
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.

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 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 offer a **small claims** division or **small claims tribunal** of their local court 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 Victoria, the Magistrates Court can deal with debt recovery claims up to the value of \$100,000. Debt recovery claims above \$100,000 can be brought in the County Court or 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 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;
- 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?

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 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

In Victoria, small claims can be commenced in the Victorian Civil and Administrative Tribunal (VCAT) or in your local Magistrates' Court.

When can I use VCAT?

VCAT is intended to offer a low cost, accessible, efficient alternative to the Magistrates Court and other courts. Often the VCAT will deliver its decision on-the-spot or shortly after hearing.

If your claim is a 'consumer and trader dispute' arising under the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (**ACLFTA**) which is a claim for no more than \$10,000 it is considered a 'small claim' and may be heard in the Civil Claims List of VCAT as a 'small claim'.

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 items purchased that won't perform, services you paid for that are inadequate or late, not being paid for services or goods that you supplied and misleading or deceptive conduct, false representation and unconscionable conduct in business. VCAT will not hear disputes about services provided under purely private arrangements as distinct from those in trade or commerce, personal injury disputes, disputes between people who are not connected with Victoria or disputes not arising under a contract.

In 'small claims' matters, the parties cannot be represented by lawyers unless the Tribunal is satisfied that the other party will not be unfairly disadvantaged and usually will not make orders for costs. In other words, even if unsuccessful, a party will not usually 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.

Local Magistrates' Court

Alternatively, a debt recovery action can be commenced in your local Magistrates' Court. If your claim doesn't fall within the specific categories of dispute eligible for hearing by the VCAT or you are outside the Melbourne metropolitan area, you can consider the Magistrates' Court. More information on the Victorian Magistrates' Court, including court costs and locations, may be found on the website www.magistratescourt.vic.gov.au.

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

If you are the purchaser in a consumer and trader dispute and the claim against you is for \$10,000 or less, you also have the option of paying the amount being claimed from you to the VCAT for it 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.

How do I Start?

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 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 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. 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 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 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. The filing fee in the VCAT varies depending on the amount you are claiming. As at 1 December 2013, for claims under \$500 it is \$44.90 and \$132.30 for claims between \$500 and \$10,000. It is possible to apply for this fee to be waived or reduced in cases of financial hardship.

In the Magistrates' Court, filing fees are also relative to the amount claimed. The filing fee varies depending on the amount you are claiming. As at 1 December 2013, for claims under \$1000 it is \$131, and for claims between \$1000 and \$10,000 it is \$273.50. 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 \$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.

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

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 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?

- 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. 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. Parties may also 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.

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

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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