

DEBT RECOVERY IN NSW

Organisation: Australian Credit Forum
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The Chair, Committee of Legal Affairs

On behalf of the Australian Credit Forum please find attached our submission on the above.

The Australian Credit Forum is a not for profit organisation formed in the 1970's by a group of credit professionals who in addition to wanting to build and strengthen existing credit standards, reviewed and discussed legislation, suggesting changes that may affect the credit industry. Since its inception, one of the major strengths of the Forum has been its dedication to select the membership of individuals from as many industries as possible ensuring a cross section of knowledge and experience in all credit related areas. This has been combined with the granting of membership to individuals within various service providing roles including debt collections firms, insolvency practitioners, legal firms, accountancy, insurance and business information providers.

I am submitting this document after being a member of the sub-committee preparing the submission and also part of the executive committee of the Australian Credit Forum.

We trust this submission is of assistance to your committee.

With Regards

James



James Van Poppel

Managing Director

Commercial Credit Services

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REVIEW INTO DEBT RECOVERY ACTION SUBMISSION

1. The effectiveness of current legislation and administrative arrangements;

a. GENERALLY

- i. The current NSW legislation for debt recovery is relatively clear and effective. The main is the *Civil Procedure Act* and *Rules* covering court procedures. Licensing is the subject of separate legislation and will be addressed separately.
- ii. It is preferable that action for debt recovery stays within the court system and not to NCAT or external dispute resolution schemes as was proposed as an option in the NSW better regulation office discussion paper. Arguments here include:
 1. The interest of the State, as a long-standing function of the State, in recording resolution of disputes between citizens in the form of court orders and in recording the reasons for the decision for the guidance of disputants in the future and their advisers;
 2. The ability of creditors to recover costs where they have had to resort to the legal system to obtain payment of money due to them;
 3. The common sense in leveraging the existing court infrastructure including online registry, recording of judgments for credit information if kept within the court system and ability to maintain generic processes for all types of debt;
 4. The NSW court system has made a significant investment in new technology, as have practitioner users. The benefits of that investment are starting to be realised and will be lost if debt recovery matters are sent to NCAT or external dispute resolution schemes;
 5. The high percentage of debt recovery actions which are undefended means that it will be a case of the “tail wagging the dog” to mandate referral to NCAT or external dispute resolution schemes. Those schemes only exist to resolve disputes – in the absence of a dispute they can serve no purpose.

iii. Licensing of commercial agents

1. Across Australia as a working federation there should be uniformity in:

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- a. Licensing requirements for debt collection agents and their staff members which are consistent with and impose no greater burdens than ASIC's *Debt Collection Guidelines*.
- b. Positive licensing for field workers and process servers and "office" collectors to avoid the outlaw motor cycle gangs getting involved in debt recovery, as happened in Victoria.
- c. Protection of creditors through trust audits and protection of trust deposits in the banking system.

b. PROBLEMS

- i. Inability to do concurrent enforcement actions, which is a matter of Registry practice.
- ii. Training and knowledge levels of court staff are inconsistent and responses can vary depending on which staff member is attending to your query.
- iii. No acknowledgment of errors from court staff and to rectify court staff errors usually involves an additional fee as well as extra time.
- iv. No communication from court staff before documents are rejected as opposed to other interstate registries. No communication that certain items had been actioned by court staff, waiting for a response.
- v. Co-ordination between Local Court registries and JusticeLink is poor, as is co-ordination between Local Court registries and the Sheriff's Office.
- vi. The Sheriff's Office has no resources (staff or vehicles) to have the officers attend the judgment debtors' properties at an hour that the judgment debtor would be at the premises. If no resources can be allocated to the Sheriff's Office, the government should privatise the service, with the Queensland private bailiff service for execution of enforcement warrants the best model. That way creditors can at least pay to get good service instead of the process at the moment that you are paying a small amount but still not getting any service for the payment.

2. Any barriers to the debt recovery process, and impacts on third parties responding to debt recovery actions;

a. BARRIERS



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i. Costs recovery – undefended claims

- 1.** Creditors are already out of pocket when they have to apply internal resources or engage an external law firm or debt collector to chase overdue debts. That financial burden should not be increased (as for small claims in WA, the ACT and to a reduced extent in SA) by court rules which prevent recovery from the debtor of the costs of the legal actions their payment default has caused.
- 2.** The recoverable costs regime should provide, as near as is possible, that the innocent creditor (including small businesses and unpaid Government agencies) is out of pocket as little as possible (see the EU Directive referred to at Point 4(e) of this submission).

ii. Costs recovery – Defended Small Claims Division matters in the Local Court

- 1.** It is a barrier to small business to use any legal-based debt recovery process that they are unable to recover any legal costs beyond merely nominal costs when the debtor defends the action, as in the case in the Small Claims Division. This means businesses decide to write off legitimate debts because it's not economical to pursue recovery.
- 2.** It is inequitable and unfair that this is the case. It could be partly ameliorated by an adoption of the 25% fixed costs regime imposed by Local Court Practice Note Civ 1 dealing with defended claims in the General Division between \$10,000.00 and \$20,000.00.
- 3.** In suggesting that approach it needs to be recognised that the amount recovered does not represent the economic cost of representation rather it is some reimbursement of the debt recovery costs paid and reduces the losses suffered by the SME client.
- 4.** The present Small Claims Division jurisdictional limit of \$10,000.00 should be retained and not increased.

iii. Debtors seeking to avoid obligations

- 1.** The time lags in the enforcement system at the moment, particularly in the enforcement of writs of execution, are so great as to allow debtors to move location thereby facilitating the avoidance of their obligations. This leads to lack of confidence by the business community in the ability of the legal system to facilitate collection of their overdue debts.

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2. Anecdotally, where this lack of confidence exists creditors may resort to extra legal means of debt recovery including employing people standover tactics.

b. IMPACTS ON THIRD PARTIES RESPONDING TO DEBT RECOVERY ACTIONS;

- i. Unless the debt recovery system operates efficiently and does not leave creditors out of pocket it will have the following social consequences:
 1. Unpaid government departments will not be able deliver their mandated services due to funds which are not able to be used because they cannot be collected.
 2. Small business either have to borrow more to cover the unavailable unpaid funds (thereby increasing their costs of doing business) or reduce staff or services because the funds are not available.
 3. Small community living bodies such as strata title owners corporations will have to pay extra for their cost of living because they cannot recover the cost of collecting unpaid strata levies from recalcitrant owners.
- ii. The impact of debt collection activity on third parties is dealt with both extensively in ASIC/ACCC's *Debt Collection Guidelines*. No additional regulation is required, particularly as it has the potential to create inconsistencies among the states (as in the former VCAT *Guidelines* for reasonable contact times).

3. Possible measures to make the debt recovery process more efficient;

a. NSW LOCAL COURTS

- i. Consistent court staff training.
- ii. An email service for queries that is attended to on a daily basis. Most queries going through the customer service take too long for a simple answer or confirmation of court details on file.
- iii. Need to ensure that all court documents are available online and up-to-date.
- iv. Need to ensure that all court documents are regularly reviewed for simplicity of language in explaining to the recipient how they are to respond.

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- v. Easy procedure to extend writs on title for the purpose of extending a writ already lodged with LPI.
- vi. Adopt the following proposals raised in the Better Regulation Office and Department Of Justice And Attorney General Issues Paper for *Review Of The Debt Recovery Process* of October 2010:
 - 1. Option 4(a) Garnishee Order changes (pp. 19 – 20) .
 - 2. Option 4(b) Garnishee Order changes (pp. 20 – 21).
 - 3. Option 4(d): Allow a writ against land to be issued for debts under \$10,000 (p. 21).

4. Practice in debt recovery in other jurisdictions

- a. Consider judgment creditor caveats in line with practice in Tasmania or charging orders in SA as effective means of enforcing a judgment debt against land.
- b. Mediation similar to process in Victoria where mediation occurs at pre-trial review. Process is confidential and encourages the parties to resolve their issue prior to hearing.
- c. Abolish the requirement for a Writ on Goods required before Writ on Title in line with other states such as QLD, SA and TAS which all have a process where the writ on goods process is not required for a writ to be lodged over title.
- d. Abolish the \$10,000 limit for on Writs on Title - no other state has a monetary limit on this enforcement option.
- e. The EU in its last two directives to member states about payment delay in commercial transactions, apart from requiring prompt payment by government, identifies the importance and real cost of payment delay. It also acknowledges the equity argument in a requirement that member States give legislative backing for creditors to recover reasonable costs of payment delay and also the reasonable costs of debt recovery.

5. Any other relevant matters.

- a. Recording of judgments together with those discontinued and set aside is an important process for credit assessment and management. The reintroduction of the reporting of judgments in NSW has led to a significant number of debts being paid when previously they would not have been. The record of the judgment then becomes an issue for the debtor's credit history and ability to get further credit. As judgments are a consequence of the debt recovery process their integrity needs to be assured by keeping it as a function of the State through the court system.