Redfern Legal Centre

14 July 2014

Legislative Assembly
Committee on Legal Affairs

Inquiry into Debt recovery in NSW

Parliament of NSW
Macquarie Street,
Sydney, NSW, 2000

By email: legalaffairs@parliament.nsw.gov.au

Dear Committee Members

Re: Response to supplementary questions following hearing on 16 June 2014

Thank you for the opportunity to contribute to the inquiry into debt recovery practices in NSW.

Please find enclosed our response to the supplementary questions following the hearing on 16 June 2014.

Yours faithfully
Redfern Legal Centre

[redacted]

Elizabeth Morley
Principal Solicitor

[redacted]

Will Dwyer
Credit & Debt Solicitor

1. *A number of submissions have called for greater use of external dispute resolution schemes.*
    a. *Could you share your views on this?*
    b. *Do you think that some debtors misuse such services to delay repayment of their debts?*

External dispute resolution schemes (EDR) are an important mechanism to ensure fairness and improve efficiency in the debt recovery process. The EDR schemes provide vulnerable consumers with an accessible avenue of review and resolution of credit disputes.

The EDR process of investigation and conciliation provides an impartial and accessible mechanism to review credit disputes, and the lending practices that precipitate them. The EDR investigative process is an important mechanism for the full and proper examination of financial service providers' conduct. This investigative process is available to consumers in an accessible way and without the need for complex and costly litigation discovery. The EDR process plays a crucial role in the early and efficient resolution of these matters and can preclude the resort to litigation. RLC believes that litigation should remain the 'forum of last resort' and that EDR schemes are best structured to fairly and efficiently resolve debt recovery disputes. EDR schemes can also properly assess debt collector conduct, and compliance with ACCC/ASIC guidelines, as part of the overall picture when resolving credit disputes.

In RLC casework experience, consumers who are pursued for debts experience a heightened sense of anxiety and stress. This is magnified at the prospect of litigation and attending court. The anxiety and stress can in turn lead to disengagement with the process. RLC clients in these situations uniformly exhibit a desire to negotiate a resolution, that will settle the matter with certainty and fairness and which properly considers their actual capacity to make repayments.

In our casework experience, the misuse of applications to EDR to delay repayments is uncommon. The predominant driver is that the investigative and conciliatory process offered by EDR is cheaper, less intimidating and does not involve appearing in court. Most RLC clients in these situations are unfamiliar with EDR process, and with the financial hardship protections available to them. There is generally a reluctance to lodge a formal EDR complaint without first obtaining information and advice about the process and the types of complaints, which EDR can investigate.

We also note that when an EDR complaint has been lodged, whilst local court action is pending, it is often more appropriate and efficient to resolve the matter through EDR, particularly where there are questions about responsible lending and whether financial hardship assistance has been properly extended to the consumer.

We note that EDR schemes have the discretion to refuse to investigate complaints, which fall outside their terms of reference.

2. *Should it be mandatory for all types of credit to be covered by an external dispute resolution scheme?*

EDR membership is already mandatory for all types of credit provided by financial service providers[1]. We believe this requirement should be extended to all debt collectors and form part of industry licensing conditions.

In many situations debt collectors will be pursuing debts, or will have bought debts, that were originally incurred with a financial service provider. Debts are also commonly incurred with Telcos or Utility companies, which also have mandatory membership of industry EDR. Consumers should not lose their right to have a dispute about that debt determined in EDR, simply because the dispute has been escalated to debt collection. As EDR membership is a mandatory element of credit licencing, we believe it is also prudent for mandatory EDR membership to correlate with debt collection licensing conditions.

We do not believe that it is practical or appropriate to extend mandatory EDR schemes to the types of credit offered by small business creditors such as builders and tradespeople. Disputes about these types of credit remain most effectively and efficiently resolved through NCAT and Local Court process.

[1] s47(1)(i) *National Consumer Credit Protection Act 2009* (Cth)

3. *Can you give your views on a proposal to allow the recovery of non-professional collection costs from debtors (that is, the reasonable costs of a debt collector)*

Our view is that this is a high-risk proposal and could provide *carte blanche* for debt collectors to run up costs without proper precautions or parameters in place. We are concerned that ambiguity around quantifying 'reasonable costs' could be prone to misuse. RLC's experience with the recovery of 'reasonable costs' in the context of strata schemes and owners corporations is that there is a real risk of gratuitous costs and interest rates being incurred at a rate out of proportion with the original debt, and it is these costs which compel people into bankruptcy, rather than the original debt.[2]

The procedures of the small claims division of the Local Court currently proscribe the award of costs[3], except in exceptional circumstances. The calculation of legal costs in this area is strictly regulated by both the legal profession regulations[4] and the general ethical duties incumbent upon legal practitioners. Cost assessment within the legal profession also has the additional safeguard of the Cost Assessment Scheme[5] and its application to 'third party payers'[6]. We do not believe that the debt collection industry could readily create safeguards, around the proper calculation of 'reasonable costs', which are equally effective and transparent.

The proposal to allow the recovery of these costs would also dramatically change the dynamic of debt collectors' commercial decisions to litigate. Where debt collectors can simply tack on their own 'reasonable costs', there is a far greater inclination, and commercial imperative, to litigate at first instance. We believe that this would create a disincentive to engage in negotiation and conciliation. We believe that these alternative dispute resolution mechanisms are most effective way to resolve the types of credit disputes in which RLC clients are ordinarily involved.

This proposal could also have a significant impact upon the capacity of the court system to adjudicate a higher volume of credit disputes. The cost of increasing resources for the court system is a burden borne by taxpayers. We believe that better engagement with EDR schemes is the most effective mechanism to efficiently resolve credit disputes and that litigation should remain a forum of last resort.

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[2] see RLC 'financial counselling tidbit', June 2012 at http://rlc.org.au/publication/rlc-financial-counselling-tidbit-june-2012

[3] s37 *Local Court Act 2007* (NSW)

[4] Schedule 2, *Legal Profession Regulation 2005* (NSW)

[5] Part 3.2, *Legal Profession Act 2004* (NSW)

[6] s302A, *Legal Profession Act 2004* (NSW)

4. *In your experience do debt collection agencies follow the guidelines set out by the ACCC/ASIC?*

    a. *Are you able to provide examples of any unfair or improper practices that are occurring in the industry?*

RLC's anecdotal experience is that our clients regularly present with complaints about deb collection practices and the conduct of individual debt collection agents. The scope of complaints is wide-ranging and includes complaints about conduct in person, particularly over the telephone, as well as complaints in relation to correspondence.

When we speak with clients experiencing financial hardship, we are regularly told about threats and intimidation over the phone, particularly in relation to inflated enforcement rights. We are told about thinly veiled threats about powers to 'send the Sherriff around' to seize property and false claims about powers to cancel driving licences and vehicle registration. Our clients' common experience is a fear that debt collectors will disclose information about debts to their partner, their family and friends and their workplace. We regularly hear of conduct, which is designed to exploit these fears, to intimidate and humiliate. Our clients tell us that they are ashamed about being in debt and are reluctant to complain about this conduct because they fear that debt collectors will follow through on threats to make these debts public knowledge. We note that some debt collection practices are working towards improving their 'customer service' but unfortunately, there is still some way to go.

We also have experience of improper practices in 'letters of demand' and other correspondence. Again, the central concern is related to claims about inflated enforcement powers. We regularly see correspondence, which claims an indemnity for legal costs arising out of threatened litigation. These types of claims are misleading and do not have any proper basis at law.

In our experience, most examples of unfair or improper conduct occurs over the phone. The conduct of debt collectors over the phone is very difficult to monitor or regulate. The experience our clients convey to us is that the pressure tactics employed in these conversations are designed to intimidate. We regularly see clients who have agreed to an instalment arrangement they could never afford. Their explanation is almost always that they felt pressured to agree to this during a phone conversation.

5. *Why do you believe that the ACCC/ASIC guidelines on debt collection should be a mandatory code of practice for the industry?*

RLC strongly supports the ACCC/ASIC guidelines on debt collection (the 'Guidelines') becoming a mandatory code of practice for the industry. We note that many of the larger and more reputable collection agencies have already undertaken to self-regulate and have incorporated the Guidelines as part of their own policies and procedures. We believe that an industry wide endorsement of these guidelines would increase consumer protections, remove the current gaps in access to EDR schemes and improve the overall efficiency of the debt recovery process.

The essential argument for the Guidelines to become an industry code of practice is enforceability, and the behavioural change this promotes. We believe that for the Guidelines to have 'teeth', they must become a uniform obligation for all players in the debt collection industry. We draw the Committee's attention to the success of industry codes of practice in the banking[7], insurance[8] and telecommunications[9] sectors.

We believe that there are 3 essential elements of an effective debt collection code of practice:

1. A uniform and mandatory requirement for compliance across the debt collection industry;
2. A mechanism for the investigation and resolution of individual complaints by EDR; and
3. A connection to credit and debt collection licensing, and powers to remove licences for systemic breaches.

Another essential element of a mandatory debt collection code of practice is the development of uniform 'financial hardship policies' across the debt collection industry. It is essential that financial hardship policies are publically available and readily accessible. We strongly believe that these changes will make the appraisal of genuine financial hardship a fairer, more efficient and consistent process.

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[7] *Code of Banking Practice*, at http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-BankingPractice

[8] *General Insurance Code of Practice*, at http://codeofpractice.com.au/

[9] *Telecommunications Consumer Protection Code*, at http://www.commsalliance.com.au/Documents/all/codes/c628

6. *Could you share your views on a proposal to allow licensed commercial agents and private inquiry agents to receive information about the location of debtors in matters that are before a court?*

    a. *What controls would be required to ensure that personal information is used only for appropriate purposes, if such an arrangement was in place?*

Our view on this matter is that any handling and disclosure of personal information must be conducted in accordance with the National Privacy Principles ('NPPs'), and extending a right to access personal information must be carefully considered for compliance with these principles. We note that this type of information is either already public, such as electoral role information, or it is private information which must then be handled in accordance with the NPPs. Once personal information has been disclosed, there is a very real difficulty in regulating the use and handling of personal information. We believe that it would be beyond the capacity of the courts to regulate this. In our view there would be inherent risks in trying to regulate 'appropriate purposes' after the information had been disclosed.

We note that the disclosure of personal information is particularly salient in the context of domestic violence, and that it is a real possibility that perpetrators of domestic violence could file claims in the local court to determine the whereabouts of former partners.

However, we also note that notification of proceedings to debtors is very important. We regularly see clients with default judgments who tell us that they were never notified of proceedings. The process of setting aside a default judgment is time consuming and an inherently inefficient use of limited court resources. We also regularly assist 'lay-creditors' who have great difficulty in tracing recalcitrant debtors. The time and cost of engaging process servers and private inquiry agents, will often dissuade these types of 'lay-creditors' from pursuing court claims. We recognise the advantage of mechanisms to properly identify the location of debtors for the service of court documents, but stress the importance of having appropriate checks and balances in place.

We are also concerned that extending this particular right, which is only available to a particular type of (licensed commercial agent) creditor, has the consequence of creating an inequity in the court process.