



Australian Government

Australian Financial Security Authority

OFFICIAL RECEIVER PRACTICE STATEMENT 5

INSOLVENT DECEASED ESTATES (PART XI OF THE *BANKRUPTCY ACT 1966*)

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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.

CONTENTS

1.	INTRODUCTION	3
2.	APPLICATION PROCESS	3
	Who may apply?	3
3.	APPLICATION PROCESS – CREDITOR’S PETITION	4
	Creditor’s petition – section 244	4
	Choosing a trustee	5
	The administration order	5
4.	DOCUMENTS APPLICANTS MUST FILE WITH THE OFFICIAL RECEIVER – CREDITOR’S PETITION	6
	Petition	6
	Administration order	6
	Statement of affairs	6
5.	APPLICATION PROCESS – ADMINISTRATOR’S PETITION	6
	Administrator’s petition – section 247	7
	Choosing a trustee	7
	The administration order	7
6.	DOCUMENTS APPLICANTS MUST FILE WITH THE OFFICIAL RECEIVER – ADMINISTRATOR’S PETITION	7
	Petition	7
	Administration order	8
7.	ACTIONS BY THE OFFICIAL RECEIVER	8
	Registering the petition	8
	Registering the court order	8
	Appointment of a trustee	8
	Statement of affairs – creditor’s petition	8
	Statement of affairs – administrator’s petition	9
8.	OTHER ISSUES	9
	Bankruptcy notice served on a debtor prior to death	9
	Creditor’s petition presented and served before the death of the debtor	9
	Death of undischarged bankrupt	10

1. INTRODUCTION

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

2. APPLICATION PROCESS

Who may apply?

- 2.1. The Official Receiver or AFSA is not involved in the application process. An order for the administration of a deceased insolvent estate can only be made by the Federal Circuit Court or the Federal Court ("the court").

- 2.2. A creditor or the legal personal representative of a deceased debtor may apply to the court for an order that the deceased estate be administrated under Part XI of the Act (commonly referred to as an “administration order”) by presenting a petition to the court (refer to sections [244](#) and [247](#) of the Act).
- 2.3. It should be noted that, where proceedings have already commenced in a State or Territory court for the administration of a deceased person’s estate under the applicable State or Territory law, a petition cannot be presented under Part XI of the Act without the leave of the court and on such terms and conditions as the court thinks fit (see section [244](#) of the Act).

3. APPLICATION PROCESS – CREDITOR’S PETITION

- 3.1. If a creditor is seeking an administration order, the application is very similar to presenting a creditor’s petition against a living debtor except there does not need to be an “act of bankruptcy”.
 - [Federal Court form – Part XI application by creditor \(Form 14\)](#)

Creditor’s petition – section 244

- 3.2. Section [244](#) of the Act prescribes the requirements a petitioning creditor must satisfy in order to obtain an administration order. These requirements are similar to those that apply in relation to creditors’ petitions against living debtors. However, there are some differences; for example, there is no need for an act of bankruptcy by either the deceased debtor or the legal personal representative of the deceased debtor (refer *Re Paravicini* [1931] 3 A.B.C. 15).
- 3.3. The requirements of section 244 are:
 - a debt of not less than \$5000 was owed to the creditor by the deceased debtor at the time of death (or debts totalling not less than \$5000 were owed by the deceased debtor to any two or more creditors at the time of death)
 - the debt, or each of the debts, in respect of which the petition is presented:
 - is a liquidated sum due at law or in equity or partly at law and partly in equity
 - is payable immediately or at a certain future time
 - the deceased had a territorial connection with Australia at the time of his or her death.

- 3.4. Such territorial connections are referred to in subsection [247\(2\)](#) and are the same as those required for a creditor's petition against a living debtor, namely:
- the deceased debtor was personally present or ordinarily resident in Australia
 - the deceased debtor had a dwelling house or place of business in Australia
 - the deceased debtor was carrying on business in Australia either personally or through an agent or manager, or
 - the deceased debtor was a member of a firm or partnership carrying on business by means of a partner(s) or agent/manager.
- 3.5. A secured creditor may present a petition against a deceased estate and the procedures in respect of their security are the same as if the debtor was alive (pursuant to subsections 244(2), (3), (4) and (7)).
- 3.6. If there is a legal personal representative ("LPR") of the deceased debtor, a sealed copy of the petition must be served on the LPR (pursuant to subsection 244(9)). However, if there is no LPR, the court may dispense with service of the petition either unconditionally or conditionally (pursuant to subsection 244(10)).

Choosing a trustee

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

The administration order

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

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

Petition

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

Administration order

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

Statement of affairs

- 4.4. Where there is a legal personal representative of the deceased person (“LPR”), section [246](#) of the Act requires the LPR to complete a statement of the deceased person’s affairs and of his or her administration of the deceased estate ([Form 4](#)), and give a copy of it to the Official Receiver within 28 days of being notified of the making of the administration order (see paragraph 7.5 below regarding the filing of a statement of affairs when there is no LPR).

5. APPLICATION PROCESS – ADMINISTRATOR’S PETITION

- 5.1. If the application is being made by the legal personal representative of a deceased debtor, the process is similar to the presentation of a debtor’s petition except that the applicant presents the petition to the court in lieu of the Official Receiver.
- [Federal Court form – Part XI application by administrator \(Form 15\)](#)

Administrator's petition – section 247

- 5.2. A person administering the estate of a deceased person may present a petition under section [247](#) of the Act, provided the deceased had a territorial connection with Australia at the time of his or her death. Such territorial connections are referred to in subsection [247\(2\)](#) and are the same as required for a creditor's petition against a living debtor, namely:
- the deceased was personally present or ordinarily resident in Australia
 - the deceased had a dwelling house or place of business in Australia
 - the deceased was carrying on business in Australia either personally or through an agent or manager
 - the deceased was a member of a firm or partnership carrying on business by means of a partner(s) or agent /manager.
- 5.3. The administrator would make such an application when it became apparent that the deceased estate was insolvent and the provisions of the deceased's will could not be given effect to.
- 5.4. The administrator's application to the court must be accompanied by a [statement of the deceased's affairs](#) (Form 4).

Choosing a trustee

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

The administration order

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

6. DOCUMENTS APPLICANTS MUST FILE WITH THE OFFICIAL RECEIVER – ADMINISTRATOR'S PETITION

Petition

- 6.1. The administrator must give a copy of the court application (along with the registered trustee consent, if applicable, and the statement of the deceased's affairs) to the Official Receiver within

two working days of the petition being endorsed by the court (as per subregulation [11.01A\(1\)](#)).

Administration order

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

7. ACTIONS BY THE OFFICIAL RECEIVER

Registering the petition

- 7.1. When a copy of the court application is filed by the petitioning creditor or the administrator, the Official Receiver¹ records the event on the NPIL.

Registering the court order

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

Appointment of a trustee

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

Statement of affairs – creditor’s petition

- 7.5. The legal personal representative, if there is one, is required by section [246](#) of the Act to file a [statement of affairs](#) (Form 4) with the Official Receiver within 28 days of being notified of the administration order. The LPR is generally notified of this

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

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

- 7.6. On receipt of the completed statement of affairs, the Official Receiver records the filing on the NP11 and provides a copy of the filed document to the appointed trustee.

Statement of affairs – administrator’s petition

- 7.7. The administrator is required by subsection [247\(1\)](#) to complete the deceased’s statement of affairs when lodging the petition with the court. When a copy of the court application is given to the Official Receiver (pursuant to subregulation [11.01A\(2\)](#)), the administrator should ensure that the statement of affairs is included. The NP11 is updated to show that the statement of affairs was filed and a copy of the document is provided to the appointed trustee.

8. OTHER ISSUES

Bankruptcy notice served on a debtor prior to death

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

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

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

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

Death of undischarged bankrupt

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