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Committee on Legal Affairs
NSW Legislative Assembly
By email: legalaffairs@parliament.nsw.gov.au

Dear Sir / Madam

We refer to the hearing before the Legal Affairs on 16 June 2014.

Issues taken on notice

A. ***Reverse licensing system for agents acting for debt collectors***

While we prefer a full licensing system, we acknowledge that a distinction can be drawn between agents who have face to face contact with consumers, and those who do not.

For debt collectors who continue to make face to face contact with consumers, our position is that a full licensing system is justified and should be maintained. Persons authorised to contact a consumer at their home, work or in public, should be subject to greater oversight and licensing systems to ensure these agents are held personally to appropriate standards of conduct and professionalism in that work.

For debt collectors who do not have face to face contact with consumers, we acknowledge that negative licensing may be an appropriate mechanism to consider, subject to:

a. Mandatory standards of conduct, including mandatory compliance with the ASIC/ACCC debt collection guidelines;
b. Mandatory membership of an ASIC approved EDR scheme, to ensure consumers have access to redress if the standards of conduct are breached. This needs to be paired with a public register of all debt collectors and the name of their EDR scheme so that consumers can readily find the right complaints service; and
c. Oversight by a government regulatory body such as ASIC with appropriate investigative and sanctioning powers to discipline and revoke licenses on an individual level, and deal with systemic issues

B. ***Use of work and development orders for private debt***

We oppose this proposal.

The introduction of Work Development Orders as an alternative for people unable to afford monetary penalties (fines) imposed by the State has been a wonderful development, retaining the penalty aspect by requiring some compulsory activities (work or otherwise) on the part of the offender that is within their capacity (unlike payment of money which is often not) and giving them an opportunity to re-

engage with the community in a positive manner. The alternative was often an accumulation of other consequences such as loss of licence and registration, loss of employment and in some cases imprisonment, all of which lead to disengagement with the community and productive workforce and likely re-offending. Fines have insufficient impact on those who can easily afford them and impact far too greatly on those who cannot.

On the other hand, we consider such a system totally inappropriate in the context of civil debt collection. Imprisonment of debtors has not been government policy in many decades and nor should there be any other essentially punitive result of incapacity to pay. Breach of contract is not a breach of any criminal law. Debtors who cannot pay their debts are given the option of going bankrupt, rather than face fruitless enforcement because we have a policy of allowing people a fresh start. Forcing debtors into compulsory, quasi-criminal penalty activity as a result of civil debt is at odds with this policy. Even giving this as an option derides from the basic principle that debtors are entitled to retain enough money for their basic needs, and should be free from harassment in circumstances where they simply do not have capacity to pay.

Bankruptcy itself protects a reasonable standard of living by quarantining certain property and income from creditors including: essential household goods, a motor vehicle and tools of trade valued less than the threshold amount, money received by way of compensation for personal injury and income below a designated threshold taking into account the number of dependents the bankrupt has. It has been recognised for sometime that forcing people into bankruptcy, when they have little income and no significant assets, is not in anyone's interest. The administration of the bankruptcy system costs money, and there are implications for other smaller creditors that may otherwise still be paid if the debtor becomes bankrupt because of one large and unmanageable debt.

We note for example that the recently reviewed Debt collection guideline: for collectors and creditors produced by the ACCC and ASIC contains provisions which reflect the general principle that debtors should only be required to repay civil debts in circumstances where they have the capacity to do so after the payment of essential living expenses, for example:

> "**Clause 2. Contact for a reasonable purpose only**
> Example at c – If you are aware that a debtor is unable to make meaningful and sustainable repayments towards a debt, then continuing to contact the debtor to demand payment will not be reasonable or appropriate."
>
> "**Clause 14. Repayment negotiations**
> (a) We encourage you to work with a debtor and to adopt a flexible and realistic approach to repayment arrangements, which includes:
> - Making reasonable allowances for a debtor's ongoing living expenses
> - Considering if a debtor is on a fixed low income (for example a disability pension or other welfare payments) and there is no prospect of their income increasing in the future…"

These provisions recognise that continued requests for payments a debtor cannot make are stressful and humiliating and can often be the impetus for a debtor going bankrupt in circumstances where there will be no benefit to creditors from their doing so.

We submit that asking debtors to submit to Work Development Orders in order to pay off civil debts is:

- Contrary to general public policy in relation to civil debt in NSW and Australia more generally by applying a quasi criminal penalty system
- At odds with the right to go bankrupt and likely to drive people into bankruptcy unnecessarily, which is not in the interests of the government or other creditors
- At odds with responsible lending obligations which require creditors to ensure consumers have the capacity to repay debts prior to lending.

Creditors already have a range of enforcement options for pursuing those debtors who have sufficient income or property to pay their debts.

C. *Finding debtors in the context of privacy laws*

The fundamental starting principle should be that consumers are entitled to privacy, unless there are real and pressing reasons for abrogation of that right.

There is already public concern over the usage and security of personal information held by governments and corporations. New amendments were made to the Privacy Act in March 2014 after widespread consultation to improve consumer rights and particularly awareness of how their information is to be used and disclosed.

Consumer mistrust of providing information to government agencies can frustrate policy objectives in other areas.

An automatic right of access to electoral rolls and RMS records should not be permitted for private actions taken for a civil debt. The ordinary consumer would not and should not have to expect their personal details to be released for this purpose.

SDRO is a unique exception and should remain so. As a government department, it enforces fines incurred from breaches of the law.

There are existing provisions under the Civil Procedure Act allowing the court to make preliminary discovery orders, subject to the applicant showing a proper basis for seeking access to that information.

We note in one recent instance, after the courts had provided one creditor with preliminary discovery orders[1], the NSW Parliament stepped in and passed new legislation in 2012 specifically to stop all creditors falling within that category from obtaining RMS records to collect car park fees[2], noting both community concerns over the privacy of information held by government, and concerns with debt collection practices being used[3].

ASIC' submission in response to this inquiry also noted actions taken recently against ACM and GE, both very large players in the debt collection and finance industry respectively for systemic debt collection issues.

The risk of potential abuse and misuse is real and significant, and will increase if en-masse access to government records is granted.

The proposal for a "tracking system", where a consumer can find out who has had access their personal information, is no substitute for privacy rights and of very limited use to consumers:

a. tracking presupposes the scenario where information may be abused or used for unintended consequences, and is used after the fact when the consumer has already suffered the consequences and is trying to locate how their information was released
b. accountability cannot be assured in instances where more than one debt collector was granted access, or the same information is available from different sources
c. it is very difficult for consumers to obtain remedies for "non-financial" losses such as breaches of privacy. In a domestic violence context, the consequences may be fatal and we support the

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[1] See for instance, Roads and Traffic Authority of NSW v Australian National Car Parks Pty Ltd [2011] NSWSC 1183
[2] Road Transport (General) Amendment (Private Car Parks) Act 2012 No 86
[3] See 2nd reading speech
http://www.parliament.nsw.gov.au/prod/parlment/NSWBills.nsf/1d436d3c74a9e047ca256e690001d75b/2ba4bb09711d3efdca257aa10002aad6/$FILE/Road%20Transport%20Amdt%20(Car%20Parks)%20-%20LC%202nd%20Read.pdf

views of Elizabeth Morley on this matter as the Redfern Legal Centre operates a Domestic Violence Court Assistance Scheme.

D. ***Perceived inconsistency between creditors being able to seize jointly owned property but not garnishee joint bank accounts***

Our understanding is that a 'debt garnishee' cannot operate on a joint bank account because the bank does not hold the money for any one of the joint bank account holders individually. Notwithstanding the fact that each account holder may have authority to withdraw from that account, there is no 'debt' as such that the bank holds to any of the individual account holders.

There are policy reasons why joint bank accounts should remain protected:

a. Joint bank accounts are often used by families, and separate sources of income go into that account. Garnishing all or even half of the household account would likely result in hardship for the whole family and default on other expenses like mortgage payments or utility bills

b. Elderly or ill people may add their carer or family member's name as a signatory, so that their carer or family member can assist them with transactions or have access to savings for their funeral after they pass. There is no contemplation that their money could be garnisheed for someone else's debts

c. Bank accounts are continuous facilities, determining the respective contributions from different account holders can be difficult and cost more than the amount in the account. When jointly owned personal property is sold, the creditor is only entitled to the proportion of the debtor's proceeds

d. Any creditor or combination of creditors who are owed over $5000 (including interest and legal costs) can still seek to force the debtor into bankruptcy where a bankruptcy trustee would be able to freeze and access to funds in a joint account

Supplementary questions

Our responses are as follows:

1. **Greater use of external dispute resolution (EDR) schemes**

We strongly support increased use of EDR schemes for a wide variety of reasons:

a. Reduced barriers to access. Consumers are generally very hesitant to use the courts for a range of reasons, including that it is too intimidating, too risky because of legal and court costs, or too difficult because of the formalities.

b. EDR schemes are set up to allow consumers to run their own complaints, without requiring legal representation

c. EDR schemes place a very strong emphasis on complaint resolution by negotiation and conciliation, and are very successful in this

d. EDR schemes can reduce pressures on court lists, and are generally a cost-effective alternative to the court

e. EDR schemes have proven successful in a range of different contexts - FOS and COSL in the financial services areas, the Energy and Water Ombudsman and Telecommunications Industry Ombudsman in utilities and telecommunications

Misuse of EDR schemes

There may be a small minority of debtors seeking to misuse the schemes for unintended or ulterior purposes. However there are safeguards and deterrents in place to minimise this:

- EDR schemes can reject complaints that are frivolous, vexatious, lacking in substance or where the same issues have been already considered previously

- FOS Terms of Reference and COSL Rules allow the EDR scheme to permit creditors to start an action in court to maintain any time limits that may soon expire, so the creditor's rights can be preserved in the event the EDR complaint is unfounded

- Interest and fees will continue to accrue on debts as per the loan contract while the complaint is being investigated by the EDR scheme, and will ultimately be payable by the debtor if the complaint is determined to be unfounded

- FOS and COSL can set expedited complaints handling processes for certain issues, and can use these to target types of complaints that could be prone to misuse

- We are aware that a number of EDR schemes have concerns about consumers using paid private companies for disputes (such as credit repair companies), where such companies may be using an EDR complaint to pressure creditors into settlements for commercial reasons. We understand the EDR schemes are in discussions about strategies to avoid this practice

In discussing misuse, it should be noted that:

- It is and should remain a legitimate use of an EDR scheme for consumers to access a temporary hardship arrangement on their debt, while they recover from illness or unemployment or other factors outside their control. This is still in effect a "delay" of repayment - but hardship rights are set out under the National Credit Code (NCC) for debts covered by the NCC, similarly utility providers, telecommunications companies and insurance companies all have hardship obligations set out in their respective codes of practice/s and can be investigated by the respective EDR schemes. The ASIC / ACCC Debt Collection Guidelines also strongly encourages repayment arrangements.

  Even through the court process, after judgment is obtained, consumers can apply through the court for a repayment arrangement on any judgment debt, regardless of the type of the debt. Anecdotally, the courts will accept arrangements spanning around 2-3 years.

- There are justifiable reasons why consumers may need to lodge more than once in an EDR scheme over the same debt.

  A complex matter may involve different legal issues, which the consumer was not aware of when they initially lodged in EDR. A common example is a consumer who has previously sought hardship assistance through EDR, but it later becomes evident later that the loan was never affordable in the first place and the lender may have breached responsibility lending provisions

  The consumer's situation can change substantially. A decision in EDR for someone to sell their home to repay the mortgage because they have been out of work too long, should be

reconsidered if that person can prove they are now in stable work and resume their normal mortgage repayments.

We note that multiple lodgements in EDR are generally rare.

2. Whether all types of credit should be covered by a mandatory external dispute resolution scheme

We support as many types of credit as possible being covered by a mandatory EDR scheme. We note that the most common consumer debts are already covered by EDR schemes – consumer loans and leases under FOS and COSL, utilities under the Energy and Water Ombudsman and phone and internet under the Telecommunications Ombudsman. It would provide greater rights for consumers and a fairer playing field for all creditors.

We are particularly eager for the pawnbroking industry to be covered by EDR and have advocated for this in the past. Pawnbroking is subject to the unjustness provisions of the NCC but not the same licensing or EDR membership requirements, despite the industry being analogous to credit more generally. Consumers who go to pawnbrokers are some of the lowest-income consumers and can be in a very vulnerable position when handing over household essentials or sentimental items as security. Pawnbroking charges are extremely high (often at 30% or more *per month*) and the amounts loaned are typically only a small fraction of the value of the pawned item. In one case, our Centre had a client who borrowed $750 using her jewellery, some of which had been her mother's. Desperate to get the jewellery back, the client spent over 3 years continuing to make interest payments totalling $7800, after which the pawnbroker demanded a further $1500 otherwise the jewellery would be sold.

We favour the usage of existing schemes FOS and COSL, rather than the establishment of new schemes. FOS and COSL are industry based, ASIC approved EDR schemes that are already well established and practiced in dealing with debt collection issues which arise in relation to creditors covered by the National Consumer Credit Protection Act (NCCP).

3. Recovery of non-professional collection costs

We are strongly opposed to any expansion to the rights of debt collectors to charge additional costs:

a. In most instances, the terms of the credit contract already allow creditors to pass on default interest and fees, and legal and enforcement costs
b. It increases the risk of unnecessary contact with debtors and faster processing to enforcement action, denying debtors a fair opportunity to negotiate repayments or consult a free financial counsellor
c. It causes further hardship to add on additional professional debt collection costs when a person is already struggling
d. It is difficult for debtors to challenge excessive or unreasonable costs because they may not have any knowledge of what steps the debt collector has taken or what has been charged for each step. The pending class actions against major banks as to whether late fees are illegal penalties illustrate the problems consumers have where there is a disparity of information about what is a fair or reasonable cost to default and debt collection

In the context of allowing professional debt collectors to perform the work of solicitors in commencing and running court proceedings, our concerns are:

1. Solicitors are officers of the court and have a paramount duty to maintain the integrity of the justice system, including an obligation to certify that there are reasonable prospects of success when filing proceedings. Professional debt collectors have no such obligation

2. Only solicitors can provide legal advice on whether to commence or continue proceedings, and this is important particularly where a debtor has previously raised a dispute or filed a

defence. The more experienced a professional debt collector becomes in court, the more likely there is to be a blurring of the boundary against a debt collector giving legal advice

3. The legal profession is highly regulated. The privileged place solicitors have in being able to provide legal advice and provide representation in court carries with it copious amount of training and education requirements and strict rules governing professionalism and appropriate contact with third parties. Solicitors face personal disciplinary processes from the Law Society and the Legal Services Commissioner for breaches.

   In contrast, the ASIC/ASIC debt collection guidelines are not mandatory, enforcement is subject to ASIC resourcing, and where enforcement does occur it may not impact the individual debt collectors responsible or provide any remedy to the consumers affected

4. Excessive or unreasonably incurred solicitor costs are subject to an independent Costs Assessment scheme, which allows third party payers such as debtors to challenge these amounts

5. Any cost savings to consumers are theoretical, and cannot justify the removal of the protections afforded by the use of solicitors. Imposing additional obligations on professional debt collectors to afford more protection will erode the theoretical costs savings to the consumer as well. It should also be taken into account that solicitor firms are likely to be employing paralegals or junior solicitors for routine administrative work, subject to more senior oversight

6. The efficiency and resourcing of the court system is a perennial issue, and unlikely to be assisted by having greater numbers of non-solicitor litigants

4. Whether debt collection agencies follow the ACCC/ASIC guidelines

We commonly receive calls about poor debt collection practices. Complaints are not isolated to any sector of the industry.

Some recent issues we have experienced are:

a. A rental company for whitegoods and household items chasing consumers for statute barred debts. These leases purported to be indefinite, and some consumers were being chased more than a decade after the last lease payment was made. The lease company made threats to refer debtors to police for larceny by bailee, presumably alleging some kind of dishonesty in the disposal of damaged items or after the item's lifespan. Our service has successfully defended a client in civil court matter, reached consent orders in another, raised a systemic issue with the main credit reporting agency over default listings being placed, and have another matter still pending

b. A major debt collector pursuing debts that would be statute barred, save for one random payment the debtor had no knowledge of. There was no logic or consistency why the debtor would make a single once-off payment out of the blue after many years, and then cease payments straight after. We have referred many of these matters to ASIC to investigate

c. A debt collector routinely commenced court action for debts that were statute barred on its own pleadings. These proceedings were commenced in one particular Local Court that continued to accept these despite a complaint being lodged

The same debt collector issued over 40 bank garnishees on two occasions that we are aware of, but we suspect this is common practice for this debt collector. In one case the person was only on Centrelink benefits

d. A debt collector telling a debtor to go steal things to pawn, to get the money to pay the loan

e. Car park companies chasing fees using notices that resemble official fines

f. A major bank using bankruptcy proceedings against homeowners for small unsecured credit card and personal loan debts

g. Debt collectors offering to remove default listings in exchange for large upfront payments, which would not occur after payment was made

h. Debt collectors refusing to accept any repayment arrangements, unless a large lump sum payment was made

i. Debt collectors not providing debtors with payment details so they can start repayments, insisting only large lump sums would be accepted

5. Reasons for ACCC/ASIC guidelines to be mandatory

The current legislative framework under the ASIC Act and ACL protect against undue harassment and physical force, unconscionable conduct and misleading conduct – all of which are inexact concepts. The ACCC/ASIC guidelines provide much clearer boundaries of conduct in a variety of scenarios. Making the guidelines mandatory will mean:

a. The regulator ASIC will be better placed to identify and enforce breaches. Confidence in the operation of the regulatory framework will drive compliance and further improvements in debt collection practices

b. Consumers are better informed about exactly what debt collectors should and should not do

c. EDR schemes are better placed to provide remedies to consumers and discourage debt collectors from continued breaches

6. Licensed commercial and private inquiry agents receiving information about location of debtors in matters that are before a court

We refer you back to our answers above in point C of the questions taken on notice, on our objections to any expansion to preliminary discovery through the court and why a "tracking proposal" is inappropriate.

In relation to post judgment matters, we acknowledge that debt collectors currently have no access to discovery mechanisms to determine a debtor's location. We prefer the expansion of the court discovery mechanisms for post judgment enforcement processes, over a more informal system of allowing debt collectors to directly access RMS or electoral records.

Again, we believe that any abrogation of privacy rights on personal information held by the government should be subject to court oversight and be limited to the purpose of enforcement through the court system. Discovery orders are traceable, being part of the court record, and use of

information gained through court discovery is subject to UCPR 21.7[4]. The courts also have a general power to impose penalties and imprisonment for contempt of court or abuse of court processes.

What controls would be required, If licensed commercial agents and private inquiry agents can receive information about debtor locations while the matter is in court

We remain completely opposed to the proposal for the reasons listed above. Accordingly we are unable to propose controls because the appropriate control is the court. Any other framework risks serious detriment to natural justice and privacy.

Please contact me on [redacted] if you have any questions or want to discuss this matter.

Regards,

[redacted]

Alice Lin
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[redacted]

[4] Use and disclosure limited to the conduct of the court proceedings, except by the court's leave or tendered as evidence in open court