

Fact Sheet - Bankruptcy Notices

1. What is a bankruptcy notice?

A bankruptcy notice is a formal notice of demand requiring someone who owes money (“a debtor”) to pay a debt to someone who is owed money (“a creditor”). The bankruptcy notice is issued by the Official Receiver and must be based on a final court judgment or order of at least \$5,000 (or more than one court judgment or order which together add up to at least \$5,000). The judgment or order must not have been made more than 6 years before the bankruptcy notice is issued.

The bankruptcy notice must be served within 6 months after it was issued by the Official Receiver unless an extension of time has been granted by the Federal Court or the Federal Circuit Court (“the Court”).

The debtor that is served with a bankruptcy notice has **21 days** to comply with the bankruptcy notice. If the debtor does not comply with the bankruptcy notice within 21 days they are assumed to have committed an “act of bankruptcy” and steps may be taken by the creditor to formally make the debtor bankrupt.

2. How is a bankruptcy notice properly served?

Once the Official Receiver has issued the creditor with a bankruptcy notice the creditor has 6 months in which to serve it on the debtor. The creditor can serve the bankruptcy notice in a number of ways, including:

- By sending it by post or courier to the debtor’s last-known address;
- By leaving it in an envelope marked with the debtor’s name, at their last-known address;
- Personally delivering it to the debtor;
- By fax, email or other forms of electronic transmission.

In most cases, the bankruptcy notice will be served personally, often by a process server. The process server will then prepare an affidavit giving written sworn evidence of how, where and when they served the bankruptcy notice along with any conversations that they may have with the debtor. Unless the debtor has strong evidence that they were not served by the process server, it will be difficult for the debtor to dispute the process server’s affidavit evidence.

If the creditor has not been able to serve the debtor, the creditor may ask the Court to make an order that the bankruptcy notice be served in another way (this is called an order for “substituted service”). As an example, the court may order that creditor serve someone else who will let the debtor know about the bankruptcy notice or make an order for the notice to be published in a newspaper.



3. How do I deal with a Bankruptcy Notice?

A debtor who is served with a bankruptcy notice has a number of options:

- Pay the amount in the bankruptcy notice in full;
- Contact the creditor and find out whether the creditor will be prepared to come to an arrangement with the debtor such as an informal agreement to pay the debt in instalments; to settle the debt by way of Personal Insolvency Agreement under Part X of the *Bankruptcy Act 1966*; or to settle the debt by way of a Debt Agreement under Part IX of the *Bankruptcy Act 1966*.
- Challenge the bankruptcy notice;
- Challenge the judgment the bankruptcy notice is based on;
- Ignore the bankruptcy notice which may be the first step towards the debtor being made bankrupt.

4. Challenging the bankruptcy notice

A debtor can challenge the bankruptcy notice by filing an application to set aside the bankruptcy notice along with an affidavit telling the story of what happened and giving the grounds in support of the application.

There are three main grounds for applying to set aside a bankruptcy notice:

4.1 Where there is a defect in the bankruptcy notice

The bankruptcy notice must strictly comply with the *Bankruptcy Act 1966* and the *Bankruptcy Regulations 1996*. The debtor should carefully check the bankruptcy notice to ensure that:

- The names of the debtor and creditor are exactly the same in the bankruptcy notice as in the judgment;
- The bankruptcy notice gives the creditor's address and the address is a place where the debt can be paid;
- The amount of the debt is stated clearly and correctly;
- The time for compliance with the bankruptcy notice is stated clearly and correctly;
- A copy of the judgment on which the bankruptcy notice is based is attached to the bankruptcy notice;
- The total amount of any payments made by the debtor to the creditor must be set out in the bankruptcy notice;
- If the creditor is claiming interest on the judgment, details of the interest calculations must be attached to the bankruptcy notice and the interest calculations must be correct.

4.2 Where the court is asked to "go behind" the original judgment or order



A debtor may dispute the judgment or order on which the bankruptcy notice is based. For example the judgment may have been made without the debtor having attended court (“default judgment”) because the debtor was not aware of the proceedings and the debtor may now wish to dispute the judgment or order.

If the debtor has grounds to dispute the judgment or order he or she may apply to the court that made the judgment to have the judgment set aside. The debtor’s challenge to the judgment or order must be genuine and have a reasonable probability of success. The debtor should then make an application to extend time to comply with the bankruptcy notice until after the hearing date for the application to set aside the judgment or order.

If the debtor intends to challenge the judgment or order, he or she should take steps to commence proceedings in that court as soon as possible as the debtor will need to demonstrate to the Court that steps have been taken to challenge the original judgment or order.

4.3 Where the debtor has a counter-claim; set-off or cross demand.

To successfully apply to set aside a bankruptcy notice on this ground the debtor needs to show that he or she has a counter-claim, set-off or cross-demand against the creditor that is equal to or greater than the amount claimed in the bankruptcy notice and could not have been raised at the time of the judgment. The debtor must be able to demonstrate to the Court that the counter-claim, set-off or cross-demand is genuine and has a reasonable probability of success.

5. Settlement arrangements with the creditor/s

There are a number of ways in which a debtor can reach a settlement agreement with a creditor. The most common way is an informal settlement agreement. It is worth the debtor contacting the creditor directly and asking for more time to pay; whether payment in instalments would be acceptable to the creditor; or whether the creditor will accept a smaller payment.

Debtors should be aware that there is no legal obligation on a creditor to negotiate a settlement with a debtor.

An informal settlement agreement is usually finalised by way of deed. The debtor should ensure that any agreement for payment that is reached with the creditor is recorded in writing so that the debtor can use it as evidence to oppose a creditor’s petition, if brought.

For more information about creditors’ petitions see the JusticeNet Fact Sheet “Creditors’ Petitions”.



A more formal settlement arrangement may be able to be reached with the creditor/s by way of Part X Personal Insolvency Agreement or Part IX Debt Agreement. For more information about the formal options see the Australian Financial Security Authority's website www.afsa.gov.au/debtors/your-options/formaloptions or contact JusticeNet's Federal Courts Self-Representation Service SA/NT.

6. How to apply to challenge the bankruptcy notice

6.1 Preparation of documents

A debtor who wishes to apply to set aside a bankruptcy notice must prepare and file the following documents:

- Form B2 – Application to set aside bankruptcy notice and/or extend time for compliance;

The Form B2 can be found on the Court website at:

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/Bankruptcy/fcc-bankruptcy-fccb2>

- Affidavit in support of the application. The affidavit is a written statement that is sworn or affirmed before a solicitor or a Justice of the Peace. The affidavit must essentially tell the story of what happened. The affidavit must only state facts, including the date on which the bankruptcy notice was served, and must not set out legal argument or give the opinion of the person swearing or affirming it. The affidavit must attach a copy of the bankruptcy notice and may also attach certain documents which support the application, such as a copy of any documents filed in other courts to set aside the original judgment or order or documents used as evidence of payments already made by the debtor to the creditor.

A template affidavit can be found on the Court website at:

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/All+Jurisdictions/form-fcc-affidavit>

6.2 Preparation of documents

The original application and affidavit and any annexures to the affidavit must be delivered for filing to the Court Registry. Ordinarily a filing fee is payable at the time of filing, however an exception is made for certain applicants including holders of a health care card; pensioner concession card; Commonwealth Seniors health card or any card giving an entitlement to



Commonwealth health concessions; the recipients of youth allowance, Austudy or ABSTUDY.

The form for obtaining an exemption from paying the court fees can be found on the Federal Court website at:

<http://www.fedcourt.gov.au/forms-and-fees/court-fees/exemptions/guide-to-form-financial-hardship>

6.3 Preparation of documents

Once the original application and affidavit has been stamped by the court (“sealed”), the debtor must personally serve the application and affidavit on the creditor within 3 days.

If the creditor is an individual, the document must be personally served. This is done by taking the documents to the individual; identifying the individual, usually by asking the person whether they are the person named on the application; and then handing the application and affidavit to the individual. If the individual will not take the application and affidavit the person serving the documents may put the documents down in the presence of the individual and tell the individual what the documents are. The person doing the service of the documents should take notes of what was said and what happened when the documents were served which can be included in an affidavit of service.

If the creditor is a company, the application and affidavit must be taken to the registered office of the company and left with a person working for that company. The registered office of a company may be different from the place of business of the company. The person undertaking the service of the documents on a company should obtain a company extract from the Australian Securities and Investment Commission (ASIC) (www.asic.gov.au) which will show the registered office of the company.

If the debtor is uncomfortable about personally serving the creditor, he or she can contact a process server who is able to complete personal service for a fee. The debtor should contact the process server in good time prior to filing the application and affidavit to ensure that service is completed within 3 days of filing the documents.



Contact JusticeNet SA's Federal Courts Self-Representation Service

This fact sheet is for general information purposes only. If you would like help with a legal problem, you may be eligible for assistance from JusticeNet SA's Federal Courts Self-Representation Service.

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