

DEBT RECOVERY

SMALL CLAIMS PROCEDURE – ACT

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.

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, O'Connor, ACT 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 the ACT, small claims may be made in the Small Claims Court ("the Court").

A claim may not be made in the court where the action arose wholly outside the ACT and the person being sued ("the Defendant") is not resident in the ACT at the time the claim is served.

When can I use the Court?

The Small Claims Court may be used for claims of up to \$10,000. Claims of more than \$10,000 must be brought in the Magistrates Court, although you may wish to abandon the excess in order to take advantage of the Small Claims Court which is quicker and cheaper. The jurisdictional maximum for the Magistrates Court is \$50,000.

What should I do?

Obtain a claim form from the Office of the Court. An officer can help you to fill out the claim form. The Office can also arrange for the claim to be delivered to the other party ("served") after the completed claim form has been lodged with the Court with the appropriate fee. Remember to include on the claim form accurate details of the name and address of yourself ("the Claimant") and the Defendant.

What does the Defendant do?

Within 14 days from the date on which the claim is served*, the Defendant must:

- (a) pay the full amount into Court - in which case a cheque for the amount will be sent to the Claimant; or
- (b) pay less than the full amount into Court - in which case the Claimant is notified of this by the Court and the Claimant will have 14 days to make a claim for the balance; and/or
- (c) file a Notice of Defence (available from the Court) - in which case a copy of the Defence will be sent to the Claimant and an informal conference will be held in the Court building by the Court clerk, to be attended by the Claimant and the Defendant.

If the Defendant fails to do any of these things within 14 days, the Claimant may obtain a form from the Court which will enable them to request that the Court enter a judgment against the Defendant.

* If the claim has been posted to the Defendant you must allow an extra 2 days. If the Defendant is situated outside of the ACT you must allow 21 days (plus 4 days if the claim was posted).

How much will it cost?

There is a small lodgement fee for filing your claim with the Court which is recoverable if your claim is successful.

If the Office of the Court arranges for the claim to be served on the Defendant by post, this is free of charge. If personal service is arranged by the Office, a non-recoverable Bailiff Service Fee must be paid.

Can I settle before the hearing?

Yes. An agreement must be signed by or on behalf of each party and be witnessed by the Registrar of the Court, a solicitor or a justice of the peace.

If the Defendant files a Notice of Defence or if you are not prepared to accept partial payment by the Defendant in full settlement of your claim, an informal conference will be held by the Registrar of the Court or their deputy, with you and the Defendant, in the Court Building. The parties are encouraged and assisted to settle the dispute at the informal conference by identifying the main issues in dispute and making sure the parties take the necessary steps to reach an agreement. If an agreement is not reached in the conference, the matter will be heard in the Court.

What happens at the hearing?

The staff at the Office of the Court can give you advice about Court procedure. You may wish to be represented by a lawyer in the Court, but most people choose not to do so. Solicitors' costs are not recoverable, even if you are successful. It is important for both the Claimant and the Defendant to have all evidence prepared and available to prove their case. After listening first to the Claimant's case and then to the Defendant's case, the Magistrate will make orders which are legally binding on the parties.

Enforcement

If your claim is successful, the Court may make an order that the amount of the claim be paid to you in instalments, in which case interest is payable on the unpaid amount. If an order is not fully obeyed by either party, the order may be legally enforced. Further advice and assistance is available from the Court if this is required.

Further Information

Magistrates Court
ACT Magistrates Court Building
Knowles Place off London Circuit
GPO Box 370
Canberra ACT 2601
Tel: (02) 6217 4444
or (02) 6217 4273

Small Claims Court
ACT Magistrates Court Building
Knowles Place off London Circuit
GPO Box 370
Canberra ACT 2601
Tel: (02) 6217 4444
or (02) 6217 4273

Canberra Welfare Rights and Legal Centre
Civic Square
Havelock House, Gould Street
Turner ACT
Tel: (02) 6247 2177

Consumer Law Centre of the ACT
Shop 16, 1st Floor
2 Akuna Street
Canberra City ACT
Tel: (02) 6257 1788

© 2002, 2006, 2007 Arts Law Centre of Australia

You may photocopy this information sheet for a non-profit purpose, provided you copy all of it, and you do not alter it in any way. Check you have the most recent version by contacting us on (02) 9356 2566 or tollfree outside Sydney on 1800 221 457.

The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.

