

Chapter 7: I've decided – so how do I do it? Part 1

Updated: 1 May 2024

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In the case of the Statement of Affairs the Chapter looks at:

- Why a question is asked (what will it be used for)?
- What to include in the answer.
- What tricks and traps to look out for.

Part 1: Declaration of Intention to Present a Debtor's Petition

Note: The Temporary Debt Protection Form is subject to change, the copy featured in this chapter is current to January 2021.



Australian Government
Australian Financial Security Authority

TEMPORARY DEBT PROTECTION FORM

By completing this form you are applying for temporary relief from your personal debts. Your unsecured creditors will not be able to take enforcement actions against you for 21 days. The 21 day period begins when your application is accepted by AFSA.

DECLARATION OF INTENTION TO PRESENT A DEBTOR'S PETITION AND STATEMENT OF AFFAIRS

SUSPENSION OF CREDITOR ENFORCEMENT
Bankruptcy Act 1966 Section 54A

Note: See **Chapter 5** for information about the consequences of entering a Declaration of Intention to Present a Debtor's Petition ('Declaration of Intent') and the circumstances in which it is appropriate.

AFSA refers to the Declaration of Intent as a '**Temporary Debt Protection Form**' but this term is not referred to in the *Bankruptcy Act*.

You must ensure your client understands the importance of ensuring the information in this form is complete and accurate. Paper forms are available, but the client should use the online portal. If the client is completing a paper form, blue or black pen should be used.

Generally speaking, financial counsellors should encourage clients to complete their own forms to ensure they are fully engaged with the process and take responsibility for their own information.

Your personal details

First name	Middle name	Family name
<input type="text"/>	<input type="text"/>	<input type="text"/>

Other names you have used in the past 10 years (if needed, an additional form is available at afsa.gov.au/tdpforms)

First name	Middle name	Family name
<input type="text"/>	<input type="text"/>	<input type="text"/>

First name	Middle name	Family name
<input type="text"/>	<input type="text"/>	<input type="text"/>

Date of birth (DD/MM/YYYY)

Preferred contact number

Email address

Street Address

Suburb

State

Postcode

Country

Your financial affairs

What is your usual occupation, trade or profession?

What industry do you usually work in?

Are you currently employed?

☐ Yes ☐ No

If no, how long have you been unemployed?

years months

The client must be ordinarily resident in Australia, or be physically in Australia, or have a residence in Australia, or have a business connection to Australia. Usually giving an Australian address will be sufficient to establish this unless other information indicates there may be no Australian connection – in that case the Official Receiver may initiate further enquiries.

From a practical point of view, the client should make sure the name(s) and other details on

the form match those being used by any current credit provider, particularly where there is imminent enforcement action that the client is seeking to suspend by lodging the Declaration of Intent.

Your financial affairs, secured assets, other assets and unsecured assets

In completing the sections in relation to the client's financial affairs, the details need to be to the best of the debtor's knowledge and understanding. That is, the debtor puts the amounts owing to creditors, value of assets, level of income, etc, as they understand them to be, irrespective of how accurate those figures may be.

It is most important that your client discloses accurate information about their creditors (to the best of their knowledge) because this information will be used by AFSA to notify their creditors of the freeze on enforcement action. Check the details against the client's statements or contracts if these are available, but do not delay the process if time is of the essence. Creditors do not get a copy of this statement of affairs, only a summary of the details to enable them to assess the debtor's financial position and decide whether they should accept a proposal by the debtor as to an alternative agreement or possible compromise.

The Declaration of Intent form incorporates a statement of affairs. The financial information required is very similar to that required in the statement of affairs accompanying a Debtor's Petition. You should warn your client that this information will be available to the Trustee to compare to later information if the client ultimately goes bankrupt (so any mismatch in debts or assets will be immediately apparent and lead to further questions or investigation – see **Chapter 6 Part 3** in relation to antecedent transactions).

Note the explanation of related creditors in Part 2 of this chapter.

Confirmation to sheriff or payroll officer

If you want us to inform either the sheriff/bailiff or your payroll office, please provide their contact details below.

First person

Contact name

Sheriff/bailiff or payroll?

☐

Sheriff/Bailiff

☐

Payroll

Street Number and Address

Suburb

State

Postcode

Country

Email address

Reference number

Second person			
Contact name	Sheriff/bailiff or payroll?		
<input type="text"/>	<input type="checkbox"/> Sheriff/Bailiff	<input type="checkbox"/> Payroll	
Street Number and Address			
<input type="text"/>			
Suburb	State	Postcode	Country
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Email address	Reference number		
<input type="text"/>	<input type="text"/>		

The accuracy of the details in this section is vitally important for stopping enforcement action. When e-mailing the Declaration of Intent form to AFSA, always request AFSA to acknowledge receipt (particularly if enforcement action is imminent).

Authority to Act			
If you would like to authorise someone else to talk with creditors on your behalf, include their details below. Ensure this person knows you have nominated them.			
First name	Middle name	Family name	
<input type="text"/>	<input type="text"/>	<input type="text"/>	
Email address	Preferred contact number		
<input type="text"/>	<input type="text"/>		
Street Number and Address			
<input type="text"/>			
Suburb	State	Postcode	Country
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
What is the relationship of the authorised person to the debtor?			
<input type="checkbox"/> Financial counsellor	<input type="checkbox"/> Registered trustee	<input type="checkbox"/> Solicitor	<input type="checkbox"/> Accountant
<input type="checkbox"/> Debt agreement administrator	<input type="checkbox"/> Other (please describe)	<input type="text"/>	

This section allows the debtor (client) to authorise a person to talk with creditors.

The completion of this section will put the authorised person in the position of having agreed to negotiate with creditors during the stay period. Before doing this, it is very important to consider whether this is:

- Something the authorised person is qualified to do, and

- Something the authorised person has the time to do, and
- Something that is likely to produce results.

For many financial counselling clients, the negotiation process may have already occurred.

If the debtor is only choosing to use a Declaration of Intent to stay enforcement action and to give them time to complete their bankruptcy forms, then this authorised negotiation period is unlikely to be of any practical use to the debtor.

Using a Declaration of Intent to try to force negotiations is a risky strategy especially as it is an act of bankruptcy and requires the debtor to complete a list of debts, income and assets that will be made available to the trustee in the event of a subsequent bankruptcy. Using a Declaration of Intent as a negotiation tool should only be done after legal advice has been sought. Usually, it should be reserved for those situations where bankruptcy appears otherwise inevitable. The Declaration of Intent will not be recorded on the NP11.

Your client must read and understand the prescribed information before signing and dating the section below.

Declaration of the Debtor

☐ I declare that, to my knowledge, the information contained in this form is true and correct. I also consent to the person authorised on page 7 of this form to talk with creditors on my behalf.

☐ I acknowledge that I have read the prescribed information at the top of this form.

You can be imprisoned for 12 months if you knowingly make a false declaration: s267 of the *Bankruptcy Act 1966*.

Signature

Date (DD/MM/YYYY)

Lodging the documents

Lodgement of the Declaration of Intent is now done online through the AFSA portal. However, paper forms can still be lodged with AFSA by email or post. Where the client cannot access the online portal and enforcement is imminent (and usually it will be if this option is being used) then e-mail is preferable.

Email: info@afsa.gov.au

Post: GPO Box 1550, Adelaide SA 5001

What happens once a Declaration of Intent has been accepted?

If the Declaration of Intent is accepted (see **Chapter 5** for reasons why a Declaration of Intent may not be accepted), then the Official Receiver must give written notice of the acceptance of the Declaration of Intent to each of the creditors disclosed in the debtor's statement of affairs (s54C). This is generally done within 2 working days of acceptance. The debts of your client that would be provable in bankruptcy if the client proceeded to present a Debtor's Petition are then 'frozen' for the stay period. The stay period begins on the day the Declaration of Intent is accepted and ends after **21 days** (including the day of acceptance) unless the debtor files a Debtor's Petition, enters a Personal Insolvency Agreement, has a Creditor's Petition presented against them or is subject to a sequestration order within that period.

Important: A Declaration of Intent will stop court-based enforcement action, but it will not stop a Creditor's Petition. A debtor is not permitted to lodge a Declaration of Intent while a Creditor's Petition is pending.

Once a debt is frozen, the creditor cannot commence or continue with any enforcement process or remedy against the person or property of the debtor. The creditor can, however, commence legal proceedings against the debtor, or take any step in legal proceedings, provided it is not to apply for an enforcement process. The creditor is also given an extension of time equivalent to the period of the stay in which to apply for any enforcement process after the period has expired if the debtor does not proceed with the bankruptcy.

What if the Sheriff has already tagged or taken possession of my client's goods?

Once the sheriff receives a copy of the accepted Declaration of Intent, they must take no further action. If the property of the debtor has been tagged but not taken, then it cannot be taken during the period of the stay. If the sheriff has taken possession of property but not sold it, then it must not be sold. If the property has already been sold, then the proceeds cannot be given to the creditor. However, any person who has already purchased the goods in good faith will not have to return them.

In extremely urgent cases, it would be prudent to contact the sheriff to verify that they have received a copy of the accepted Declaration of Intent and acted on it. Whilst AFSA usually emails the copy of accepted Declaration of Intent to sheriffs and paymasters, AFSA does not follow up to check whether they have acted on it. If it appears that the sheriff or paymaster is non-compliant (not refraining from taking enforcement action), AFSA should be contacted immediately.

Note: The practical effect of the Declaration of Intent provisions of the Act is that if a sheriff has already taken action (e.g. taken goods in the morning prior to the receipt of the copy of the accepted Declaration of Intent), the sheriff is not

obligated to return the goods to the debtor during the stay period. However, in some cases the sheriff may be able to be persuaded to release the goods back to the debtor (the debtor would usually have to collect the goods at their expense).

How do I stop my client's wages being garnisheed?

As stated above, AFSA usually notifies the paymaster of the accepted Declaration of Intent by email, however AFSA does not follow up to check whether the paymaster has acted on it. Therefore, it would be prudent to contact the paymaster to verify that they have received a copy of the accepted Declaration of Intent and stopped the garnishee on the debtor's wages/salary.

It should be noted here that garnishees issued by the Taxation Commissioner under s 260-5 of Schedule 1 to the *Taxation Administration Act 1953* may not be affected by a declaration of intent or bankruptcy because the ATO is treated as a secured creditor once the notice has been issued. If your client is in this position, you should refer them for legal advice.

What if my client does not proceed with the bankruptcy?

If the client does not come to some arrangement with creditors following the presentation of the Declaration of Intent and does not present a Debtor's Petition, they will leave themselves vulnerable to enforcement action by their unsecured creditors after the expiry of the stay period (for example seizure of their goods by the sheriff and/or garnishee of their wages/salary). If goods have already been seized they will be sold, and any garnishee will recommence. A creditor may also rely on the Declaration of Intent to apply for a Creditor's Petition. If this occurs, see **Chapter 10 – Help I'm being made bankrupt!** and encourage your client to seek urgent legal advice.

What if my client does proceed with the bankruptcy?

Goods seized by the sheriff

The Act prescribes that upon the bankruptcy of the debtor, the sheriff is required to deliver to the Trustee all the property that has been seized, and the property that is protected property (for example household items, motor vehicles under the prescribed value, etc – see **Chapter 6 Part 2**) which does not vest in the Trustee, is to be returned to the bankrupt by the Trustee. The Act also prescribes that such items are subject to a first charge for the sheriff's enforcement costs.

However, in practice the Trustee will usually notify the bankrupt that the goods are available for collection from the sheriff who will release them upon payment of the enforcement costs. In the case of say a Disability Support Pensioner, the sheriff may be amenable to a persuasive request that the goods be delivered back to the bankrupt.

Garnishee on wages/salary

Once the paymaster is notified by the Trustee of the employee's bankruptcy, the paymaster is required to cease enforcement of the garnishee. Any moneys held by the paymaster that have not been paid to the creditor are to be repaid to the employee. The Trustee will decide whether to take action to recover the moneys paid to the creditor by way of the garnishee as preference payments under the provisions of s 122 of the Act (see **Chapter 6 Parts 1 and 3**).

Note: again, as mentioned above, the exception for notices issued under the *Taxation Administration Act 1953* relating to the ATO may apply. Refer your client for legal advice if necessary.