Submission No 21

DEBT RECOVERY IN NSW

Organisation: Institute of Mercantile Agents

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INSTITUTE OF MERCANTILE AGENTS
NATIONALLY REPRESENTING THROUGH SECTOR GROUPS
COLLECTORS • INVESTIGATORS • PROCESS SERVERS • REPOSSESSION AGENTS

16 May 2014

The Hon Mr Bryan Doyle, MLA
The Chair
Committee on Legal Affairs
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir,

Inquiry into debt recovery in NSW

We refer to the invitation extended to the Institute of Mercantile Agents to respond to the Committee's Inquiry into Debt Recovery in NSW and are pleased to provide this Submission. We acknowledge the Terms of Reference for the Inquiry allows wide scope for the range of matters relating to debt recovery to be submitted for the Committee's consideration.

In this Submission, we address the following matters:

1. About the IMA
2. Existing legislative framework and associated issues
3. Some suggestions for specific improvements

1. About the IMA

Established in 1961, the Institute of Mercantile Agents (IMA) represents collectors, investigators, process servers and repossession agents throughout Australia who generally work as agents for principals such as banks, financiers, lawyers, insurers, government and the business community.

IMA membership covers the broad spectrum of industry participants from small businesses operating in rural and regional areas through to large corporations offering services across all jurisdictions.

The raison d'être for all members is to act as intermediaries for principals who generally do not have the available resource of internal staff suitably trained and experienced to handle the debt collection functions for their businesses.

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This intermediary role involves members explaining to their clients the processes, costs and timeframes for litigation to recover a debt and within such context providing specific recommendations in relation to individual debts.

IMA members are routinely tasked to provide debt collection services and processes for their clients, which range widely from individuals through to small businesses, large corporations, government departments and statutory authorities.

2. Existing legislative framework and associated issues

Debt recovery within NSW is framed and/or impacted upon by the following state legislation:

a) Commercial Agents and Private Inquiry Agents Act 2004;
b) Civil Procedure Act 2005 and Uniform Civil Procedure Rules 2005;
c) Building and Construction Industry Security of Payment Act 1999; and
d) Consumer Claims Act 1998.

Federal legislation and regulations also impact upon how debt recovery operates, including:

a) ACCC/ASIC Debt Collection Guideline
b) Australian Consumer Law
c) Commonwealth Privacy Act, 1988
d) Corporations Act 2001
e) National Consumer Credit Protection Act 2009

The collection industry's perspectives on some of the NSW legislation include:

Commercial Agents and Private Inquiry Agents Act 2004
Historically, businesses and persons operating in debt collection activities first came under a licensing regime in NSW in 1963 pursuant to the Commercial Agents and Private Inquiry Agents Act 1963 - this Act was enacted to bring the previously unregulated industry under some form of control including providing standards relating to the need for industry applicants to be of good fame and character.

The 1963 Act of course had its genesis in a period predating computers and modern telecommunications – in those days manual recordkeeping was the methodology and the main means of undertaking debt collection involved doorknocking the debtor's home to make demands for payments.

Minor reforms to that Act were introduced in about 1989 when the first course for industry training known as Commercial Agency Practice was introduced by NSW TAFE.

A key benefit of the 1963 Act was that persons with little to no prior experience were able to enter the industry as commercial sub-agents to work under employment to commercial agents.

Applications for the granting of commercial sub-agent's licences were made under the 1963 Act at the registries of the nearest Local Court for a minimal fee ($15.00) – applicants were subject to an criminal history check by NSW Police and where applications were successful, licences were granted efficiently sometimes within days and no later than one calendar month from the date of application as in the absence of an approval by that date, the 1963 Act deemed the applicant to be the holder of a commercial sub-agent's licence.

The 1963 Act was eventually repealed and replaced by the Commercial Agents and Private Inquiry Agents Act 2004 (CAPI Act). The CAPI Act introduced certain reforms to the way persons and businesses were licensed including:

- Transferring responsibility for the issue and renewal of licences away from the registries of the nearest Local Court to the Firearms Registry (now known as the Security Licensing & Enforcement Directorate) of the NSW Police based at centralised offices in Parramatta, without the opportunity for applicants to attend in person or to make direct telephone enquiries, instead all transactions being required in writing by post or email;

- The introduction of "credit card style" photo identification licences;

- Licence applicants to be fingerprinted by NSW Police;

- Licence applicants subject to an annual criminal history and bankruptcy search undertaken by NSW Police; and

- Licence applicants seeking an Operator's or Master Licence required to provide evidence of meeting the training qualification known as Cert III Financial Services (Mercantile Agency) and in the case of a Master Licence also the qualification of training module "FNSCNV506A - Establish and manage a trust account".

Superficially, some of those new requirements might appear reasonable and designed for the ultimate betterment of the industry however, in practical terms the CAPI Act has manifested to be long regarded by the industry as a nightmare of excessive bureaucracy fraught by lengthy and unreasonable delays directly and detrimentally affecting the efficiencies and cost structures of collection businesses in NSW compared to how such businesses are regulated in other jurisdictions.

The problems which the NSW collection industry encounters in dealings in relation to the CAPI Act and the process for licensing in the State are many, but include the following specific issues:

- Lengthy delays in the processing of licence applications – new licences routinely take between 4 to 8 weeks – during that time, the person is not able to engage in any licensed occupational activities so it will be immediately seen this is an immense problem in terms of recruiting persons to the industry as few quality applicants will wait for such a period before they can start to earn an income from employment in the industry.

- Problems in applicants having their fingerprints taken – this responsibility is divested to certain police stations to undertake but it is never any particular officer's responsibility to do the task and so often avoided by duty officers – further fingerprinting scanning equipment is usually located in what is known as the "lock up" areas of the police stations and in the event there are any prisoners in the area, the duty police refuse to take civilian applicants into the area to attend to fingerprinting – members report having to attend their local police station on repeated occasions to get their fingerprints taken and until such task is completed and reported back to the Registry, the licence is not issued.

- Problems often surface under the present licensing regime when it comes time for industry members to renew Operator and Master licences. Members report experiencing situations where renewal applications have been rejected by the Registry due to the applicant either incorrectly completing the required form or due to a minor omission of a supporting document from the application.

  The rejection advice is returned to the applicant after the expiry date of the current licence together with advice that due to the rejection and the expiration of the current licence, the licence holder is prohibited from acting in the licensed capacity until such time as a fresh application has been lodged, processed and confirmed by the Registry.

  The difficulty is that the application then changes from a renewal application to an application for the grant of a new licence and even though the licence holder is known to the Registry and has previously lodged all the necessary background evidence of proof of identity and education qualifications and experience, the Registry requires the application to be in the form as though such details are not known to the Registry and this requires gathering updated documentation of the previously provided and accepted evidence.

  Such "new" application is not fast tracked in recognition of the situation of the applicant having administratively failed in the renewal process but is treated to all the same delays the original licence process involved for fingerprinting, checking of bona fides etc – again it takes between 4 to 8 weeks for the process to be concluded by the Registry and a licence issued.

  On any fair and considered basis, it is plainly evident such a situation is both inequitable and unreasonable on the individual applicant caught up in such a situation given his/her employment or business activities are directly curtailed by these bureaucratically slow and unnecessary procedures.

  We would submit a reasonable and proper course of action in such a situation should be to grant a temporary licence or an abridgement of time, until such time as the licence holder has re-submitted the renewal application in the proper format and the Registry had processed the amended application.

- The introduction of mandatory training linked to specific competency based qualifications has been problematic for collection businesses for the following reasons:

    - There are only a limited number of private Registered Training Organisations providing the qualification through course delivery;
    - The course involves an excessive amount of time and although the modern industry is mostly specialised into businesses solely focussed on collections, process serving or repossessions all areas must be completed in order to achieve the qualification; and
    - Most concerning is that the course content and materials for the qualification in the main fail to reflect the modern practices of the various areas of endeavour of the industry.

  Further as the modern industry is mostly specialised and the collection businesses typically operate in a call centre model, it will be appreciated the actual training required is not onerous or extensive – instead employers in those situations routinely provide induction and refresher training to their collection staff dealing with:

    - Privacy
    - The collection process
    - The ACCC/ASIC Debt Collection Guideline
    - The product requirements relating to the debt accounts being pursued.

  Additionally, as is often the case in call centre environments, turnover of staff can be high for a variety of reasons including that some employees look for seasonal work only, others are international travellers journeying for a limited period through NSW and because from time to time available work flows do rise and fall markedly in accordance with client requirements for pursuing overdue debt with certain times of the year determined as unsuitable for collection activities for example, in the lead up to and over the Christmas period.

  For these reasons, the competency based qualifications required by the CAPI Act are a total and excessive miss-match to the needs of the persons working in the modern collection industry.

- The cost of obtaining and renewing an Operator Licence or Master Licence under the CAPI Act has increased exponentially from the 1987 Act where licences were on an annual basis: Agent's Licence $110.00 and Sub-agent's Licence $15.00. The current licensing costs under the CAPI ACT are:

Operator licences	
$130.00	1 year term
$480.00	5 year term
Master Licences (5 year term)	
$480.00	Nil employees self-employed individual or corporation (owner/operator)
$910.00	1-10 employed CAPI licensees
$1,940.00	11 or more CAPI licensees

- The activities of collection businesses increasingly follow the call centre model, such that the modern day collector has little if any face to face contact with debtors. Instead collectors make contact with debtors to follow up payment of overdue accounts by way of telephone, SMS messaging, emails and letters.

  Some collection activities do lead to the commencement of recovery action by way of litigation and in that situation, the work of attending upon a debtor at his/her residence or place of business for the purpose of serving the court process is usually outsourced to other commercial agents who act in the role of Field Agents specialising in face to face contact with debtors.

The industry and this association in particular for the past 5 years have expended significant efforts to bring the difficulties and excessive requirements of the CAPI Act to the attention of both the NSW Regulator and the Ministry for Police. Further much work was undertaken by the industry in respect to the 2010 COAG project aimed at national harmonisation of debt collection before the Ministerial Council of Consumer Affairs determined it could not reach agreement upon a common approach to industry licensing.

In comparison, neighbouring jurisdictions to NSW have in place regulatory regimes for the collection industry which more fairly and appropriately recognise the modern realities of the industry and the absence of any systemic issues in the conduct of the industry:

I. In ACT there has never been any licensing regime for commercial agents;
II. In Victoria since July 2011 the former Private Agents Act, 1966 was repealed and a negative licensing regime introduced through the Fair Trading Act, 1999; and
III. In Queensland the Debt Collectors (Field Agents and Collection Agents) Bill was passed as an Act by that State's Parliament on 6 May 2014 for a system of negative licensing for collectors whilst retaining a positive licensing regime for field agents.

The risk for the collection industry in NSW and also for the State's community in terms of employment prospects is that those other jurisdictions with more appropriate industry regulatory regimes are increasingly appealing for collection businesses to operate from rather than continuing to operate from NSW locations.

The industry has seen a decrease of collectors and field agents in NSW in recent years - this trend of jobs moving interstate is destined to continue in the absence of a timely and appropriate response to modernisation of NSW industry licensing.

The IMA strongly advocates the following urgent actions in relation to industry licensing in NSW are essential:

1. The repeal of the Commercial Agents & Private Inquiry Agents Act, 2004;
2. The introduction of a negative licensing scheme for those in the collections sector where the work involves no face to face contact with debtors; and
3. The introduction of a positive licensing scheme for those in the field agents sector (engaged in process serving and repossession activities) where the work involves face to face contact with debtors.

Civil Procedure 2005 and Uniform Civil Procedure Rules 2005 (UCPR)

The direct benefits for debt recovery actions commenced under the UCPR are seen as including:

- Parties have the ability to lodge documents for the proceedings online.
- Processes have become standardised removing previous issues of inter-jurisdictional non-conformities which historically existed when there were three separate forms of legislation for the three different Court jurisdictions of NSW.
- The structure of the Small Claims Division not being like a Tribunal or Arbitration Division allows parties to choose to have legal representation.
- The method of evidence within the Small Claims Division is appropriate as there is the ability to file and serve "Statement Evidence" compared to relying upon unknown witness information to be disclosed on the day of a Hearing.
- Parties have access to the Mediation programs of the Community Justice Centres.
- There has been an extension of time for Writs of Execution to be levied.
- Enforcement procedures retain the option of the use of Garnishee Orders to be issued to employers, banks and third parties for recovery of judgment debts.
- The instalment arrangement process has abolished the listing of objections.

The majority of "Debt Recovery Actions" commenced within NSW are undertaken within the jurisdiction of the Smalls Claims Division of the Local Court of NSW where claims less than $10,000 can be issued.

IMA members report in comparison to other jurisdictions they regard the Small Claims Division of the Local Court of NSW is the best framework for dealing with claims under $10,000.

Members cite a strong positive of the system is the way in which the Small Claims Division deals with defended claims – in NSW, unlike the procedures of other Australian jurisdictions, there is a requirement in defended actions for the parties to file and serve Statement Evidence prior to any Small Claims Hearing.

This procedural requirement provides the parties to the dispute with ample opportunity to assess the strengths and weaknesses of their case. Further the procedures do not require the parties providing such Statement Evidence to be personally present at the Small Claims Hearing. The resultant experience of this procedural requirement is that a very high proportion of claims are settled due primarily to these facts being efficiently exchanged.

In stark contrast Victoria has a framework which is the complete opposite to the NSW procedural approach. In that jurisdiction, the procedures require all evidence to be formally presented by witness testimony on the day of a Hearing – accordingly the parties' attendance in person is required. The obvious outcome from such an inefficient procedure is an excessive and unreasonable amount of expense and wasted time is imposed upon all parties to the action.

Our members report however there are major shortcomings impeding the debt recovery process in NSW which are directly related to the performance of the NSW Sheriff's Office in relation to enforcement actions undertaken to recover judgment debts.

Available enforcement options for the recovery of judgment debts from debtors include:

- Application for a Writ of Execution
- Garnishee Orders
- Examinations Summons

IMA members report creditors and collectors are increasingly either not issuing a Writ of Execution or alternatively only reluctantly issuing a Writ of Execution due to extensive and long established ongoing delays in the performance of the NSW Sheriff's Office, specifically failing to effectively action Writs of Execution and to arrest under a Warrant of Arrest (Civil) those Judgment Debtors who fail to attend court in response to an Examinations Summons.

Members say their enquiries to the NSW Sheriff's Office to learn the outcome of progress on such processes lead to repeated responses that the inability to action those matters directly stems from under-resourcing of and/or operational directives issued to the NSW Sheriff's Office.

In a response to an earlier discussion paper *"Review of the Debt Recovery Process"* issued by the Better Regulation Office and the Department of Justice and Attorney-General in 2010 this association raised the performance of the NSW Sheriff's Office as a matter of critical concern and made the suggestion the Government should seriously consider outsourcing the civil enforcement responsibilities to private enterprise namely to commercial agents who as Field Agents routinely attend to similar functions such as the service of court process and the repossession of goods.

Subsequently, further consultation with the IMA and certain NSW members was undertaken as the Attorney-General's Department considered the possibilities of outsourcing as a solution to the vexed problem of the inability of the NSW Sheriff's Office to meet the expectation of creditors and their collectors and lawyers in the area of civil enforcement actions.

The outsourcing of such enforcement functions to private enterprises is not a new or untested concept – such arrangements work successfully in other jurisdictions:

- The jurisdictions of Northern Territory and Queensland for many years have had a system of court appointed private bailiffs to attend to enforcing judgment debts through the exercise of Writs.

- The WA Government in or about 2011 entered into commercial arrangements to outsource its Bailiff functions to Baycorp Australia for the Southern Zone of WA comprising all bailiwicks in area from Kalbarri, around to Kalgoorlie and down to Esperance and including Perth Metropolitan and all centres and towns within such area.

The lack of performance by the NSW Sheriff's Office has reached a critical stage where creditors are increasingly concluding a fair and reasonable service will not be forthcoming if enforcement methods relating to the NSW Sheriff's Office are pursued. This is to the detriment of the economy of NSW as creditors cannot in the long term simply write judgment debts off as uncollectable - ultimately such write off costs are absorbed as higher operating costs of the businesses concerned and in turn passed on to other consumers such that goods and services within NSW will be at a higher cost structure than in other jurisdictions.

It is our strong contention and recommendation that the situation of the performance of the NSW Sheriff's Office be immediately reviewed and appropriately resourced or alternative arrangements made.

If the NSW Sheriff's Office is to be appropriately resourced this should include extending the hours of the Sheriff's Office in line with the times for face to face personal contact with debtors as defined in the ACCC/ASIC Debt Collection Guideline, namely between the hours of 9.00am to 9.00pm on weekdays and weekends, with no contact on national public holidays. The reason for such an extension is so officers are rostered to work more suitable hours to attend on debtors at times when they are likely to be at home, whereas under the current hours of the Sheriff's Office any debtor who works normal business hours is unlikely to ever be home when a Sheriff's Officer attends for civil enforcement purposes.

Consumer Claims Act 1998

Similarly to other Australia jurisdiction, the NSW Government has established the NSW Civil and Administrative Tribunal (NCAT) which provides a single entry point for access to the State's various tribunal services.

NCAT conducts hearings dealing with consumer trading cases, tenancy disputes, professional disciplinary matters and applications about adults who are incapable of making their own decisions. A principle of NCAT is the opportunity to have informal discussions directly between the parties to a dispute such that either directly or through a lawyer or agent, aggrieved parties can negotiate a compromise agreement

The functions of NCAT provide a resource to consumers for the area of disputes where emotions can run high and are often about the behaviour or conduct of at least one of the parties.

The collection industry is mostly involved in disputes about the payment for the supply of goods or services and for this reason, such matters are rarely within the realm of the NCAT but instead come under the jurisdiction of the Small Claims Division of the Local Court of NSW.

3. Some suggestions for specific improvements

In terms of some practical suggestions as to how the processes of debt recovery in NSW could be improved for the sake of efficiency, we suggest the following specific ideas for the Committee's consideration:

e-filing of Amended Claims

Regulation 19.1 of the UCPR provides that:

> *"(1) A plaintiff may, without leave, amend a statement of claim once within 28 days after the date on which it was filed, but, unless the court otherwise orders, may not amend it after a date has been fixed for trial."*

We respectively submit there would be no prejudice to a defendant if e-filing of an Amended Claim was allowed, particularly if the original claim had not been served and in circumstances where the amendment did not materially alter the cause of action.

Given the regulation does not require filing of a Notice of Motion or an Application then an Amended Claim sought to be filed within 28 days of the filing of the original Claim ought to permitted via the JusticeLink system, provided the amendments are clearly identified and the document noted as an amendment pursuant to Regulation 19.5.

Amendment of compliance time for responding to a Statement of Claim

In the spirit of harmonisation of processes so as to create consistencies across state jurisdictions, serious consideration ought to be given to reducing the 28 day limit to 21 days.

Improvement of Enforcement Proceedings

Further to our earlier comments on the poor performance of the NSW Sheriff's Office, it is the area of effective enforcement options for recovery of judgment debts that IMA members regard the most pressing need exists for improvement to the existing debt recovery processes.

Regretfully, the reality is that whilst court processes impose time constraints and "best practice" ideology on the finalisation of defended matters it appears the same urgency does not currently exist on achievable results for enforcement of judgments.

A cynical observation is that from a statistician's perspective the discontinuance of civil proceedings and the recording of judgments might be regarded as "finality", but from the creditor's perspective a matter is not finalised until the debt is satisfied (paid in full)!

Improving the effectiveness of enforcement actions is an important initiative and essential for restoring confidence to the debt recovery process in NSW. Some suggestions to this purpose include:

<u>Garnishee Orders</u>

In this area there are two specific suggestions:

1. The establishment of a system for creditors on a "fee for use" basis to identify the bank account details of judgment debtors similar to the Government's existing system for such purpose for the State Debt Recovery Office.

2. The amendment of garnishee orders to cover future credit balances in a bank account as well as existing funds.

Presently, when a garnishee order is applied for in relation to the judgment debtor's bank account to be garnished, all the money held in the account at the date of the order will be taken from the account and sent to the creditor, if such amount does not cover the whole judgment debt, then the creditor must apply for another garnishee order.

This "once off" action of a garnishee order is different to the system which applies when a creditor applies for a garnishee order for continuous attachment to a judgment debtor's wages or salary – in that situation, the order tells the judgment debtor's employer to take an amount of money from the judgment debtor's wage and pay it to the creditor until the whole judgment debt is paid off.

Expanding the Suite of Services of a Sheriff's Officer

Whether or not the NSW Sheriff's Office remains the only provider for civil enforcement processes as currently exists or as most creditors and collectors would prefer is outsourced for the sake of improved efficiency to private enterprise, we suggest Sheriff's Officers should be provided with a suite of enforcement options to explore when attending upon a judgment debtor to address the issue of an unpaid judgment debt such as:

- Writ of Execution of Goods;
- Sheriff's Examination Order; and
- Time to Pay Application.

Expanding the Powers of the Sheriff's Office

As we have noted earlier creditors and collectors alike are generally frustrated by the delays and ineffectiveness of existing enforcement options. Possibly some improvement would be evident by expanding the powers of the Sheriff's Office to overcome the current restriction that a Sheriff's Officer is not allowed to enter a judgment debtor's property to execute a Writ if asked to leave the property.

Further powers should be granted to a Sheriff's Officer to enable the Officer to enter a judgment debtor's property to enable the effective levying of a Writ of Execution to satisfy the judgment debt.

Ideas from other jurisdictions

IMA members generally regard NSW has the best framework to deal effectively with the requirements of debt recovery but as noted throughout this submission where NSW falls behind is in the area of operational efficiency. Looking at processes in other jurisdictions, there as some which could be usefully employed in NSW to strengthen the enforcement options available to creditors to recover judgment debts such as:

a. Implementation of judgment creditor caveats in line with practice in Tasmania or charging orders in South Australia as effective means of enforcing a judgment debt against land.

b. Abolishing the requirement for a Writ on Goods required before Writ on Title in line with other states such as Queensland, South Australia and Tasmania.

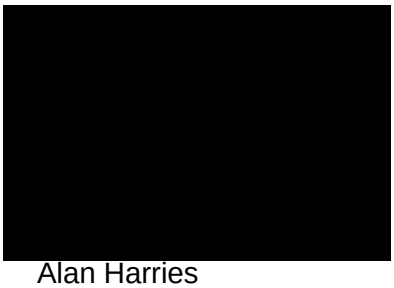
c. Abolishing the $10,000 limit for Writs on Title - there is no requirement for a monetary limit on enforcement in any other jurisdiction.

Contact

Any enquiries should be addressed to the undersigned at the address appearing on the cover page of this submission.

Finally, it is appropriate to note that the IMA and its members would welcome the opportunity to work with the NSW Government in a collaborative effort to grow, develop and improve the State's debt recovery framework to benefit all stakeholders.

Yours faithfully,
INSTITUTE OF MERCANTILE AGENTS



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