

Back to basics– court claims

There are a number of ways that a Creditor (you) can take legal action in an effort to recover its outstanding debts. One of those ways is to file a Claim in the appropriate Court and serve the stamped Claim on the Debtor and any Guarantor.

There are different processes to be followed across the different States in Australia, but each Claim will usually contain the same basic information:

- (a) The name and details of the Creditor;
- (b) The name and details of the Debtor;
- (c) The name/s and details of the Guarantor/s, if any;
- (d) Details of the contract pursuant to which the debt is payable or the transaction/s giving rise to the debt;
- (e) The quantum of the debt and particulars of how it has been calculated;
- (f) Details of any demand for payment of the debt;
- (g) Details of legal costs incurred, where applicable; and
- (h) Details of default interest payable on the debt.

If you wish to proceed with a Claim, you must do so before the expiration of any limitation period. This period, for unpaid debts, usually commences on the date that the debt became properly due and payable (i.e. the expiration of the payment terms) and ends six years from that date. If you fail to file a Claim before the expiration of the limitation period, it is normally very difficult to procure the leave of the Court to file out of time.

Once a Claim has been filed, it is not effective until it is served. The Claim should be served within 1 year of it being filed, otherwise it becomes stale. If it becomes stale, the leave of the Court can be obtained to renew the Claim, but this renewal is by no means guaranteed and the delay in service must be properly explained.

A Claim can be served on a company by posting it to the registered office of the company. Service on any other address will be ineffective, unless supported by a Court order. A Claim can only be served on an individual by personally serving the Claim on that individual (subject to some concessions in respect of Magistrates Court claims).

If an individual cannot be served reasonably quickly, you can seek to serve the Claim by way of substituted means (i.e. post, email, text or even via Facebook). In order to succeed on such an application to the Court, you must be able to establish that the Claim is likely to come to the attention of the Defendant. This is sometimes difficult where the Defendant has purposefully gone to ground to avoid being served.

Given the current vagaries of Australia Post, a Claim posted by express post intra-state will likely be deemed to be received two days after postage (unless proven otherwise by the Defendant). A Claim posted interstate by express post will likely be received four days after postage.

Anything posted by normal post could be received anywhere between 7 to 10 days after postage and allowances need to be made for this delay in determining when a Defence is due to be filed by any Defendant.

It is not recommended that legal documents be served by Registered Post, as service is not deemed to occur until the Defendant has actually collected the documents. Some Defendants, knowing that they are about to become subject to legal action, will purposefully avoid collecting mail so that service is not deemed to have been effected.

Claims served personally are deemed served on the date of receipt, unless service takes place after 4pm or on the weekend, in which case, service is deemed to take place on the next business day.

After service, in most jurisdictions (the Victorian Magistrates Court being one exception), the Defendant must file a Defence within 28 days.

If the Defendant does file a Defence, you cannot simply abandon your Claim. In order for the Claim to be discontinued, you must either settle the Claim with the Defendant or obtain a Judgment from the Court. If you simply abandon it, the Defendant could seek to strike it out for want of prosecution and seek the payment of any legal costs it has incurred as a result of the Claim.

Whenever you file a Claim for payment of a debt, you should be prepared to compromise that Claim as early as possible to avoid legal cost and the risk of trial. If your debt is less than \$20,000, you can reasonably expect that the legal costs of proceeding to a trial will be greater than the amount of your debt. In this circumstance, even if you ultimately win, you will still lose, because your net result after accounting for legal costs will be worse than when you started.

If no Defence is filed within 28 days, you can seek Default Judgment. Default Judgment may be sought from the Registrar without a hearing where judgment is to be entered in respect of a Debt and interest and costs are to be recovered in accordance with the relevant legislation.

If you are seeking default interest at a greater rate than that prescribed by legislation (the legislative rate is quite low) or legal costs on a full indemnity basis, the Registrar may refuse to make an order for these amounts and you may be compelled to apply to a Judge to have these matters determined. Obviously, if this happens, your legal costs will be far greater.



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