

Self-Representation Service SA / NT (Federal Courts)



Fact Sheet - Creditors' Petitions

1. What is a creditor's petition?

A creditor's petition is a formal court document that has been lodged (or "filed") with the Federal Court or Federal Circuit Court ("the Court") by someone who is owed money ("a creditor") against someone who owes the creditor money ("a debtor"). By filing a creditor's petition in the Court the creditor is asking the Court to declare the debtor bankrupt (also called a "sequestration order").

2. Preconditions for a creditor's petition to be filed

There are a number of requirements that must be met by a creditor before a creditor's petition can be filed in the Court. They are:

- The debtor must owe the creditor (or creditors) at least \$5,000; or the debtor must owe the creditor a number of debts that add up to at least \$5,000; or the debtor must owe several creditors debts that add up to at least \$5,000.
- The debt(s) must be for a particular sum of money and either due immediately or at a certain time in the future.
- The creditor's petition must be based on an "act of bankruptcy" which occurred within 6 months of the creditor's petition being filed.

3. What is an "act of bankruptcy"?

The *Bankruptcy Act 1966 (Cth)* lists 21 different acts that can amount to an "acts of bankruptcy". They include where:

- the debtor breaches a debt agreement;
- The debtor files a debtor's petition to become voluntarily bankrupt;
- the debtor does certain things to defeat or delay the creditor(s).

The most common "act of bankruptcy" on which the majority of creditor's petitions are based is the failure of a debtor to comply with a bankruptcy notice. A bankruptcy notice can only be served on a debtor after the creditor has obtained a final judgment for the debt in another court, such as the Magistrates' Court, the District Court or the Supreme Court.

For more information about bankruptcy notices see the JusticeNet Fact Sheet "Bankruptcy Notices".

4. What are the requirements of a creditors' petition?

There are certain requirements that must be fulfilled for the creditor's petition to be validly filed. Debtors should check to ensure that the creditor's petition contains the following:



- The creditor's petition itself which is also called the Form B6. The creditor's petition must be signed, either by the creditor or by the creditor's solicitor, and dated;
- An affidavit of the person who knows the facts on which the creditor's petition is based;
- An affidavit of service sworn by the person who served the bankruptcy notice on the debtor;
- An affidavit of search stating that the records of the Court have been searched and that the debtor has not filed an application in relation to the bankruptcy notice.

The Court registry will make a date for the first court hearing of the creditor's petition when the creditor's petition is filed. That hearing date will be recorded on the front of the creditor's petition.

5. Service of the creditor's petition

The creditor must personally serve the creditor's petition on the debtor at least 5 days before the court hearing. Usually the creditor will arrange for a process server to personally serve the creditor's petition and affidavits (referred to in paragraph 4 above) on the creditor.

Personal service means that the process server must take the documents to the debtor; identify the debtor as the person named in the creditor's petition; and hand the creditor's petition to the debtor. If the debtor refuses to take the documents, the process server can put the documents down near the debtor and tell him or her what the documents are. If the process server has served the debtor in that way, unless the debtor has strong evidence that they were not served by the process server, it will be difficult for the debtor to dispute that he or she was served with the documents.

If the creditor has had difficulty in personally serving the debtor, the creditor may ask the Court to make an order that the creditor's petition and affidavits be served in another way. This is called an order for "substituted service". As an example the Court may order that the creditor serve someone else who will let the debtor know about the creditor's petition.

6. What are the options for dealing with a creditor's petition?

There are a number of options which a debtor should consider when served with a creditor's petition.

6.1 Agree to become bankrupt

If the debtor agrees that he or she owes the debt and is unable to pay the debt either in full, or the creditor is not willing to consider a compromise or



does not agree to accept payments in instalments, the debtor may have no option but to agree to a sequestration order being made against him or her.

If the debtor fails to attend the court hearings, a sequestration order may be made in their absence.

The debt and the creditor's costs in applying for a sequestration order will be taken out of the bankrupt estate.

6.2 Pay the debt

Debtors should be aware that if they decide to pay the debt in full that they will usually also be liable to pay interest on the debt and the creditor's costs.

Once the debt, interest and costs have been paid either the creditor or the debtor will attend the next court hearing to advise that the matter has been resolved and that the parties have agreed that the creditor's petition be dismissed.

6.3 Negotiate with the creditor to pay the debt in instalments or in some other manner

If the debtor has some means to pay the debt (and pay interest and the creditor's costs) either in instalments or if the debtor is able to sell property or refinance in order to obtain pay the debt and associated costs the creditor may be willing to put off or adjourn the court hearing for a short time to enable to the debt to be paid.

Debtors should be aware that the creditor is under no obligation to negotiate a settlement with the debtor and is unlikely to do so unless a commercially attractive offer is made. Many creditors are not inclined to accept an offer of payment in instalments as they are not in a position to monitor the payments over a period of time.

If a settlement involving the payment in instalments is reached between the creditor and the debtor a written agreement or contract will generally be prepared setting out the terms of the repayment which should include dismissal of the creditor's petition.

Debtors should also be aware that the Court has no power to force a creditor to accept a settlement offer made by a debtor. If the Court is satisfied that an act of bankruptcy has occurred then the Court may make a sequestration order.



The Court may be agreeable to adjourning the hearing for a short period to enable the debt to be paid; for the debtor to file the necessary documents to challenge the creditor's petition; or for the parties to negotiate a settlement. However the Court is reluctant to adjourn hearings for more than a few weeks, and therefore it is important for debtors to act quickly if they wish to do anything other than agree to being made bankrupt.

6.4 Oppose the creditor's petition

There are a number of different grounds for opposing a creditor's petition. They are:

- the debtor did not commit the act of bankruptcy
- the debtor does not owe the debt to the creditor
- the debtor is solvent
- any other "sufficient cause"

The different grounds are discussed at greater length below.

7. Opposing the creditor's petition

7.1 Debtor did not commit the act of bankruptcy

In most cases the "act of bankruptcy" alleged by the creditor will be that the debtor did not comply with the bankruptcy notice.

The debtor may have grounds to oppose the creditor's petition if:

- The debtor was not served with the bankruptcy notice.

Unlike the creditor's petition, the bankruptcy notice does not have to be personally served on the debtor. It can be properly served by sending it by ordinary post, to a known email address, or by hand delivery to the debtor's last known address. A debtor will require strong evidence to dispute the facts contained in the affidavit of service of the bankruptcy notice. For more information about bankruptcy notices see the JusticeNet Fact Sheet "Bankruptcy Notices".

- The debtor received the bankruptcy notice and paid the debt.

If the debtor paid the debt within the 21 days allowed by the bankruptcy notice, the debtor should provide evidence of that payment. If the debtor paid the debt in full after service of the creditor's petition the debtor will usually also be liable for the costs



incurred by the creditor in going to the expense of filing and serving the creditor's petition.

- The debtor and the creditor have come to an arrangement for the payment of the debt, such as payment in instalments. The debtor should ensure that any arrangement for payment that has been reached with the creditor is recorded in writing, preferably by deed (a signed written contract), so that the debtor can use it as evidence to oppose a creditor's petition if brought.

7.2 Debtor does not owe the debt to the creditor

In most cases, the bankruptcy notice will be issued after the creditor has obtained a judgment against the debtor in another court (see paragraph 3 above). If the debtor disputes that judgment, he or she will have to take steps to challenge the judgment in the appropriate court. This is more usual where the a "default judgment" has been made, which is where the debtor did not attend the court hearings or file documents in the case and a judgment was made in their absence.

If the debtor has begun court proceedings in another court to challenge the judgment on which the bankruptcy notice is based, the Court will usually adjourn the bankruptcy proceedings until the other court proceedings have been completed.

7.3 Debtor is solvent

The Court may dismiss the creditor's petition if satisfied that the debtor is solvent.

When the creditor's petition comes to a court hearing, the Court will decide whether the debtor is able to pay his or her debts as and when they become due and payable. It is up to the debtor to provide evidence of solvency. The Court will look at the debtor's whole financial situation including evidence of the debtor's debts and how much cash the debtor has as well as the debtor's ability to sell an asset or obtain a loan in a short period of time (ie several weeks).

7.4 Any other "sufficient cause"

This ground of opposing a creditor's petition is rarely used and concerns exceptional circumstances where making someone bankrupt would not be in the public interest, such as where the creditor is using the bankruptcy proceedings to obtain some other advantage.



8. Documents needed to oppose a creditor's petition

If a debtor wishes to oppose the creditor's petition for one of the reasons set out in paragraph 7 above, the following forms need to be filed in the Court registry and served on the creditor at least 3 days before the court hearing:

- Notice of appearance (Form B4)
The Notice of appearance lets the court know that the debtor is planning to attend the court hearings and notifies the court and the creditor of how to contact the debtor.

The Form B4 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/bankruptcy_form4

- Notice stating grounds of opposition to application or petition (Form B5)
This form is used to allow the debtor to set out the grounds on which the creditor's petition is being opposed, for example "*The respondent is able to pay her debts as and when they fall due pursuant to Section 52(2)(a) of the Bankruptcy Act, 1966 (Cth)*".

The Form B5 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/bankruptcy_form5

- Affidavit
The affidavit is a sworn (or affirmed) statement which sets out the facts on which the debtor is relying to oppose the creditor's petition, and attaches evidence supporting the debtor's case.

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>

9. Attending court

It is important for debtors to attend the hearing of the creditor's petition. The first hearing date will be recorded on the front page of the creditor's petition. If a debtor does not attend the hearing, a sequestration order (bankruptcy order) can be made in their absence.



If the debtor wishes to attend the hearing by telephone they should contact the Court registry several days before the hearing to make the necessary arrangements.

Debtors should be ready to inform the court of what they intend to do in relation to the creditor's petition at the first court hearing.

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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