

**Bankruptcy Information Sheet 3:**

**Opposing a Creditor’s Petition**

**About this information sheet**

This information sheet sets out general information on the options available to a debtor who is served with a creditor’s petition to make them a bankrupt. This includes general information on how to oppose a petition where valid legal grounds exist, or asking for more time to pay the debt or get legal or financial advice.

It is important to note the following information.

* This informationsheet is published as part of a series of information sheets and practical guides and contains links to the most commonly used forms approved or prescribed by the relevant legislation or court rules.
* This informationsheet contains general information only and is not a substitute for the *Bankruptcy Act 1966* or the *Bankruptcy Rules 2016* or a substitute for advice from a lawyer or qualified professional adviser. To the extent that there is any inconsistency or discrepancy, the Bankruptcy Act and Bankruptcy Rules as interpreted by the Courts prevail. Links to the legislation and court rules are set out below.
* While Registry staff can provide practical assistance to litigants they cannot provide legal advice or assist with the content of any document. The onus is on the parties to undertake their own enquiries and assessment of the legal issues and get help from a qualified professional adviser.

References and links to legislation, court rules and approved forms:

* + [*Bankruptcy Act 1966*](https://www.legislation.gov.au/Series/C1966A00033) (the Bankruptcy Act)
	+ [*Federal Court (Bankruptcy) Rules 2016*](https://www.legislation.gov.au/Series/F2016L00386)(the Bankruptcy Rules)
	+ [*Bankruptcy Regulations 2021*](https://www.legislation.gov.au/Series/F2021L00261) (the Regulations)
	+ [*Federal Court of Australia Act 1976*](https://www.legislation.gov.au/Series/C2004A01586)(the Court Act)
	+ [*Federal Court Rules 2011*](https://www.legislation.gov.au/Series/F2011L01551)(the Court Rules)
	+ [Prescribed forms](https://www.legislation.gov.au/Series/F2021L00261) under the Regulations
	+ [Approved forms](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules) under the Bankruptcy Rules
1. **Introduction**
	1. A creditor’s petition is an application filed by a creditor asking the Court for an order that a debtor be made bankrupt and that his or her estate be sequestrated and affairs managed by an external trustee. A creditor’s petition may be filed (sometimes referred to as ‘presenting’ the petition) in the Federal Court of Australia or the Federal Circuit and Family Court of Australia.
	2. A creditor may only file a petition with the Court after the debtor has committed an act of bankruptcy and owes the creditor at least $10,000.
	3. While s 40(1) of the Bankruptcy Act provides for the different ‘acts of bankruptcy’ that a creditor may rely on to present a creditor’s petition, the most common act of bankruptcy relied on is a debtor’s non-compliance with a bankruptcy notice (s 40(1)(g) of the Bankruptcy Act).
	4. Where a creditor can show that a debtor failed to comply with a bankruptcy notice or commence proceedings to set aside the bankruptcy notice, within 21 days of being served with the notice, they may commence bankruptcy proceedings by presenting a petition with the Court. A debtor fails to comply with a bankruptcy notice if she/he does not pay the amount referred to in the notice or come to a payment arrangement agreed by the creditor.
	5. A creditor must present/file the petition within 6 months of the date of bankruptcy. This time period cannot be extended.
	6. For more information on how to set aside or extend the time within which to comply with a bankruptcy notice, see [Bankruptcy InformationSheet 4](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-4).
	7. For more information on the essential matters a creditor must prove to file a creditor’s petition and to obtain a sequestration order, see [Bankruptcy InformationSheet 1](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-1) on presenting a creditor’s petition and the bankruptcy checklist at [Bankruptcy InformationSheet 2](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-2).
2. **Service of the creditor’s petition**
	1. The debtor will usually be served with the creditor’s petition and supporting documents personally unless the Court has made an order that the petition may be served in another way (such as by delivery, post or email). The latter is known as a substituted service order. For more information on substituted service applications, see [Bankruptcy Information Sheet 5](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-5).
	2. A debtor who is served with a creditor’s petition should act quickly. Ideally, they should try and get advice from a qualified lawyer as soon as possible after being served with the Court documents. The debtor will be referred to as the ‘Respondent’ in the creditor’s petition. The creditor presenting the petition will be referred to as the ‘Applicant’.
	3. It is also important that a debtor attend the court if they wish to be heard on the hearing date specified in the petition. The hearing date, time and place information can be found on the cover page of the creditor’s petition. A debtor can also check the court date through the Court’s website using [Federal Law Search](https://www.comcourts.gov.au/public/esearch/disclaimer).
	4. If the debtor does not attend court on the hearing date and stand up when a matter is called, the Court may make orders in their absence including an order that they be made a bankrupt.
	5. In addition to attending the court hearing, there are other key steps which must be taken before the court hearing within set deadlines. These are outlined below.
3. **How to oppose a creditor’s petition**
	1. If a debtor does not agree to being made bankrupt, disputes the debt or wishes to challenge or oppose a creditor’s petition, they must:
4. file a notice of appearance in accordance with [Form B4](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB4), and
5. file a notice in accordance with [Form B5](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB5) stating the grounds of opposition to the petition, and
6. file an affidavit in support of the grounds of opposition, and
7. serve the notices and supporting affidavit on the Applicant.

***Time limit***

* 1. The debtor should file these documents at least 3 days before the date fixed for the hearing of the petition (r 2.06 of the Bankruptcy Rules). The Court may, if it considers appropriate, grant the debtor leave to file these documents in Court on the date of the hearing. If an extension of time is sought to file these documents, the Court may order the debtor to pay the creditor’s costs occasioned by the delay.

*Notice of appearance*

* 1. A [Form B4](https://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-3https%3A/www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB4) Notice of Appearance is a form filed with the Court giving notice that a party or its legal representative wishes to appear at the hearing of an application.
	2. The debtor should complete the relevant details of the Form B4. The names of the Applicant and Respondent are to be stated in the heading of the Form B4 together with the Court proceeding number. The debtor should insert their contact details in the footer of the form, including an email address, if possible, for service of documents in the proceedings.

*Notice stating grounds of opposition*

* 1. A [Form B5](https://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB5) Notice Stating Grounds of Opposition is a form filed with the Court giving notice of the grounds on which a party intends to challenge and oppose the making of orders.
	2. The debtor should complete the relevant details of the Form B5. The relevant details such as heading should be filled out in accordance with [3.4] above.
	3. In addition to the formal requirements, the debtor must also state succinctly, but in sufficient detail, the nature and substance of each ground relied on to oppose the creditor’s petition. If there is more than one ground, each ground needs to be stated separately. Although the grounds relied on will depend on the circumstances of the matter, the most common grounds for opposing the creditor’s petition are that the debtor:
* did not commit the act of bankruptcy as alleged in the creditor’s petition - this could be because the notice was never effectively served, or the amount in the notice was repaid or a payment plan agreed by the creditor within the 21 day compliance period
* does not owe the money claimed by the creditor - this could be because the debt was repaid or the judgment that founds the debt is being challenged in another court (or is on appeal) or there are substantial reasons for the Court to go behind the judgment
* is able to pay their debts and is not insolvent
* has an agreement or other arrangement with the creditor to pay the debt by instalments or to postpone the enforcement of the debt
* has a genuine and arguable claim against the creditor for an equivalent amount of the debt, or
* has ‘other sufficient cause’ or reason as to why the court should decline to make the order.
	1. The grounds on which a debtor may challenge a petition are variable and depend on the circumstances and it is not appropriate to enumerate or circumscribe them. For more information on the grounds that are commonly raised in opposing a petition, refer to information resources provided by third party organisations to help and guide debtors on how to resist a petition (see paragraph [7.3] of this document for a link to some of those services). It is recommended that debtors get advice from a qualified professional adviser on whether legal grounds exist to oppose the petition and what evidence would be required to support those grounds.
	2. Once the grounds have been identified, the debtor should set out the details clearly and succinctly in the [Form B5 Notice Stating Grounds of Opposition](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB5). The relevant details, such as the document heading, should be filled out in accordance with [3.6] above.

*Affidavit in support*

* 1. The debtor should support their grounds of opposition by written evidence that proves each of the grounds set out in the Form B5 opposing the petition. The burden falls on the debtor to prove the grounds stated. Mere assertion or a bare claim, no matter how genuinely the debtor believes them, is not enough.
	2. All evidence should be submitted by way of affidavit.
	3. An affidavit is a written form of evidence either sworn or affirmed before a solicitor, Justice of the Peace, Commissioner for Declarations or other authorised person.
	4. The [Form 59 Affidavit](http://www.fedcourt.gov.au/forms-and-fees/forms/federal-court-rules#form59) to be filed in the Federal Court of Australia is available on the [Forms](http://www.fedcourt.gov.au/forms-and-fees/forms/federal-court-rules) page. This form should be modified to include the bankruptcy heading in [Form B1](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB1).
	5. There is no prescribed form for affidavits to be filed in the Federal Circuit and Family Court of Australia.
	6. The affidavit must be divided into numbered paragraphs and must be signed on each page. Any document relevant to the matter may be annexed to the affidavit. Each document that is annexed must have an annexure certificate signed by the person before whom the affidavit is made identifying it as the particular annexure.
	7. Formal requirements for documents filed in bankruptcy proceedings in the Court are set out in Rule 1.07(5) and [Form B1](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB1) of the Bankruptcy Rules and Rules 2.11 to 2.16 of the Court Rules. Formal requirements for Affidavits filed in the Court are set out in Rules 29.01 to 29.03 of the Court Rules but modified to include the heading in approved Form B1 prescribed by rule 1.07(5). For forms used in bankruptcy proceedings in the Court, refer to the [Bankruptcy Forms](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules).

*Filing of notices and affidavit*

* 1. The debtor must file the completed documents with the Court’s Registry. There is no filing fee for this. The documents should be lodged in the same court file as the creditor’s petition. The court file number is stated on the heading of the creditor’s petition.
	2. The debtor may lodge documents electronically through the Court’s eLodgment facility. For more information on eLodgment and the Court’s Online Services, refer to Section [8] of this information sheet.
	3. The debtor may also file the documents in person in the Court’s registry or by facsimile. Generally where a document is lodged by 4.30pm, it is deemed to have been filed on the same day. (Note: There are important exceptions and qualifications that could be relevant in calculating the time of filing. A debtor therefore should obtain advice from a qualified professional as to how the court rules apply to them).

*Service of the documents*

* 1. If the documents lodged electronically are accepted for filing, the user will receive an email containing a link to the processed documents, which can be printed out for the purposes of service.
	2. If the documents are lodged personally, the debtor can obtain processed copies from the Registry.
	3. The debtor will be required to serve copies of the processed documents on the applicant creditor. This can be done by sending the documents to the applicant at the address for service provided in the creditor’s petition. Under rule 2.06 of the Bankruptcy Rules*,* a debtor is required to serve any documents opposing the petition at least three days before the matter is listed before the Court although the Court may, in appropriate circumstances, grant leave to serve the documents out of time.
1. **The hearing of the petition**
	1. A creditor’s petition may be heard by a Judge or Judicial Registrar of the Court. Most petitions are heard by a Judicial Registrar.
	2. When the matter is called, the respondent should walk to the long bar table at the front of the courtroom and tell the Judge or Judicial Registrar their name. A Judge should be addressed as ‘Your Honour’. A Judicial Registrar should be addressed as ‘Registrar’.
	3. A debtor has three options at the hearing of the creditor’s petition. He or she may:
2. agree to being made bankrupt or not oppose the making of the sequestration order,
3. not agree to being made bankrupt and explain the reasons why, or
4. ask for an adjournment because they need more time.

***The debtor agrees to (or does not oppose) being made bankrupt***

* 1. If the debtor does not dispute the debt, does not wish to challenge or oppose the petition or agrees to being made bankrupt, they should tell the Judge or Judicial Registrar at the hearing. The Judge or Judicial Registrar will review the creditor’s petition and supporting documents. If the formal requirements are proven and the Court is satisfied there is an act of bankruptcy available, the Court will generally make a sequestration order, which has the effect of making the debtor a bankrupt.

***The debtor does not agree to being made bankrupt***

* 1. The debtor should tell the Judge or Judicial Registrar that they oppose the petition and the legal reasons why they believe orders should not be made.
	2. As noted in paragraph [3.7], some of the more common grounds for challenging and opposing a creditor’s petition include that the debtor:
* did not commit the act of bankruptcy as alleged in the creditor’s petition
* does not owe the money claimed by the creditor
* is able to pay their debts and is not insolvent
* has a genuine and arguable claim against the creditor for an equivalent amount of the debt, or
* has ‘other sufficient cause’ or reason as to why the court should decline to make the order.
	1. The debtor should support their grounds of opposition with written evidence that demonstrates their claims and supports the grounds articulated in the [Form B5 Notice of Grounds of Opposition](http://www.fedcourt.gov.au/forms-and-fees/forms/bankruptcy-rules#formB5).
	2. This evidence should be prepared and filed by way of affidavit in accordance with paragraphs [3.10]-[3.19] above.
	3. Mere assertion or a statement of belief, no matter how genuinely held, will not be enough to show that the grounds or claims have merit or substance. If the Court is not convinced on the evidence that the debtor has a real and arguable claim or grounds against the creditor, the Court may dismiss the grounds and make a sequestration order.

***The debtor needs more time***

* 1. If the debtor needs more time to prepare their case or negotiate with the other side, they may ask the Court for an adjournment. In some instances a debtor will ask the Court to adjourn the petition so they may pursue pending court proceedings to set aside (or appeal) a judgment founding, or cross claim against, the debt owing to the creditor on the basis that those proceedings are brought on genuine and reasonable grounds.
	2. An adjournment is a suspension of the hearing until a later date. An application for an adjournment will often need to be supported by an affidavit setting out the matters the Court will be asked to consider.
	3. At the hearing, the Judge or Judicial Registrar will consider the reasons for the proposed adjournment. The Court will ask the applicant if they agree to or oppose the adjournment. The Court will not grant an adjournment automatically, but may do so if it considers appropriate.
	4. It may be prudent for the debtor to contact the applicant creditor in advance of the hearing and seek their consent for the matter to be adjourned.
	5. A debtor should be mindful that the Court has a broad discretion to make orders as to the costs of the proceedings. The Court may make an order that the debtor pay the legal costs of the applicant’s appearance in court where the debtor has been granted an adjournment.
1. **The Court’s decision**
	1. At the hearing the Court can:
* Adjourn the petition
* Dismiss the petition or
* Make a sequestration order adjudging the debtor a bankrupt.

***Adjourn the petition***

* 1. The Court may adjourn a petition in the exercise of its discretion where it is appropriate to do so. The length of the adjournment will depend on the circumstances and the purposes for which it is sought.
	2. In some circumstances, the petition may only be adjourned for a short period of time to allow the debtor some time to obtain advice from a qualified professional adviser. For example, a short adjournment may be granted to allow a debtor to get legal advice on whether there is a legal basis to oppose the petition. Alternatively, a short adjournment may be approved where the debtor wishes to get financial advice or financial counselling as to their capacity to repay the debt or negotiate a payment arrangement with the creditor.
	3. Where the petition is disputed and there is sufficient evidence to show that the Form B5 Notice of Grounds of Opposition have merit, are more than barely arguable, or are not frivolous, the Court may adjourn the petition to another date and give directions for the parties to file and serve any further written evidence and legal submissions. In these circumstances where the petition is disputed, the Court will generally adjourn the proceedings for hearing at a later date when all the evidence has been completed and any other court directions complied with.
	4. Where the debtor can show that they have commenced proceedings to challenge, set aside/appeal or pursue a cross claim in relation to the debt the Court may, where there’s sufficient evidence to show that the pending proceedings or cross claim is based on genuine, substantial and reasonably arguable grounds, or has sufficient chance of success, adjourn the petition for an extended period of time to allow those proceedings to continue. Mere assertion, a barely arguable claim or expression of belief as to the strength of the claims raised, no matter how genuinely held, will not be sufficient to warrant an adjournment, particularly a lengthy one.

***Dismiss a petition***

* 1. The Court will consider the respondent debtor’s grounds before allowing the applicant to proceed on its petition. If the Court is persuaded by the debtor’s grounds of opposition, it may decline to make a sequestration order and dismiss the petition.
	2. In addition, the Court will usually decline to make a sequestration order where the debtor can prove on affidavit evidence that they are not insolvent and can pay their debts as and when they fall due.
	3. If the creditor fails to prove its case and satisfy the Court of all the formal matters in accordance with the Bankruptcy Act and Rules, the court may refuse to make the sequestration order and dismiss the petition.
	4. In addition, the Court retains an overriding discretion to refuse to make a sequestration order even where the formal matters have been proven. For example, the Court may agree to dismiss the petition where a payment arrangement has been agreed between the parties and there is no supporting creditor who wishes to be substituted on the petition. Generally, in this type of situation, the creditor will be entitled to recover their legal costs of the proceedings.

***Sequestration order***

* 1. Where the Court is not persuaded by the debtor’s grounds of opposition, the Court will carefully consider all the evidence and legal requirements to determine whether or not to make a sequestration order against the debtor’s estate.
	2. Generally a creditor has a prima facie right to a sequestration order upon proof on affidavit at the hearing of the petition that:
* the debtor has committed an act of bankruptcy within 6 months of presenting the petition
* a minimum liquidated debt of $10,000 was owed at the date of the act of bankruptcy referred to in the petition *and* remains owing at the date of the hearing of the petition
* the matters stated in the petition have been verified
* the petition has been properly served, and
* all the final searches and updating affidavits comply with the requirements referred to in rule 4.06 of the Bankruptcy Rules.
	1. For a more detailed explanation of the formal requirements, refer to [Bankruptcy Information Sheet 1](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-1) and the detailed checklist in [Bankruptcy Information Sheet 2](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-2).
	2. Where a sequestration order is made, the creditor will ordinarily be entitled to recover its legal costs of the petition from the bankrupt estate.

***After the hearing***

* 1. Upon the making of a sequestration order, a trustee will be appointed to the debtor’s estate to manage their financial affairs. Unless a private registered trustee has given their written consent to act, the Official Receiver (administered by AFSA) will manage the bankrupt estate. Further information on the consequences of bankruptcy is available on [AFSA’s website](https://www.afsa.gov.au/insolvency).
1. **Related practice materials**
	1. Debtors are also referred to the following related material:
* [Guide for Practitioners and Parties in Bankruptcy Matters listed before a Judicial Registrar](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/guide)
* [Bankruptcy Information Sheet 1](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-1): Presenting a Creditor’s Petition
* [Bankruptcy Information Sheet 2](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-2): Creditor’s Petition Checklist
* [Bankruptcy Information Sheet 4](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-4): Setting aside a Bankruptcy Notice
* [Bankruptcy Information Sheet 5](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-5): Substituted Service Applications
* [Bankruptcy Information Sheet 6](http://www.fedcourt.gov.au/law-and-practice/guides/guides-bankruptcy/information-sheet-6): Consequences of a Sequestration Order
1. **Other resources**
	1. Debtors who are self-represented litigants will be supported by the Registry to assist them through the court process efficiently. Refer to [Information for Litigants](https://www.fedcourt.gov.au/going-to-court/i-am-a-party) for further information.
	2. A self-representation service is available to litigants in each Registry. The service provides free, confidential and impartial legal advice and assistance with Federal Court and Federal Circuit and Family Court proceedings for individuals and community groups. For further details contact the nearest [Registry](https://www.fedcourt.gov.au/contact).
	3. In addition, debtors can also approach various ‘not for profit’ bodies for assistance and guidance and access free online information on bankruptcy and opposing a creditor’s petition including:
* [LawRight](http://www.lawright.org.au/) (Queensland)
* [Justice Connect](http://www.justiceconnect.org.au/get-help/self-representation-service/resources-and-fact-sheets/bankruptcy-factsheets)
* [Financial Rights Legal Centre](https://financialrights.org.au/factsheets/help-im-being-made-bankrupt-factsheet/)
* [Australian Financial Security Authority](https://www.afsa.gov.au/insolvency) (AFSA)
1. **Information on the Court’s online services**

*eLodgment*

* 1. The Court provides an electronic lodgment ([eLodgment](http://www.fedcourt.gov.au/online-services/elodgment)) facility through which a document that commences a proceeding or is relevant to an existing proceeding may be lodged for filing online.
	2. The use of eLodgment provides many benefits to court users. It is available from each user’s computer at any time and provides a complete record of all lodgement transactions with the Court.
	3. eLodgment also allows court users to lodge other documents regarding a proceeding, for example: a draft order, terms of consent and case management correspondence.
	4. A party must be registered to use eLodgment. The [eLodgment page](http://www.fedcourt.gov.au/online-services/elodgment) includes information about registering, preparing and lodging documents.

*Commonwealth Courts Portal*

* 1. Filed documents in a matter can be viewed by parties or those authorised by a party on the [Commonwealth Courts Portal](http://www.fedcourt.gov.au/online-services/commonwealth-courts-portal). The Commonwealth Courts Portal (CCP) provides web-based services for court users to access information about cases before the Court. Parties may register for the CCP to gain access to documents which have been eLodged, as well as orders of the Court, judgments and listing events (past or future). More information about the CCP can be found in [Online Services](https://www.fedcourt.gov.au/online-services).

*Federal Law Search*

* 1. Alternatively, stamped court orders are also available online via [Federal Law Search](http://www.fedcourt.gov.au/online-services/federal-law-search). The Federal Law Search facility provides selected information on cases to members of the public.