

## DEBT RECOVERY

### SMALL CLAIMS PROCEDURE – WESTERN 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; or
- 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 installments 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.

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 from the local court; 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](http://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, Perth, WA 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](http://www.asic.gov.au) for more information).

## **Small claims procedure**

In May 2005 the WA Magistrates Court began operating and amalgamated the former Local Court and Small Claims Tribunal into a single court.

The Magistrates Court deals with criminal matters and civil matters and consumer/trader claims for debts, including:

- claims for debts of up to \$50,000 (to be increased to \$75,000 in January 2009);
- minor claims for debts up to \$7,500 (to be increased to \$10,000 in January 2009); and
- consumer/trader claims over the sale, supply or hire of goods or services up to \$50,000.

### ***How do I make a claim in the Magistrates Court?***

Obtain a claim form from the Magistrates Court together with a copy of any printed brochures and information booklets. The relevant forms and information are also available online at [www.justice.wa.gov.au](http://www.justice.wa.gov.au).

To make a claim you will need to complete the general procedure claim form (for claims between \$7,500 and \$50,000) or the minor claim form (for claims less than \$7,500). Lodge the completed form together with the application fee in person at the court registry.

You must ensure that the other party ("the Defendant") receives a copy of the claim. You ("the Plaintiff") can serve (deliver) the Summons or it can be done for a fee by a person ("the Bailiff") appointed by the Court.

When you complete your claim form you can also complete a Statement of Claim, which narrows the issues in dispute and reveals your case. If you do not lodge a Statement of Claim at this time you can lodge one within 14 days of receiving a notice of intention to defend from the Defendant.

### ***How much will it cost?***

A small fee is payable when you lodge your claim. Contact the Magistrates Court for further information.

### ***What happens next?***

The Defendant is required to respond to the claim within 14 days from the date they are served by either: admitting the debt; disputing the debt; or admitting part of the debt and defending the balance. If there is no response from the Defendant, judgment will be made in the Plaintiff's favour.

Where the Defendant disputes part or all of the debt, the Defendant will be required to lodge a notice of intention to defend. Then the parties will be brought together for a pre-trial review which will be conducted by a registrar of the court. The parties are encouraged to further clarify the issues and to settle the matter. If the matter is not settled, the registrar will either list the case for trial or a listings conference in front of a magistrate of the court.

For claims of \$7,500 or less, both parties can elect to have access to a less formal dispute resolution process. This saves both parties time and money.

### ***Can I settle before the hearing?***

Yes. If the matter is settled you should advise the Magistrates Court in writing that you wish to withdraw your claim.

### ***What happens at the trial?***

Both parties are entitled to be represented by a lawyer. However, a lawyer cannot represent you if you are making a claim for less than \$7,500, unless all parties agree, or the court grants special permission for you to have a lawyer. However, if your claim is for less than \$7,500 the lawyer's costs are generally not recoverable even if you win your case, unless the court is satisfied that exceptional circumstances exist.

Each party presents their case before the Magistrate. Evidence is given under oath. Each party is then given the opportunity to ask questions and cross examine witnesses of the other. Each party then summarises their case and the Magistrate will make a decision.

If the Defendant fails to attend the trial you may be able to proceed with your case if the Defendant has been notified of the trial dates but fails to attend.

## Enforcement

If you are successful and the Defendant does not make an acceptable proposal to pay the debt and costs to you as the Plaintiff (also referred to as the judgment creditor), there are a number of methods of enforcement. Firstly, a Means Inquiry may be conducted before the court to determine whether the Defendant (also referred to as the judgment debtor) has the ability to pay, and whether it is more appropriate that the debt be paid in full or by periodic instalments. Secondly, the court may also order a Property (Seizure and Sale) Order for the sheriff or bailiff to seize and sell the judgment debtor's property to satisfy the debt owed to you.

## Appeal

For minor cases not decided by a magistrate you can appeal to a magistrate in the Magistrates Court against the judgment on limited grounds. If it was a general procedure claim or a minor claim decided by a magistrate you can appeal to the District Court, but the appeal must be commenced within 21 days after the date of judgment in the Magistrates Court.

## Further Information

- The Magistrates Court civil registry offers general information about procedures, forms and costs and can be contacted on (08) 9425 2222. Information is available on the internet at [www.justice.wa.gov.au](http://www.justice.wa.gov.au).
- Contact the Ministry of Fair Trading, Department of Consumer and Employment Protection on (08) 9282 0777 or visit their website at [www.docep.wa.gov.au](http://www.docep.wa.gov.au).
- Your local community legal centre (e.g. Bunbury Community Legal Centre) can also provide advice and assistance on how to file a defence and other enquiries regarding the procedures of the Court and Tribunal. For details contact the Community Legal Centres Association WA Inc. on (08) 9221 9322 for referral to the appropriate community legal centre. You can also contact the National Association of Community Legal Centres on (02) 9264 9595 or visit [www.naclc.org.au](http://www.naclc.org.au) which contains a directory of community legal centres in all States and Territories.

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