

## Debt Recovery Basics

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If you are owed money for goods or services, the first step in attempting to recover the debt owed is generally to send a *letter of demand* to the other party setting out the amount of money outstanding and giving them a defined period of time within which to settle the matter by paying you the money owed or face legal action.

### Letter of Demand

The letter of demand should be sent by your lawyer on your behalf warning the person owing the money (the debtor) that if they don't pay the debt within a certain time period (often seven days) they will be sued by you (the creditor) in court to recover the debt.

A letter of demand should be the last letter a creditor sends before issuing court proceedings. While letters of demand are not court documents they are often an effective means of forcing the debtor to take action, particularly when they are sent by a lawyer.

It is a good idea to contact us first to ascertain whether it is prudent to proceed with court proceedings and this will usually depend on the size of the debt. Naturally if the sum owed is small it maybe uneconomic to pursue the debt by engaging a lawyer or even pursuing the debt at all. If the sum owed is in excess of \$5,000.00, it allows you to proceed with Bankruptcy against the debtor, which in our view is the most effective recovery option.

You must, however, ensure that in enforcing your rights to recover the debt you act within the law.

### Principles of debt collection fairness

When sending a letter of demand, you should be careful not to harass the debtor or send a letter which is designed to look like a court document.

You must not pursue a person for a debt unless you have reasonable grounds for believing the person is liable for the debt.

#### (a) Time limits

A creditor has a limited period of time to sue for a debt. In most instances for debts owed this will be 6 years.

If the debtor has made no payments towards the debt or has not acknowledged in writing that they owe the debt for a period of 6 years from when the debt arose then the debt may no longer be recoverable.

## **(b) Disputed debts**

The debtor has the right to dispute a debt and may do so on the grounds that:

- it is not their debt;
- they have already paid the money;
- they disagree with the amount of the debt; or
- it is an old debt and they haven't made a payment for at least 6 years, no court judgment has been entered against them and they haven't admitted in writing that they owe the debt in that time.

If the debt is disputed then you, as the creditor, may have no alternative but to commence legal proceedings or to seek to negotiate a compromise with the debtor.

### **When a your lawyer becomes involved**

If you, as the creditor, are not willing to negotiate or wait for payment, you may wish to contact us to assist with pursuing the debt.

If you know the debt is due and payable and you want to commence legal proceedings it is prudent to have a legal professional assist you and represent you in court to recover the debt. If the size of the debt does not warrant that, then we may still be able to help you to negotiate a payment plan that is manageable to the debtor and acceptable to you.

It is not in the debtor's interest to ignore your claim and risk the additional costs of the legal fees and interest on top of the original debt. By following the correct process we can help bring the matter to a conclusion satisfactory to you.

### **The debt recovery process**

Our usual process would be to obtain from you copies of the outstanding Invoices owed to you and a summary of the work performed and recovery attempts made to date.

We would then draft a letter of demand requesting payment within 7 days.

If no response was forthcoming, or the debtor fails to pay within 7 days, we obtain your instructions to draft a Magistrates' Court Complaint.

The Magistrates' Court Complaint provides the debtor with 21 days to pay the debt or file a Defence.

If the debt is not paid after 21 days, we obtain your instructions to file an application for judgement. Once a judgement debt is obtained, we will discuss your recovery options i.e. Bankruptcy, Attachment of Earnings, or a Sheriff's warrant.

If the debt is disputed and we receive a Defence from the debtor, then the matter will be listed for Pre Hearing Conference or Mediation at the Magistrates' Court. In general, all defended matters, except claims for motor vehicle collisions or claims for less than \$1,000.00, are referred to a pre-hearing conference or mediation. Mediation is ordinarily reserved for the more complex matters, where the amount in dispute is \$30,000.00 or more.

It is hopeful that the matter can be resolved at Pre Hearing Conference or Mediation, however, if not the Court will list the matter for Hearing and a Magistrate will decide whether or not to make an Order for judgement debt in your favour.

At the hearing, the Creditor will call witnesses to give evidence in support of the claim. After each witness has given their evidence, the witness can be cross-examined by the Debtor on issues raised in the evidence. The same procedure applies to the Debtor once the Creditor has closed their case.

After all witnesses have completed giving their evidence, the Magistrate will give a decision. The decision is based on the balance of probabilities.

As mentioned above, if the judgement debt is greater than \$5,000.00, Bankruptcy is a recovery option available to you. If the debt is less than \$5,000.00, the Magistrates' Court provides various options for the recovery of debt such as attachment of earnings or a warrant to seize property.

### Conclusion

You should contact us to discuss your legal rights and obligations if you are owed money or even if you owe money to someone else who is threatening court action.

If you would like more information or require assistance or advice on how to proceed in debt recovery matters please contact us on (03) 9347 0355 or email [info@schembrilawyers.com.au](mailto:info@schembrilawyers.com.au) today.



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