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## DEBT RECOVERY IN NEW SOUTH WALES

*The information contained on this website is general information only and should not be relied on as legal advice. The information herein assumes that the contracts under which money is owed is legally enforceable and that the debts are not subject to the National Consumer Credit Protection Act, 2009 (Cth) or the National Credit Code.*

*This information generally explains the processes in the Debt Recovery Flow Chart.*

### Contract

A documentary trail including quotes, invoices, delivery dockets, statements of account, contracts, applications for credit including personal guarantees are the key to effective debt recovery. It is important to get the details of the relationship accurate at the outset.

It is important to correctly identify the party with whom you are contracting. Who are you selling or providing services to? Ask for business cards or even better confirmation by email so you can clarify your customer. Is it a company, a trust, partnership or sole trader? Do you need a personal guarantee?

Once you have determined the correct identity and status of the customer, it is advisable to undergo a process of confirming the customer's financial ability to pay. Usually if a company applies to contract with you, a personal guarantee may be required or security including an ability to lodge a Caveat or obtain a Bank Garnishee. An ASIC search is useful to obtain and think about not only a guarantee from the director but also the shareholder.

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## Ask Us

Ask us to do searches including ASIC, bankruptcy and real property searches to assist you in considering the contract.

Ask us for advice as to your prospects in recovery of your debt, bankruptcy, winding up or mortgagee possession proceedings.

## Terms and Conditions

Be clear about what your terms and conditions are. They should be published on your website together with your privacy policy.

Not documenting the terms of the agreement can lead to uncertainty as to what was in fact agreed which may cause difficulties in debt recovery.

Create a paper trail by emails and confirmations in writing.

## Recovery Options

## Letter of Demand

When chasing payment for goods and services we recommend that the first step to be taken is to send a letter of demand to the other party clearly setting out your dispute, the money outstanding and then giving them a definite period within which to settle the matter or else face legal action being commenced.

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We will assume your accounts staff will follow up with the company letter of demand and phone calls. Any complaint should be promptly dealt with and documented as to the outcome. However when sending a letter of demand you must be careful not to harass the debtor or send a letter which is designed to look like a Court document because this is illegal.

In response to a letter of demand, a debtor has the following options: -

- Pay the full amount owing. At this point, if your debt is paid in full the debt recovery process ends here as there is no need to take further action.
- Show that no money is owed.
- Negotiate a compromise, for example, payment of your debt by instalments or part payment. Any compromise should be confirmed, in writing to avoid later disputes.
- Ignore the letter or respond to it in a way that is unsatisfactory to the creditor.

Our fee is \$45 plus GST per letter of demand.

Debt recovery court action is 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; and

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- Once judgment is obtained you must actually recover the money owed to you, which may involve taking enforcement action against the debtor.

## Statement of Claim

You can commence proceedings by issuing a Statement of Claim in the appropriate Court for recovery of your debt. Depending on the size of your debt, will depend on which Court your matter will be heard in. The Court limits are: -

- a) Local Court - claims up to \$100,000.00
- b) District Court – claims up to \$750,000.00
- c) Supreme Court – unlimited

We issue the Statement of Claim electronically on Justice Link.

Service on a company is by ordinary post and personally on an individual Defendant. The Local Court will serve an individual by post.

Once the Defendant has been served with a Statement of Claim they can file a Defence within 28 days of service of the Statement of Claim.

If the Defendant fails to file a Notice of Defence with the Court, or confess and apply to repay by instalments within 28 days of being served with the Statement of Claim, the creditor can apply for judgment.

If the Defendant defends the claim, the matter will automatically be set down in the Court list.

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If an individual has personally guaranteed the company's payment of the debt, you also have the option to sue the guarantor to seek recovery of the debt.

## **Scale Costs and Disbursements**

We charge the Court scale for undefended matters so you are not charged more than the Court allows and orders are sought wherever possible for the otherside to reimburse you our costs.

## **Judgment**

If the proceedings are not defended by the debtor, then Judgment will be entered in 4 – 6 weeks from the date of service of Statement of Claim. Again we apply online for judgment and charge the Court scale.

## **Enforcement Options**

### **Writ**

Once judgment is obtained then the creditor can make an Application for Writ of Levy of property which means the Sheriff will go out to the house or business of the debtor and seize goods such as T.V., car, furniture and then sells them at auction to pay for the debt. This would take 2 – 3 months from the date the Writ is applied for and the Sheriff charges a fee for each visit.

### **Garnishee Order**

Once judgment is obtained a Garnishee Order can be issued to the employer for garnishee of wages. Not all wages can be deducted but some of the wage is available to be paid to creditors on a Garnishee Order. A Bank account or investment deposit, dividends and any debts such as rent can all be garnisheed. If

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## **Examination Notice/Examination Summons**

The judgment debtor can be sent an Examination Notice to set out their statement of assets, liabilities, income and expenditure and for production of wage details, Bank statements and income tax returns so you can properly determine whether any of the above steps are best undertaken.

## **Bankruptcy**

Once Judgment is obtained the creditor can issue a Bankruptcy Notice which is a further 21 day demand for payment of the Judgment debt. Once again, the 21 day period starts from the date which the Bankruptcy Notice is served.

Service can be by email or by post. It does not have to be personal service. Within 6 months of service a Creditors Petition can be issued.

If the Writ of Levy of Property is unsatisfied and/or the Bankruptcy Notice is issued and debt unpaid, then the Creditor has 6 months and 21 days from the date of service of the Bankruptcy Notice to file a Creditors Petition to make the debtor bankrupt. The Creditors Petition hearing usually is within 2 months from the filing date of the Petition. The judgment debt must exceed \$5,000.

The advantage of bankruptcy is that a Trustee in Bankruptcy can investigate the financial affairs of the debtor, including any transfers of property to family members or sell property, including real property which the bankrupt owns at the date of bankruptcy.

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Upon the appointment of a Trustee in Bankruptcy he sells all of the assets and distributes the proceeds amongst the unsecured creditors in accordance with the priority rules in the Bankruptcy Act, 1966 (Cth). Banks and other secured creditors have first priority. The bankruptcy lasts for at least 3 years unless it is extended by the Trustee in Bankruptcy. The 3 year period does not commence to run until the Statement of Affairs is filed by the bankrupt.

### Winding Up

If the debtor is a company and the debt is more than \$2,000, and there is no genuine dispute in relation to the debt, then you can issue and serve a Statutory Demand upon the debtor. The debtor has 21 days to either pay the debt or make a payment arrangement with you. The debtor may also apply to the Court to set aside the Statutory Demand, on the basis that there is a genuine dispute. A judgment is not needed for a Statutory Demand but usually it is the safest course.

A failure to comply with a Statutory Demand gives the ability to initiate winding up proceedings. These proceedings result in an order being made by the Court to appoint a liquidator to take control of and liquidate the assets of the debtor company, then distribute the proceeds amongst unsecured creditors in accordance with the priority rules in the Corporations Act 2001 (Cth). Banks and other secured creditors have first priority and the Liquidator is paid before employees and unsecured creditors.

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