
The Debtor's Kit

When YOU owe someone money!



A guide to the debt recovery process

Contents

IMPORTANT NOTICE	4
ACKNOWLEDGEMENTS	4
PART A - WHAT DO I DO IF SOMEONE SAYS I OWE THEM MONEY?	5
1. WHAT HAPPENS IF I OWE SOMEONE MONEY?	5
2. WHAT CAN A CREDITOR DO TO RECOVER THE DEBT?	5
3. WHAT IS A LETTER OF DEMAND?	5
4. WHAT DO I DO IF I HAVE RECEIVED A LETTER OF DEMAND?	6
5. WHAT IF I DISAGREE WITH THE AMOUNT OF THE DEBT?	6
6. WHAT IF I DISAGREE THAT I OWE ANY MONEY AT ALL?	7
7. IS THERE A TIME LIMIT ON SEEKING REPAYMENT OF A DEBT?	7
8. SETTLING A CLAIM	7
9. WHAT HAPPENS IF I DON'T RESPOND TO THE LETTER OF DEMAND OR I CANNOT COME TO AN AGREEMENT WITH THE CREDITOR?	8
PART B - COMMENCEMENT OF LEGAL PROCEEDINGS	8
1. THE LOCAL COURT DIVISIONS EXPLAINED	8
2. WHAT HAPPENS IF I RECEIVE A STATEMENT OF CLAIM?	8
3. YOUR OPTIONS FOR RESPONDING TO A STATEMENT OF CLAIM	9
4. SMALL CLAIMS DIVISION – WHAT HAPPENS AT COURT?	10
4.1 What happens at the Pre-Trial Review?	10
4.2 What happens at the hearing?	11
4.3 Can I appeal a decision?	12
4.4 Costs	12
5. GENERAL DIVISION – WHAT HAPPENS AT COURT?	12
5.1 The Call-Over	12
5.2 What happens if I have to go to a mediation?	12
5.3 What happens at the hearing?	13
5.4 Can I appeal a decision?	14
5.5 What happens if I lose the case?	14
5.6 Costs	14
PART C - ENFORCEMENT OF JUDGMENT	14
1. HOW IS THE JUDGMENT ENFORCED?	14
2. HOW LONG DOES THE CREDITOR HAVE TO ENFORCE THE JUDGMENT DEBT?	14

3.	WHAT HAPPENS IF A DEFAULT JUDGMENT IS ENTERED AGAINST ME?	15
4.	CAN A DEFAULT JUDGMENT BE SET ASIDE?	15
5.	BANKRUPTCY PROCEEDINGS	15
6.	DEBTS OVER \$100,000.00	16
	PART D – OTHER THINGS YOU SHOULD KNOW ABOUT GOING TO COURT	16
1.	WITNESSES	16
2.	LEGAL AID NSW	16
3.	INTERPRETERS	17
4.	OTHER USEFUL CONTACTS	17
5.	LETTER OF DEMAND	18
6.	REPLY TO A LETTER OF DEMAND	19
7.	DEED OF RELEASE	20

IMPORTANT NOTICE

1. You should only use this Kit after a lawyer has explained it to you.
2. You should only use this Kit if you allegedly owe money to a person or company in New South Wales.
3. This Kit is a guide only and does not deal with every possibility that may arise.
4. Do not use this Kit as a substitute for legal advice. While we have tried to ensure that the information in this Kit is as accurate and up to date as possible, you should seek legal advice about your particular debt.
5. This Kit tells you about the debt recovery process in the NSW Local Court only.
6. Hawkesbury Nepean Community Legal Centre does not accept responsibility for the outcome of your particular case.

N.B. This Kit is current as at 30 June 2011

ACKNOWLEDGEMENTS

Information contained in the Kit is summarised from the following sources:

1. Barry R (ed.), *The Law Handbook: Your Practical Guide to the Law in New South Wales*, 10th Edition (Redfern Legal Centre Publishing: Sydney, 2007).
2. Debt – Recovering a Debt in Fast Answers,
<http://www.lawsociety.com.au/page.asp?partid=6646>
3. Ritchie's Uniform Civil Procedure NSW (LexisNexis, Butterworths)

© Copyright Hawkesbury Nepean Community Legal Centre 2011

PART A - WHAT DO I DO IF SOMEONE SAYS I OWE THEM MONEY?

1. WHAT HAPPENS IF I OWE SOMEONE MONEY?

If **you** owe someone money they can take legal steps to recover the money from you.

A person who is owed money is called the **creditor** and the person who owes the money is called the **debtor** (you).

This Kit outlines the process when a creditor takes legal action against you, the debtor. It provides information about what you can do to respond to the creditor and explains the debt recovery process in the Local Court in NSW.

2. WHAT CAN A CREDITOR DO TO RECOVER THE DEBT?

There are a number of things the creditor can do to try to recover the money they say you owe them.

A creditor can:

- (a) contact you to discuss how you might pay back the debt;
- (b) make a demand for payment. This is usually by way of a letter of demand;
- (c) stop supplying you with goods or services;
- (d) if the creditor is a bank, it may apply other money you have deposited with the bank against your debt;
- (e) commence legal proceedings against you;
- (f) repossess goods which the creditor previously provided to you;

There are other things a creditor can do depending on the type of debt. For example, if you owe your landlord money your landlord might try to evict you. If you are a guarantor for a loan you should not use this kit. You should see a lawyer as soon as possible.

The creditor may contact you to try to reach an agreement before taking you to Court. They may contact you by letter, telephone or email. You should keep a record of when and how they contacted you and what the creditor said to you and what you said in reply.

3. WHAT IS A LETTER OF DEMAND?

This is a letter from the **creditor** demanding that you pay the money the creditor says is owed by a certain date (usually within 14 days) or Court proceedings will be commenced against you.

A letter of demand is not from the Court. It is from the creditor. It is against the law for anyone to send a letter of demand designed to look like a Court document.

A letter of demand might come from a debt collection agency rather than from the creditor. The letter may include a demand that you pay the agency's costs. The debt collection agency is not allowed to charge you for collecting the debt, so those costs do not have to be paid. You will only need to pay enforcement costs if;

-
- (a) it is the creditor and not the debt collection agency which incurred the costs; and
 - (b) you previously agreed with the creditor that you would pay those costs (for example it is a standard clause in most bank document that a debtor will be liable for the Bank's enforcement costs);
 - (c) or if the Court orders you to pay the creditor's costs.

See Part D of this Kit for an example of a letter of demand and a response to a letter of demand.

4. WHAT DO I DO IF I HAVE RECEIVED A LETTER OF DEMAND?

Don't ignore a letter of demand!

Firstly, work out whether you owe the amount claimed. If so, contact the creditor and make arrangements to pay the money as soon as possible. Otherwise, if the matter goes to Court, you may have to pay the debt plus Court costs (such as filing fees paid by the creditor and interest).

If you cannot pay the whole amount of the debt at once or within the time demanded try to negotiate with the creditor. For example you may want to ask:

- (a) for additional time to get legal advice;
- (b) for an extension of time to pay the debt;
- (c) to pay off the debt in instalments;
- (d) to pay a reduced amount to finalise the debt; or
- (e) ask that the debt be written off

Remember, the creditor's main concern is to get their money and often a creditor would prefer to negotiate a settlement rather than having to incur significant costs in going to Court.

If you do not have any money or assets it may help to tell the creditor about your financial position. A creditor may decide that it is not worth spending the time and cost going to Court when they can't recover the money from you anyhow.

5. WHAT IF I DISAGREE WITH THE AMOUNT OF THE DEBT?

If you disagree with the amount the creditor is claiming or you do not have enough information about the debt, you can write to the creditor and ask them for a detailed statement of the money they say you owe.

If you think you owe the creditor, but not as much as they are asking for, contact the creditor, let them know how much you think you owe and make an offer.

You should collect all of the documents you have which relate to the debt and file the documents in a folder. Make sure you keep this folder safe as the documents will be extremely important if you have to go to Court at a later date.

6. WHAT IF I DISAGREE THAT I OWE ANY MONEY AT ALL?

There are many reasons why you might not agree that you owe the creditor any money. Some examples may be:

- (a) you did not sign the contract;
- (b) you signed the contract but were misinformed about what it meant;
- (c) you did not get what you paid for or the quality of the goods or services was poor;
- (d) you have paid everything you owe;
- (e) someone else owes the money to the creditor (e.g. a company of which you are the director or a family member);
- (f) the creditor said previously that you don't have to pay the debt;
- (g) the creditor owes you money

If you do not owe the money, you can refuse to pay. You should contact the creditor immediately and tell them you do not agree you owe the money. Follow this up with a letter and keep a copy. You can state in your letter that if the creditor commences legal proceedings against you, you intend to defend the proceedings in Court.

Remember! The fact that you can not afford to repay the debt is not a valid defence to a creditor's claim. If the creditor brings proceedings against you, you will still need to go to Court.

7. IS THERE A TIME LIMIT ON SEEKING REPAYMENT OF A DEBT?

Generally, a creditor must commence legal proceedings to recover a debt within **6 years** of the date the debt becomes payable or 6 years from the date a payment was last made toward the debt. However, different limitation periods may apply depending on the type of debt and any payments made towards it.

You may not be required to pay if the creditor is trying to recover a debt that was payable more than 6 years ago. You should seek legal advice if you think your debt is more than 6 years old.

8. SETTLING A CLAIM

It is usually worthwhile trying to settle the claim with the **creditor** prior to them taking you to Court. If the matter goes to Court, the Court may order you to pay more money than the creditor would accept in settlement. Also, if a matter goes to Court, there are costs (such as interest and Court filing fees) added to the original claim.

If you lose in Court, in addition to having to pay the debt, you may have to pay for the creditor's legal costs, as well as your own legal costs.

When you are negotiating a settlement with the other party, on the top of every letter, you should write the words "**Without Prejudice**". This will mean the letter and any offer you make or accept cannot be used as evidence against you in any later Court case, except in limited circumstances (for example, if you breached the agreement that was reached).

If you agree to settle, then you and the creditor should both sign a **Deed of Release**. An example of a Deed of Release is included in Part D of this Kit. A Deed of Release legally binds you and the creditor to the agreement. If either of you breaks the agreement, the other party can take you to Court to enforce that agreement.

If you settle your matter after proceedings are commenced in Court, you should make sure you file a **Notice of Discontinuance** with the Court.

You also need to keep copies of the settlement agreement, all receipts for money you have paid and copies of all correspondence in your file.

If you reach an agreement, you should put your agreement in writing. Each of you should also sign and date the agreement and keep a copy. This agreement can be used as evidence if the creditor fails to keep to the agreement and the matter goes to Court.

9. WHAT HAPPENS IF I DON'T RESPOND TO THE LETTER OF DEMAND OR I CANNOT COME TO AN AGREEMENT WITH THE CREDITOR?

If you do not respond to the letter of demand or you cannot come to an agreement with the creditor, the creditor may commence legal proceedings against you.

PART B - COMMENCEMENT OF LEGAL PROCEEDINGS

1. THE LOCAL COURT DIVISIONS EXPLAINED

The Local Court has two divisions:

- (a) **Small Claims Division:** deals with debts up to \$10,000. Proceedings conducted in the Small Claims Division are conducted with less formality so the proceedings can be resolved quickly. You can represent yourself without the assistance of a solicitor.
- (b) **General Claims Division:** deals with claims between \$10,000 and \$100,000. This division is more formal than the Small Claims Division and while you can represent yourself, there are more formal procedures for proving that a debt is owed and then enforcing the debt. Rules of evidence must be followed. This division is also more expensive which means that if a judgment debt is made against you, you are likely to have greater costs (such as filing fees, interest and solicitor costs) added to the original debt.

2. WHAT HAPPENS IF I RECEIVE A STATEMENT OF CLAIM?

The Statement of Claim is a document issued by the Local Court and it means the creditor has commenced legal proceedings to recover the money you owe them.

In the Statement of Claim, the creditor must, amongst other things, set out:

- (a) how much money owe, including interest (if any);
- (b) who owes the debt (i.e. you as the debtor);
- (c) why the creditor believes you owe them money; and

-
- (d) when the debt was incurred.

A Statement of Claim must be served on you. This may take place in the following ways:

- (a) giving it to you personally, or if you refuse it, by leaving it with you, with an explanation of what it is;
- (b) sending it to you by post arranged by the Court. Service of the Statement of Claim is assumed to have occurred within **4 business days** of posting;
- (c) arranging for a sheriff or a process server to serve it on you or any other person at your home or place of business;

If you avoid service, the creditor may ask the Court if they can serve the Statement of Claim on you by sending the Statement of Claim to another address where the creditor thinks you can be contacted or by sending the Statement of Claim to someone who is able to contact you.

A Statement of Claim must be served on you (given to you) within 6 months of the date on which it is filed with the Court, otherwise the creditor will need to file a new Statement of Claim with the Court.

You have **28 days** from the date the Statement of Claim is served on you to respond to the Local Court. If you do not respond to the Local Court the creditor can apply to the Court for default judgment against you. Part C below sets out information about default judgments.

If you receive a Statement of Claim you must respond with 28 days. **Do not ignore it!**

If you need further assistance in understanding the process, contact LawAccess.

3. YOUR OPTIONS FOR RESPONDING TO A STATEMENT OF CLAIM

If you receive a Statement of Claim, there are a number of options available to you. These include:

- (a) **Acknowledge and pay the debt in full** – If you agree you owe the money you can admit the debt and offer to pay the debt in a lump sum and the matter will be finalised.
- (b) **Acknowledge the debt and pay by instalments** – If you agree you owe the money, you can acknowledge the debt and offer to pay by instalments through the Court office. You will need to fill in a form at the Local Court and also provide details of your income and assets. If the Court agrees to your application you will need to keep up with your payments otherwise the plaintiff can take further legal action. Interest will be charged on the debt until it is fully paid and there will be some Court costs.
- (c) **Agree to part of the debt** - If you agree you owe part of the money claimed, you can confess or admit to that part of the debt and file a Defence to the rest of the amount claimed.
- (d) **Defend the claim** – If you do not owe the money, you can file a Defence to the whole of the claim. A Defence sets out why you say you do not owe the money (or part of the money). In preparing a Defence, it is best to start by looking at each paragraph of the Statement of Claim, to decide whether you either admit or deny what each paragraph says. Sometimes, you might admit part of what a paragraph says, but you might want to include an additional explanation as to why you disagree with the balance of the paragraph.

-
- (e) **Seek more information** – You may need more information on the Statement of Claim before you can decide whether you will defend the claim. You can obtain this information by requesting that the creditor provide you with further and better particulars concerning certain paragraphs of the Statement of Claim.
 - (f) **File a Notice of Appearance** – If the creditor does not agree to give you more time, you may wish to file a **Notice of Appearance** with the Court, which will give you more time to prepare your Defence.
 - (g) **File a Cross-Claim against the creditor** – If you think the creditor owes you money, you should file a **Defence** and a **Statement of Cross-Claim**. A cross-claim sets out why you believe the creditor should pay for the debt and how much you are claiming from the creditor and why you think the creditor owes you that amount. Your Defence and Cross-Claim need to be filed within **28 days** of service of the Statement of Claim and at the same time. If filed within time your Cross Claim against the creditor can be heard at the same time as the creditor's claim against you.
 - (h) **File a Statement of Cross-Claim against a third party** – If you think another person is responsible, either completely or partially, for the debt, you can file a Statement of Cross-Claim against that person to join him or her in the proceedings. After you have filed the Statement of Cross-Claim with the Local Court, you must serve the person you say owes part or all of the debt with a sealed copy of the Statement of Cross Claim. If you file a Statement of Cross-Claim, you still need to file a Defence.

Remember you must file your DEFENCE and/or Cross-Claim in the Local Court within 28 DAYS of receiving the Statement of Claim.

Go to web address below at Lawlink NSW to download the forms you will need to fill in:
http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms

4. SMALL CLAIMS DIVISION – WHAT HAPPENS AT COURT?

Once you have filed a Defence, the Court sets a date for a pre-trial review in approximately 6 weeks. The Court will notify the parties and send out an information sheet explaining how to prepare for the Pre-Trial Review.

4.1 What happens at the Pre-Trial Review?

Pre-Trial Reviews are managed by the Registrar in Court. The Registrar will call out your name when he or she is ready to deal with your case. During the pre-trial Review, the Registrar will ask you questions to identify the facts and legal issues that are in dispute and to determine whether your matter is ready for hearing. You must come prepared to present your argument and to say what evidence you intend to rely on if the matter were to go hearing and how long you will need to prepare this evidence.

Generally a Pre-Trial Review is the only time the Court will make orders regarding the preparation of the case. The Court may allow you, for example, to issue a "subpoena" on the creditor or a third party. A subpoena is a Court order that requires the recipient to give you access to the documents you ask for in the subpoena. Another example of an order the Court can make at a Pre-Trial Review is to give you (or your lawyer) permission to cross-examine the creditor or a witness at the final hearing. This gives you (or your lawyer) the opportunity to ask that person questions about their case.

At the Pre-Trial Review the Registrar may also encourage and assist the parties to reach a settlement. If, at the end of the Pre-Trial Review a settlement cannot be reached, the Registrar will set a timetable to prepare the matter for hearing.

Alternatively, both you and the other party may be referred to a Community Justice Centre for mediation.

4.2 What happens at the hearing?

Cases in the Small Claims Division are often decided by an Assessor appointed by the Court.

At the hearing **the creditor** must prove to the Court that on the **balance of probabilities** (ie more likely than not), you owe the money. The creditor will present their case first.

You will be then be given a chance to present your case. You can use witness statements (the Court does not usually allow a person to ask a witness to speak in person in the Small Claims Division) and other evidence to argue your case. You should make sure you give the Court all the documents that help prove you do not owe all the money claimed. Those documents might include a written agreement between you and the creditor about how much you owe or receipts showing you have paid the money. You can also challenge the evidence given by the creditor.

The creditor will be given an opportunity to challenge your evidence. In the Small Claims Division, the Court will rarely let you ask questions of the creditor's witnesses.

Once both of you have presented your case, you will each be given the opportunity to give a summary of your case and point out any weaknesses in the other party's case. The Assessor will then consider the arguments and the evidence from both parties before making a decision and recording a judgment.

If the Assessor decides in **your** favour, then the Statement of Claim will be struck out (dismissed) and you will not have to pay the debt.

However, if the Assessor finds in favour of the creditor, then you will be ordered to pay the debt, which will then be called the **judgment debt**. The judgement debt includes:

- (a) the amount claimed;
- (b) filing and serving fees paid by the creditor;
- (c) pre-judgment interest – either contractual interest as agreed between you and the creditor, or if there is no agreement for interest and the debt is more than \$1000.00, interest fixed by the Court rules (currently the pre-judgment interest rate is 8.75%). Interest must be claimed in the Statement of Claim;
- (d) the creditor's solicitor's costs (if any);
- (e) if the judgment debt is not paid within **21 days**, the creditor can claim interest on the judgment debt until it is paid. Currently the post-judgment interest rate is 10.75%.

When a judgment is a made, it is **final and binding**. You must pay the full amount of the debt or comply with any Court order about payment of the judgment debt.

The Assessor may also require you to pay the creditor's legal costs.

If you don't pay the **judgment debt** in full within **21 days** of the decision, you may also be **charged interest** on the debt.

4.3 Can I appeal a decision?

There are very limited rights of appeal against a decision in the Small Claims Division and you can only appeal to the Supreme Court on grounds of procedural fairness.

Moreover, there is a set time limit to appeal a decision. As a result, a decision by a Small Claims Assessor will most often be the final judgment in the proceedings.

You should seek legal advice before proceeding with an appeal.

4.4 Costs

If you lose the case, you will have to pay the creditor's costs of bringing the Court case. There are limits to the costs you can be ordered to pay in the Small Claims Division. The costs you may have to pay include Court filing and service fees, cost of preparing the Statement of Claim and any witness expenses.

Where the creditor has a lawyer, you may have to pay for the lawyer's legal costs. In the Small Claims Division, these costs are capped based on the size of the debt being claimed. This also means that even if you are successful, the amount of costs that you will be repaid by the creditor is also limited.

5. GENERAL DIVISION – WHAT HAPPENS AT COURT?

5.1 The Call-Over

When you file your defence, the Court will list the proceedings for a call-over.

A call-over is the first time you and the creditor will appear in Court. You will appear before the magistrate or registrar. At the call-over the Court will usually only make orders about how the proceedings should progress.

The types of orders a Court might make include:

- (a) orders about what the parties must do to prepare the matter for hearing. This may include setting a timetable for you to file and serve your evidence, as well as listing the matter for further directions;
- (b) allow you and/or the creditor to issue subpoenas on each other or someone else to obtain relevant documents;
- (c) setting a hearing date;
- (d) referring the case to mediation (where a third person meets with both parties to try and resolve the matter);
- (e) adjourning the call-over if the Court believes that you will be able to reach an agreement with the creditor; and
- (f) dismissing the action altogether (also referred to as **striking out** the matter), although this will only happen in exceptional cases.

5.2 What happens if I have to go to a mediation?

A mediation is an out of Court dispute resolution process designed to try to get the parties to reach a settlement.

A mediation is conducted by a mediator who is independent of you and the creditor. A mediator cannot impose an agreement on the parties. Their job is to facilitate discussions between you and the creditor to try to get you to come to an agreement.

If you are ordered to mediate with the creditor, you must go to the mediation on the date nominated by the Court. Anything you say in a mediation cannot be used later in Court against you. For this reason, it is important to approach the mediation with the intention of trying to resolve the matter.

If you cannot reach an agreement during the mediation that is acceptable to both you and the creditor, you can have the matter determined by the Court.

Remember! If you do not reach an agreement with the creditor at the mediation, you can always change your mind later and make an offer to settle the proceedings at a later stage.

5.3 What happens at the hearing?

The General Division of the Local Court operates on a more formal basis than the Small Claims Division and you will be required to present your case in a way that complies with the rules of evidence. For example, both parties must call witnesses to give evidence in Court rather than relying on witness statements. The witnesses can be cross-examined on their evidence.

At the hearing **the creditor** must prove to the Court that on the **balance of probabilities** (ie more likely than not), you owe the money. The creditor will present their case first and you will be given an opportunity to challenge their evidence.

You will be also be given a chance to present your case. You can use witnesses and other evidence to argue your case. The creditor will be given an opportunity to challenge your evidence.

Once both of you have presented your case, you will each be given the opportunity to give a summary of your case and point out any weaknesses in the other party's case. The magistrate will then consider the arguments and the evidence from both parties before making a decision and recording a judgment. If the matter is complex, a magistrate may reserve their judgment and give their reasons at a later date.

If the magistrate decides in your favour, then the Statement of Claim will be struck out (dismissed) and you will not have to pay the debt.

However, if the magistrate finds in favour of the creditor, then you will be ordered to pay the debt, called the **judgment debt**.

The judgment debt includes:

- (a) the amount you owe the creditor;
- (b) the Court fees paid by the creditor;
- (c) pre-judgment interest – either contractual interest as agreed between you and the creditor, or if no agreement for interest and the debt is more than \$1000.00, interest fixed by the Court rules (which is currently 8.75%). Interest must be claimed in the Statement of Claim;
- (d) solicitor's costs (if any). Generally the person who loses the case is ordered by the Court to pay the legal costs of the other party;
- (e) if the judgment debt is not paid within **21 days**, the other party can claim interest on the judgment debt until it is paid. Currently the post-judgment interest rate is 10.75%.

When a judgment is made, it is **final and binding**. You must pay the creditor the full amount of the debt or comply with any Court order about payment of the judgment debt.

5.4 Can I appeal a decision?

There is only one ground of appeal from the General Division. The appeal is to the Supreme Court and to succeed on the appeal you will need to show that the magistrate made an error in law in entering judgment against you.

There is a set time limit to appeal a decision. You should seek legal advice before proceeding with an appeal.

5.5 What happens if I lose the case?

If the Court finds in favour of the creditor, you will have to pay the amount the Court orders. You can make an application to the Court to pay by instalments, but you must do this **within 21 days** of the judgment. If the Court approves your application to pay by instalments, it's important that you keep up with the payments; otherwise the creditor can take enforcement action against you.

5.6 Costs

If **you lose** the case, you will be ordered to pay the creditor's costs such as Court filing and service fees, the cost of preparing the Statement of Claim and any witness expenses.

Where the creditor has a lawyer, you may have to pay for the lawyer's costs.

PART C - ENFORCEMENT OF JUDGMENT

1. HOW IS THE JUDGMENT ENFORCED?

If you do not pay the Judgment Debt the creditor will need to enforce judgment against you.

A creditor can enforce a judgment against you in the following ways:

- (a) issuing an examination notice which requires you to tell the judgment creditor about your income and assets (property and possessions);
- (b) garnisheeing your wages or savings. This is an order asking a third party (usually a bank or an employer) to pay money directly to the judgment creditor rather than to you;
- (c) obtaining a Court order that you pay the debt in instalments;
- (d) obtaining a writ of execution, which allows the sheriff to go into your home and take certain goods up to the value of the judgment debt;
- (e) issuing a bankruptcy notice (if the judgment debt is \$5000 or more).

2. HOW LONG DOES THE CREDITOR HAVE TO ENFORCE THE JUDGMENT DEBT?

A judgment debt can be enforced up to **12 years** after the date of the judgment. If the Court permits, a judgment debt may be enforced beyond 12 years.

3. WHAT HAPPENS IF A DEFAULT JUDGMENT IS ENTERED AGAINST ME?

Where you have been served with a Statement of Claim but do not file a Defence within 28 days, the creditor can ask the Court to enter a **default judgement** against you. A default judgment, like a judgment debt, allows the creditor to enforce payment against you through the Court.

4. CAN A DEFAULT JUDGMENT BE SET ASIDE?

If a default judgment has been made against you, you can apply to the Court to **set aside** the judgment. A Court may set aside a default judgment in circumstances where you:

- (a) provide a good explanation to the Court about why you were not able to respond to the Statement of Claim within 28 days; and
- (b) demonstrate to the Court that you have an arguable defence to the Statement of Claim.

In your explanation to the Court, you need to give reasons as to why you did not respond to the Statement of Claim. A Court may be more willing to set aside the default judgment if you can show that your delay in filing a defence was due to no fault on your part (for example, you did not receive a Statement of Claim).

This application can be made at any time, even if the creditor has already commenced enforcement action. However, the later the application, the more difficult it will be to explain to the Court why you did not respond as soon as possible.

Please note that to make this application you will need to file a **Notice of Motion** with an **Affidavit** explaining why you didn't file a Defence to the original Statement of Claim and also explaining your Defence. It is also a good idea to file a Defence at the same time as filing the Notice of Motion.

Go to web address below at Lawlink NSW to download the forms : http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms
--

The Court Registrar will set a date for the hearing about whether the default judgment should be set aside and you must appear in Court on that date.

5. BANKRUPTCY PROCEEDINGS

If a creditor successfully obtains judgment in their favour, and you fail to pay the judgment debt, the creditor may serve a bankruptcy notice on you. If you are served with a bankruptcy notice, you will have **21 days** to respond to the Court by either repaying the debt or offering a payment proposal to the creditor.

If you do not respond to the bankruptcy notice within 21 days, the creditor may file a Creditor's Petition in the Federal Magistrate's Court of Australia seeking order that you be declared bankrupt.

Being declared bankrupt has serious consequences, some of which are:

- (a) a "trustee in bankruptcy" is appointed over your estate (i.e. everything of value that you might own) to collect all of your assets, for example your house or your car, and to seize all of your income for the benefit of your creditors. However, the trustee will generally leave you with enough property or money to support a basic lifestyle;

-
- (b) the trustee will confiscate your passport and you will not be able to leave the country without the trustee's consent;
 - (c) a trustee may investigate past transactions you entered into prior to bankruptcy and recover property that you may have previously given to your relatives or friends;
 - (d) bankruptcy may lower your credit rating, which may prevent you from obtaining loans in the future; and
 - (e) if you are a professional or a tradesperson who holds a license, you may be disqualified from practising your occupation.

Generally, a person will remain a bankrupt for three years, after which they will be free of their debts.

6. DEBTS OVER \$100,000.00

If the amount you owe is more than \$100,000, the creditor will commence legal proceedings against you in the District Court. It is **recommended** that you obtain legal representation in these cases.

PART D – OTHER THINGS YOU SHOULD KNOW ABOUT GOING TO COURT

1. WITNESSES

As a general rule, witness statements should be written in the first person and should attach all supporting documentation.

Generally, documents are the best evidence and should be relied upon if available. Whoever appears as a witness in the proceedings is obliged to tell the truth, especially when cross-examined, even if their evidence is not helpful to your case.

The usual way to present a case in the General Division is to have witnesses in Court with you for the hearing. They should expect to give evidence about what they saw and what they heard. They may also be cross-examined by the other party.

If you fail to respond to an allegation raised in the creditor's evidence, the Court may infer that you do not have a response and what the creditor alleges is true.

If the debt relates to a car accident, you should obtain written statements from any witnesses as soon as possible after the accident. The Statement should have details such as the date, time, weather, traffic conditions and the event itself.

2. LEGAL AID NSW

Legal Aid NSW provides a free 15-minute interview for **credit and debt advice**. To make an appointment, ring your nearest Legal Aid Office. See the useful contacts at the end of this Kit.

You may also be eligible for legal aid if you satisfy certain tests. These tests relate to your income and assets, and to the nature and merits (likely success) of your case. Legal Aid is not usually provided for simple debt cases.

3. INTERPRETERS

Check with the Court to see if they can organise an interpreter for you. If not, you will need to organise and pay for one yourself. Remember to book your interpreter at least **5 days** prior to your Court hearing.

4. OTHER USEFUL CONTACTS

Interpreters	Phone: 131 450
LawAccess	Phone: 1300 888 529
Local Court	
Windsor Local Court	Cnr North Pitt & Court Streets WINDSOR NSW 2756 Phone: (02) 4577 3023 Fax: (02) 4587 7272
Penrith Local Court	62-74 Henry Street PENRITH NSW 2750 Phone: (02) 4720 1510 Fax: (02) 4720 1555
Creditline	Phone: (02) 9951 5544
Credit Helpline	Phone: 1800 808 488
Office of Fair Trading - Department of Commerce	1 Fitzwilliam Street PARRAMATTA NSW 2150 Phone: (02) 9895 0111 http://www.fairtrading.nsw.gov.au
Consumer Credit Legal Centre	Phone: (02) 9212 4111 http://www.cclcnsw.org.au
Legal Aid Commission	http://legalaid.nsw.gov.au Parramatta Office (Civil Law) Level 5, 91 Phillip Street PARRAMATTA NSW 2150 Phone: (02) 9891 1600 Penrith Office 95 Henry Street PENRITH NSW 2750 Phone: (02) 4732 3077

5. LETTER OF DEMAND

[Creditor's Address]

[Date]

[Debtor's Name]

[Debtor's Address]

WITHOUT PREJUDICE

Dear *[Debtor's Name]*

I am writing to you about the debt you owe me.

On [23 June 2005] I loaned you [\\$3000.00]. I did this by [giving you [\\$3000] in cash/ transferring [\\$3000] to your bank account/ writing you a cheque for [\\$3000]].

We agreed that you were to repay this loan within three months with [5% interest]. The total amount now owing is [\\$ 3150.00].

You have not repaid the loan to me

Please pay me the sum of [\\$ 3150.00] (original sum loaned plus 5%) within 14 days. If you do not pay me this amount by [date] I will be left with no other option than to commence legal proceedings against you.

You can pay me the money by [insert payment method].

I look forward to hearing from you shortly.

Yours sincerely,

[Creditor's signature]

[Creditor's Name]

6. REPLY TO A LETTER OF DEMAND

[Your Address]

[Date]

[Creditor's Name]
[Creditor's Address]

WITHOUT PREJUDICE

Dear *[Name]*

I refer to your letter dated [.....]

I deny that I owe you the money you allege I owe you in your letter of [date of creditor's letter] If proceedings are commenced, I will defend any such claim:

OR

I am only liable for [\$.....] and I am prepared to pay the total of [\$.....] in instalments of [\$.....] per fortnight.

Please let me know if this offer is acceptable.

Yours sincerely,

[Your Signature]
[Print Name]

7. DEED OF RELEASE

This deed of release is made between [your name] (the creditor) and [debtor's name] (the debtor).
[Make sure if the parties are incorporated, their ABN, ACN or ARBN are included after the name of the party]

The creditor hereby agrees to and accepts the amount of [\$] paid by the debtor in full and final settlement of all claims for [explain circumstance in which the debt arose] involving [] (name) and [] (name).

OR

The debtor agrees to pay to the creditor the sum of [\$] in equal [fortnightly/monthly] instalments of [\$]. The first payment shall be made on [] and each payment thereafter shall be made on [eg. The 15th day of each month].

If the debtor does not make the payments as agreed under this deed, then the balance remaining and outstanding as at the time of the default, shall become immediately due and payable by the debtor to the creditor.

This deed of release is made on the [(date)] day of [(month and year)] at [] (place)].

Executed as a deed.

.....
Name of signatory

.....
Signature

In the presence of:

.....
Name of witness

.....
Signature of witness

.....
Creditor

.....
Name of signatory

.....
Signature

In the presence of:

.....

.....
Name of witness

.....
Signature of witness