

Bankruptcy Notice

Fact Sheet



This fact sheet covers:

- ✔ Requirements, service and compliance of a bankruptcy notice
- ✔ Challenging a bankruptcy notice
- ✔ How to apply to set aside a bankruptcy notice

1. Requirements of a bankruptcy notice

A bankruptcy notice is a demand for payment of money by a creditor from a debtor. A creditor is someone who is owed money. A debtor is someone who owes money.

A bankruptcy notice is usually issued because a creditor has obtained a court judgment or judgments worth \$5,000 or more against a debtor.

After receiving a bankruptcy notice, you will commit an “act of bankruptcy” if you:

- fail to comply with the bankruptcy notice within 21 days of receiving it; or
- fail to apply to the court to have the bankruptcy notice cancelled within the time stated in the bankruptcy notice (usually 21 days after you receive the bankruptcy notice).

If you commit an act of bankruptcy, you give the creditor grounds to lodge a creditor’s petition to apply for a court order that you be made bankrupt (this is called a sequestration order).

2. Service of a bankruptcy notice

A bankruptcy notice can be given to you by being:

- sent in the post, or by a courier, to your last-known address; or
- left in an envelope at a document exchange (if you have one); or
- left in an envelope marked with your name, at your last-known address; or
- personally delivered to you; or
- sent by fax, email or another type of electronic transmission.

When a bankruptcy notice is given to you like this, it has been “served”.

If the creditor can’t serve the bankruptcy notice in any of these ways, the Court may order that the bankruptcy notice be served in another way. For example, the Court may order that the bankruptcy notice be given to another person who will let you know about the bankruptcy notice.

3. Complying with a bankruptcy notice

There are two ways to comply with a bankruptcy notice:

- pay the amount in the bankruptcy notice in full; or
- come to an arrangement that is to the creditor's satisfaction, e.g. payment by instalments. It is up to the creditor as to whether to accept the payment arrangement. It is always best to put the agreement in writing so that you have evidence of the agreement.

4. Challenging a bankruptcy notice

You may apply to the court to challenge a bankruptcy notice before the time for compliance with the notice has finished. If you do this you should also request that the court extend the time for compliance with the bankruptcy notice so that you don't commit an act of bankruptcy while waiting for your court hearing to cancel the notice.

You can apply to challenge a bankruptcy notice by arguing that:

- there is a defect in the bankruptcy notice;
- the debt on which the bankruptcy notice is based does not exist;
- you have a claim against the creditor, equal to or greater than the amount claimed in the bankruptcy notice; or
- the bankruptcy notice is an abuse of process.

4.1 Defect in the bankruptcy notice

Defects in the bankruptcy notice are to do with requirements under the *Bankruptcy Act 1966* (Cth) not being met.

The following are grounds upon which a court may cancel a bankruptcy notice:

- the debtor's and creditor's name in the bankruptcy notice should be same as the debtor's and creditor's name in the court judgment it is based upon;
- the bankruptcy notice needs to contain the address of the creditor and that address needs to be one at which you can make payment (e.g. a PO Box would not be okay);
- the bankruptcy notice must include a time limit for compliance with the notice;
- a copy of the judgment or order which the bankruptcy notice is based on must be attached to the notice;
- if interest on the judgment is being claimed, details of the calculation must be set out in a document attached to the bankruptcy notice; and
- if payments have been made by you or other reductions allowed to the amount owed, the total amount of these must be set out in the bankruptcy notice.

Other requirements of a bankruptcy notice include:

- The judgment or order relied upon must be worth at least \$5,000 before interest – interest that has accrued after the judgment does not count towards this amount. However, a bankruptcy notice may be issued for an amount less than \$5,000 as long as the judgment(s) or order(s) when given was for an amount in excess of \$5,000.
- A bankruptcy notice must be served within 6 months after it is issued unless an extension of time has been granted.
- A bankruptcy notice must be based on a final judgment or order currently payable to the creditor.
- Enforcement of the judgment or order must not be suspended (for example by the court allowing payment to be made by instalments), when the bankruptcy notice was first issued or when it was served. If a suspension of enforcement is granted or you enter into a payment plan through the court after service of the bankruptcy notice, the notice will still be valid.
- The judgment or order on which the bankruptcy notice is based must not be more than 6 years old at the time the notice is issued.
- The bankruptcy notice will not be invalid only because the amount of the debt is overstated unless you have told the creditor within the time for compliance with the notice that you dispute the notice on this ground.

NOTE

The following problems with a bankruptcy notice have been found *not* to cause a notice to be invalid:

- the failure to include the ACN of the creditor if it is a company; and
- the creditor's address being listed as care of its solicitors (as long as payment can be made at the address shown).

4.2 The debt on which the bankruptcy notice is based does not exist

To prove that the debt in a bankruptcy notice does not exist, you need evidence that:

- you have paid the creditor the amount owing in the judgment or order; or
- you have started a court claim to challenge the judgment or order (for example, by commencing an appeal). It is not enough to show that you intend to challenge the judgment or order or that that you think you have grounds to do so – you must have filed the documents with the relevant court and be able to provide evidence that shows a genuine and arguable case that you are pursuing.

4.3 Counter-claim, set-off or cross demand

There are two things you will need to satisfy the Court of to succeed under this ground:

- 1) that you have a counter-claim, set-off or cross-demand equal to or exceeding the amount claimed in the bankruptcy notice. You must be able to satisfy the court that your claim is genuine and has a reasonable probability of success; and
- 2) the counter-claim, set-off or cross demand could not by law have been pursued in the court proceeding in which the creditor obtained the judgment on which the bankruptcy notice is based. Failure to take advantage of the opportunity to counter-claim or other personal

circumstances which prevented you from pursuing the claim (like not having relevant evidence at the time, or not knowing about your claim), will not be sufficient.

4.4 Abuse of process

If you can prove that the purpose of the bankruptcy notice is to put pressure on you to pay the debt, rather than a genuine effort by the creditor to make you bankrupt then you may be able to get the bankruptcy notice set aside because it is an abuse of process. You will need evidence of an improper purpose or unfair pressure on the part of the creditor to succeed on this ground.

5. How to apply to set aside the bankruptcy notice

To apply to set aside the bankruptcy notice you will need to take the following steps:

1. File an [Form B2 application](#) and [affidavit in support](#) at the Federal Circuit Court

- a) You can get these from the Federal Court or Federal Circuit Court website. There will be a filing fee (as at September 2017 - \$1,445 for individuals) payable to lodge your application, though in certain circumstances you can apply for a waiver of this fee, e.g. on grounds of financial hardship.
- b) The affidavit in support must state the grounds in support of the application and the date when the bankruptcy notice was served. If relevant you will also need to attach to the affidavit a copy of any application you have made to challenge the judgment or order upon which the bankruptcy notice is based.

EXAMPLE

An example of the orders to be sought in the application are as follows:

1. *That bankruptcy notice number BN0000 issued on 1 January 2014 (**Bankruptcy Notice**), which was served on me on 1 February 2014, be set aside pursuant to section 30(1) of the Bankruptcy Act 1966 (Cth).*
2. *A copy of the Bankruptcy Notice accompanies this application.*

2. Get a copy of the application and affidavit in support stamped by the court

3. Serve a copy of the application and affidavit stamped by the court on the creditor within 3 days after the documents are lodged with the court.

Similar to Part 2 (Service of a Bankruptcy Notice) above, service can be by a number of ways, including by post or in person. If service is to be performed personally, the following steps apply:

- a) If the creditor is an individual, personal service means that the document must be taken to the person, the person must be identified as the person named on the document, and the document handed to them. If the person refuses to take the document, the person serving it may put the document down in the presence of the person to be served and tell the person what the document is. If you are not comfortable serving the creditor yourself, a process server can do it for a fee.
- b) If the creditor is a corporation, personal service requires someone to go to the registered office of the corporation and to leave a copy of the documents with a person working for that corporation.
- c) The registered office of a corporation can be different from the company's principal place of business. The registered office of a corporation will be shown on a current company extract which can be obtained from the Australian Securities and Investments Commission (ASIC). You can contact ASIC on 1300 300 630.

USEFUL INFORMATION

See <https://www.afsa.gov.au/> for more information about bankruptcy.