
DEBT RECOVERY – SMALL CLAIMS PROCEDURE (TASMANIA)

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; and
- 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 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 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 Tasmania, the General Division of the Magistrates Court can deal with debt recovery claims from \$5,001 up to the value of \$50,000 or, if the parties agree, an unlimited amount. For debts in excess of \$50,000 where the parties have not agreed to use the Magistrates Court, you must commence action in the Supreme Court of Tasmania.

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; 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](#).

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, Hobart, Tasmania 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

When can I use the Court?

If you are in dispute over a debt of \$5,000 or less, you should bring your claim in the Minor Civil Claims Division of the Magistrates Court ("Court"). The procedure discussed in this information sheet applies in the Minor Civil Claims Division.

What should I do?

You will need to complete a claim form in which you give full and accurate details of the names and addresses of yourself ("Claimant"), and the other party ("Defendant"), and of your claim. It is preferable to file your claim in the Registry that is closest to the district in which your claim arose. You must file 3 copies of your claim (and the original). The Court will retain the original and stamp the other three copies. One copy is for the Defendant, another for you to keep and the last for the Affidavit of Service. One stamped copy must be 'served' on the Defendant. You can either do that yourself, arrange for a process server to do so., or the Court will serve it for you. You have one year after filing your claim to

have it served on the Defendant. If you require longer, you must seek the permission of the Court. If you arranged the service, you then need to file an Affidavit of Service at the Court, to prove the Defendant has received the claim.

Copies of a claim form, Affidavit of Service and other relevant court forms can be obtained from the Court registry or [online](#).

What does the other party do?

Once the Defendant is served, the Defendant has 21 days to:

- pay the amount claimed;
- settle the matter; or
- file a defence and, if appropriate, a counter claim.

If the Defendant files a defence within that time, you will receive a copy and the Court will fix a date for a directions hearing. If the Defendant does not, and the matter is not settled, you may apply to the Court for default judgment.

How much will it cost?

A small filing fee is payable when you lodge your claim. As at 1 February 2013, the filing fee is \$108. There is also a service fee payable for the delivery (service) of the claim to the Defendant. (Check the [Magistrates Court website](#) for further details.) Alternatively, you can arrange for the claim to be served.

Can I settle before the hearing?

Yes. If you settle the dispute before the hearing, though, you should advise the Registrar in writing that you wish to withdraw your claim. It is also advisable to confirm any terms of settlement by making an application to the Court for a Consent Order. The Consent Order form and instructions on the preparation of it are available from the Court.

What happens at the hearing?

Generally, neither party may be represented by a lawyer at the hearing unless both parties agree and permission is granted by the Magistrate. You will need to have given copies of all relevant documents that you intend to rely on to the other party and to the Court.

At a directions hearing, the Magistrate will enquire into the progress of the action and explore ways of achieving a settlement. If settlement is not achieved, the Magistrate will set a date for mediation or set a date for the hearing.

At the hearing you will be able to tell the Magistrate what happened and what the basis of your claim is. You will be expected to make your statement under oath. You should show the Magistrate any evidence that supports your claim. After you have presented your case, the Magistrate will give the Defendant and their witnesses an opportunity to tell their side of the story. The Magistrate will encourage the parties to settle. If this is not possible, the Magistrate will decide the case. For more detailed information about the Court process, obtain the minor claims information brochure from the Court Registry or [online](#).

The Magistrate's decision is final and binding, with limited provision for appeal. The costs of filing the claim may be awarded if you are successful but generally other preparation costs are not.

Enforcement

If an order of the Magistrate for the payment of money is not complied with, the party in whose favour the order was made can enforce the judgment by returning to 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.

More information

Information on making a claim is available from the Court's [website](#), and more specifically for a small claim at www.magistratescourt.tas.gov.au/divisions/civil/minor_civil_claims.

To contact Legal Aid call 1300 366 611 or visit their [website](#).

Court staff can assist you with your claim, but are not permitted to give legal advice. Information can be obtained at the following Registries of the Magistrates Court:

Magistrates Court, Launceston

73 Charles St Launceston

PO Box 551

Launceston 7250

Tel: (03) 6336 2605

Magistrates Court, Burnie

38 Alexander St Burnie

PO Box 690

Burnie 7320

Tel: (03) 6434 6215

Magistrates Court, Devonport

8 Griffith Street

PO Box 208

Devonport 7210

Tel: (03) 6421 7892

Magistrates Court, Hobart

23-25 Liverpool Street

PO Box 354

Hobart 7001

Tel: (03) 6233 3623

You can obtain a small claims form from a Community Legal Centre, Legal Aid and Consumer Affairs Offices. Legal advice and the video “Help yourself to Justice” can be obtained from:

Hobart Community Legal Service

166 Macquarie Street

Hobart 7000

Tel: (03) 6223 2500

Hobart Community Legal Service

(Bridgewater Office)

Cove Hill Fair Shopping Centre

Bridgewater 7030

Tel: (03) 6263 4755

North West Community Legal Centre

62 Stewart Street

Devonport 7310

Tel: (03) 6424 8720

Northern Community Legal Centre

Suite 17, Level 1

97A York Street

Launceston 7250

Tel: (03) 6334 1577

Office of Consumer Affairs and Fair Trading	Legal Aid Commission of Tasmania
15 Murray Street	158 Liverpool Street
Hobart 7000	Hobart Tasmania 7000
Tel: (03) 62334503 or 1300 654 499	Telephone: (03) 6236 3800

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