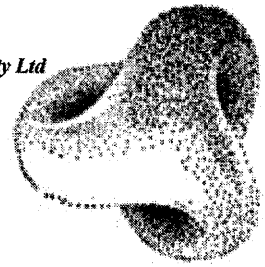


The Australian Creditors Alliance Pty Ltd

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The Legal Affairs Committee,
Parliament House,
Macquarie Street,
SYDNEY. NSW. 2000.

21 July 2014

Dear Sir,

RE: Your ref: D14/15619.

I refer to your e-mail of 16/07/14 supplying supplementary questions and I supply the following responses.

A number of problems arise simply from the structure of the question. It assumes that only licensed Commercial Agents and Private Inquiry Agents will access the data. This is of course a self-serving request because they run a business and their business is greatly enhanced if they can "corner the market" on this source of information. Allowing them to corner the market creates yet another barrier to justice. The existing legislation that licenses these people says that a Solicitor need not hold such a license but can do everything that licensed agents can do. So, one must presume that Solicitors will be included. If that is the case, what about the increasing number of self representing parties who won't use either a solicitor or a Commercial Agent due to the cost. Are they to be shut out of the system and forced into the hands of Agents and Solicitors. How does one afford such information if the debt is, say, \$800, and the cost of using an Agent or a Solicitor to obtain the information is high and cannot be added automatically to the debt? There needs to be equality of access.

The simplest approach is that used by the NSW Roads and Maritime Service which currently has a system under the Freedom of Information laws that allows members of the public, agents and solicitors to access license and registration information by written application. The application is reviewed by a senior officer of the RMS to see that the need for the information is sufficiently connected with road and maritime issues (such as a victim seeking information in order to sue the driver of a "hit and run" incident). Fees for this service are prescribed and, if the application is granted, the information is supplied directly to the member of the public. That member of the public can then use the information to contact the debtor directly or take the information to the Court House and issue a Statement of Claim to sue for damages arising from the car accident. The form includes a Statutory Declaration that the information is sought for and will be used only for the purposes of seeking legal redress arising from the car accident. RMS will not supply license and registration information for simple debt collecting that does not have a

motoring or maritime connection. The RMS has little means of policing the use of the information once it is released.

Under the Uniform Civil Procedure Rules, 2005, a process for Preliminary Discovery already exists for debt recovery claims over \$10,000. This involves a creditor filing a Notice of Motion with a Court seeking an order that specific information be supplied by a specific person or organisation in order to be able to issue and serve a Statement of Claim. The Notice of Motion requires a supporting affidavit setting out what information is sought, from whom and for what purpose. The Court polices the process and decides if the information sought is sufficiently focused and relevant to the cause of action that the creditor is seeking to commence. The creditor may obtain that information and use it to negotiate a settlement without substantive legal action needing to be commenced. The problem is that it does not extend to the enormous number of Small Claims matters under \$10,000 which make up just over half of all matters..

Section 23(5)(a) of the Privacy and Personal Information Protection Act, 1998 allows a subpoena to be issued to obtain otherwise private information. This is not restricted to a criminal subpoena. Civil Courts currently have the power to issue a subpoena for documents and to receive subpoenaed information. The view is currently taken, however, that this only applies in relation to defended actions with the subpoena being targeted at information relevant to the issues in dispute between the parties. This is because subpoenae have traditionally be used to collect evidence and not for discovery. Such subpoenae are currently made returnable before the Registrar of the Court who then decides what level of access may be had to that material. One simple solution is to make it clear in the legislation that a subpoena in the form of discovery can be issued at any time and made returnable before the Registrar who then reviews the material and decides if the material will be made available by the Court to the creditor. This system has the advantage of being available in any town that has a Court House rather than in some centralised city locality, is supervised by the Court at the much cheaper level of a Registrar (rather than a Magistrate or Judge) and the Registrar's decision is then open for review by the Magistrate or Judge.

The advantage with the RMS approach is that it is cheap and simple. The problem is that it is wide open to abuse by that tiny number of people who might seek information for nefarious purposes. There is minimal direct supervision and the RMS does not get to see how the information is actually being used.

My view is that having the information supplied to a Court is the best process. An application could be made at any time under a relatively simple and cheap Notice of Motion for Discovery. The fee for a Notice of Motion is currently \$78.00 (\$156.00 for a corporation). There is currently no fee in the Small Claims Division. Such a procedure means that it would be closely supervised by the Registrar at a reasonable cost. It could be dealt with in chamber or, perhaps, listed before the Registrar with commercial agents given the right to appear just as they now do with an Examination Order. It would allow solicitors and self representing persons to engage as well. The Notice of Motion would require a simple affidavit setting out basic facts and relating the information sought and the agency from which it is sought to the legal action that is under way or being contemplated. It would contain a standard undertaking not to use the information for other purposes. Abuses might therefore be less likely to take place and nefarious persons are likely to keep way from a Court. The procedure would most often be associated with an existing Court action and the fees and costs could readily form part of the judgment just as the costs of enforcement actions do at the moment. There would be one file in one place with one

agency containing all the information, thereby making review of the process much easier. The Court would see the information that came in and would see how it was used.

I note that the N.S.W. Sheriff has recently advised that future enforcement action is to be channelled through the State Debt Recovery Office. Just how this will work is currently unclear. Such a move should, however, be optimised to allow the wider resources of the SDRO database to cross reference information to assist in the enforcement of all matters, including private debt enforcement, through the SDRO. I strongly suggest that the SDRO be given wider access to other government and private databases such as RMS and VEDA in order to find absconding debtors.

In relation to the licensing of Commercial and Private Inquiry Agents, I have too little experience of the field to be able to offer any insightful response.

Yours faithfully




(Mark Vine)
Director