

Cash is King | How to guide your clients

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■ WORKPLACE ■ LITIGATION + DISPUTE RESOLUTION ■ COMMERCIAL + PROPERTY ■ CONSTRUCTION ■
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1. Introduction | Debtor Statistics

- 1.1 Credit as a concept has revolutionised the way that we conduct business. The downside is that, as we move further and further away from cash-in-hand transactions, this places more risks on businesses providing credit, or even net payment terms to customers.
- 1.2 According to a 2019 study by accounting giants Xero analysing 10 million invoices, Australian SME's are owed a total \$115 billion in unpaid invoices from large business alone. Across all customers, 53% of invoices are paid late at an average of 23 days overdue.
- 1.3 Shockingly, 15% of SME's admit that such late payments lead to their own delays in paying staff wages or super. SME finance specialists Scottish Pacific state that the average SME turning over between \$1-20 million is owed \$1.55 million in unpaid invoices, tying up 29% of their revenue.
- 1.4 In their 2019 study, Xero stated that if big businesses paid SME invoices on time, it would lead to an immediate \$7 billion boon to SME's.
- 1.5 Late payment of invoices is rampant in Australia. UK finance company MarketInvoice reported in 2016 that the average payment time for an invoice in Australia is 26.4 days overdue, the longest in the world. Mexico, the second worst offender, was over a week shorter, with payments made 18.6 days overdue on average. It should come as little surprise that the world's most prompt payer is Japan, with invoices paid 6.5 days early on average.
- 1.6 One can only imagine how these harrowing figures have increased in light of the COVID-19 pandemic.
- 1.7 Businesses face not only direct hits to their cashflow, but the sting of an average 12 days per year chasing debtors. Indeed, some business have chosen to devote an entire role, or a large portion of a non-dedicated employee's role, to deal with this pervasive problem.

2. Prevention over a cure | how you can guide clients

- 2.1 We as solicitors often deal with debts that have gone too far. Another thing we do is review businesses' credit management policies, assisting them to design systems that keep cash coming in and avoid it going out to chase problem accounts and customers.
- 2.2 You should encourage your clients to protect their interests by getting on the front-foot with preventative measures suitable for their business.
- 2.3 Your clients may wish to reflect on which of the following protections may be suitable for their business/es:
 - (a) **Terms and Conditions given prior to engagement**

Ensure that proper terms and conditions (T&C's) are given to BEFORE any engagement. This will avoid any confusion. If possible, the T&Cs should be distributed with each quote so when your client's customers engage your client, everyone is on the same page about the terms and conditions.
 - (b) **Regular review of Terms and Conditions**
 - (i) How long has it been since your client last had their T&Cs reviewed? In our experience, some clients have kept the same T&Cs for their business for long periods of time, even where their business has developed significantly since the T&Cs were first prepared. The problem with this is that the T&Cs may no longer be suitable for your client. For example, we have seen T&Cs prepared for sole traders where the rights relating to debt recovery are

for an ABN which the client no longer uses, particularly where the growth of the business led to a restructure and creation of a proprietary limited company. This may create issues in the event that your client must enforce its rights.

- (ii) Understanding your T&Cs - their boons and potential shortfalls - may allow your clients to 'guide' debtors to certain favourable courses of action.

(c) Variations to any terms of the agreement between the parties, including payment terms, should be recorded in writing

One issue we often see is where parties agree to vary the terms of their agreement verbally, including the scope of services or quantity of goods to be provided, changes to pricing and of course, payment terms, and said variations are not confirmed in writing. Due to there being no written record of the variations, issues may arise when it comes to payment time and there may be a "he said, she said" argument about the varied terms. Hence, you should advise your clients to confirm variations in writing. Something as simple as a quick email exchange following a phone call between the parties could save your client the hassle of having to argue with a debtor (and if necessary, taking them to Court) because the parties cannot agree on whether certain items in their invoices are payable.

(d) Security and the PPSR

- (i) Depending on the goods / services provided by your client, it may be possible for your client to obtain security over their clients' property. Any term relating to security over should be clearly set out in the contract between the parties and must clearly identify the property which your client has a right over in the event of outstanding debt. If your client does have a right to security, then any security should be perfected by registration with PPSR. If your client needs assistance, CG Law can help.
- (ii) The PPSR is an extremely useful tool for business but has strict rules about registration of securities. Alleasing Pty Ltd found this out the hard way, losing \$23 million worth of leased equipment to a lessee in liquidation due to using the lessee's ABN, rather than their ACN on the Register.

(e) Interest

One way to encourage your client's debtors to prioritise your client's payments is to include an interest charging clause in their T&Cs which stipulates when interest is charged and how it accumulates. This may also have the effect of recouping interest for client's credit providers/bank.

(f) Legal Fees and Outlays recoverable on indemnity basis

Unless your client has previously been involved in litigation, they may not be aware of the time and costs associated with the litigation process. Legal fees and relevant outlays are not usually expenses which businesses budget for. This can create significant financial stress on your clients. Hence, inclusion of a clause which gives your client a right to recover legal fees and outlays on an indemnity basis in the event that debt recovery requires the engagement of solicitors or subsequent commencement of proceedings may not only give your client the comfort needed to pursue the debts owed to it, but may also deter your client's debtors from failing to make payment and encourage them to settle debt recovery proceedings early.

(g) Guarantees

- (i) For corporate clients, obtaining a guarantee from a customer's director, or another interested individual, is an excellent way to ensure that even if a customer goes into liquidation, there is security for your debt.
- (ii) Guarantees require the guarantor's signature and therefore, cannot simply be incorporated into T&Cs or contracts without further documentation.

(h) Tight Debt Collection Policy

As discussed earlier, if your client does not have a tight debt collection policy, it is more likely than not that your client's invoices will not be prioritised by debtors. If your clients do not already have a set procedure with respect to debt collection, then you should advise them to create one. For example, if your client's invoice payment term is 30 days, then one example of a tight debt collection policy may be:

- (i) Day 1 - Invoice issued.
- (ii) Day 25 - If invoice not paid, send reminder that due date is approaching.
- (iii) Day 31 - If invoice not paid, issue notice that payment is overdue.
- (iv) Day 45 - If invoice not paid, call debtor and discuss overdue invoice, including whether the debtor has any issues with the invoice (such as any disputed item), record whether the debtor acknowledges the debt is due and owing when the debtor can promise payment will be made and whether debtor requires any payment plan. Note that if a debtor does request a payment plan to which your client is agreeable, that payment plan should be confirmed in writing and instalments should be tracked closely so that the debtor still prioritises the invoice.
- (v) Day 60 - If invoice not paid and no response, issue standard letter of demand for payment requiring payment in full within 7 days.
- (vi) Day 65 - If invoice not paid, call debtor and advise if payment in full is not received within the timeframe required in standard letter of demand for payment, you may proceed with enforcement options.

When it comes to following up debtors, the squeaky wheel gets the oil!

3. Enforcement | when the rubber hits the road

If your client has followed its tight debt collection policy and still has not received payment from a debtor, then it may be time for your client to enforce its rights to recover the debt.

3.1 Suspension of work / withholding of goods

Whether your client is providing goods or services, consider whether the terms enable your client to stop work / withhold goods until payment is received from the debtor. If your client is unsure, they may need to seek legal advice to ensure that they themselves do not breach the contract Terms and Conditions between the parties.

3.2 Has a formal letter of demand been issued?

Whether the debtor is an individual or a company, a formal letter of demand should have been issued prior to further enforcement. As discussed earlier, this may be included in your client's tight debt collection policy. By having issued a formal letter of demand, your client has a written record regarding the debt and may even have some form of acknowledgement of the debt or clear admission of liability in a response from the debtor. This may include statements by the debtor, acknowledging the debt is owing and promising to pay the debt, or acknowledging the debt and refusing to make payment.

3.3 Exercise of Security

If your client has security over any of the debtor's assets, this option may be more cost-effective than commencing action. However, this will also involve time and cost, so the resources required to enforce security need to be considered.

3.4 Consider the debtor's assets prior to commencing action

If the goal is for payment to be received, it is important that your client consider the debtor's assets at the outset. There are a number of searches that can be done in order for your client to determine some appropriate enforcement options if your client successfully obtains a Tribunal/Court judgment down the track. If your client needs any assistance with this, CG Law can help.

3.5 Is the debtor a company and does the debt meet the relevant threshold to issue a creditor's statutory demand?

- (a) For the period up to and including 24 September 2020, the threshold for issuing a creditor's statutory demand has temporarily been set to \$20,000 as a result of the Coronavirus Economic Response Package Omnibus Act 2020 (Cth) (COVID Act). However, if the relevant provisions under the COVID Act are not extended further, the usual threshold of \$2,000 under the Corporations Act 2001 (Cth) will apply from 25 September 2020 onwards. If your client's debtor is a registered company, and the debt owed to it is at least \$20,000 (\$2,000 from 25 September 2020), then your client will be eligible to issue a creditor's statutory demand.
- (b) A creditor's statutory demand gives the company debtor 21 days from the date it is served on the company debtor to either:
 - (i) pay the debt in full; or
 - (ii) reach agreement with your client to settle the debt; or
 - (iii) apply to the Court to set aside the creditor's statutory demand.
- (c) In the event the debt remains unpaid on day 22, the parties have not reached any agreement to settle the debt, and the company debtor has not made any application to set aside the creditor's statutory demand, your client will be entitled to commence winding up proceedings against the debtor. In our experience, in the circumstances where a company debtor wishes to continue trading, issuing a creditor's statutory demand may well be the only step required to force a company debtor to make payment.

3.6 Debt under \$25,000? QCAT may be an option

If the debt is under \$25,000 your client may wish to commence action in the Queensland Civil and Administrative Tribunal (QCAT). QCAT is a jurisdiction which encourages self-represented litigants so this is often the most cost-effective option for clients wishing to recover debts of this size. If your client does not feel comfortable preparing their QCAT documents, or requires any advice regarding same, CG Law can help. However, a possible downside of commencing action in QCAT is because it encourages self-represented litigants, legal costs are not usually awarded even where an application is successful.

3.7 Debt more than \$25,000? Determine the relevant Court to commence action

If the debt is more than \$25,000, your client will need to determine the relevant Court to commence action, as follows:

- (a) up to \$150,000 can be commenced in the Magistrates Court; or
- (b) between \$150,000 and \$750,000 can be commenced in the District Court; or
- (c) for any amount over \$750,000 can be commenced in the Supreme Court.

3.8 Judgment obtained? Time to consider your client's enforcement options

- (a) Whether your client has commenced action via QCAT or the Court, if your client obtains a judgment for the debt, then it is time for your client to consider the appropriate enforcement options. This will often depend on the size of the debt and the debtor's assets. Some options include:
 - (i) bankruptcy (individuals);

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- (ii) winding up following the issuing of a creditor's statutory demand (previously discussed);
 - (iii) enforcement warrant for seizure and sale of property;
 - (iv) enforcement warrant for regular redirections from a financial institution;
 - (v) enforcement warrant for redirection of earnings;
 - (vi) enforcement warrant for redirection of a debt; and
 - (vii) enforcement warrant for payment of order debt by instalments.
- (b) Preliminary searches regarding the debtor's assets and liabilities can be easily conducted to hone in on your client's most effective enforcement options.

4. Handing Over | Starting your Claim

Advisors are well-positioned to facilitate handover of potential claims to solicitors. Further, knowledge of the types of documents required to evidence demands and claims will help you advise your clients to maximise their debt recovery potential.

4.1 Letter of Demand

- (a) A letter of demand on a solicitor's letterhead is nearly always our first advised step in dealing with a problem debtor. Even where your client has sent their own letters of demand, we often find that 'letterhead power' alone can produce results.
- (b) In order for a solicitor to draft a letter, they will need to be provided with:
 - (i) all invoices in question;
 - (ii) details of any repayments, or agreements regarding same;
 - (iii) the applicable contract, correspondence forming a contract, terms and conditions, terms of trade, etc.;
 - (iv) the debtor's contact details; and
 - (v) optionally - background to or further facts regarding the debt and debtor to assist in crafting the most effective letter of demand.
- (c) If your client is able to provide all materials in one go, the drafting process can begin with the minimum of delay and further requests for documents and instructions. For Clifford Gouldson's frequent debt collection clients, we're able to streamline the process considerably and get straight to work recovering client's cash.
- (d) Clifford Gouldson also has a fixed-fee debt collection division called CGCollect, which for \$220 (incl. GST) will:
 - (i) prepare and send a letter of demand to the debtor;
 - (ii) if payment is not forthcoming, following up that debtor by phone and notify your client of the outcome;
 - (iii) if the debtor remains stubborn, advise on your client's further recovery options; and
 - (iv) advise on, draft and administer an appropriate repayment arrangement, for a further \$220 (incl. GST) fixed fee.
- (e) CGCollect obtains payment and initial instructions through a convenient online portal at cgcollect.com.au.

4.2 Commencing a Court Proceeding

- (a) The benefit of instructing a solicitor to prepare a letter of demand is that they will have the necessary background and most, if not all of the documents required to begin drafting your claim.
- (b) Correspondence stemming from the letter of demand with the debtor or their solicitors can provide valuable insight into the debtor, their financial position, whether they'll be likely to be legally represented, or otherwise.
- (c) If your client is forced to bring a claim, or apprehend one may need to be made, they should be made aware of the following things:
 - (i) anything your client is able to prepare to assist their solicitor's understanding of the matter will assist in saving costs and improving their legal position;
 - (ii) your client should prepare the following material to be provided to their solicitor at the outset:
 - all documents required to prepare a letter of demand as set out in 4.1 above;
 - timeline/chronology of events, which includes details of the agreement entered into by the parties, goods/work done, goods/work outstanding, dates of follow ups and part payments made;
 - narratives/statements by the relevant people regarding the debt, including agreed payment terms, follow ups and contemporaneous file notes of conversations with the debtor;
 - (iii) your client should organise their internal lines for receiving and discussing advice, as well as providing instructions. If a solicitor is required to repeat advice and/or obtain instructions from multiple people in your client's organisation, there will be significant time and costs incurred so it is best to avoid this by having a dedicated point of contact who receives legal advice and provides instructions. This does not necessarily mean you give that person the authority to make the decisions about what options to take on receipt of legal advice, especially if they are an employee and not a director. It just means that one person will be able to keep track of the Court proceeding and effectively relay information between your client and their solicitors;
 - (iv) your client should have a clear process for how decisions are to be made with respect to a Court proceeding such as who needs to be informed of the progress of the matter and who is authorised to make decisions about options to take, offers to make and any settlement. This will ensure that the dedicated point of contact can seek instructions from the relevant person/s as the Court proceeding progresses.
- (d) The less time solicitors spend seeking your client's further documents and instructions, the more efficient and economical the litigation process will be.



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