
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 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.

A guideline on acceptable and unacceptable debt collection practices is published by the Australian Securities & Investment Commission (ASIC) as *ASIC Regulatory Guide 96 - Debt collection guideline: for collectors and creditors*. It is available at the [ASIC website](#).

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 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.

If you decide to write the debt off, you may be able to claim an income tax deduction or a Goods and Services Tax (GST) adjustment, so that you do not pay income tax or GST on the amount that you do not recover from the debtor. See the '*Taxation implications of bad debts*' section of this information sheet.

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. For example, in South Australia, the Magistrates Court can deal with small claims up to the value of \$6,000. If the money that is owed exceeds \$6000 and is less than \$40,000, the Magistrates Court may still hear the claim but different procedures and fees apply. For claims in excess of \$40,000, debt recovery is dealt with by the District Court and the Supreme Court depending on the amount.

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 Australian Securities and Investments Commission (ASIC) Business Names Register, which can be accessed free via their [website](#).

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, Adelaide, SA 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 company search. See the [ASIC website](#) 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. Claims of between \$6,001 and \$40,000 may be dealt with in the Civil (General Claims) Division of the Court.

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. If you skip this step, you cannot recover your costs of filing your claim against the Defendant if you are successful. You can purchase the final notice document online at <https://efiling.courts.sa.gov.au> or at the registry of any Magistrates Court in South Australia.

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 [online](#). 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;
- file a Notice of Defence; or
- file a Notice of Defence and lodge a counterclaim.

If the Defendant files a Notice of Defence, a copy will be sent to you by the Court, and (later) the Court will give you 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. As at 1 February 2013, the filing fee is \$127. For more information see <http://www.courts.sa.gov.au/ForLawyers/Pages/Magistrates-Court-Fees.aspx#civil>.

Can I settle before the hearing?

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

The matter can be brought to an end by the parties by:

- 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.

Taxation implications of bad debts

You may be able to claim an income tax deduction or a Goods and Services Tax (GST) adjustment in respect of a bad debt.

In order to claim a tax deduction for a bad debt deduction under section 25-35 of the *Income Tax Assessment Act 1997 (Cth)*, the following minimum requirements must be met:

- The bad debt must be written off in writing;
- The bad debt must be written off in your financial accounts;
- The bad debt must be written off before the end of the financial year in which you are seeking to claim the tax deduction;
- You must retain written records relating to the writing off of the bad debt and to the claiming of the tax deduction; and
- If the tax deduction is claimed by a company, the company must meet the conditions in section 165-123 of the *Income Tax Assessment Act 1997 (Cth)* (about maintaining the same owners) OR meet the condition in section 165-126 of the *Income Tax Assessment Act 1997 (Cth)* (about satisfying the 'same business test').

For more information about income tax deductions for bad debts, see the Australian Taxation Office '*Taxation Ruling TR 92/18*' and/or seek advice from a taxation professional.

If you account for GST on an accrual basis, you may be able to claim a GST adjustment if you decide to write the debt off, or if the debt has been overdue for 12 months or more. If you have reported the GST in respect of the bad debt but have not received all or part of that GST from the debtor, you may have reported too much GST. You may be able to claim a decreasing adjustment on your Business Activity Statement (BAS) in the tax period in which the debt is written off, or if it has not been written off, in the tax period in which you become aware that the debt has been overdue for 12 months or more.

For more information about GST adjustments for bad debts, see the Australian Taxation Office '*Goods and Services Tax Ruling GSTR 2000/2*' and/or seek advice from a taxation professional.

More information

More information on Minor Civil Claims is provided on the South Australian Courts [website](#).

A very helpful guide on [How To Recover a Debt: A Do-it-yourself Guide For Creditors](#) is published by the South Australian Legal Services Commission which can also be contacted for advice on (08) 8463 3691 or 1300 366 424.

Information is available from the Registries of the Magistrates Court although while Court staff can assist you with your claim, they are not permitted to give legal advice.

Adelaide Magistrates Court

260-280 Victoria Square
Adelaide SA 5000

Tel: (08) 8204 2444

Christies Beach Court

98 Dyson Road
Christies Beach SA 5165

Tel: (08) 8204 2444

Elizabeth Court

15 Frobisher Rd
Elizabeth SA 5112

Tel: (08) 8204 2444

Holden Hill Court

Lyons Rd
Holden Hill SA 5088

Tel: (08) 8204 2444

Port Adelaide Court

260 Vincent St
Port Adelaide SA 5015

Tel: (08) 8204 2444

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

Northern Community Legal Centre

26 John St
Salisbury SA 5108

Tel: (08) 8281 6911

Central Community Legal Centre

Unit 2/59 Main North Rd
Medindie Gardens SA 5081

Tel: (08) 8342 1800

South East Community Legal Centre

9 Penola Rd
Mt Gambier SA 5290

Tel: (08) 8723 6236 or 1300 369 236

Riverland Community Legal Centre

8 Wilson St
Berri SA 5343

Tel: (08) 8582 2255

Westside Community Lawyers

The Parks Community Centre
Entrance 5, Trafford St
Angle Park SA

Tel: (08) 8243 5521

Southern Community Justice Centre

40 Beach Rd
Christies Beach SA 5165

Tel: (08) 8384 5222

Westside Community Lawyers

Spencer Gulf Office
1st Floor, 60 Florence St
Port Pirie SA

Tel: (08) 8633 3600

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