



Euler Hermes

Collection Profile Australia

Collecting in Australia

- The payment behavior of domestic companies is good compared to international standards. However, delays are registering a deteriorating trend and average DSO now stands at 56.4 days.
- The court system is complicated by the country's federal structure and provides no fast-track proceedings for the settlement of undisputable claims. The courts are otherwise efficient, but delays and costs tend to be significant and enforcing foreign judgments may prove difficult.
- Insolvency proceedings are complex and expensive, with chances of recovery very low.

Collection complexity



Complexity relating to

Notable → Severe

Payments	\$ \$ \$ \$
Court proceedings	⚖️ ⚖️ ⚖️ ⚖️
Insolvency proceedings	↘️ ↘️ ↘️ ↘️



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General information

Availability of financial information

Relevant financial information on domestic companies is difficult to obtain for several reasons. Firstly, only stock exchange listed companies have an obligation to publish their financials, therefore only 2% to 3% of Australian companies publish or publicly file annual or semi-annual records. Secondly, corporations often rely on trust structures, which are not legal entities in their own right but aim to limit visibility and accountability. The vast majority of Australian traders' portfolio furthermore consists of small to mid-size companies, where financials are confidential and can only be obtained by our analysts via direct approach or through credit reporting agencies. Euler Hermes allocates each company a grade reflecting its financial health and how it conducts business. Grades represent a core of our knowledge and analyses, and help clients identify and avoid risk. Data is continuously monitored to offer the most up-to-date information to support management decisions.

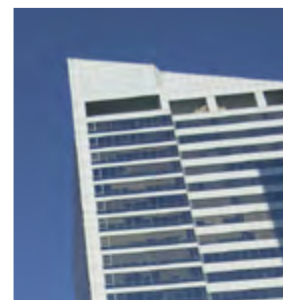
Main corporate structures

Liability for business debts is determined by legal structures, which are described as follows:

- Proprietorship is commonly relied upon for small scale operations since it is based on the personal qualities of the sole proprietor who owns the business assets. As a result, the proprietor is fully liable for the business' activities and debts.
- Partnerships allow up to 20 partners to conduct business together. The partners establish their liabilities and rights in a specific 'partnership agreement' but do not create a separate legal entity. Unless a Limited Partnership is set up, the partners' liability is joint and unlimited, even if one partner generates business debts without the other partners' knowledge or consent.
- Proprietary Limited Companies are very popular structures which may be set up by one to fifty shareholders. There is no minimum capital requirement, and the shareholders are liable on their contribution. Companies provide another formalized legal structure in which the shares are tradable and risk is limited to capital contributions.
- Trusts are particular structures in which operations are regulated by an agreement (deed) and in which a trustee (i) holds the assets of the trust and (ii) runs the business for the benefit of beneficiaries. Trusts are complex structures which often aim at minimizing tax, but the courts have in time become concerned about their methods and beneficiaries are increasingly being held personally liable for the entity's debts.
- Foreign businesses may also settle in Australia through a Representative Office (which cannot generate income) or through a Branch (which is independent and entitled to conduct business activities).
- Joint Ventures differ from partnerships insofar as the parties (whether individual or corporate entities) regroup their resources and skills

Days Sales Outstanding

(DSO): There is a deteriorating trend in payments with average DSO at 56.4 days .



in order to develop a common project and generate a common income without necessarily incorporating a separate entity.

Regulatory environment

The court system in Australia can be complex since the country has a federal government structure and it is composed of two internal territories (the Northern Territory and the Australian Capital Territory) and six sovereign states with reserve powers. Each has its own legal system and laws, which sometimes adds complexity despite ongoing harmonization efforts taking place. There are no specific tribunals for commercial matters, but there are certain specialized divisions within existing courts (i.e. the Commercial List, the Admiralty Division, etc.). Therefore, depending on the quantum of the claim and the cause of action, large commercial disputes are usually brought to the Federal Court of Australia (the FCA sits in all capital cities) or to the Supreme Court in one or another territory.

As a general rule, though, Local Courts or Magistrates Courts (names may vary from one state to another) are capable to decide on claims up to AUD 40,000 in South Australia, AUD 100,000 in Victoria and New South Wales, or AUD 150,000 in Queensland. District Courts are able to decide on claims up to AUD 750,000, whereas Supreme Courts would be suitable for claims in excess of AUD 750,000.

Getting Paid

Days Sales Outstanding (DSO)

Payment behavior of domestic companies remains good compared to international standards, with payments in Australia normally taking place within 30 days on average (measured from the end of the month in which goods are delivered or services are supplied). However, there is a deteriorating trend in payments with average DSO at 56.4 days for 2016.

Late payment interest

Government agencies are required to pay small businesses within 30 days of receipt of a correctly rendered invoice, otherwise penalty interests may apply (as determined under section 22 of the Taxation Administration Act 1996). In business-to-business relations, however, late payment matters are not regulated and must be dealt with by the parties directly.

Debt collection costs

Collection costs are usually not chargeable to the debtor unless the contract outlines precisely which costs may be considered. Often, the costs are not recuperated as the parties prefer settling claims amicably, but they nonetheless constitute efficient negotiation tools.

Ownership protection

Retention of Title (RoT) contractual provisions (also known as Romalpa clauses) ensure that a buyer shall only acquire ownership of goods once payment has been received in full. These arrangements may be triggered during and outside of insolvency proceedings alike, but there is an increasingly significant formalism attached to these clauses, which must therefore be considered with the greatest care. In particular, the Personal Property Security Act 2009 (Cth) (PPSA) which came into force in January 2012 has created a strict obligation for suppliers of goods to register their security interests for the guarantee to become effective. Indeed, only the RoT arrangements registered with the Personal

Property Security Register protect the supplier's property (called a 'purchase money security interest,' or PMSI) by giving the creditor 'super priority' over other creditors' debts. Super priority, in addition, requires that registration is completed before the goods are delivered (PPSA s.62), and only applies for goods which have remained unpaid for. Retention of Title provisions included in contracts entered into prior to January 2012 lost their effect unless registered by 30 January 2014.

Payments

The most common payment methods are as follows: The majority of transactions in Australia are done on open account, which means that the goods are shipped and delivered before payment is due. EFT electronic funds transfer and swift bank transfers are otherwise among the most popular payment means worldwide as they are fast, secured, and supported by an increasingly developed banking network domestically and internationally. For export transactions, transfers may be insured by an Export Credit Insurance policy, which helps minimize the risk of sudden or unexpected customer insolvency. Euler Hermes' worldwide network of risk offices monitors the financial well-being of customers and grants them a specific credit limit up to which clients may trade and claim should something go wrong. Alternatively, Standby Letters of Credit (a bank guarantees the debtor's credit quality and repayment abilities) constitute reliable guarantees which can be interpreted as a sign of good faith since they can be triggered as a 'payment of last resort' if the client fails to fulfil a contractual commitment. Also, Confirmed Documentary Letters of Credit (a debtor guarantees that a certain amount of money is made available to a beneficiary through a bank once certain terms specifically agreed by the parties have been met) may be considered as it can be obtained easily from local banks (may be costly). Checks are hardly used in Australia, except perhaps by sole traders. Generally speaking, bank guarantees can be obtained fairly rapidly even though they may be expensive depending on the issuing institution.



Late payment interest:
In business-to-business relations, late payment matters are not regulated and must be dealt with by the parties directly.



Collecting overdues

Amicable action

Amicable settlement opportunities should always be seen as the most efficient alternative to formal litigation proceedings since Australian law does not provide for fast track legal proceedings. In practice, the Australian authorities have set up various pre-legal action mechanisms (under the Civil Dispute Resolution Act of 2011) to encourage the parties to negotiate and settle commercial disputes prior to commencing a court trial.

Before starting legal proceedings against a debtor, assessment of assets is important as it allows verification as to whether the company is still active and whether recovery chances are at best. In addition, it is essential to be aware of the debtor's solvency status: if insolvency proceedings have been initiated, it indeed becomes impossible to enforce a debt (see below). For undisputed debt above AUD 2,000, creditors may alternatively send the debtor a request (Statutory Demand) to pay within 21 days and threaten to file a petition for liquidation if the time limit is not respected (under section 459E of the Corporations Act 2001).

Legal action

Ordinary proceedings

If the amicable phase fails, or if the debtor questions the claim, the option of starting legal proceedings remains, although it tends to be lengthy and costly when the claim is defended.

Ordinary proceedings would typically take place as follows: although there is no mandatory obligation to request payment in writing before taking legal action, a Demand Letter recalling the principal and interest due is advisable. In order to commence formal proceedings, a Statement of Claim must be served to the debtor, who must then abide by the decision or file a defense within 30 days (delays may be granted depending on geographical factors). Failure of the debtor to comply with the rules entitles the creditor to apply for a default judgment. Otherwise, the court would organize hearings and define a timeline for the proceedings (discovery phase allowing lawyers to question the parties, mediation phase).

Remedies ordered by the court may take the form of compensatory damages, specific performance orders, restrictive injunctions or restitution orders. Punitive damages are available in tort cases but remain unheard of in debt litigation proceedings.

It is also worth adding that commencing the lawsuit before the competent court in the debtor's place of registration usually helps prevent procedural delays due to lack of jurisdiction arguments. Class Action (lawsuit involving a group) proceedings are also increasingly common in Australia.

Necessary documents

Copies of unpaid invoices, last statement of account, copy of supply contract, copy of credit application, proof of delivery if necessary (AWB BOL for export).

Time limitations

Debt-related claims must be brought to court within six years, starting from the original due date. Beyond this time limitation, legal action will not be granted although certain factors (formally acknowledging debts, for instance) may in certain circumstances interrupt the prescribed period. In the Northern Territory, the prescribed period is reduced to three years.

Precautionary measures

Precautionary measures in the form of preliminary injunctions may be awarded to preserve the status quo pending a final and enforceable judgment. Mandatory and prohibitory injunctions would respectively compel or prevent a party to do something, but although they are common in Intellectual Property or Trade Practices cases, they remain rare in debt litigation.

Each requires that the applicant demonstrates, among other points, that mere damages would be insufficient to compensate potential losses in the absence of an injunction. Search orders (Anton Pillar orders), issued if critical evidence is likely to be concealed or destroyed by the defendant, are extremely rarely awarded. Stay orders prevent a party from commencing or continuing proceedings on a temporary basis, while anti-suit injunctions restrain a party from commencing or continuing proceedings in a foreign jurisdiction. Alternatively, interim attachment orders (also known as freezing orders) help preserve assets which ought to be used to satisfy a final judgment but which are at risk of being dissipated in order to frustrate enforcement.

Application is made *ex parte* (i.e. without the debtor being present), therefore the creditor must disclose all relevant facts supporting the request.

It is important to note, however, that a freezing order does not create any preferential right in favor of the claimant over the seized assets should the legal action lead to liquidation proceedings. In addition, if the creditor is defeated, they may be liable for the loss and damage suffered by the debtor as a result of the freezing order. Courts may therefore order creditors to provide security on costs in order to protect debtors from irresponsible action.

Collection @ Euler Hermes

It is always advised to attempt collection prior to any legal action in order to maximize chances of successful recovery and avoid legal costs and delays. Our key principle is to collect in close proximity to the debtor, using a series of letters, emails and phone calls in the local debtor language. Our World Collection Network of Euler Hermes offices and external providers are experts in professional trade debt collection and negotiation, ensuring positive outcomes while retaining important client relationships. Euler Hermes can handle the complete collections process from amicable, pre-legal action through to judgment and enforcement.

Lodging an appeal

Appeal is usually available when a judgment is tainted by an error of law or fact though procedures may vary from one court to another. Appeals against judgments rendered in first instance by Federal Courts are reviewed internally by a Full Court (three judges). Appeals against judgments rendered in first instance by the States' Supreme Courts, by contrast, are reviewed in the Appeal Division of the same Courts (in South Australia or Tasmania, appeals from first instance judgments in the Supreme Court are considered by a Full Court of the Supreme Court).

Finally, decisions rendered in second instance by Appellate jurisdictions may be brought to the High Court (usually competent on constitutional matters) provided that special leave has been granted. The time limits for bringing an appeal differ from one jurisdiction to another, but leave for appeal can usually be requested within 45 days to three months following the notification of the decision to the parties. Overall, this court structure tends to make appeal procedures complex and expensive.

Enforcing court decisions

A judgment is enforceable as soon as it becomes final (i.e. when appeals are not available anymore). The judgment creditor has up to twelve years to seek enforcement of a local judgment through Examination Notices, Garnishee Orders or Writs of Execution. Examination Orders are useful tools as they may force the debtor to provide information on their financial situation and assets, and thus help us choose a recovery strategy. The Order must be requested from the court after judgment has been entered.

The court may also issue a Garnishee Order allowing the creditor to recover its debt directly from the debtor's bank account (or salary) as well as from the debtor's debtors, until the principal and interest are paid off. In practice, however, the procedure is best used after examining the books and records of the company in court (Examination Order).

The court may finally grant a Writ of Execution for the Levy of Property, which orders a sheriff to seize and sell the debtors' property to the benefit of the creditor. The sheriff's costs include fixed fees (less than AUD 100) as well as a percentage on the proceeds. The sheriff's intervention often pushes the debtor to achieve an arrangement (instalments) to avoid seizure, but the debtor might alternatively prefer to file an application to set the judgment aside. Such costs are usually added to the debtor's payable debt.

Debts may also be recovered through insolvency proceedings. A certificate of judgment may indeed be annexed to a Creditors Statutory Demand requiring the debtor to pay secure or compound the debt within 21 days. Failure to do so would constitute prima facie proof of insolvency and would give grounds to a winding up application.

How long could legal action take?

Straightforward claims would normally be settled within two to four months, but disputed claims may last more than a year. Enforcement proceedings, in addition, could take six to nine months where the

debtor's assets are difficult to identify.

International litigation will always take longer and cost more than domestic litigation – the difference would depend on numerous factors which could only be meaningfully quantified on a case by case basis.

How much could this cost?

Procedural costs may differ from one state's legislation to another, but the courts enjoy broad discretion in ordering costs.

As a general rule, the unsuccessful party is requested to pay the reasonable legal costs of the successful party, but in practice, approximately 60% to 70% of the costs are effectively charged to them, unless the courts calculate costs so as to grant indemnity to the winning party (which may then recover 100% of its costs).

Efforts (whether positive or negative) made during the pre-legal amicable negotiations are usually taken into consideration when awarding costs.

As previously mentioned, the law does not authorize adding automatic collection costs and interests unless the matter has been agreed contractually. However, the law allows the creditor to add a fixed amount to the claim while filing its case with a court, in order to recuperate legal fees upon obtaining an enforceable final decision. In practice, costs are usually left aside as paying the debt is what matters most. Court fees are regulated and 'scale costs' are set by each state or territory government. These are published on the relevant court website.

Having a lawyer may constitute a good way to minimize procedural costs. Conditional arrangements whereby attorneys are not paid upfront but rather receive a fixed sum upon success (i.e. 'no-win-no-fee') are common in various litigation proceedings, but not in relation to debt recovery cases. Contingent fees whereby the legal professionals are entitled to receiving a percentage on the final award may be prohibited by law depending on the jurisdiction. This prohibition does not normally apply to litigation-funding companies.



Litigation @ Euler Hermes

Should legal action be necessary, Euler Hermes can provide support throughout the legal process from judgment to enforcement via our World Collection Network of Euler Hermes offices and external providers. Legal action can often be complicated and expensive, so you will be informed of all costs prior to any action and advised on which route is best to take.

Alternatives to legal action

Alternative Dispute Resolution methods (ADR)

ADR mechanisms are popular in Australia but remain unused in debt litigation thus far. Nonetheless and as previously noted, the parties have an obligation to negotiate in order to settle their dispute prior to bringing formal legal action. In addition, mediation and arbitration may be relied upon by the parties on a voluntary basis, or upon court invitation aiming at solving commercial disputes through informal procedures. In mediation proceedings, a mediator is appointed (by the parties or by a court) to help the parties reach an acceptable compromise, but it has no authority to decide for the parties. Any agreement between the parties and validated by the mediator is binding. In arbitration proceedings, by contrast, the arbitrator is appointed by the parties and given authority to solve the dispute on their behalf. Therefore, the arbitral award is final, binding, and enforceable through domestic courts. Arbitration standards for international disputes coincide with the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration. Arbitrators may grant interim relief.

Foreign forums

As a result of the difficulty to obtain timely decisions from domestic courts when the claim is disputed, a foreign forum (i.e. under a foreign law or before a foreign court) may in theory be considered. Indeed, Australian courts usually respect foreign jurisdiction provisions as agreed by the parties to a contract unless public policy reasons prevent from applying the law of the chosen forum (or if, as in relation to consumer protection matters, the legislator has imposed the exclusive application of Australian law). It is essential, however, that the agreement is characterized by an international connection (for example, one party has elected domicile in another country, or the place of execution is located abroad), and that a jurisdiction clause is drafted to this effect.

Enforcing foreign awards

Enforcing foreign awards in Australia may be a time consuming exercise and using domestic courts may sometimes remain faster than obtaining an award abroad and enforcing it through an exequatur procedure. Currently, the enforcement of foreign judgments in Australia is governed by both statutory regimes (the Foreign Judgments Act 1991 and the Foreign Judgments Regulations 1992) and Common Law principles. Foreign awards must first be registered officially with an Australian Court and be recognized as a domestic and enforceable judgment (exequatur proceedings).

The foreign award must be a final and conclusive money judgment. Of course, the award must be enforceable in the country of the issuing court but it must have remained unenforced. Furthermore, recognition normally depends on whether a reciprocal recognition and enforcement agreement exists between Australia and the issuing country. Therefore, unless the issuing

country is listed in the 1992 Regulations, judgment from its courts will not be enforceable in Australia.

Australia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Therefore, domestic courts also ought to recognize and enforce decisions rendered through international arbitration proceedings.

Handling insolvent debtors

Insolvency in Australia is merely a cash flow matter and Section 95A of the Corporations Act 2001 (Cth) states that a company remains solvent if (and only if) the company is able to pay all its debts when they become due.

Insolvency proceedings are expensive and complex, so are usually used as a last resort. However, the National Personal Insolvency Index (a public register in electronic format) provides a list of insolvent companies.

Therefore, the threat of initiating insolvency proceedings (through a statutory demand letter) may constitute an effective means of pressure while collecting unpaid debt. In practice, insolvency proceedings tend to follow a final judgment or result from the debtor's failure to comply with a statutory demand within 21 days (in which case proceedings occur before the Federal Court). Section 459P of the Corporations Act provides for different proceedings.

Insolvency proceedings

Out-of-Court proceedings

Informal out-of-court proceedings may be conducted but all creditors would need to agree and execute a deed so that only one creditor could overturn such an arrangement. Unlike a Deed of Company



Arrangement (DoCA), the creditors would have no protection against unfair preference claims by any later liquidator.

Restructuring the debt

Receivership proceedings constitute a first settlement possibility. A receiver is nominated upon enforcement of a general security agreement (debenture) and takes over the company management until the debt is repaid or recovered. If the process fails, a liquidation procedure may be initiated.

A court-sanctioned Scheme of Arrangement between creditors and the company may also be reached. It becomes effective once a required majority of creditors (at least 50% in number and 75% in value of creditors in each class) has approved the scheme and the court has validated the agreement. Those creditors that did not vote in favor of the arrangement are nonetheless bound, which may have significant consequences considering that the law provides no limitation as to how much of the debt is susceptible to being written-off. Voluntary Administration is the most common procedure as it aims to maximize a company's chances to continue its activities. The procedure suspends the director's control in favor of a registered administrator (appointed by the company itself).

Creditors and other parties are generally prevented from enforcing their rights during the moratorium phase, but it is very common for commercial contracts to allow a party to terminate the contract if the other undergoes some insolvency procedures. DoCA may eventually formalize an agreed compromise which then binds all unsecured creditors, including those that did not vote in favor.

Winding up proceedings

Liquidation may be requested by the parties and leads to nominating a liquidator in charge of controlling the company, keeping the creditors informed, and distributing any assets. The company is then deregistered. Once appointed, the liquidator must contact potential creditors and communicate a claim submission date (through newspapers for instance). The liquidator may then admit or reject a claim, and would often ask for further evidence justifying the creditor's right.

Priority rules

Priority rules normally apply while distributing the proceeds to the creditors. Secured creditors holding a security interest (as defined in Section 12 of the Personal Property Securities Act 2009) are given priority against unsecured creditors in liquidation proceedings. Expenses flowing from the insolvency proceedings, for instance, constitute priority debts. Employees are a special class of creditors which has a degree of priority over secured and unsecured creditors. Tax debts are considered unsecured and would only be paid for if sufficient funds remain.

The petitioning creditor's legal costs (related to the insolvency proceedings) may be considered a priority and refunded to the creditor prior to sharing dividends.

Cancellation of suspect transactions (clawback)

In addition, the liquidator may cancel various types of transactions concluded during 'suspect periods' prior to the proceedings. For instance, transactions aiming at avoiding creditors within ten years prior to the proceedings, unreasonable decisions taken by the directors within four years prior to the proceedings, transactions favoring one creditor over the others (unfair preferences) concluded within six months prior to the proceedings, unfair loans, fraudulent transactions etc. would be considered problematic. Incriminated transactions would then be void and the creditor would be requested to refund the amounts at stake (a claim would be lodged against the creditor).

How long could insolvency proceedings take?

It is difficult to provide timeframes for reorganization-based proceedings, however, liquidation tends to be effective and fairly quick (from six to 18 months on average).

Necessary documents

Copies of unpaid invoices, last statement of account, copy of supply contract, copy of credit application, proof of delivery if necessary (AWB BOL for export).



Insolvency @ Euler Hermes

Euler Hermes works closely with debtors, creditors and lawyers to provide support during insolvency and restructuring processes. With many options available when it comes to insolvency action, we can offer advice on which option is most suitable.

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