

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION



THOMSON REUTERS

REDFERN LEGAL CENTRE PUBLISHING

Published in Sydney
by Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

19 Harris Street, Pyrmont NSW 2009
First edition published by Redfern Legal Centre as *The Legal Resources Book (NSW)* in 1978.
First published as *The Law Handbook* in 1983
Second edition 1986
Third edition 1988
Fourth edition 1991
Fifth edition 1995
Sixth edition 1997
Seventh edition 1999
Eighth edition 2002
Ninth edition 2004
Tenth edition 2007
Eleventh edition 2009
Twelfth edition 2012
Thirteenth edition 2014
Fourteenth edition 2016
Fifteenth edition 2019

Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

ISBN: 9780455243689

© 2020 Thomson Reuters (Professional) Australia Limited asserts copyright in the compilation of the work and the authors assert copyright in their individual chapters.

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the *Copyright Act 1968*, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

This edition is up to date as of 1 October 2019.

The Law Handbook is part of a family of legal resource books published in other states:

Vic: *The Law Handbook* by Fitzroy Legal Service, ph: (03) 9419 3744

SA: *Law Handbook* by the Legal Services Commission of South Australia, ph: (08) 8111 5555

Qld: *The Queensland Law Handbook* by Caxton Legal Centre, ph: (07) 3214 6333

Tas: *Tasmanian Law Handbook* by Hobart Community Legal Service, ph: (03) 6223 2500

NT: *The Northern Territory Law Handbook* by Northern Territory Legal Aid Commission,

Australasian Legal Information Institute and Darwin Community Legal Services, ph: (08) 8982 1111

Editor: Newgen Digitalworks

Product Developer: Karen Knowles

Printed by: Ligare Pty Ltd, Riverwood, NSW

This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

Debt

Matthew Hazard – Legal Aid NSW

Kai Wu – Legal Aid NSW

[15.20] Demands for payment.....	504	[15.190] Enforcing the judgment debt.....	519
[15.80] Going to court.....	507		

[15.10] A debt is created when one person (the debtor) owes money to another (the creditor).

A debt can be resolved either by negotiation between creditor and debtor or by court action. Creditors often prefer to negotiate, as court action can be time-consuming and expensive.

The *Civil Procedure Act 2005* (NSW) (CPA) is the main NSW Act dealing with debt collection.

It is only possible to enforce or defend a debt by complying with the Act as well as the court rules, and by using the proper court forms.

This chapter considers the three possible stages in the process of debt collection:

- demands for payment;
- going to court;
- enforcing a judgment debt.

Demands for payment

[15.20] Collection action begins when a creditor, or someone working for them (such as a debt collector), contacts a debtor to require payment.

[15.30] Letters of demand

Letters from a creditor or debt collector (*letters of demand*) often state that unless the debtor pays by a certain date, court action will be taken.

Letters of demand that look like court documents

It is against the law to send a letter of demand designed to look like a court document (*Unauthorised Documents Act 1922* (NSW), s 4). A person receiving one can complain to the police, NSW Fair Trading or the Australian Competition and Consumer Commission.

Responding to a letter of demand

Check the creditor's claim

The debtor should check the basis of the claim that there is a debt, as well as the calculation of the amount. If necessary, the debtor should write requesting copies of contracts, statements or other information, and asking that no further action be taken until they have been provided.

Is the claim enforceable?

Some consumer contracts are not legally enforceable or are only partly enforceable – usually because the seller has not obeyed the law in some important respect.

The question of whether or not a debt is fully enforceable directly affects the options open to a debtor. For where to get advice, see [15.260].

Debt collectors' costs

Debt collection agencies often include a fee, called their "costs", in letters of demand.

This need not be paid. It is illegal in NSW for a debt collector to charge the debtor for collecting the debt, or even to try to do so, except where the fee is for costs incurred in certain types of repossession of goods on hire purchase (*Commercial Agents and Private Inquiry Agents Act 2004* (NSW), s 19(1)). The debtor can recover money unlawfully taken by a debt collector in any court of competent jurisdiction (s 19(2)).

However, the practice is legal in some states, and some creditors try to recover debts through interstate debt collectors. This can result in proceedings being commenced outside NSW. For the remedies available to a debtor, see [15.50].

[15.40] The creditor's options

If a debtor does not pay, reach agreement with the creditor about payment, or establish that they do not in fact owe the money, the creditor can begin legal proceedings, and the debtor may be ordered to pay the creditor's legal costs.

[15.50] The debtor's options

Payment in full

If the debt is not disputed, the debtor should consider paying it in full if their circumstances allow.

Refusal to pay

A person may refuse to pay on the grounds that:

- they do not owe the money;
- the debt has been paid already;
- they cannot afford to pay.

Getting into debt and getting advice

People sometimes agree to buy things they can't afford; or they take on manageable debt, but then their circumstances change.

Taking action

Sometimes there is a legal right to get out of a contract establishing a debt or to vary the contract (see Chapter 11, Contracts; Chapter 13, Credit). Otherwise, it is best to write immediately to the creditor asking to end the agreement. If goods have been bought, the buyer could offer to return them. The seller does not usually have to agree, but may do so.

Getting advice

People who are overcommitted may benefit from financial counselling. A counsellor can be found by contacting the Financial Counsellors Association of NSW or Wesley Financial Counselling. Advice on debt matters may also be obtained from:

- Legal Aid NSW offices;
 - community legal centres;
 - community welfare organisations, including ethnic welfare associations.
-

If the person disputes the debt

A person who believes they do not owe the money should get expert advice and then write to the creditor explaining why they do not owe the money. This may stop the creditor taking further action.

Going to a tribunal

A person who disputes the debt may be able to ask a tribunal to determine the matter. Tribunals are usually cheaper and less formal than courts. For example, a person who bought something that does not work properly can apply to the Consumer and Commercial Division of NSW Civil and Administrative Tribunal (NCAT) for an order for repairs or release from payment (see Chapter 10, Consumers).

If the debt has been paid

If the person has already paid the debt, they should write immediately to the creditor stating that this is the case and including evidence such as bank statements or receipts.

If the person cannot afford to pay

A person who cannot afford to pay the debt can try negotiating with the creditor (see below).

If the person has borrowed money from a finance company or a bank, they may be able

to apply to the external dispute resolution schemes, namely Australian Financial Complaints Authority (AFCA) to seek hardship variations (see Chapter 13, Credit); and they may be able to do so even after the statement of claim has been filed but before a judgment has been given.

Negotiating with the creditor

If the debtor does not dispute the debt, but cannot afford to pay in full, they can negotiate with the creditor about payment.

In particular, the debtor can:

- offer to pay by instalments;
- offer a reduced lump sum to finalise the debt;
- ask the creditor to write off the debt;
- ask for a payment moratorium.

Some of these options may not be available in certain circumstances, or the debtor may propose a combination of options.

Temporary difficulties

A debtor who is temporarily unable to pay should ask the creditor for more time. Most creditors will accept reduced payments, or defer payment, if the debtor cannot afford to pay for a month or two.

Writing to the creditor

The debtor should write to the creditor explaining their financial situation in some detail, including information about income and expenditure, dependants and any special circumstances.

If the inability to pay is likely to be temporary (because of unemployment or illness, for example), this should be mentioned.

Offering a lesser amount

Sometimes the debtor's inability to pay is likely to be long term, but they have access to a smaller lump sum (such as a compensation payment, inheritance, asset sale, or loan from family or friends).

The creditor may be willing to accept less than the full amount in exchange for the certainty of being paid at least some of the money.

Asking the creditor to write off the debt

When a debt is written off, the creditor can claim a tax benefit that reduces the loss. Writing off the debt also saves the creditor the expense of trying to recover it. So in circumstances of particular hardship, such as the death or permanent

disability of a breadwinner or desertion by an income-earning spouse, the debtor should ask that the debt be written off, especially if they can show they have been a good customer in the past.

Similarly, a debtor who has no income or assets obviously cannot pay. If this is pointed out to the creditor, they may agree to write off the debt as the trouble of trying to collect is likely to outweigh any benefit.

Any agreement with the creditor should be in writing and signed by both creditor and debtor to avoid the possibility of dispute later on. The agreement should state that it is in full and final settlement of the claim.

Ensuring that the agreement is enforceable

To be enforceable in a court, the agreement should show that the debtor is giving something or foregoing a legal claim in return for the debt being written off.

A clause stating that the debtor pays a nominal sum in exchange is enough to ensure that the agreement is enforceable.

Asking for payment to be postponed

If the inability to pay is likely to be temporary, it may be possible to obtain a *moratorium* (a postponement of payments) for a few months.

It is advisable to ask that no interest be charged during this period, or the debtor's position may not improve.

There are special provisions for people whose debts are subject to the *National Credit Code (National Consumer Credit Protection Act 2009 (Cth), Sch 1)* and who are having trouble meeting payments because of illness, unemployment or some other good reasons (see Chapter 13, Credit).

[15.60] Where there are numerous debts

Someone with a number of debts might consider the available options and eventually decide on a different option for each.

There are, however, several options available that take all debts into account. These are:

- debt consolidation;
- pro rata repayment schemes;
- selling assets;

- voluntary bankruptcy (see Chapter 6, Bankruptcy, for information about this).

The matter should be discussed with a financial counsellor before a decision is made.

Debt consolidation

The term *debt consolidation* generally applies to a loan used to pay out two or more existing debts, thus reducing the number of debts and, usually, the monthly repayments.

Potential disadvantages

Many debtors regard debt consolidation as the solution to their financial problems. However, a person who cannot pay a number of small debts may not be able to make one regular payment of almost the same amount.

Debt consolidation may provide only a short-term benefit and be ultimately more expensive.

Pro rata repayment

Pro rata repayment schemes are informal schemes (ie, not arranged through the courts) set up to ensure that all creditors are repaid by instalments over a period of time. They differ from other instalment schemes in the way that the amount offered to each creditor is calculated. Each is offered a monthly amount based on:

- the proportion of the total debt owed to that creditor; or
- the proportion of the total regular monthly payments payable to that creditor.

The debtor decides how much they can comfortably pay each week to all creditors and divides the amount in one of the two ways.

Creditors generally like pro rata schemes, but they may not always be appropriate; for example, where a debt is secured.

[15.70] Dealing with creditors and debt collectors

There are legal limits to what a creditor or debt collector can do or say in pursuit of the debt.

Debtors at a special disadvantage

Debt collectors must not engage in unconscionable or unfair conduct. This means that they cannot take advantage of a debtor's disability, vulnerability or "special disadvantage", that is, a person's condition or circumstances which affect their

ability to judge what is in their best interest (see *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447).

Harassment by creditors

A debt collector should only contact a debtor for a reasonable purpose (eg, to demand payment or discuss a payment arrangement). A debt collector cannot physically threaten or harass a debtor, contact a debtor more than necessary or at unreasonable hours, nor should they make contact with other people without the debtor's permission. It is an offence under both the *Competition and Consumer Act 2010* (Cth) and the *Fair Trading Act 1987* (NSW) for a creditor or debt collector to unduly harass someone about a debt.

False or misleading statements or conduct

Debt collectors cannot make false statements about the debt (eg, the amount owed or who is liable to pay it), about what will happen if the debt is not paid (eg, that the debtor will be made bankrupt or that their house will be taken), nor can they engage in conduct which is misleading (eg, sending letters of demand which look like court documents).

What to do if unfair or illegal conduct occurs

Harassment and other unfair or illegal conduct can be reported to the following agencies:

- the Australian Securities and Investments Commission, if the debt relates to loan repayments;
- the Australian Competition and Consumer Commission, if the debt does not arise from a loan;
- NSW Fair Trading, for all kinds of debts;
- the police, in the case of violence, trespass, threats of assault or other possible criminal offences.

Cancellation of the debt collector's licence

Harassment of debtors or others while collecting debts may be grounds for cancelling a debt collector's licence (*Commercial Agents and Private Inquiry Agents Act 2004*, ss 10, 11). Creditors who collect their own debts do not need a licence and have less to fear in harassing debtors (s 5(3)).

Taking the creditor or agency to court

Someone who has suffered a loss through harassment (such as loss of reputation) can sue the creditor or collection agency (if it is a company) for *damages* (compensation for loss).

Going to court

[15.80] Which court?

Legal action in debt matters can be commenced in the Supreme Court, the District Court or the Local Court.

The Local Court can hear claims for up to \$100,000 (or up to \$120,000 if the parties consent or fail to object). The District Court can hear claims for up to \$750,000 (or more if the parties consent). The Supreme Court can hear claims for any amount.

This chapter deals with debt collection through the Local Court.

In the Local Court

The Local Court is divided into a General Division and a Small Claims Division. Debt matters are usually heard in:

- the General Division, if the amount claimed is \$20,000 or more;
- the Small Claims Division, if the amount is less than \$20,000.

The main advantages of the Small Claims Division are:

- the relative lack of formality;
- the limitation on the legal costs that can be awarded against an unsuccessful party.

More detailed explanations on procedures and forms for Local Court cases in the Small Claims Division can be found from the Law access website www.lawassist.lawaccess.nsw.gov.au/lawassist/lawassist_debt_small_claims_home.html: www.lawassist.lawaccess.nsw.gov.au/lawassist/lawassist_index.html (provided by LawAccess NSW).

[15.90] Time limits

There are time limits (*limitation periods*) for taking a debtor to court. Most court actions for debt recovery must be started within six years of when the debt (or *cause of action*) first arose (*Limitation Act 1969* (NSW), s 14).

However, if the debtor signs a written agreement that an amount is owing, or makes a payment before the end of the limitation period, the limitation period starts again from the date that the debt was *confirmed* (s 54).

[15.100] What the creditor must do

The statement of claim

To take an action to recover a debt in the Local Court, the creditor (*plaintiff*) must:

- complete a statement of claim;
- file it with the court where they want the action to be heard (this is called “issuing a statement of claim”);
- arrange for it to be served on the debtor (*defendant*).

Completing the statement of claim

A *statement of claim* is a court document that states what the plaintiff claims and on what basis.

Statement of claim forms is available from any Local Court.

A creditor may commence either a *liquidated* or an *unliquidated* claim. Both are commenced by a statement of claim (Form 3A or 3B, *Uniform Civil Procedure Rules 2005* (NSW), r 6.2 (UCPR)).

Liquidated claims

A claim is liquidated if it can be calculated to a precise amount, such as a sum of money owing under a loan contract.

The debtor (the defendant) must take action within 28 days of receiving a statement of claim. Otherwise, the creditor (the plaintiff) can apply to the court for *default judgment* (Form 38, UCPR, rr 16.3, 16.6).

Unliquidated claims

A claim is unliquidated if the sum claimed is unspecified; for example, in an action for damages where the value of damage is not yet known, as may be the case in a claim arising from a motor vehicle accident.

The debtor must take action within 28 days of receiving the statement, otherwise the plaintiff can apply for a default judgment in their favour (Form 39, UCPR, rr 16.3, 16.7).

Mixed claims

If the claim is for an amount that is partly liquidated and partly unliquidated, it is treated as an unliquidated claim. This could arise, for example, in a tenancy dispute where a tenant has left the premises and the landlord brings proceedings to recover the rent owing (a liquidated claim) as well as the cost of repairing the premises and damages (an unliquidated claim).

Default judgments

An application for default judgment can be dealt with in the absence of the parties, and need not be served on the debtor (UCPR, r 16.3(1A)).

Default judgments are generally only available in relation to claims of possession of land, detention of goods, debts and liquidated claims, although there are some exceptions for unliquidated claims (see UCPR, rr 16.4–16.8).

Acknowledging a liquidated claim

In a liquidated claim, the defendant can file a statement acknowledging liability for the full amount of the claim (Form 35, UCPR, r 20.34), *unless*:

- the defendant has filed a defence; or
- the plaintiff has filed an application for default judgment (UCPR, r 20.34).

Once the statement is filed, judgment will be entered for the plaintiff for the full amount of the claim. This will discharge all of the plaintiff’s claims in the proceedings.

Acknowledging part of a claim

A defendant who wishes to acknowledge part of a liquidated claim cannot file a Form 35, but instead must plead the matter in a defence (see [15.130]).

Filing the statement of claim

The statement of claim may be filed, and the action commenced, at any Local Court.

Having the action transferred

To another Local Court

In some circumstances, the debtor can ask for the matter to be transferred to a court more convenient

to them (CPA, ss 150–154). The procedure is set out in r 8.2 of the UCPR.

This is explained in more detail in Changing courthouses at [15.160].

Serving the statement of claim

The creditor must give the debtor an official court copy of the statement of claim. This is called *service*. The defendant is then considered to have been notified that the plaintiff is taking court proceedings against them.

The statement may be served in various ways (UCPR, r 10.20). It may be:

- served personally on the defendant; or
- left, addressed to the defendant, at the defendant’s business or home address with a person apparently over 16 who is apparently employed or lives at that address; or
- served by post.

The creditor may serve the statement of claim personally. However, it is more common to have the statement served on the creditor’s behalf by:

- the creditor’s solicitor; or
- a commercial *process server*.

Process servers

Commercial process servers must be licensed. As for debt collectors, complaints about their conduct may be made to various government and consumer protection agencies, including:

- the Australian Securities and Investments Commission (if the debt relates to loan repayments);
- the Australian Competition and Consumer Commission (if the debt did not arise from a loan);
- NSW Fair Trading (for all kinds of debts);
- the police.

See What to do if unfair or illegal conduct occurs at [15.70].

Service by post

The claim may be sent by ordinary post to the debtor’s current business or residential address (UCPR, Pt 10). In this case, it must be posted by a court officer in an envelope with the return address of the court.

If the envelope is returned unopened and marked “not delivered to the addressee”, the statement is considered not to have been served.

If the debtor is a company

If the debtor is a company, the claim can be:

- served personally on an officer of the corporation; or
- posted, preferably by registered mail, to the registered office of the company; or
- left at that address; or
- served in any other lawful way for service to be effected.

If the debtor runs a registered business

A person operating a registered business can be served by:

- delivering the document to the person; or
- posting it to the address specified for service, or the person’s residential or business address; or
- sending it by fax to the person’s fax number.

Time limits

In most courts, there are time limits for the service of court documents, after which the documents will be deemed invalid for service. Once invalid, the documents must be filed again.

In the Supreme Court, District Court or Local Court, a statement of claim seeking relief in relation to a debt or other liquidated claim is valid for service for six months after filing r 6.2(4) of the UCPR. Application can be made to extend this time (UCPR, r 1.12).

Service outside NSW

When someone incurs a debt in another Australian state or territory, the creditor can serve the court documents under the *Service and Execution of Process Act 1992* (Cth).

Section 16 requires certain information to be attached to a statement of claim that is to be served outside the state.

If an expected claim is not received

Because the rules about service are so wide, it is possible for a debtor to be unaware of a statement of claim even if it was properly served.

A person who believes they should have received a statement of claim but has not should immediately notify the creditor or the creditor’s solicitor. Notification should be by letter (keep a copy), or telephone if time is short.

If the creditor has not yet obtained judgment, the debtor should ask them to do nothing further until the debtor has examined a copy of the statement of claim and decided what to do.

Many creditors will allow debtors time to consider their options under such circumstances.

Can the debtor avoid service?

A debtor may try to avoid service of the claim by, for example, not answering the door or sending children under 16 to the door. This may not work, because the creditor can apply for permission to bring the statement of claim to the debtor's attention in some other way (UCPR, r 10.14). This is called *substituted service*.

[15.110] Responding to service

Entering an appearance

The debtor has 28 days after service to *enter an appearance*. An appearance can be entered, unless the court directs otherwise, by filing either:

- an *appearance* (Form 6A, UCPR, rr 6.9, 6.11);
- a *submitting appearance* (Form 6B, UCPR, rr 6.9, 6.11); or
- a *defence* (Form 7A or 7B) (UCPR, r 14.3).

Filing a notice of appearance

A party who files a notice of appearance is considered to have waived any objection to the manner of service (*Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529).

Submitting to judgment by notice of appearance

The debtor can choose to take no active part in the proceedings by filing a notice of appearance stating that they submit to the court's orders and any judgment made in relation to the claim. This is called *submitting to judgment by notice of appearance* (UCPR, r 6.11).

Once the debtor submits to judgment by notice of appearance, no defence or affidavit can be filed except with leave of the court.

Filing a defence

See [15.160].

If recovery is statute-barred

Debts cannot be collected through the courts after a certain period of time has passed. A debtor may have a defence if:

- six years or more have passed since the debtor last made a payment or confirmed the debt; and
- no court action has been taken to recover the debt in the meantime.

In this case, recovery of the debt through the courts is *statute-barred*, and the courts will not enforce it.

Should the debtor make another payment?

If there is no court judgment against the debtor and they make another payment on the debt, the limitation period will usually start again, and normally they will no longer be able to rely on the defence that the debt is statute-barred.

A debtor who thinks that a debt collector is contacting them about a debt that is statute-barred should get legal advice before making any payment or confirming the debt in any other way.

Paying the amount claimed

The debtor may also, within the time limited for making an appearance, respond to the statement of claim by paying the creditor the amount claimed, including any interest and costs (UCPR, r 6.17).

The debtor may then file a *notice of payment* (Form 34) which operates as a permanent stay of the proceedings (subject to court orders).

If the debtor does not respond

If for any reason the debtor does nothing within 28 days of the claim being served, the creditor can apply to the clerk of the court (a Local Court officer) for a default judgment against the debtor.

If the statement of claim is in proper form, the judgment is made:

- without a court hearing;
- without the creditor having to prove the claim.

[15.120] Obtaining a default judgment

To get a default judgment, a creditor simply has to file two statements sworn in front of a justice of the peace – an *affidavit of service* (Form 41) and an *affidavit in support* (Form 40) – setting out how much the creditor claims the debtor owes, including court costs (UCPR, r 16.3(2)).

An affidavit of service is unnecessary if the documents were served by the Local Court.

Time limits

The creditor has 12 months from the expiry of the debtor's 28-day response period to apply for the default judgment.

Consequences for the debtor

A default judgment means the creditor has won, even if the debt was never owed at all or the debtor had some other good case, simply because the debtor did not file a defence.

Once this has happened, the creditor can take further action against the debtor, such as wage garnishment, to enforce payment. A judgment creditor has 12 years to enforce the debt after the date of the judgment (see [15.190]).

Filing a defence after the default judgment

A defence filed after the entry of default judgment is invalid until the judgment is set aside (*Guardian Co-operative Housing Society v Pritchard* [2002] NSWSC 1002).

[15.130] Applying to have a default judgment set aside

If a default judgment has been entered against a debtor who has a good defence, the debtor can ask the court to set it aside (UCPR, r 36.16(2)(a)).

How to apply

Application to set aside default judgment is made by filing two documents:

- a *notice of motion* (Form 20); and
- an affidavit in support (Form 40).

The affidavit should:

- explain why a defence was not filed before default judgment (eg, because the statement of claim was not received);
- explain any delay in bringing proceedings to set aside judgment;
- contain details of the grounds of defence (eg, illegality or lack of good faith). There should be enough detail to satisfy the court that the defence has merit, and to give the other side advance notice of what will be relied on.

The debtor should apply for a stay of proceedings at the same time.

Filing a defence with the notice of motion

In practice, the debtor should file a defence with the notice of motion, or at least attach a draft of the defence to the affidavit in support. Usually, the court will set aside a judgment if it is satisfied that the debtor has a good defence.

If the motion to set aside fails

There is no limit on the number of motions that can be filed to have judgment set aside.

Setting aside a default judgment by consent

A judgment can be set aside by the court if the parties consent (UCPR, r 36.15(2)), as long as the rights of third parties are not affected.

If the creditor consents, the debtor should prepare consent orders setting out any terms and conditions in clear language. Usually, the terms will specify:

- the date of the default judgment being set aside;
 - that the debtor will file a defence within 14 days;
 - that the debtor will pay the creditor's costs.
-

Tribunal judgments

If a decision has been made in the NSW Civil and Administrative Tribunal (NCAT) and a certificate of judgment is filed in the Local Court for enforcement, the Local Court does not have jurisdiction to set aside the judgment awarded in NCAT.

The debtor (or another party seeking to set aside the judgment) must bring proceedings, in NCAT for internal appeal, or in the District Court or Supreme Court to appeal that original NCAT decision (*Civil and Administrative Tribunal Act 2013* (NSW), ss 80, 83, 84).

The hearing

The application is not granted just on the basis of the form. When the notice of motion is filed, the court registrar sets a date for a hearing.

The debtor must apply to the court in person on the hearing date, and the creditor may contest the application. It is therefore vital that the debtor obtains legal advice and appears in court on the date.

If the judgment is set aside

If the court sets aside the judgment it often imposes conditions on one or more of the parties, the most common being that the debtor file a defence in the next 14 days if this has not yet been done.

If the conditions are not met, the creditor can apply to the registrar to have the judgment re-entered.

Payment of costs

The court may make orders for the costs incurred in setting aside the judgment.

If the failure to lodge a defence was not the debtor's fault, the court may order that costs be paid by the party that ultimately loses the case.

If the debtor was at fault, the court is likely to order the debtor to pay the creditor's costs.

Has someone come to take your furniture?

This person is called a court sheriff. If you did not know about any court proceedings, it is likely that a creditor has obtained a default judgment against you. Ring the court or the creditor to get a copy of the statement of claim setting out the creditor's claim. If you want the chance to defend the claim, you can apply to set aside the default judgment (see above). If you want to make an arrangement to pay the debt, you can apply to the court for an instalment order (see [15.210]).

[15.140] Applying for a stay of proceedings

A creditor can continue to enforce a judgment until it is set aside. For this reason, a debtor who applies to have a judgment set aside should also apply for a *stay of proceedings* – an order stopping enforcement of the judgment for a specified period (CPA, s 67).

A stay will normally only be granted for substantial reasons (*Re Taylor* (1876) 4 Ch D 157).

In the Local Court, a stay is normally granted for a specified period, with the matter to be reviewed at the end of that period.

The court may suspend enforcement action until the motion for a stay of proceedings has been resolved.

How to apply

To apply for a stay of proceedings, the debtor should complete a *notice of motion*. This can be done on the form used for applications to set aside judgment (Form 20).

The debtor must set out the orders sought, such as length of the stay, and the reasons for the application (eg, that they are applying to have the whole judgment set aside). Alternatively, the reasons can be set out in an affidavit (UCPR, Pt 35).

Normally, the application should be filed at the court in which judgment was entered.

A hearing day is set, and notice given to the other side to allow them to oppose the application at the hearing.

Urgent applications

Often, enforcement proceedings must be stopped urgently; for example, where a sheriff is about to seize goods under a writ of execution or an employer has been ordered by a garnishee order to deduct the judgment debt from wages.

In this case, the debtor can apply to *any* court (such as the court nearest to their workplace), and the court may grant the order even if notice has not been given to the other side.

The court has limited power to grant such a stay until the first available list day for a Local Court to hear the motion.

[15.150] If the debtor admits the claim

Once a statement of claim is served, the defendant should check the amount claimed to be owing.

There are a number of options open to the debtor if the amount is correct and the debtor does not intend to defend the claim.

Making an offer

The debtor may make an offer to the creditor and, if possible, reach an agreement before default judgment is applied for. This is because, the creditor's costs, for which the debtor is liable if judgment is entered against them, are less if judgment is made after they admit or agree to the claim.

Additional costs

Where judgment is entered in favour of a creditor within 28 days of service of the statement of claim as a result of agreement, the court will usually only add to the judgment debt the cost of issuing and serving the statement of claim (UCPR, Pt 42, Div 1). Outside this time, a creditor in the General Division can apply to the court for their legal costs to be included.

Effect of informal agreements

An informal agreement with a creditor after receiving a statement of claim does not protect the debtor against default judgment. Unless the statement of claim is withdrawn, the creditor can

still apply for default judgment, and enforce it (see Judgment by agreement at [15.150]).

If the creditor tries to enforce the judgment

If a creditor makes an informal agreement with a debtor and then tries to enforce a judgment, the debtor should apply to have the judgment set aside. If the debtor can satisfy the court that the agreement was made and the debtor has not defaulted in their obligations under it, the court will usually set the judgment aside.

If a private agreement is made, the debtor should always get receipts as proof of payment.

Acknowledging the claim

The acknowledgement of liquidated claim procedure replaces the full confession procedure previously available in the District and Local Courts.

The debtor should seek legal advice before making any acknowledgment.

At any time before judgment, a debtor can admit liability for the whole amount of a liquidated claim by filling in and signing an *Acknowledgment of liquidated claim* (Form 35) in accordance with r 20.34 of the UCPR, which can be obtained from any Local Court. Judgment is then entered for the creditor for the whole amount of the claim.

An acknowledgment cannot be filed if:

- the debtor has already filed a defence; or
- the creditor has already filed an application for default judgment.

If a default judgment has already been set aside under r 36.15 or r 36.16 of the UCPR, the defendant may only file an acknowledgment with leave of the court (UCPR, r 20.34(5)).

Acknowledging part of the debt?

Part confessions (as they were previously known) are no longer available. It is not possible to acknowledge only part of the debt. A defendant who wishes to acknowledge only part of a liquidated claim must plead this matter in their defence.

Requesting to pay by instalments

The debtor can apply to pay by instalments by filing Form 46 or Form 47 at any time after the default judgment (or earlier if filed together with an acknowledgment Form 35).

The debtor should consider whether there are good prospects of obtaining an order to pay by instalments, or whether they would be better off negotiating with the creditor.

Judgment by admission

If a party makes admissions, the court may make an order or enter a judgment on the application of any party entitling the applicant to the fact (eg, an amount) admitted. The court's power to enter judgment by admission is discretionary, and will not be exercised if there is evidence that it would be contrary to the true facts.

Admissions may be express or implied, but must be clear.

Judgments based on admissions alone are rare in the Local Court. Parties usually use admissions as the basis of agreements or terms of settlement.

Judgment by agreement

At any time before judgment, the creditor and debtor can make an agreement as to judgment, and any terms and conditions, such as:

- the amount the debtor agrees to pay;
- the amount of instalments, if any;
- when payments are to be made (UCPR, r 37.1A).

When the agreement is filed, the court enters judgment in accordance with the agreement. If terms of payment are named, they are binding on the parties and a court can enforce them.

Disadvantage of filing an agreement

In practice, it may not be in the debtor's best interests to file an agreement as to judgment. Though filing the agreement binds the creditor to its terms, it has the disadvantage of being a judgment in the creditor's favour. This can affect the debtor's ability to obtain future credit (see Publication of debt information at [15.250]; Chapter 13, Credit).

It is often better for the debtor to seek an informal arrangement to pay by instalments on the understanding that the creditor will not pursue the claim.

If the debtor does choose this course of action, it is best to keep records of the informal agreement in case the creditor later applies for a default judgment.

Filing a defence and continuing to negotiate

If the debtor has good reasons for why they should not have to pay, they should file a defence (Form 7A or Form 7B) (see [15.160]).

Once the defence has been filed:

- the debtor can still negotiate with the creditor;
- the creditor cannot obtain a default judgment.

A word of warning

The debtor should be aware that in the General Division they risk being responsible for the creditor's legal costs if they later wish to discontinue the proceedings:

- without reaching an agreement with the creditor about the amount owing; and
- without reaching an agreement that each party pay their own costs.

The debtor should keep in mind that their defence must have reasonable prospects of success, otherwise the costs awarded against them may be greater.

Advantages

The advantages of filing a defence and continuing to negotiate are:

- the debtor gains an extension of time in which to decide what to do, seek legal advice and negotiate with the creditor;
- the creditor cannot catch the debtor out by immediately taking out a default judgment;
- the debtor may gain an edge in negotiations – a defence indicates a determination to make the creditor prove the case in court.

The debtor and creditor can reach agreement, or judgment can be entered on the debtor's acknowledgment, at any time before the hearing.

If the creditor offers to reduce the debt

An offer by the creditor to reduce the debt should be viewed with suspicion, particularly if no reason is given. The debtor can agree, of course; but it could mean there are inaccuracies in the creditor's accounting, or that the creditor is unable to prove the debt, perhaps through loss of records. An offer to reduce could be the basis for much harder negotiation by the debtor.

If more information is needed for matters heard in the Local Court

Sometimes a statement of claim is filed in the Local Court with limited details about how

the debt arose or how the amount owing is calculated.

Seeking particulars

The debtor is entitled to write to the creditor seeking particulars (asking questions). If the creditor does not respond, or if they dispute the relevance of some of the questions, the debtor can:

- file a notice of motion asking the court to make an order that the questions be answered (UCPR, r 15.10); or
- write to the creditor and notify them that they will seek orders at the next callover or review date.

Similarly, the creditor can ask for particulars of the defence once it is filed.

If a party has not provided sufficient particulars

If the court finds that one party has not provided sufficient particulars, they are likely to order that they pay the costs of the notice of motion.

If a party fails to provide information

A continuing failure to provide relevant particulars by one of the parties may lead to the statement of claim, or the defence, being struck out and judgment being entered in favour of the other.

[15.160] Defending the claim

Filing a defence

The first thing to do in defending a statement of claim is to file a defence (Form 7A or Form 7B) within 28 days of being served with the statement of claim. It should be filed at the Local Court from which the statement of claim was issued.

The court may also order another time limit for filing (UCPR, r 14.3).

Forms are available from any Local Court. There is no filing fee for a defence.

The affidavit

In Local Court proceedings, the debtor does not need to file an affidavit stating that the matters set out in the defence are true.

What the defence must contain

The debtor must set out clearly the grounds of defence – that is, why they do not owe all or part of the debt. It must contain enough information for the creditor to know what the debtor's case is going to be and how to respond to it.

The court may find that the particulars of the defence are insufficient if they mislead the other party.

The grounds of the defence should indicate where an issue raised in the statement of claim is admitted; for example, “the cost of fixing the plaintiff’s bicycle is not in dispute”.

Making a cross-claim

A debtor who has *any* claim against the creditor or any other person can make what is known as a *cross-claim* (CPA, s 22; UCPR, r 9.1 – see Form 9: *Statement of cross claim*).

A cross-claim should be distinguished from a defendant’s right to set-off, which applies where there are mutual debts (ie, liquidated claims) between the plaintiff and the defendant (CPA, s 21).

While a set-off is pleaded by way of defence, a cross-claim must not be included in the same document as the defence (UCPR, r 4.8) (see Set-off of judgments at [15.160]).

What can the claim be about?

The debtor’s cross-claim need not arise from the same matter as the creditor’s claim and can be for payment of a debt or for damages.

There can be any number of cross-claims as long as the total is not more than \$100,000 (in the General Division). If the debtor’s claims exceed this limit, there is the option of abandoning the excess in order to continue to bring the cross-claim in the Local Court (CPA, s 23(1)(a)).

How to make a cross-claim

The debtor should file a *statement of cross-claim* (Form 9).

Time limits

A party may make a cross-claim within the time for filing a defence or within any further time that the court allows (UCPR, r 9.1) (for the discretion to allow further time, see *Kandt Stening Group Pty Ltd v Stening* [2006] NSWSC 307).

What must the debtor prove?

If the debtor files a cross-claim, they bear the burden of proving, on the balance of probabilities, their claim against the creditor or other cross-defendant.

If the cross-claim is successful

If a cross-claim is successful, the court may give judgment for the balance of money awarded taking into account all the claims, or it may give judgment in respect of each claim (CPA, s 90(2)).

Set-off of judgments

If the creditor and debtor are the active parties to more than one judgment of the same court, the defendant to any proceedings may apply to the court for an order that the first judgment be set-off against any other judgment that will affect the parties (CPA, ss 21, 96).

Judgments of different Local Courts are taken to be judgments of the same court.

Proceedings commenced outside NSW

A creditor may start proceedings in a court outside NSW (UCPR, r 10.4; *Service and Execution of Process Act 1992* (Cth), s 15). In this case, the debtor can seek to have the proceedings stayed (s 20). If the stay is granted and the creditor starts proceedings in NSW, the debtor will usually save expense by defending the matter in their home state.

Changing courthouses

The court can order that the proceedings be transferred to some other Local Court, even if the parties do not apply for a transfer (*Local Court Act 2007* (NSW), s 55; UCPR, r 8.2).

What is an appropriate court?

An appropriate court is either:

- the court closest to where the debtor lives, works or runs a business, or lived, worked or ran a business at the time the cause of action arose; or
- the court closest to where the cause of action (the legal issue in dispute) arose.

Application for changing court is to be made by motion in accordance with Pt 18 of the UCPR and r 2.10 of the *Local Court Rules 2009* (NSW).

What the court may do

Even if the court chosen by the creditor is an appropriate court, the court still has the power to order that the case be heard in another court if, in the circumstances, it can be more conveniently or fairly heard there (*Local Court Act*, s 55; UCPR, r 8.2).

Generally, the court will only make such orders if there are very good reasons for doing so.

[15.170] In the General Division

Debt matters are usually heard in the General Division of the Local Court if the amount claimed is \$20,000 or more.

The General Division has formal procedures for proving that a debt is owed and then enforcing the

debt. A creditor or a debtor should obtain legal advice if they are litigating in this division.

Filing a notice to admit facts

Once a defence is filed, either the creditor or the debtor, or both, may serve on the other party a *notice to admit facts and authenticity of documents* (Form 17). To object, a party must file, within 14 days of service, a *notice disputing facts and authenticity of documents* (Form 18).

For example, the creditor may call on the debtor to admit that they made a specified contract with the creditor, or that a particular bill represents the money claimed. If an objection is not made within 14 days, the party must seek leave of the court to withdraw the admission.

If there is no objection

If the party does not object, they are taken to have admitted the facts. This can help to reduce the number of facts to be proved at the hearing.

Case management in the Local Court

Proceedings in the Local Court are subject to case management. The court takes an active role in setting a timetable and ensuring that the matter proceeds to hearing in accordance with it.

The timetable and standard directions

When a defence is filed, the court will provide both parties with a document headed *Standard Directions*, which will include a *callover date*.

The callover

The first callover will be held within six weeks of the defence filing date and will be conducted by either a magistrate or a registrar.

What the magistrate or registrar may do

Both the magistrate and the registrar have wide powers to make orders for the future conduct of the matter. They can:

- direct a party to take specified steps within particular time limits;
- dismiss the action if a party does not comply with directions;
- refer the matter to mediation or arbitration;
- set a trial date and a review date;
- set the matter down for a second callover (within 28 days of the first callover).

When an action may be dismissed

The court may dismiss an action or strike out a defence if the plaintiff or defendant fails to conduct their case with “due despatch” (UCPR, r 12.7). A lack of “due despatch” usually involves some excessive delay or inefficient use of court time and resources.

In deciding whether to dismiss an action, the court will consider general fairness to the parties and the need to ensure the integrity of the judicial system (*Fairey v Fairey (No 2)* [2000] NSWCA 173 at 52).

The court may also dismiss an action within nine months after a statement of claim is filed if:

- a defence or cross-claim is not filed; or
- a default judgment is not entered; or
- the proceedings are not otherwise disposed of.

The court does not need to give the parties notice before making an order on these grounds.

An action may also be dismissed on more general grounds, such as:

- the plaintiff fails to appear (UCPR, r 13.6);
- there is no reasonable cause of action (UCPR, r 13.4);
- the cause of action is frivolous or vexatious (UCPR, r 13.4).

If the debtor does not appear

If an action has been started by a statement of claim and the debtor does not appear at the callover, judgment may be given in the creditor’s favour with no hearing.

However, if the debtor has good reasons for not appearing, this can usually be set aside later on.

When the matter may be referred to mediation

Mediation is a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to resolve the dispute.

The court may, at any stage, refer the parties to attend mediation with or without their consent (CPA, s 26). If either party wishes to attend mediation, they should raise this at the callover, as the court is likely to support such a suggestion. Parties are under a duty to participate in mediation in good faith (s 27).

Evidence of anything said or any admission made in a mediation session or neutral evaluation session is not admissible in any proceedings before any court, unless the court allows evidence

of a mediated agreement in order to give effect to it (s 29). A mediator or evaluator may only disclose information obtained during mediation in very limited circumstances (s 31).

If the matter is referred to arbitration

Under s 38(1), the court may refer a case for arbitration. The arbitrator is usually an experienced solicitor or barrister. These cases are not expected to be long or overly complex.

The procedure for an arbitration hearing is similar to that for a court hearing, but the arbitrator must try to bring the parties to an agreed settlement before making a decision.

The arbitrator has the same power as the court to make a decision on the claim and to award costs (ss 37, 54). Parties to an arbitration have the same right to representation as if they were before the court (s 48).

The arbitrator's decision (the *award*) becomes a judgment of the court and is enforceable in the same way as a court judgment (s 40).

When a matter can be reheard after arbitration

A party who is not satisfied with an arbitrator's decision can apply to have the case reheard by a court (CPA, s 42; UCPR, r 20.12). The application must be made within 28 days of the award taking effect (CPA, ss 43, 40). Applications can currently be made using Form 32.

The award is suspended from the time the application is made until an order for rehearing is made (s 42(3)). The application for rehearing is listed before the court, which decides whether it will hold a full or limited rehearing (CPA, s 43; UCPR, r 20.12).

An order for rehearing cannot be made if the amount claimed is less than \$20,000 (CPA, s 43(2)), and need not be made if it appears that the applicant failed to attend an arbitration without good reason (s 43(3)). If an order for a full rehearing is made, the award ceases to have effect; for limited rehearing, the award is suspended (s 44).

If the matter is set down for hearing

If the matter is set down for hearing, standard directions will require parties to prepare and exchange evidence such as witness statements, affidavits or reports.

A review date will be set at least 28 days before the hearing so that the court can check that the directions have been complied with. A matter can also be relisted for further directions where a

party does not comply with a case management direction.

The plaintiff must file a statement of agreed facts and issues seven days before the hearing.

The hearing

Each party can put their own case or be represented by a barrister or solicitor. Each side has the opportunity to call and cross-examine witnesses and make submissions to the magistrate on the facts or the law.

The magistrate then makes a decision and records a judgment.

The court's decision

If the court decides in the debtor's favour, the alleged debt need not be paid.

If the court decides in the creditor's favour, the amount to be paid to the creditor by the debtor is called the *judgment debt*.

The creditor is called the *judgment creditor* and the debtor the *judgment debtor*.

What does the judgment debt include?

The judgment debt includes the amount claimed by the creditor plus:

- filing and service fees;
- solicitor's costs;
- pre-judgment interest.

Pre-judgment interest

If the amount claimed is more than \$1,000, the creditor can claim interest on the debt from when the cause of action arose (ie, from the time the debt was payable) to the date of judgment (UCPR, r 36.7(2)).

The creditor must specifically claim interest and provide the amount of interest in the statement of claim (CPA, s 100; UCPR, r 6.12(6)). The pre-judgment interest rate is currently 5.25% (as at the date of publication).

Interest incurred after the judgment date

If the judgment debt is not paid within 28 days of the judgment date, the creditor can claim interest on any unpaid part until it is paid. The rate follows that set by the Supreme Court and is currently 7.25% (as at the date of publication).

Costs

As a general rule, the court will order the party who lost the case to pay the court fees and legal costs of the other party.

Appeals

The only appeal from a Local Court General Division judgment is to the Supreme Court, on the grounds that the court made an error of law (*Local Court Act*, s 39). A party may also appeal to the Supreme Court on other grounds with leave under limited circumstances, including where the parties consent to an order or judgment (s 40).

If the judgment was wrongly made, the person making the appeal (the appellant) should seek an order setting aside the judgment and a stay of enforcement until the appeal is heard.

[15.180] In the Small Claims Division

The aim of the Small Claims Division is to resolve small claims quickly and cheaply without parties needing legal representation (a party still has the right to be represented by a solicitor or barrister if they choose).

Cases are heard by magistrates or assessors (who may be solicitors or barristers appointed to help the court hear Small Claims Division cases). The court is obliged to seek settlement between the parties before making any judgment or final orders (s 36).

Procedure

The procedures followed are less technical than in the General Division. Certain parts of CPA and UCPR therefore do not apply (UCPR, Sch 1). For example:

- the rules of evidence do not apply (*Local Court Act*, s 35);
- there is no provision for filing a notice to admit facts or documents (see Filing a notice to admit facts at [15.170]);
- leave of the court is required before a subpoena can be issued (UCPR, r 7.3);
- any application must be made orally unless the court orders otherwise (*Local Court Rules 2009*, r 2.10). Thus, there are only limited circumstances in which a notice of motion should be filed. For instance, a notice of motion may be filed when applying:
 - to set aside or vary judgments or orders;
 - for an order to inspect property;
 - for applications made after judgment;
 - for interpleader motions.

Otherwise, the requirements for “Motions” under Pt 18 of the UCPR do not apply.

Mediation and arbitration

Mediation is encouraged, but matters cannot be referred to arbitration unless the parties consent or the court finds special circumstances to justify a referral (UCPR, r 20.8).

The pre-trial review

After a defence has been filed, the court sets a date within six weeks for a pre-trial review (*Local Court Rules 2009*, r 2.4).

Notification of the parties

The court notifies the parties of the date and sends an information sheet on how to prepare for it.

What happens at the review

The pre-trial review is a meeting of the plaintiff and the defendant with a court official. Its purpose is to:

- identify the facts and legal issues in dispute;
- encourage and help the parties to settle.

Referral to mediation

Mediation is encouraged, and the court may make orders as it thinks fit, including an order for adjournment. Referrals may be made to community justice centres (see Chapter 18, Dispute Resolution). In larger courts, mediators are present and accept referrals.

Note that the regular rules in relation to mediation under the Div 1 of Pt 20 of the UCPR and the Pt 4 of the CPA do not apply.

If settlement is not reached

If a settlement cannot be reached, the parties must identify the issues in dispute and disclose the witness statements and documents they wish to rely on at the hearing if they are known. The court will then fix a date for hearing and will advise the parties on how to prepare their cases for hearing.

The court will direct that the parties exchange written statements of the intended evidence of each witness, together with any other relevant documentation in support of their case.

The hearing

The formal rules of evidence do not apply in the Small Claims Division.

The court should conduct proceedings with minimal formality and technicality (*Local Court Act*, s 35(2)).

Proceedings are usually conducted by both sides handing up their witness statements and

other documents and then addressing the court on the main points of their case and on the opposing party's case.

A statement of agreed facts and issues should be filed seven days before the hearing; however, not all courts enforce this requirement.

Most hearings are informal, although there are some occasions when the court will conduct semi-formal or formal hearings. The type of hearing will determine how evidence is to be given.

What if a party is unrepresented?

The rules of evidence and other formalities are relaxed in order to assist unrepresented litigants. The rules of natural justice still apply, however; this means that the court should always conduct cases with fairness.

Can witnesses be called to give evidence or be cross-examined?

There is no right to call a witness to give evidence, to cross-examine witnesses or to give oral evidence at a hearing unless this is authorised by a Practice Note issued by the court (*Local Court Act*, s 35(4); CPA, s 62(4)(d)). If the court conducts a more formal hearing, the right to cross-examine may survive; however, such hearings are rare.

Appeals

Rights of appeal against a decision of the Small Claims Division are very limited. A party can appeal to the District Court only on the ground that:

- they were not given the opportunity to put their case (*denial of natural justice*); or
- the Local Court did not have the power to hear the case (*lack of jurisdiction*) (*Local Court Act*, s 39(2)).

Costs

There are limits to the costs the court can order a losing party to pay (*Local Court Rules 2009*, r 2.9). The losing party will still need to pay some costs, such as:

- court filing and service fees;
- the costs of preparing the original statement of claim;
- witness expenses (considered after a decision is made);
- professional costs (limited to the amount prescribed for the entry of default judgment on a claim for that amount);
- costs for obtaining an order for judgment or enforcing a judgment later set aside.

Where an action is adjourned, struck out or reinstated, costs are allowable if the failure to proceed was caused by one party's fault or neglect.

Enforcing a judgment given in the Small Claims Division

Any applications to enforce a judgment given in the Small Claims Division must be heard in the General Division. (This does not include default judgments or judgments by agreement or acknowledgment.)

Enforcing the judgment debt

[15.190] When must the debt be paid?

If a creditor gets judgment against a debtor, the amount the court orders to be paid (known as the judgment debt) should be paid immediately.

If the debt is paid

Whenever any or all of the judgment debt is paid, the debtor should demand a receipt. This applies to payments made before and after judgment.

If the creditor's record of payment is subsequently lost and the creditor then proceeds to enforce the

judgment, the debtor should at once seek a stay of enforcement (CPA, s 67) and an order setting it aside, using the receipts as evidence that payment has been made.

[15.200] If the debtor does not pay

If the debtor does not or cannot pay the creditor immediately, the creditor can use the court processes described below to recover the money from the debtor. This process is called "enforcing

the judgment debt". The creditor has 12 years from the date of the judgment to enforce it.

Additional costs incurred by delay

If the debtor does not pay immediately, they may have to pay the creditor's cost of enforcing the judgment as well as the original debt.

If the debt is not paid in full within 28 days, interest on the judgment debt will be applied from the date of judgment (CPA, s 101(3)) – so it is in the debtor's financial interests to pay the judgment debt as soon as possible.

Can a person be imprisoned for debt?

A person cannot be imprisoned for debt in NSW. However, a Local Court registrar has power to issue an arrest warrant (s 97) to bring a debtor before the court to be examined.

[15.210] Application to pay by instalments

A debtor who cannot pay the full amount of the judgment debt should ask the court for an order for it to be paid in instalments.

Instalment orders by agreement

A debtor and creditor can enter into a formal agreement to pay the judgment debt by instalments (UCPR, r 37.1A). If either the creditor or the debtor is not legally represented, the agreement has no effect unless their signature is witnessed by a registrar or other officer of the court, or by a solicitor or barrister.

When the agreement is filed in the court that gave judgment, it becomes a court order.

The debtor can seek a new order at any time (r 37.2). The creditor can do so only in some circumstances (see Changing instalment orders at [15.210]).

Advantages of payment by instalments

If you cannot pay the judgment debt in full, it is usually best to pay the judgment debt in this way. The debtor can then pay a regular amount without being forced into further debt. There is no examination hearing nor the embarrassment and financial hardship of a garnishee order. The instalment order can be changed if the debtor's financial situation changes or they find they cannot keep up payments under the original order.

Applying after the judgment

If no agreement can be reached, the debtor can apply to the court at any time afterwards (UCPR, r 37.2) by filing in a notice of motion to pay by instalments (Form 46). This form (available from the Local Court) includes a financial statement requiring details of employment, income, property (both goods and land) and liabilities (household expenses such as maintenance or child support, medical expenses, other debts and insurance premiums).

The debtor should file the notice of motion at the court in which judgment was entered or in which the examination is being held (see Where will the examination be held? at [15.220]), or mail it to that court office.

A full statement should be given in the notice of motion, as the registrar may refuse to make an order if there is not enough information to justify the proposed terms. A registrar would also refuse if, for example, the amount suggested by the debtor was unreasonably low given their income. The registrar can only accept or reject the terms suggested, not change them, so it is important to suggest reasonable terms (UCPR, r 37.3).

If the application is not granted

If the registrar refuses the debtor's suggested terms, the debtor should file an objection (Form 50) within 14 days. The matter will go for hearing before the court to assess the terms, vary them, or refuse to make an instalment order.

If this is the debtor's first application, it acts as a stay of enforcement until the application is dealt with by the court (UCPR, r 37.5). The creditor cannot take out further enforcement proceedings until the court has made a decision about the instalment order.

If the creditor objects

If the creditor objects, they have 14 days to file an objection (Form 50). The matter is set down for hearing by the court to affirm, vary or repeal the order (UCPR, r 37.4).

If the creditor does not object within 14 days, the order becomes binding and can only be changed in certain circumstances.

Changing instalment orders

Application by the debtor

A debtor whose financial circumstances change or who cannot pay the instalments can apply for a new instalment order using the same procedure.

If the court grants another order, it replaces the first one.

Application by the creditor

The creditor can apply to the court for a variation of the instalment order, but only if there has been a substantial increase in the property or means of the debtor (UCPR, r 37.6). Even then, the court need not change the order.

If the court refuses to grant the application, the creditor may have to pay the debtor's expenses of going to court (such as loss of wages) to oppose the application.

[15.220] Examination

Issuing an examination notice

If the creditor wishes to find out the financial circumstances of the debtor, they can issue an *examination notice* (UCPR, r 38.1) (Form 51). The creditor can use the information they obtain to consider any further enforcement action they may take.

An examination notice requires the debtor to answer the examination questions contained in the notice about their present income, assets and liabilities. The debtor's response in the financial statement and copies of any relevant documents must then be returned to the judgment creditor.

Examination orders

If the debtor does not respond or provides inadequate answers to the examination notice, the creditor can file a *notice of motion – examination order* (Form 53). This must be served on the debtor 14 days before it is listed in court.

Where will the examination be held?

The debtor is required to come to the court named in the notice. This will be the court in which judgment was entered, or the nearest court to the debtor if the debtor neither lives nor works within 30 kms from the court that entered judgment (UCPR, r 38.4).

The examination hearing

At the examination hearing, the debtor must present information about their financial situation. The creditor can then decide on the best way of enforcing the judgment debt; for example, they can ask for details of the debtor's employer or

bank account so that wages or money held in the bank can be garnisheed (see [15.230]).

When an examination notice or order is received

If the debtor disputes the default judgment

If judgment was entered by default and the defendant does not owe the money or the amount is wrong, they should contact the plaintiff immediately and check the facts.

If the plaintiff will not cooperate, the defendant should apply for a stay of enforcement and an order setting aside the judgment.

The defendant should *not* simply ignore the examination notice or fail to turn up at court on the date set by the *notice of motion – examination order*. Without positive action, the judgment is still effective and the creditor can take legal proceedings to enforce the debt or apply to have the debtor arrested and brought before the court for examination.

If the debtor has paid

A debtor who has paid the judgment debt and court costs can avoid examination by sending copies of receipts to the registrar of the court named in the summons. The debtor should obtain the court's written confirmation that they are no longer required to attend.

If a part of the debt has been paid, the debtor should attend the court for examination and take the receipts for the payment with them.

If the debtor cannot attend

A debtor who is ill or has other commitments should phone the court office and ask for the examination hearing to be adjourned. A notice will be sent giving the new date and time.

If the debtor is avoiding examination

If the debtor appears to be trying to avoid examination, the court may serve a notice on the debtor that failure to attend for examination may result in their arrest.

If the debtor does not appear for examination within 14 days after the service of this notice, the court or the creditor can file at court a *notice of motion – arrest warrant for examination* (Form 57).

At the examination hearing

When the debtor attends the court for examination, they can expect to be examined by the creditor about their financial circumstances. The creditor

may also wish to use this time to negotiate for payment of the debt.

Being prepared

Debtors summoned to court for an examination should try to take a prepared statement of their financial position. The debtor should also talk to a financial counsellor before they attend court and have ready a workable proposal for paying off the debt by instalments (see [15.260] to locate a free financial counsellor).

[15.230] Garnishment

If a judgment debt is unpaid, the creditor can apply to the registrar of the court in which the judgment was made for an order to *garnishee* money from:

- certain people who owe money to the debtor;
- the debtor's bank account;
- the debtor's wages.

Garnisheeing the debtor's wages

The most common garnishee order is to the debtor's employer to take an amount from their wages. The creditor files a *notice of motion – garnishee order* (Form 69) with an affidavit in support. This may be heard in the absence of the parties and need not be served on the debtor or garnishee (eg, the debtor's employer) (UCPR, r 39.34).

The court may decline to make an order if, for example, the debt or debtor's income is relatively small (UCPR, r 39.38).

Limits on wage garnishee orders

The debtor must be left with an amount equivalent to the weekly payment of compensation under s 37 of the *Workers Compensation Act 1987* (NSW) (\$516.40 as at 1 October 2019). The weekly benefits tables are adjusted at the beginning of April and October each year. Contact the Local Court to check the current amount.

An employer subject to a garnishee order can deduct \$13.00 for administration expenses each time they are required by the order to forward money to the creditor. This does not apply where the garnishee order is expressed as an instalment order (CPA, s 123; UCPR, Sch 3).

Disadvantages of a garnishee order

A garnishee order has many disadvantages for the debtor:

- the creditor can apply for the order *ex parte*; that is, there need be no hearing at which the debtor can object. The debtor may only become aware that an order has been made when they receive a notice from the registrar – or they actually receive their reduced wages;
- it may cause great financial hardship. The amount the registrar orders the bank or employer to deduct may mean a sudden, drastic drop in income;
- the registrar making the order may be unaware of the debtor's circumstances; for example, that the debtor's wages support a big family and outgoings are high;
- the order may affect the debtor's relations with their employer;
- the process can be inconvenient and expensive – an employer subject to a continuous garnishee order can deduct an amount to cover expenses (UCPR, Sch 3);
- the debtor may find it embarrassing to have their financial affairs revealed;
- a garnishee order can be made against any person (or company) owing money to the debtor. If the person owing money is a friend or family member, then they can be embarrassed and put in financial hardship when they receive a garnishee order requiring them to pay their debt to the creditor.

If wages are being garnisheed

If the debtor questions the debt or the amount

If wages have been garnisheed, and the person is not sure the debt is owed or the amount is correct, they should immediately contact the creditor to check the facts. If the creditor will not cooperate, they can apply for a stay of enforcement and an order setting aside the judgment.

The matter may not be heard for some weeks, however, and the debtor's wages will be garnisheed up to the date of the hearing. The court can make an immediate order stopping the proceedings, but will only do so where the circumstances are urgent and only until the next court date when both parties can be present to argue the issue in detail.

Applying for an instalment order

If the debt is owed and the garnishee order is made, the debtor should apply at once to the registrar for an instalment order. An instalment order converts the garnishee order into a *garnishee instalment order*.

This means that the garnishee order lasts until the debt is paid and the deductions from each pay will be less.

The creditor can file an objection to the garnishee instalment order (Form 50) within 14 days after which it is listed in court for hearing.

Negotiating with the creditor

Instead of applying for an instalment order, the debtor can negotiate with the creditor and offer to pay by instalments.

Effect of bankruptcy

Bankruptcy will stop garnishee action (see Chapter 6, Bankruptcy).

Changing jobs

Some debtors who have their wages garnisheed change jobs to avoid the garnishment. This is risky, as the debtor may find it difficult to get another job. It may not prevent garnishment of wages from a new employer, and the creditor can summon them for another examination.

Public servants

The wages of state public servants can be subject to garnishee orders (CPA, s 119(4)).

Commonwealth public servants are covered by the Pt 8A of the *Public Service Regulations 1999* (Cth). The department head appoints a paying officer who, once satisfied that the debt exists and has not been paid, decides how much money to deduct from the debtor's salary in order to pay the debt.

[15.240] Writ for the levy of property

Another option for a creditor is to apply for a writ for the delivery of goods or a writ for the levy of property.

Writs for the levy of property are the most common form of enforcement chosen by creditors in NSW. It is a court authorisation to a sheriff to seize and sell goods of the debtor to satisfy the judgment debt.

Applying for the writ

The creditor can apply for a writ at any time within 12 years of the date of judgment. This is done by filing a *notice of motion – writ for the levy of property* (Form 65) in the court that entered the judgment.

The notice of motion may be heard in the absence of the parties without notice to the debtor (UCPR, r 39.2).

Executing the writ

The writ can be *executed* (served and enforced) by any sheriff of any Local Court in NSW. The sheriff charges a fee of \$86 (as at May 2019) for each address and each time they visit.

The sheriff generally goes to the debtor's house and explains that if they do not pay the amount in the writ, their goods will be seized and auctioned to pay the debt. The sheriff must give the debtor a copy of the writ of execution or leave it in a conspicuous position (UCPR, r 39.18).

Most sheriffs are reasonable and allow debtors a short time to get the money, or to negotiate.

If the debtor has no property

As the writ may be in force for 12 months (UCPR, r 39.20), the creditor can apply to have it sent back to the sheriff for another attempt at execution; that is, at getting more goods or money to pay the debt in full.

If the debtor pays the sheriff

Payment can be made to the sheriff at any time, even after goods have been seized, provided they have not yet been sold. On payment of the debt, the sale is stopped and the goods returned.

If the debtor pays after the goods have been seized, they may have to pay the costs of seizure, advertising and arranging for sale, if this has been done. If the debtor acts quickly, they may be able to avoid incurring the costs of advertising and sale if the sheriff did not do this immediately.

What property can be seized?

Personal property

The sheriff can seize personal property such as money, furniture, TVs and radios, electrical appliances and cars.

The personal property must belong to the debtor. The sheriff cannot take:

- anything on hire purchase;
- anything rented (such as a TV);
- anything belonging to someone else such as the debtor's spouse.

If property that is not the debtor's is seized

If the sheriff tries to seize property that does not belong to the debtor, it is up to the owner to prove that they own the goods in dispute. The owner of the goods may give a *notice of disputed property* (Form 75) to the sheriff outlining their claim over the goods (UCPR, r 43.3). The sheriff must give this notice to the judgment creditor, who has seven days to admit the claim (UCPR, rr 43.3(3), 43.6(1)).

If the creditor admits the claim, the sheriff must give back the disputed property (UCPR, r 43.5). If the creditor does not admit the claim or does nothing, the sheriff can file a notice of motion and seek *interpleader* relief from the court (UCPR, r 43.6). This is to protect the sheriff from civil liability and allow the court to determine the true owner of the goods. If the sheriff does not seek such relief, it is up to the owner of the goods to sue the debtor and/or the sheriff for return of the goods.

The court has wide powers to grant relief and can determine issues of contested ownership of property.

Some property that cannot be seized

The sheriff cannot take, for example:

- a car still on hire purchase;
 - a lounge suite that was already in a rented house and belongs to the landlord;
 - a washing machine borrowed from parents;
 - a sewing machine owned by the debtor but used by another family member in their home dressmaking business;
 - clothes, or bedroom or kitchen furniture, used by the debtor or any family member, even if it belongs to the debtor;
 - tools of trade, professional instruments or reference books belonging to the debtor, with a total value under \$2,000, used by the debtor or a family member (CPA, s 106(3); UCPR, r 39.46).
-

What is seizure of goods?

A sheriff can “seize” goods without actually picking them up and taking them away. Often, it is convenient to leave them at the debtor’s house while a sale is arranged.

Notice of seizure

The sheriff should give a notice to the debtor, or anyone else looking after their goods, which includes a list of the goods seized. The sheriff may

also attach a *notice of seizure* to any of the property seized.

Penalty for interfering with seized goods

There is a penalty of \$5,500 for interfering with or giving away any property known to be seized without the leave of the court or the sheriff’s written consent (CPA, s 132(2)).

Selling the goods

The sheriff is responsible for obtaining a fair price for the goods seized. They should ensure that:

- the property is advertised for sale in a local newspaper;
- the sale is by public auction;
- they get the best price possible.

The property can only be sold by private treaty if it fails to reach its fair value at auction.

Despite these efforts to obtain a fair value, the proceeds are often much less than the value of the goods to the debtor, or their replacement value.

A debtor who has more than enough property to satisfy the judgment debt can negotiate with the sheriff which items to sell first (UCPR, r 39.6(2)).

What the sheriff can do***Entering the debtor's house***

The sheriff or judgment creditor may by notice of motion seek orders authorising the sheriff to enter premises for the purpose of taking possession of goods under a writ for levy of property. The notice of motion need not be served on the debtor (CPA, s 135).

If the debtor owns land

The creditor can apply for a court order to give the sheriff power to take possession of land owned by the debtor and use the proceeds of sale to repay the debt. The creditor needs to file a *notice of motion – writ for possession of land* (Form 59), supported by an affidavit.

Once the writ is issued, the judgment debtor has eight weeks to try to repay the debt themselves by entering into an agreement to sell or mortgage the land. The judgment creditor must consent by notice in writing to the sale or mortgage of the land by the judgment debtor (s 113(3)). If the property is subject to a bank loan, the creditor also needs the bank’s consent.

A writ for possession of land lasts for six months from the date it is registered (s 113(2)(b)).

The sheriff cannot take possession and sell land if the amount of the debt is less than the

jurisdictional limit of the Small Claims Division of the Local Court (currently \$20,000) (s 106(5)).

The debtor's personal goods must be sold first before their land (UCPR, r 39.21(1)(b)), unless the sheriff believes that this would cause hardship to the debtor.

Once the writ is registered and no further personal goods may be sold to satisfy the writ, the creditor can file at the Local Court an affidavit verifying these facts (UCPR, r 39.21). At this time, the creditor should also lodge with the court two copies of a notice advising the debtor that the writ has been registered, that a sale of the land would proceed after four weeks, that the debtor is only entitled to sell the land under s 113 of the CPA, and that they are entitled to an instalment order under s 107 (UCPR, r 39.21). A sealed copy from the court is to be served on the debtor.

Upon service of the above notice to the debtor, the creditor is to file an affidavit of service at the Local Court, along with seven copies of a Notice of Sale (Form 68). Once sealed by the court, the creditor is to give six copies of the Notice of Sale to the sheriff, and may also need to inform the sheriff as to whether any person is occupying the land (UCPR, r 39.3A).

The sheriff can then proceed to take steps in accordance with r 39.22 of the UCPR to sell the land. The creditor will also need to serve on the debtor a copy of the Notice of Sale at least one week before the sale of the land (UCPR, r 39.22(h)).

If the debtor disputes the writ

A person who either does not owe money or believes the amount is wrong should ask the sheriff to delay a few days while they contact the creditor to check the facts.

If the sheriff or creditor does not cooperate, the debtor should file a notice of motion and a supporting affidavit at the court where the

judgment was entered. The debtor should ask the court for an urgent *ex parte* application for a stay of enforcement and an order setting aside the judgment.

Applying for an instalment order to stay enforcement

If the person does owe the amount claimed, they should immediately apply to the registrar for an instalment order. This acts as a stay of enforcement of the writ. As long as the debtor keeps making payments, the sheriff cannot seize their goods.

It will also prevent the creditor from taking other enforcement action.

Bankruptcy will also stop a writ of execution (see Chapter 6, Bankruptcy).

[15.250] Bankruptcy

A creditor can enforce a judgment debt of over \$5,000 by commencing proceedings to bankrupt the debtor (*Bankruptcy Act 1966* (Cth), s 44).

If the debtor has many debts that they cannot pay in full, voluntary bankruptcy or formal arrangements to consolidate, the debts might be advisable.

See Chapter 6, Bankruptcy, for a detailed discussion of what is involved.

Publication of debt information

Creditors such as banks and finance companies often report a debtor's slow payment or non-payment of a particular debt to a credit bureau. They almost always report a judgment debt. This information forms part of the person's credit record and will be disclosed to those who make an inquiry to the credit bureau. It may be more difficult for the person to get credit in the future.

What to do if you are refused credit under these circumstances is discussed in Chapter 13, Credit.

Contact points

[15.260] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australian Disputes Centre

www.disputescentre.com.au

ph: 9239 0700

Australian Competition and Consumer Commission (ACCC)

www.accc.gov.au

infoline: 1300 302 502

Australian Financial Complaints Authority (AFCA)

ph: 1800 931 678

www.afca.org.au

Australian Finance Conference

www.ausfic.com

ph: 9231 5877

Australian Financial Security Authority (AFSA)

www.afsa.gov.au

ph: 1300 364 785

Australian Prudential Regulation Authority (APRA)

www.apra.gov.au

ph: 1300 558 849

Australian Securities and Investments Commission (ASIC)

www.asic.gov.au

ph: 1300 300 630

Australian Taxation Office (ATO)

www.ato.gov.au

ph: 13 28 61

Chartered Accountants Australia & New Zealand

www.charteredaccountantsanz.com

ph: 1300 137 322

CPA Australia

www.cpaaustralia.com.au

ph: 1300 737 373

Customer Owned Banking Association (COBA)

www.customerownedbanking.asn.au

ph: 8035 8400

Financial Counsellors Association of NSW (includes a list of accredited financial counsellors in NSW)

www.fcan.com.au

ph: 9211 4409 or 1300 914 408

Financial Rights Legal Centre

www.financialrights.org.au

ph: 9212 4216

Credit and debt hotline

ph: 1800 007 007 (NSW only)

Insurance hotline

ph: 1300 663 464

Mob Strong Debt Help (formerly Aboriginal Advice Service)

ph: 1800 808 488

The Financial Rights Legal Centre deals with matters concerning credit, debt, bankruptcy and banking issues. It does not deal with general consumer issues (except general insurance matters).

LawAccess NSW

www.lawaccess.nsw.gov.au

Law and Justice Foundation of NSW

www.lawfoundation.net.au

Legal Aid NSW

www.legalaid.nsw.gov.au

My Credit File (Equifax)

www.mycreditfile.com.au

ph: 13 83 32

Holds and distributes information on credit ratings and histories.

NSW Civil & Administrative Tribunal

www.ncat.nsw.gov.au

ph: 1300 006 228

NSW Fair Trading

www.fairtrading.nsw.gov.au

ph: 133 220

Aboriginal Enquiry Officer

ph: 1800 500 330

Financial counselling

Credit and Debt Hotline

www.financialrights.org.au

ph: 1800 007 007

Wesley Counselling Services

www.wesleymission.org.au

ph: 1300 827 638