

DEBT RECOVERY – SMALL CLAIMS PROCEDURE (NEW SOUTH WALES)

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 National Consumer Credit Protection Act 2009 (Cth) or the National Credit Code. 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 on [Debt recovery 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 \$25,000 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. In NSW the Local Court deals with debt recovery claims up to the value of \$60,000. If the amount of money that is owed exceeds \$60,000 you will be required to commence action in either the District Court or Supreme Court of NSW.

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 (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, Sydney, NSW 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 the ASIC website www.asic.gov.au for more information).

Debt recovery in the Local Court

In NSW, you may use the Small Claims Division of the Local Court (Court) for claims less than \$10,000. However, the Court in its General Division can hear claims between \$10,000 and \$60,000. In particular circumstances (where a particular procedure is followed and there is no objection or there is consent) the Court can hear claims of up to \$72,000. If your claim is for an amount between \$60,000 - \$72,000 you should obtain legal advice on the appropriate court and procedure that must be followed.

What should I do?

To lodge a claim, including a small claim, you need to file a Statement of Claim with the Court. This court form is available from the Court by calling (02) 9287 7923 or the nearest NSW Local Court and online at www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms. You should include the accurate name and address for you ('Plaintiff') and the other party ('Defendant'). If the Defendant is a registered company, you should ensure that the name and address on the Statement of Claim are the same as those on the company's register (see the 'Who Can I sue?' section of this information sheet). You should also include details of the claim such as any invoice number and when the debt became due. The Statement of Claim contains instructions on how to complete the form.

The NSW Local Court website at www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_money_issues#owe contains information on commencing legal action for debt recovery and the procedures involved. You can also make an appointment to see the chamber magistrate at the nearest Local Court, who will assist you to fill out the Statement of Claim form.

Once you have completed the Statement of Claim form you must file at least 4 copies of it with the court by handing the copies in to the court registry and paying the filing fee. One copy will be returned to you, two are for the defendant and the other is retained by the Court. You must then ensure the Statement of Claim is served on the Defendant.

What can the Defendant do?

Once the Defendant has been served with a Statement of Claim they can file a Notice of Defence (Notice of Defence Forms are available from the Local Court or on their website) within 28 days of service of the Statement of Claim. The Notice of Defence must be served on the Plaintiff no later than 14 days after it has been filed.

If the Defendant fails to file a Notice of Defence with the Court, or confess and apply to repay by instalments within 28 days of being served with the Statement of Claim, the Plaintiff can apply for judgment by lodging a form, which is available from the Court (or website).

If the Defendant defends the claim, the matter will automatically be set down for a pre-trial review.

How much will it cost?

There is a small filing fee for the Statement of Claim. For further information on filing fees visit the NSW Law Courts website at

www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_newwebsitefees05.

In addition, you must either pay a fee for the sheriff to serve the Statement of Claim, or you can pay a smaller fee to the Court to serve the Statement of Claim by post.

Although each party can engage a solicitor to represent them, for many proceedings before the Small Claims Division there is no need for a solicitor. Legal representation will add to the cost of the claim. Generally, the successful party is not entitled to claim their legal costs from the other party, although they may be able to claim their administrative costs and expenses, such as service fees and witness expenses, for bringing or defending the claim.

Can I settle before the hearing?

Yes, the parties may settle the matter between themselves at any time before the hearing. They are encouraged to do so at the pre-trial review and, during the pre-trial review, the Magistrate may refer the parties to a Community Justice Centre representative present at the Court. Community Justice Centres also offer mediation services.

The pre-trial review is an informal review of the facts of the dispute, and statistics show that an amicable settlement will often be reached at this stage. The review is conducted by an officer of the Court, usually a Magistrate. The failure by either party to attend the pre-trial conference without a good reason can result in an order being made against them.

What happens at the hearing?

If there is no agreement at the pre-trial review a hearing date is set. The person conducting the pre-trial review will advise all parties about the evidence they will have to present to ensure that a quick and fair trial will take place. Hearings are generally conducted by a Magistrate or an Assessor, and there should be minimal formality.

Enforcement

The order of the Magistrate made at the hearing is legally binding on the parties. If either party fails to comply with the order, it may be enforced against the defaulting party in the Local Court.

Further information

- Downing Centre, NSW Local Court, Civil Claim Enquiries, Sydney, telephone (02) 9287 7923 or visit the local court website at http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_index
- For your nearest NSW Local Court check the White Pages or http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_location
- Your local community legal centre (eg. Inner City Legal Centre in Sydney) can also provide advice and assistance on how to file a defence and other enquiries about the procedures of the Small Claims Division of the Local Court. For details contact the National Association of Community Legal Centres at (02) 9264 9595 or visit www.naccl.org.au which has a directory of community legal centres in all States and Territories.
- NSW Community Justice Centres can assist with mediation of disputes. For more information please contact (02) 9790 0656 or visit their website at www.cjc.nsw.gov.au

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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