



Australian Government

Australian Financial Security Authority

OFFICIAL RECEIVER PRACTICE STATEMENT 4

SETTING UP A PERSONAL INSOLVENCY AGREEMENT

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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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INTRODUCTION

A personal insolvency agreement (“PIA”) under Part X of the [Bankruptcy Act 1966](#) (“the Act”) is a flexible way for a debtor to come to an agreement with their creditors to settle debts without becoming bankrupt. A debtor must be insolvent to propose a PIA. There are no income, asset or debt limits.

A PIA may involve:

- a lump sum payment to creditors via the trustee either from the debtor’s own money or money from third parties (eg family or friends)
- an assignment of assets to the trustee to be sold and the net proceeds distributed to creditors or the payment of the sale proceeds of assets to the trustee for distribution to the creditors
- periodic payments to the trustee to be distributed to creditors.

Generally, the cost of setting up a PIA is much more than that of setting up a debt agreement under Part IX of the Act. This is due to the extensive nature of enquiries, investigations and actions that have to be undertaken in a very short period of time in order to report to creditors on the proposed agreement. A PIA is often considered by debtors who do not meet the debt, asset and income eligibility requirements of debt agreements, but still want to avoid bankruptcy.

Debtors who wish to continue operating a business also prefer PIAs to bankruptcy. However, a debtor who enters into a PIA is precluded from managing a corporation until all the terms of the agreement have been fully complied with, except with the leave of the court. To limit the period of ineligibility, debtors who want to manage a corporation usually propose a lump sum settlement to creditors in the PIA.

This practice statement sets out the process followed by the Official Receiver in registering the initiating documents for a PIA and updating its status on the [National Personal Insolvency Index](#) (“NPII”) as the administration progresses.

This practice statement is set out in four sections. The first three sections set out the three basic stages of a PIA and the fourth section deals with various exceptions/problems that may arise during the life of a PIA, as well as variation or termination of a PIA. An annexure summarising the filing requirements is at the end of the practice statement. The documents required to be filed during the various stages are sequentially noted **a)** through to **o)** within the document.

AFSA Regulation & Enforcement is likely to monitor the progress of PIA proposals and may attend creditors’ meetings. Relevant information about the role of Regulation & Enforcement in relation to various types of administrations (including PIAs) has been published in [Inspector-General Practice Statement 11 – Monitoring and inspection of bankruptcy trustees and debt agreement administrators](#).

1. STAGE ONE

Debtor appoints a controlling trustee and gives a proposal

- 1.1. The PIA process commences when the debtor appoints a controlling trustee by signing a [controlling trustee authority](#) form and provides the controlling trustee with a [statement of affairs](#) and a draft PIA that details the proposal for settling his/her debts. By appointing a controlling trustee, the debtor effectively hands over control over his/her property to the trustee.
- 1.2. The control over the debtor's property becomes effective once the controlling trustee accepts the appointment by signing the controlling trustee authority form.
- 1.3. The controlling trustee must, within two working days after a proposal for dealing with the debtor's affairs is finalised, provide a copy of the proposal to all known creditors of the debtor (refer to subregulation 10.03(3) of the Bankruptcy Regulations 1996).

Forms and documents that must be filed with the Official Receiver at stage one

- 1.4. Subsection 188(5) of the Act and subregulation 10.03(2) prescribe that, within two working days of consenting to an appointment, the controlling trustee must file with the Official Receiver:
 - a) the completed controlling trustee authority form (which includes the trustee's consent to exercise the powers given by the authority)
 - b) the debtor's completed statement of affairs form.
- 1.5. Subregulation 10.03(3) of the Regulations requires that, within two working days after a draft PIA proposal has been finalised, the controlling trustee must give to the Official Receiver:
 - c) a copy of the draft PIA proposal.
- 1.6. The PIA proposal checklist, which is designed as an aid to the debtor and the controlling trustee in ensuring that the proposed PIA contains all the elements that are prescribed by legislation, must be filed.
- 1.7. A fee is payable to the Official Receiver upon lodgment of the above forms/documents.
- 1.8. It is recommended that a debtor talk to a controlling trustee before completing any of the documents. A controlling trustee can provide guidance on completing the forms and drafting a PIA.

Official Receiver's role in registering a PIA proposal

- 1.9. The Official Receiver may refuse to register the above forms/documents if:

- the required forms are incomplete and/or incorrect form/s have been used
- the debtor is ineligible to propose a PIA
- the person appointed as controlling trustee is ineligible
- the registration fee has not been paid.

Checking eligibility of debtor – previous proposals

- 1.10. A debtor cannot give a controlling trustee authority within six months of giving an effective controlling trustee authority (pursuant to subsection 188(4) of the Act). The six months is counted from the date the debtor signed the authority (the “date of authority”).
- 1.11. The Official Receiver will advise the debtor by letter that he/she is unable to present a controlling trustee authority. The trustee that consented to act under the authority should also be advised.
- 1.12. An administrative record of the presentation of the documents and the reason for the debtor’s inability to present an authority is created. The authority is ineffective and no record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

Checking eligibility of debtor – Australian connection

- 1.13. Similar to a debtor presenting a debtor’s petition, a debtor may only give a controlling trustee authority if they are personally or ordinarily resident in Australia, have a house or business in Australia, carry on business in Australia (can be through an agent or manager) or they are a member of a partnership carrying on business in Australia (can be through an agent or manager) (pursuant to subsection 188(1)). (See discussion on Australian connection.)
- 1.14. An administrative record of the presentation of the documents and the reason for the debtor’s inability to present an authority is created. The authority is ineffective and no record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

Checking eligibility of the controlling trustee

- 1.15. The controlling trustee can be a registered trustee, an eligible solicitor, or the Official Trustee.
 - REGISTERED TRUSTEES: any [registered trustee](#) can be appointed as a controlling trustee.
 - SOLICITOR CONTROLLING TRUSTEES: a solicitor controlling trustee will have to be a full member of the Insolvency Practitioners Association

or have satisfactorily completed a course in insolvency approved by the Inspector-General (see subregulation 8.35(1)(f)). If the proposed solicitor controlling trustee is unknown to the Official Receiver, a statement of eligibility and evidence is required from the proposed appointee before the proposal can be registered.

- **OFFICIAL TRUSTEE:** the Official Receiver (or delegate) is required to sign the controlling trustee authority form where the Official Trustee is to be appointed as the controlling trustee. However, the Official Receiver does not normally consent to such an appointment and debtors are requested to seek the consent of a registered trustee.
- 1.16. The Official Trustee is automatically appointed as controlling trustee in certain limited circumstances (for example, if the previous trustee dies, becomes ineligible etc, as per subsection 192(1)).
- 1.17. If the controlling trustee is ineligible, the debtor and trustee will be advised in writing. An administrative record of the presentation of the documents is created. The authority is ineffective and no record is entered on the NPII. The electronic image of the documents is retained by the Official Receiver as part of the administrative record.

Pending creditor's petition

- 1.18. Where there is a creditor's petition on foot in the Federal Court or Federal Circuit Court ("the court") and a controlling trustee authority given by the debtor becomes effective, all proceedings in respect of the creditor's petition are stayed (section 189AAA) until a meeting of creditors called under the authority is concluded or adjourned, whichever is sooner.
- 1.19. The Official Receiver will write to the court and the petitioning creditor advising it of the lodgment of an effective controlling trustee authority.
- 1.20. Note that the 12-month life of a creditor's petition (see subsection 52(4)) is not affected by section 189AAA of the Act. Therefore, if the 12-month period expires whilst the stay under section 189AAA is in operation, the creditor's petition still lapses. Furthermore, section 189AAA precludes the petitioning creditor from applying to the court for an extension of the life of the creditor's petition whilst the stay is in place.

2. STAGE TWO

Controlling trustee makes enquiries and calls a creditors' meeting

- 2.1. The controlling trustee makes extensive enquiries into the debtor's affairs and then compiles a comprehensive report to creditors. The report includes a comparison between the return that creditors can expect from the proposed PIA and the return they could expect to receive if the debtor became bankrupt. The controlling trustee is required to inform creditors whether the trustee believes that creditors' interests would be better served by accepting the debtor's proposed PIA or by the bankruptcy of the debtor. The courts have held that the report should specify an approximate rate of return to creditors, eg 60 cents in the dollar. The controlling trustee normally makes a recommendation to creditors in the report concerning the merits or otherwise of the proposed PIA.
- 2.2. A creditors' meeting must be held within 25 working days from the date the controlling trustee accepted the appointment or 30 working days if the controlling trustee authority became effective in December (section 194) and creditors must receive the controlling trustee's report at least 10 days before the meeting to vote on whether the debtor's proposal should be accepted (regulation 10.04). For the proposal to be accepted, it must be passed by a special resolution – that is, a majority in number and at least 75% in debt value of the voting creditors must vote in favour (subsection 204(1)).
- 2.3. If the creditors decide to accept the proposal, they must appoint a trustee to administer the terms of the agreement. This trustee is usually the same person who was appointed as the controlling trustee by the debtor but creditors may appoint another trustee. **Only a registered trustee or the Official Trustee can be the trustee of a PIA.**
- 2.4. If the creditors decide not to accept the PIA proposal they can, by special resolution, decide to either hand back control over the debtor's property to the debtor or require him/her to present a debtor's petition within seven days from the date the special resolution is passed (see subsection 204(1)). Important note: unless the creditors resolve to hand back control of the property to the debtor, the property of the debtor remains under the control of the controlling trustee until the expiry of four months from the date the controlling trustee authority became effective, or until the debtor becomes bankrupt or dies, or until the court releases the property from control, whichever event happens sooner.

Forms and documents that must be filed with the Official Receiver at stage two

Before the creditors' meeting

- 2.5. At least 10 days before the first meeting of creditors is held, the controlling trustee must give to the debtor, each creditor and the Official Receiver the following (regulation 10.04):
- d)** notice in writing of the date, time and place of the meeting
 - e)** a copy of the controlling trustee's report prepared under section 189A
 - f)** a copy of the controlling trustee's statement under section 189B in relation to special resolutions expected to be passed at the meeting
 - g)** notice of the basis and method on which the controlling trustee seeks to be remunerated and, if appropriate, an estimate of the amount of that remuneration.

Following the creditors' meeting

- 2.6. If a special resolution is passed at the meeting the controlling trustee must lodge with the Official Receiver within seven days after the date on which the resolution was passed:
- h)** notice of special resolution/s passed at a meeting of creditors (with copies of the resolution/s)
 - i)** consent of the PIA trustee (only applicable if creditors resolve to accept the proposal).
- 2.7. Note: if a special resolution is passed requiring the debtor to execute a PIA, the resolution must specify the provisions to be included in the agreement (subsection 204(2)). Creditors must also resolve to nominate a trustee or trustees to be trustee(s) of the agreement (subsection 204(3)).
- 2.8. If the creditors' meeting is adjourned, the controlling trustee should notify the Official Receiver of the date of the subsequent meeting. It is also recommended practice to inform the Official Receiver if there was no outcome from the meeting.

Upon ending of the control period

- 2.9. Within seven days of a trustee becoming aware of an event that causes the control period to end, the trustee must file with the Official Receiver:
- j)** a written notification that the control has ended.

3. STAGE THREE

A trustee administers the terms of the agreement

- 3.1. The newly-appointed trustee has the responsibility to ensure that the debtor complies with the terms of the PIA. The trustee receives moneys from the sale of property and/or payments from the debtor or third parties and makes a distribution(s) to creditors. The administration of the agreement can be short or can span several years, depending on the terms of the agreement. For example, a PIA may provide for monthly payments to be made by the debtor over a three-year period.
- 3.2. The PIA must be in the form of a deed and be executed (ie signed by the debtor and trustee, and witnessed) within 21 days from the day the special resolution requiring the debtor to execute a PIA was passed (subsection 216(1)). Only a registered trustee or the Official Trustee can be the trustee of a PIA.
- 3.3. If the trustee is satisfied that all of the obligations under the PIA have been discharged, the trustee must, on written request by the debtor, give the debtor a certificate signed by trustee to that effect.
- 3.4. If the debtor defaults under the agreement, or fails to execute the agreement, there are legislative provisions for bringing the administration to an end. See [part 4](#) below regarding problems, terminations and variations.

Forms and documents that must be filed with the Official Receiver at stage three

- 3.5. Within 2 days from the execution of the PIA the trustee must lodge:
 - k)** a copy of the executed PIA.
- 3.6. Upon completion of the terms of the PIA and/or finalisation of the administration the trustee must lodge:
 - l)** a certificate relating to realisation of divisible property and non-availability of dividend (regulation 10.14)
 - m)** a certificate relating to discharge of obligations ([Form 19](#))
 - n)** a notice of completion/finalisation ([Form 19](#)) (regulation 8.14).

4. PROBLEMS, VARIATIONS AND TERMINATIONS

Failure of trustee to execute PIA

- 4.1. If the PIA is not executed by the nominated registered trustee, a meeting of creditors can be called by any creditor or the debtor to nominate a replacement registered trustee. The meeting must be called for that purpose and a resolution passed (section 217 and regulation 10.09).

Filling of vacancy in office

- 4.2. Where a vacancy occurs in the office of the trustee of a PIA, the Official Trustee becomes trustee (subsection 231(5) and section 160 of the Act and Part 3 of Schedule 6 to the Regulations). In such instances, the Official Trustee will normally transfer the matter to another registered trustee under section 181A.

Debtor fails to attend meeting, execute PIA etc

- 4.3. The Inspector-General, a creditor or the controlling trustee may apply to the court to make a sequestration order against the debtor (section 221) in the following instances:
- the debtor has failed, without sufficient cause, to attend meeting of creditors
 - the debtor contravenes subsection 189(2) (that is, removes, disposes of or deals with property without the trustee's consent, does not give trustee information that trustee requires or does not comply with a trustee direction)
 - the debtor has failed, without sufficient cause, to execute the PIA within the specified time
 - the meeting has not passed one of the special resolutions under subsection 204(1) within four months from date the meeting was called.
- 4.4. If the court makes a sequestration order, the applicant must file the order with the Official Receiver within two days of the order being made (pursuant to subregulations 10.11(2) and 10.11(4)).

Variation of PIA by resolution of creditors

- 4.5. The terms of a PIA can be varied during the life of the PIA by a special resolution at a meeting of creditors called for that purpose. Normally the debtor contacts the trustee seeking a variation of the terms and, if the trustee considers the variation to be reasonable, the trustee seeks the approval of creditors. As an alternative to a formal meeting of creditors to consider the variation, the trustee can notify the creditors that the proposed variation to the PIA will take effect on a specified date and inform them that, if they wish

to object to the variation, they are required to do so in writing at least two days before the specified date. If there are no objections by creditors, the variation takes effect on the specified date. If a creditor objects, the trustee may hold a meeting for creditors to consider the proposed variation.

Setting aside of PIA by the court

- 4.6. There are various situations under which the court may set aside a PIA on the application of the Inspector-General, the trustee, a creditor or the debtor. These situations include:
- the terms of the agreement are unreasonable or are not calculated to benefit the creditors generally
 - the agreement does not comply with the requirements of the legislation
 - the agreement is based on false or misleading information.
- 4.7. The application for an order to set aside a PIA can only be made before all the obligations that the PIA created have been discharged.
- 4.8. The application to set aside the PIA may also include an application for a sequestration order.

Termination by the trustee

- 4.9. The trustee may terminate a PIA by written notice to the creditors if the trustee is satisfied that the debtor is in default. The notice must include a statement of the reasons for the termination and its impact on creditors and specify a date on which the termination is to take effect (not less than 14 days after the notice is given).
- 4.10. The PIA is terminated if the debtor is in default and creditors have not lodged a written notice of objection to the termination at least two days before the proposed termination takes effect.

Termination by creditors

- 4.11. The creditors may terminate a PIA by resolution at a meeting called for that purpose, if the debtor is in default and the trustee tabled, before the resolution, a written declaration that the trustee is satisfied the debtor is in default.

Termination by the court

- 4.12. The trustee, a creditor, the debtor or, if the debtor has died, the person administering the estate of the debtor may apply to the court to terminate a PIA. The court may make an order terminating the PIA if it is satisfied that:
- the debtor or, where the debtor had died, the person administering the estate, has failed to carry out or comply with a term of the PIA
 - the PIA cannot be proceeded with without injustice or undue delay

- for any other reason the PIA ought to be terminated.
- 4.13. The application to terminate the PIA may include an application for a sequestration order against the debtor.
- 4.14. Should a sequestration order be made, it is required to be filed with the Official Receiver.
- 4.15. The making of an application for a sequestration order is taken to be equivalent to the presentation of a creditor's petition (but the requirements relating to creditors' petitions in subsections 43(1), 52(1) and 52(2) and sections 44 and 47 of the Act do not apply).

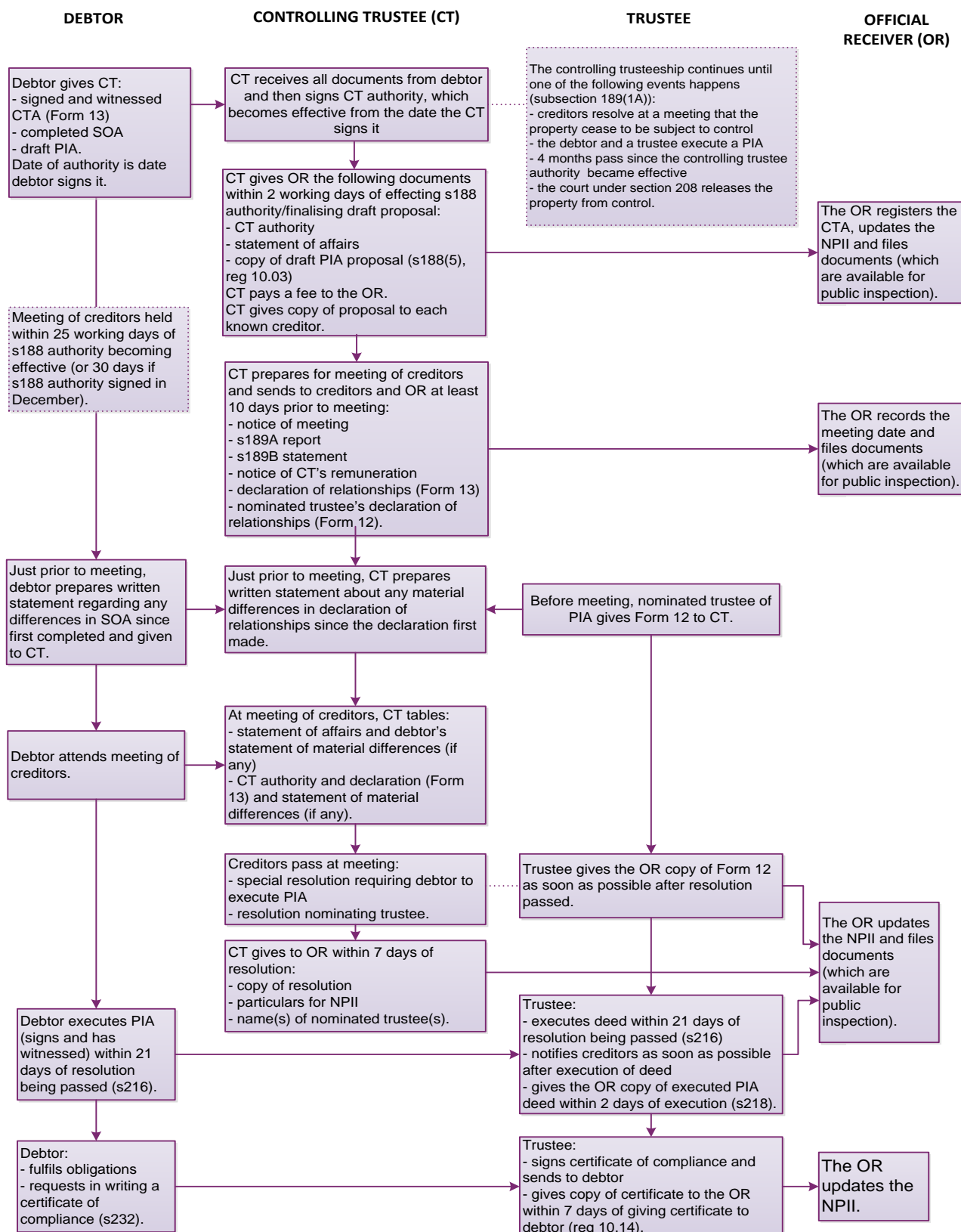
Termination by occurrence of a terminating event

- 4.16. A PIA is “automatically” terminated if it includes a provision for termination on the happening of a specified event (eg loss of employment for a period exceeding three months, death of the debtor etc) and the event occurs.

Forms and documents that must be filed with the Official Receiver

- 4.17. Upon variation, termination or setting aside of a PIA the trustee must lodge:
- o) a [Form 19](#) notifying the Official Receiver of the variation/termination/setting aside of the PIA.
- 4.18. This notification is required immediately in the case of:
- variation/termination of the PIA by creditors
 - termination by the trustee
 - termination by the occurrence of a termination event in the PIA.
- 4.19. Where a PIA is terminated or set aside by the court, the Official Receiver must be given a copy of the court order by the person who applied to the court within two days of the making of the order (this notification requirement does not apply where the applicant to the court was the Official Trustee or Inspector-General in Bankruptcy). The notification is used to update the status of the administration on the NPIL.

ANNEXURE A – FLOW CHART – PIA PROCESS AND FILING REQUIREMENTS



ANNEXURE B – TABLE OF DOCUMENTS THAT MUST BE FILED WITH THE OFFICIAL RECEIVER

DOCUMENT NAME	FILED BY	FILED WHEN	INFORMATION ENTERED ON THE NPII	BANKRUPTCY ACT / REGULATIONS REFERENCE
Controlling trustee authority (Form 13)	Registered trustee or solicitor	Within two days of consenting	Date of authority, date of filing of statement of affairs, name of controlling trustee, particulars of debtor	S188(5) R10.03
Statement of affairs (Form 3)				
Draft PIA proposal		Within two working days of proposal being finalised		R10.03
Notice of meeting	Controlling trustee	At least 10 days before meeting held		S189A(2)(a) R10.04
Controlling trustee report				
Declaration of relationships				S189A(4)
Section 189B statement				S189B(2)(a)
Notice of remuneration				R10.04
Notification of ceasing control	Controlling trustee	Within seven days of becoming aware that control has ceased	Date of ceasing control	S189(1B)

DOCUMENT NAME	FILED BY	FILED WHEN	INFORMATION ENTERED ON THE NPII	BANKRUPTCY ACT / REGULATIONS REFERENCE
Certificate of resolution (Form 18)	Controlling trustee	Within seven days of the resolution	Date of resolution, particulars of debtor (if different from controlling trustee authority), name of each nominated trustee (if resolution requires debtor to execute a PIA)	S204(2) R10.06
Copy of PIA	Trustee	Within two days after execution by the debtor and the trustee	Date of execution, particulars of debtor (if different from controlling trustee authority), name of each nominated trustee	S204(3) S218(1)(b)
Consent to act (Form 12)	Trustee	As soon as possible after the resolution nominating trustee passed		S215A(1A)
Certificate of resolution declaring PIA terminated; written notice of termination by occurrence of circumstance (Form 19)	Trustee	Immediately following resolution/termination	Date of termination	S222B S224A
Certificate of resolution varying PIA (Form 19)	Trustee	Immediately following resolution		S224A(1) S221A
Notification of variation by trustee under s221A(2) (Form 19)	Trustee	Immediately once variation takes effect		S224A(2) S221A(2)

DOCUMENT NAME	FILED BY	FILED WHEN	INFORMATION ENTERED ON THE NPII	BANKRUPTCY ACT / REGULATIONS REFERENCE
Court order setting aside or terminating personal insolvency agreement (Form 19)	Trustee	Within two days after the order is made	Date set aside or terminated	R10.11 Fed Court Rule 10.05 S224A(4)
Sequestration order	Applicant	Within two days after the order is made	Date of order, particulars of bankrupt	R10.11 S221 S222 S222C
Certificate relating to realisation of divisible property and non-availability of dividend	Trustee	Within seven days of giving debtor certificate		R10.14
Certificate relating to discharge of obligations (Form 19)	Trustee	Within seven days of giving debtor certificate	Result	S232 R10.14
Notice of finalisation of administration	Registered trustee	Within seven days of finalising an administration		R8.14