



# Debt Recovery

Providing credit to your clients may have some advantages, such as attracting more sales by providing your clients with an added convenience. However, businesses sometimes run into the unfortunate problem of having to recover bad debts.

In the first instance, it is best to minimise the likelihood of bad debts through practices such as clearly stating the terms of trade and credit, conducting credit checks prior to issuing credit, and keeping track of all your debtors. In the event of needing to recover debt from clients, there are a number of methods you can use. In particular, you may seek to personally consult your client, send a written request to settle the debt, or proceed with legal action.

## Credit Management Strategies

A sensible business practice in providing credit is to undertake appropriate measures to prevent the incidence of bad debts. These measures do not need to be complicated or overwhelming.

The following simple preventative measures will be a good start:

- Conduct a credit check on new clients – this may include each client completing an application for credit. A credit check may include business and personal details, credit references/guarantors, or a commercial credit check.
- Ensure that your credit policy and conditions are clearly explained to your clients.
- Ensure all agreements including the conditions of credit are made in writing and signed.
- If practical, collect a deposit or pre-payment before making a supply. Alternatively you may collect progress payments to reduce the risk of bad debts.
- Maintain your debtors' account and make regular credit reports to highlight any due or overdue debts.
- Implement a structured practice for following up overdue debts. In the first instance, this may involve making a phone call, visiting your clients or sending a polite reminder letter.
- Continuously evaluate the credit rating of your clients.
- Remember: you are not obliged to provide credit to risky clients.

If you still incur bad debts after having implemented credit management strategies and you wish to recover these debts, you may do so through the three following methods: Consultation; Letter of Demand; or Legal Proceedings. It is advisable that you select the appropriate method(s) for recovering your bad debts.

## Consultation

When a bad debt arises, it is in your best interest to contact the person who owes you the money and attempt to agree over the payment of the debt. You may also seek the assistance of Community Justice Centres to help you resolve any disputes. Community Justice Centres provide free and confidential mediation and conflict management services to assist people to resolve disputes. You may contact the Community Justice Centres on (02) 9228 7455 or email them at [cjc\\_info@agd.nsw.gov.au](mailto:cjc_info@agd.nsw.gov.au).

## Letter of Demand

If you are unsuccessful in recovering the debt by consultation, you may wish to issue a letter of demand to the person who owes you the money (including a company), requesting that they pay you the outstanding amount by a certain date. Either you or your solicitor can draw up a letter of demand.

The letter should state details of the debt and also warn the person that legal action will be commenced if they do not pay by the prescribed date. Before issuing a letter of demand, it is important that you evaluate the consequences of taking legal action. If you prefer not to send a letter of demand, a less formal letter requesting payment may be more appropriate.

The letter of demand may be later produced as evidence that you tried to recover the debt, if legal action is taken.

In the case where you are trying to recover a debt from a company, you may also issue a statutory demand, if you receive no response from your letter of demand. A statutory demand is a formal version of a letter of demand, set out similar to a court document. A statutory demand indicates that legal action is imminent if the debt is not paid within twenty-one (21) days. Either you or your solicitor can draw up a statutory demand.

At this point in time, if the debtor does not respond to your written request/demand, you may consider taking legal action.

### **Legal Proceedings**

If you wish to recover your debt through legal proceedings, be aware that in some cases, the process may become complicated and you may need to seek legal assistance.

The type of legal proceeding will depend on the amount of the debt owed by the person. There are four main courts you may go to depending on the amount of the debt.

- Debts up to \$10,000 are dealt with in the Small Claims Division of the Local Court.
- Debts between \$10,000 and \$40,000 are dealt with in the General Division of the Local Court.
- Debts between \$40,000 and \$750,000 are dealt with in the District Court.
- Debts over \$750,000 are dealt with in the Supreme Court.

Legal proceedings go through a number of steps:

#### **Step one – Statement of Claim**

To start a legal proceeding, you must lodge a Statement of Claim at the relevant Court. As a plaintiff, you will lodge a Statement of Claim against the person that owes you the money (known as the defendant).

A Statement of Claim is a document that sets out:

- Who owes you the money;
- How much you are owed;

- When and how the debt arose; and
- How long they have to pay you back.

In the case where a business owes you money, it is required that you conduct a search to identify the business name, address, place of business and ABN (for companies). You may obtain this information from the Australian Securities and Investment Commission (ASIC) for companies or the Office of Fair Trading for other businesses.

You may complete a Statement of Claim at any Court or ask your lawyer to prepare a Statement of Claim for you. If you are lodging your Statement of Claim at the Local Court, you may access Statement of Claim forms from the NSW Local Court website at [www.lawlink.nsw.gov.au/lc.nsf](http://www.lawlink.nsw.gov.au/lc.nsf).

#### **Step two – Serving the Summons**

Upon lodging your Statement of Claim, you will be issued a Summons that must be served to the defendant. A Summons is a court document which informs the defendant that a legal claim has been sought by the plaintiff for a certain amount of money. The Summons also demands that the debt be paid by a certain date.

A Summons may be served by either the Sheriff's Office or yourself. If you serve the Summons yourself, you should ensure that you serve the Summons correctly. Because each Court may have different rules on serving a Summons, it is best to check on the correct procedure beforehand. A Summons should be handed to the person who is named in the document who owes you the money, or in the case of a company, to the registered office. You may either post the Summons to the registered office of the business or hand the Summons to an employee of the business. Note that you can only serve the Summons to a person who is over the age of 16 years.

After you have served the Summons, you may be required to provide the Court information on how and when the document was given. This is usually done through an Affidavit of Service. Make sure you have proof that the summons was actually served.

#### **Step three – Legal Proceedings**

Upon receiving the summons, the defendant may:

- Ignore the Statement of Claim;
- File a confession to the debt; or
- File a defence to the debt.

#### No Action

After 28 days, if the defendant has not responded to the Summons with a confession/defence or has not made any payment, thereby ignoring the Statement of Claim, the plaintiff may ask the Court to make a 'default judgement'. Applying for a default judgement is simple and does not require a solicitor. The plaintiff will be required to file an Affidavit of Service (stating how the service was carried out) and an Affidavit of Debt (stating the amount owed). In this case, the Court will normally decide in your favour without you having to go to court at all.

#### Undefended Action

The defendant may file a confession to the debt and request to pay the amount by instalments. If the Registrar of the Court makes an instalment order, the plaintiff is given the opportunity to accept or reject it. If the plaintiff rejects an instalment order or the Registrar refuses to make an instalment order, there is a hearing as to what the payment should be.

#### Defended Action

If the defendant believes that they do not owe the money or does not agree with the amount of the debt, a defence may be filed with the Court. As well as filing for a defence, the defendant may file for a cross claim at the same time, if they wish to raise a claim against the plaintiff or any other person.

Upon filing for a defence/cross claim, the Statement of Claim, defences and cross claims are filed together and referred to as "pleadings".

Claims of less than \$10,000 that are dealt with in the Small Claims Division of the Local Court have been simplified. A solicitor is not necessary for the hearing. A 'pre-trial review' is first conducted to try to negotiate a settlement between the two parties. If there is no agreement, a hearing is scheduled to decide the matter. Generally, the hearing does not involve parties giving oral evidence. Rather the court directs parties and their witnesses to provide written statements and a decision is made based on the evidence in the statements.

Claims larger than \$10,000 require a more formal procedure to be undertaken. There are several proceedings before a hearing. Each party may need to list and make available to the court all documents in their possession or control and/or issue court orders (subpoenas) requiring third parties to produce specific documents to the court. Further, the court may order each party to file statements or Affidavits in some cases.

Due to the complex nature of formal court proceedings, it is advisable that you seek the assistance of your solicitor if your debt recovery goes that far.

#### **Step four – Enforcing the Judgement**

If you are successful in your legal proceedings, the next step is to enforce the judgement. This means taking action to recover the debt from the debtor.

To recover your debt, you may:

- Issue a writ of execution, whereby the Sheriff's Office goes to the debtor's address to try to collect the money.
- Issue a writ against land, in the case where a writ of execution was unsuccessful.
- Issue a garnishee order to anyone that owes the debtor money. The order directs the garnishee to direct the money to the creditor.
- Issue an examination summons, if little is known about the debtor's financial position. This summons the debtor to go to a nearby court to be examined about their financial position.
- Seek the debtor's bankruptcy in the case of individuals or liquidation/winding up in the case of a company.

Prescribed forms are required for enforcing the judgement. These are available from the Court, or in the case of the Local Court, from their website at [www.lawlink.nsw.gov.au/lc.nsf](http://www.lawlink.nsw.gov.au/lc.nsf).

It is important to note that the debtor may at this point apply to the court to pay by instalments. If an application is made and rejected, another hearing relating to the payment may arise.

#### **Costs**

Legal proceedings may be complicated and expensive. You are likely to incur

costs at every stage of the legal process, including costs relating to your solicitor and to the services of the Sheriff's Office. Consult your Local Court for information on costs that may be incurred.

## **Contacts**

**Law Access:** General advice about debt recovery matters can be accessed through Law Access by phoning 1300 888 529 or visiting [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).

**NSW Local Courts:** To find out the location of your nearest NSW Local Court, refer to the NSW Attorney General's Department website at [www.lawlink.nsw.gov.au/lc.nsf](http://www.lawlink.nsw.gov.au/lc.nsf). You may also access further information about going to a Court, including a Guide to Serving a Statement of Claim, at this website.

**Civil Court:** To inquire about debts exceeding \$40,000, contact the Civil Registry of the Civil Court on (02) 9377 5830, or alternatively search the website: [www.lawlink.nsw.gov.au/](http://www.lawlink.nsw.gov.au/).

**Community Justice Centres:** If you have an inquiry regarding arranging mediation or advice on dealing with a dispute, you may locate your local Community Justice Centre by searching their website at [www.lawlink.nsw.gov.au/cjc.nsf](http://www.lawlink.nsw.gov.au/cjc.nsf).

**Solicitors:** To locate solicitors in your area, search the Law Society of NSW website ([www.lawsocnsw.asn.au](http://www.lawsocnsw.asn.au)) by name or suburb/region, or contact the Law Society on (02) 9926 0305 / (02) 9926 0383.

## **For More Information:**

Contact your local Business Advisory Service on 1300 650 058 to talk over business management issues or visit the Department of State and Regional Development's Small Business Website at [www.smallbiz.nsw.gov.au](http://www.smallbiz.nsw.gov.au).