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## DEBT RECOVERY – SMALL CLAIMS PROCEDURE (QUEENSLAND)

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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 Fair Work Act, 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 '[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 have a **small claims tribunal** or a **small claims division** of their local court that provides a simple debt recovery procedure. The 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 Queensland, the Magistrates Court can deal with debt recovery claims up to the value of \$150,000. Debt recovery claims between \$150,000 and \$750,000 are dealt with by the District Court and debt recovery claims greater than \$750,000 are dealt with by the Supreme Court.

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 court or tribunal; 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 (which is not common in small claims), the other party may 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 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 Surreal Crescent, Brisbane, Qld 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

Small claims are part of the minor civil disputes jurisdiction and are dealt with by the Queensland Civil and Administrative Tribunal ('QCAT'). The Magistrates Court of Queensland does not have a small claims jurisdiction.

## When can I use QCAT?

QCAT's jurisdiction extends to:

- Debt disputes - These involve disagreements with another person, business or company about a fixed or agreed sum of money, valued up to and including \$25,000. Examples of a debt dispute include:
  - unpaid invoices or accounts
  - rent arrears, other than arrears of rent for a residential tenancy
  - work done and/or goods supplied with the cost having been agreed beforehand
  - money lent and not repaid
  - IOUs

- dishonoured cheques;
- Consumer and trader disputes, and other minor civil disputes - These involve disputes against another person, trader or company that arise out of a contract for the supply of goods and/or services and that are valued up to and including \$25,000;
- Property damage disputes - claims for payment of an amount for damage to property caused by, or arising out of the use of, a vehicle;
- Residential tenancy disputes, including rooming accommodation disputes; and
- Dividing fence disputes.

The maximum amount of money that can be claimed in QCAT's minor civil dispute jurisdiction will be \$25,000. If your dispute is about unpaid wages then QCAT may not be the appropriate court even if the amount is less than \$25,000. Such claims can be brought in one of the courts nominated under the *Fair Work Act 2009*. For more information see the Industrial Court of Queensland's information sheet on ['Recovery of Unpaid Wages and Superannuation'](#).

## What should I do?

To bring an action in QCAT for a minor debt dispute, you need to complete and file an *'Application for minor civil dispute - minor debt'* using Form 03. To bring an action for a consumer and trader dispute, you need to complete and file an *'Application for a minor civil dispute - consumer dispute'* using Form 01. You can obtain these forms and a free guide from QCAT on Level 9, Bank of Queensland Centre, 259 Queen Street Brisbane, from the local office of a Clerk of the Magistrates Court (who is also a Registrar of QCAT), from any Legal Aid Office, or from the QCAT [website](#).

After your Application is filed, the Registrar of QCAT will send a copy of your claim with a Notice of Hearing to the respondent. You will also receive a Notice of Hearing shortly after you have filed your claim.

The Registrar of the Court or the Registrar of QCAT can help you lodge your claim.

The claim form must include your full name and address (Applicant) and those of the other party (Respondent) (see the *'Who Can I sue?'* section of this information sheet). It should be lodged with a copy of any contract and other documents, such as receipts, which relate to the claim. You will have to provide multiple copies to QCAT: usually one for you, one for the Tribunal and one for each other party.

## What does the other party do?

In QCAT proceedings, the parties are referred to as the Applicant (you, or the person initiating the claim) and the Respondent (the person responding to the claim). If the Respondent is unable to attend the hearing, they may give their evidence in defence of the claim by filing a statement of oath or, with the consent of QCAT, they may appoint an agent to represent them. If the Respondent fails to do any of these things, the claim may be heard without them, and a default judgment may be entered against them if requested. Sometimes, an application can be made for the matter to be re-heard.

In either case, if you are successful or if you have default judgment entered in your favour, you can apply for a warrant to recover the debt through, for example, compulsory deduction from wages or by seizing goods or property.

## How much will it cost?

A small fee is payable when you lodge a claim. The amount of the fee depends on the amount claimed. This fee may be recoverable if you are successful. Application and appeal fees are listed on the [QCAT website](#). In limited cases, you may be able to have the fee waived if you can demonstrate financial hardship.

## Can I settle before the hearing?

Yes. If the matter is settled, you should tell the Tribunal immediately and always confirm the settlement in writing.

## What happens at the QCAT hearing?

In QCAT proceedings, parties are not allowed to be represented by a lawyer unless both parties and the Adjudicator agree.

Both parties must organise documents required to support their case, such as contracts, bills for work done, sales slips, receipts, and photographs. Parties must also organise for their witnesses (who will assist in proving the facts of their case) to attend the hearing. Expert witnesses are called at a party's own expense. Sworn written evidence can be used but verbal evidence is preferred.

The Adjudicator will usually ask if the parties can agree to settle. If an agreement is reached, it will be recorded by the Registrar; otherwise the Registrar will hear the dispute. It is then up to each party to the dispute to present their case and to call witnesses when necessary. After hearing both parties, the Referee will make a binding decision based on what they consider fair and equitable.

## Costs

In QCAT proceedings, the parties must appear for themselves without representation. The only costs recoverable are the filing and service fees. Legal representation costs are not recoverable.

## Enforcement

Orders made by the Referee are final and binding on all parties. Only in exceptional circumstances is an appeal against the decision allowed.

When an order for the payment of money is not satisfied, the other party may enforce the judgment in the Magistrates Court or by contacting the Civil Court Registrar at the courthouse who will give advice on enforcing the claim.

## 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

- QCAT publishes an '[Application checklist - minor debt](#)', which can assist to identify the correct application form and procedures for your application.
- The QCAT '[Form 3 - Application for minor civil dispute - minor debt](#)'.
- The Queensland Legal Aid '[Debt for creditors](#)' information sheet.
- The Queensland Legal Aid '[Debt for debtors](#)' is designed for debtors but contains information about remedies available to creditors.
- [ASIC Regulatory Guide 96 - debt collection guideline: for collectors and creditors](#).
- Australian Taxation Office '[Taxation Ruling TR 92/18](#)'.
- Australian Taxation Office '[Goods and Services Tax Ruling GSTR 2000/2](#)'.
- The Registrar of the Queensland Civil and Administrative Tribunal Level 9, Bank of Queensland Centre, 259 Queen Street Brisbane or [www.qcat.qld.gov.au](http://www.qcat.qld.gov.au).
- If you live outside Brisbane, contact the nearest Magistrates Courts Office. To locate your nearest Queensland Magistrates Court Office check the White Pages or the Queensland Courts [directory](#).
- Contact Dispute Resolution Centres: (07) 3239 6269 (Brisbane) or 1800 017 288 (outside Brisbane).
- Contact your local community legal centre, such as Cairns Community Legal Centre. For details contact National Association of Community Legal Centres at (02) 9264 9595 or visit [www.naclc.org.au](http://www.naclc.org.au) which has a directory of community legal centres in all States and Territories.

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