

1 Defences to actions for debt based in contract

Mental disability

At common law, a person will be able to avoid their liabilities under a contract if they can show that:

- a) they were suffering from such a degree of mental disability at the time of making the contract that they were incapable of understanding that contract; and
- b) the other party to the contract was aware, or ought to have been aware, of this.

Practical limitation: the person with the disability will need to give back the benefit received under the contract (ie the money).

Limitation of actions

Actions to recover debts founded on contract may not be brought after the expiration of six years from the date on which the cause of action accrued. In practical terms this means six years after last action (such as a payment, or acknowledgment that the debt is owed) by debtor on account. (See CCLS fact sheet)

Actions to recover debts secured by a mortgage of either real or personal property (such as car or home loan) have a statutory limitation of 15 years.

If a court order has been made the time period is 15 years from the date of the order.

Important: the period will recommence if the debtor or his or her authorized agent acknowledges a debt in writing, or if the debtor makes a payment towards the debt.

See CCLS fact sheet *Do I have to pay an old debt?*

Unfair contract terms

A term in a consumer contract is unfair if it is contrary to the requirements of good faith and in all the circumstances it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer. An unfair term is void (can't be enforced).

Standard form contracts can be prescribed as unfair by regulation and it is an offence to use or recommend the use of such a prescribed term.

A contract term that is in small print (less than 10pt type) contravenes the Fair Trading Act and may be unenforceable.

Unconscionable conduct

A court may set aside contracts procured by unconscionable conduct. In consumer law, such unconscionable conduct ordinarily arises out of three factors:

- (1) the relationship between the parties which, to the knowledge of the trader, places the consumer at a special disadvantage vis-à-vis the trader;
- (2) the trader's unconscionable exploitation of the consumer's disadvantage; and
- (3) the consequent overbearing of the will of the consumer whereby the consumer is unable to make a worthwhile judgment as to what is in his or her best interests.

Misleading and deceptive conduct

These provisions are extraordinarily wide in their application and should be considered in all contract disputes. Any circumstance in which a party has suffered loss as a result of another party's failure to tell the truth may give rise to a cause of action under misleading or deceptive conduct.

2 Defences to actions in consumer credit contracts

If a contract is a consumer credit contract, ie for a non-business purpose, then as well as the above defences, there is a whole range of protections provided by the Consumer Credit Code.

Unjust transactions

There is a 'shopping list' of matters which a court (the Victorian Civil and Administrative Tribunal – Credit List) may consider in determining whether a transaction is unjust. Unjust includes, but is not limited to, unconscionable, harsh or oppressive and covers categories already discussed above. The list includes factors such as the intelligibility of the language used and the 'over commitment clause' – whether at the time the contract was entered, the credit provider knew, or could have found out by reasonable enquiry of the

debtor that the debtor could not pay in accordance with its terms or not without substantial hardship.

Debtor may apply to VCAT to have the contract reopened, which has very wide powers to change terms of the contract.

Hardship variations

See CCLS fact sheet *How do I change my loan payments if I have suffered hardship?*

Applications may be made to the Victorian Civil and Administrative Tribunal (VCAT) to vary a credit contract where the cause of the hardship is illness, unemployment or other "reasonable cause"; the debtor "reasonably expects" to be able to pay if the variation is granted and the maximum amount of credit that may be provided under the contract is approx \$300,000 (this figure is indexed monthly).

The Code allows a debtor to seek the following changes:

- (a) extending the period of the contract and reducing the amount of each payment accordingly and /or
- (b) postponing payments for a specified period

The first is useful when the debtor's long term financial position has changed, for example income is less than time when contract entered into and then second is helpful when the hardship is temporary, such as an illness or short-term loss of employment.

Victorian Civil and Administrative Tribunal: exclusive jurisdiction

Both applications to reopen a credit contract and hardship applications may be made only to VCAT. This can be a powerful tool. A debtor sued by a lender in the Supreme Court on a credit contract which may be unjust, may apply to VCAT to have it reopened and apply to the Supreme Court for a stay of proceedings.

3 Debtor harassment

Harassing behaviour by a creditor or debt collector can be unlawful under s 60 of the *Trade Practices Act 1974*. According to the ACCC the following conduct may constitute undue harassment and coercion by a debt collector:

- a) using abusive, threatening, offensive, obscene or discriminatory language;
- b) using, or threatening to use, violence or physical force;
- c) communication outside the hours of 7:30 am to 9:00 pm;

- d) visiting a debtor's place of work;
- e) disclosing personal information regarding the debtor to a third party;
- f) making more than 3 unsolicited phone calls per week to a debtor;
- g) communicating directly with a debtor after being advised that the debtor's representative is acting in the matter.

See CCLS fact sheet *I'm being hassled by a debt collector*

4 Judgment debt recovery

Where a court order to repay money owed is made in the Magistrates' Court of Victoria, a creditor may take further action to enforce the judgment debt. Interest on the debt will accrue from the date of the judgment under the *Penalty Interest Rates Act 1983*, which currently stands at 11.5%.

Oral examination

A judgment creditor may serve upon a judgment debtor a summons to appear in Court to be questioned about the debtor's financial position.

Instalment orders

A judgment debtor or – more commonly - a judgment creditor may apply to the Court for an order to pay a judgment debt by instalments.

While not subject to any formal policy, an order will usually not be made unless the debt – if is less than \$10,000 – will be paid off within 3 years. Penalty interest on the debt will continue to accrue while the instalment order is in place.

If an instalment order is in place and is being complied with, or if a copy of an application for an instalment order has been served upon the judgment creditor, all other methods of enforcement of the judgment are blocked.

An instalment order will not be made without the consent of the judgment debtor where s/he is a recipient of social security benefits: JDRA, s 12.

Warrant to seize property

A warrant to seize property is an order to the Sheriff to seize and sell goods belonging to the debtor unless the debtor pays the amount stated in the warrant. A debtor is entitled to refuse entry to the Sheriff. The Sheriff cannot seize any property which could not be taken from a bankrupt. This protects normal household items and a car worth less than \$6000.

Attachment of earnings

A judgment creditor may apply to the Court for an order compelling a debtor's employer to deduct instalments from the debtor's salary and pay them to the creditor. Income received as a social security payment cannot be subject to attachment.

5 Credit reporting

A credit report is information held by a credit reporting agency regarding an individual or company's credit history. It will include loan applications, overdue debts and court judgments. Lenders check credit files when assessing applications for credit and also give information to a credit-reporting agency to include upon a credit information file.

An individual can get a copy of their file free of charge by writing to Baycorp Advantage at the address below.

The following information can be placed on a credit information file:

- (a) details of all credit applications made to credit providers;
- (b) defaults;
- (c) serious credit infringements (noted as "clearout");
- (d) court judgments;
- (e) bankruptcy.

A default listing can be made if:

- a) the consumer is 60 or more days in arrears, and
- b) the creditor has demanded the amount outstanding, and
- c) the contract or other document has warned the creditor that they will be listed if in default for more than 60 days.

Complaints about credit reporting should be raised with Baycorp Advantage and with the creditor in question. The Federal Privacy Commissioner provides a forum for dispute resolution if the matter is unresolved.

Public Access Division
Baycorp Advantage
PO Box 964
North Sydney NSW 2059
02 9464 6000
www.baycorpadvantage.com.au
Office of the Federal Privacy
Commissioner
GPO Box 5218
Sydney NSW 2001
1300 363 992
www.privacy.gov.au

6 Financial counsellors

Financial counsellors can provide assistance and advocacy to people in financial difficulties, and are particularly experienced in negotiating settlements with creditors in debt matters. Find out which financial counsellor services a particular area by contacting:

Financial & Consumer Rights Council
Level 13
227 Collins Street
Melbourne, VIC. 3000
03 9663 2000
www.fcrc.org.au
admin@fcrc.org.au

7 Bankruptcy

The *Bankruptcy Act* 1966 (Cth) provides a mechanism whereby, once a debtor is declared bankrupt:

- a) with some exceptions, creditors are prevented from pursuing the bankrupt for payment;
- b) certain restrictions are placed on the bankrupt's activities, including access to credit and employment opportunities;
- c) a trustee is assigned to the bankrupt's matter;
- d) the bankrupt's property (with exceptions such as household furniture, personal injuries compensation and certain vehicles) is made available, through the trustee, for distribution amongst creditors;
- e) the bankrupt's conduct and affairs generally may be the subject of investigation and/or examination, although this would be unlikely to happen in most non-business bankruptcies.

Bankruptcy usually lasts for three years.

7.1 Debtors' Petitions

There is no minimum amount that must be owed before a debtor files for bankruptcy. Some points to consider:

- most debts are wiped out by bankruptcy
- contact from creditors should cease
- deductions from salary to pay debts will stop
- reasonable household goods (furniture, clothing) may be retained

- a car valued at less than \$6,000 (indexed) may be kept
- tools of trade to \$3,050 (indexed) may be kept
- debtor may maintain a bank account and save money.

Bankruptcy usually lasts for three years. The main categories of debts which bankruptcy does not clear are

- child support payments
- court fines (including PERIN)
- debts incurred after the date of bankruptcy
- debt incurred by fraud
- unliquidated damages (claims for payment of damages, such as a claim of negligence in a motor vehicle accident, where the amount owed has not yet been decided by a court or formal agreement with the other party).

It is compulsory for a bankrupt to pay half of net income above the base income threshold to the trustee. A debtor with no dependants may earn the base income threshold income of \$36,190.70 after tax (indexed) before it becomes compulsory to contribute income to creditors. Half of any amount over the threshold must be paid to the trustee.

7.2 Provable debts

After bankruptcy a bankrupt is released from *most* provable debts. A bankrupt is not released from any non-provable debts. The term 'provable' means that a creditor can lodge a proof of debt or a claim to be paid, and then be paid a proportion of the money (if any) raised by the sale of the bankrupt's property.

The bankrupt is not released from a provable debt if it was incurred by fraud or is a debt under a maintenance agreement order, or in relation to a bond or to certain other criminal law penalties.

The main categories of debts which are *not* provable are: debts incurred after the date of bankruptcy, court fines (including PERIN Court fines) and unliquidated damages.

7.4 Income contributions

It is compulsory for a bankrupt to pay half of net income above the *base income threshold* to the trustee. The base income threshold at 20 March 2004 for an individual with no dependants was \$35,271.60 per year (after tax).

7.5 Divisible property

The general rule is that all property owned by the bankrupt at the time of the bankruptcy, or acquired during the bankruptcy, vests in the trustee. However, property which the trustee cannot take from a bankrupt includes the following:

- a) necessary household property;
- b) property the bankrupt uses to earn income, not exceeding in total \$2,900 (indexed) in value;
- c) a motor vehicle which does not exceed the value of \$6,000 (indexed). If the vehicle is worth more than this, the trustee may take the vehicle and refund the bankrupt \$6,000;
- d) the interest of a bankrupt in a regulated superannuation fund;
- e) the proceeds of certain damages claims for compensation (generally for pain and suffering only);
- f) policies of life insurance or endowment assurance; and
- g) the amount of money a bankrupt holds in an RSA (retirement savings account, as defined in the *Retirement Savings Account Act*), and any payment to a bankrupt from an RSA received on or after the date of bankruptcy if the payment is not a pension.

Any divisible property acquired during bankruptcy (unless exempt under s116) forms part of the estate and may be seized by the trustee.

7.6 Debt Agreements

Under Part IX of the Act, a debtor who earns under \$54,286.05 and has unsecured debts of less than \$72,381.40 can put a written proposal for dealing with their debts and creditors to the Official Trustee.

A financial counsellor will be able to help a debtor to draft a proposal that offers a compromised payment arrangement to creditors. If the Official Trustee approves the proposal, it will then ask the creditors to respond to the proposal. If a majority in number and at least 75 per cent in value of the creditors who reply to the proposal accept it, then the proposal becomes binding on all creditors.

An industry has grown up which can charge high fees for assisting people to put Part IX proposals to their creditors, and such proposals are being promoted as a preferable alternative to bankruptcy, but this is not always so.

Part IX agreements, like bankruptcy, will result in a listing on your credit report for 7 years.

Information regarding bankruptcy can be obtained from the government regulator:

Insolvency & Trustee Service Australia
Level 10, Melbourne Central

360 Elizabeth Street
Melbourne VIC 3000
03 9272 4800
www.itsa.gov.au

8 Must I Pay?

Old debts
Social security recipients and JDRA s12
- Which debts might one choose to pay?
Bankruptcy

9 Resources

advice@ccls.org.au

email for advice

www.ccls.org.au

Click on information and access our fact sheets:

How do I get more information about my loan?

Do I have to pay an old debt?

What can I do if a debt collector calls?

I'm being hassled by a debt collector

How do I get a copy of my credit report?

How do I change my credit report?

How do I change my loan payments if I have suffered hardship?