

Court claims - an overview

What?

1. It is one method by which a creditor (plaintiff) may seek payment of outstanding debts from, or recover damages for breaches of any agreement with, a debtor and any guarantors of the debtor's obligations under that agreement (defendants).
2. If a defendant fails to pay the outstanding debt or damages within a specified period of time, the plaintiff may seek default judgment against the defendant/s for the full debt, plus costs and default interest. A simple debt judgment can be processed by the court registry and does not require an appearance before the court.
3. If the plaintiff seeks judgment for damages, the court registry cannot make an order for default judgment and the damages will need to be assessed via the lodgement of affidavit material and an appearance before the court.
4. Although it is submitted that the registry ought to be able to make a default judgment for full indemnity costs (what are known also as solicitor/own client costs - the costs that a plaintiff pays to its solicitor), the various court registries have taken the view that they are not entitled to make an order for full indemnity costs.
5. In this case, the plaintiff has a choice:
 - (a) limit the default judgment to the recovery of costs according to the court scale (in general, this means 30-40% of the total legal cost in the Magistrates or Local Court, 60% in the District or County Court, and maybe 70 to 80% in the Supreme Court); or
 - (b) have the application for default judgment referred to a judge or magistrate for determination of the full indemnity costs.
6. Sometimes, the cost of seeking payment of the full indemnity costs from the court will consume the difference between the scale costs and full indemnity costs in any event.
7. Where an agreement specifies a special rate of default interest, sometimes the registry will refuse to make an order for interest on that basis - for example, the basis of interest is novel, interest is to be compounded etc. If this occurs, the plaintiff is again left with a choice:
 - (a) accept the existing rate of default interest provided in the relevant State legislation (at present, the rate is 10% per annum under the *Civil Proceedings Act* (Qld)); or
 - (b) have the application for default judgment referred to a judge or magistrate for determination of the default interest.
8. As with legal costs, sometimes the cost of seeking the default rate of interest under the agreement will consume any benefit that may accrue.

Why?

9. A claim filed in the court allows the plaintiff to enter default judgment against the defendant/s if a defence is not filed within the appropriate time.
10. A default judgment allows the plaintiff to:
 - (a) serve a creditor's statutory demand on any company defendant with the possibility of winding up the company;
 - (b) serve a bankruptcy notice on an individual defendant with the possibility of making the individual bankrupt (a bankruptcy notice cannot be issued unless a judgment has first been obtained);
 - (c) lodge a writ over any land that may be owned by any defendant, which prevents its sale (except by a mortgagee) and allows the plaintiff to force the sale to pay its judgment;
 - (d) garnishee the defendant's wages by having the employer redirect payment to the plaintiff directly;
 - (e) obtain an instalment order, requiring the payment of the judgment by instalments;
 - (f) obtain an order that the defendant's bank redirect a proportion of payments received to the plaintiff directly.
11. The issuance of a claim is the most effective legal action for recovery of payment from an individual, such as a guarantor.

When?

12. A creditor may file a claim at any time that it considers a debtor to be in breach of its agreement.
13. It is submitted that a creditor should first ascertain whether the debtor professes to have a defence to any claim and determine whether that defence has any merit, before a claim is filed.

How?

14. 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 agreement pursuant to which the debt is payable or damages claimable, or the transaction/s giving rise to the debt or entitlement to damages;
 - (e) details of the breach of agreement complained of;
 - (f) the quantum of the debt or damages and particulars of how they have been calculated;
 - (g) details of legal costs incurred, where applicable; and
 - (h) details of default interest payable, where applicable.

15. If a creditor wishes to proceed with a claim, it must do so before the expiration of any limitation period.
16. This period, for unpaid debts, usually commences on the date that the debt became properly due and payable (ie, the expiration of the payment terms) and ends six years from that date (for debts payable pursuant to a deed, the limitation period may be 12 years).
17. The limitation period for claims for damages will usually commence on the date of the defendant's breach of the agreement and will end six years from that date (some claims for damages have a reduced limitation period - for example, some claims under the *Australian Consumer Law*).
18. If a creditor fails to file a claim before the expiration of the limitation period, it is normally very difficult to obtain the leave of the court to file a claim out of time.
19. Once a claim has been filed, it is not effective until it is served. The claim should be served within one 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.
20. A claim can be served on a company by posting it to the registered office of the company.
21. 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 and Local Court claims).
22. Service on a partnership must be served personally on each individual partner.
23. Service in any other manner will be ineffective, unless supported by a court order (called a substituted service order).
24. After service, in most jurisdictions (the Victorian Magistrates Court being one exception), the defendant must file a defence within 28 days.

Common issues

25. If an individual cannot be served reasonably quickly, a plaintiff can seek to serve the claim by way of substituted means (ie, post, email, text or even via Facebook).
26. In order to successfully obtain a substituted service order, a plaintiff 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.
27. Given the current vagaries of Australia Post, a claim posted intra-state (by express post) will usually be deemed to be received two business days after postage (unless proven otherwise by the defendant). A claim posted interstate by express post will likely be received four days after postage.
28. It is not recommended that a claim be served by ordinary post, as it may take seven business days or more to reach its destination, making it impossible to make an accurate determination as to when a defence will be due.
29. 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.

30. Claims served personally are deemed to be 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.
31. If a defendant does file a defence, you cannot simply abandon your claim.
32. 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 recover any legal costs it has incurred as a result of the claim.
33. 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.



Rob Grealy LL.B
Special Counsel
Commercial Dispute Resolution
Anderssen Lawyers

Phone: 07 3234 3130
Email: rob@anderssens.com.au

DISCLAIMER: *This content is intended only to provide a summary and general overview on matters of interest. It is not intended to be comprehensive nor does it constitute legal advice. We attempt to ensure that the Content is current but we do not guarantee its currency. You should seek legal or other professional advice before acting or relying on any of the Content. Your use of this publication or the receipt of any information from Anderssen Lawyers is not intended to create nor does it create a solicitor-client relationship between you and Anderssen Lawyers.*