
DEBT RECOVERY – SMALL CLAIMS PROCEDURE (VICTORIA)

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.

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 you decide to write the debt off, you may be able to claim a tax benefit to lessen the loss. 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.

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 the Northern Territory, the Local Court can deal with debt recovery claims up to the value of \$100,000. If the money that is owed exceeds \$100,000 you must commence action in the Supreme Court of the Northern Territory.

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;

- 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, at www.asic.gov.au.

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 for more information).

Small claims procedure

You may be able to commence your action for debt recovery in the Victorian Civil and Administrative Tribunal (VCAT) or in your local Magistrates' Court.

VCAT

Disputes before VCAT must generally be about the supply of goods and services, and are usually between a consumer and a trader, or between a business and an individual. Your claim may be heard in the Civil Claims List of VCAT as either a 'fair trading dispute' or a 'small claim' (under the *Fair Trading Act 1999*).

Fair Trading Disputes at VCAT under the Fair Trading Act (FTA)

The FTA allows for a wide range of claims and remedies. The most notable features of claims brought under the FTA are as follows:

- there is a filing fee, which depends on the amount you are claiming;
- the dispute must involve a purchaser or possible purchaser and a supplier or possible supplier of goods or services;
- the claim may be brought by a consumer or a trader without monetary limit;
- in most cases no costs can be ordered for claims for \$10,000 or under and even for claims over \$10,000, generally each party will pay their own costs;
- the dispute must have arisen on or after 1 September 1999;

- proceedings must be commenced under the FTA at the VCAT within six years of the dispute (claims under the Motor Car Traders Act 1986 must be made within 3 months);
- personal injury must not be involved; and
- there is a wide range of remedies available under the FTA, including orders for payment of money found to be owing by one party to another, orders for the specific performance, variation, or cancellation of a contract, or the payment of exemplary damages.

Small Claims at VCAT under the Fair Trading Act (FTA)

To be a small claim the following additional requirements must be met:

- the claim must be either for the payment of money not exceeding \$10,000, or the performance of work of a value not exceeding \$10,000; and
- the claim must not relate to a contract for life insurance.

Local Magistrates' Court

Alternatively, a debt recovery action can be commenced in your local Magistrates' Court. 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.

If an action is commenced against you in the Magistrates' Court you may ask the court to transfer your case to VCAT. If your case is basically a consumer and trader dispute the court may agree that it would be more appropriately heard by VCAT.

If you are the purchaser and your action is for \$10,000 or less, you also have the option of paying VCAT the amount being claimed from you for them to hold and then your action will automatically be dismissed from the Magistrates' Court and transferred to VCAT. You can only do this before the case has commenced hearing.

If you are outside the Melbourne metropolitan area and your claim is relatively small, the Magistrates' Court might be a better option than the VCAT. The Magistrates' Court may also prove the better option if you don't fall within one or more of the specific categories of complainant required by the VCAT. More information on the Victorian Magistrates' Court, including court costs and locations, may be found on the website www.magistratescourt.vic.gov.au.

How do I Commence Legal Proceedings?

VCAT

You (the 'Applicant') should obtain an 'Application to Civil Claims List' form by calling the VCAT Civil Claims List Registry on (03) 9628 9830 or 1800 133 055 outside the Melbourne metropolitan area. The application form and a copy of the 'Civil Claims Guide' can also be obtained at the website: www.vcat.vic.gov.au. Fill in the application form and send it off to VCAT with the appropriate fee. Once received, the Registrar will send a copy of your application to the other party (the 'Respondent'). Shortly thereafter, you will be notified of the time, date and place for the hearing of your claim.

The Magistrates' Court

Obtain a copy of a Claim Form (the 'Complaint') from the Court. To find your closest Magistrates' Court, telephone the Civil Division Registry on (03) 9628 7777 or go to the website at www.magistratescourt.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 to obtain from the Court two copies of a 'Notice of Defence' form.

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 can the Respondent/Defendant do?

VCAT

The Respondent is not required to lodge any form with the VCAT in order to defend your claim. The Respondent can simply attend the Tribunal on the date set for the hearing with their evidence. However, the Respondent is 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. 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 (this is correct) 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 Defendant who counterclaims has to file and serve the counterclaim no later than 21 days (this is correct) after notice of defence to the first hearing

is given unless the Court otherwise orders. A counterclaim is normally heard at the same time as the hearing of the original claim unless the Court otherwise orders.

If the Defendant defends the 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.

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 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'.

Whilst mediation is no longer part of the formal Court process, parties may pursue mediation for themselves, independently of the Court. A dispute can only be referred to mediation if both parties agree. The Dispute Settlement Centre conducts mediations for free. They can be contacted on (03) 9603 8370 or 1800 658 528 (toll-free).

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 an informal 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. Magistrates' Court filing fees are relative to the amount claimed. A successful Plaintiff can apply to the Court for reimbursement of the filing fee from the Defendant.

There is a fee to make an application under the Fair Trading Act 1999, which depends on the amount you are claiming. In some circumstances this fee is non-refundable, regardless of who wins. If an action is started in VCAT the fee may be waived if it can be proved that it will cause you financial hardship, or if there are exceptional circumstances. Check www.vcat.vic.gov.au for further details.

What Happens at the Hearing?

VCAT

For claims where less than \$10,000 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) will 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.

If the claim was brought under the *Fair Trading Act*, it may be possible for 'costs orders' to be made for you or against you.

The VCAT must give reasons for a decision, however these are not always written. 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. 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 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 of Orders

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 in the Magistrates' Court.

The Magistrates' Court

An order by the Magistrate is legally binding. If a party does not pay in accordance with the Magistrate's order, the order can be enforced 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 but 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?

- The Registrar of the VCAT Civil Claims List telephone (03) 9628 9830 or 1800 133 055 or visit their website at www.vcat.vic.gov.au.
- Melbourne Magistrates' Court - Civil Division telephone: (03) 9628 7777 or visit their website www.magistratescourt.vic.gov.au.
- The Federation of Community Legal Centres (Victoria) Secretariat can refer you, where appropriate, to your nearest community legal centre. Telephone (03) 9602 4949. You can also contact the National Association of Community Legal Centres on (02) 9264 9595 or visit www.naclc.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. Whilst mediation is no longer part of the formal court procedure, parties may pursue mediation for themselves independently of the court, 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 (03) 9603 8370 or toll-free on 1800 658 528 or go to their website via www.justice.vic.gov.au.

Consumer and Business Affairs Victoria

As an alternative to commencing legal proceedings, you should consider making a complaint to Consumer and Business Affairs Victoria (telephone 1300 558 181 for business names information, go to their website at www.consumer.vic.gov.au, or email consumer@justice.vic.gov.au). Be aware that this Government body can only negotiate on your behalf and cannot compel any party to accept a proposed resolution of your dispute. Consumer and Business Affairs Victoria will generally only consider complaints from private consumers about goods or services which have been purchased, or are to be purchased, provided that the complaint has a sufficient “public interest”. A complaint is within the public interest if:

- it is serious;
- it is prevalent or has a wider impact; or
- it is of sufficient interest to the complainant, the respondent to the complaint and to the wider community.

Consumer and Business Affairs may also handle complaints from traders, however it will only do so if it considers there is a **significant** public interest.

Ombudsman

You should also make enquiries as to whether an Ombudsman has been appointed as a “watchdog” over the particular industry involved. Ombudsmen have been established in many industries, including the Telecommunications Industry Ombudsman (telephone (03) 8600 8700; www.tio.com.au) and Insurance (telephone 1300 363 683; www.insuranceombudsman.com.au). However, you should be aware that the scope of the powers of Ombudsman to investigate complaints and make binding determinations varies significantly between industries.

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.

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