
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 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 Western Australia, the Local Court can deal with debt recovery claims between \$10,001 and up to the value of \$75,000. If the money that is owed exceeds \$75,000 but is less than \$750,000 you must commence action in the District Court of Western 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 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;
- there is a time limit on starting debt recovery court action, 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](#).

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 Barrack St, 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 the ASIC [website](#) for more information).

Small claims procedure

In May 2005, the WA Local Court and Small Claims Tribunal were amalgamated into the Magistrates Court.

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

- claims for debts up to \$10,000 (known as a Minor claim);
- claims for debts up to \$75,000 (known as a General Procedure claim); and
- consumer/trader claims over the sale, supply or hire of goods or services up to \$50,000.

How do I make a Minor Claim in the Magistrates Court?

Obtain a claim form from the Magistrates Court together with a copy of any printed brochures and information booklets (available online from the [Magistrates Court website](#)). The relevant forms and information are also available online at the website for the [WA Courts Service](#).

To make a claim you will need to complete the minor claim form (for claims less than \$10,000). You may lodge the claim online if you have a credit card or 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 or after a pre-trial conference. Get legal advice about what should be in your Statement of Claim.

In some circumstances you may name more than one defendant on the claim. This is called joining defendants. Joining defendants may be done when a claim is issued or at a later date. Legal advice should always be sought before joining defendants.

How much will it cost?

A small fee is payable when you lodge your claim. As at 1 February 2013, the filing fee for a minor claim against an individual debtor is \$81 or \$158 if the Defendant is not an individual (such as a company). For more information see the [Magistrates Court website](#).

Interest may also be claimed from the date the claim arose. Write on the claim that you are claiming interest.

In a Minor claim, you are not expected to comply with the ‘rules of evidence’ and legal representation is not allowed unless all parties and the magistrate agree. Usually each person must pay their own lawyer’s fees.

Serving the Defendant with your claim

Once you have lodged your claim at the court you will need to ‘serve’ it on the Defendant. This means giving your claim to the Defendant. There are special rules for serving a claim. The claim has to be served as soon as practicable, and within one year after the day on which you lodge it. You may serve the claim yourself, such as handing the claim to the individual, their lawyer, or a person authorised in writing to receive documents for the individual, or by paying an additional fee for an enforcement officer, such as a bailiff to serve the claim.

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 a Minor Case claim, 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. If the defendant admits to only part of the claim, get legal advice before accepting an offer to settle in this situation.

What happens at the trial?

However, a lawyer cannot represent parties to a Minor Claim unless all parties agree, or the court grants special permission for you to have a lawyer. In any event, for Minor Claims 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. If the defendant does not lodge a response within the time stated on the claim, you may apply for a default judgment. An application for default judgment must be made within 12 months of the date the claim was served on the defendant.

Enforcement

If you are successful and the Defendant does not make an acceptable proposal to pay the debt and costs to you 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.

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.

Further information

- See the Magistrates Court Fact Sheet 3 "[How to Commence a Minor Case Claim](#)". The Magistrates Court civil registry also offers general information about procedures, forms and costs and can be contacted on (08) 9425 2222. Information is available at their [website](#).
- Contact the Ministry of Fair Trading, Department of Consumer and Employment Protection on (08) 9282 0777 or visit their [website](#).
- 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 their [website](#) which contains a directory of community legal centres in all States and Territories.

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.

While Arts Law tries to ensure that the content of this information sheet is accurate, adequate or complete, it does not represent or warrant its accuracy, adequacy or completeness. Arts Law is not responsible for any loss suffered as a result of or in relation to the use of this information sheet. To the extent permitted by law, Arts Law excludes any liability, including any liability for negligence, for any loss, including indirect or consequential damages arising from or in relation to the use of this information sheet.

© Arts Law Centre of Australia 2013

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 toll-free 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.

