



FEDERAL MAGISTRATES COURT OF AUSTRALIA

Queensland

GUIDE TO FILING A CREDITORS PETITION

This document is a brief summary of the practice and procedure in presenting a creditors petition in the Federal Magistrates Court in Queensland. The staff at the Court Registry cannot give legal advice or assist with the content of any document. You must still make your own enquiries and do your own assessment and legal research.

Contact details for the Federal Magistrates Court in Queensland for federal law matters

Brisbane

Commonwealth Law Courts

Level 6

119 North Quay

BRISBANE QLD 4000

Telephone: 07 3248 1100

General Fax: 07 3248 1260

Fax filing: 07 3248 1240

PO Box 13084

George Street Post Shop

BRISBANE QLD 4003

Townsville

2nd Floor

143 Walker Street

TOWNSVILLE QLD 4810

Internet address: www.fmc.gov.au

References to Legislation

- *Bankruptcy Act 1966* (Cth) (the Act)
- *Federal Magistrates Court (Bankruptcy) Rules 2005* (the Rules)
- Bankruptcy Regulations (Cth) (the Regulations)
- *Federal Magistrates Act 1999* (Cth)

1. *Prior to lodging creditors petition*

Before presenting a creditors petition the applicant creditor may consider conducting a search of the National Personal Insolvency Index (NPII) to ensure the debtor has not already become a bankrupt. There is a fee for this search.

The NPII is maintained at the Insolvency and Trustee Service Australia (ITSA) located at Level 13, 340 Adelaide Street, Brisbane (tel) 3360 5444 and (fax) 3360 5466. Internet address www.itsa.gov.au

If the debtor is already a bankrupt, the applicant creditors debt may be a debt provable in that bankruptcy. If that is the case, the debt cannot be made the basis of another creditors petition.

2. *Presentation of a creditors petition*

A creditors petition must be presented for filing within six months of the date of the “act of bankruptcy” (s 44(1)(c) of the Act). Refer to s 40(1) of the Act for the different “acts of bankruptcy” that a creditor can rely upon. The most common act of bankruptcy relied upon is the failure to comply with a bankruptcy notice served on the debtor (s 41(1)(g) of the Act). Refer to the Regulations for the prescribed form of the bankruptcy notice (reg 4). A copy can be downloaded from ITSA’s website.

3. *Filing fee*

A fee is payable for filing a creditors petition. Different amounts are payable depending on whether the applicant is an individual or a corporation.

4. *Documents required (rules 4.02 & 4.04)*

- a) Creditors petition (Form 6).
- b) Affidavit verifying paragraphs 1, 2 and 3 of petition pursuant to rule 4.02 by someone who knows the relevant facts verifying the petition. The affidavit

may be in accordance with the affidavit set out in Part 2 of Form 6, or may be a separate document. Refer to paragraph 8 below for further details.

- c) Affidavit verifying paragraph 4 of petition pursuant to rule 4.04 verifying whether or not an application has been made for an order setting aside the bankruptcy notice. Refer to paragraph 11 below for further details.
- d) Affidavit of service of the bankruptcy notice, with a signed copy of the bankruptcy notice and copy of the judgment attached.

5. *Formal requirements for documents*

Rules 2.01 to 2.04 set out the formal requirements of forms in the Federal Magistrates Court. In bankruptcy proceedings, the documents are headed in accordance with Form 1 as follows:

IN THE FEDERAL MAGISTRATES COURT OF AUSTRALIA
REGISTRY: (*Registry*)

BRG of 20

IN THE MATTER OF (*name of debtor or bankrupt*)

(*name of applicant*)
APPLICANT

(*name of respondent*)
RESPONDENT

Rules 15.25 to 15.28 set out the formal requirements of affidavits filed in the Court. Section 59 of the *Federal Magistrates Act 1999* sets out the requirements for swearing of affidavits.

6. *Footer*

A document prepared by a party for use in the Court shall have a horizontal line drawn at the foot of the first page below which shall be shown the party on whose behalf the document is filed, and the address, telephone number and facsimile number of the party or their legal representative.

7. *Copies of documents*

All copies of the petition and the verifying affidavits must be clear and legible. Any alterations in the original documents must be initialled by the person executing or swearing that document and the person who witnessed the execution or swearing (if applicable).

Extra copies of the petition and verifying affidavits will need to be prepared and presented for filing with the original documents. Two copies of each of the documents per respondent debtor are required. The copies will be returned to the applicant for service and proof of service purposes.

8. *Creditors petition and affidavit verifying paragraphs 1, 2 & 3 of petition (s 47(1) & rule 4.02)*

The creditors petition should be in Form 6 and be executed by either the applicant or by the applicant's authorised agent or solicitor.

The affidavit verifying the petition pursuant to s 47(1) of the Act and rule 4.02 should be sworn by a person who knows the relevant facts and should refer to the creditors petition it verifies. The affidavit may be accordance with the affidavit set out in Part 2 of Form 6, or may be a separate document. If it is a separate document, a copy of the creditors petition must be attached to the affidavit.

Before presenting the creditors petition ensure it is dated and signed and that the affidavit verifying it does not pre-date the date the petition was executed.

If the petition is founded on an act of bankruptcy mentioned in s 40(1)(d) of the Act (ie issue of execution), further affidavit material is required (rule 4.03).

9. *Address for service*

The creditors petition must reveal an address for service as provided for in Form 6.

10. *Notice to respondent debtor*

Form 6 (creditors petition) contains a form of Listing Notice addressed to the respondent debtor. In the Listing Notice the address of the Court can be either:

Brisbane
Federal Magistrates Court of Australia
Level 6
Commonwealth Law Courts
119 North Quay
BRISBANE

Townsville
Federal Magistrates Court of Australia
2nd Floor
143 Walker Street
TOWNSVILLE

(Special arrangements may be made for listings outside Brisbane or Townsville.)

The date and time of the hearing will be completed in the Registry. The petition will then be signed and sealed. Completed service copies will be given back to the applicant to effect service on the respondent.

IMPORTANT NOTE: A copy of the creditors petition must be given to the Official Receiver's Office (ITSA) within three days of filing (reg 4.05).

11. Affidavit verifying paragraph 4 of petition (rule 4.04)

If the petition is founded on failure to comply with a bankruptcy notice, the applicant or representative must conduct a search of the records of **both** the Federal Court of Australia and the Federal Magistrates Court of Australia. Searches can either be conducted in person at the Registry or electronically using eSearch. eSearch is a searchable database of selected information on cases initiated in the Federal Court of Australia and in the federal law jurisdiction of the Federal Magistrates Court of Australia. It is accessed at www.fedcourt.gov.au.

The search is by name of the respondent debtor. There is no fee for the search of either Court's electronic records, but a fee may be payable if you conduct a file search of a court file. The object of the search is to see if the respondent has filed any application to set aside the bankruptcy notice or any other related application, such as to extend time for compliance.

Note that if any such application exists, it will appear in the index by reference to the respondent's name. It will not have the same number as the bankruptcy notice. The Federal Court or Federal Magistrates Court file number allocated to any application filed by the respondent will not be the bankruptcy notice number allocated by ITSA when it issued the bankruptcy notice.

If the respondent has not filed an application, it will be in order for the person conducting the search to swear an affidavit deposing to these facts. The form of affidavit merely swears to whether any application has been made in respect of the bankruptcy notice. There is no need to be any more specific if no application exists. The affidavit will need to be presented for filing with the creditors petition and affidavit verifying paragraphs 1, 2 & 3 of the petition.

If the search mentioned above reveals that the respondent has filed material in response to the bankruptcy notice, the solicitor handling the file for the petitioning creditor should be informed immediately and guidance sought as to further action, if any, that is to be taken. Generally, that action will involve a retyping of the affidavit to set out what the search revealed, namely the existence of a particular type of application and its outcome. The affidavit must also be accompanied by a copy of the order finally deciding the application (rule 4.04(2)).

If an act of bankruptcy (other than failure to comply with a bankruptcy notice) is relied upon, the affidavit verifying paragraph 4 of the petition must set out the facts which establish the particular act of bankruptcy.

12. Consent of registered trustee

Bankruptcy Regulation 8.06 provides that a trustee who signs a Consent to Act pursuant to s 156A of the Act must file that Consent with the Official Receiver (ITSA) as soon as practicable after signing it, or, if a sequestration order is made against the debtor's estate, no later than two working days after the day on which the order is made.

The original of the Consent to Act is **not** filed with the Court. However, the affidavit of service of the petition must state how any Consent to Act as trustee was served.

13. Service of petition documents (rule 4.05)

Rule 4.05 provides that the applicant must, at least 5 days before the hearing date of the creditors petition, serve personally on the respondent the following documents:

- Creditors petition;
- A copy of the affidavit verifying the petition required by s 47(1) of the Act and rule 4.02;
- A copy of the affidavit of search of both Courts' electronic records required by rule 4.04;
- A copy of the affidavit of service of the bankruptcy notice; and
- A copy of the Consent to Act as trustee (if applicable).

When reckoning time under the Rules, regard should be had to rule 3.04, which states, in part, that where time is reckoned by reference to a given day, the given day shall not be counted and that where the period in question is a period of 5 days or less and includes a day on which the Registry is closed, that day must not be counted. In other words, 5 clear business days service is required.

14. Affidavit of service of petition documents (rule 4.05)

After service of all the documents referred to in rules 4.02 & 4.04, an affidavit of service should be filed as soon as possible. The affidavit of service should depose to when and how the documents were served and the means by which the identification of the person served was established.

The affidavit of service must have attached to it a copy of the documents that were served.

15. *Affidavits required at the hearing* (rule 4.06)

The applicant must file the following documents for the hearing pursuant to rule 4.06:

- Affidavit of service of the petition (see paragraph 14 above).
- Affidavit of a person who has conducted a search of the NPII no earlier than the day before the hearing. The affidavit must set out the details of any references to the debtor in the Index and state that there are no details of any debt agreement in relation to the debt on which the applicant relies on the day the petition was presented. A copy of the search extract from the NPII must be attached to the affidavit.
- Affidavit of a person who knows the relevant facts stating that each debt on which the applicant relies is still owing. This affidavit must be sworn as soon as practical before the hearing.
- Affidavit of search if the debt stated in the creditors petition is an amount payable pursuant to a judgment of a court that ordered the amount to be paid into the court.

While the affidavit of service of the petition should be filed as soon as possible, the remaining affidavits required by rule 4.06 may be filed by leave of the Court at the hearing. If it is not practical for the applicant to file the original of either of the affidavits, rule 4.07 enables a facsimile copy to be filed. The original affidavit must be kept and produced if directed by the Court.

16. *Hearing of the petition* (s 52 Act)

Section 52 of the Act sets out the matters that the Court shall require proof of before making a sequestration order. A sequestration order is in Form 7.

17. *Post sequestration steps* (rule 4.08)

Once the sequestration order is made, the order must be entered by filing the order in Form 7 within one day after the order is made (rule 4.08), unless the Court enters the order automatically. Some registries have the capacity to enter the order in Court and provide sealed copies to the parties.

On the day the sequestration order is made, the applicant must advise the trustee in writing of the making of the order and his/her appointment (rule 4.08).

A copy of the sequestration order must be served upon the Official Receiver (ITSA) and the trustee within two working days of the order (rule 4.08).

If the petition is dismissed, the applicant must enter the order within one day after the order is made (unless entered by the Court) and within two days must give a copy of the order to any person who had consented to act as trustee and the Official Receiver (rule 4.08).

ATTACHMENT:

FMC Court forms