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## DEBT RECOVERY – SMALL CLAIMS PROCEDURE (VICTORIA)

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

### 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

In Victoria, you can bring a debt recovery action through the Victorian courts and/or tribunals.

### ***Magistrates' Court***

The Magistrates' Court of Victoria can deal with debt recovery claims up to the value of \$100,000. Unlike some other States and Territories, it has no small claims division. You may need legal representation or at least legal advice to bring an action in the Magistrates' Court, although it is not compulsory.

### ***Supreme Court***

Debt recovery claims above \$100,000 (and for any amount) can be brought in the Supreme Court of Victoria (or in the County Court). You are much more likely to need legal representation or at least legal advice.

### ***Victorian Civil and Administrative Tribunal (VCAT)***

VCAT can resolve 'consumer and trader' disputes arising under the *Australian Consumer Law and Fair Trading Act 2012* (Vic) between individuals, businesses and/or companies involving any amount of money, provided the dispute arises in or is connected with Victoria. VCAT is less formal than a court and cheaper. Note, usually parties need VCAT's permission for legal representation and this is unlikely to be granted for matters which involve a debt of less than \$15,000 (as at July 2019).

Debt recovery in a court or tribunal 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/orders in your favour from the court or tribunal; and
- you must actually recover the money owed to you, which may involve taking enforcement action against the debtor in a court. 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 (although 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 any debt recovery 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 do I sue?

An 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 using the ASIC Organisation and Business Names register (formerly the National Names Index), which can be accessed free via the ASIC [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 St Kilda Rd, Melbourne, VIC 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 Victoria, claims can be commenced in VCAT or in the Magistrates Court of Victoria.

### When can I use VCAT?

VCAT is intended to offer a low cost, accessible, efficient alternative to the Magistrates' Court and other courts. Often VCAT will deliver its decision on-the-spot or shortly after hearing. As noted above, VCAT can assist parties to recover debts that arise in the context of a 'consumer and trader' dispute.

A 'consumer and trader' dispute is one arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services in relation to a supply or possible supply of goods or services. Examples of such claims are disputes about not being paid for services or goods that you supplied, items purchased that won't perform, services you paid for that are inadequate or late, and misleading or deceptive conduct, false representation and unconscionable conduct in business.

In practice, this means that while VCAT does not have a general 'debt recovery' jurisdiction, it can assist you to recover a debt that arises out of a contract you have with someone else for the supply of goods or

the provision of services. VCAT cannot resolve disputes between employers and their employees, disputes between drivers in car accidents, or disputes that involve purely private debts that have not been incurred in the course of a consumer and trader dispute. For example, VCAT could not hear a dispute about a debt arising from a private arrangement where you loaned money to a friend or relative and they have refused to pay you back. VCAT also cannot hear disputes between people who are not connected to Victoria.

If your consumer and trader dispute is a claim for \$15,000 or less, and arises out of a contract for the supply of goods or the provision of services (other than a contract for life insurance), it is classified as a 'small claim'. Unless you fall within a special exception, you generally need to seek permission to be legally represented in VCAT, and for a small claim, that permission will only be granted in very limited circumstances. Further, VCAT generally cannot order costs in a small claim proceeding (and has only limited powers to award costs in larger consumer and trader disputes). In other words, even if unsuccessful, a party will probably not be required to pay the costs of the successful party.

VCAT is located in Melbourne but also sits at a number of metropolitan and country locations on a regular basis.

## Magistrates' Court

Alternatively, a debt recovery action can be commenced in the Magistrates' Court of Victoria. If your claim doesn't fall within the specific categories of dispute eligible for hearing by VCAT or it is a complex dispute in which you require legal representation, you can consider the Magistrates' Court, where you do not need to seek permission to be legally represented. Keep in mind that the Magistrates' Court is a costs jurisdiction, which means that usually, the unsuccessful party will be ordered to pay the legal costs of the successful party.

Unlike other States, there is no small claims division within the Victorian Magistrates' Court. The Magistrates' Court hears claims of up to \$100,000 in its civil jurisdiction. Generally, claims must be brought within 6 years of the date the dispute arose.

More information on the Victorian Magistrates' Court, including court costs and locations, may be found on the website: <https://www.mcv.vic.gov.au/>.

## How do I Start?

### VCAT

You (the 'Applicant') may apply using either the online or PDF version of the 'Application to the Civil Claims List', available on VCAT's website: [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). VCAT has also prepared a guide to making an application in the Civil Claims List (Goods and Services) (**Civil Claims Guide**), which is available on the website. It is a good idea to read through this document before you get started.. Then, fill in the application form and send it off to VCAT with the appropriate fee. The Civil Claims Guide provides details about how you can lodge your application and methods of payment.

Once received, the VCAT will give your application a reference number and send you a notice that will let you know what the next step is going to be (whether that is a directions hearing, mediation, compulsory conference, or final hearing). Within 28 days of receiving that notice, you must send each other party ('Respondent') a copy of your application with any attachments, together with copies of all documents you want to rely on at your hearing, including things like contracts, invoices, quotes and receipts.

## The Magistrates' Court

Obtain a copy of a Claim Form (the 'Complaint' – Form 5A) from the Court. To find your closest Magistrates' Court, go to the website at <https://www.mcv.vic.gov.au/>. You should also review information on completing a Complaint and starting a claim on the Court's website. You will also need two copies of a 'Notice of Defence' form. More information about the conduct of Civil Matters is available here on the Court's website: <https://www.mcv.vic.gov.au/civil-matters>.

You (the 'Plaintiff') must set out your claim in the Complaint. You will probably need legal assistance to draft it. However, some Court Registrars are willing to provide general assistance as to how to set out your claim. Once drafted, you need to make a photocopy of the Complaint and deliver the original to the court registry along with the appropriate fee. This is called 'filing'. You will then need to 'serve' (ie. deliver) a copy of the Complaint, stamped by the Court Registrar, on the other party (the 'Defendant'), along with the two copies of the blank 'Notice of Defence' form.

## What does the other party (debtor) do?

### VCAT

The Respondent is not required to lodge any form with the VCAT in order to defend your claim, although they may file a response that sets out what their position is. The Respondent could also simply attend the Tribunal on the date set for the hearing with their evidence. The Respondent is also entitled to bring a counterclaim against you by also completing and filing the Application to Civil Claims List form.

The Respondent may also choose to settle or pay the amount claimed at any time before the hearing. The parties are encouraged to settle their dispute before the hearing. To help settle disputes, the VCAT can arrange for appropriate cases to be mediated, or discussed with a VCAT member at a compulsory conference. If a dispute is settled between the parties, the Applicant must notify the Registrar of this in writing and request that the claim be withdrawn. The Applicant must then notify all other parties in writing of the withdrawal. If a dispute is settled at mediation, the mediator will encourage the parties to make a written record of their settlement terms. The VCAT may make orders necessary to give effect to the settlement reached by the parties.

If you wish to withdraw your application you must give written notification to VCAT and all other parties involved immediately. Failure to do so may result in costs being awarded against you.

Alternatively, the Respondent may seek to adjourn the hearing, in which case the Respondent will need to forward supporting documents such as medical certificates and, usually, the written consent of all other parties to the VCAT prior to the hearing date.

If no adjournment is granted and either party fails to attend the hearing, the hearing will usually proceed without them. It is very difficult to obtain a re-hearing.

## The Magistrates' Court

Once the Defendant has been served with the Complaint, they have 21 days from the date of service to either pay you, or defend the claim.

The Defendant may also lodge a counterclaim in the same proceedings. This has the effect of the Defendant in the first hearing becoming the Plaintiff in the second hearing and the Plaintiff in the first

hearing becoming the defendant in the second hearing. A counterclaim is normally heard at the same time as the hearing of the original claim unless the Court otherwise orders.

If the Defendant wants to defend your claim they need to lodge a completed 'Notice of Defence' form with the Court and send a copy to you, the Plaintiff. If the Defendant fails to do this, you should apply to the Court for a default judgment against the Defendant by filing an 'Application for Order' form, which is available from the Court. You also need to have filed an affidavit of service of the Complaint with the Court to obtain judgment in this way (an affidavit of service is required to prove that you have properly served the Complaint on the Defendant).

Once the Notice of Defence has been filed, the Court will usually set the matter down for a pre-hearing conference within two months. A pre-hearing conference is an informal conference between the parties and the Registrar of the Court to clarify the issues in dispute and promote a settlement or, alternatively, to ensure that the matter is ready for hearing.

The dispute may also be referred to mediation before going ahead with a hearing. In fact, except for matters heard at the Melbourne Magistrates' Court, most defended civil matters involving a claim for less than \$40,000 are referred to the Dispute Settlement Centre of Victoria for free mediation. Even if a dispute is not referred by the Court for mediation, parties may wish to voluntarily approach the Dispute Settlement Centre of Victoria to see if their dispute would be appropriate for mediation. You can contact the Centre on 1300 372 888 or learn more on their website: <https://www.disputes.vic.gov.au/>.

Whether through mediation or otherwise, the parties are encouraged to settle their dispute before the hearing. If this happens the parties must notify the Court in writing that the dispute has been settled and request that the claim be withdrawn by filing a 'Notice of Discontinuance'.

If the dispute is not settled at the pre-hearing conference or by mediation, and the amount claimed is less than \$10,000, the Court will usually set the matter down for arbitration. Arbitration is a somewhat less formal court hearing conducted by a magistrate. A decision by the Court in arbitration has the same effect as if it were made at an ordinary hearing.

## How much will it cost?

In most cases there is a filing fee to commence legal proceedings. The filing fee in the VCAT varies depending on the amount you are claiming. As at 1 July 2018, the application fee for consumer and trader dispute claims of \$3,000 or less is \$63.70, and for claims between \$3,001 and \$15,000, it is \$212.50. It is possible to apply for this fee to be waived or reduced in cases of financial hardship.

In the Magistrates' Court, filing fees also vary depending on the amount you are claiming. As at 1 January 2019, for claims up to \$1,000 it is \$147.40 and for claims between \$1,000 and \$10,000 it is \$307.80. There are additional fees if you ask the Court to arrange for service on the Defendant. Unlike in the VCAT, a successful Plaintiff can usually apply to the Court for a costs order against the Defendant.

## What Happens at the Hearing?

### VCAT

For claims where less than \$15,000 is in dispute, parties are generally not allowed to be represented by a lawyer and must prepare their cases to the best of their ability. The parties must take to the hearing all of the evidence, including relevant original documents (such as contracts, receipts, cheque books, time



sheets, written quotes, photographs) and witnesses. If an interpreter is required, the VCAT should be contacted. Interpreters can be arranged by the VCAT at no cost.

First the Applicant, then the Respondent, presents their case to a Tribunal Member in a fairly informal atmosphere. Any other party with 'sufficient interest', (for example, persons who have carried out work or supplied goods in connection with the contract) may then give evidence. Evidence is given under oath. The Tribunal Member can ask questions at any time. Both parties are given the opportunity to question each other. The Tribunal Member will attempt to bring the parties together to settle the dispute. If this is not possible, the Tribunal Member will make an order.

The VCAT will give reasons for a decision, however these are not always written. If your matter is a small claim (\$15,000 or less), VCAT is not obliged to give written reasons unless a person has made a specific request for written reasons before or at the time of the giving or notification of VCAT's decision in the proceeding. In any other case, if the VCAT gives oral reasons, a party may, within 14 days, request that the VCAT provides written reasons.

## **The Magistrates' Court**

Parties may be represented by a lawyer. If the matter is not referred for mediation, or the mediation has not succeeded in resolving the matter, a pre-hearing conference will be scheduled at least 28 days after lodging a notice of defence. At the conference, a Registrar will try and assist the parties in reaching an agreement to resolve the dispute. If the dispute cannot be resolved an attempt will be made to identify the issues in dispute. If the matter is still not resolved, it will be listed for a final hearing (or arbitration – see above) before a Magistrate.

Following a pre-hearing conference, a hearing date will be set. The hearing is conducted before a Magistrate according to the rules of the Court. After hearing both parties, the Magistrate will hand down a judgment and may make an order as to costs (the legal costs of making or defending the claim) against the losing party.

## **Enforcement**

### **VCAT**

An order by a Tribunal Member is legally binding. If an order for payment of money is not complied with, it can be enforced by bringing separate enforcement proceedings in the Magistrates' Court.

### **The Magistrates' Court**

An order by a Magistrate is legally binding. If a party does not pay in accordance with the Magistrate's order, the order can be enforced by bringing separate enforcement proceedings in the Magistrates' Court.

## **Appealing the Decision**

### **VCAT**

A party may seek leave to appeal a decision of the VCAT to the Supreme Court of Victoria on questions of law. Be aware that time restrictions apply.

## The Magistrates' Court

A review of the decision of the Magistrate may be made in certain circumstances by the Supreme Court of Victoria but again, be aware that time restrictions will apply.

## Where can I obtain further information about VCAT and the Magistrates' Court?

- Visit the VCAT website at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au), or call on 1300 01 8228.
- Visit the Magistrates' Court website at <https://www.mcv.vic.gov.au/>. Telephone numbers for the individual Court registries are available via the 'Find a Court' function on the website.
- The Federation of Community Legal Centres (Victoria) Secretariat can refer you, where appropriate, to your nearest community legal centre. Telephone (03) 9652 1500. You can also contact the National Association of Community Legal Centres on (02) 9264 9595 or visit [www.naccl.org.au](http://www.naccl.org.au), which contains a directory of community legal centres in all States and Territories.

## Alternatives to Legal Proceedings

### Mediation

In both VCAT and the Magistrates' Court the parties are encouraged to settle their dispute outside the formal system. Under the ACLFTA the Director of Consumer Affairs Victoria can order parties to mediate or conciliate their dispute. This is where the dispute is between a business and a purchaser, or a consumer and a supplier of goods or services in trade and commerce. This aims to assist small businesses in resolving their disputes. As noted above, parties may also pursue mediation for themselves independently of the court or tribunal, provided both parties agree to the process. The Dispute Settlement Centre conducts mediation for free and offers a free dispute advisory service. They can be contacted on 1300 372 888 or go to their website via <https://www.disputes.vic.gov.au/>.

## 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.

### Disclaimer

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