



# Letters of Demand Guidelines

## Introduction

During 2011 there were several important developments in relation to debt collection practices.

Whilst the precedent letters of demand below (taken from the 2007 guidelines) have not changed, it is important that practitioners know that increased Federal and State regulatory interest in this area could have significant implications for them.

## Federal Court decision

In October 2011 the Federal Court of Australia declared by consent that a Victorian legal practitioner had engaged in misleading conduct in sending out letters of demand in contravention of the Trade Practices Act (now known as the Competition and Consumer Act (CCA)) over a number of years.<sup>1</sup> The practitioner conceded in court that the documents contained representations that were misleading or deceptive, or were likely to mislead or deceive. The practitioner agreed to an order to cease making the offending representations in correspondence with debtors, publish corrective notices in several national newspapers and legal industry publications, and undergo trade practices compliance training along with the practitioner's staff.

This decision serves as a timely reminder to practitioners that they have an ethical duty not to make any statement to another person on behalf of a client that is calculated to mislead or intimidate that other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client.<sup>2</sup> Conduct by practitioners in breach of the CCA may result in action being taken against them by the Australian Competition and Consumer Commission (ACCC) with the possibility of stringent financial penalties and costs being imposed.

## ACCC action

On 8 December 2011 the ACCC wrote to Australian solicitors practising in the field of debt collection advising them of the Federal Court decision and its ramifications, and requesting that they review their debt collection letters and notices to ensure that no aspects of those letters and notices are misleading or deceptive, or likely to mislead or deceive.<sup>3</sup>

In its letter the ACCC advised practitioners that, when reviewing debt collection letters and notices, some important things to remember are:

- If something is only a possible consequence of not paying a debt, ensure you do not create the impression that it is a definite consequence;
- Before asserting the right to payment of administrative and/or legal costs on top of a debt amount, ensure you are aware of whether or not your client has a legal entitlement to claim this amount;
- Ensure you do not create the impression that your debt collection letters and notices are documents that have been or are able to be filed with a Court.

The ACCC has made it clear that it now considers the debt collection industry (and the solicitors who practise in this field) to be on notice and that it will take a serious view of any further complaints received about this type of conduct.

## “ACCC/ASIC Debt Collection Guideline: for collectors and creditors”

On 8 July 2014, the ACCC and the Australian Securities and Investments Commission (ASIC) released revised guidelines for businesses and consumers about debt collection activities. This joint publication has been revised following consultation with industry and consumer representatives to provide guidance to anyone involved in debt collection.

<sup>1</sup> *ACCC v Sampson* [2011] FCA 1165 (17 October 2011) and also *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177 (10 July 2013)

<sup>2</sup> Rule 34.1.1, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

<sup>3</sup> <https://www.liv.asn.au/PDF/2011DebtCollectionJudgement14Dec>

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The publication has been updated to reflect significant changes to the law since the earlier ASIC debt collection guidelines were published in 2005.<sup>4</sup>

## Victorian Legal Services Board + Commissioner

In his 2011 Annual Report the Victorian Legal Services Commissioner (VLSC) said that he had become increasingly concerned with the number and type of complaints being made in relation to practitioners who practise in the area of debt collection.<sup>5</sup> In April 2014 the LSC published a Fact Sheet entitled **Letters of Demand: traps for lawyers**. The fact sheet begins by stating that it “covers the issues common to complaints about lawyers involved in debt collection and provides guidance on avoiding common errors”.<sup>6</sup>

**The following sample precedent letters were published by the Law Institute Council in 2007 and remain unchanged**

### Letter One

Dear [insert name],

Re. Debt due to [insert name of client]

We act for [insert name of client].

Our client informs us that the amount of [insert amount of debt] is owing to him / her.

We ask that this payment be forwarded to us by 4.00pm on [insert date].

To avoid further costs and inconvenience to our client you are requested to pay the amount due to our client by [insert date].

Yours faithfully,

[Name of firm]

### Optional Further Letter Two

Dear [insert name],

Re. Debt due to [insert name of client]

In a previous letter sent to you on [date], we sought the payment of [insert amount of debt] which is owing to our client.

We advise that we have instructions from our client to commence legal action against you to recover the amount of [insert amount of debt].

Before we commence court action as instructed we advise that our client will accept your payment of the amount of debt being [insert amount of debt] by 4.00pm on [insert date].

If our client is obliged to go to court and the court determines in favour of our client you should be aware that you may be held liable to pay amounts in addition to the amount of the debt.

We ask that you respond to this letter as soon as possible and before 4.00pm on [insert date].

Yours faithfully,

[Name of firm]

### Practical Issues

If the recipient of the letter of demand is unlikely to have any legal background or facility in English, the language should be kept simple.

Where the practitioner believes the recipient of the letter of demand may not speak English fluently, the practitioner may wish to refer in the letter to availability of interpreting services provided by the Translating and Interpreting Service (TIS, telephone 13 14 50) or local Migrant Resource Centres.

Language which implies that it is inevitable that judgment will be entered in the client's favour if proceedings are issued must be avoided.

The practice of forwarding with a letter of demand an unissued complaint application, statement of

<sup>4</sup> Refer to the publication “Debt Collection guidelines for collectors and creditors” available on the ACCC website at [www.accc.gov.au](http://www.accc.gov.au)

<sup>5</sup> Legal Services Commission Annual Report 2011

<sup>6</sup> Refer to the publication “Letters of demand: traps for lawyers” available on the LSBC website at [www.lsbc.vic.gov.au](http://www.lsbc.vic.gov.au)

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claim or other initiating process can mislead and should be avoided.

A letter of demand should therefore not threaten the institution of legal proceedings if legal costs are not paid within a particular time unless the creditor has an enforceable contractual right to recover the legal costs from the debtor.

Demands by private car park operators for payment of contractual car parking fees framed to appear as official “infringement notices” and “fines” have been held by the Federal Court of Australia and the Supreme Court of Victoria to be misleading and deceptive<sup>7</sup>.

## How can we help you?

These are guidelines only and do not have the force of law.

The information is intended to be a general guide only and is not intended to constitute professional or legal advice and you should rely on your own inquiries and assessment.

The Law Institute of Victoria expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this document.

A practitioner must comply with the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* and the *Legal Profession Uniform Law Application Act 2014* and any other applicable rules or legislation.

To discuss concerns about letters of demand, contact the Legal Ethics Manager on (03) 9607 9336.

*Adopted by the Council of the Law Institute of Victoria on 15 October 2015.*

<sup>7</sup> *Director of Consumer Affairs Victoria v Parking Patrols Vic Pty Ltd* [2012] VSC 137 and *Corporation of the City of Adelaide v Adelaide City Fines Pty Ltd* [2009] FCA 132