Submission No 33

DEBT RECOVERY IN NSW

Organisation: Department of Police and Justice

Name: Mr Andrew Cappie-Wood

Position: Secretary

Date Received: 20/06/2014

NSW GOVERNMENT | Police & Justice

Office of the Secretary
GPO Box 6
Sydney NSW 2001
Tel 02 8688 7313
www.lawlink.nsw.gov.au

The Chair
Legislative Assembly Committee on Legal Affairs
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Doyle

Please find enclosed the Department of Police and Justice's submission to the Legislative Assembly Committee on Legal Affairs inquiry into debt recovery in NSW.

Should you wish to discuss this matter further, the relevant departmental contact is [redacted], Senior Policy Officer, who may be contacted on [redacted] or at [redacted]

Thank you for the opportunity to make a submission to the inquiry.

Yours sincerely

[redacted]

Andrew Cappie-Wood
Secretary

Committee on Legal Affairs:
Inquiry into debt recovery in NSW

Submission
Department of Police and Justice

1. Introduction

The Legislative Assembly Committee on Legal Affairs (**the Committee**) has been asked to inquire into and report on the debt recovery framework in NSW. This submission sets out background and contextual information that may be useful to the Committee in its deliberations.

2. The debt recovery framework in NSW

Unpaid debts can be the source of financial hardship for both creditors and debtors. It is therefore important that debt recovery processes are as fair, effective and efficient as possible. It is also important that debt recovery processes appropriately balance the rights of creditors and debtors and have due regard for vulnerable members of the community.

The Department of Police and Justice (**the Department**) plays a key role in relation to the debt recovery process in NSW. The Department administers a range of entities that assist people to resolve disputes about money and enforce orders for the payment of money, including:

- LawAccess NSW, which provides information to citizens about dispute resolution options and the debt recovery process.
- Community Justice Centres, which provide experienced mediators free of charge to help people resolve disputes without going to court.
- The NSW Civil and Administrative Tribunal, which is an informal and inexpensive dispute resolution provider that has the power to make orders for the payment of money, including in relation to minor civil claims, tenancy disputes and home building disputes.
- The Local Court of NSW, which hears and determines disputes involving claims of up to $10,000 and enforces orders and judgments for the payment of money. The Small Claims Division of the Local Court provides an informal forum for the resolution of disputes under $10,000, where the rules of evidence do not apply and witnesses are not called unless the court decides otherwise.
- The District Court of NSW and Supreme Court of NSW, which hear and determine disputes over $100,000.
- The Office of the Sheriff of NSW, which exercises functions in relation to the service of warrants, summonses, enforcement and other orders issued by courts and tribunals and enforces writs, warrants and Property Seizure Orders issued under the *Fines Act 1996* in relation to the recovery of government debt.

The NSW Police Force also exercises functions in relation to debt recovery. The NSW Police Force's Security Licensing and Enforcement Directorate exercises licensing and enforcement functions in relation to the activities of commercial agents and private inquiry agents, including process serving, debt collection and repossession, and the investigation and surveillance of persons.

3. Review of the debt recovery process

In July 2013, the then Department of Attorney General and Justice (now the Department of Police and Justice) concluded a joint review of debt recovery

processes with the then Better Regulation Office (**BRO**). A copy of the final report is provided at **Annexure A** to this submission. The report found that existing debt recovery mechanisms in NSW are generally working well and are largely consistent with those in other Australian and overseas jurisdictions. Nevertheless, the report found that there is some scope to streamline certain debt recovery practices. The report made 33 recommendations to that end.

By the time the review was finalised, certain aspects of the report which relate to the functions of the Office of the Sheriff of NSW had become out of date. As a result, the report was not publicly released. Instead, the Department has used the report as an internal tool for progressing reform in this area. **Annexure B** provides an outline of the current status of the recommendations.

4. Current statutory reviews

Civil Procedure Act 2005

The *Civil Procedure Act 2005* (**the CPA**) provides a unified legislative framework for civil litigation in NSW. In relation to debt recovery, Part 8 of the CPA sets out certain provisions relating to the enforcement of judgments and orders. However, it should be noted that detailed procedural provisions regarding the enforcement of judgments and orders are not located in the CPA, but are set out in the Uniform Civil Procedure Rules (**UCPR**). The UCPR are administered by the Uniform Rules Committee. Provisions relating to the establishment and membership of the Uniform Rules Committee are located in section 8 of the CPA.

The Department is currently finalising a statutory review of the CPA. The purpose of the review is to determine whether the policy objectives of the CPA remain valid, and whether the terms of the legislation remain appropriate for securing those objectives. The review of the CPA is investigating a number of proposals that were referred to it from the DPJ/BRO review of debt recovery processes, including that the Government consider amending the CPA to:

- Extend the lifespan of bank garnishee orders to 28 days
- Clarify that an administrative charge for garnishee orders can be deducted in addition to the amount being garnished
- Allow bank garnishee orders to operate in relation to funds held in term deposit without requiring expiration of the term
- Authorise the Sheriff to enter premises to execute writs for the levy of property;
- Align the definition of protected personal property with that used in federal bankruptcy legislation
- Allow creditors to seek Orders for Discovery to ascertain the whereabouts of judgment debtors.

The Parliamentary Committee's findings may be relevant to a number of these proposals.

Commercial Agents and Private Inquiry Agents Act 2004

The *Commercial Agents and Private Inquiry Agents Act 2004* (**the CAPIA Act**) is also the subject of a review, which is being undertaken by the Ministry for Police and

Emergency Services (**MPES**). The CAPIA Act provides a licensing scheme for commercial agent and private inquiry agent activities, such as process serving, debt collection, repossession of goods, surveillance and investigation of people. The objects of the CAPIA Act are to:

- Protect the public in relation to commercial and private inquiry agent activities
- Provide for the licensing of people carrying out, and persons carrying on business in relation to, such activities
- Establish standards to be observed by licensees in relation to such activities
- Ensure that licensees are accountable for their acts and omissions in relation to such activities.

The review of the CAPIA Act commenced in 2008. Consultation with industry and government stakeholders occurred throughout 2008 and 2009. The review was deferred in 2009 when the then Ministerial Council for Consumer Affairs commenced a project to harmonise the regulation of debt collection across Australian jurisdictions. However, the project was discontinued in March 2013. MPES has now recommenced the review.

5. Other Acts and statutory instruments

A number of other Federal and State laws may also be relevant to debt recovery in NSW, including the *Fair Trading Act 1987 (NSW)*, the Australian Consumer Law, privacy laws and anti-money laundering laws, as well as corporations law and financial laws such as the *National Consumer Credit Protection Act 2009 (Cth)*.

BETTER REGULATION OFFICE
AND
DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE

FINAL REPORT

REVIEW OF THE DEBT RECOVERY PROCESS

TABLE OF CONTENTS

EXECUTIVE SUMMARY

There is a range of existing mechanisms for dealing with debt disputes in New South Wales. These include legal proceedings in the courts; bringing matters to the Consumer, Trader and Tenancy Tribunal (CTTT); and resolution via alternative dispute resolution (ADR) processes. ADR could include, for example, mediation through Community Justice Centres (CJC) or external dispute resolution (EDR) services approved by the Australian Securities and Investments Commission (ASIC) in relation to Australian financial and credit industries.

Existing debt recovery mechanisms in NSW are in many respects working well and are largely consistent with those in other Australian and overseas jurisdictions. Nevertheless, a number of issues with current processes have been identified, particularly for individuals and small businesses. They include:

- the complexity of taking legal action for debt recovery
- the time involved when claims go through the courts
- the inconvenience for both parties of attending court
- the cost of debt recovery
- difficulties that creditors have with enforcing judgment
- access to information on debt recovery.

It is important that debt recovery processes operate efficiently and effectively, to minimise the impact of the process on the parties and the wider community.

In October 2010, the Better Regulation Office (BRO) and Department of Attorney General and Justice (DAGJ) released an Issues Paper seeking feedback on the current arrangements and a number of proposed options for change. Consultation with stakeholders has informed the review recommendations contained in this report.

The review finds that there is scope to improve certain aspects of the debt recovery process to make it easier, faster, less costly and more effective, while balancing the rights of creditors and debtors equitably.

A range of recommendations have been made to:

- **reduce the need to attend court by using online tools**, in particular for DAGJ to:
  - proceed with expanding online services in the civil jurisdiction of the Local Court
  - ensure that parties are provided helpful guidance on how to use online services and tracking progress of cases
  - consider improvements to payment processes

- **reduce the complexity and improve the effectiveness of processes**, including that:
  - DAGJ consider increasing the monetary jurisdiction of the Small Claims Division from $10 000 to $30 000. Such a change has the potential to reduce litigation costs significantly

- **improve the availability of information on debt recovery**, including by:
  - ensuring that Government websites assist people to access the most suitable debt recovery resources

    - providing online access to debt recovery judgments to help businesses to manage credit risks
    - referring a number of important proposals for simplifying and improving court procedures to the Uniforms Rules Committee (the judicial body responsible for changes to forms and procedures)

- **change enforcement arrangements**, including that:
    - the NSW Sheriff offer the option of multiple enforcement visits for a single fee to reduce administrative costs for creditors
    - DAGJ review the costs and benefits of enabling private bailiffs to undertake some enforcement activities
    - that the Uniforms Rules Committee further consider reforms to the process by which creditors can garnish money from debtors accounts.

A complete list of the recommendations is below.

Recommendations to reduce the need to attend court using online tools

1. That DAGJ proceed with expanding online services as scheduled to allow claimants and defendants in the civil jurisdiction of the Local Court, including self-represented parties, to file documents electronically, participate in electronic direction hearings via online court and obtain default judgment.
2. That, in expanding online services, DAGJ's Legal eServices team ensure user requirements are considered in the design and implementation. Such requirements include the provision of guidance material; tools to track the receipt, issue and progress of matters; and reports on a user's progress in completing procedures online.
3. That DAGJ's Legal eServices team consider improvements and modifications to finance payment processing in the currently available eServices online products and increase the number of payment options offered to court users in eServices and Legal eServices.

Recommendations to reduce the complexity and improve the effectiveness of processes

4. That DAGJ consider amendments to the *Local Court Act 2007* to increase the monetary jurisdiction of the Small Claims Division to $30 000, and report back to the Attorney General by 1 October 2013.
5. That the Local Court should continue to be able to transfer matters between Divisions where appropriate, on application of the parties or of its own motion.
6. That DAGJ consider the most appropriate arrangement for cost order limitations in consultation with stakeholders.
7. That, as planned, DAGJ investigate whether a trial should be conducted of mandated mediation for defended matters in the Small Claims Division of the Local Court, other than matters dealt with under an EDR scheme.
8. That the NSW Government's online information about debt recovery should include information on EDR.
9. That the Local Court provides information and training on EDR processes to registrars and assessors to enable them to refer appropriate matters to EDR.
10. That the NSW Government's online information on debt recovery should stress the importance of having the correct current address for the defendant and the potential consequences of non-delivery of the Statement of Claim.

11. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to introduce a 21 day timeframe for filing of a defence, and provide advice to the Attorney General.

12. That the Uniform Rules Committee consider minimising the need for documents to be sworn before a Justice of the Peace or other authorised person, and provide advice to the Attorney General.

Recommendations to improve the availability of information on debt recovery

13. That DAGJ co-ordinate the improved provision of online information regarding debt disputes and debt recovery processes across NSW Government agencies.

14. That NSW Government agencies providing online information regarding debt disputes and debt recovery (including DAGJ, Industry & Investment NSW and NSW Fair Trading) should have a prominent webpage that links creditors and debtors to other government and non-government resources, and provides sufficient information to allow them to choose the most appropriate site for their needs.

15. That DAGJ develop a plain English fact sheet to be sent to alleged debtors with the Statement of Claim. The fact sheet should make alleged debtors aware of the consequences of judgment being entered; their options for responding to the claim (such as ADR processes, including EDR); and resources for more information and assistance.

16. That DAGJ provide online access to debt recovery judgments.

Recommendations to change enforcement arrangements

17. That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider amending the Act to extend the lifespan of bank garnishee orders to 28 days.

18. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to introduce a minimum threshold of $20 for the operation of bank garnishee orders, and provide advice to the Attorney General.

19. That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider allowing bank garnishee orders to operate in relation to funds held in term deposit, without requiring expiration of the term.

20. That, as part of the statutory review of the *Civil Procedure Act 2005*, DAGJ consider amending the Act to clarify that the administrative charge for garnishee orders should be deducted in addition to the amount being garnisheed.

21. That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider authorising the Sheriff to enter premises to execute a writ for the levy of property.

22. That the Uniform Rules Committee consider the desirability of developing a specific form for use when the legal ownership of goods that have been seized by the Sheriff to satisfy a judgment debt is in dispute, and the provision of a seven day timeframe for response by a judgment creditor to such a form, and provide advice to the Attorney General. The form could seek information on the basis of the claim for ownership; information about why the goods were found in the possession of the judgment debtor and a declaration that the goods were not sold or gifted to the judgment debtor.

23. That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider aligning the definition of protected personal property to that used in federal bankruptcy legislation.

24. That the Sheriff offer the option of multiple enforcement visits for a single fee on a cost recovery basis.

25. That DAGJ develop an information pack to be given to debtors by Sheriff's officers when they visit debtors' premises, setting out the options available to them and appropriate referral information to organisations that may provide assistance.
26. That the hours in which enforcement activities are undertaken by Sheriff's officers be extended, where appropriate. Implementation should be on a cost recovery basis.
27. That DAGJ review the costs and benefits of private bailiffs undertaking debt enforcement activities in relation to writs for the levy of property.
28. That, as part of the statutory review of the *Civil Procedure Act 2005*, DAGJ consider amending the Act to allow a creditor to seek an Order for Discovery to ascertain the whereabouts of a judgment debtor.
29. That the NSW Government's online information on debt recovery should include information to assist creditors with conducting examination hearings.
30. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide a timeframe of 21 days for response to an Examination Notice, and provide advice to the Attorney General.
31. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide a lead time for service of an Examination Order of seven days, and provide advice to the Attorney General.
32. That DAGJ develop plain English fact sheets to be sent to judgment debtors with Examination Notices and Examination Orders. The fact sheets should provide guidance on how to respond to an Examination Notice and items to bring when attending an examination hearing.
33. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide guidelines for the processing of instalment applications and objections hearings, and provide advice to the Attorney General.

1. Introduction

Unpaid debts create problems for both creditors and debtors. For creditors, particularly individual and small business creditors, financial hardship can result from the non-payment of monies owing. For debtors, the existence of the debt can be a source of significant stress, especially for debtors that lack the financial capacity to repay the debt.

Once a creditor makes the decision to commence debt recovery action, there are consequences for both parties: proceeding with, or responding to, a debt recovery claim involves time, effort and money. It is important that debt recovery processes minimise the resource impact on both debtors and creditors. Government has an important role in ensuring that debt recovery processes are effective and efficient and that they balance the rights of creditors and debtors fairly.

The NSW Government believes there is scope to streamline the administrative side of debt recovery to make the process easier, faster and less costly for creditors and debtors, and to improve its effectiveness.

2. The Review

This review examines the effectiveness and efficiency of existing debt recovery mechanisms and considers concerns raised about the cost and complexity of the current process.

Stakeholders have raised a number of concerns with the current debt recovery process including:

- litigation in relation to debt disputes may be costly, particularly when legal representation is needed. This can represent a barrier to creditors that wish to pursue unpaid debts through the courts and can impose a burden on alleged debtors wishing to defend claims made against them
- debt recovery through the courts may be a lengthy and complex process
- court action may be inconvenient and time-consuming for both creditors and debtors
- court processes can cause unnecessary delays for parties engaged in a debt dispute
- service of documents by post can cause difficulties for both parties
- the effectiveness and efficiency of processes for enforcing judgment
- the accessibility of information provided to assist creditors and debtors.

The review investigates a range of options, with a view to making the process of debt recovery less onerous while taking into account the need to balance the rights of creditors and debtors equitably.

The *Civil Procedure Act 2005* and the Uniform Civil Procedure Rules 2005 brought about changes to NSW civil procedure processes with far-reaching benefits for the judiciary, legal profession, court users and staff. One of the greatest benefits has been the introduction of common rules and procedures in civil proceedings in the Supreme, District and Local Courts, Industrial Relations Commission, Land and Environment Court and Dust Diseases Tribunal. A number of recommendations in this review would affect these rules and procedures and could potentially affect all civil proceedings in these courts and tribunals, not only proceedings for debt recovery. The broader impact requires consideration and further consultation with other stakeholders may be warranted.

2.1. Scope of the review

The review has not:

- considered Australian Government debt recovery processes. These include remedies provided under the *Corporations Act 2001* and those related to the provision of financial services, including credit facilities
- examined issues in relation to the regulation of debt collection. The Legislative and Governance Forum on Consumer Affairs is currently undertaking work to harmonise the regulation of debt collection. It aims to minimise the overlap between the regulation and licensing of debt collectors, currently administered by the states and territories, and the new national consumer credit regime
- duplicated the work of DAGJ in its *ADR Blueprint Discussion Paper, Framework for the delivery of alternative dispute (ADR) services in NSW*. The review touches on issues related to alternative dispute resolution, but does not deal with the subject in detail.

2.2. The review process

An Issues Paper was released for consultation which provided information about the risks associated with providing credit, strategies to reduce the risk of bad debt and current debt recovery processes. It sought stakeholder comment on a number of reform options. A summary of current debt recovery processes is provided at Appendix A.

Written submissions were received from 15 stakeholders including:

- creditors
- organisations which provide advice and assistance to respondents to debt claims
- the legal profession
- the debt collection industry
- individuals involved in enforcement activities.

Meetings or telephone discussions were held with nine stakeholders. A list of stakeholders that provided submissions and met with the review team is at Appendix B.

3. The nature of debt disputes

Debt disputes occur relatively frequently and they comprise a significant proportion of matters in the NSW court system, as reflected in the civil claims statistics of the Local Court.

Local Court Civil Claims Statistics – Downing Centre and Parramatta

Matter	Number	Percentage
Money due under card agreement	6871	33
Money due under loan agreement	2084	10
Negligence, motor vehicle	1901	9
Unpaid council rates	1816	9
Goods sold and delivered	1767	9
Monies due under agreement/account	1761	9
Monies due for unpaid premiums	1293	6
Professional services rendered	726	4

Non-payment of strata levies	505	2
Work done materials provided	437	2
Unpaid advertisement fees	387	2
Unpaid tax	229	1
Other	909	4
TOTAL	**20 686**	**100**

Source: NSW Attorney General's Department, ADR Blueprint Discussion Paper, page 30

A large number of debt disputes are related to the provision of consumer credit. The above data indicates that legal action is initiated most commonly after there has been a failure to repay money due under a card agreement or loan agreement.

A further significant portion of debt disputes are business-to-business disputes. The statistics suggest that a significant proportion of debts are owed to businesses under purchase and services agreements. These include debts owed to small businesses. Two-thirds of business-to-business disputes were about payment, according to small businesses surveyed by the Department of Innovation, Industry, Science and Research (DIISR) [1]. Debt disputes are also common in respect of unpaid council rates and strata levies.

Research by credit agency Dun & Bradstreet found that the average value of debts referred to the debt collection industry in the June quarter of 2010 had exceeded $1000. According to Mendelsons Lawyers Pty Ltd, 49 per cent of bankruptcy files handled by them in the period July 2008 to August 2009 related to claims for amounts between $2000 and $5000, 22 per cent related to amounts between $5000 and $10 000 and 29 per cent related to amounts above $10 000[2].

4. The impact of debt on small business creditors

Businesses often supply trade credit in order to maintain competitiveness and retain regular clientele. Around half of small businesses invoice their customers and extend trade credit[3]. Slow paying business customers impact around 50 per cent of firms, according to Dun & Bradstreet[4].

When debtors pay slowly or do not pay at all, this can cause financial hardship for creditors. Unpaid customer debts can restrict cash flow, limit funds available for business investment and cost creditors interest on their own borrowed funds. A report on the profile of debtors by the Insolvency and Trustee Service Australia (ITSA)[5], found that two per cent of business-related bankruptcies were caused by an inability to collect debts.

Many small businesses have disputes related to unpaid debts. About 20 per cent of small businesses surveyed by DIISR reported experiencing a dispute in the last five years. Nine per cent had experienced a serious dispute or potentially serious dispute where a third party or legal action was used or considered and, of these, 65 per cent reported that the dispute involved a disagreement over payment for goods and services.

[1] DIISR, Industry and Small Business Policy Division, *Small Business Dispute Resolution*, June 2010
[2] Submission by Prushka Fast Debt Recovery Pty Ltd and Mendelsons Lawyers Pty Ltd to the Attorney General in relation to the *Bankruptcy Legislation Amendment Bill 2009*.
[3] Ipsos-Eureka, *Understanding the characteristics of micro business tax debtors, Research Findings, Final report prepared for the Australian Taxation Office,* August 2008
[4] Dun & Bradstreet, Business Expectations Survey, October 2010
[5] Insolvency and Trustee Service Australia, *Profiles of Debtors*, 2011

Forty-five per cent arose after a client had been unable to pay a bill and nine per cent after a client had been unable to pay their bill due to bankruptcy or liquidation.

In the experience of debt collection lawyers, Mendelson Lawyers, 87 per cent of petitioning creditors for bankruptcy files handled by the firm from July 2008 to August 2009 were small to medium sized enterprises. It was noted that cash flow was an issue for such creditors because they 'need to recover the money owed to them to survive.'

The incidence and seriousness of disputes experienced by small businesses that took part in the DIISR survey varied across industry sectors. Disputes requiring legal action or third party intervention tended to be concentrated in the mining (17 per cent); wholesale trade (17 per cent); electricity, gas water and waste services (13 per cent); and construction (12 per cent) industries.

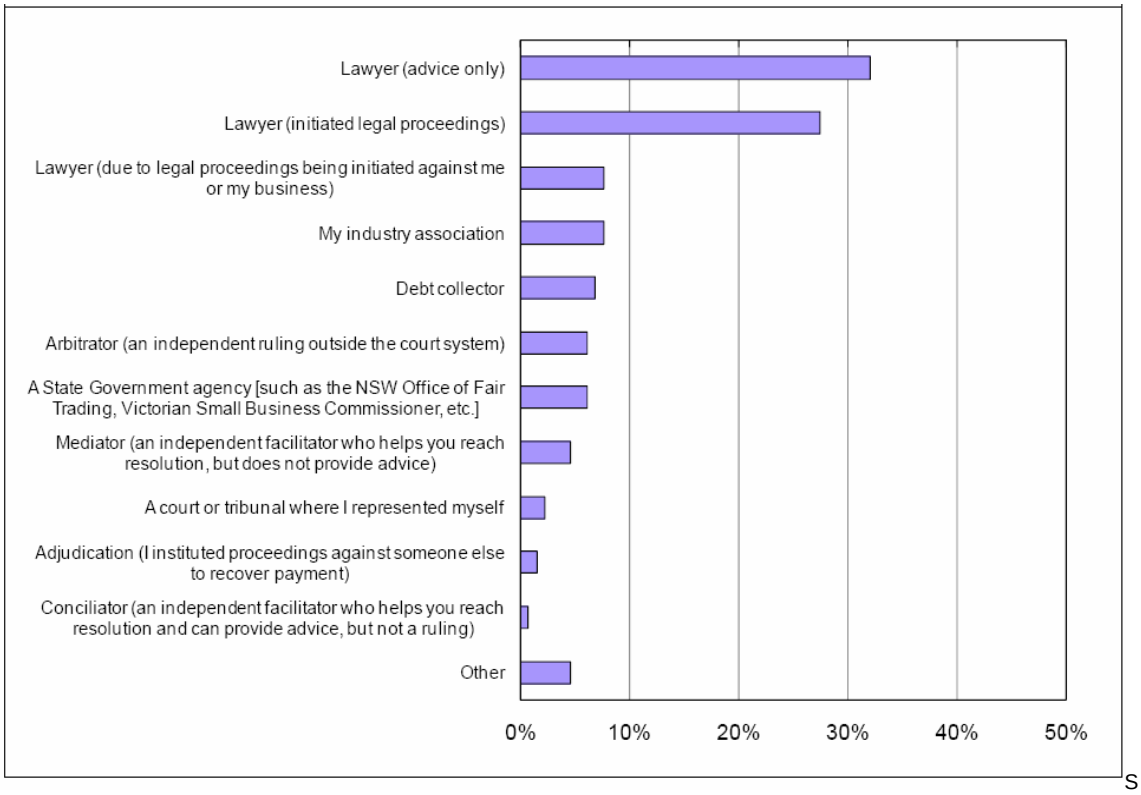
The main creditors in relation to bankrupts and debt agreement debtors are financial institutions[6], utilities and tax agencies. However, 39 per cent of bankrupts, 33 per cent of debtors with a debt agreement and 41 per cent of personal insolvency agreement debtors owed money to 'other' creditors. This category includes trade creditors, store accounts, professional fees, medical bills, school fees and family loans[7].

Creditors generally attempt to recover debts using other measures before proceeding with legal action. They will often approach third parties to help resolve the matter. DIISR identified a range of third parties approached by the six per cent of respondents who had approached a third party to help resolve a matter. The main third parties approached were lawyers, industry associations and/or debt collectors. According to debt collection agency Prushka Fast Debt Recovery, only four per cent of debts referred to it proceed to legal action.

[6] banks, finance companies and credit unions
[7] ITSA, 2011

Figure 1: Use of third party dispute resolution support

(Base: respondents who had a dispute and sought 3rd party support n =131)



Source: DIISR, Industry and Small Business Policy Division, *Small Business Dispute Resolution*, June 2010

DIISR examined the typical cost of disputes for small businesses surveyed. It sought information on the out-of-pocket expenses for respondents' most serious dispute in the last five years, as well as lost business opportunity and other costs. The out-of-pocket costs ranged from $0 to $160 000 and were relatively evenly spread. Fifty per cent of respondents in New South Wales indicated that their out-of-pocket expenses had been $2500 or less. 'Other costs' were considered to be larger than the out-of-pocket expenses.

Many businesses factor the cost of pursuing unpaid debts and the risk of non-recovery into their prices. The cost of debt recovery processes is therefore borne not only by a particular business, but by their customers and society generally. Where the cost of debt recovery is seen as high or the likelihood of successful recovery is seen as low, businesses may decline to provide services altogether. There is a role for government to facilitate market transactions and to ensure that transaction costs for businesses and consumers are low.

5. The impact of debt on debtors

The debt recovery process is a significant issue for debtors and alleged debtors. They can spend significant time and money participating in debt disputes and recovery processes and it is important that their rights are protected. Some debtors lack the capacity to repay a debt. The effect of reforms to the debt recovery process on disadvantaged individuals must be carefully considered.

Veda Advantage's 2010 Australian Debt Study report found that 2.1 million Australians are struggling to repay debts. The report says 17 per cent of Australians in debt are finding it difficult or are unable to make debt repayments as they fall due.

As highlighted above, a significant portion of debt disputes relate to the provision of consumer credit. In the experience of Legal Aid NSW, consumer credit matters:

- often involve relatively modest sums of money, but can result in significant levels of stress and anxiety for disadvantaged members of the community who have neither the means to defend such matters nor the assets to satisfy the debt
- are usually undefended, often because the legal system is difficult to understand for people who are not legally represented.

While there is limited information about the profile of debtors in general, information about the socio-economic circumstances of debtors that became bankrupt or who enter into debt agreements[8] in ITSA's report may be indicative.

Key characteristics of debtors that became bankrupt or entered into debt agreements in 2011

	Bankrupts	**Debt agreement debtors**
Number	23 125	8120
Age (most represented)	40-49(29%)	25-29 (18%)
Not employed	47%	9%
Income <$30,000	52%	21%
Assets <$1,000	65%	68%
Debt<$20,000	23%	22%
Most common family situation	Single without dependants (40%) Couples with dependants (27%)	Single without dependants (40%) Couples with dependants (32%)
Most common causes (non-business related)	Unemployment/loss of income (34%) Excessive use of credit (22%)	Excessive use of credit (45%) Unemployment/loss of income (35%)
Most common causes (business related)	Economic conditions affecting industry (42%)	Economic conditions affecting industry (51%) Excessive drawings including failure to provide for taxation (12 %)

Source: ITSA *Profiles of Debtors* 2011

The data suggests that these debtors have limited income due to unemployment or loss of income and limited assets, and would be unable to pay the debt regardless of the debt recovery process. The data does not capture other debtors (those not bankrupt or subject to debt agreements) that may have a greater capacity to pay.

[8] A person can become bankrupt by filing their own debtor's petition or by a sequestration order made by the court on the petition of a creditor. Debt agreements provide a relatively simple, low-cost and flexible alternative to bankruptcy, allowing debtors to reach a legally binding arrangement with their creditors for the settlement of debt. A debtor can enter into a debt agreement only if their income, unsecured debts and assets are below the threshold amount as defined in the *Bankruptcy Act 1966*.

The high number of bankruptcies and debt agreements caused by excessive use of credit and excessive drawings suggests the need for better education for potential debtors about how to avoid getting into debt trouble.

The characteristics of small business debtors have also been the subject of research. Ipsos-Eureka examined the characteristics of small business debtors that owed money to the Australian Tax Office. The findings may be indicative of the characteristics of small business debtors generally.

The characteristics of small business tax debtors

	Debt	**No debt**
Industry	More likely to be in the construction or retail trade, accommodation, cafes and restaurants industries.	More likely to be in the agriculture, forestry & fishing or health & community services industries.
Turnover	More likely to have turnover of between $50 and $500 000.	More likely to have turnover of less than $50 000 or more than $1 million.
Employees	More likely to have between two and four employees.	More likely to be a sole trader or have between ten and 19 employees.
Years of business in operation	More likely to have been operating for one year or less.	-

Source: Ipsos-Eureka, *Understanding the characteristics of micro business tax debtors, Research Findings, Final report prepared for the Australian Taxation Office,* August 2008

Any reforms should not reduce the ability of debtors to challenge the existence of the debt or make a counter claim, such as for breach of contract by the other party. The impact on judgment debtors of any proposed changes to enforcement measures should be considered in assessing reform options. Those found to owe a debt should not be subjected to debt collection measures that unduly impinge upon their civil liberties.

6. Concerns with the current system

In New South Wales, debt recovery options include negotiation, ADR, proceedings in the courts and, in some cases, application to the CTTT. These debt recovery options are generally consistent with the avenues available in other Australian and overseas jurisdictions. Further detail on the options available and processes involved is in Appendix A.

This review was prompted by concerns raised by small businesses and individuals regarding the current arrangements. In the 12 months to 8 November 2010, DAGJ received 41 separate complaints related to debt recovery procedures in New South Wales. These complaints indicate that the process of debt recovery through the legal system is perceived to be “lengthy, expensive and time consuming”. Submissions to this review are consistent with this view and have also raised a range of other issues.

Concerns about the cost of legal action were raised in 12 per cent of complaints received by DAGJ in relation to debt recovery procedures. These concerns are

supported by the DIISR survey on business-to-business dispute resolution arrangements for small business that found that it was common for small business creditors to decide not to seek to reclaim debts due to cost. In addition, DIISR found that the potential cost of third party intervention in disputes was a factor in businesses avoiding such interventions. Smaller businesses were more likely to have avoided a dispute due to the potential cost of legal action or third party intervention[9].

The cost of collecting debts is also an issue for larger organisations. A paper by Ipsos-Eureka for the Australian Tax Office in relation to tax debts owed by businesses noted that '(s)mall business debts are relatively expensive to collect and a significant proportion of these debts become uncollectible'[10].

The complex nature of pursuing legal action is also a concern. This issue was raised in seven per cent of debt recovery complaints received by DAGJ.

Another common area of complaint with the debt recovery process is the enforcement of judgment debts.

- Thirty-four per cent of complaints received by DAGJ highlighted difficulties encountered when a debtor cannot be located and privacy protections prevent judgment creditors from obtaining necessary information regarding a debtor's whereabouts. It was also noted that an individual creditor has no means of finding out the extent of debts that a particular debtor owes to other parties.
- Reflecting similar concerns, seven per cent of complainants raised concerns relating to the role of the Sheriff's Office. Several stakeholders believed that the Sheriff's Office should be more proactive and investigative, to assist with ascertaining information about a judgment debtor's whereabouts, assets and other details.
- Issues surrounding the unsuccessful execution of writs by the Sheriff's Office were raised in 15 per cent of complaints received by DAGJ. The fees payable on each occasion that the Sheriff's Office attempts the enforcement of a writ for the levy of property was highlighted as an issue. Concerns about delays in the enforcement of matters by the Sheriff's Office were raised in 12 per cent of complaints.
- Concerns about garnishee orders were raised in seven per cent of complaints.

The availability of information about debt recovery procedures is also an area of concern for stakeholders. Some constituents do not know where to start when obtaining information about debt recovery processes and how to initiate or respond to proceedings. In some cases, basic, plain English legal information was not perceived to be readily accessible to stakeholders, particularly at the time of judgment. This was the case in relation to 10 per cent of complaints received by DAGJ from creditors.

The Consumer Credit Legal Centre submission raised the issue of providing information to debtors, particularly the need for debtors to have access to information, advice and assistance before judgment is entered against them, as well as after. Of the 994 callers to the Consumer Credit Legal Centre's Mortgage Hardship Service since July 2009, 25 per cent (or 294 callers) called for advice for the first time after judgment had been entered.

Service of documents by post was also raised as a concern by stakeholders during the consultation process.

[9] DIISR, 2010
[10] Ipsos-Eureka, 2008

- The Australian Creditors and Debt Buyers Association (ACDBA) and the Institute of Mercantile Agents (IMA) both noted that the likelihood of a wrong address being recorded for a defendant is high as individuals often do not update contact and residential details after original credit applications are made. This combined with 'delays in returning notices of non-service by Australia Post to the issuing court and in turn to plaintiffs is likely to give rise to judgments being recorded without defendants having been served. Subsequent applications to set aside such judgments would be costly to plaintiffs'[11], as well as delaying the debt recovery process.
- The Consumer Credit Legal Centre advised that it speaks to many alleged debtors that have been served Statements of Claim at their last known address long after they moved from those premises and the first that the defendant knows of a claim may be on enforcement. This may cause stress to alleged debtors and '(c)redit contract debtors can face considerable prejudice when they lose the opportunity to apply for EDR and can no longer apply for hardship'.

Complaints have also been received by DAGJ about default judgments being issued without the debtor be notified of the judgment. Of 994 callers to the Consumer Credit Legal Centre's Mortgage Hardship Service, 38 had received a Statement of Claim but were unable to give information about whether judgment had since been entered.

7. Options for reform

It is important that court debt recovery processes provide creditors and debtors the opportunity to address a debt dispute in a timely, efficient and cost-effective manner.

The Issues Paper called for comment on a range of options under four main themes:

- reducing the need to attend court in person using online services
- reducing the complexity and improving the effectiveness of processes
- improving the availability of information
- improving enforcement arrangements.

The options raised in the Issues Paper and other options suggested by stakeholders are addressed in subsequent sections of this report. The analysis of each option considers comments by stakeholders, the merits of the option and a number of factors including:

- **Efficiency**. Options were assessed for their ability to reduce costs and improve convenience for parties involved in debt disputes. The cost to taxpayers was also a relevant factor.
- **Effectiveness** in enabling resolution of a debt dispute. Options were assessed on their ability to help parties reach settlement or allow a judgment debt to be recovered within a reasonable timeframe.
- **Fairness**. Options were assessed in terms of whether the rights of creditors and debtors would be appropriately balanced.

It should be noted that the options are not mutually exclusive. A combination of options may be appropriate to improve debt recovery processes in New South Wales.

[11] IMA submission

7.1. Reduce the need to attend court using online tools

One of the primary concerns for small business creditors about the current debt recovery process is the need to attend court, often on multiple occasions. Attendance may be to file documents in person; for court-based mediation; or to attend a hearing that may be spread across several days. Small businesses are concerned about the associated increase in legal representation costs and the disruption from their everyday business activities.

To address these concerns, the Issues Paper put forward the options of:

- developing an online system for submitting debt recovery claims, similar to the UK Money Claim Online (MCOL) website
- encouraging greater use of online services for electronic filing of forms and accessing default judgment.

In general, stakeholders supported measures that would reduce the need to attend court in person. An online system was seen by most stakeholders as a time saving measure for both debtors and creditors, however a number of issues were identified.

Stakeholders raised the issue of whether all court users would have the resources, skills or inclination to use an online system. The benefits of such a service would be limited to those who are computer literate, have access to the internet and feel capable of using such a system.

There was also some concern that simplification of the process may lead to the perception of a more casual delivery of the legal process. If defendants do not appreciate the legal nature of the action taken against them, this could lead to inappropriate acknowledgement of debt or less considered defences being lodged by defendants, to their detriment. This may also impact a debtor's ability to access EDR, which is available in relation to debts arising from ASIC regulated credit contracts[12].

Greater use of online tools to allow online filing of documents by both parties would reduce the need to attend court in person, allow parties or their legal representatives to interact and manage proceedings electronically and help to minimise costs for both creditors and debtors.

Legal eServices is being developed to allow claimants and defendants in the civil jurisdiction of the Local Court, including self-represented parties, to file documents electronically, participate in electronic direction hearings and obtain default judgment online.

The cost savings from not having to attend court or send documents by mail are likely to be significant.

- In 2011 there were 109 323 civil claims in the Local Court and about half of all civil claimants used Legal e-Services to lodge the Statement of Claim. If an additional 20 per cent of civil claimants used Legal e-Services to lodge the Statement of Claim after Legal e-Services is expanded and each claimant saved 30 minutes from not having to send by mail, the overall time savings would be $616 000.[13]

[12] See Attachment B for more information on EDR.

[13] If the economy-wide default rate of $32.20 was used and with an overhead multiplier of 1.75 – refer to BRO, Guidelines for estimating savings under the red tape reduction target, 2012

- Around 10 per cent of claims are defended in the Local Court. Assuming half of these used Legal e-Services and did not have to attend a directions hearing in court, the savings would be a further $924 000 if it saved the parties three hours travel time to attend court.[14]

An easier online system may also increase the proportion of creditors that elect to represent themselves rather than pay for legal representation. This would also reduce costs significantly. If an additional five per cent of claimants in the Local Court decided to represent themselves, it would save them at least $2.4 million.[15]

There may also be cost savings for the Local Court in dealing with simple debt recovery matters in this manner. Savings would include a reduction in the cost of retaining, moving and storing paper files. A reduction in paper filing and subsequent data entry by registry staff would free up registry resources. There would also be lower postage costs as electronically filed documents are returned electronically and printed by the filing party.

The review recommends expansion of the courts' online services as planned and notes that it is important that the expanded online service is designed with a view to meeting community expectations for a customer-focused service.

Stakeholders suggested a number of improvements to the online service system to make it more user friendly. The need for user support to provide responsive, timely assistance with queries or problems was highlighted, particularly given the intention to make online services available to self-represented claimants. Stakeholders suggested that:

- guidance should be provided on how to use the online service system as a means to facilitate a claim and also contain information on litigation requirements, such as rules of evidence and points of law
- a tracking and recording tool should be incorporated to enable litigants to track the receipt, issue and progress of matters without the need to telephone the court. This would reduce the time needed for such follow-up and frustration experienced in not having access to information about the progress of a matter
- it would be helpful for the online service to include a process/progress guide for both parties to explain the steps and the capability to report in real time to the user on their progress through the steps and the proportion completed
- online filing of Amended Claims should be allowed
- there should be a range of payment methods (for example, personal credit card, BPay, PayPal).

Public awareness would also need to be addressed. Stakeholders expressed the view that community awareness of the online service would not be significant amongst individuals outside the legal profession. Awareness could be promoted:

- by written information at court houses
- by court staff
- online (see further discussion of options to improve the provision of information).

14 If the economy-wide default rate of $32.20 was used and with an overhead multiplier of 1.75 – refer to BRO, Guidelines for estimating savings under the red tape reduction target, 2012. This estimate does not include solicitors' time.

15 Based on the prescribed solicitor costs for default judgments in the Small Claims Division

Recommendations

1. **That DAGJ proceed with expanding online services as scheduled to allow claimants and defendants in the civil jurisdiction of the Local Court, including self-represented parties, to file documents electronically, participate in electronic direction hearings via online court and obtain default judgment.**
2. **That, in expanding online services, DAGJ's Legal eServices team ensure user requirements are considered in the design and implementation. Such requirements include the provision of guidance material; tools to track the receipt, issue and progress of matters; and reports on a user's progress in completing procedures online.**
3. **That DAGJ's Legal eServices team consider improvements and modifications to finance payment processing in the currently available eServices online products and increase the number of payment options offered to court users in eServices and Legal eServices.**

7.2. Reduce the complexity and improve the effectiveness of processes

Pursuing and responding to debt claims in the courts can be a complex process, particularly for those with no legal training. Options for reducing the complexity and improving the effectiveness of processes are discussed below.

Increase the jurisdictional limit of the Small Claims Division of the Local Court

The ADR Blueprint Discussion Paper released by the NSW Attorney General in 2009[16] suggested increasing the jurisdictional limit of the Small Claims Division of the Local Court.

Increasing the monetary jurisdiction of the Small Claims Division from $10 000 to $30 000, for example, would allow more matters to be dealt with using the Small Claims procedures and may save parties time and money. A number of Canadian jurisdictions, including Ontario, British Columbia and Alberta Canada, have increased the jurisdiction of the small claims court to C$25 000 for these reasons.

A significant number of submissions expressed support for increasing the jurisdictional limit of the Small Claims Division of the Local Court to $30 000, including submissions from stakeholders representing the interests of creditors, debtors and the debt collection industry. Many noted the lower cost of matters dealt with by the Small Claims Division.

Concerns about increasing the monetary jurisdiction of the Small Claims Division generally related to the perception that complex issues of law are more common in matters over a certain value and that self-representation may not be appropriate.

Increasing the monetary jurisdiction of the Small Claims Division would provide easier, less costly and faster court processes for creditors and debtors. The streamlined processes in the Small Claims Division would be likely to result in faster resolution of matters. This would benefit individuals and businesses that would be able to dedicate more time to productive purposes, with wider economic benefits.

[16] NSW Government, Attorney General's Department, *ADR Blueprint Discussion Paper, Framework for the delivery of alternative dispute (ADR) services in NSW,* April 2009

As noted by stakeholders, the option would allow creditors to avoid incurring extra costs such as increased filing fees applicable in the General Divisions of $217 for individuals and corporations with a turnover of less than $200 000 per year and $434 for corporations respectively; as opposed to $88 and $176 in the Small Claims Division. These cost savings would be passed on to debtors. For the Local Court, there would be an associated reduction in fee income.

The simpler process would potentially allow a greater proportion of claimants and defendants to be self-represented and save money on legal fees. However, some parties may be reluctant to represent themselves. Stakeholders Pro-Collect and the Australian Creditors Alliance share the view that, even with a change in the jurisdictional limit of the Small Claims Division, the substantial majority of creditors faced with a defence would still engage a solicitor because they:

- would be intimidated by the thought of representing themselves
- would not wish to take time away from work or business activities to attend court or prepare paperwork
- would lack the legal training and expertise to undertake the tasks required.

Even taking a conservative view of the possible increase in self-representation, there would be notable cost savings to claimants from this option. If an additional five per cent of claimants in the Local Court represented themselves, there would be an overall saving of $4.8 million in legal fees[17]. Cost savings would also be achieved for parties represented by lawyers. It is likely that legal costs would be reduced, as there is typically less legal work involved in a Small Claims Division case than in the General Division due to the simpler processes.

There is a risk that an increase in the number of self-represented litigants would result in poorer legal outcomes. Legal practitioners have expertise and experience in conducting cases and self-represented litigants may lack the ability to explain their case to the court or neglect to include important evidence. However, this risk would be mitigated to some extent by Small Claims Division processes. Registrars and deputy registrars provide guidance and assistance to self-represented litigants at pre-trial reviews. Magistrates, and assessors provide guidance and assistance at hearings as necessary to ensure that each party puts their case forward effectively

The General Division of the Local Court or the higher courts are arguably more suitable for determining disputes where there are complex issues of law. Case complexity is not determined by the value of the claim and matters can be transferred to the General Division on application from a party, or if the court considers it appropriate.[18] This enables more complex matters to be handled by the General Division or higher courts.

On balance, it is recommended that DAGJ consider increasing the monetary jurisdiction of the Small Claims Division of the Local Court. Consideration would need to be given to the resourcing arrangements for the Local Court to implement such change.

Such a reform would increase the number of matters for the Small Claims Division. The increase would be comprised partly of matters that would otherwise have been dealt with by the General Division of the Local Court. In 2011, there were 109 323 civil claims commenced in the Local Court. Of these, 88 246 were commenced in the Small Claims Division and 16 072 were commenced in the General Division. Under such a change, a

[17] applying the current prescribed fee rate for matters valued between $5,000 and 10,000.
[18] under section 2.3 of the Local Court Rules

significant proportion of these actions in the General Division would be dealt with in the Small Claims Division.

An increase could also be comprised of new claims that would not otherwise have been filed due to the perceived cost and complexity of action in the General Division. However, feedback from Local Court officers suggests that this impact would be minor, based on experience with the previous change in the monetary jurisdiction of the Local Court in 2000.

One option for implementing the change in monetary jurisdiction would be to use a phased approach and increase the monetary threshold gradually to ensure that a backlog of cases is not created by the likely additional workload. The review does not support this approach as a phased introduction would be likely to generate confusion.

Another issue that requires consideration is that of cost order limitations. As highlighted above, the procedures of the Small Claims Division were developed with a view to encouraging self-represented litigants to mediate and resolve disputes informally, without needing legal practitioners. While the use of lawyers is not prohibited, it is discouraged by limits on the ability of a party to recover legal professional costs from the unsuccessful party. These limits are specified in Schedule 2 of the *Legal Profession Regulation 2005*. Where a lawyer appears on behalf of a party, the recovery of legal professional costs is limited to an amount up to the maximum amount allowed for the entry of a default judgment for that particular action.

Cost order limitations mean that it may not be cost effective for parties to have legal representation in the Small Claims Division. The amounts recoverable may not cover the costs of legal services.

Some stakeholders expressed concerns about cost order limitations generally. In relation to the proposal to increase the monetary jurisdiction of the Small Claims Division, specific concerns were raised that creditors that engaged legal practitioners would not be able to recover their substantial costs and that this would introduce a disincentive for creditors to file larger claims. There would also be a negative impact on the legal profession if cost order limitations operated in relation to a higher proportion of matters.

In the absence of cost order limitations, parties may choose to outlay a greater amount on legal services with a view to increasing their chances of success and in the expectation that they will be able recoup such costs from the other party. This effect would however be mitigated in part by:

- the obligation on lawyers to facilitate the ‘just, quick and cheap disposal of proceedings’ under the Uniform Civil Procedure Rules 2005
- the discretion of the court to make appropriate costs orders
- the operation of section 60 of the *Civil Procedure Act 2005* that requires the court to seek to resolve the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

The issue of cost order limitations is complex and extends beyond the scope of debt recovery matters and the option being considered. It will also be impacted by the National Legal Profession Reform Project, which is proceeding under the auspices of the Council of Australian Governments. It is therefore recommended that DAGJ consider this issue further in consultation with stakeholders such as the Law Society, Bar

Association, the debt recovery industry, debtor assistance services and business groups. The costs and benefits of a range of options should be assessed. Such options may include:

- applying cost order limitations for cases valued at or below $10 000
- removing cost order limitations in the Small Claims Division
- applying a scale of fixed costs for each step of the Small Claims process
- reviewing the limits applied to cost orders.

Recommendations

4. **That DAGJ consider amendments to the *Local Court Act 2007* to increase the monetary jurisdiction of the Small Claims Division to $30 000, and report back to the Attorney General by 1 October 2013.**
5. **That the Local Court should continue to be able to transfer matters between Divisions where appropriate, on application of the parties or of its own motion.**
6. **That DAGJ consider the most appropriate arrangement for cost order limitations in consultation with stakeholders.**

Increase the number of assessors

The Issues Paper proposed appointing more assessors to deal with small claims, as suggested in the ADR Blueprint. Although there would be cost implications in having more assessors, this option would expand the capacity of the Small Claims Division to deal with matters, potentially reducing the time for completion of matters.

Stakeholders did not express concerns with the number of assessors. It was noted, however, that an increased caseload for the Small Claims Division would necessitate a greater number of assessors to conduct hearings.

Increasing the number of assessors would have cost implications for taxpayers. In the absence of stakeholder feedback indicating any need for a greater number of assessors to improve service levels, the review does not recommend changing the number of assessors independently of changes to the jurisdictional limit of the Small Claims Division of the Local Court. The review notes, however, that any change to the monetary jurisdiction of the Small Claims Division would necessitate changes to resourcing arrangements, including the number of assessors in the Small Claims Division.

Further measures to encourage parties to reach settlement

The Small Claims Division of the Local Court conducts a pre-trial review in defended matters. Parties are encouraged to attend an informal conference to identify the matters in dispute and make a genuine effort to settle their matter without a court hearing. Each party is required to attend, either in person or by a legal representative that has the general authority to negotiate a settlement. Only eight per cent of small claims are defended. Of those, 25 per cent settle[19].

The following options are discussed below:

[19] Statistics based on Local Court civil claims figures for 2009; 97 498 small claims filed, 8213 defences filed, 2027 defended cases that are settled.

- requiring parties (not just their legal representatives) to attend pre-trial reviews
- mediation training for court officials
- mandated court-annexed mediation
- training on EDR for court officials.

Parties to attend pre-trial review in person

The Issues Paper suggested the option of parties (not just their legal representatives) being required to attend pre-trial reviews, as proposed in the ADR Blueprint.

Overall, stakeholder support for this option was limited. A number of stakeholders expressed the view that mandating attendance by parties would only add to the cost and time for parties, particularly corporations or where a person suffers from a disadvantage that precludes them from attending.

The Consumer Credit Legal Centre noted that, for debts covered by the *National Consumer Credit Protection Act 2009 (Cth)*, a dispute resolution process exists that includes informal negotiation via the case managers of the scheme and more formal processes such as conciliation conferences. It highlighted the importance of courts being aware of and appropriately referring to these schemes.

Legal Aid NSW expressed concern that urging parties to settle at an early stage of proceedings, including forcing parties to attend pre-trial reviews, would advantage the party more familiar with court process and may result in one party being 'bullied' into settlement.

While the presence of the parties would improve the extent to which there can be direct settlement negotiations, the success of this measure for any given case would depend on the genuine interest of both parties in reaching settlement. On balance, the review does not support legislative reform requiring parties to attend pre-trial reviews in person.

Mediation training

The ADR Blueprint noted that registrars, magistrates and assessors are expected to encourage parties to attempt settlement but that they are generally not trained in mediation. An option, as put forward by the ADR Blueprint, may be to ensure that, registrars and assessors (and perhaps magistrates) receive mediation training.

Stakeholder views were split on this option. While some submissions supported mediation training for court officers, others did not consider that such training was warranted.

The Consumer Credit Legal Centre expressed a view that the 'separation of decision-maker and mediator must be maintained in any dispute resolution and policies are required to ensure that a mediator does not make a final determination or be otherwise involved in the case management of a matter that has been referred for mediation and the decision maker was involved.'

There would be costs to government to provide mediation training to all registrars, assessors and magistrates. This option was given in principle support as part of the ADR Blueprint process, however widespread training has not yet occurred due to resource constraints.

Mandated court-annexed mediation

In the Small Claims Division of the Local Court about 10 per cent of matters are settled at the pre-trial review.[20]

The Local Court may also encourage or order parties to attend mediation with CJC or another mediation service. In 2011–12, CJC handled 452 small claims disputes referred from the Local Court. CJC have an overall settlement rate of 80 per cent.

At the District Court, hearings estimated to last more than five days are required to go to mediation. Hearings estimated to last for less than five days are encouraged to do so. It is estimated that 50 per cent of District Court matters referred to mediation are settled[21].

The Issues Paper put forward the option of mandating mediation for defended cases in the Small Claims Division.

Some stakeholders favour voluntary mediation rather than mandatory mediation. It was perceived that if either party lacked the genuine desire to settle, mandatory mediation would involve additional time without benefit. The DIISR survey found that respondents who had participated in a voluntary dispute resolution process with a professional facilitator (i.e. mediator, conciliator or arbitrator) were most likely to be satisfied that the range of dispute resolution mechanisms available provided them with the best chance for resolution[22].

However, voluntary participation does not necessarily reap the full benefits of mediation. This may be because parties and their representatives treat litigation as the default method of dispute resolution, or may perceive it as a sign of weakness to initiate mediation.

Dorcas Quek (2010)[23] noted that rates of voluntary mediation have been low in many jurisdictions. Quek highlighted the example of England's Central London County Court system in which mediation occurred only with the parties' consent. Only 160 mediations took place out of the 4 500 cases in which mediation was offered. In contrast, after England introduced the Civil Procedure Rules, which empowered the courts to encourage the use of ADR (with cost sanctions), the number of commercial disputes referred for mediation increased by 141 percent.

The NSW Local Court is already empowered to order parties to attempt mediation before a matter proceeds to hearing, however, this power is rarely invoked.

Given the generally high rates of resolution in mediated matters, it is to be anticipated that an increase in referrals arising from mandatory mediation will result in a decrease in the number of matters proceedings to hearing overall.

This expectation is supported by the positive results of a program for mandating mediation in a number of Victorian magistrates' courts. Mediation replaces the equivalent of a pre-trial review. An evaluation of the initial pilot program, conducted in Broadmeadows court in matters valued at up to $10 000, noted that:

---

[20] In 2009, there were 6186 matters listed for pre-trial review of which, 417 were settled at the pre-trial review stage (although it is noted that 349 were struck out or stood out of the list, 132 were finalised at the pre-trial review by other means and 1239 were settled after the pre-trial review but prior to a hearing.

21 According to the Attorney General's Department (as it was then) 2008-09 Annual Report.

[22] DIISR, 2010

[23] Quek, Dorcas (2010) *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,* Cardozo Journal of Conflict Resolution [Vol. 11:479]

- approximately 100 disputes were mediated during the six month evaluation period
- the initial settlement rate was 86 per cent
- registrars reported that delays in the civil list decreased from 12-14 weeks to six weeks [24].

Given these results, the program was extended to three other magistrates' courts in Victoria. Its coverage was also expanded to all defended civil matters where the amount was less than $40 000. A settlement rate of 85 per cent was achieved for the first 1 280 mediations following commencement of the program. This compares favourably with the settlement rate arising from the mandatory pre-trial reviews currently held in defended matters in the Small Claims Division of the NSW Local Court.

In light of these results, DAGJ is currently developing a detailed proposal for the introduction of a trial of mandated mediation, for the consideration of the Attorney General. This proposal would allow objective assessment of the merits of more widespread use of mandatory mediation in New South Wales.

Recommendation

7. **That, as planned, DAGJ investigate whether a trial should be conducted of mandated mediation for defended matters in the Small Claims Division of the Local Court, other than matters dealt with under an EDR scheme.**

External Dispute Resolution (EDR)

An important development in providing access to justice in consumer credit matters has been the expansion of the jurisdiction of EDR schemes (such as the Financial Ombudsman Scheme and the Credit Ombudsman Scheme) to hear and determine consumer disputes.

EDR is designed to provide a cheap and effective mechanism to resolve disputes between creditors and consumers and to assist unrepresented consumers who are unfamiliar with formal court processes. EDR may be available even where enforcement proceedings have commenced.

The review considers that there is scope to improve awareness and use of EDR. The review supports the proposal by the Consumer Credit Legal Centre that, where debtors are entitled to access EDR, they should be referred to EDR by the courts. The Consumer Credit Legal Centre considers that this could be achieved by:

- including this option on the Statement of Claim for debts covered by the *National Consumer Credit Protection Act 2009 (Cth)*
- training court staff to ensure that debtors who seek to file defences and applications to pay by instalments in consumer credit matters are aware of the availability of EDR and have sufficient information to make referrals
- improving knowledge and understanding of EDR processes within the court system (including amongst registrars and assessors)
- developing links with EDR schemes and associated services

[24] http://www.aija.org.au/NAJ%202010/Papers/Lauritsen&Wallace.pdf

- empowering assessors, registrars and magistrates to refer appropriate matters to EDR.

The provision of additional information with the Statement of Claim is discussed further in section 7.3.

Recommendations

8. **That the NSW Government's online information about debt recovery should include information on EDR.**

9. **That the Local Court provides information and training on EDR processes to registrars and assessors to enable them to refer appropriate matters to EDR.**

Amend court procedures

Court procedures can be complex and the timeframes imposed by certain processes may delay debt recovery.

Stakeholders did not support introducing different court procedures in relation to debt recovery matters alone. A range of other options for reducing complexity and streamlining processes are discussed below.

Service of Statements of Claim

Under the Local Court rules, personal and postal service of a Statement of Claim are equally valid. Stakeholders representing the interests of both debtors and creditors raised concerns about postal service of court documents and Statements of Claim in particular.

In 1994-95, the then Rules Committee amended the Local Courts (Civil Claims) Rules 1988 to permit service of a Statement of Claim by ordinary post by the Court to reduce cost and improve convenience to parties. The previous system relied on personal service by:

- Sheriff's officers, which was slow and costly
- process servers, which was even more costly
- plaintiffs themselves, which required unrepresented parties to comply with cumbersome processes. A plaintiff attempting personal service may also have to try several times before finding the defendant at home or their place of business.

A key downside of postal service is the loss of certainty of receipt by the defendant.

Plaintiffs face the risk that if they serve the Statement of Claim by standard post or leave it with someone else at the defendant's home or place of business, the defendant may not receive it. Stakeholders noted that delays in Australia Post returning notices of non-service to the issuing court can give rise to judgments being recorded without the defendant having been served.

The ACDBA highlighted difficulties for creditors if a defendant challenges the validity of service at an advanced stage of legal proceedings. There is also considerable hardship and stress for judgment debtors if their first knowledge of a claim is when their wages are garnished or the Sheriff attends their premises for enforcement. In addition, if the

enforcement process commonly results in an application being made to set aside judgment, this diverts court resources away from resolution of disputes to determining the preliminary issue of whether a defendant is entitled to have judgment set aside.

Postal service is convenient for many plaintiffs. It is rarely challenged in court. It is considered that service by post is effective in most cases.

It is nevertheless important to ensure that plaintiffs are aware of the need to have the correct current address for the defendant and of the possible consequences of non-delivery of the Statement of Claim. The review recommends that the NSW Government's online information on debt recovery should stress the importance of having the correct address for the defendant and the potential consequences of non-delivery of the Statement of Claim.

Recommendation

10. That the NSW Government's online information on debt recovery should stress the importance of having the correct current address for the defendant and the potential consequences of non-delivery of the Statement of Claim.

28 day limit for filing a defence

An alleged debtor currently has 28 days after being served with a Statement of Claim to file a defence. The timeframe allows defendants to assess their options, seek legal advice if required and document the basis for their defence. The Issues Paper put forward the option of reducing the 28 day limit to a shorter timeframe (such as 21 days).

Where the defendant does not file a defence and a default judgment follows, the 28 day limit may be viewed as merely slowing the debt recovery process. Reducing the 28 day limit to 21 days would reduce the time involved in undisputed debt cases (the majority of cases). There would be no discernable impact on defendants that do not file a defence. There may, however, be concerns that individuals that intend to lodge a defence would have insufficient time to prepare their defence.

The present period of 28 days can be insufficient time to prepare in complex cases. In these cases debtors must apply for an extension of time to file a defence unless the parties agree to an extension themselves. An application for an extension of time involves a number of steps and additional costs for debtors. Debtors must file a notice of appearance, a notice of motion, pay a notice of motion filing fee (in the Small Claims Division, notices of motion also require leave), serve the notice of motion, and attend a hearing.

If the period for filing a defence was reduced to 21 days, more debtors may need to apply for an extension of time and bear the additional costs. These costs could be reduced if applications could be determined ex-parte. However, such an approach would increase complexity as it would require introducing a separate set of court rules.

Most submissions from the legal profession and the debt collection industry supported the proposal to reduce the period to 21 days. Three weeks was considered sufficient time for a party to seek legal representation, obtain legal advice and prepare and lodge the necessary documents. The 28 day timeframe was considered excessive given the widespread access to email, facsimile and other fast communication methods.

The legal profession also noted that it is current practice that when there is a delay, a defendant's solicitor can seek an extension and such extensions are commonly granted by the plaintiff's solicitor. It was considered that such a practice is likely to continue with a 21 day timeframe.

Stakeholders also highlighted that 21 days is the timeframe generally afforded in respect of legal action in other jurisdictions. For example, a 21-day timeframe is allowed in Victoria and South Australia for the filing of a defence. Federal Court rules also allow a debtor 21 days in which to respond to a Bankruptcy Notice or Statutory Demand. An alignment would reduce confusion over different timeframes and may reduce the risk of respondents to a Bankruptcy Notice or Statutory Demand incorrectly assuming that they have 28 days in which to respond.

Legal Aid NSW and the Consumer Credit Legal Centre oppose this option. They consider that to reduce the timeframe would prejudice the rights of debtors and increase the number of default judgments. Legal Aid NSW highlighted the waiting period to get legal aid and the impact on disadvantaged defendants in a dispute. It considered that the benefit to creditors of reducing the timeframe to file a defence would be offset by an increase in the number of motions to set aside default judgment.

A former registrar with the Local Court commented on the option and highlighted that, prior to 1982, the timeframe for response by a defendant served with a Statement of Claim in the Local Court was 14 days. Changes made in 1982 extended the timeframe to 28 days, to bring the Local Court into line with the Supreme Court. As a registrar, he perceived little reduction in the number of applications to set aside default judgments caused by insufficient time to respond, finding that it 'just takes longer for the majority of creditors to get a result out of the court'.

On balance, the review finds that a 21 day timeframe for the filing of a defence would be of benefit. For cases involving default judgment, the waiting time for plaintiffs would be reduced by one week. Three weeks is considered sufficient time by the legal profession for the filing of most defences. In more complex cases, extensions are likely to be sought and granted.

Any changes to court procedures require alteration of the Uniform Civil Procedure Rules 2005, which are made by the Uniform Rules Committee. The review therefore recommends that the Uniform Rules Committee be asked to consider amending the Uniform Civil Procedure Rules 2005 to introduce a 21 day timeframe for the filing of a defence.

As the introduction of a 21 day timeframe for the filing of a defence would impact all Local, District and Supreme Court proceedings, not only proceedings for debt recovery, consultation with additional stakeholders may be warranted.

Recommendation

11. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to introduce a 21 day timeframe for the filing of a defence and provide advice to the Attorney General.

Notice of Intent to File a Defence

Another option considered was to require a defendant to a debt recovery action to lodge a 'Notice of Intent to File a Defence' within a shorter period, such as 7 or 14 days, with a requirement for a defence to be filed within 28 days.

This option would also reduce the time involved in undisputed debt cases with no discernable impact on defendants that do not file a defence. However, it would increase paperwork for alleged debtors that intend to defend themselves.

Stakeholder support for this option was limited.

Legal Aid NSW highlighted that it would be an additional burden on defendants. The Consumer Credit Legal Centre commented that it may have the unintended consequence of compelling defendants to file an Intent to File a Defence without legal advice due to the shorter timeframe.

There is also a risk that this option could negatively impact defendants who do not initially intend to file a defence but change their minds (perhaps after ascertaining supporting evidence for their case). In addition, there would also be a financial cost to a defendant in submitting an Intent to File a Defence and then not pursuing a defence.

Some members of the legal profession and the debt recovery industry opposed the option on the grounds that it would create more paperwork and add an additional step to the process.

In light of the potential downsides of this option and the recommendation for the Uniform Rules Committee to consider reducing the timeframe for the filing of a defence to 21 days, the review does not recommend the introduction of a Notice of Intent to File a Defence.

Changes to court forms

A number of stakeholders believed that there may be scope to make court forms more user-friendly. Forms used by the courts were seen as lengthy and difficult to fill out.

It was suggested that improvements be made to:

- the form for a 'Notice of Motion Writ for the Levy of Property'. The current form is a four page document that requires 42 pieces of data. Some support was expressed for a shorter form, similar to the former Local Court Form 72 'Application to Issue Execution' which was a single A4 sheet requiring 15 pieces of data (dates, amounts, names, addresses etc).
- the form for a 'Notice of Motion To Pay By Instalments – Individual'. Stakeholder concerns were that the format and information required is inadequate for a registrar or creditor to make an informed decision on the bona fides of the debtor's application, the appropriateness of the amount that the debtor is offering to pay or other options that may be available to the debtor to satisfy the judgment debt.

It was also suggested that minimising the requirement for certain documents to be sworn and signed before a Justice of the Peace (JP) would streamline processes for both parties.

The Uniform Rules Committee must balance different considerations when considering any changes to court forms. For example, in relation to the Notice of Motion To Pay By Instalment, the form must be simple enough for the debtor to complete but contain sufficient information so that the registrar and the judgment creditor can assess the financial circumstances of the debtor. The review considers that the current forms adequately balance these competing interests.

Requiring documents to be sworn before a JP or other authorised person provides some safeguards and reinforces the understanding that court forms are official documents and that the information provided in them must be true and correct. The risks of removing this could, however, be reduced by substituting verification by a representing solicitor or by introducing a legislative provision to make it an offence to declare information within a court form to be true when such information was not true.

Recommendation

12. That the Uniform Rules Committee consider minimising the need for court documents to be sworn before a Justice of the Peace or other authorised person and provide advice to the Attorney General.

Case management rules

At present, the District Court requires service of a Statement of Claim within one month of issue. The Local Court requires service within six months.

Stakeholder concern was expressed that when a Statements of Claim is issued but cannot be served (for example, in the case of an absconding debtor), the case expires. This means that the case must then be restarted, resulting in additional paperwork and court fees for the creditor.

It was suggested that previous case management rules be reinstated to allow parties to prepare cases in the timeframe they wished before seeking a date by filing a Certificate of Readiness.

While this potentially reduces costs and frustration for plaintiffs from having to recommence proceedings, the previous system led to many proceedings being extensively delayed as plaintiffs could choose not to file a Certificate of Readiness, leaving the case hanging over the defendant. Requiring the filing of another document had time and cost implications for both the parties and the court. Feedback from the Local Court suggests that a return to the previous system would result in a backlog of pending cases.

For these reasons, the review does not recommend re-introduction of a Certificate of Readiness.

Expand the jurisdiction of the Consumer, Trader and Tenancy Tribunal

The CTTT provides a relatively fast and low cost means of resolving disputes between tenants, landlords, traders and consumers as an alternative to the court system. The

CTTT was involved in around 29 700 debt recovery matters in the year ending 30 June 2010.[25]

The CTTT's jurisdiction under the *Consumer Claims Act 1998* allows consumers, including small businesses, to make claims in relation to goods and services, including professional services. The CTTT is not generally available to businesses seeking recovery of debts.

The jurisdiction of the CTTT could be expanded to enable small businesses to recover debts from consumers or other businesses that have purchased goods or services from them. The CTTT also currently deals with an array of disputes in relation to strata and community schemes and this jurisdiction could be expanded to allow for debt recovery of strata levies. Around 5 000 claims brought to the Local Court each year have the potential to be dealt with by the CTTT[26].

The CTTT has eight registries and 70 different hearing locations, which provides convenient access, including regional access. While additional staff resources would be required, current venues and information technology systems could accommodate an expansion of its jurisdiction. In addition, almost half of applications are now lodged online[27] through a simple application process and the CTTT is expanding the use of hearings by telephone and videoconferencing, thereby enhancing accessibility and reducing party costs.

CTTT processes are relatively fast and inexpensive for parties. There is a focus on conciliation, but in the absence of conciliation an undefended matter will be heard within four weeks of lodgement. A matter is heard and determined on the same day.

Parties to CTTT proceedings are generally encouraged to conduct their own case without legal representation[28]. Stakeholders felt that in more complex cases, legal representation would be preferred by parties and were concerned that the CTTT would preclude such representation. However, parties can apply to be legally represented where a matter raises complex factual or legal issues.

The cost of bringing a matter to the CTTT is $37 for matters up to $10 000 and $76 for matters valued between $10 000 and $30 000. In contrast, filing fees in the Local Court for corporations is $176 in the Small Claims Division and $434 in the General Division. If 40 per cent of the matters that would be appropriate for the CTTT transferred from the Local Court and businesses saved an average of $139 in filing fees each, this would mean an overall cost saving to creditors of around $280 000 per year.

Consultation with the CTTT suggests that expansion of its jurisdiction to allow it to hear general debt recovery matters is a viable option. Equivalent tribunals in Victoria, Queensland and the Australian Capital Territory hear such debt recovery matters. A $30 000 limit was considered appropriate by the CTTT as it would align with the current limit in the consumer claims division. It was also noted that a claimant can waive the amount above the jurisdictional limit to enable it to be heard by the CTTT (although the claim amount would be limited to $30 000).

[25] Of these, 82 percent related to residential tenancy disputes, around 10 per cent related to home building disputes and the remainder related to other divisional matters.
[26] About 4 per cent of total civil claims filed annually. These matters could include goods sold and delivered; monies due under agreement or account; professional services rendered; non-payment of strata levies; work done materials provided; and unpaid advertisement fees.
[27] *CTTT Annual Report 2010-2011*
[28] See section 36(1) *Consumer, Trader and Tenancy Tribunal Act 2001.*

Despite the potential benefits discussed above, stakeholders did not support this option. Stakeholders favoured expansion of the monetary jurisdiction of the Small Claims Division of the Local Court instead. The Small Claims Division was considered more efficient, as having a well-established statewide infrastructure and as possessing a more precedent-based process for setting aside default judgments.

In light of the recommendation to expand the monetary jurisdiction of the Small Claims Division and views expressed by stakeholders, the review does not recommend expanding the CTTT's jurisdiction to allow it to hear general debt recovery matters.

Establish a Debt Disputes Tribunal

Debt recovery represents a significant proportion of matters that go through the court system. There may be benefits in offering a service that is focused specifically on debt recovery matters.

The Issues Paper put forward the option of establishing a separate tribunal, similar to but separate from the CTTT, with a specific focus on straight-forward debt disputes valued above the small claims threshold of $10 000.

Stakeholders did not consider that there would be significant benefits to creditors or debtors from a separate tribunal. The Consumer Credit Legal Centre notes that most claims are potentially 'debts' and that it could be overly cumbersome to divide out 'debt' claims from other legal disputes. It also expressed the view that a tribunal would be inappropriate for debt related matters that are regulated by the National Credit Code as it would lack jurisdiction under Commonwealth law.

In October 2012 the NSW Government announced the establishment of the NSW Civil and Administrative Tribunal (NCAT). The establishment of NCAT is a response to a Legislative Council Inquiry, which noted that stakeholders find the current tribunal system to be complex and bewildering. NCAT will reduce the proliferation of ad hoc tribunals and provide the citizens of New South Wales with a single gateway for tribunal services. The creation of a new tribunal to hear debt disputes would be contrary to the Government's goal of creating a streamlined framework for administrative and civil justice.

Given the establishment of NCAT to reduce the proliferation of ad hoc tribunals, and the absence of stakeholder support for this option, the review does not recommend the establishment of the Debt Disputes Tribunal.

7.3. Improve availability of information on debt recovery

Information about debt recovery processes and options is important for both creditors and debtors. There are a number of resources available to creditors and debtors through various government agencies and community organisations.

The Issues Paper suggested two options to improve the availability of information:

- more effective delivery of information on debt recovery
- notifying debtors of their obligations and options.

More effective delivery of information on debt recovery

The DIISR survey on business-to-business dispute resolution identified that of the 15 per cent of small businesses that had a serious or potentially serious dispute, only one in five used government support services.

Of the businesses that used government services, 43 per cent felt that the information or guidance that was provided was helpful in resolving the dispute. Fifty-seven per cent of the businesses were satisfied with the quality of the information and guidance provided. Respondents from New South Wales were the most satisfied, with 73 per cent agreeing or strongly agreeing that the information was useful, and being satisfied with the quality of the guidance.

This suggests that concerns about the availability of information relate to accessibility of information, rather than the quality of the information being provided. Information on debt recovery is contained on a number of websites and in a number of separate publications. Different organisations provide advice about debt to the general public or different groups, in particular business or consumer groups.

The LawAssist website provides advice for creditors and debtors about the debt recovery process in the form of practical tools. It includes step-by-step guides for both creditors and debtors, instructions for filling out court forms, checklists, information on alternatives to court and contacts for further information and advice. It also provides guidance for self-represented litigants on court procedures and forms. Individuals are also able to obtain advice from LawAccess over the telephone, or face-to-face from the Local Court Chamber Service.

Information tailored to the needs of consumers is available from Legal Aid NSW, the Consumer Credit Legal Centre, community legal centres, ASIC and the Australian Competition and Consumer Commission (ACCC). Small businesses may also access information from the Small Business NSW website, such as information about credit management strategies, pursuing a debt, letters of demand, relevant consumer protection laws and legal proceedings. DAGJ also provides a website to inform the public of services provided by CJC. A summary of information sources is at Appendix C.

There are clear benefits from providing information to parties. Local Court officers have advised that the LawAccess service has reduced the number of mistakes on court forms, saving parties and court staff time. Legal Aid NSW officers have advised that they use LawAssist to help their clients during civil advice appointments.

Stakeholders have, however, commented that the various resources are not accessible from one website and that creditors and debtors may need to locate a number of different sites to find relevant information. This may be difficult as many websites do not provide easily accessible links and if links are provided, there is no information directing the user to the most appropriate one.

The Issues Paper raised the proposal of a stand-alone website with an easily recognisable internet address (such as www.dealingwithdebt.nsw.gov.au) to better promote the availability of debt recovery information.

There are advantages with having a range of resources. Importantly, each resource can be tailored to suit the needs of particular groups. It is also easier to ensure that only relevant information is provided and that it is easy to navigate.

There was general support from stakeholders for improvements to the provision of information relating to debt disputes. A range of different views were expressed as to the type of information that should be made available and the best way in which to deliver information.

Type of information

The ACDBA and the IMA considered that the basic issues to cover for alleged debtors are what to do if they:

- believe that they do not owe the money
- agree that they owe the money and wish to pay
- understand that they owe the money but cannot pay.

Legal Aid NSW highlighted the benefits of ensuring that information on consumer rights and EDR is publicly available. Information should be available about the right to bring a claim for financial hardship, unjust contract, irresponsible lending and/or maladministration in lending, notwithstanding the commencement of proceedings for enforcement of an alleged debt. Legal Aid NSW suggested that a government website should provide information on or links to:

- online lodgement of a credit or insurance dispute with the Financial Ombudsman Service or Credit Ombudsman Service
- internal dispute resolution contact details for creditors to allow lodgement of financial hardship disputes
- details of specialist consumer credit services, such as Legal Aid NSW and the Consumer Credit Legal Centre.

The IMA and the ACDBA suggested that the information that is provided should take into account jurisdictional considerations, as most commercial entities sell nationally.

Delivery of information

Stakeholders considered that responsibility for disseminating information on debt disputes should lie primarily with DAGJ at a NSW Government level, and with ASIC and the ACCC at an Australian Government level.

In addition to online information, stakeholders suggested improving delivery of information about options for resolving debts and consequences of judgments by:

- including further information with a Statement of Claim and court documents
- distribution of information through existing physical centres, such as post offices and municipal libraries
- more extensive use of emerging technology.

The Australian Institute of Credit Management (AICM) suggested that a smart phone application on debt recovery and debt management be developed as it may assist young people who are at risk of entering into financial contracts which they do not fully understand.

The review finds that while there are advantages in providing a single website, this may be a complicated task as there are a range of NSW Government, Australian Government and independent community agencies involved and the various agencies provide different kinds of assistance and target different groups. The review therefore

recommends that NSW Government websites should be improved so that debtors and creditors can easily find the most appropriate resource. Each agency with a website providing debt recovery information should have a prominent page which links creditors and debtors to other resources and provides sufficient information to allow them to choose the most appropriate site, including how to find out about low cost measures such as CJC.

Recommendations

13. **That DAGJ co-ordinate the improved provision of online information regarding debt disputes and debt recovery processes across NSW Government agencies.**

14. **That NSW Government agencies providing online information regarding debt disputes and debt recovery (including DAGJ, Industry & Investment NSW and NSW Fair Trading) should have a prominent webpage that links creditors and debtors to other government and non-government resources, and provide sufficient information to allow them to choose the most appropriate site for their needs.**

Notifying debtors of their obligations and options

The Issues Paper raised the option of requiring additional information be provided to debtors about their obligations and the options available to them at the time that a default order is made against them. A notice that judgment has been entered would provide another opportunity for the debtor to be made aware of the proceedings and take action, if appropriate.

Stakeholder comment on this option was largely positive. The option was seen as consistent with the provisions of the *National Consumer Credit Protection Act 2009 (Cth)* whereby debtors must be given specified information when they have defaulted.

However, providing a notice of default judgment to the debtor is unlikely to be effective if the debtor is aware of the proceedings and has decided not to take action. The concerns raised in relation to postal service of court documents are also relevant. The benefits to debtors of a notice that judgment has been entered or the provision of other information by post depends on the actual receipt by the judgment debtor. No benefit will be derived if the information is sent to a similarly incorrect address as the Statement of Claim.

There would also be additional cost to government if it were to issue a notice that default judgment has been entered which may need to be passed on to the parties, at least in part. If the cost of issuing such a notice was $20, the total cost in relation to default judgments in the Local Court would be around $950 000 per year[29]. There would also be costs for the higher courts.

Another option would be to provide additional information to alleged debtors with the Statement of Claim. A fact sheet could provide useful information regarding:

- the potential consequences of judgment, including the possibility of garnishee orders in respect of wages and bank accounts, the seizure and sale of property by the Sheriff and credit rating issues
- options for responding to the claim, including ADR/EDR options

[29] based on 47 155 default judgments for civil claims in the Local Court in 2009.

- resources for information and assistance, including contact details for community organisations such as the Consumer Credit Legal Centre and Legal Aid NSW.

On balance, the review prefers this approach as it would enable alleged debtors to consider their options early in the process. As a result, more may take action to avoid a default judgement being issued against them and the associated impacts.

It was also suggested by certain stakeholders that:

- judgment debtors be given notice when a creditor has been granted a garnishee over wages or a writ for enforcement against real property, prior to the execution of either
- judgment debtors be given notice simultaneously with the enforcement of a garnishee order against a bank account or a writ for the levy of property
- the Summons Form 3A/B be revised to assist with providing practical information that may assist a judgment debtor.

The review notes that the Summons Form 3A/B is rarely used in the Local Court. The review considers that further notices at the point of enforcement could impact the effectiveness of enforcement options, such as garnishee orders. Such change is not recommended.

Recommendations

15. **That DAGJ develop a plain English fact sheet to be sent to alleged debtors with the Statement of Claim. The fact sheet should make alleged debtors aware of the consequences of judgment being entered; their options for responding to the claim (such as ADR processes, including EDR); and resources for more information and assistance.**

Access to court judgments

At present, public information about debt recovery judgments can be difficult to access. While the website www.caselaw.nsw.gov.au offers an online service for viewing the published judgments and decisions of NSW courts and tribunals, it does not offer easily accessible information about debt recovery judgments made against a particular individual or organisation.

The review notes that easier access to information may assist creditors and debtors. Creditors could use such information to inform decisions about whether to grant trade credit to a particular applicant or about whether to pursue debt recovery action against an individual or organisation. Debtors and organisations assisting debtors could check for the existence of default judgments.

As noted above, Legal eServices is being developed to allow claimants and defendants in the civil jurisdiction of the Local Court, including self-represented parties, to file documents electronically, participate in electronic direction hearings and obtain default judgment online.

The review recommends that DAGJ continue its development of Legal eServices to provide online access to debt recovery judgments. In practice, it should be possible to conduct a search by party name so that users can ascertain whether a judgment has been issued against a particular individual or organisation. The review understands that

these judgments are likely to be available to parties for free, and to the general public for a fee.

Recommendation

16. That DAGJ provide online access to debt recovery judgments.

7.4. Changes to enforcement arrangements

The Issues Paper considered a number of difficulties for creditors in enforcing judgment, including issues with garnishee orders, writs for the levy of property, writs against land and examination orders.

As noted in the Issues Paper, any proposals to improve enforcement will not address the many circumstances in which the debtor lacks the financial capacity to repay the debt. It is also important that the civil liberties and privacy rights of debtors are protected.

Changes to the operation of garnishee orders

The Issues Paper put forward options for changing the operation of garnishee orders. These options are discussed below, along with several suggestions from stakeholders.

Identification of bank accounts

A bank garnishee order requires the creditor to have particular information about the debtor's account details with a particular financial institution. The Issues Paper proposed establishing a system for creditors in civil debt recovery matters that would operate in a similar manner to the arrangement that the NSW State Debt Recovery Office (SDRO) has with all banks to enable it to identify the bank accounts of fine defaulters.

Garnishee orders would be more effective for creditors if banks swept their account records to garnish relevant accounts, consistent with the current garnishee order arrangements for fine defaulters. Creditors would be more likely to be successful at the first attempt and would therefore save time and money from not having to obtain a second garnishee order.

AICM, the IMA and the Australian Credit Forum supported this option as it would improve effectiveness of garnishee orders as an enforcement tool. Pro-Collect noted that there would be difficulties in using a system similar to SDRO's unless the debtor's date of birth was known. It stated that in many cases this is not known or obtainable, other than via an examination hearing.

Debtors would be more likely to have money garnisheed. There is, however, an existing protection which ensures that debtors are left with sufficient money for living expenses. Section 122 of the *Civil Procedure Act 2005* provides that the amounts attached under one or more garnishee orders must not, in total, reduce the net weekly amount of any wage or salary received by the judgment debtor from the garnishee to less than the standard workers compensation weekly benefit.

A more significant issue is the impact on civil liberties and privacy of civil debtors. The Consumer Credit Legal Centre and Legal Aid NSW oppose the proposal and consider that it would be an infringement of privacy and civil liberties in response to a private civil debt dispute.

There would also be cost implications for financial institutions. They would be unlikely to recover the full cost of an account sweeping service with the current prescribed fee cap of $13. This would disadvantage banks and may mean that other customers ultimately cross-subsidise the service through their fees, charges and interest rates. This could be addressed if the cap was reviewed to ensure that banks could recover costs.

Despite some support from stakeholders, the review does not support this option due to the privacy and civil liberty implications. There is arguably less justification for intruding on the privacy of civil debtors than in respect of fine defaulters as civil debtors have not broken the law.

Extending lifespan of garnishee orders

A bank garnishee order only takes effect on the day it is served on the financial institution subject to the order. Bank account balances tend to fluctuate according to pay cycles and a garnishee order that is timed towards the end of the pay cycle is more likely to be unsuccessful. If a bank garnishee operated over an extended period of time, rather than as at one point in time, this may reduce the need for a creditor to return to court to obtain successive garnishee orders. For debtors, the proposal would expose all deposits to their account within the relevant period to the garnishee order.

There was support from the debt collection industry for this option. The Consumer Credit Legal Centre and Legal Aid NSW did not support this option, given the potential impact on debtors.

It is recognised that an indefinite order would not be effective or desirable:

- The Consumer Credit Legal Centre noted that it would be onerous on debtors to make such an order indefinitely and would defeat the limitation period for enforcing a judgment.
- Having a garnishee order operate for an indefinite period would pose an unreasonable administrative burden on financial institutions. Pro-Collect commented that it would be 'would be a logistical nightmare for the garnishee organisation'
- An indefinite order would be unlikely to be effective as it would not prevent debtors from changing their banking arrangements or closing the account permanently to avoid the effects of the order.

As such, the review considers that any extension of the period of operation for bank garnishee orders should be for a short and defined period. The review recommends that bank garnishee orders be given a 28 day period of effectiveness. This would improve the usefulness of bank garnishee orders as an effective enforcement tool, without imposing an unreasonable burden on debtors or financial institutions as the garnishee order would have a limited life. A creditor would still have the option of filing and serving a further garnishee order to attach to the same account on the expiration of the first order.

Recommendation

17. **That, as part of its statutory review of the *Civil Procedure Act 2005,* DAGJ consider amending the Act to extend the lifespan of bank garnishee orders to 28 days.**

Bank garnishee order threshold

Banks are required to comply with garnishee orders even when the balance available within the account is small and when the $13 bank fee for executing the garnishee order will deplete the account. For example, if a debtor held a bank account with a balance of only $15, the creditor would only receive a cheque for $2. For a creditor in these circumstances, the benefit of receiving a small amount of money would generally be outweighed by the time and cost of processing and depositing the cheque. According to the Australian Creditors Alliance, it costs $4 to process a garnishee order cheque once received and the exercise is not worthwhile if the cheque received is for less than this. To address this, Australian Creditors Alliance suggested setting a minimum balance below which accounts should not be garnished.

The introduction of a minimum balance for implementation of a garnishee order would have administrative savings for creditors and the debt collection industry. Garnishees would not be disadvantaged if they were still able to charge for attempting execution of a garnishee order even if the balance was below the minimum.

The review supports this suggestion. The amount should reflect the cost for a creditor to process and deposit a cheque. Assuming that it took a creditor around five minutes to process and deposit the cheque, it would typically cost $5[30]. It is suggested that the minimum balance be $20 and that this figure be reviewed periodically to ensure that it remains in line with the bank fee and the cost of processing and depositing the cheque.

Recommendation

18. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to introduce a minimum threshold of $20 for the operation of bank garnishee orders, and provide advice to the Attorney General.

Automatic attachment of garnishee orders to term deposits

An option suggested by the Australian Creditors Alliance was the automatic attachment of garnishee orders to term deposits, irrespective of when they fall due. The law currently requires that a term deposit held in a bank account on behalf of the judgment debtor cannot be garnisheed until the deposit matures or is terminated by the account holder.

For judgment debtors, this option would cause them to suffer loss of interest and other possible bank penalties by having a term deposit terminated before full term. Other impacts would be similar to those in relation to bank garnishee orders on transaction accounts.

Funds held in a term deposit are an asset of the debtor, just as funds held in a transaction account are. It seems reasonable that such an asset should be accessible to judgment creditors through a bank garnishee order. However, the contractual arrangements between the judgment debtor and the financial institution with which the account is held are relevant. A judgment creditor should not be entitled to greater access to the funds than is afforded to the judgment debtor.

[30] Using the economy-wide default wage rate of $32.20 and the overhead multiplier of 1.75 – refer to *Estimating red tape savings under the red tape reduction target,* BRO

One approach may be to allow bank garnishee orders to operate in relation to funds held in term deposits without requiring maturity of the term, where the terms and conditions of the term deposit allow for the account holder to access the funds prior to maturity. This is the approach adopted in relation to notices issued by the Australian Government's Child Support Agency under section 72A of the *Child Support (Registration and Collection) Act 1988 (Cth)*, which have some similar characteristics to garnishee orders.

The review recommends that DAGJ give further consideration to implementation of this option as part of the statutory review of the *Civil Procedure Act 2005*.

Recommendation

19. That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider allowing bank garnishee orders to operate in relation to funds held in term deposit, without requiring expiration of the term.

Clarification of administrative charge

When a bank or employer executes a garnishee order, the regulations allow them to charge $13 for the cost of administering the order. Stakeholders suggested that it is unclear from the wording of the regulations whether this fee is additional to the amount being deducted or if it is to be deducted from it. Different organisations take different approaches.

It would be appropriate to clarify that the intended operation of the administration fee. If the fee is deducted from the amount being garnisheed, the judgment debt will be underpaid by $13, which could create a perpetual loop of debt and enforcement process; or that the judgment creditor carries the administrative costs, which does not align with the passing through of enforcement costs to the judgment debtor.

It is therefore recommended that, as part of the statutory review of the *Civil Procedure Act 2005*, DAGJ consider clarifying that the administrative charge should be deducted in addition to the amount being garnisheed.

Recommendation

20. That, as part of the statutory review of the *Civil Procedure Act 2005*, DAGJ consider amending the Act to clarify that the administrative charge for garnishee orders should be deducted in addition to the amount being garnisheed.

Bank garnishee orders to apply to joint accounts

When a bank is served with a garnishee order, it may not apply the order to any account that the judgment debtor holds jointly with another person.

During consultation, it was noted that the third party may be a spouse or business partner, who benefits from the actions of the debtor in not repaying the debt. It was therefore suggested that bank garnishee orders should be allowed to apply to funds held in joint accounts.

The review considers that extending the application of bank garnishee orders to joint accounts would not be appropriate. There are many instances where a joint account holder would not benefit from or even be aware of the debt that was owed. It would be unfair to such individuals or entities to allow their savings to be garnisheed to repay the debt.

Changes to the seizure and sale of personal property

Authority to enter a property to execute a writ for the levy of property

Under the common law, Sheriff's officers have the right to enter a property to enforce a writ for the levy of property. However, if the gate to the property is locked or a sign states that the Sheriff's Office is not permitted access, they are not permitted to enter and are unable to enforce the writ. Similarly, if a Sheriff's officer has entered the property to enforce a writ and is then instructed to leave, they must immediately do so. In cases where officers have not been permitted access, the creditor must seek a court order under section 135 of the *Civil Procedure Act 2005* to authorise a Sheriff's officer to enter the premises for the purpose of taking possession of goods under a writ of execution.

The Issues Paper proposed that a writ for the levy of property give Sheriff's officers the authority to enter a property to enforce it. This option is similar to the arrangements in South Australia and Queensland.

The proposal would improve the chance of Sheriff's officers being able to seize property to enforce a debt and save creditors an additional $74 Sheriff's fee. It would also save them the cost and inconvenience of further court action. The cost of using a solicitor to seek a writ for the levy of property in the Local Court is $235. Cost savings to creditors would be passed on to debtors. Court resources would also be freed up by a reduction in applications for section 135 orders.

Several stakeholders supported the proposal, reflecting concerns that the current arrangements:

- delay or rebuff enforcement efforts by the Sheriff's office
- prejudice the creditor by delaying the recovery of debt
- place a further paperwork burden and financial pressure on the creditor to seek a section 135 order, while still unaware of whether there will be goods of sufficient value to cover the debt and the extra expenses
- provide opportunity for the debtor to dispose of or hide assets
- consume unnecessary court time and administrative time by the Sheriff and court staff.

On the other hand, concerns were expressed that this option would disadvantage and cause stress to debtors, especially those who have not had the opportunity to seek legal advice upon receiving the writ for the levy of property and who may not understand the consequences of failing to respond to the writ. The removal of the requirement to seek a section 135 court order would reduce the amount of time that debtors have to seek legal advice and consider the options for repayment of debt. This would be of concern for debtors who were not previously aware of a judgment being made against them. Information for judgment debtors, as per recommendation 15, would help to address this concern.

Redfern Legal Centre expressed the view that a power of entry attached to a writ for the levy of property would represent an undue intrusion on the rights of citizens for civil claims that are at the lower end of the spectrum.

The Issues Paper noted that increasing the numbers of entries without permission could lead to increased violence or increased threats of violence because forced entry may aggravate some debtors. Safety is an existing problem for Sheriff's officers. However, feedback from individuals employed by the Sheriff's Office suggested that the additional risk would not be great as Sheriff's officers are well trained in conducting property seizures in difficult situations, such as when entry is made without permission.

On balance, the review considers that streamlining the process for executing a writ for the levy of property may be of benefit and that Sheriff's officers have the expertise to diffuse and manage any additional risk. Section 135 of the *Civil Procedure Act 2005* currently allows a court to give directions with respect to the enforcement of its judgments, including orders to allow entry to premises. Consideration should be given to empowering a court to give such direction and issue such an order at the time that it issues a writ for the levy of property, which is a court order for enforcement of a court decision.

Recommendation

21. That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider authorising the Sheriff to enter premises to execute a writ for the levy of property.

Improvement to claim form used to dispute ownership of personal property

When the Sheriff's Office attempts to enforce a writ for the levy of property, there may be occasions where the inventory of goods includes items that belong to someone other than the judgment debtor. If the Sheriff's officer includes any goods on the list that belong to another person, the legal owner of the goods must complete an Affidavit, detailing their ownership along with any proof of that ownership, and forward this to the Sheriff's officer who made the seizure. When this is received, the Sheriff's officer is required to forward this advice to the creditor and seek instructions on whether they accept or reject the claim.

Stakeholder consultation suggested that the Affidavit may not contain sufficient information to ascertain the appropriate course of action. In addition, the creditor has only 4 days in which to respond. This often results in the creditor refuting the claim and the Sheriff needing to apply to the court for interpleader relief. This requires the claimant, the creditor and the Sheriff to attend court.

It was suggested that a better process would be to introduce a specific form that would require the legal owner of the goods to:

- explain the basis of the claim for ownership (purchase, gift, construction)
- explain why the goods were found in the possession of the judgment debtor
- declare that the goods were not sold or gifted to the judgment debtor.

It was also suggested that the creditor be allowed at least seven days in which to respond.

The review considers that there is merit to these suggestions.

Recommendation

22. That the Uniform Rules Committee consider the desirability of developing a specific form for use when the legal ownership of goods that have been seized by the Sheriff to satisfy a judgment debt is in dispute, and the provision of a seven day timeframe for response by a judgment creditor to such a form, and provide advice to the Attorney General. The form could seek information on the basis of the claim for ownership; information about why the goods were found in the possession of the judgment debtor and a declaration that the goods were not sold or gifted to the judgment debtor.

Changes to the definition of protected personal property and Sheriff's discretion in executing seizure and sale

In New South Wales, the list of personal property protected from forced seizure and sale by creditors includes clothing, bedroom and kitchen furniture and $2,000 worth of tools of trade in use by the debtor or the debtor's family.[31]This is more limited than that in other jurisdictions and that allowed under federal bankruptcy legislation.

In Queensland and South Australia, protected personal property is defined by reference to federal bankruptcy legislation. This allows people to retain one phone, one television, one videocassette recorder, one washer and dryer, numerous items of kitchenware and kitchen furniture, certain sentimental items such as trophies and awards, and one car (up to a prescribed value).[32]The creditor must also have regard to any special medical needs of the people in the debtor's household, any other significant factor affecting the household and the likely sale value of the personal property when it is seized.

In Victoria, debtors may retain a reasonable amount having regard to their resources and needs.[33]In the Northern Territory, debtors are permitted to retain enough personal possessions that are necessary for adequate living and the continuation of work.[34]There are also discretionary provisions in these jurisdictions that allow a judge to look at the totality of a person's situation before deciding on a fair balance between what a debtor should be able to keep and what a creditor may take as reasonable satisfaction of a debt.

There may be benefits from aligning the New South Wales definition of protected personal property with the federal bankruptcy definition. It would reduce the incentive for debtors to declare bankruptcy as a strategy to retain more of their personal possessions. Debtors would not then suffer the other consequences of bankruptcy, such as a negative listing on their credit file and permanent listing on the National Personal Insolvency Index.

There would also be some benefit for creditors from a reduced incentive to declare bankruptcy. A bankruptcy declaration in response to the actions of one creditor to initiate seizure and sale of property may impact other creditors.

[31] s106, *Civil Procedure Act 2005 (NSW)*
[32] s116(2), *Bankruptcy Act 1966 (Cth),* Reg 6.03 *Bankruptcy Regulations 1996 (Cth)*
[33] s72.05 Supreme Court (General Civil Procedure) Rules 2005 (Vic)
[34] s44.03 Local Court Rules (NT)

Concerns were also raised about the lack of discretion involved in deciding what personal property can be seized and sold in New South Wales. Stakeholders considered that this can leave an entire household practically destitute, save for the three categories of protected items.

The Consumer Credit Legal Centre suggested that a Sheriff in New South Wales executing a seizure and sale of property should be given the discretion to execute it in a way that minimises expense and hardship to the debtor and allows some direction to be taken from the debtor.[35]The Consumer Credit Legal Centre considered that such a change would be fairer for debtors and not have a discernable impact on creditors as it would merely alter the order in which possessions were sold to satisfy the debt.

In New South Wales, the relevant requirements are set out in the *Uniform Civil Procedure Rules 2005.*[36]If it appears to the Sheriff that the value of the property seized is greater than the debt outstanding, the Sheriff may not sell any more of the property than is sufficient to satisfy the debt. The Sheriff is also generally required to sell property, such as goods, before any land. In deciding in which order to sell property, the Sheriff is to ensure the speedy satisfaction of the judgment without undue expense. However, subject to this requirement, the Sheriff is also required to give consideration to the preferences of the debtor and also to minimising hardship on the debtor. Accordingly, the review considers that the current provisions in New South Wales already provide discretion for the Sheriff to minimise hardship on debtors in the sale of seized property.

Recommendation

23. That, as part of the statutory review of the *Civil Procedure Act 2005*, DAGJ consider aligning the definition of protected personal property with that used in federal bankruptcy legislation.

Sheriff's Office enforcement services

The Issues Paper put forward several options to improve the enforcement services offered by the Sheriff. Options put forward in stakeholder submissions were also considered.

Single fee enforcement package

There was general support for a single fee enforcement package to be offered by the NSW Sheriff. A number of stakeholders supported a single upfront fee for the Sheriff to attend a debtor's premises as many times or as many reasonable times as necessary to effect a result.

The Australian Creditors Alliance noted that in other States, higher fees are levied to pay for multiple attempts to execute. In Victoria, they charge $178 and make four attempts, while in the ACT $220 is charged.

While the cost of a 'single-fee, multiple visit' service could be higher in some instances (if, for example, the first visit resulted in success or discovery that the debtor had absconded), it was generally perceived that there would be cost savings to creditors from this option. Any cost savings to creditors would be passed through to debtors.

[36] r39.6

Concerns about creditors facing a higher cost in cases when a single visit is sufficient could be addressed by giving creditors a choice of whether to take up the multiple visit service for a higher upfront fee or to opt for a single visit for a lower fee.

Such an approach would also have the following potential benefits:

- Reduced frustration for creditors from delays between calls and unknown fees.
- Reduced paperwork and processing of fees by Sheriff's officers and administration staff.
- Increased momentum and reduced time for the Sheriff to effect a result by eliminating the preparation of a form report (Notice of Non Levy) to the creditor after each call.
- Reduced staff time spent responding to requests by creditors for updates.
- Increased job satisfaction for Sheriff's officers.

The review recommends that the Sheriff's Office offer the option of a single fee, multiple visit enforcement service on a cost recovery basis.

Recommendation

24. That the Sheriff offer the option of multiple enforcement visits for a single fee on a cost recovery basis.

Sheriff facilitation of time to pay applications and examination hearings

The Issues Paper proposed the option of Sheriff's officers assisting debtors with time to pay applications and conducting examination hearings when visiting a debtor's premises.

There was support for this option from the debt recovery industry. However, the review notes concerns raised by the Consumer Credit Legal Centre and Legal Aid NSW.

The Consumer Credit Legal Centre appreciates the potential benefit of assisting a debtor with a time to pay application, but perceives a danger that the debtor may feel coerced into applying for time to pay a debt rather than exploring a possible application to set aside when faced with the Sheriff at their door or in their house. In the Centre's experience, most debtors take advantage of the information given by the Sheriff on the first visit to the premises to seek advice and take appropriate action, such as applying to pay by instalments.

Legal Aid NSW holds similar views and does not support the option of allowing the Sheriff to conduct examination hearings or assist with time to pay applications, seeing these as coercive powers with the potential for unjust or unfair consequences. It considered that such reforms would blur the line between the role of the creditor to call in debt and the traditional role of the Sheriff to act on court orders.

The review considers that these concerns are warranted. It does not therefore recommend that the Sheriff be actively involved in time to pay applications or examination hearings when visiting a debtor's premises.

Rather, the review supports the suggestion by the Consumer Credit Legal Centre that the Sheriff provide an information pack for debtors, setting out their options and appropriate referral information. It notes, however, that there would be a cost to

government to provide such an information pack and that this cost would be passed through to Sheriff's fees.

Recommendation

25. That DAGJ develop an information pack to be given to debtors by Sheriff's officers when they visit debtors' premises, setting out the options available to them and appropriate referral information to organisations that may provide assistance.

Review of the timing of enforcement activity

A number of stakeholders proposed changes to the hours within which Sheriff's officers attend the addresses of judgment debtors to undertake enforcement action. There were concerns that the practice of visiting a judgment debtor's premises during normal working hours was not effective and that additional costs were incurred by creditors as a result. Stakeholders suggested extending the hours to include evenings and weekends, with associated higher fees for this service.

Given the widespread stakeholder concern about the effectiveness of current enforcement measures, the review recommends that the hours of operation for Sheriff's enforcement activities be extended where appropriate, and that this be done on a cost recovery basis.

Recommendation

26. That the hours in which enforcement activities are undertaken by Sheriff's officers be extended where appropriate. Implementation should be on a cost recovery basis.

Use of private bailiffs

Submissions from the debt collection industry suggested that there might be benefits in allowing the use of private bailiffs in New South Wales as an alternative to the Sheriff's Office. The IMA noted that incentive options available to private bailiffs to achieve successful enforcement outcomes at the first instance could reduce the need for multiple visits to judgment debtors. Such incentives might include commission-based payments; increases in the amount of disbursements for process serving, executions and seizures; and increases in recoverable travel expenses.

The ACDBA noted that private bailiffs operate in other jurisdictions, including Queensland, Western Australian and the Northern Territory. Pro-Collect advised that private bailiffs are used for the equivalent of a writ for the levy of property and the sale of land in five other jurisdictions.

Stakeholders believed that the use of private bailiffs would not necessarily mean increases in costs to judgment debtors, as privatisation may would result in a more efficient system of recovery and reduce the costs to creditors, which are passed on to debtors.

The review believes that there would be potential benefits to creditors from expanding the choice of service providers. Allowing private bailiffs to undertake enforcement

activities would also free up the resources of the Sheriff's Office for other duties. The review recommends further consideration of this option by DAGJ.

Recommendation

27. That DAGJ review the costs and benefits of private bailiffs undertaking debt enforcement activities in relation to writs for the levy of property.

Allow a writ against land to be issued for debts under $10 000

Under New South Wales law, the power to seize and sell land owned by a debtor cannot be exercised if the outstanding debt is less than $10 000. The review considered removal of the threshold limit.

Some stakeholders expressed a view that the threshold restriction was inequitable and restricted a creditor's ability to enforce recovery of a judgment debt. In the experience of Pro-Collect, there 'will often be no other viable enforcement means' available to the judgment creditor. Pro-Collect also believes that a writ against land is effective to encourage a resistant debtor to make payment.

This option was not supported by the Consumer Credit Legal Centre, Legal Aid NSW, AICM, the Australian Credit Forum, the Australian Financial Counselling and Credit Reform Association or the IMA.

- The Consumer Credit Legal Centre considers the potential forced sale of a debtor's home to be 'an extremely punitive measure to settle a small debt'. It notes the expense, humiliation and social dislocation of such a response.
- Legal Aid NSW's view is that creditors that have taken the risk to lend money unsecured do so at their own risk. It suggested lifting the threshold to $20 000.
- AICM considered that creditors would not be advantaged and questioned whether this option would accord with the provisions of the *National Consumer Credit Protection Act 2009 (Cth)*.

Removal of the threshold may reduce the incentive for a creditor to pursue bankruptcy against a debtor. If a creditor pursues bankruptcy of a debtor, the bankruptcy trustee is obliged to sell all of the debtor's assets to satisfy all creditors, whether those debts are due, in arrears or otherwise. This could have more severe consequences for the debtor than the creditor lodging a writ on the debtor's land.

Removing the threshold could mean that people could lose their homes over relatively small debts. This would affect members of the debtor's household, as well as the debtor themselves.

The cost to the creditor of the Sheriff commencing sale of land is about $6 000 to $8 000, depending on the complexity of the sale. It was argued that this would deter creditors that are owed amounts of lesser value from pursuing this enforcement option and minimise the impact on debtors in those cases. However, the review notes that the costs would be recoverable from the debtor, so the moderation effect may be minor.

Given the potentially significant impact on members of a debtor's household, the review does not recommend this option.

Credit and financial counselling post-adjudication

The review considered the option of requiring and encouraging greater negotiation and counselling during the enforcement stage, drawing upon experience in Singapore.

There was limited stakeholder comment on this option. Those that provided comment did not support the option.

The Consumer Credit Legal Centre and Legal Aid NSW opposed the proposal on the basis that there is considerable potential for the process to be coercive and potentially detrimental to debtors who might be unaware of their rights. Both noted that the proposal is not 'financial counselling' as the term is more commonly used.

Given the mediation and negotiation opportunities that currently exist, options considered elsewhere in this report and the lack of stakeholder support, the review does not recommend this option.

Ascertaining the whereabouts of absconding debtors

As discussed above, a significant proportion of complaints received by DAGJ related to difficulties encountered when a debtor cannot be located.

These concerns were also reflected in submissions. For example, the Australian Creditors Alliance noted that the largest problem with enforcement is finding absconding debtors. It suggested the option of allowing for an Order for Discovery as to a judgment debtor's whereabouts to be made at any time.

This would draw upon Preliminary Discovery procedures, in which application may be made to the court to order any person to disclose the whereabouts of a prospective defendant so that a Statement of Claim may be served upon them. This procedure is available only at the point of commencing legal action and only in relation to claims valued at over $10 000.

Introducing a similar arrangement to allow judgment creditors to locate absconded debtors after judgment would increase the workload for the courts, but would also improve the likelihood of successful enforcement and reduce the frustration experienced by creditors that have attained judgment against a debtor but are unable to locate them.

The review recommends that the as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider amending the Act to allow a creditor to seek an Order for Discovery to ascertain the whereabouts of a judgment debtor.

Recommendation

28. That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider amending the Act to allow a creditor to seek an Order for Discovery to ascertain the whereabouts of a judgment debtor.

Changes to the examination process

An examination hearing gives a judgment creditor the opportunity to seek information from a judgment debtor regarding their financial affairs, to inform other enforcement action.

Stakeholder suggestions to streamline processes attached to examination hearings and to improve their effectiveness are discussed below.

Examination hearings to be conducted by court registrar

Examination hearings are usually informal. Often the creditor and debtor sit together in the courthouse and the creditor can ask questions about the debtor's financial circumstances. The parties may also use the time to try and negotiate payment of the judgment debt. If the judgment debtor does not answer the questions asked, the creditor may advise the court registrar and the registrar can conduct the examination on their behalf. The registrar may also refer the matter to a magistrate if the judgment debtor still refuses to answer the questions.

Stakeholder concerns were raised about the effectiveness as an enforcement tool of having creditors undertake examination hearings. Their informal nature was seen as reducing debtors' respect for the process and undermining the power of the hearings. Creditors may also feel ill-equipped to ask the necessary questions or be averse to confronting the debtor in person.

The Australian Creditors Alliance recommended a return to examination hearings being conducted on oath before the court registrar as the default arrangement. It considers that trained court registrars have the expertise to ask the necessary questions and glean the relevant information in a quick and thorough manner. The increased formality may potentially encourage debtors to attend court, take the proceeding seriously and provide the relevant information to creditors. The provision of such information would assist many creditors in recovering monies owed.

Greater use of registrars to conduct examination hearings would, however, have a significant resource impact for the courts and a negative impact on other court users. Further, feedback from court officers suggests that it is doubtful that use of court registrars to conduct examination hearings would result in a substantial improvement in the usefulness of such hearings for judgment creditors. The review does not therefore recommend adoption of this option. Rather, it recommends the provision of further information to assist judgment creditors with conducting examination hearings, including guidance on the type of information that may assist a creditor with enforcement, the supporting documentation to request and how to record the pertinent details.

Recommendation

29. That the NSW Government's online information on debt recovery should include information to assist creditors with conducting examination hearings.

Change of timeframes for Examination Orders

Before an examination hearing may proceed, the judgment creditor must serve an Examination Notice and then an Examination Order on the judgment debtor.

A 28 day period is allowed for the judgment debtor to respond to an Examination Notice with information about their financial affairs. If the debtor does not respond within 28 days, an Examination Order can be issued to require the debtor to attend an examination hearing at a courthouse. The Examination Order is required to be served 14 days prior to the date of the examination hearing.

These timeframes mean that a judgment creditor must wait at least 42 days before an examination hearing can proceed. It was suggested by the Australian Creditors Alliance that there would be benefit from shortening the timeframes in relation to Examination Notices and Examination Orders.

It was suggested that the timeframe for response to an Examination Notice be reduced from 28 days to 14 days and that the lead time for service of an Examination Order be reduced from 14 days to seven days.

The timeframe allowed for response to an Examination Notice gives the judgment debtor time to collect the requested information about their financial affairs. They may need to contact financial institutions if their financial records are incomplete. It seems reasonable that such information could be gathered in a timeframe of less than 28 days, given the level of access to financial information over the internet and telephone. The review therefore recommends reducing the timeframe for response to an Examination Notice to 21 days.

The review notes that the 14 day timeframe for service of an Examination Order seems out of line with the shorter period of five days for service of general subpoenae. The review also notes that an Examination Order is used only if the judgment debtor does not provide the requested information in response to the Examination Notice. The review therefore recommends that the Uniform Rules Committee consider a seven day lead time for service of an Examination Order before an examination hearing may be conducted.

Recommendations

30. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide a timeframe of 21 days for response to an Examination Notice, and provide advice to the Attorney General.

31. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide a lead time for service of an Examination Order of seven days, and provide advice to the Attorney General.

Fact sheets for judgment debtors to improve the examination process

Stakeholders indicated that debtors often do not know how to respond to Examination Notices. This creates difficulties for debtors and creditors. Low levels of English literacy may contribute to the issue.

In addition, many debtors do not know what items to bring with them when attending an examination hearing. When a debtor attends an examination hearing without bringing the relevant documentation, time can be expended by the debtor, the creditor, legal representatives and the court for little result.

The review recommends that DAGJ develop plain English fact sheets to be sent to judgment debtors with Examination Notices and Examination Orders. The fact sheets should provide guidance on how to respond to an Examination Notice and items to bring when attending an examination hearing (such as identification, recent payslip(s) and recent statements from financial institutions).

Stakeholders suggested that additional information could be provided in multiple languages to help debtors who speak a language other than English, and that the fact sheets should be attached to, but separate from, the existing court documents.

Recommendation

32. That DAGJ develop plain English fact sheets to be sent to judgment debtors with Examination Notices and Examination Orders. The fact sheets should provide guidance on how to respond to an Examination Notice and items to bring when attending an examination hearing.

Guidelines for processing instalment applications

Some concern was raised by stakeholders about inconsistent approaches by court registrars and magistrates in relation to applications to pay a judgment debt by instalments.

It was suggested that registrars and magistrates be provided with guidelines and additional training on the processing of instalment applications and objection hearings.

The review sees merit in guidelines being developed to ensure consistency of approach and fairness for all parties. The guidelines should set out relevant factors to assist registrars and magistrates to determine when instalment payments should be allowed and appropriate instalment amounts. The following factors are suggested:

An instalment order should be granted where a debtor is unable to pay a judgment debt in full immediately but there is a realistic prospect that a debtor will be able to pay the judgment debt by instalments, within a reasonable time.

The rights and interests of the creditor and debtor should both be taken into consideration when deciding whether to grant an order.

The amount and frequency of instalments should be based on an assessment of what the debtor can afford to pay, without imposing unreasonable hardship on the debtor.

The court may take into account other factors, including:

- how long the proposed instalments will take to clear the debt
- the age and nature of the debt
- the financial status of the claimant
- the impact on the debtor of refusing to grant the order including the potential for bankruptcy and its consequences
- whether it affords better prospects of ultimately satisfying the judgment than by immediate resort to bankruptcy.

An instalment order should not be granted where:

- the judgment debtor's financial means are sufficient/enough to enable the judgment debt to be paid immediately
- the order would be futile because the judgment debtor will be unable to comply with the instalment order

- the creditor will be required to wait unduly or unreasonably long for payment.

An instalment order should not generally be granted when it would not result in a net reduction of the judgment debt because of the amount of the interest that continues to accrue on the judgment debt.

Recommendation

33. That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide guidelines for the processing of instalment applications and objections hearings, and provide advice to the Attorney General.

8. Conclusion

Existing debt recovery mechanisms are in many respects working well and are largely consistent with those in other Australian and overseas jurisdictions. However, the review finds that there is scope to improve current processes and makes 33 recommendations to this end.

Implementation of the overall package of reforms should improve the ease, speed and effectiveness of debt recovery processes; reduce the cost of debt disputes; and balance the rights of creditors and debtors equitably.

The review team thanks stakeholders for their submissions and assistance during the review.

Appendices

Appendix A: Current debt recovery processes

Direct contact

Generally, before the courts are involved in a debt recovery matter, a creditor will have attempted to resolve the issue by contacting the debtor directly to remind or encourage the debtor to repay the debt.

Creditors should not harass debtors into making payments. The Australian Consumer Law (ACL), which commenced on 1 January 2011, creates a single national consumer law framework. More specifically, the ACL introduces a raft of reforms to legislation dealing with unfair contract terms, the national product safety network, and legislation regarding implied conditions and warranties in consumer contracts for goods and services, and creates new civil penalties, new investigative and enforcement powers for the ACCC and a new power for courts to order redress for consumers. The *Competition and Consumer Act 2010* (formerly the *Trade Practices Act 1974*) includes prohibitions on misconduct associated with debt collection activities.

The ACCC and ASIC are responsible for dealing with misconduct associated with debt collection activities. They have produced a number of publications to provide guidance on acceptable and unacceptable practices in the recovery of debt. Copies of the publications can be downloaded free from the ACCC's website.[37]

Letter of Demand

If direct contact is unsuccessful, the creditor may issue a Letter of Demand containing a formal request to the debtor to pay the outstanding amount by a certain date (for example, within 14 days from the date of the letter). The Letter of Demand should also warn the debtor that if payment is not made, legal action to recover the debt may proceed.

The letter issued is considered evidence of the creditor having attempted to recover the debt. It is therefore important that copies of such evidence are kept to assist with any subsequent legal action.

Mediation and Adjudication

Before legal action is undertaken through the courts, mediation may be an option. The use of mediators can assist parties to reach an agreement to settle disputes and thereby avoid the need to go through the court process.

Both the creditor and the debtor need to attend the mediation. Where one party is a business, it needs to be represented by someone authorised to make decisions on behalf of the business.

In New South Wales, debt recovery disputes can be resolved through the free mediation service provided by CJC. More information on mediation at CJC is available on the CJC website.[38] Parties may also choose to engage their own private mediator.

[37] http://www.accc.gov.au
[38] http://www.cjc.nsw.gov.au

In addition, the *Building and Construction Industry Security of Payment Act 1999* provides for adjudication services to construction industry contractors and sub-contractors. It provides a low cost option for the recovery of progress payments and as the adjudicator's decision is recognised by the courts, enforcement proceedings can commence without the need to re-substantiate the existence of the debt.

Consumer Credit Protection and EDR

Under the *National Consumer Credit Protection Act 2009 (Cth)*, there are a number of provisions that relate to regulated credit contracts but not to other types of debt. These provide that:

- the debtor has a right to apply for the contract to be varied on grounds of hardship at any time until judgment has been entered
- the debtor has a right to take any dispute in relation to a contract, including an application for hardship that has been denied, to a free, independent, ASIC-approved EDR scheme up until judgment is entered. Membership of such a scheme is a condition of holding an Australian Credit Licence
- the debtor may have a range of defences and/or cross claims arising from the obligations on lenders, lessors, brokers and other intermediaries.

EDR schemes hear consumer complaints for free and may be a simpler and less daunting alternative to resolving disputes in court.

There are currently two ASIC-approved EDR schemes (the Financial Ombudsman Service and the Credit Ombudsman Service) and one statutory scheme (the Superannuation Complaints Tribunal).

The Financial Ombudsman Service handles complaints about banks (and their affiliates operating in Australia), credit unions and building societies, life insurance companies, superannuation providers, financial planners, life insurance brokers, stockbrokers, investment managers, friendly societies, time share operators, general insurance companies and their agents.

Under national credit laws, the Financial Ombudsman Service can handle complaints about lenders and debt collectors (who are authorised on behalf of a lender to collect repayments for a credit contract and credit), non-lenders such as brokers and other intermediaries who have been given a credit licence by ASIC.

Since 1 July 2010, the Financial Ombudsman Service has also handled complaints about credit representatives. Credit representatives are people or companies who a credit licensee has authorised to provide credit services and engage in credit activities on their behalf. Under the national credit laws, credit representatives must also be members of EDR schemes.

The Credit Ombudsman Service handles complaints about credit unions and building societies, non-bank lenders, mortgage and finance brokers and financial planners.

Under the national credit laws, the Credit Ombudsman Service can handle complaints about lenders and debt collectors (who are authorised on behalf of a lender to collect repayments for a credit contract and credit), non-lenders such as brokers and other intermediaries who have been given a credit licence by ASIC.

Since 1 July 2010, the Credit Ombudsman Service has handled complaints about credit representatives.

Legal Aid NSW's submission notes recent statistics from EDR schemes demonstrate that consumers achieve superior outcomes from EDR, with 'close to a 50% chance of winning all matters that proceed to recommendation or determination'.

Legal action through the court system

If the debtor is unwilling to pay a debt, creditors may take legal action. A legal dispute is often settled between the parties before court or may proceed to court for determination.

Debt recovery arrangements are similar across all Australian jurisdictions and in the USA, UK and Canada.

The procedural requirements for a debt to be pursued and contested through the courts are set out in the *Civil Procedure Act 2005*, the Uniform Civil Procedure Rules, and the Acts which govern the various courts. Most court-related debt recovery action is undertaken in the Local Courts, but more substantive matters can be determined in either the District Court or Supreme Court. Legislation such as the *Contractors Debts Act 1997* also provides specific requirements regarding debts arising from work carried out or materials supplied. Enforcement of judgments obtained in the courts is then largely dealt with in the *Civil Procedure Act 2005* and Uniform Civil Procedure Rules.

The collection of debts through the court system comprises two phases. The first, 'seeking judgement', is seeking recognition by the court of the existence and the amount of the debt. The second is the enforcement of the judgment to recover the monies owed.

To commence legal action, the creditor completes a Statement of Claim and lodges it at the appropriate court.

Value of claim	**Appropriate court**
Less than $10 000	Small Claims Division of the Local Court
Between $10 000 and $100 000	General Division of the Local Court
Between $100 000 and $750 000	District Court
Above $750 000	Supreme Court

The court will seal the original Statement of Claim and copies. The court will keep the original and return the copies to the claimant, who is obliged to serve the alleged debtor with a stamped copy of the Statement of Claim. There are strict rules about how a Statement of Claim may be served[39]. If the rules are not followed, the case may be delayed or dismissed. The majority of claims against individuals are served by the court by post upon payment of a service fee by the claimant.

The person who served the Statement of Claim may be required to fill out an Affidavit of Service form and sign it in front of a solicitor or a Justice of the Peace. The Affidavit of Service describes how and when the Statement of Claim was served and is evidence for the court that the Statement of Claim was served.

Once the Statement of Claim is served, the defendant has 28 days to respond to it. If the defendant admits the debt, they can file an acknowledgement with the court and serve a

[39] For more information about these rules, see http://www.lawlink.nsw.gov.au//lawlink/LawAccess/ll_lawassist.nsf/pages/lawassist_serving_a_statement_of_claim

copy on the creditor. The parties may also file an agreement. If the defendant files a defence, the creditor will be served with the defence and both parties will need to attend court, possibly on multiple occasions. If the defendant does not respond to the claim within 28 days, the creditor can apply for default judgment to be entered. This is not dealt with in court for simple debt matters. Judgment is entered by the court registrar based on the creditor's written application.

If action is taken through the courts, there are costs involved for court filing, court services and any legal representation. The actual cost depends on the amount of legal representation needed and will generally increase for action taken in the District and Supreme Courts.

Enforcement

If the creditor is successful in court and the debtor still does not pay, it is the creditor's responsibility to enforce the judgment. This may be done anytime within 12 years of the date of the judgment.

The creditor has the following enforcement options:

- **seek an examination order** if little is known about the debtor's financial position. The order requires the parties to attend court where the creditor will examine the debtor's financial position
- **seek a garnishee order** to anyone that owes or will in future be required to pay the debtor money, such as the debtor's employer or financial institution. The order directs the money that would have been paid to the debtor to be paid instead to the creditor
- **apply for a writ for the levy of property**. This is a court order that directs the Sheriff or his or her officers to seize and sell the debtor's personal assets
- **apply for a writ against land**. This is a court order that directs the Sheriff or his or her officers to seize and sell real property owned by the debtor
- **seek the debtor's bankruptcy** (for individuals) if the debt exceeds $5000 **or liquidation** (for companies) if the debt exceeds $2000.

The debtor may apply to the court to pay by instalments. If the application is rejected by the court, another hearing relating to the payment arrangement may arise. Further information on legal action for debt recovery can be found at the NSW Local Courts website and at the LawAccess 'LawAssist' website[40].

Court action has a number of significant advantages as a means of resolving disputes, including that both parties have the opportunity to make detailed submissions on the facts of the case and relevant law and to rigorously test evidence. Decisions are also made in strict accordance with law and are highly consistent with similar cases. This consistency provides businesses and individuals with certainty and enables them to conduct their affairs with confidence. Another benefit is that the parties pay the majority of the costs of court action which provides a strong incentive for them to minimise their risks and avoid legal disputes in the first place. In relation to debt recovery, it encourages businesses which extend credit to their customers to properly assess the costs and benefits of doing so and to take action to minimise the risks of bad debt by implementing credit management strategies. It also strongly encourages the parties to settle disputes rather than proceed to court.

[40] http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_index

However, court action also has significant disadvantages. It is often costly and inconvenient. Legal representation is normally required because the law and legal procedures are complex and legal representation costs are significant. These costs may not be able to be fully recovered from the other party even if the claimant wins the case. Court cases also often take a long period of time to conclude and there may be multiple court dates which the parties and their legal representatives must attend. Another issue is that claimants not only run the risk of losing the case, they may not be able to recover the debt even if they win because the defendant is incapable of paying or if enforcement processes prove ineffective. The high cost, inconvenience and risky nature of court action makes it unsuited to resolving disputes involving small claims and creditors often decide to 'write off' debts or withdraw claims as a result.

There are other problems with court action which relate to fairness. Those with good access to legal resources have an advantage over those with poor access, such as those who have difficulty paying for legal representation. This disadvantage may discourage some creditors from pursuing court action against those who have better access to legal resources.

The NSW Government has sought to address these issues in a number of ways, consistent with best practice in other Australian and overseas jurisdictions.

Civil procedures in NSW courts have been reformed to improve efficiency, including through the following measures:

- a Small Claims Division was established in the Local Court in 1991 for claims of lower value. It was initially available for claims valued at up to $3000 but this was increased to $10 000 in 2000. The Small Claims Division has simpler and less formal procedures and rules than those in other civil courts which provides for speedier and less costly dispute resolution processes and makes it easier for litigants to represent themselves. Costs are also reduced for those that obtain legal representation as costs orders in the Small Claims Division are capped to that which may be awarded for a default judgment. This encourages parties to limit the amount of legal resources used for small claims cases as they may not be able to recover all their solicitor costs from the other party if they win. The Small Claims Division is available to businesses and individuals for the recovery of small debts without restriction.
- case management processes have been introduced to enable judges to expedite the conduct of cases and minimise costs.
- Pre-trial reviews have been introduced and Rule 9 of the *Local Courts (Civil Procedure) Rules 2005* requires the Court to assist the parties to identify the issues in dispute and bring parties to a settlement at the review.
- Parties are required to attempt settlement for matters in the Small Claims Division of the Local Court to avoid unnecessary hearings and reduce costs.
- In the General Division of the Local Court, litigants are required to provide statements and evidence in writing and simultaneously exchange these with the other party 14 days before hearing as a more cost effective alternative to oral submissions at a hearing.
- Magistrates or Assessors in the General Division of the Local Court may also now refer the parties to mediation and arbitration to assist them to settle disputes and avoid the large legal costs involved with hearings.

DAGJ is also introducing new technology to streamline court processes and reduce costs for litigants. Online services are being expanded to enable electronic filing of court documents and for court hearings and proceedings to be conducted over the internet. Electronic filing of court documents reduces the need for court appearances for

preliminary procedural arguments and directions. Online court replaces the need to attend court for case management and is also used for matters that do not require court attendance from the application stage to the directions delivered by the judicial officer.

Consumer, Trader and Tenancy Tribunal

The CTTT provides a relatively fast and low cost means of resolving disputes as an alternative to the court system. It is available in relation to 'consumer claims' and resolves disputes related to residential tenancy and in the residential building, conveyancing, and retirement village industries and application can be made by either individuals or businesses. Tribunal fees are low, legal representation is not needed and matters are resolved quickly.

The CTTT has nine divisions: General, Tenancy, Social Housing, Home Building, Motor Vehicles, Strata and Community Schemes, Residential Parks, Retirement Villages and Commercial. Each division deals with disputes of a different nature. Each division has its own limits on the amount of money that may be awarded; applicant criteria; and order-making powers.

Businesses generally cannot use the CTTT to recover debts. The exceptions are:

- small proprietary businesses, firms and companies limited by guarantee that have purchased goods and services up to the value of $30 000. Such businesses are considered to be 'consumers' when buying goods and services, and are able to make a 'consumer claim'
- conveyancers seeking determination of a costs dispute with a property purchaser
- builders and tradespeople in relation to payments for residential building work valued at up to $500 000
- landlords in relation to breaches of tenancy agreements
- retirement village operators in relation to disputes with residents about village contracts and administration.

The CTTT manages about 30 000 matters relating to debt recovery annually (including matters relating to loan agreements). Of these, 82 per cent related to residential tenancy disputes, around 10 per cent related to home building disputes and the remainder related to other divisional matters.

To start proceedings at the CTTT, an application form must be completed and lodged. The fee for an application in the General Division is $37 for disputes and claims up to $10 000 and $76 for disputes and claims between $10 000 and $30 000. Applications can be lodged online, by post, or in person at a Tribunal Registry, Fair Trading Centre or the Local Court. Around 47 per cent of applications to the Tribunal are lodged online.

After an application is lodged, the matter is listed for conciliation and hearing. The Tribunal sends the complainant and the other party a Notice of Conciliation and Hearing, generally within 14 days. The Notice will include the time and place of the hearing.

The majority of applications are listed for conciliation. If conciliation is successful, consent orders will be made on the day without the need for a hearing. Tribunal Members will check that the consent agreement is made without coercion. Where conciliation is unsuccessful, the matter proceeds to a hearing.

Most applications are listed for first hearing in a 'group list' where a number of matters are listed together before a Tribunal Member. The Tribunal Member will hear and evaluate the parties' evidence, consider submissions, make a decision and issue a binding and legally enforceable Tribunal order. The Tribunal may order that money be paid or make a possession or work order. If a money order is not paid, the other party may have it registered as a judgment for a debt in the Local Court, with the normal enforcement options.

In most divisions, hearings are held within six weeks of lodgement of an application. The Tribunal Member will make a decision on the day of the hearing in most cases. Decisions are usually accompanied by brief oral reasons. The decision is then typed into orders that are usually issued to both parties immediately (or within seven days of the hearing). In very complex matters the Tribunal Members may reserve their decision.

Tribunal decisions are final and binding, subject to a limited right of rehearing or an appeal to the District Court on a matter of law.

Creditor's Statutory Demand

If the debtor is a corporation and owes more than $2000, a creditor may pursue a Creditor's Statutory Demand under the *Corporations Act 2001 (Cth).*

A Creditor's Statutory Demand must be in the prescribed form (referred to as a Form 509H). The Form 509H must be accompanied by an Affidavit from or on behalf of the creditor verifying that the debt is due and owing.

A company that is served with a Creditor's Statutory Demand has a period of 21 days to either:

- pay the amount demanded; or
- bring an application in the Supreme Court to have the Creditor's Statutory Demand set aside.

The 21 day period must be strictly complied with and cannot be extended even by a court.

If the company does not comply with the demand, section 459C(2)(a) of the *Corporations Act 2001 (Cth)* provides that the company is deemed to be insolvent. Prohibitions apply on the company continuing to trade while insolvent. The company is also at risk of a court later ordering a liquidator to be appointed to wind up the company.

Third party debt collectors

Creditors may also outsource debt collection activities to third-party agents or sell outstanding debts as a cash management strategy. In general, third-party debt collectors act as:

- mercantile agents, where they act as agent for the original creditor and collect the debt on their behalf in exchange for a fee or commission; or
- debt purchasers, where they purchase the right to collect the debt at a discount from the face value of the outstanding debt.

The third party debt collection industry is a market response to the problem of bad debt. ASIC noted in May 2009 that the industry manages approximately $6 billion of unpaid

debt across Australia, which represents approximately 12 million accounts per annum. Industry investigators make more than 60 million debtor contacts per annum[41].

The ACCC and ASIC regulate debt collection activity at the federal level through the consumer protection provisions of the *Competition and Consumer Act 2010* and equivalent provisions in the *Australian Securities and Investments Act 2001*.

ASIC is responsible for ensuring activities of creditors and collectors that are engaged in recovering outstanding debts arising from the provision of financial services comply with the ASIC Act. The ACCC is responsible for ensuring compliant collection activity for debts arising from the supply of non-financial products and services under the *Competition and Consumer Act 2010*.

In New South Wales, licensing provisions apply to private agents involved in debt collection, process serving, repossession of goods, surveillance of people and investigation of people under the *Commercial Agents and Private Inquiry Agents Act 2004* and *Commercial Agents and Private Inquiry Agents Regulation 2006*.

Credit agency reports

A credit report, or a credit information file, contains information held by a credit reporting agency on an individual or company's credit history.

There are two main credit reporting agencies in Australia: Veda Advantage and Dun & Bradstreet. Their services reflect another market response to the issue of unpaid debts.

Credit information files are checked by some creditors when assessing applications for credit. Creditors may also give information to a credit reporting agency to include upon a credit information file.

A credit information file will generally include:

- details of credit applications made to credit providers, if reported by the creditor
- defaults, if reported by the creditor
- serious credit infringements, if reported by the creditor
- court judgments
- bankruptcies.

Court judgments may appear on a credit report for up to seven years. A bankruptcy may appear on a credit report for up to 10 years.

The inclusion of information on a credit report that indicates poor credit worthiness may limit the ability of an individual or company to access credit in the future. A debtor may therefore be motivated to defend a claim or to repay a debt to avoid such information being included on their credit information file.

[41] ASIC, *Debt collection practices in Australia: Summary of stakeholder consultation*, May 2009

Appendix B: List of submissions and meetings with stakeholders

Submissions or responses were received from:

- Australian Collectors and Debt Buyers Association
- Australian Credit Forum
- Australian Creditors Alliance
- Australian Financial Counselling and Credit Reform Association
- Australian Institute of Credit Management
- Consumer Credit Legal Centre NSW
- Forbes Dowling Lawyers
- Hot Chilli Source
- Institute of Mercantile Agents
- Legal Aid NSW
- three individuals with experience as a Sheriff's officer
- Pro-Collect
- Redfern Legal Centre

Meetings or teleconferences were held with:

- Australian Collectors and Debt Buyers Association
- Australian Industry Group
- Consumer Credit Legal Centre
- Consumer, Trader and Tenancy Tribunal
- Creditor Watch
- Fair Trading NSW
- Legal Aid NSW
- Local Court
- Sheriff’s Office

Appendix C: Current information resources on debt recovery

Information resource/ provider	Groups assisted	Information provided	Method of providing information
LawAccess NSW (Department of Justice and Attorney General	General public, particularly those who live in regional and rural areas of NSW, Aboriginals or Torres Strait Islanders, people with a disability or from a culturally and linguistically diverse background, and those with an urgent legal problem. Businesses are not able to receive legal advice for commercial matters.	Legal information, advice and referrals for people who have a legal problem in NSW.	Telephone
LawAssist (launched in May 2010 by LawAccess)	General public	Information for those with a legal problem, with particular assistance for those who are representing themselves. Practical tools on legal topics, currently debts – small claims and motor vehicle accidents, including step by step guides on legal problems and running cases, instructions for filling out court forms, checklists, frequently asked questions, information on alternatives to court and contacts for further information and advice.	Website
Community legal centres, including Consumer Credit Legal Centre and independent community organisations	Mostly consumers, particularly disadvantaged and marginalised groups. Businesses would generally be referred for private legal advice unless they were small businesses with limited financial resources.	General advice on debt problems. Consumer Credit Legal Centre - information, legal advice and referral in relation to banking, credit and debt and related matters to consumers and community/welfare agencies through its website, over the telephone. It disseminates a range of community legal education resources, with fact sheets on financial hardship and credit law, getting a loan, loan problems, financial counselling, banking, debt collection, the Local Court, bankruptcy, insurance and finance for maths tutoring. It also provides a range of useful sample letters for debtors.	Telephone Face-to-face Website
Local Court Chamber Service/NSW Government	General public	Local Court registrars or deputy registrars provide information, assistance and guidance on local court procedures and applications. Information about court matters and court forms, including Statements of Claim for civil proceedings where the cause of action is straight forward, defences, notices of motion to stay proceedings and set aside judgment in civil actions. This help does not extend to the provision of legal advice such as guidance on what what to say in support of a defence or motion.	Face-to face
Community Justice Centres (Department of Justice and Attorney General)	General public	Free mediation and conflict resolution services.	Website Telephone
Small Business NSW (Industry & Investment NSW)	Small business	Debt recovery including credit management strategies, pursuing a debt, letters of demand, relevant consumer protection laws and on legal proceedings.	Website
Legal Aid NSW	Consumers	Face-to-face credit and debt advice as well as information for debtors about debt problems and for defendants about court processes through its website.	Face-to face Website
Australian Securities and Investment Commission (ASIC)	Consumers of financial services	The federal financial services regulator, provides information for those having trouble with debt, including in relation to home loans, personal loans, credit cards, consumer leases, overdrafts and line of credit accounts, among other products and services.	Webpage Telephone
Australian Competition and Consumer Commission	Consumers	The federal consumer protection 'watchdog' provides information to assist consumers to	Webpage Telephone

Information resource/ provider	Groups assisted	Information provided	Method of providing information
(ACCC)		manage debts and in relation to debt collection practices.	

Annexure B

Status of recommendations arising from the DPJ/BRO Review of the debt recovery process

	Recommendation	Status
1.	That DAGJ proceed with expanding online services as scheduled to allow claimants and defendants in the civil jurisdiction of the Local Court, including self-represented parties, to file documents electronically, participate in electronic direction hearings via online court and obtain default judgment.	Complete. The Local, District and Supreme Court Online Registry is now operational. Debt collectors and lawyers can now commence proceedings online without needing to attend a court registry. Parties can also track the progress of cases and view filed documents and court orders online.
2.	That, in expanding online services, DAGJ's Legal eServices team ensure user requirements are considered in the design and implementation. Such requirements include the provision of guidance material; tools to track the receipt, issue and progress of matters; and reports on a user's progress in completing procedures online.	Complete.
3.	That DAGJ's Legal eServices team consider improvements and modifications to finance payment processing in the currently available eServices online products and increase the number of payment options offered to court users in eServices and Legal eServices.	In progress. A range of payment options are available as part of the Online Registry service. DPJ will continue to expand payment options where possible.
4.	That DAGJ consider amendments to the *Local Court Act 2007* to increase the monetary jurisdiction of the Small Claims Division to $30 000, and report back to the Attorney General by 1 October 2013.	Under consideration.
5.	That the Local Court should continue to be able to transfer matters between Divisions where appropriate, on application of the parties or of its own motion.	No action required.
6.	That DAGJ consider the most appropriate arrangement for cost order limitations in consultations with stakeholders.	Under consideration.

7.	That, as planned, DAGJ investigate whether a trial should be conducted of mandated mediation for defended matters in the Small Claims Division of the Local Court, other than matters dealt with under an External Dispute Resolution (EDR) scheme.	Under consideration.
8.	That the NSW Government's online information about debt recovery should include information on EDR.	In progress – project scoping stage.
9.	That the Local Court provides information and training on EDR processes to registrars and assessors to enable them to refer appropriate matters to EDR.	Under consideration.
10.	That the NSW Government's online information on debt recovery should stress the importance of having the correct current address for the defendant and the potential consequences of non-delivery of the Statement of Claim.	In progress – project scoping stage.
11.	That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to introduce a 21 day timeframe for the filing of a defence and provide advice to the Attorney General.	This matter was referred to the Uniform Rules Committee. The Committee did not support the recommendation on the basis that: • The current 28 day period is a standard that has existed for many years and any change could cause confusion. • The 28 day period applies to defences other than debt claims and applying different time periods to file defences in different types of proceedings could cause confusion. • 21 days is unlikely to be regarded as sufficient time for defendants to obtain legal advice and that the shortened timeframe would result in an increase in applications to set aside default judgments.
12.	That the Uniform Rules Committee consider minimising the need for court documents to be sworn before a Justice of the Peace or other authorised person and provide advice to the Attorney General.	This matter was referred to the Uniform Rules Committee. The Committee did not support the recommendation, as it considered that existing requirements for sworn evidence in relation to default judgements should be retained.

13.	That DAGJ co-ordinate the improved provision of online information regarding debt disputes and debt recovery processes across NSW Government agencies.	In progress – project scoping stage.
14.	That NSW Government agencies providing online information regarding debt disputes and debt recovery (including DAGJ, Trade & Investment NSW and NSW Fair Trading) should have a prominent webpage that links creditors and debtors to other government and non-government resources, and provide sufficient information to allow them to choose the most appropriate site for their needs.	In progress – in project scoping stage.
15.	That DAGJ develop a plain English fact sheet to be sent to alleged debtors with the Statement of Claim. The fact sheet should make alleged debtors aware of the consequences of judgment being entered; their options for responding to the claim (such as ADR processes, including EDR); and resources for more information and assistance.	In progress – in project scoping stage.
16.	That DAGJ provide online access to debt recovery judgments.	Complete. Parties to debt recovery matters are able to access judgments via the online registry, provided they have registered to use that service. The Online Registry imports in real time all updates made by court staff to Justice Link, and parties can view those updates and outcomes when logged in.
17.	That, as part of its statutory review of the *Civil Procedure Act 2005*, DAGJ consider amending the Act to extend the lifespan of bank garnishee orders to 28 days.	In progress. The statutory review of the *Civil Procedure Act 2005* is currently being finalised.
18.	That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to introduce a minimum threshold of $20 for the operation of bank garnishee orders, and provide advice to the Attorney General.	This matter was referred to the Uniform Rules Committee. The Committee supported the proposal.

19.	That, as part of its statutory review of the *Civil Procedure Act 2005,* DAGJ consider allowing bank garnishee orders to operate in relation to funds held in term deposit, without requiring expiration of the term.	In progress. The statutory review of the *Civil Procedure Act 2005* is currently being finalised.
20.	That, as part of the statutory review of the *Civil Procedure Act 2005,* DAGJ consider amending the Act to clarify that the administrative charge for garnishee orders should be deducted in addition to the amount being garnished.	In progress. The statutory review of the *Civil Procedure Act 2005* is currently being finalised.
21.	That, as part of the statutory review of the *Civil Procedure Act 2005,* DAGJ consider authorising the Sheriff to enter premises to execute a writ for the levy of property.	In progress. The statutory review of the *Civil Procedure Act 2005* is currently being finalised.
22.	That the Uniform Rules Committee consider the desirability of developing a specific form for use when the legal ownership of goods that have been seized by the Sheriff to satisfy a judgement debt is in dispute, and the provision of a seven day timeframe for response by a judgement creditor to such a form, and provide advice to the Attorney General. The form could seek information on the basis of the claim for ownership; information about why the goods were found in the possession of the judgement debtor and a declaration that the goods were not sold or gifted to the judgement debtor.	This matter was referred to the Uniform Rules Committee. The Committee advised that it will consult with the Office of the Sheriff of NSW before making a final decision in relation to this recommendation.
23.	That, as part of the statutory review of the *Civil Procedure Act 2005,* DAGJ consider aligning the definition of protected personal property with that used in federal bankruptcy legislation.	In progress. The statutory review of the *Civil Procedure Act 2005* is currently being finalised.
24.	That the Sheriff offer the option of multiple enforcement visits for a single fee on a cost recovery basis.	This recommendation is being considered by the Office of the Sheriff of NSW as part of its ongoing work in this area.
25.	That DAGJ develop an information pack to be given to debtors by	Under consideration.

	Sheriff's officers when they visit debtors' premises, setting out the options available to them and appropriate referral information to organisations that may provide assistance.	
26.	That the hours in which enforcement activities are undertaken by Sheriff's officers be extended where appropriate. Implementation should be on a cost recovery basis.	This recommendation is being considered by the Office of the Sheriff of NSW as part of its ongoing work in this area.
27.	That DAGJ review the costs and benefits of private bailiffs undertaking debt enforcement activities in relation to writs for the levy of property.	This recommendation is being considered by the Office of the Sheriff of NSW as part of its ongoing work in this area.
28.	That, as part of its statutory review of the *Civil Procedure Act 2005,* DAGJ consider amending the Act to allow a creditor to seek an Order for Discovery to ascertain the whereabouts of a judgement debtor.	In progress. The statutory review of the *Civil Procedure Act 2005* is currently being finalised.
29.	That the NSW Government's online information on debt recovery should include information to assist creditors with conducting examination hearings.	In progress – in project scoping stage.
30.	That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide a timeframe of 21 days for response to an Examination Notice, and provide advice to the Attorney General.	This matter was referred to the Uniform Rules Committee. The Committee did not support the recommendation. The Committee noted that defendants often require time to obtain documents from third parties such as the Australian Tax Office or accountants. The Committee considered that there is a risk that shortening relevant time periods could result in less notices being complied with, fewer examinees attending and more adjournments of examinations.
31.	That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide a lead time for service of an Examination Order of seven days, and provide advice to the Attorney General.	This matter was referred to the Uniform Rules Committee. The Committee did not support the recommendation, for the same reasons outlined in relation to recommendation 30 above.
32.	That DAGJ develop plain English fact sheets to be sent to judgment	In progress – in project scoping stage.

	debtors with Examination Notices and Examination Orders. The fact sheets should provide guidance on how to respond to an Examination Notice and items to bring when attending an examination hearing.	
33.	That the Uniform Rules Committee consider amending the Uniform Civil Procedure Rules 2005 to provide guidelines for the processing of instalment applications and objections hearings, and provide advice to the Attorney General.	This matter was referred to the Uniform Rules Committee. The Committee did not support the recommendation and questioned the necessity for setting out guidelines in the rules. Despite the inconsistencies suggested by the review, the Committee indicated it was not aware of any widespread problem in this area.