DEBT RECOVERY – ENFORCEMENT BY WINDING UP

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A debt is due to you by a company and your internal debt recovery methods have failed as they won't pay!! What's next for you to collect those unpaid invoices?

The *Corporations Act* 2001 ("the **Act**") provides for a company owing money to be wound up and a liquidator appointed to recover the assets of the company and distribute them to all creditors of the company. The winding up process is a strong debt collection tool for unpaid creditors.

Debt collection from a company with an intention to apply for it to be wound up is kicked off by the service of a written Demand for payment. The Demand is prescribed in section 459E of the Act. The Demand does not require the monies owing to be the subject of a judgment entered by a Court. However, if not a judgment debt, the Act requires an affidavit sworn/affirmed by an officer of the creditor to be served with the Demand.

If after 21 days following service of the Demand the debtor company fails to pay the debt, make an arrangement for payment or does not set the Demand aside, the debtor company is presumed to be insolvent. The 21 day period is strictly observed by the Court.

Based upon that presumption of insolvency, an Application to either a Supreme Court or the Federal Court of Australia can be made. The minimum due to the creditor must exceed $2,000 and rely on the presumption of insolvency of the debtor company arising within three months prior to the presentation of the Application to the Court.

The Application is issued by the Court and nominates a date for hearing. The Application and various affidavits in support as required by the Corporations Rules must be served upon the company at its registered office. Once served, and in preparation for the hearing, further documents are drafted to confirm the debt is outstanding and searches of Court records undertaken to satisfy the Court that no application has been made to oppose the Application and that the company has not had a liquidator or administrator appointed.

At the hearing of the Application, the Court is presented with the Application and the supporting affidavits. If all is in accordance with the requirements of the Act, the Court will wind up the company. The Court will also order the appointment of a liquidator to act. The liquidator is nominated by the creditor subject to approval by the Court. The liquidator appointed will endeavour to collect the assets of the company for distribution.

As you can see, there is ample opportunity for the debtor company to make an arrangement to pay the debt to the creditor prior to the Court making the wind up order, so as a key debt

collection tool, winding up can be an effective method in the debt recovery process.

The provisions for the issue of a Demand can be found at http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s459e.html

If you would like more information or advice in relation to insolvency, restructuring or debt recovery practice and procedure, contact Darrin Mitchell on 02 9806 7428 or darrinm@matthewsfolbigg.com.au or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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