



## DEBT RECOVERY – BANKRUPTCY ENFORCEMENT

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Obtaining a judgment from the Court is the first step in the debt collection process. Enforcement is the next step but which option is going to recover that debt.

One option is to proceed with an application to have the individual declared bankrupt. In an effort to avoid bankruptcy, the individual will have to pay the judgment debt or make other arrangements satisfactory to the creditor.

There is a finality to bankruptcy and so the process to obtain the order gives every opportunity to the judgment debtor to pay the debt.

The application to the Court is by way of a Creditor's Petition. The minimum due to the creditor must exceed \$5,000 and rely on an act of bankruptcy committed by the individual within six months prior to the presentation of the Petition to the Court.

The most common form of an act of bankruptcy relied upon is non-compliance with a Bankruptcy Notice served upon the individual. There are other forms of acts of bankruptcy as set out in section 40 of the *Bankruptcy Act* 1966 such as a Writ of Execution being unsatisfied or "keeping house" to avoid his/her creditors.

A Bankruptcy Notice is issued by the Official Receiver upon application by the creditor. If after 21 days following service of the Bankruptcy Notice the individual fails to pay the debt, make an arrangement for payment or does not set the Bankruptcy Notice aside, the individual commits an act of bankruptcy.

The Creditor's Petition is issued by the Court and nominates a date for hearing. The Petition and various affidavits in support as required by the Court Rules must be served personally upon the individual. 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 Petition or that the individual has voluntarily declared bankruptcy.

At the hearing of the Petition, the Court is presented with the Petition and the supporting affidavits. If all is in accordance with the requirements of the *Bankruptcy Act* 1966, the Court will make a "sequestration" order against the individual. The Court will also order the appointment of a trustee to act. The trustee could be a private trustee as nominated by the creditor or by default the Official Trustee in Bankruptcy, a statutory nominee of the Federal Government. The trustee appointed will endeavour to collect the assets of the individual for distribution to all creditors of the individual.



As you can see, there is ample opportunity for the individual to make an arrangement to pay the debt to the creditor prior to the Court making the sequestration order, so as a key debt collection tool, bankruptcy can be an effective method in the debt recovery process.

A list of the acts of bankruptcy able to be relied upon can be found at [http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/ba1966142/s40.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s40.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](mailto:darrinm@matthewsfolbigg.com.au) or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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