

DEBT RECOVERY

SMALL CLAIMS PROCEDURE – SOUTH AUSTRALIA

Introduction – letter of demand

This Information Sheet assumes that the contracts under which money is owed are legally enforceable, and that the debts are not subject to the Consumer Credit Code and equivalents. If you are unsure, please contact Arts Law on (02) 9356 2566 or toll free on 1800 221 457.

When chasing payment for goods or services, the first step is generally to send a letter of demand to the other party telling them of the dispute and the money outstanding, and giving them a defined period within which to settle the matter or else face legal action.

When sending a letter of demand, you should be careful not to:

- harass the debtor – they have the right to complain about this behaviour to particular government agencies and the police; and
- send a letter which is designed to look like a court document because this is illegal.

For assistance with drafting a letter of demand see Arts Law's Information Sheet "Letter of Demand".

Response to letter of demand

In response to a letter of demand, a debtor may:

- pay the full amount owing;
- show that no money is owed;
- negotiate a compromise, for example, payment by instalments or part payment. If a compromise is agreed to, make sure that it is, or is confirmed, in writing to avoid later disputes; or
- ignore the letter or respond to it in a way that is unsatisfactory to the creditor.

You may consider writing off the debt – either because the debtor's response to your letter of demand is unsatisfactory or because the debtor has asked you to do this and you have agreed.

If you decide to write the debt off, you may be able to claim a tax benefit to lessen the loss. If the debt is relatively small – say under \$2,000 – many people decide to write off the debt because of the perception that it is too difficult and expensive to pursue, especially if lawyers are retained.

Small Claims debt recovery action

A "do it yourself" legal action is, however, available. All State and Territory courts in Australia offer a **small claims** division of their local court or tribunal that provides a simple debt recovery procedure. Advantages are that the process is relatively informal, and that costs awarded against an unsuccessful party are limited.

So, what is a "small claim"? A small claim is a claim:

- in respect of money, goods purchased or delivered, labour or a combination of these; and
- up to an amount of between \$2,000 and \$10,000 depending on the State or Territory in which the legal action is conducted.

If the debt is over the limit provided for in the relevant small claims division, you can still bring an action against the debtor, but you will probably need legal representation or at least legal advice. For example, in South Australia, the Magistrates Court can deal with debt recovery claims up to the value of \$40,000. If the money that is owed exceeds \$40,000 you must commence action in either the District Court or the Supreme Court of South Australia.

Debt recovery court action is actually a two-step process:

- you must either negotiate a settlement after having commenced proceedings (which you can do at any time up to the hearing) or obtain a judgment in your favour; and
- you must actually recover the money owed to you, which may involve taking enforcement action against the debtor. Briefly, these measures include obtaining a writ of execution against the debtor's property, securing a garnishee order against the debtor's wages or bank account, or (but this is uncommon with small claims) forcing the debtor into bankruptcy.

To sue or not to sue...

Things to think about when deciding whether or not to commence a debt recovery action and when you should do this, include:

- whether the debtor can pay. If the debtor has a number of creditors seeking payment of debts and is basically insolvent (i.e. unable to pay their debts as they fall due) it may not be worth pursuing legal action. If, after a company search, you find that the company is in the hands of a receiver or liquidator, contact that person directly;
- whether there is a genuine dispute over the facts, and whether the evidence to support your claim is strong. If your claim is unsuccessful and the other party retains a solicitor to represent them (this is not common in small claims), the party will apply for a legal costs order against you;
- that it is generally worth the effort to settle a matter out of court as this is unquestionably preferable to spending time and money on court proceedings. Again, if you do reach agreement with a debtor, make sure that the agreement is in (or is at least confirmed in) writing, to avoid later disputes;
- wherever you start debt recovery court action, there is a time limit on bringing it, which is generally 6 years from the date the debt first arose. Limitation periods can start again, though, in certain circumstances, such as when a debt is confirmed by a debtor signing a contract that states the money owed to the creditor. You may need help from a lawyer to

work out the relevant time limits, if they are an issue.

Who can I sue?

A small claims action can be brought against a person (sole trader), a group of people (partnership) or a corporate entity (company, incorporated association). If the debtor is trading under a business name you need to do a business name search to identify the owner of the business. This can be done by carrying out a search at the Business and Consumer Affairs Office (or its equivalent) in your State or Territory or using the Australian Securities and Investments Commission's (ASIC) National Names Index which can be accessed free, via their website, at www.asic.gov.au.

The owner of the business has to be identified in the Defendant or Respondent details of your claim form (often referred to as the Statement of Claim) as follows: Defendant – Glen X of 99 Surreal Crescent, Darwin, NT trading as (or "t/a") Fantasy Dressers.

If the debtor is a company – for example, Fantasy Dressers Pty Ltd – any business documents (such as invoices and business letters) should have its nine digit Australian Company Number (ACN) after the company name. A company search, using this ACN, should be conducted through ASIC to identify the address of the registered office at which to serve the Statement of Claim and to ensure that the company is not in liquidation (you will have to pay a fee to ASIC to complete a registered office address search. See www.asic.gov.au for more information).

Small claims procedure

In South Australia, small claims may be made in the Magistrates Court (in the Civil (Minor Claims) Division) ("Court").

When can I use the Court?

A consumer may use the Court for claims of up to \$6,000 against traders who provide goods or services, and against people and corporate bodies for debt or damages claims.

What should I do?

Your first step before you officially commence bringing a claim should be to notify the Defendant of your intention. You can do this by completing and delivering a Final Notice of Claim form or sending a letter to the Defendant. Although this step can be skipped, you can not claim your costs of filing your claim against the Defendant if you are successful, if you do not give the Defendant written notice of the claim first. The Final Notice can be obtained from the Court for a small fee. For more information on this form please refer to the Court's pre-lodgement fact sheet at http://www.courts.sa.gov.au/community/going_to_court/index1.html.

If you use a letter to tell the Defendant of your intended claim, you must also tell them what is being claimed, the fact that they have 21 days to resolve the matter, and that, if the matter is not resolved, you intend to take the matter to the Magistrates Court. It is advisable to include information about the Defendant's options, for example going to mediation. This letter does not have to be filed in court, and can be sent directly to the Defendant.

If, after the 21 day period, there has either been no response or an unsatisfactory response, you can file the claim or agree to submit to mediation.

You commence Court proceedings by completing a Minor Civil Action – Claim form. This form contains instructions to assist you, and is available from the Court, by either phoning 8204 2444 or accessing the Court's website as above. If the claim is against a person, ensure that both of

your names and the addresses are correct. If the claim is against an incorporated body, ensure that both the name and address on the form are the same as those on the company's register.

You ("Plaintiff") must file four copies of the Claim Form with the Court Registry, with the filing fee. You can do this electronically. The Registry will stamp all copies and give three back to you. You must deliver ("serve") one copy on the other party ("Defendant"), and then complete an Affidavit of Service and file it in Court. Alternatively, you can arrange for a process server or bailiff to serve the Defendant. There are several suitable ways in which the Defendant can be served with the Claim form, and you may want to ask the Court about them. All the forms that you need can be obtained from the Court. Unless the Court allows otherwise, the Claim form must be served within 1 year of filing it.

Don't forget that you will not be entitled to the costs of filing a claim unless written notice of the intended claim (in either a written letter or a 'Final Notice of Claim' form available from the Magistrates Court) was given to the Defendant more than 21 days before your claim is filed.

What does the Defendant do?

After the claim has been served, the Defendant has 21 days to either:

- settle the claim with the Plaintiff without going to court; or
- pay the full amount due; or
- file a Notice of Defence.

If the Defendant files a Notice of Defence, a copy will be sent to you by the Court, and (later) notice of the time and date of the hearing. If the Defendant does not settle or file a Notice of Defence within the specified period, you may ask the Registrar to make a default order against the Defendant without conducting a hearing. You can do this at any time from the end of the 21 day period up to 12 months from the date on which the Defendant was served with the Claim form. The Defendant can apply to the Court to set aside this default order.

How much will it cost?

A small filing fee is payable for all claim forms and must be paid when the completed Claim Form is filed at Court. The amount of the fee depends on the amount claimed.

Can I settle before the trial?

Yes. Settlement can be achieved by mediation or a directions hearing before any steps are taken by the Court. If this happens, the Plaintiff must advise the Court in writing.

There are other ways in which the matter can be brought to an end by the parties, for example:

- by signing a formal agreement as to judgment and filing it with the court; or
- settling at the hearing.

Alternatively, the Defendant can:

- file an Admission of Liability document in court, in which the Defendant admits all or a part of the Plaintiff's claim; or
- at any time before the hearing, pay an amount into court that the Defendant admits owing,

plus an amount for the Plaintiff's costs, for the Plaintiff to accept to settle the claim.

It is advisable (and sometimes necessary) that any terms of settlement are in writing.

What happens at the trial?

If there is no agreement before the hearing, the Court will send a notice of the date and place of a directions hearing to both parties. This is usually about 3 weeks after the Defendant files their defence. This is an informal Court appearance where the Court will enquire into how the case is progressing and attempt to help the parties to resolve the matter. If the matter is not resolved at the direction hearing, the Court will set the matter down for a final hearing, usually within the following 2-3 months.

At the final hearing Parties must present their cases logically, supported by any witnesses and evidence which the parties must have with them at the trial.

Both the Plaintiff and the Defendant are given a chance to present their side of the story. Lawyers are generally not allowed to appear for the parties, unless both parties agree. The Defendant, Plaintiff and witnesses may be questioned by the Magistrate or the opposing party. The Magistrate will then make a decision that is legally binding on the parties.

The party who wins is normally entitled to ask the Magistrate to make an order that the losing party pay their court costs. Costs will usually include filing fees and witness fees .

Enforcement

If the Defendant does not pay the successful Plaintiff, the Plaintiff can approach the Magistrates Court to seek advice on a variety of enforcement actions.

More Information

You can contact the Magistrates Court for more information on 82042444 or online at http://www.courts.sa.gov.au/community/going_to_court/index1.html. Court staff can assist you with your claim, but are not permitted to give legal advice. Instead, you should contact your local Community Legal Centre or the Legal Services Commission on (08) 8463 3691 or 1300 366 424 for advice.

Information on how to make a claim is available at www.lawhandbook.sa.gov.au. Information is also available at these Registries of the Magistrates Court:

Adelaide Magistrates Court
260-280 Victoria Square
Adelaide South Australia 5000
Tel: (08) 8204 2444

Christies Beach Court
98 Dyson Road
Christies Beach South Australia 5165
Tel: (08) 8204 2444

Elizabeth Court
15 Frobisher Road
Elizabeth South Australia 5112
Tel: (08) 8204 2444

Holden Hill Court
Lyons Road
Holden Hill South Australia 5088
Tel: (08) 8204 2444

Port Adelaide Court
260 St Vincent Street
Port Adelaide South Australia 5015
Tel: (08) 8204 2444

You can also obtain advice on making a claim from a Community Legal Centre:

Northern Community Legal Service

26 John Street
Salisbury SA 5108
Tel: (08) 8281 6911

South East Community Legal Service

9 Penola Road
Mt Gambier SA 5290
Tel: (08) 8723 6236 or 1300 369 236

WestSide Community Lawyers
The Parkes Community Centre
Entrance 5, Trafford Street
Angle Park SA
Tel: (08) 8243 5521

Central Community Legal Service

Unit2/59 Main North Road,
Medindie Gardens SA 5081
Tel: (08) 8342 1800

Riverland Community Legal Service

8 Wilson Street
Berri SA 5343
Tel: (08) 8582 2255

Southern Community Justice Centre

40 Beach Road
Christies Beach SA 5165
Tel: (08) 8384 5222

WestSide Community Lawyers

Spencer Gulf Office
1st Floor, 60 Florence Street
Port Pirie SA
Tel: (08) 8633 3600

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