

Global Economic Downturn fact sheet

Debt recovery methods

Series 1 – Issue 6

As part of the Institute's ongoing efforts to provide members with guidance and information on key issues affecting the current business environment, the Institute has developed a practical factsheet series, which presents guidance for members written by members.

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Enforcement of judgment debts

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Given the challenging economic environment facing business, it is important that debts outstanding from customers are carefully monitored to ensure they are collected in a timely manner.

When all non legal avenues of collecting long outstanding debts have failed, organisations will need to decide whether it is commercially viable to take legal recourse against a debtor to recover the amount outstanding. Legal action will normally take the form of obtaining a judgment against the debtor for the amount outstanding. Obtaining a judgment prior to taking any other form of action, will ensure that any disputes regarding the amount outstanding are resolved.

Once a judgment is obtained, there are a number of ways that the judgment can be enforced. These include:

- > Obtaining a warrant from the court to seize property. This procedure entitles the sheriff to attend the debtor's premises and seize assets, which are then sold to satisfy the judgment debt
- > Summons for oral examination. The judgment debtor may be summonsed to appear before the registrar of the court to be examined regarding what income, assets and available cash the debtor has to satisfy the judgment debt
- > Attachment of earnings order. The court may make an order that the debtor's employer make payments to the creditor from the debtors earnings in satisfaction of the judgment debt
- > Attachment of debt (garnishee). The court may order that all debts due to the judgment debtor from another party be paid directly to the creditor in satisfaction of the judgment debt. This may also include money in a bank account.

The two most common options, however, to enforce a judgement debt are:

- > Individuals – bankruptcy
- > Corporations – liquidation.

Bankruptcy

- > The debt must exceed \$2000
- > A bankruptcy notice is issued which includes a certified copy of the judgment debt. Penalty interest can be claimed on the judgment debt
- > The bankruptcy notice is to be served upon the judgment debtor. This is normally done by way of personal service
- > If the judgment debtor fails to comply with the bankruptcy notice by paying the amount outstanding, within 21 days from the date of receipt, he or she will have committed an act of bankruptcy
- > Once an act of bankruptcy has been committed, bankruptcy proceedings can then be commenced by the judgment creditor through the issuing of a creditors' petition. Note that there is no obligation on the judgment creditor to proceed with bankruptcy proceedings despite issuing a notice of bankruptcy

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'Where a debtor, which is a company, has not paid its debts, a creditor may apply to either the supreme court or the federal court to have the company wound up and placed into liquidation.'

Bankruptcy (continued)

- > The creditor may nominate the bankruptcy trustee of his or her choice. Should no trustee be nominated, in the event that the debtor is made bankrupt, the government trustee (also known as the official trustee) will become trustee of the bankrupt estate
- > Bankruptcy proceedings are issued in the federal magistrates' court
- > Once the creditors' petition is issued, the court will list it for hearing in around four to six weeks. If the court is satisfied that the debtor has committed an act of bankruptcy or the debtor fails to appear at the hearing, the court will normally make a sequestration order against the estate of the debtor and a trustee is appointed.

Involuntary liquidation

- > Where a debtor, which is a company, has not paid its debts, a creditor may apply to either the supreme court or the federal court to have the company wound up and placed into liquidation
- > A statutory demand is issued against the debtor company for debts exceeding \$2000. This is not a court document, rather a document prescribed pursuant to Section 459E of the Corporations Act 2001
- > The onus is on the debtor company to either pay the debt, come to a suitable arrangement with the creditor, or to apply to the court to have the statutory demand set aside. This must be done within 21 days of service of the demand, failing which the debtor will be deemed to be insolvent and the creditor can issue winding up proceedings in either the supreme or federal courts
- > A statutory demand can be set aside, by application to court, if there is a genuine dispute over the debt or if the demand notice is defective. While it is not necessary, it may be desirable to first obtain a judgment in respect of the outstanding debt in order that there can be no dispute regarding the quantum claimed
- > A statutory demand only remains valid for three months from the expiration of the 21 day time frame
- > The creditor may nominate the official liquidator of his or her choice. Should no official liquidator be nominated, the court will choose an official liquidator based on a rotation system
- > Once the application to wind up the company is filed with the court, it normally takes between four to eight weeks for the application to be heard. In certain circumstances, a provisional liquidator may be appointed at any time after the filing of the application if the court considers that the company's assets are at risk.

Refer to factsheet 'Series 1 – Issue 4' for further details on the liquidation process for a debtor company at charteredaccountants.com.au/news_issues/global_economic-downturn

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