

A Business Lawyer's Practical Guide to Debtor Management and Recovery

Here's some timely, practical guidance and basic tips on how to improve your business by better managing debtors and, in turn, improving your cashflow:

Terms of Trade

1. It is prudent that you implement standard, written Terms of Trade (also known as Terms & Conditions, Retainer/ engagement Agreement and the like) with all your clients or customers, as the case may be.
2. Terms of Trade specify your business' contractual terms and conditions, including how/when payment will be made to you (the creditor) by your client (the debtor).
3. To enable enforcement of your Terms of Trade, your client/customer must accept them before you supply them with any goods and/or services.
4. Terms of Trade should also incorporate debt recovery provisions specifying:
 - (a) if you extend credit and/or have large invoices, the client and its owners/directors provide "security" for such credit e.g. personal guarantees, charges, mortgages etc.;
 - (b) your rights to reclaim supplied goods (if appropriate). This is also known as "retention of title" and now must be properly dealt with and registered on the [Personal Property Securities Register \(PPSR\)](#);
 - (c) security over any goods that have not been paid for and security for payment of all amounts due. This too should be registered on the PPSR;
 - (d) interest accrues on unpaid debts (e.g. 8% per annum calculated daily); and
 - (e) the ability for you to recover from your client any legal costs incurred chasing payment of the debt (including Court proceedings).
5. A good business lawyer can also help you:
 - (a) Prepare an appropriate set of custom Terms of Trade (plus related Credit application and Guarantor documents, if so requested) to specifically suit your business. (As opposed some parties "borrowing" Terms of Trade they've found on the internet... which is not uncommon to find and it also not unusual see that referring to USA laws etc!), or
 - (b) review your existing Terms of Trade to ensure they are complaint and fully effective,



to ensure that your Terms of Trade are now suitably robust and offer the maximum protection available from delinquent debtors.

Your Internal Debt Recovery Process

6. The key to successful debt recovery is ensuring the debtor prioritises its payment of its debt to you. A simple way to ensure you are prioritised is to adhere to your Terms of Trade and/or payment terms, and follow up with the debtor.
7. Firstly, as soon as the deadline for payment (as noted on your invoices) expires, contact the debtor to inquire as to why payment has not been made, and when payment can be expected.
8. Secondly, if the debt remains unpaid, a written reminder notice should then be sent, specifying a deadline by which the debtor must respond.
9. If the debtor requires more time to pay, you should at the very least ensure that the amount of the debt is acknowledged or admitted in writing by the debtor. The easiest way to do this is to have them put any proposal to pay the debt to you in writing (this includes by email).

Legal Demands

10. If the debt remains unpaid, or agreement has not been reached (or complied with), details of the debt should then be sent to your business lawyer together with:
 - (a) your Terms of Trade signed by the debtor
 - (b) any correspondence between you and the debtor in relation to the debt; and
 - (c) your instructions as to whether you wish to:
 - i) preserve your business relationship with your debtor/client (i.e. a “softer” yet stern demand is prepared); or
 - ii) recover the debt without compromise (a more aggressive demand would be utilised).
11. We will review the debtor documents and then prepare and promptly issue your customised Letter of Demand, which will generally state that:
 - (a) your business lawyer acts for you;
 - (b) despite prior demands by you, the debt remains unpaid;
 - (c) payment of the debt is required to be made to you, together with legal costs and interest (if you are entitled to them under your Terms of Trade); and



- (d) if payment is not received within, say, 5 days of the date of the letter then we are instructed to commence legal action for the outstanding debt, interest and legal costs without further notice to the debtor.
- 12. Quite often, after receiving the Letter of Demand from your business lawyer, the debtor will either pay the debt or contact your business lawyer with a proposal to repay the debt in instalments.
- 13. Your business lawyer should always seek your instructions as to
 - (a) whether to accept a proposal, reject a proposal and negotiate a better payment plan; or
 - (b) reject a proposal and require full payment.
- 14. If your business lawyer fails to receive a response to the demand letter, or receive an inadequate proposal from the debtor, they then can commence legal proceedings against the debtor on your behalf - of course subject to your instructions expressly do so.

Legal Action Options

- 15. **Magistrates Court** - for debts up to \$75,000, proceedings can be commenced in the Magistrates Court.
- 16. **District Court** – for debts in excess of \$75,000 and up to \$750,000, proceedings can be commenced in the District Court.
- 17. **Supreme Court** – generally, actions for debts exceeding \$750,000 are brought in the Supreme Court.
- 18. **Federal Courts** – proceedings under Commonwealth (Federal) legislation can be brought in the Federal Magistrates Court and/or Federal Court, including insolvency proceedings.
- 19. **Statutory Demand** – as an alternative to standard Court proceedings, where:
 - (a) the debtor is a company;
 - (b) the debtor has no genuine dispute to the debt; and
 - (c) there are questions as to the debtor's solvency,

you may be able to issue a Statutory Demand to the debtor company under the *Corporations Act 2001*. If the debtor does not comply with the Statutory Demand within 21 days, you could then apply to Court to wind-up (liquidate) the debtor company. A similar process exists for natural person debtors, but a judgment in Court proceedings is first required.



When is it best to seek your business lawyer's assistance?

Generally, it is best to retain your business lawyer as soon as the potential dispute becomes known or as soon as it becomes evident the debtor is not prioritising its debt to you.

A good business lawyer should also be able to assist with pro-actively implementing a legal strategy to settle the dispute on a commercial basis and **avoid** legal costs associated with litigating the dispute to trial.

We take a commercially savvy and expedient approach to dispute resolution as, with litigation, not only is our time required but your own valuable time is diverted away from your business' operations.

Accordingly, we develop at an early stage, and constantly revise, a settlement strategy to be implemented side-by-side with aggressively asserting and litigating our clients' position/rights.

The information in this document is a guide only and should not be relied upon as legal advice.

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