

This fact sheet covers:

- ✔ Requirements of a Creditor's Petition
- ✔ Commencing bankruptcy proceedings
- ✔ Service of a Creditor's Petition
- ✔ Options in dealing with a Creditor's Petition
- ✔ Attending the hearing

1. Requirements of a Creditor's Petition

A creditor's petition is a document lodged with a court by a creditor (someone who is owed money) against a debtor (the person who owes money to the creditor). The purpose of the creditor's petition is to ask the court to make a debtor bankrupt. A court can do this by making a sequestration order against a debtor.

The requirements of a creditor's petition are set out in the *Bankruptcy Act 1966* (Cth). These include:

- a) you must owe at least \$5,000 to the creditor;
- b) the debt or debts must be for a specified sum of money;
- c) the debt or debts must be payable either immediately or at a certain future time; and
- d) the 'act of bankruptcy' on which the creditor's petition is based must have been committed within 6 months before the filing of the creditor's petition.

ACT OF BANKRUPTCY

An act of bankruptcy is an event listed in section 40 of the [Bankruptcy Act 1966 \(Cth\)](#) which can be used by a creditor to apply to the court to make a person bankrupt. An act of bankruptcy must be established before the Court can make a sequestration order against you. The most common act of bankruptcy relied upon by a creditor is the failure to comply with a bankruptcy notice.



2. Commencing bankruptcy proceedings

To commence bankruptcy proceedings, the petitioning creditor must lodge with the court the following:

COMMENCING BANKRUPTCY PROCEEDINGS

- A creditors petition
- An affidavit by a person who knows the relevant facts, stating that the details in the creditor's petition are true
- An affidavit of service of the bankruptcy notice; and
- An affidavit of search

The creditor's petition will be stamped by the court with a hearing date, which will usually be approximately 5 to 8 weeks after the date the documents are lodged.

2.1 Getting a sequestration order at the Creditor's Petition hearing

To get a sequestration order at the hearing of the creditor's petition, the creditor must attend the hearing and lodge:

- an affidavit of service that states how the creditor's petition was given to you; and
- an affidavit of debt which states that the debt or debts on which the creditor is relying on, are still owing. This affidavit should be made by the creditor no earlier than the day before the hearing.

If the court hands down a sequestration order making you bankrupt, the creditor who obtained the order must give a copy of it to the Official Receiver (the Australian Financial Security Authority) within two days of the order being made. The Official Receiver is an organisation involved in the management of your bankruptcy.

A creditor's petition will expire 12 months after it has been lodged with the court, however, extensions of time can be given by the court.

3. Service of a Creditors Petition

A copy of the creditor's petition and the additional affidavits must be given to you personally (unless the court makes an order for service to be done in a different way) at least 5 days before the hearing date, in order for a sequestration order to be made.

This means that the petition must be taken to you, you must be identified as the person named in the petition, and the petition must be handed to you. If you refuse to take the document, the person serving it may put the document down in your presence and tell you what the document is. Normally, the creditor's petition will be served on you by a person hired by the creditor to give it to you.

If the creditor's petition is given to you less than 5 days before the hearing date, the creditor will usually ask the court for a new hearing date. The court will then usually tell the creditor to tell you in



TIP

The **affidavit of search** should state:

- that the records of the Federal Court of Australia and the Federal Circuit Court of Australia have been searched in relation to the bankruptcy notice issued against you; and
- it appears from that search that you have not made any application to the court to cancel the bankruptcy notice or to extend the time for compliance with the bankruptcy notice.

writing of the new hearing date so that you are aware of the new date for the hearing of the creditor's petition.

Substituted Service

If the creditor is able to convince the court that it has been difficult to give you the creditor's petition personally, the Court may order that certain steps be taken for "substituted service" instead.

The creditor has to make an application to the court for substituted service of the creditor's petition, and has to prove that the creditor's petition will come to your attention, or should come to your attention, if it is served some way other than personally. For example, the Court may order that the creditor's petition be given to another person who will bring the document to your attention, or be served on you by the creditor sending or delivering it to your work place.

4. Options in dealing with a Creditor's Petition

If you are served with a creditor's petition, you should consider your options, which generally are:

4.1 Agree to a sequestration order being made against you

This option is recommended if you do not dispute the debt and you cannot pay the entire debt within a reasonable period of time. The creditor's legal costs in bring the creditor's petition to court will normally be paid out of your bankrupt estate.

4.2 Negotiate to pay the debt or negotiating payment by instalments with the creditor

Negotiating will give you some time if you decide to sell your property or obtain a loan to pay the debt. This has to be accepted by the creditor and the court has no power to force a creditor to accept a payment arrangement. In this situation, the court case may be adjourned, i.e. suspended, for a short period of time.

4.3 Paying the debt off in full

In this case you or the other party should ask the court to dismiss the Creditor's Petition.

If you agree with the creditor to pay the debt off in full, you should make sure that the amount you pay includes any costs and interest. The creditor may be able to get an order for you to pay the creditor's legal costs in bringing the creditor's petition to the court.

! COSTS

If you **agree with the creditor to pay the debt in full** you might also have to pay costs!

4.4 Opposing the creditor's petition (see below)

You should file a Notice of Opposition and supporting affidavit that details why you are opposing the creditor's petition.

5. Opposing a Creditor's Petition

The following are common grounds upon which a creditor's petition can be opposed.

5.1 You did not commit the act of bankruptcy

If you have been given a creditor's petition that states that the act of bankruptcy relied upon is failure to comply with a bankruptcy notice and you;

- have never received the bankruptcy notice;
- received the bankruptcy notice but paid the debt; or
- came to another arrangement with the creditor for payment of the debt (e.g. a payment plan);

Then you may have grounds to oppose the creditor's petition.

If you never received the bankruptcy notice, you should review the affidavit of service of the bankruptcy notice and provide evidence disputing service. It is not necessary for a bankruptcy notice to be personally served. A bankruptcy notice may be validly served personally, by ordinary post or by hand delivery to your address as last known to the creditor. Remember, the fact that you did not receive the bankruptcy notice is not enough to prove that the bankruptcy notice was not in fact delivered.

If you paid the debt in full or came to a payment arrangement with the creditor within the time for compliance with the bankruptcy notice (usually 21 days from the date of service of the notice), you should provide evidence to the court of any payment or agreement. For that reason it is always best to put any payment arrangement in writing.

5.2 You do not owe the money to the creditor

You will need to provide proof that shows the debt is not owed to the creditor. It is recommended that you show that you have taken steps to challenge the judgment, and the earlier this is done, the better. The court will usually adjourn the bankruptcy proceedings if you show that the debt is currently being disputed in another court.

In addition, if you dispute owing the debt from the judgment upon which the bankruptcy notice is based, in some circumstances it is possible to ask the court to "go behind" the judgment. However, generally the Court will only do this where the judgment is a default judgment (that is, a judgment in which you didn't appear at the court hearing or lodge a defence with the court). Except in cases of fraud, conspiracy or a miscarriage of justice, the court will usually refuse to go behind a judgment where it was defended and a decision was on the merits of the case.

5.3 You are solvent

To prove solvency, you need to be able to demonstrate to the Court that you are able to pay your debts within a reasonable period of time from your own resources. The Court will look at your financial position as a whole - not just the debt that is the subject of the creditor's petition. Your assets must be available in cash to pay your debts within a relatively short period of time, otherwise the Court may not consider you to be solvent even if you have valuable assets like a house.

If you do not dispute the debt owed to the creditor, the Court will usually assume that the reason you have not paid it is because you cannot afford to. Therefore, proving that you are solvent is usually something that you would only do if you had some other reason for not paying the debt, such as because you dispute it.

5.4 Any "other sufficient cause"

This ground is concerned with exceptional circumstances that outweigh the public interest in making a sequestration order against a person who is insolvent. The categories that would satisfy this ground are not clear and it would be very rare to successfully oppose the making of a sequestration order on this ground.

6. Documents you need to file to oppose a Creditor's Petition

If you do not agree to being made bankrupt, you need to complete some forms and file them with the Court at least three days before the court hearing.

OPPOSING A CREDITORS PETITION

To oppose the creditor's petition you will need to prepare, lodge with the court and give to the creditor the following documents:

- Notice of appearance** (Form B4)
- Notice stating grounds of opposition to application or petition** (Form B5); and
- Affidavit**

All these forms, and further information about these forms, can be obtained from the Federal Circuit Court's website at this link: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics>.

7. Attending the hearing

You will need to attend court for the hearing at the place, date and time shown on the creditor's petition. You can contact the court to ask if you can appear by telephone if the court is a long way from where you live or you have other difficulties getting to the hearing.

The hearing may be adjourned (i.e. delayed/suspended) to another date, for example if the Court decides to give you more time to provide evidence about your financial circumstances, but you should still attend court on the first date shown on the petition.

RELATED RESOURCES

The Federal Circuit Court has a brochure about bankruptcy and appearing at the hearing which is available here: www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/gfl/bankruptcy