

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 years¹. 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 client². 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 deceive³.

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.

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

² Rule 28.2, *Professional Conduct and Practice Rules 2005*

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

Legal Services Commission Annual Report

In his 2011 Annual Report the Victorian Legal Services Commissioner (LSC) 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 collection⁴. In June 2011 the LSC published a Fact Sheet entitled **Issues in complaints about debt collection**⁵. In relation to letters of demand the LSC Fact Sheet states: “*Letters of demand should contain clear and accurate information and instructions about the amount owing and the process for paying the debt in order to prevent legal proceedings being issued. Letters should be carefully worded and should not contain threats for the issuing of legal proceedings for unpaid costs, where those costs may not be legally enforceable.*”

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].

⁴ *Legal Services Commission Annual Report 2011*

⁵ *Legal Services Commission Fact Sheet – “Issues in complaints about debt collection”*, <http://www.lsc.vic.gov.au/cms.php?user=legalservicesvic;doc=Home;page=;pageID=188>

Adopted by the Council of the Law Institute of Victoria on 20 December 2012.

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 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 deceptive⁶.

How can we help you?

These are guidelines only and do not have the force of law. A practitioner must comply with the *Professional Conduct & Practice Rules 2005* and the *Legal Profession Act 2004*. To discuss concerns about letters of demand, contact the Legal Ethics Manager on (03) 9607 9336.

⁶ 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

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