



# Who is making Australians bankrupt?

A review of applications by creditors in the Federal Court to force people into bankruptcy.



July 2019

## About Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

## About Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

## About Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers, especially low income and otherwise marginalised or vulnerable consumers, understand and enforce their financial rights. We provide free and independent financial counselling, legal advice and representation, and self-help resources to individuals about a broad range of financial issues including consumer credit, debt and insurance. We also advocate for law reform and improvements to industry practices to improve outcomes for consumers.

## What financial counsellors do

Financial counsellors assist people experiencing financial difficulty. Working in community organisations, financial counsellors provide advice to help people deal with their immediate financial situation and minimise the risk of future financial problems. Their services are free, confidential and independent.

## What specialist consumer community lawyers do

Specialist consumer community lawyers provide free, independent and confidential legal advice to people struggling with a range of consumer and financial issues. There are five specialist consumer community legal centres around Australia: Consumer Law Centre ACT, Financial Rights Legal Centre (NSW), Consumer Credit Legal Service SA, Consumer Action Law Centre (Vic), and Consumer Credit Legal Service WA.

## National Debt Helpline

The National Debt Helpline is a not for profit service that helps people in Australia tackle their debt problems. Financial counsellors offer a free, independent and confidential service. There is a national number 1800 00 007 and a website [www.ndh.org.au](http://www.ndh.org.au).

## About the case studies

The case studies in this report were provided by financial counsellors and community lawyers working with people in financial difficulty. The case studies use a pseudonym for first names and anonymise the creditor.

## About the data

The data in this report about bankruptcy petitions (Creditor's Petitions) was obtained by searching the Commonwealth Courts Portal under bankruptcy at <https://www.comcourts.gov.au/public/eseach/federal/bankruptcy>.

This is publicly available information after a registration process has been completed.

The website also states that there is no guarantee that the information provided is accurate.

The data was obtained by searching under key words (the name of a creditor) and collecting the information delivered from the search. All effort was made to ensure the data collected was accurate and excluded irrelevant information (for example, duplicates). However, given the limitations of searching and our reliance on the public data there will be an error rate. This means that the numbers given are best read as approximate values.

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# Prologue

Peter is a former refugee. He and his older brother had to flee their home when they were young children and they lived in a refugee camp for more than 10 years before coming to Australia.

Peter has no formal education and since arriving in Australia has worked in various low paid manual jobs. He is currently employed in a low paying job, works long hours and has taken on extra shifts. He has five dependent children.

Peter and his wife bought a home in the outer part of a capital city and have a mortgage with one of the major banks. Peter worked hard to meet the mortgage payments and to support his family.

At short notice, Peter had to travel overseas when his parents became ill and died. Peter obtained a credit card to pay for the overseas travel. Unfortunately, he struggled to keep up with the payments on his credit card, as well as the mortgage payments and everyday living expenses for his family.

The credit card account went into default and the major bank sold the debt to a debt collection company.

Peter tried to negotiate a payment plan with the debt collection company but they continued to pressure him to pay the debt and then proceeded to obtain judgment against him (a judgment is an order from a court that a debt is owed). The debt collection company has now commenced bankruptcy proceedings against Peter.

The debt has increased significantly due to the legal costs claimed by the debt collection company.

Peter and his family now face the loss of their home over a modest credit card debt.

The events have placed Peter and his family under financial and emotional stress.

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# Who is making Australians bankrupt?

This report reviews the applications in the Federal Court of Australia to make people bankrupt over the past four financial years (2015-16, 2016-17, 2017-18 and 2018-19). The report was put together after financial counsellors and community lawyers noticed that some creditors regularly applied to bankrupt people while other creditors did not.

The experience of being forced into bankruptcy is highly stressful for people. It involves court proceedings, substantial costs, the need for legal advice and very often the fear of losing the family home.

There are two problems with the current system of bankrupting someone. First, legal and other costs are continually added throughout the process, making it less and less likely that the debtor will be able to make a repayment arrangement to stop being declared bankrupt.

Second, a person can be bankrupted on a debt as little as \$5,000. This can mean that a small credit card debt could lead to the loss of the family home. Using bankruptcy as an enforcement mechanism is particularly problematic for people on low incomes who own their homes. It is poor public policy when people become homeless over relatively small debts.

Financial counsellors and community lawyers also report that many people being made bankrupt are in financial hardship and could make a repayment arrangement to pay their debts if given the opportunity. Given that some creditors are not using, or rarely using the bankruptcy process, while others use it extensively, it raises the question as to why there are such different practices.

This report aims to change the way creditors use bankruptcy as a way to enforce a debt. Forced bankruptcy should be a last resort.



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# Executive summary

## About the report

This report is based on data about the number of applications made by creditors in the Federal Court to make people bankrupt. The report covers the past four financial years (2015-16, 2016-17, 2017-18 and 2018-19). It collates data on the use of the court system to apply to make people bankrupt by the Australian Taxation Office, debt collectors, banks and finance companies, and strata plans/owners' corporations. We did not access data on every company applying to make a person bankrupt. The court data used in this report is an estimate as the court does not guarantee the accuracy of the data.

## The problem

The need for this report became clear because of the time and resources that financial counsellors and community lawyers were spending negotiating with some creditors who repeatedly try to make people bankrupt. Not all creditors engage in this behaviour. In fact, only a few creditors do. Concerns about the use of the bankruptcy system have been raised with creditors with problematic practices and there has been some change but some creditors continue to overuse this enforcement process.

Financial counsellors and community lawyers were also reporting the catastrophic consequences for their clients who were being forced into bankruptcy. Debts could be small at the start, but blow out enormously due to the addition of legal costs, fees and interest. Some clients were facing the loss of the family home and, in some cases, the loss of their job, if they became bankrupt. The stress of the legal proceedings meant clients desperately tried to save their home for example, by getting a high-cost loan, selling possessions, begging for money from family, and drastically cutting their expenses. These remedies could often be too late, not feasible or in the case of high-cost credit, worsen the situation.

## What did we do?

We wanted to know how many people were potentially being made bankrupt and by which creditors. To obtain this information we searched the publicly available database of the Federal Court and extracted the data for the past four financial years (2015-16, 2016-17, 2017-18 and 2018-19).

It is important to note that there is a difference between an application for bankruptcy by a creditor and a person actually being made bankrupt. Not all the applications to make a person bankrupt are successful. The person may successfully defend the application, pay the debt and legal costs in full, or negotiate a settlement.



Obtaining data on how many applications to make people bankrupt actually result in bankruptcy was difficult to obtain. In our experience however, many creditor applications to make a person bankrupt are successful. In any event, the data on the number of applications by creditors to make people bankrupt stands alone as an indicator of debt collection practices.

## What did we find?

Some creditors were far more likely than others to apply to make people bankrupt. For 2018-19, the data shows:

- **Government:** The most prolific user of the system was the ATO, which applied to make 543 people bankrupt in the past financial year of 2018-19. This number, however, was significantly lower than in the past three financial years.
- **Debt collectors:** The top three debt collectors applying to make people bankrupt were: Lion Finance (512); CCC Financial Solutions (28); and Complete Credit Acquisitions (20). Lion Finance, part of the Collection House group, is a publicly listed company. The two other publicly listed debt collectors/debt purchasers, Credit Corp and Pioneer Credit rarely use the bankruptcy system. Credit Corp made no applications in the past two years and Pioneer Credit made just one. There are a number of other debt collectors that also rarely, if ever, use forced bankruptcy.
- **Big four banks:** Commonwealth Bank had the most applications to make people bankrupt (7), followed by Westpac (1), NAB (1) and ANZ (0).
- **Non-major banks:** Bendigo and Adelaide Bank used the bankruptcy system relatively frequently, and much more than any of the big four banks, with 36 applications (down from 63 the previous financial year). Given the fact that this bank is much smaller than any of the big four banks, its use of the system is disproportionate. Macquarie and Bank of Queensland had 7 and 6 applications respectively.
- **Finance companies:** American Express also used the system extensively with 119 applications.

## What does all this mean?

The data in this report shows that some debt collectors and some of the banks use the bankruptcy system disproportionately in comparison to their competitors.

Significantly, with debt collectors who have purchased debt, we do not know the identity of the original creditor. This means that some creditors may never apply to make a person bankrupt, but they may sell the debt to debt collectors who more frequently apply to make a person bankrupt.

Some organisations that engage in debt collection have never or rarely applied to make people bankrupt. This shows that it is possible to run debt collection processes without making people bankrupt. Almost everyone wants to pay their debts; they just need the creditor to show them some compassion and work with them while they resolve their financial hardship.

## What needs to change

### ATO

While it is positive that the ATO made fewer applications to bankrupt people in the past financial year, in our experience there is room for improved hardship practices including detailed guidance. There should also be the option of seeking an independent, binding review of decisions by the ATO to either grant or not grant a hardship arrangement (including the terms of the arrangement). The review body could be the Inspector-General of Taxation.

### Debt collectors and banks that use the system disproportionately

Creditors that sell debts to debt collectors and banks that are using the bankruptcy system disproportionately need to reassess their approach as a matter of urgency.

When a debt is sold, the seller can specify conditions for how the debt is managed.

The original credit provider or creditor therefore has an important role in making sure debt collectors are not unfairly aggressive in their enforcement practices. Creditors can, and should, make sure they choose to only sell to debt collectors that have good financial hardship practices and that debt collectors only bankrupt debtors as a last resort.

The creditor should also require debt collectors to seek approval from them to commence proceedings to force bankruptcy. In this way the creditor can ensure forced bankruptcy is a last resort.

### Body corporates

Legislative change is needed to ensure that people who owe body corporate fees on their strata unit get adequate notice and a fair chance to make a repayment arrangement. When the body corporate is unreasonable there must be a way to review that decision at no or low cost, such as through a State Tribunal or Ombudsman.

### Policy and legislation

The threshold at which a creditor can apply to make someone bankrupt is currently \$5,000. This is far too low and needs to be increased to \$50,000.

Excessive fees and charges need to be reined in. There should be:

- Abolition or restriction of debt collection costs and banning the recovery of legal costs before court proceedings;
- Improving the accessibility of free and independent review processes of legal costs for debtors in every State or Territory in Australia;
- Examination of the effectiveness of review processes for trustee fees; better compliance and enforcement to address unjustifiably high trustee fees; and consideration of whether trustee fees should be regulated.

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# 1 Introduction

## 1.1 The genesis of this report

Over the past few years financial counsellors and community lawyers began noticing that some creditors were consistently trying to bankrupt people who owed them debts. When a client is being made bankrupt a financial counsellor or community lawyer can spend many hours, sometimes over many months, trying to find a way to resolve the matter in another way. It is difficult and complex work. Because of the time spent with these clients, other people who need financial counselling and/or legal help may be turned away.

After noticing an anecdotal problem, the next step was to find the facts. The best evidence we could find was the public records of applications in the Federal Court<sup>1</sup> to make people bankrupt.

## 1.2 About this report

This report analyses the publicly available information on the Commonwealth Courts Portal about applications to make people bankrupt. Only individuals are included in this list because companies are not made bankrupt, but are liquidated or put into administration. The report also includes some case studies that describe the experiences of the clients of financial counsellors and community lawyers who are being made bankrupt.

This report is structured as follows:

- Section 2 – An overall comparison on the creditors using the bankruptcy system
- Section 3 – An analysis of the number of people the ATO made bankrupt and the trends
- Section 4 – An analysis of the number of people debt collectors made bankrupt and the trends
- Section 5 – An analysis of the number of people the banks and selected finance companies made bankrupt and the trends
- Section 6 – Data on the number of people made bankrupt by body corporates and the trends
- Section 7 – What needs to change

## 1.3 How the information was collected and used

The information on applications to make people bankrupt (called creditor's petitions) was collected by searching each creditor over a specified period in the Bankruptcy List of the Commonwealth Courts Portal. The data points are approximate because we were unable to check the court files to ensure all the applications actually related to an application to make a person bankrupt.

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1 Most applications are heard in the Federal Circuit Court. In this report we refer to it as the Federal Court.

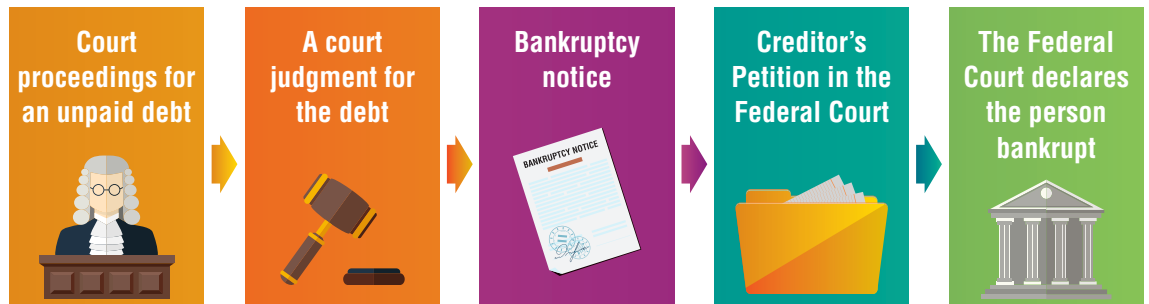
## 1.4 What is bankruptcy?

Bankruptcy is a process where a person is declared as being insolvent; that is, they are legally unable to pay their debts when they fall due. It is an exchange where the bankrupt's assets and debts are handed over to a trustee and the trustee arranges payment of the debts from those assets. After a period of time, the person who is being made bankrupt is released from their debts and can make a fresh start.<sup>2</sup>

## 1.5 How is a person forced into bankruptcy?

The usual process for a creditor to make a person bankrupt is outlined below. The person being made bankrupt has an opportunity to defend the claim at all stages in the process.

In Australia, a debt must be greater than \$5,000 for a person to be made bankrupt.



People can also voluntarily bankrupt themselves (called a debtor's petition). It would be rare for someone who owns a home to do this. It would be better for the person to try to come to an arrangement with their creditors or, if necessary, to sell their home on their own terms and avoid costs.

## 1.6 What other options are available to a creditor to enforce a debt?

Bankruptcy is only one option available to creditors when collecting a debt. Other options available after obtaining a court judgment are:

garnishee of money in a bank account	garnishee of wages	examination of financial position	instalment order	repossession of goods and real estate (sheriff)

Generally, all of the above options are not as costly as, or have the serious consequences associated with, forced bankruptcy.

<sup>2</sup> Some debts survive bankruptcy. These include court-imposed penalties and fines, child support and HECS and HELP debts.

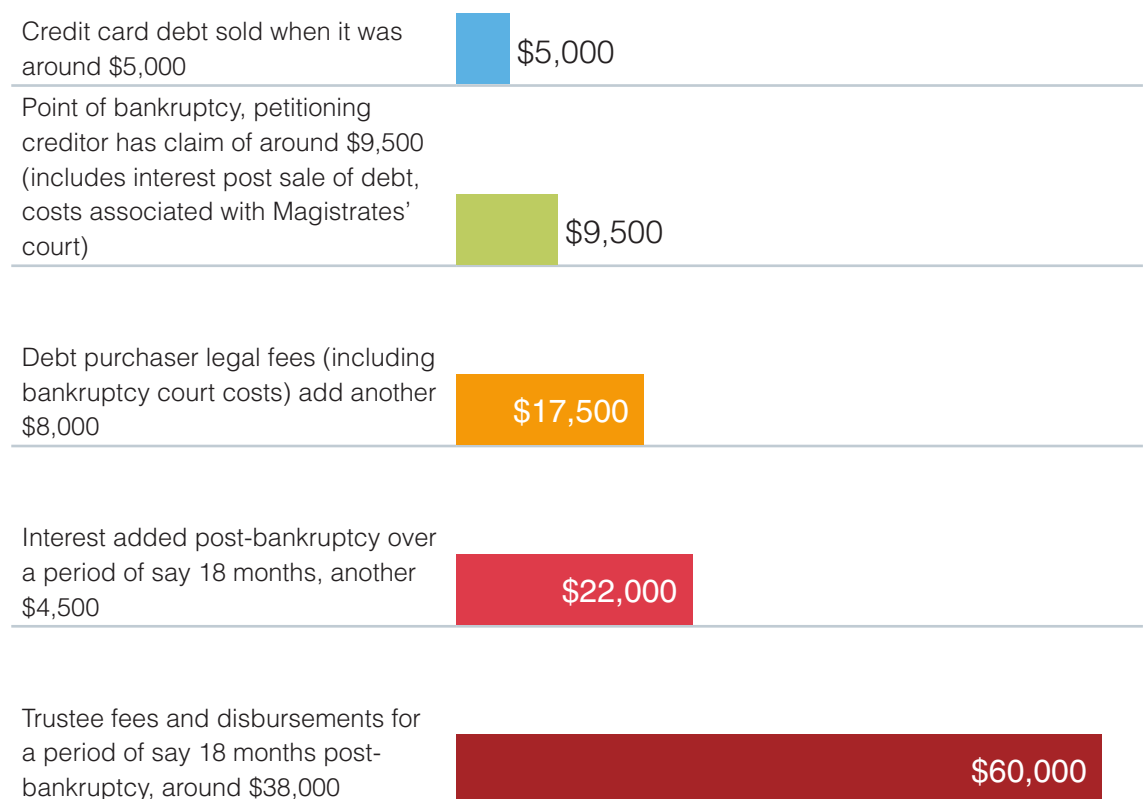
## 1.7 Why would a creditor choose bankruptcy as an enforcement option?

Creditors may choose different enforcement options for a range of reasons. Based on our experience, it appears that some creditors prefer bankruptcy as an enforcement option for one or more of the reasons listed below:

- If the debtor owns a home, the threat of bankruptcy and losing the home is a powerful threat;
- Court proceedings can be very intimidating;
- There is a stigma associated with bankruptcy and this can scare the debtor; and
- The legal costs are considerable and a law firm can charge a lot of money in the process that is almost certain to be recovered if there is a home with equity. If the creditor has its own law firm this arrangement can be lucrative.

## 1.8 The cost of being made bankrupt: how a \$5,000 debt becomes \$60,000

The costs of forced bankruptcy can be significant. A small initial debt of around \$5,000, can balloon to many thousands after legal costs and fees are added. The following example is from the casework of Consumer Action Law Centre and involved a client who had an initial credit card debt of around \$5,000. The amount outstanding 18 months after the forced bankruptcy was around \$60,000. How this occurred is shown in the diagram below.



A trustee may act sooner to sell a home post-bankruptcy and therefore not incur as many costs, but in our experience costs are often substantial.

## **Dealing with the creditor when being made bankrupt**

As soon as court action commences, the person can find it difficult to contact the creditor and is instead asked to deal with the creditor's solicitors. This can be very intimidating for people who cannot afford or access legal representation.

The costs of the creditor's solicitor are usually added to the debt, which may significantly increase the total amount owed.

### **1.9 Getting help when being made bankrupt**

When a person is being made bankrupt it means they cannot pay their debts when they fall due. It also means (in most cases) that they cannot afford a solicitor. Paying a solicitor also means less money is available to pay the creditor.

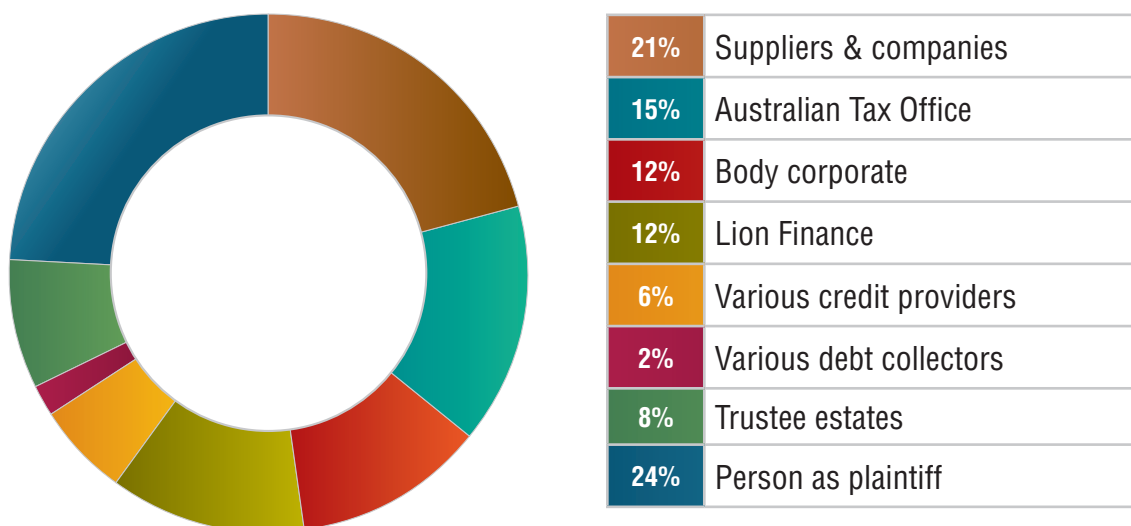
There are a number of court support schemes around Australia to support and give free legal advice to people facing forced bankruptcy. These services, including community legal centres, are often the only way people can access legal advice.

## 2 Who is making people bankrupt?

### 2.1 A snapshot

The Commonwealth Courts Portal had some limitations in its search functionality. There is no option to obtain all of the data as a whole, and instead searches needed to be based on a particular organisation. There is however a function to search for the last 30 days of filings, which we did for October 15, 2018. This gave us all the applications to make people bankrupt for the period from September 16, 2018 until October 15, 2018. There were 265 filings in total.

### Overview of applications for bankruptcy October 2018



The biggest percentage of filings involved individuals as plaintiffs (the person initiating the bankruptcy) and various companies suing over debts. It is not possible to ascertain any trends or make any observations on this data without further details.

The next largest percentage of filings is the Australian Taxation Office (15%), followed by one publicly listed debt collector, Lion Finance (12%), and then various body corporates (strata plans/owners corporations) (12%). It is this information that is cause for concern and worthy of further investigation.



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# 3 Australian Taxation Office

The Australian Taxation Office (ATO) collects money (tax) from the people and businesses of Australia to fund services and run the government.

## 3.1 How many applications for bankruptcy does the ATO make?

In the 2015-16 financial year the ATO applied to the Federal Court to make 1,215 people bankrupt. This fell to 1,061 people in 2016-17. In 2017-18 that number had fallen further to 833. For the last financial year (2018-19) that number had fallen again to 543.



There is a clear and significant downward trend of applications by the ATO to make people bankrupt.

## 3.2 How does the ATO decide whether to pursue bankruptcy?

The ATO does not publish a policy document setting out how and why it chooses to pursue bankruptcy against a person and it is unclear how the decision is made. It is apparent from the significant decline of bankruptcies over this year and previous financial years, that the policy relating to debt collection must be changing. The question is whether the ATO could have avoided making anyone bankrupt, or at least further reduced the numbers.

## 3.3 Is the ATO using other debt collection options other than bankruptcy?

Based on our casework experiences, the ATO also uses a number of other debt collection options including:

- obtaining a court judgment and enforcing that judgment through garnishees and seizing goods or property; and
- administrative garnishees under the *Taxation Administration Act 1953 (Cth)*.

There is no data on the extent to which these other options are used. We are concerned about the use of administrative garnishees by the ATO because:

- the garnishee continues even if the person goes bankrupt. This denies a person a “fresh start”,<sup>3</sup> which is one of the objectives of bankruptcy;
- the garnishee is decided without a court hearing—a denial of natural justice; and
- 30% of income is garnisheed, which can cause serious financial hardship.

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3 The Australian Financial Services Authority uses the words “fresh start” in describing bankruptcy. See <https://www.afsa.gov.au/insolvency/i-cant-pay-my-debts/what-bankruptcy>.

A recent report *Review into the Australian Taxation Office's use of Garnishee Notices*<sup>4</sup> made four recommendations which have been accepted by the ATO. They are:

1. to incorporate into the annual planning process contingency plans for material assumptions used in operational plans and appropriate assurance for related business continuity measures;
2. to improve the candidate selection models for garnishee work and refine these models with feedback from staff who conduct this work;
3. to facilitate consistency of expectations between all levels of staff by providing facility for direct communication from the Debt Executive for critical or complex messages where major changes to personnel resource deployment occur, particularly where personnel are new or are undertaking new work or expected to carry out work they have not engaged in for a period; and
4. to improve support for Early Intervention unit staff by developing more effective mechanisms for regular case-specific outcome feedback and by incorporating role-playing exercises into facilitated training sessions.

The above recommendations may lead to improvements but the problems outlined by consumer advocates have not been addressed.<sup>5</sup>

The Auditor-General also released a report, *Management of Small Business Tax Debt – Australian Taxation Office*<sup>6</sup> on 30 May 2019. Although the report does not look at all tax debtors it does look at enforcement practices for small business debtors. The report does cover enforcement action but does not make any specific recommendations to change the use of any particular action. Again, this report does not address or change the issues raised in this report or previous submissions by consumer advocates.

Making a person bankrupt should be a last resort. The latest Commissioner of Taxation Annual Report 2017–18 does not cover financial hardship as an issue in any detail. Similarly, the report does not discuss debt collection or improving practices in debt collection. Not being able to pay a tax debt is stressful. Tax debts can increase as a result of the added interest and penalties, which causes further financial hardship. The ATO should be continuously working on best practice financial hardship practices and reporting on that work.

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4 Inspector General of Taxation, [Review into the Australian Taxation Office's use of Garnishee Notices](#): Tax administration management report, March 2019.

5 See Consumer Action Law Centre [submission](#) to the Inspector-General of Taxation dated 22 June 2018.

6 Auditor-General Report Management of Small Business Tax Debt, 30 may 2019 available at <https://www.anao.gov.au/work/performance-audit/management-small-business-tax-debt>.

## Case Study

Fabian had a debt of about \$60,000 with the ATO. On top of this, Fabian also lost his job after his employer closed in 2014 and he had to care for a partner who was diagnosed with cancer.

Since mid-2017, the ATO had garnisheed Fabian's wage, which caused him to fall behind on other debts, including his home loan. In November 2018, the ATO applied for a sequestration order (an application to make Fabian bankrupt) in the Federal Court in an attempt to recoup what Fabian owed. This is despite Fabian paying back about \$25,000 over the previous 18 months through the garnishee arrangement, causing him and his family considerable stress and hardship.

If the sequestration order is successful and Fabian is forced into bankruptcy, he will likely lose his home.

Fabian's matter is ongoing.

*Consumer Action Law Centre*

### 3.4 ATO and financial hardship

Constructively working with people in financial hardship gives them an opportunity to repay their tax debt. Extra time can mean the person is able to improve their financial position, for example, to recover from an illness or get back to work. We acknowledge that the ATO enters into many repayment arrangements each year.

The ATO divides its assistance into two categories:

- financial difficulty; and
- serious financial hardship

#### Financial difficulty

According to the ATO website, a taxpayer can call to discuss their financial difficulty in paying their tax. The ATO states it may be able to assist by offering:

- more time to pay tax debts without interest charge;
- tailored payment plans;
- remission of general interest charges; and
- release from payment of certain taxes or penalties.

There is no information on the ATO website on the extent of the assistance.

There is no explicit right to a repayment arrangement under the tax laws (except for those people in serious financial hardship). While people have a right to have the administrative conduct of the ATO reviewed by the Inspector-General of Taxation, the Inspector-General cannot override the decision of the ATO.

## Serious financial hardship

The tax laws<sup>7</sup> specifically refer to the power of the Commissioner of Taxation to release a person from a tax debt if making the payment would cause serious hardship. Serious hardship is defined as where the payment of a tax liability would result in a person being left without the means to afford basics such as food, clothing, medical supplies, accommodation or education.

If the serious hardship standard is met (as determined by the ATO), then the person may be able to be released from all or part of the tax debt. Serious financial hardship can be a difficult standard to meet. If the ATO decides the individual is not in serious financial hardship, that decision can be appealed in the Administrative Appeals Tribunal.

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7 Section 340-5 of Schedule 1 of the Taxation Administration Act 1953.

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# 4 Debt collectors

For the purposes of this report, a debt collector is a specialist company that collects debts. In all of the cases reported below, the debt collector bought a debt from a creditor (usually the creditor that provided the initial credit or service, for example a telecommunications company).<sup>8</sup>

## Case Study

After experiencing some mental health issues, Mika was having trouble keeping up with her debts. She told us she had fallen behind on her home loan repayments and was also being pursued for a debt of about \$9,000 by a debt collector. The debt collector had applied to the Federal Court for a sequestration order (to make Mika bankrupt). The debt collector was also pursuing legal costs of about \$7,000.

At the first hearing, Mika informed the registrar that she was in the process of refinancing her home loan and was granted an adjournment. Mika was also referred to a financial counsellor for independent advice.

The financial counsellor explained to Mika that she faced a real prospect of a sequestration order being made by the Federal Court if she could not come to an arrangement with the debt collector. The financial counsellor explained that if this were the case, she might lose her family home. At the second hearing, the financial counsellor was able to negotiate an adjournment with the debt collector to allow Mika more time.

Ultimately, Mika was able to pay her debt to the debt collector, avoid bankruptcy and save her family home.

*Consumer Action Law Centre*

### 4.1 The debt collectors reviewed

It was not possible to review all debt collectors. Instead we reviewed applications lodged by the largest. Three debt collectors are publicly listed on the Australian Stock Exchange:

- Collection House Ltd (Lion Finance Pty Ltd is in the Collection House Group<sup>9</sup>)
- Credit Corp Ltd
- Pioneer Credit Ltd

Based on market capitalisation Credit Corp is the largest of the publicly listed debt collectors.<sup>10</sup> The remaining companies were located through the list of members of the Australian Collectors and Debt Buyers Association (an industry association) and from internet searches.

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8 These companies are also referred to in the industry as “debt purchasers”. We use the term “debt collector” interchangeably as this is the term used commonly in the community.

9 Lion Finance is listed as a brand in the Collection House Group at page 1 of the [2018 Annual Report](#).

10 As at 27/10/18 market capitalisations were: Pioneer Credit Ltd \$184M, Collection House Ltd \$182M and Credit Corp Ltd \$880M.

## Case Study

Hann had a credit card with a \$6,000 limit. About four years earlier he had been through a period of unemployment and had stopped making repayments on the card. The resulting debt had been sold to a debt collector and a bankruptcy notice had been issued on a judgment debt of nearly \$9,000. Hann rang the National Debt Helpline for advice when he faced a creditor's petition to make him bankrupt for \$16,000. The debt had increased due to costs.

Hann was paying off a house with a mortgage that his mother and brother were living in, but the home had very little equity. He did not want to go bankrupt and lose the house. He was earning a decent salary but he was renting and supporting a wife, child and mother in law. He offered \$300 per month but the debt collector said that was not adequate. After receiving advice on six occasions over the coming week, he ultimately agreed with the debt collector that it would withdraw the proceedings by consent and set aside the default judgment if he paid \$10,000 by the following Monday and a further \$5,500 by the following day. It was unclear, but it appeared he was borrowing the money to meet this arrangement.

*Financial Rights Legal Centre*

## 4.2 What did we find?

There were startling differences in applications for bankruptcy (creditor's petitions) by debt collectors. Many debt collectors did not apply to make any people bankrupt in the past four financial years.<sup>11</sup> For the remaining debt collectors, the search results revealed that some debt collectors are more likely to make a person bankrupt than others. This data is shown in the table and graph below.

Debt collector	2015-16	2016-17	2017-18	2018-19
ACM Group Ltd	26	14	16	<b>2</b>
Axess Debt Management	21	20	12	<b>8</b>
Baycorp Collections PDL (Australia) Pty Ltd	131	56	57	<b>19</b>
CCC Financial Solutions No.3 Pty Ltd	37	23	19	<b>28</b>
Lion Finance (part of the Collection House Group)	182	218	279	<b>512</b>
Complete Credit Acquisitions Pty Ltd	24	35	40	<b>20</b>
Credit Corp	16	0	0	<b>0</b>
Pioneer Credit	2	0	1	<b>1</b>
Prushka	3	1	2	<b>0</b>

The top three debt collectors applying to make people bankrupt in the past financial year (2018-19) were: Lion Finance (512); CCC Financial Solutions (28) and Complete Credit Acquisitions (20). Overall, the figures for most debt collectors show a downward trend. Lion Finance stands out because of a significant increase in the number of applications for bankruptcy each year.

<sup>11</sup> ARL, CFMG, Charter Mercantile, Credit Collection Services, Credit Solutions, NCML, Panthera, Dun & Bradstreet, Probe, Professional Recovery Services and Shield Mercantile.

## Debt collector bankruptcy applications 2018–19

2	ACM Group Ltd
8	Axess Debt Management
19	Baycorp Collections PDL (Australia) Pty Ltd
28	CCC Financial Solutions No.3 Pty Ltd
512	Lion Finance (part of the Collection House Group)
20	Complete Credit Acquisitions Pty Ltd
0	Credit Corp
1	Pioneer Credit
0	Prushka



In 2018-19, Lion Finance applied to make 484 more people bankrupt than the next highest debt collector.

### Case Study

Lynda is a 30-year-old Aboriginal woman who is married with two children. She suffers from severe depression. She and her partner are paying off their home and have a \$180,000 mortgage in regional NSW. She is currently on sick leave and waiting for Centrelink to be approved. Her partner works but earns a relatively low income.

Four years ago, she obtained a credit card as a result of buying goods on credit in a department store. She asked for a \$5,000 limit but was granted \$10,000. She fell into financial difficulty not long afterwards as a result of a back injury and reduced working hours. Her mental health also deteriorated and she stopped responding to collection calls and correspondence.

A debt collector bought the debt, obtained judgment in the Local Court and proceeded to make Lynda bankrupt via a creditor's petition in the Federal Circuit Court. The debt had by then increased to \$16,000 with interest and legal fees. At the time of seeking advice, the trustee in bankruptcy said it would take \$48,000 to annul the bankruptcy.

Neither Lynda, her partner nor their extended family could raise this much money. Purchasing Lynda's equity from the trustee would cost close to the same amount. Lynda and her family had no choice but to allow the trustee to sell their home, or to seek permission to try to sell it themselves and annul the bankruptcy.

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### 4.3 All debt collectors are not the same

The data in this section shows that some debt collectors regularly apply to make people bankrupt. In contrast, some debt collectors rarely, or never, apply to make individuals bankrupt.

The debtor does not choose the debt collector that will pursue them. The data shows that some debtors are very unlucky if they get a debt collector that commonly appears to use bankruptcy as a collection tool, while other debtors get debt collectors that only use bankruptcy as a last resort, if ever (although we make no comment about other debt collection tactics).

#### Case Study

Sam is separated, has three children, a mortgage and a mountain of debt from her defunct relationship. Last year she paid \$12,000 with the help of family to stop a creditor's petition for a credit card debt being sought by a debt collector. She does not recall how much the original debt was. She called the National Debt Helpline because she was facing another creditor's petition. Further investigation revealed that the court had made an order against her for more than \$6,000 in legal costs when it dismissed the creditor's petition the previous year. The debt collector was now pursuing another creditor's petition for the legal costs. Sam was completely overwhelmed and confused. She did not know how she could possibly raise the money to ward off this second petition.

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### 4.4 The role of the debt sellers

When a debt is sold, the seller can specify conditions on how the debt is managed and many creditors do this. The debt collector may also specify the conditions under which the creditor must buy back the debt. These contracts are private so the exact terms vary.

The original creditor has an important role in making sure debt collectors are not overly aggressive with enforcement practices. Creditors can, and should, make sure they choose to only sell to debt collectors that have good financial hardship practices and that bankrupt debtors only as a last resort.

The Independent Review of the Code of Banking Practice in 2017 recommended that banks develop processes to monitor compliance by debt collectors to which they have assigned a debt with a focus on: the law, the ASIC/ACCC Debt Collection Guideline and the Code of Banking Practice.<sup>12</sup> This recommendation was not adopted into the Banking Code of Practice, which started on 1 July 2019.

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# 5 Banks and finance companies

Overall, banks and finance companies rarely apply to make people bankrupt, although our searches did reveal that some banks and finance companies are more likely than others to appear in the list. Even if banks and finance companies are not applying to make people bankrupt, they sell debts to debt collectors that are making people bankrupt.

## 5.1 The Big Four Banks

The big four banks are ANZ, Commonwealth Bank, National Australia Bank and Westpac. Their conduct has received significant scrutiny through the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. It is of interest just how many people the big four banks try to bankrupt.

Bank	2015-16	2016-17	2017-18	2018-19
ANZ	40	13	0	0
Commonwealth Bank	46	24	18	7
National Australia Bank	27	23	2	1
Westpac	35	26	5	1

The downward trend in applications for bankruptcy by all of the big banks is positive. The Commonwealth Bank makes the most applications. Although this bank has the largest market share, the figures are still much higher than the other majors.

## 5.2 Other banks

This report also looks at smaller banks. The results highlighted that Bendigo and Adelaide Bank is applying to make people bankrupt at a higher rate than other similar institutions. It is not clear why.

Bank	2015-16	2016-17	2017-18	2018-19
AMP	1	0	0	4
Bank of Queensland	23	7	15	6
Bendigo and Adelaide Bank	54	99	63	36
Citibank	3	2	0	0
HSBC	0	2	0	0
Macquarie Bank (incl Macquarie Leasing)	14	9	15	7

### 5.3 Charge card/credit card (non-bank)

Charge card/credit card	2015-16	2016-17	2017-18	2018-19
American Express	51	80	80	119
Diners Club	0	0	1	0

American Express is a large international credit card and charge card company. Diners Club also offers credit cards and charge cards.



American Express applied to make more than 10 times the amount of people bankrupt than the big four banks combined in the past financial year.

### 5.4 Other non-bank finance companies

The list below is a sample of non-bank finance companies.

Finance company	2015-16	2016-17	2017-18	2018 –2019
Latitude	0	0	0	0
Pepper Money	0	0	0	0
BMW Australia Finance	4	10	15	23
Toyota Finance	1	5	6	2
Liberty Financial	0	0	0	0

The main finding is that BMW Australia Finance applies to make people bankrupt at a greater rate than other finance companies.

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# 6 Body corporates

People who live in an apartment will often have a body that manages the block and issues levies to manage the costs of maintaining the building and shared areas, including insurance, repair, cleaning and other expenses. The apartment owner must pay the required fees (usually quarterly). This body has various names in different states and territories of Australia including strata plans, owner's corporations and body corporates. For the purpose of this report we refer to them as a body corporate.

## Case Study

Elizabeth is 72 and widowed. She receives a pension from Veteran's Affairs. She previously paid off a \$10,000 debt to her building's body corporate for strata levies with the help of a charity and is paying it back out of her pension. She says she has kept up with current levies via constant payment arrangements and has even paid a bit extra. Now she has received a bankruptcy notice over \$11,000 in legal fees.

She fell behind in her strata fees nine years previously when her husband died. At about the same time she had been a victim of an internet fraud costing her \$60,000. She was very upset because she had been negotiating the repayment arrangements with lawyers because the strata management firm would not deal with her directly, but no one told her she was racking up legal fees.

A solicitor reviewed the legal costs and found that \$20,000 had been charged over essentially a \$7,000 bill for strata levies. While this seems excessive, there was nothing obvious in the bill to challenge and the legal firm had already obtained judgment. There was a real risk that challenging the bill could cost Elizabeth more in the long run and she was already at risk of being made bankrupt, losing her home and accruing more costs due to trustees' fees

### 6.1 Debt collection and body corporates

If an apartment owner does not pay the body corporate fees then the body corporate may collect the fees. The body corporate can commence legal proceedings, and any legal or court costs (and interest) will be added to the amount outstanding. Body corporates can (and do) hire law firms to undertake debt collection. The amount of the original arrears in body corporate fees can be small compared to the legal fees and court costs that end up being added to the debt.

## Are body corporates applying to make people bankrupt?

A review of the court data shows that body corporates are regularly lodging applications to make people bankrupt.

2015 – 2016	51
2016 – 2017	51
2017 – 2018	52
2018 – 2019	56

This data is a concern because if the apartment owner is made bankrupt, the trustee will likely sell the apartment to recover the outstanding fees. This means the owner will lose their apartment due to unpaid fees. They will usually also have to pay thousands of dollars (often more than \$40,000) in trustee fees, expenses and legal costs.



**When an apartment home owner is forced into bankruptcy for unpaid strata fees the Trustee may take their home.**

### 6.2 Why is this happening?

We are not sure why bankruptcy instead of other options is being used to enforce debts. We speculate that the body corporate is using bankruptcy because it is a very effective threat to get apartment owners to pay arrears. A concern is that apartment owners can be older people living on the age pension. A big unexpected fee for repairs can cause a lot of financial difficulty.

In saying this, we recognise that in some cases body corporates may have a very small number of owners and the non-payment of strata levies by one unit-holder can have a serious financial impact on the remaining unit holders. But this is not always the case. Further, the impact on the debtor of losing their home, plus tens of thousands of dollars, is so serious as to warrant some checks and balances to ensure insolvency proceedings are really necessary to resolve the issue.

## Case Study

Mary, an aged pensioner with multiple health conditions, contacted the National Debt Helpline about her strata levies. It turned out she had already been made bankrupt by the strata management firm and was in danger of losing her home and facing costs of tens of thousands of dollars in trustees' fees over a debt of just over \$5,000. One of our solicitors contacted the trustee in bankruptcy and let them know the client would be either seeking to have the sequestration order set aside or the bankruptcy annulled.

The solicitor then sought to determine whether there were any grounds for setting aside the sequestration order but found none. She assisted the client to enquire whether her bank (which had already provided her with a reverse mortgage) would extend further funds to annul the bankruptcy. The bank said it could not extend any more credit, but it was willing to donate the funds to save Mary's home. The solicitor then negotiated a payout figure with the trustee, which came in at more than \$46,000. Finalising the annulment was an enormous amount of work, including three or more hours on the phone trying to access an up-to-date copy of Mary's credit report for the trustee.

It had then become apparent that Mary was having a number of issues managing her money and it was not clear she still had the capacity to do so. There was a danger that despite the annulment (and considerable funds put up by the bank), Mary would not pay the ongoing strata levies and would ultimately lose her home anyway. With her consent our solicitor applied for a financial management order from the Guardianship Tribunal. Mary changed her mind at the hearing and tried to resist the order. The Tribunal made the order, but granted Mary the opportunity to show she could keep up with her essential bills before any intervention would occur. In essence the order was temporary, with no active management unless there was evidence Mary's bills were going unpaid. There was to be a review after 12 months.

The bankruptcy was annulled and Mary was able to retain her home, but only after many, many hours of work and a large donation by the bank.

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# 7 What needs to change?

Some organisations have never applied to make people bankrupt or have changed their behaviour in recent years. This clearly shows it is possible to successfully run debt collection processes without making people bankrupt. Almost everyone wants to pay their debts; they just need the creditor to show them some compassion and work with them while they resolve their financial hardship.

## 7.1 Bankruptcy

Consumer advocates have campaigned to lift the minimum amount required to make a person bankrupt. Currently that amount is \$5,000, which is far too low. It means that people can lose their home over a \$5,000 credit card debt. This is unfair and does not meet community expectations. The amount should be increased to at least \$50,000.

Bankruptcy should be a last resort for enforcement. This public policy position should be a relevant consideration for when the Court decides on whether a sequestration order (declaring a person bankrupt) should be given. The court should be specifically empowered to refuse a sequestration order if:

- the debt is small;
- there are reasonable prospects for payment in the short term (under three years);
- the only significant asset of the debtor is the family home; and/or
- other enforcement options have not been utilised.

## 7.2 Australian Taxation Office

The ATO is making fewer people bankrupt, which is a good sign. The aim should be to further reduce the number of applications to make people bankrupt. To assist in this aim, a transparent and accountable approach to financial hardship is required that involves the following:

- Publishing detailed guidance on financial hardship. The ATO website includes information on hardship processes but further detail would be helpful. This guidance should include how to apply, what to expect and how the ATO can assist. The guidance needs to cover vulnerable groups such as people on low incomes, people with a disability and people experiencing family violence. The detailed guidance should also make it clear that people continue to be able to access staff at the ATO for hardship negotiations even when being forced into bankruptcy (to give people a chance to pay the debt);
- Making the hardship application process more accessible by including an online form, a dedicated email address and a phone number. These should be easy to find on the ATO website;



- Specifically legislating for the Inspector-General of Taxation to be able to make binding decisions when reviewing repayment arrangements. This external review and decision process would ensure the ATO is acting fairly;
- Instigating a policy of referring people who may face court action and/or forced bankruptcy to the National Debt Helpline (1800 007 007) for assistance from a free and independent financial counsellor;
- Ensuring the lawyers acting for the ATO have clear instructions on:
  - › making sure vulnerable people are referred back to the ATO for direct assistance; and
  - › making sure realistic repayment arrangements are considered.
- The ATO should commit to comply with the ASIC/ACCC Debt Collection Guideline so that people can expect the same minimum standards that apply to industry apply to the ATO; and
- A transparent policy approach that covers when the ATO may consider pursuing bankruptcy.

### 7.3 Debt collectors

A few debt collectors are regularly and persistently making people bankrupt. This is clearly a deliberate policy decision. Such a decision is inconsistent with a best practice approach to working with people in financial hardship.

#### Addressing conduct in the industry Code

Debt collectors should update the Australian Collectors and Debt Buyers Association Code of Practice to include the following:

- a. A process needs to be in place to genuinely make contact with a person to consider hardship options before legal action is considered;
- b. Forced bankruptcy must be a last resort so that other enforcement options are used before bankruptcy is considered; and
- c. The Code subscriber must agree to an external dispute resolution scheme reviewing disputes after a court judgment has been obtained. This is to ensure people get genuine access to justice; and
- d. The Code is approved by the Australian Securities and Investments Commission (meeting the benchmarks of Regulatory Guide 183).

#### The role of creditors that sell debt to debt collectors

Creditors have a pivotal role to play. Creditors can ensure they only sell debts to debt collectors that have a best practice approach to financial hardship.

#### ACCC/ASIC Debt collection guideline<sup>13</sup>

ACCC and ASIC should consider updating the Debt Collection Guideline to specifically provide guidance to debt collectors on using bankruptcy as a last resort.

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13 [ASIC Regulatory Guide Debt collection guideline](#): For collectors and creditors.

## 7.4 Banks and finance companies

Generally speaking, there seems to be fewer problems with banks and finance companies using the bankruptcy system. Bendigo and Adelaide Bank and American Express are the exception, with higher numbers of bankruptcies instigated by them.

Without more data it is difficult to know what is happening. It may be that banks with low numbers of bankruptcies are still selling their debts to debt collectors that do use the bankruptcy system disproportionately, while banks with higher numbers undertake more debt collection in-house.

Casework also suggests that some banks sell loan or credit card debts with a reasonably low balance, and then some debt collectors take legal action and/or initiate bankruptcy as part of their debt recovery process that significantly increases the overall debt.

Given the serious impact on people of losing their homes as a result of creditor-initiated bankruptcy, we recommend that ASIC undertake an investigation into all of these matters.

Banks decide to which companies they will sell debts. We recommend the following changes to sale processes:

- not selling debts where they know a person is in receipt of a Centrelink income or is vulnerable in some other way, such as age;
- putting in place contracts that allow for the repurchase of debt in certain circumstances, such as customer vulnerability;
- require through contract that debt purchasers do not use the creditor's petition process where the original debt was less than \$50,000;
- require through contract that debt purchasers only use the creditor's petition process with the approval of the bank or finance company.

## 7.5 Body corporates

The numbers of applications to make people bankrupt are not large for body corporates but each of those people is facing the loss of (usually) their home. They should have access to the following:

- Notices about the arrears that include details about their options;
- A legislated hardship process, with adequate timelines, where the body corporate is required to consider reasonable repayment arrangements or other enforcement options; and
- A review process through a tribunal or ombudsman if the body corporate will not accept a reasonable repayment arrangement.

## 7.6 Law firms and insolvency trustees

### Law firms, debt collection and legal costs

A significant part of why forced bankruptcy can be so unfair is that the legal costs mount up so quickly. A debt that may have been manageable becomes less and less so as thousands of dollars in debt collection or legal costs are added. The additional costs (even if charged at hundreds of dollars an hour) are difficult to challenge as often the original contract provides that such costs can be charged. There is also a perverse incentive to build up the additional costs because the debtor will end up paying.

There is no doubt that further reform is needed to protect debtors. We recommend that this situation is addressed by:

- Abolishing or capping debt collection costs by restricting terms in contracts which allow for the recovery of such costs;<sup>14</sup>
- A ban on legal costs being recovered before ordered by a court, unless it can be objectively shown that the costs were incurred in relation to court proceedings that were on foot;<sup>15</sup>
- Improving the accessibility of free and independent review processes of legal costs for debtors in every State or Territory in Australia.

The various state-based Legal Services Commissioners and similar bodies do offer free complaints services in relation to legal costs. However, there can be limitations on these services including time limits. The review process needs to be available for complainants who are not clients of the lawyer (i.e. a debtor seeking review). It also needs to be available whether or not a court judgment has been obtained.

### Trustee fees

Once a person is forced into bankruptcy, the bankrupt is then liable for the trustee's fees for the administration of the bankrupt estate. These fees are eye-wateringly high. Time is charged out at hundreds of dollars per hour. The Trustee fees continue to be charged even when a bankrupt is seeking to challenge the sequestration order or annul the bankruptcy. The trustee's fees are then paid (in most cases) from the sale of the family home. Even if the person had substantial equity in their home, that equity is significantly eroded by the Trustee fees. It can be heartbreaking to see a \$5,000 debt end up as \$60,000 or more when a person is made bankrupt.

As outlined above, prevention is the key way to avoid these problems. It is recommended that:

- The Government examine the effectiveness of review processes for trustee fees. There is a review process available, but it is not clear this is widely used.
- The Australian Financial Security Authority undertakes more and better enforcement in relation to trustee fees that are unjustifiably high. Bankruptcy legislation requires trustees to administer bankrupt estates efficiently and to avoid unnecessary expense. There should be auditing for compliance with these requirements.
- Consideration is given as to whether trustee fees should be regulated. Creditors approve trustee remuneration, and where there are assets sufficient to pay the debts and trustee fees, there are few incentives for them to choose a lower-charging trustee over a higher-charging trustee. In these circumstances, there is little opportunity for competitive pressure. In this context, there is a case for caps to be set on trustee fees.

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14 Section 52 of the Australian Consumer Law & Fair Trading Act 2012 (Vic) provides that it is an offence to recover costs of collection from a debtor, including the costs and expenses of a debt collection (this does not apply in relation to creditor enforcement expenses where a contract is regulated by the National Credit Code).

15 The case of *ACCC v Sampson* [2011] FCA 1165 provided guidance on what is acceptable in a lawyer's letter of demand. It says if a contractual right does not exist between the creditor and debtor, the letter must not include a demand or request for payment of legal costs in addition to the outstanding debt. An improper demand of this kind may also be in breach of the Australian Solicitors Conduct Rules.

## 7.7 Publishing data

This report has identified trends in applications to make people bankrupt. Those trends are significant. The public should have easy access to this type of quantitative data. The Australian Government has committed to “open data”<sup>16</sup> and as part of that commitment trends in litigation data should also be published.

Both the State and Commonwealth Governments should publish:

- Significant plaintiff use (over 20 per year) of Creditor's Petitions in the Federal Court of Australia; and
- Significant plaintiff use (over 20 per year) of Statements of Claims or Summons to collect a debt.

AFSA should publish:

- Details on plaintiffs who obtain more than 20 sequestration orders per year; and
- Aggregated data on trustee costs each year.

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16 Australian Government Public Data Policy Statement, December 2015 at <https://www.pmc.gov.au/resource-centre/public-data/australian-government-public-data-policy-statement>.