

---

## DEBT RECOVERY – SMALL CLAIMS PROCEDURE (AUSTRALIAN CAPITAL TERRITORY)

---

### 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 at [www.asic.gov.au](http://www.asic.gov.au).

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; or
- ignore the letter or respond to it in a way that is unsatisfactory to the creditor.

If you agree a compromise with the debtor, make sure that it is, or is confirmed, in writing to avoid later disputes. You can seek the assistance of Arts Law regarding the form and terms of that agreement including any release you are asked to provide in return for part payment.

You may consider writing off the debt – if for example the debtor's response to your letter of demand makes it clear that there is no prospect of repayment, or because the size of the debt is so small that you decide that it is not worth pursuing further. 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

Many people decide to write off a debt because of the perception that it is too difficult and expensive to pursue, especially if lawyers are retained. However, a "do it yourself" legal action is 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"? In the ACT, a small claim is a claim:

- for \$10,000 or less; and
- where the debtor is resident in the ACT or a material part of the subject matter of the claim has arisen in the ACT.

If the claim is over \$10,000, you can still bring an action against the debtor, but you will probably need legal representation or at least legal advice. Also such claims must be dealt with by a superior court (the Magistrates Court for claims up to \$250,000 and the Supreme Court for larger claims) unless the parties both agree that it can be dealt with by ACAT.

Debt recovery court action is actually a twostep process:

- after commencing proceedings, you must either negotiate a settlement (which you can do at any time up to the hearing) or obtain a judgment in your favour; 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 bankrupt or 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 a 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;
- the fact 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 writing, to avoid later disputes;
- wherever you start debt recovery court action, there is a time limit on bringing it, which is generally six 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.

## Whom 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 or cooperative). 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](http://www.asic.gov.au).

If the person whom you intend to sue is an individual under the age of 18 you will need to obtain further advice from a lawyer or from the court staff before proceeding.

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: Respondent – 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 the ASIC website [www.asic.gov.au](http://www.asic.gov.au) for more information).

## Small claims procedure

In the ACT, small claims are dealt with by the ACT Civil and Administrative Tribunal (ACAT).

### When can I use the Court?

The Small Claims Court may be used for claims of up to \$10,000. You may consider abandoning the excess over \$10,000 in order to take advantage of the ACAT procedure which is quicker and cheaper. Claims of more than \$10,000 must be brought in the Magistrates Court, unless the parties agree to use ACAT.

### How do I make a Small Claim?

ACAT has a useful Guide to Applicants on its [website](#) which contains the forms you will need. Complete the Debt Application – Civil Dispute form and file the original plus two copies with ACAT and

pay the filing fee. Remember to include on the claim form accurate details of the name and address of yourself ("the Claimant") and the Respondent. ACAT will stamp the copies and return them to you. You must then either deliver (serve) a stamped copy of the Debt Application – Civil Dispute form to the Respondent personally or leave it with ACAT to be mailed to the Respondent.

If you serve the Debt Application – Civil Dispute form on the Respondent yourself, you must complete an Affidavit of Service within 72 hours and file it at ACAT. The Affidavit of Service is proof that the Respondent has been served with the Debt Application..

If you are claiming a sum of money, you may include a claim for interest on that amount.

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

There is a small lodgement fee for filing your claim. As at 1 February 2014, it is \$130 for individuals and \$260 for corporations. If the debt is less than \$2000, the fee is \$48 for individuals and \$96 for corporations.

A hearing fee is charged if the matter goes to a hearing which lasts longer than one day – not usually the case for small claims.

### **What happens next?**

Within 21 days from the date on which the claim is served\*, the Respondent must:

- (a) pay you the full amount - in which case you need to notify ACAT that the debt has been paid; **or**
- (b) file a Response with ACAT stating that the debt is disputed either in full or in part or admitting the debt and making a proposal for payment; or
- (c) contact you to try and reach a settlement agreement – if you do reach an agreement, ACAT must be notified in writing.

If the Respondent fails to do any of these things within the 21 (or 25) day period, the Applicant may file an 'Application for Default Judgment' form requesting ACAT to enter a judgment against the Respondent.

*\*If the claim has been posted to the Respondent or the Respondent is located outside the ACT, you must allow an extra 4 days.*

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

Yes. If you do reach an agreement, ACAT must be notified in writing.

If the Respondent files a Response, ACAT will usually arrange an informal conference where a Tribunal officer will encourage and assist the parties to settle the dispute. If an agreement is not reached in the conference, the matter will be heard in the Court.

### **What happens at the hearing?**

The parties will be notified of the hearing date. You may wish to be represented by a lawyer although many people choose not to do so. Solicitors' costs are not recoverable, even if you are successful. It is

important for both the Applicant and the Respondent to have all evidence prepared and available to prove their case. After listening first to the Applicant's case and then to the Respondent's case, the Magistrate will make orders which are legally binding on the parties.

## Costs

Generally each party must pay their own costs although ACAT does have a discretion to order the unsuccessful Respondent to reimburse the cost of the filing fee. Either party can ask the Tribunal to make an order that the unsuccessful party pay their costs of the proceedings (filing fees and legal costs) but this is a matter entirely at the discretion of ACAT.

## 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.

## Enforcement

If you are successful and the Respondent does not pay you, there are a number of methods of enforcement. ACAT's order is treated as an order filed in the Magistrates Court and can be enforced under the rules of that Court. The Court may order the sheriff or bailiff to seize and sell the judgment debtor's property to satisfy the debt owed to you, or make an order 'attaching' the wages or earnings of the Respondent until you are paid. If you are in this position, seek advice from the Court or from Arts Law.

## Appeals

An unsuccessful party can appeal a decision by ACAT. The appeal must be lodged within 28 days of the decision (although ACAT can extend the time).

## 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

Arts Law cannot represent you at these proceedings and cannot draft your Tribunal documents, but we can advise you about your rights in an arts related matter both before and during any legal action you pursue. If the debt is over the limit for a small claim and you need legal representation, Arts Law can assist with referrals to an appropriate solicitor.

## Further information

### ACT Civil and Administrative Tribunal

ACT Health Building  
Level 4  
1 Moore Street  
Canberra City ACT 2601

(02) 6207 1740  
[tribunal@act.gov.au](mailto:tribunal@act.gov.au)

### Magistrates Court

ACT Magistrates Court Building  
Knowles Place (off London Circuit)  
GPO Bow 370  
Canberra ACT 2601

Tel: (02) 6217 4444 or (02) 6217 4273  
[www.courts.act.gov.au](http://www.courts.act.gov.au)

### Canberra Welfare Rights and Legal Centre

Havelock House  
Cnr Northbourne Ave & Gould St  
Turner ACT 2602

### Small Claims Court

ACT Magistrates Court Building  
Knowles Place (off London Circuit)  
GPO Bow 370  
Canberra ACT 2601

Tel: (02) 6217 4444 or (02) 6217 4273  
[www.courts.act.gov.au](http://www.courts.act.gov.au)

### Consumer Law Centre of the ACT

Shop 16, 1<sup>st</sup> Floor  
Waldorf Apartments  
2 Akuna Street  
Canberra City ACT 2600

Tel: (02) 6247 2177  
[www.welfarerightsact.org](http://www.welfarerightsact.org)

Tel: (02) 6257 1788  
[www.carefcs.org](http://www.carefcs.org)

## 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 2014

*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.*

