



Australian Government

Australian Financial Security Authority

OFFICIAL RECEIVER PRACTICE STATEMENT 3

BANKRUPTCY BY SEQUESTRATION ORDER

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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.

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1. INTRODUCTION

- 1.1. The [Bankruptcy Act 1966](#) (“the Act”) allows a creditor who is owed money to apply to the court to make a person (“the debtor”) bankrupt. The application to the court is called a **creditor’s petition** and, if the court does make the debtor bankrupt, this is called a **sequestration order**.
- 1.2. This practice statement deals with the role of the Official Receiver¹ in registering creditors’ petitions and sequestration orders. It also provides an overview of the creditor’s petition process and provides links to the Federal Court of Australia website for more detailed information about the court processes.
- 1.3. This practice statement does not deal with petitions for administration of insolvent deceased estates under Part XI of the Act. Information on these can be found in [Official Receiver Practice Statement 5 – Insolvent deceased estates \(Part XI of the Bankruptcy Act 1966\)](#).

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

Conditions

- 2.1. There are three conditions a creditor must meet before the creditor can petition for a person’s bankruptcy:
 - an amount of \$5000 or more is owed to the creditor (or where the petition is being presented by two or more creditors, then the total amount owed to these creditors is \$5000 or more)
 - the amount/s owed is a liquidated sum (ie 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 predefined events in section 40 of the 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 on bankruptcy notices is available in [Official Receiver Practice Statement 6 – Applying for a bankruptcy notice](#).)

Petition by a secured creditor

- 2.2. 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

¹ A reference to the Official Receiver in this paper also refers to a delegate of the Official Receiver

owing exceeds the value of the security held or if the secured creditor states that he/she is willing to surrender his/her security for the benefit of creditors generally in the event that a sequestration order is made against the debtor.

Petition against a partnership

- 2.3. 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

- 2.4. 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

- 2.5. 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 they are due a liquidated sum of \$5000 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 they seek independent legal advice.

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

- 4.1. A creditor who presents a petition must give a copy of the petition to the Official Receiver within two working days after the petition is endorsed by the

court. This enables the Official Receiver to record the details of the petition in the [National Personal Insolvency Index](#) (“NPII”).

- 4.2. The copy of the endorsed petition can be filed with the Official Receiver via email to 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 assets before the court can hear the 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 Act.
- 5.2. The court can make an interim property control order and appoint a trustee if the court believes that it is in the creditor’s interests and if it is shown that the debtor has not complied with a 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 court decides on the creditor’s petition.
- 5.4. The section 50 order must be filed with the Official Receiver within seven days and can be filed by email to registry@afsa.gov.au.

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 five days before the hearing
 - the fact that the debtor still owes the money.
- 6.2. The court also requires the petitioner to provide a NPII search extract of 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 Federal Court (Bankruptcy) Rule 4.06).
- 6.3. If the debtor disputes the creditor’s claims, the debtor can oppose the creditor’s petition. The most 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, based on the evidence before it, the court is not satisfied that the creditor has met the requirements of the 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 two working days after the court has endorsed the order.
- 6.6. If the court is satisfied that the creditor has met the requirements of the Act and proved that the debt is owed, the court makes a sequestration order and the debtor becomes bankrupt.
- 6.7. The creditor is required to file a copy of the sequestration order with the Official Receiver within two days of the order being made (s52(1A)). The copy is not required to be sealed or endorsed by the court. Therefore, where there is a delay (or predicted delay) obtaining a sealed or endorsed sequestration order from the court, the Official Receiver will accept an unsealed copy of the order to facilitate it being registered on the NPII as quickly as possible after the order has been made. This is important because the person becomes bankrupt when the order is made, not when the NPII sequestration order record is created.
- 6.8. A copy of an unsealed sequestration order will generally be available on the courts' website (see www.comcourts.gov.au).
- 6.9. As with the filing of a creditor's petition, the Official Receiver will accept a sequestration order via email to registry@afsa.gov.au to ensure expedient filing and processing.

Adjournments

- 6.10. Either party can request an adjournment if they require further time to establish their case. 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 working days after the court has endorsed the order. 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 file an extract from the relevant electronic court record which shows that the matter has been adjourned. The date of the next hearing should 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 two working days after the court has endorsed the order. 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 two working days after the court has endorsed the order. 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/she is solvent and has produced reasonable evidence to suggest that he/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. There is no record of the stay of a sequestration order on the NPII.

7. APPOINTMENT OF A TRUSTEE

- 7.1. Once a person is made bankrupt, their bankrupt estate must be administered by a bankruptcy trustee. The trustee investigates the debtor's affairs, reports to creditors, recovers property (if any) and makes a distribution to creditors (if sufficient funds are realised). Trustees charge for this service.
- 7.2. Subsection 156A(1) of the Act provides that a registered trustee may file with the Official Receiver a consent to act as trustee of the estate of a debtor specified in the consent in the event the debtor becomes bankrupt. A creditor who is petitioning the court to make a debtor bankrupt should select

a trustee and obtain the trustee's consent to administer the estate should the court make the debtor bankrupt. AFSA's website contains [contact details for registered trustees](#) in each State and Territory and the trustee consent to act declaration ([Form 12](#)).

- 7.3. Where a registered trustee has consented, the signed consent must be served on the debtor along with the creditor's petition at least five days before the court hearing date (pursuant to Federal Court (Bankruptcy) Rule 4.05(e)).
- 7.4. The creditor should file the trustee's consent to act with the Official Receiver when the creditor's petition is filed. If it is not filed at this time, it must be filed with the sequestration order.
- 7.5. If a creditor does not obtain a registered trustee's consent, the Official Trustee becomes the trustee of the estate should the court make the debtor bankrupt. Similarly, if a registered trustee consents to act but the consent is not filed with the Official Receiver before a sequestration order is registered, the Official Trustee will become the trustee of the estate. However, creditors can subsequently appoint another trustee, either at their own initiative or upon the Official Trustee's initiative.

When more than one consent to act is filed

- 7.6. In circumstances where the Official Receiver is provided with two consents to act from different trustees, it will generally appoint the first trustee that filed the consent. An exception to this will be when:
 - the court has appointed a trustee and this is provided for in the sequestration order itself
 - if the court appoints trustees as joint trustees²
 - the court makes any other order regarding the appointment of a trustee or trustees
 - the first trustee has since revoked their consent to act.

8. BANKRUPT'S STATEMENT OF AFFAIRS

- 8.1. Where the court has made a sequestration order, the debtor is required to file a [statement of affairs](#) with the Official Receiver within 14 days of being advised of the order.
- 8.2. The statement of affairs form is usually sent to the debtor for completion by the appointed trustee. The bankrupt can also obtain the form by contacting AFSA or downloading it from AFSA's website.
- 8.3. It is important for the bankrupt to file the statement of affairs as soon as

² As occurred in *Re Close (trading as FB Close Transport); Ex Parte Abbott* (1983) 50 ALR 571

possible as the minimum three-year period of bankruptcy does not commence until the form has been filed with and accepted by the Official Receiver. Failure by the debtor to file the statement of affairs within 14 days of notification of their bankruptcy is an offence and penalties can apply if prosecuted.

- 8.4. The Official Receiver may refuse to accept the bankrupt's statement of affairs for filing if it is:
- not signed
 - not dated
 - not in the approved form
 - illegible or substantially blank (such that it is impossible to identify the bankrupt)
 - incomplete.
- 8.5. If the bankrupt has not reasonably attempted to answer all the questions on the statement of affairs, it may not be accepted. The Official Receiver will assess whether the unanswered question/s is critical to an understanding of the debtor's affairs and whether the information provided is sufficient, for example:
- an indication that the bankrupt owns assets without details of the location or estimated value would not constitute a reasonable attempt
 - an indication by the bankrupt that they have creditors other than the petitioning creditor without identifying them would not constitute a reasonable attempt.
- 8.6. 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, if the bankrupt has difficulty with English or suffers from an intellectual or physical impairment.
- 8.7. A copy of the statement of affairs form is returned by Registered Post (with a requested delivery confirmation) to the bankrupt advising him or her of the reasons why it was not accepted and the corrective actions that needs 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.

9. DEBTOR PRESENTING A DEBTOR'S PETITION FOR BANKRUPTCY BEFORE COURT ORDER

- 9.1. 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, however, important that the debtor does not wait until just

before the hearing date to present the petition. Unless the debtor's petition for bankruptcy is presented at least one working day prior to the creditor's petition hearing date, the Official Receiver will not be able to process the petition before the court hearing.

- 9.2. More information about debtors' petitions is available in [Official Receiver Practice Statement 2 – Bankruptcy by debtor's petition](#).

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

DOCUMENT NAME/EVENT	FILING TIME	LEGISLATION	MUST BE FILED BY
Creditor's petition	Within two working days after the court endorses the petition	Subregulation 4.05(1)	Creditor
Section 50 order	Within seven days of the court making a direction or other order (except when the trustee is the Official Trustee)	Regulation 4.06	Creditor
Extension of creditor's petition	Within two working days after the court endorses the order	Subsection 52(5), subregulation 4.05(3)	Creditor
Stay of creditor's petition	Within two working days after the court endorses the order	Subsection 52(3), subregulation 4.05(3)	Creditor
Dismissal or withdrawal of creditor's petition	Within two working days after the court endorses the order	Subsections 47(2) and 52(2), subregulation 4.05(3)	Creditor
Adjournment of hearing of creditor's petition	Within two working days after the court endorses the order	Subregulation 4.05(3)	Creditor
Sequestration order	Within two days after the court makes the order	Subsection 52(1A)	Creditor
Trustee's consent to act	As soon as practicable after it is signed, or not later than 2 days after sequestration order made	Section 156A, subregulation 8.06(1)	Trustee
Statement of affairs (bankruptcy by sequestration order)	Within 14 days of the bankrupt being notified of his or her bankruptcy	Subsection 54(1)	Bankrupt