



## FEDERAL MAGISTRATES COURT OF AUSTRALIA

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### HOW TO APPLY TO SET ASIDE A BANKRUPTCY NOTICE AND/OR EXTEND TIME FOR COMPLIANCE WITH A BANKRUPTCY NOTICE

A person who has been served with a bankruptcy notice may apply to the Federal Magistrates Court to set aside the bankruptcy notice and/or extend time for compliance with the notice. A person generally has 21 days in which to comply with the requirements of a bankruptcy notice otherwise he/she will have committed an act of bankruptcy. The time for compliance is stated on the bankruptcy notice.

However s 41(6A) of the *Bankruptcy Act 1966* (Cth) states that the Court may extend time for compliance with a bankruptcy notice if, **before** the expiration of the time fixed for compliance, either:

- Proceedings to set aside the judgment or order in respect of which the bankruptcy notice was issued, have been initiated by the debtor; or
- An application has been made to the Court to set aside the bankruptcy notice.

#### Application

An application to set aside the bankruptcy notice and/or to extend time for compliance with the notice may be made by filing an Application in Form 2.

The person applying for the orders is the *applicant*. The person who issued the bankruptcy notice is the *respondent*. Details of the applicant and respondent must be completed on the application form. The applicant must state in the section for *Final Orders* on page 2 of the form, the orders that are sought from the Court, that is, what it is the applicant wishes the Court to do in relation to the application and the legislative basis of the Court's jurisdiction to hear the matter.

The section for *Interim Orders* in the form must be completed if the applicant requires orders to be made temporarily while the action is proceeding towards a hearing. For example if the applicant also seeks an order to extend time for compliance with the bankruptcy notice this order should be stated in this section. The time for compliance may, if the Court sees fit, be extended until the application to set aside the bankruptcy notice has been heard by the Court.

The rest of the form must be completed in full, signed and dated. The applicant must provide an address for service in which documents in the proceedings can be left during normal business hours or may be posted and a telephone and facsimile number.

## **Documents to be filed with the Application (rule 3.02)**

Rule 3.02 of the *Federal Magistrates Court (Bankruptcy) Rules 2005* (the Rules) states that the applicant must file the following additional documents with the application:

1. A copy of the bankruptcy notice
2. An affidavit by the applicant stating the grounds in support of the application

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. The affidavit must state the date the bankruptcy notice was served on the applicant and set out the grounds in support of the application. For example, if the applicant is relying on the fact that an application has been filed in another court to have the judgment on which the bankruptcy notice is based set aside, the affidavit must state the steps that have been taken to set aside the judgment. A copy of the application to set aside the judgment and any documents that have been filed to support that application must be attached to the affidavit.

Alternatively, if the applicant is relying on the fact there exists a counterclaim, set off or cross demand to the debt referred to in the bankruptcy notice, the affidavit must state the full details of the counterclaim, set off or cross demand and the amount that is being claimed. The amount of the counterclaim, set off or cross demand must be equal to or exceed the amount referred to in the bankruptcy notice. The affidavit will also need to explain why the applicant could not raise the counterclaim, set off or cross demand in the proceedings resulting in the judgment on which the bankruptcy notice is based.

## **Filing the Application**

The application, affidavit and bankruptcy notice should be copied (one for the Court and one for each party to the action) and all copies lodged at the Registry.

If the documents are in order, the application will be filed and processed upon payment of the appropriate fee.

## **Filing Fees**

A filing fee is payable by an applicant on the filing of an application. An applicant may be exempt from paying this fee, or eligible for a waiver of payment of the fee. Further information about this can be obtained by asking the Registry staff and an appropriate form will need to be completed.

## **What happens after the documents are filed?**

When the documents are filed, the Registry will endorse on the application the date, time and place at which the matter will be listed before the Court and return the extra copies sealed with the Court's stamp.

## **Service of the Application**

Rule 3.02 provides that the applicant must serve a copy of the application and supporting affidavit on each respondent to the application within three days after the application is filed.

The documents should be delivered personally to each respondent at the address for service stated in the bankruptcy notice.

## **Hearing**

The applicant should attend at Court at the appointed time when their matter is to be heard. The respondent or their legal representative should attend if they wish to oppose the application.

## **Documents attached:**

- Application Form 2
- Affidavit

## **Registry address for the Federal Magistrates Court of Australia in Queensland for federal law matters**

Level 6  
Harry Gibbs Commonwealth Law Courts  
119 North Quay  
BRISBANE QLD 4000  
Phone: 07 32481100  
Fax: 07 3248 1260  
Website: [www.fmc.gov.au](http://www.fmc.gov.au)

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George Street Post Shop  
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