to the debtor's bankrupt estate. The debtor's name (including any aliases), gender, date of birth, date of bankruptcy, address and occupation are entered on the NPII. The trustee's details are also entered.

### Joint administrations

- 12.3. The Official Receiver will create a joint administration (ie a bankruptcy involving more than one bankrupt debtor) where two or more debtors have presented debtors' petitions and:
- indicated on the face of the petitions that they are joint debtors and a review of their statements of affairs indicates that there are joint assets that must be dealt with, and/or
  - a registered trustee has consented to administer the estates of joint debtors and has asked that a joint administration be created.

### Appointment of a trustee

- 12.4. Where a registered trustee has consented to act as trustee of the estate, copies of the debtor's petition and statement of affairs, together with any attachments to the statement of affairs (eg pay slips, tax assessment notices, contracts etc), are forwarded to the trustee. The Official Receiver also provides a certificate of appointment to the trustee.
- 12.5. By operation of subsections 156A(1) and 156A(3) of the Act, where more than one consent to act is received, the Official Receiver will generally appoint the trustee whose consent was filed first in time, unless it is revoked by that trustee. However, this "rule" may be displaced in certain

circumstances. For example, in *Re Close (trading as FB Close Transport); Ex Parte Abbott* [1983] 50 ALR 571, it was held that where two petitions have been presented by creditors each accompanied by a consent to act as trustee given by different trustees, upon the making of a sequestration order the trustee whose consent was given in respect of the proceedings upon which the order was made becomes the sole trustee of the estate of the bankrupt (regardless of whether that trustee was the first to file a consent to act).

- 12.6. Where a registered trustee has not consented to act in a bankruptcy, the Official Trustee is automatically appointed as trustee of the estate initially.
- 12.7. If a creditor's petition is on foot (but not yet determined) at the time the debtor presents a debtor's petition that the Official Receiver then accepts, and if a different registered trustee had consented to act for in relation to each petition, the trustee who consented to be the trustee of the debtor's petition becomes the trustee of the estate. If there is no consent filed with the debtor's petition, then the Official Trustee becomes the trustee.

### 13. PUBLIC RECORDS AND ADMINISTRATIVE RECORDS

- 13.1. On the acceptance of a debtor's petition by the Official Receiver or delegated officer, details of the debtor and the bankruptcy are entered on the NPII. Records entered on the NPII are permanent.
- 13.2. A debtor may apply to have his or her address suppressed or not entered on the NPII either at the time of presenting a petition or at a later stage. The process for suppression is addressed in [Official Receiver Practice Statement 8 – The National Personal Insolvency Index](#).
- 13.3. The original statement of affairs (other than Part A, which is expressed to be confidential) is a public document and can be inspected by any member of the public for a fee (although there is no examination fee for the debtor or his/her creditors). Copies of the documents may also be obtained for a fee. The Official Receiver may refuse to allow a person to access particular information on the statement of affairs if that access would jeopardise or be likely to jeopardise the safety of any person.
- 13.4. Copies of documents such as tax returns, invoices, copies of contracts, pay slips etc accompanying the petition and statement of affairs are passed to the trustee of the bankrupt estate. Electronic images of these documents are also retained by the Official Receiver.
- 13.5. A debtor's petition that is received and rejected by the Official Receiver is not recorded on the NPII. Documents relating to rejected petitions are not available for public inspection.

## ANNEXURE A – AUSTRALIAN CONNECTION

Subsection 55(2A) of the Act 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 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 (ie 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 (eg 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 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 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 \(13 April 2012\)](#))<sup>3</sup>.

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 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

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<sup>3</sup> Where 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)

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 – PROCEDURE FOR REFERRAL TO THE FEDERAL CIRCUIT COURT

Should the Official Receiver or delegated officer decide to refer a matter to the court for a decision on whether or not to accept a petition, the following processes apply:

1. the petition is not registered on the NPII
2. an application form is completed. (The form is the [Federal Court \(Bankruptcy\) Rules 2016 – Form 8](#), which is the same form used under the [Federal Circuit Court \(Bankruptcy\) Rules 2016](#).) This form is signed by the Official Receiver
3. copies required:
  - one for each debtor named in the debtor's petition
  - one for each debtor named in the creditor's petition
  - one for each creditor named in the creditor's petition
  - one copy for the court
  - one copy for the Official Receiver's file
4. Form 8, photocopies of the debtor's petition and statement of affairs and a covering letter to the Registrar of the Federal Circuit Court are filed with the Court Registry
5. the court will fix a time date and place for the hearing and will note the details on the Form 8
6. notice of the hearing, together with a sealed copy of Form 8, is served by the Official Receiver by post at least **three days before the date of the hearing** on all relevant parties:
  - a. each debtor named in the debtor's petition
  - b. each debtor listed in any relevant creditor's petition
  - c. each creditor named in the creditor's petition
7. an affidavit must be completed by the person who arranged service (eg if by post) or served on the people listed in point 6 above
8. immediately after the hearing, a draft order should be prepared which replicates the terms of the order announced by the court at the hearing. Three copies of the draft order are filed with the Registry. The drafts are then corrected or sealed and returned
9. if the petition is to be accepted by the Official Receiver, the result is entered on the NPII.

## ANNEXURE C – THE DUBOW CASE

In the matter of *Dubow v Official Receiver & Anor* [2013] FMCA 217 (28 March 2013), the court was asked to consider annulment of a bankruptcy pursuant to section 153B of the Act as the applicant (Ms Dubow) claimed that it should not have been accepted by the Official Receiver. The reasons that Ms Dubow provided to support her claim and the court's findings dismissing each are outlined below.

### Is the Official Receiver required to scrutinise a debtor's petition and statement of affairs?

Ms Dubow believed that she did not have outstanding debts that were either not being paid or were not being paid as and when they fell due. She further claimed that neither her debtor's petition nor statement of affairs reflected otherwise and that the Official Receiver ought to have enquired as to whether the debts disclosed by her were paid up to date when she presented her petition.

The court commented that the statement of affairs does not ask when debts are due or what overdue amounts are involved, so this is not something that the Official Receiver can, should or may consider. Further, the court found that the Official Receiver is not obliged to scrutinise a debtor's petition to the extent that Ms Dubow suggested.

### Solvency

Following on from the previous point, Ms Dubow claimed that she was therefore solvent at the time she presented her debtor's petition and, as a result, she was "not eligible to be declared bankrupt".

The court did not accept this position and even commented that "*Presenting a debtor's petition when the debtor knows that he or she is not insolvent is an abuse of process.*"

The court found Ms Dubow's case inconsistent as, on the one hand, she presented a petition to the Official Receiver to be accepted and to bring an end to some ongoing litigation with which she was involved; yet, on the other hand, she says that the Official Receiver should have picked up on the fact that she was solvent. Further, at the time the petition was filed, some debts could not be quantified and, therefore, Ms Dubow could not be certain that she was in fact solvent.

### Prescribed Information

Ms Dubow contended that she had not read the "Prescribed Information" (being the information that the Official Receiver is required to supply all debtors pursuant to the Bankruptcy Regulations) and that this was relevant to her debtor's petition being accepted.

The court found that the evidence did not establish this and looked at the fact that Ms Dubow indicated along that process that she had read the Prescribed Information on the back of the debtor's petition form. The court also found that the Prescribed Information on the back of the debtor's petition form did comply with regulation 4.11.

## Overall

The court's overall findings were that it would not exercise its discretion to annul the bankruptcy under section 153B because:

- Ms Dubow's bankruptcy has come about upon her own application, which she made after soliciting advice about her affairs
- Ms Dubow had stated that she lodged her debtor's petition to avoid legal proceedings being pursued by one of her creditors, yet she later said that her petition ought to have been rejected
- the evidence established that Ms Dubow was insolvent.

The court commented at paragraph 37 that:

*"... there is no obligation upon the Official Receiver to scrutinise the debtor's petition in the way in which Ms Dubow suggests. The Official Receiver may do so, and may reject the petition if it appears from the information in the statement of affairs (and any additional information supplied by the debtor) that, if the debtor did not become a bankrupt, the debtor would be likely (either immediately or within a reasonable time) to be able to pay all the debts specified in the statement of affairs: s.55(3AA)(a) of the Act, but there is no obligation upon the Official Receiver to subject the petition to such scrutiny: s.55(3AB) of the Act."*



## ANNEXURE D – EXAMPLES OF SITUATIONS WHEN THE OFFICIAL RECEIVER MAY REJECT A PETITION

In applying the court's findings in the Dubow case, the Official Receiver will consider the discretionary power to reject a petition if it appears that the debtor may be abusing the bankruptcy system by using it as a means to avoid paying debts that he or she has the capacity to pay over a reasonable period of time. The Official Receiver is not required to make a decision as to whether the debtor is insolvent or to examine the documentation provided in minute detail; nor is the Official Receiver required to reject a petition when it could be rejected under subsection 55(3AA) (given that it is a discretionary power).

Following are some instances where the use of the discretionary powers can be considered:

- the debtor has an ability to pay **all** of his or her debts immediately, for example from existing cash reserves or by selling an asset
- the debtor appears to have been making payments to some but not all of his or her creditors
- the debtor has incurred debts within a very short period of time prior to lodging the petition and his or her stated income indicates there may be capacity to pay
- the debtor has not explored the alternatives available to deal with his or her financial difficulties
- the debtor's opinion as to the cause of his or her insolvency.

There may be other factors affecting the debtor's ability to pay all of his or her debts either immediately or within a reasonable time. The following factors should be taken into account in each case:

- the debtor's ongoing commitments (eg number of dependants)
- recent changes in the debtor's circumstances which reduced his or her capacity to pay debts owed (eg loss of a job)
- any exceptional circumstances affecting ability to pay (eg ongoing or sudden serious illness, special needs of dependants, loss of a second income in the household, sudden and unexpected loss of major assets including the debtor's home).

It should also be noted that there are no grounds in the Act to reject a debtor's petition for the following reasons:

- the debt(s) disclosed do not appear provable
- in the case of a single petition, there is a creditor's petition pending
- the debtor has been bankrupt before (once in the past five years or more than three times overall) BUT does not appear to be able to pay disclosed debts within a reasonable time period.