Submission No 19

DEBT RECOVERY IN NSW

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Mr Brian Doyle
Committee Chair
Inquiry into Debt Recovery in NSW
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

By email: legalaffairs@parliament.nsw.gov.au

Dear Mr Doyle

SUBMISSION TO INQUIRY INTO DEBT RECOVERY IN NSW

Thank you for the opportunity to make submissions to the inquiry into the debt recovery framework in NSW.

About Collection House

Collection House Limited is Australia's leading receivables manager. With over 700 staff, our core business is providing receivables management, debt collection, debt ledger purchasing and legal services to support collection activities. We are listed on the Australian Securities Exchange and operate throughout Australia, New Zealand and the Philippines.

Our subsidiary companies include:

- Lion Finance Pty Ltd;
- Jones King Lawyers Pty Ltd; and
- Midstate CreditCollect Pty Ltd.

In New South Wales, we have offices in Sydney CBD and Newcastle. From our Sydney office, we primarily conduct telephone collections under the Collection House brand as a collection agent on behalf of major banks. From our Newcastle office, we primarily undertake telephone collections under the Lion Finance brand on purchased debt ledgers. Jones King Lawyers is a New South Wales Incorporated Legal Practice, based in our Sydney office, which undertakes debt recovery litigation as part of its portfolio.

Our Submissions

As the five terms of reference overlap, we have structured our response to cover nine topic areas. Within each of those topic areas we address the relevant Term of Reference.

Executive Summary

In this submission we provide comment on the effectiveness of the present law, identify barriers to the effective debt recovery process and posit possible measures to overcome those inefficiencies.

We appreciate that the challenge for policy makers is balancing the various competing interests of creditors/debtors, maximising the resources of the Court system and ensuring administrative arrangements are both efficient and effective. Our comments are designed therefore to not only identify the issues, but additionally propose solutions to them.

Licensing

The existing Commercial Agents and Private Inquiry (**CAPI**) licensing regime in New South Wales recognises that there are two very distinct specialisations, being the Commercial Agent (**CA**) activities and the Private Inquiry Agent (**PIA**) activities. As we do not operate or conduct any PIA activities, our submission on the licensing regime will be limited to CA activities.

With the intent to align the New South Wales licensing regime with those operating in Victoria[1] and imminently Queensland[2], thus starting to achieve the objects of National Harmonisation, we propose that a negative licensing regime (no licence requirement) should be implemented for CA activities that are not conducted directly face to face with debtors.

A negative licensing regime should be adopted for non face to face CA activities as there is a range of State and Federal legislation which governs the interaction, conduct and timing of CA activities with debtors. This is also contractually regulated under the CA's agreement with its client.

Our proposal for a negative licensing regime is based on the following:

- To achieve economies of scale, debt collection activities are call-centre based[3] with little, if any, face to face debtor contact[4];
- Calls are usually monitored or recorded for quality control purposes;
- The call centre model operates across all jurisdictions;
- Complaint levels are very low in relation to the number of debtors contacted;

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1 We note that Victoria has inserted its 'debt collection practices' provisions into the Fair Trading Act 1999 (Vic), which are similar to Victoria's previous harassment and coercion provisions before the implementation of the Australian Consumer Law (Cth) – thus the consumer/debtor has both State and Federal protection.

2 Currently an introduced Bill awaiting Royal Assent with a commencement date to be fixed by proclamation - https //www.legislation.qld.gov.au/Bill_Pages/Bill_54_13.htm

3 The rapid development of technology has resulted in approximately 70% of collection action being taken through phone calls, SMS and texts. Technology allows our members to work across jurisdictions from central offices. It also allows for much closer scrutiny of collector conduct through call recording and actions audit trails. Both the creditors and debtors benefit from internet access to their accounts and online payment methodologies.

4 Although we actively discourage customers/debtors from attending our places of business, by recommending more convenient ways to make a payment, if by person, at a Westpac (Bank of New South Wales) branch or at the post office, or if electronically by B-pay or by direct deposit, we can not entirely rule out a customer/debtor coming into our Premises to make a payment.

- The industry[5], and Collection House Limited have adopted the ASIC/ACCC Debt Collection Guidelines as the benchmark for collection standards;
- Our clients, in protection of their brand reputation and in accordance the Code of Banking Practice (where applicable), contractually require compliance standards that meet or exceed the ASIC/ACCC Debt Collection Guidelines;
- There is a range of Federal regulation[6] which covers governance, market practices and consumer (debtor) protection. Further regulation simply duplicates Federal obligations and those mandated within client contracts;
- Regulatory enforcement action:
  - remains at both the State or Commonwealth level; and
  - is extremely rare;
- Many CAs[7] are existing members of External Dispute Resolution Schemes, which provide consumers[8] an external mechanism to resolve disputes and complaints; and
- Both Victoria and Queensland recognise that there are no, or insufficient, grounds to justify the expensive and legislatively burdensome positive licensing regimes that previously existed in those states.

We assert that the decisions taken in both Victoria and Queensland to move to a negative licensing regime have been, in part, based on the high levels of compliance and minimal regulator intervention demonstrated within the non face to face CA industry.

Compliance obligations within the CA Industry have increased significantly over the years although some outside the industry may be unaware of the actual reach of the obligations imposed or of the significant level of duplication and conflict across and between State and Federal jurisdictions.

Currently, the industry has compliance obligations which include, but are not limited to, the ACCC/ASIC Debt Collection Guidelines and the Institute of Mercantile Agents Best Practice Guide which provide the industry with clear guidance on appropriate practices.

Some observers wrongly downplay the effectiveness of these documents on the contention they are guidance only and do not have the same effect as “black letter” law. However, the industry regards such contentions as unfounded because:

- Compliance with these documents is often part of the contractual agreement between sector members and their clients; and
- Compliance with these documents routinely provides the framework on which members base all their collection activities with debtors.

The ACCC and ASIC both have extensive regulatory powers which allow them to access company sites and files, review activity and compliance systems and negotiate enforceable undertakings or seek penalties or incarceration through the courts. The

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[5] The major players in the collections sector are now public companies or owned by professional investors including financial service providers and private equity investors.

[6] Includes but is not limited to the Corporations Law; National Consumer Credit Protection Act – for those collecting consumer credit debt; Anti-money Laundering & Counter Terrorism Financing Act; Australian Consumer Law and the Privacy Act.

[7] Including Collection House Limited, Lion Finance Pty Ltd and Midstate CreditCollect Pty Ltd.

[8] Where a CA is acting for a Client, a consumer/debtor aggrieved about a collector's contact is always able to refer to a third party, the principal creditor.

impact of these powers is that the CA Industry actually treats its obligations under these guidelines as binding and structures its compliance systems based on obligations contained within these.

The abovementioned, together with the sophistication, maturity and size of the CA industry which increasingly functions on a multijurisdictional basis together with its significant overall contribution to the Australian economy warrants a streamlined national approach to regulation removing costly, artificial and antiquated regulatory requirements.

The modern day reality is business and corporate behaviour generally is already well regulated in Australia. Such wider business and corporate regulations directly impacts upon, and shapes the businesses operating as, Commercial Agents. There is no evidence of the CA industry failing to be good citizens with respect to its business and corporate regulatory requirements and expectations.

In summary, we believe that New South Wales should adopt a negative licensing regime as an appropriate approach for a professional industry, noting the following key outcomes:

- Standards are set by existing Federal laws and the ASIC/ACCC Debt Collection Guideline which supports the Australian Competition and Consumer Act;
- Inconsistencies[9] across States and Territories are removed;
- Regulators at both State and Commonwealth levels retain the power to take action against collectors who do not maintain appropriate standards;
- There is no need to establish a new regulatory body or to continue to tie up valuable police resources;
- Unprofessional conduct will be brought to regulator attention through consumer complaints, consumer action groups and the media; and
- A negative licensing regime is cost effective, given the small number of people engaged in the industry.

NSW Sheriff's Office

The downgrading of the services provided by the NSW Sheriff's Office with respect to the enforcement of writs for the levy of property has had a noticeable and significant impact on the effectiveness of that office and has meant that this avenue for enforcement is, in practical terms, all but unavailable to creditors. The difficulties experienced in dealing with the Sheriff's Office by solicitors were set out in a letter from the NSW Law Society to the Attorney General on 20 March 2014. The tenet of that complaint and the appropriate solution, namely that adequate funding be restored to the NSW Sheriff's Office to enable it to properly carry out its statutory obligations, are clearly set out in the letter.

In addition to the issues raised in The Law Society's letter, we state that the office hours of the NSW Sheriff's Office, being 9:00am to 4:30pm Monday to Friday, mean that the

[9] Inconsistencies include licensing requirements and standards across jurisdictions, licensing overlay for those regulated under the NCCP Act, inconsistent conduct requirements across jurisdictions, unwarranted intrusion into commercial arrangements between businesses, inappropriate, restrictive and expensive training delivery requirements which ignore workplace training and administrative inefficiencies across all jurisdictions.

effectiveness of that office is undermined since debtors who work ordinary business hours will never be at home at the times the Sheriff attends. An appropriate solution would obviously be to expand the office hours of the NSW Sheriff's Office.

The NSW Sheriff's Office is also frustrated in carrying out its statutory obligations through disputes regarding the ownership of goods on the subject property. It is our submission that there should be a statutory requirement for an affidavit to be sworn by the owner of those goods. At present, mere oral representations made during the Sheriff's visit are taken to be sufficient evidence that the debtor – usually a registered proprietor of the property - does not own those goods. This position means that enforcement by a writ over property is effectively unavailable as debtors constantly maintain that they do not own the goods.

The effectiveness of the NSW Sheriff's Office carrying out its statutory obligations is further undermined by the process of sending a letter to the debtor in advance of a Sheriff's visit. By providing the debtor with prior warning, the debtor can then simply either fail to answer the Sheriff's expected knock at the door or deny ownership of the property within the premises upon the Sheriff's arrival. It is our submission that the requirement to send a letter to the debtor in advance of a Sheriff's visit should be reviewed.

At present, the cost of the Sheriff executing or attempting execution of a writ for the levy of property under Part 8 of the *Civil Procedure Act* 2005 is $76.00 plus 3% of the proceeds of enforcement. In the event that our submissions are accepted, we propose that the cost of these changes be reflected in an increased fee plus an increased percentage of the proceeds of enforcement.

It is our submission that creditors would be willing to pay a higher fee and a greater percentage for the levy if the NSW Sheriff's office was adequately funded to enable it to effectively carry out its statutory obligations.

Instalment Orders

There is presently no restriction on how many instalment orders a debtor can apply for through the Courts. In our experience, many debtors are routinely applying for consecutive instalment orders as each one is successfully rejected by the Court, challenged by the creditor or upon attempts by the Sheriff to enforce the judgment. This is a significant barrier to effective debt enforcement.

Despite the evidence in the application for an instalment order being sworn evidence, there are frequently a number of major discrepancies between consecutive applications by the debtors, including for significant assets and liabilities such as the value of property and the mortgage repayments.

It is our submission that this barrier could be overcome by registrars taking into account the history of the file before making a new instalment order. This would include checking for major discrepancies in the evidence, investigating how many consecutive applications have been made, and examining the history of default. These checks are possible through the use of the Justicelink system which is available to the registrars.

There would be a time-cost to the reviewing registrars, but that time would be earned back by the Court by having a fewer number of hearings listed for instalment orders under challenge.

It is also our submission that there should be a maximum number of three applications for payment of a debt by instalments per judgment debt per calendar year. Once these three applications are dismissed by the Court (or successfully challenged by the creditor) subsequent applications should be automatically rejected by the Registry.

It is additionally our submission that there should be more transparency between the State and Federal Courts. We are aware of circumstances where a bankrupt debtor will successfully file an application for payment by instalments of a judgment debt upon which they have been bankrupted. Registrars should take into account whether or not a debtor is bankrupt at the time the registrar is making an order which is bound to fail due to the bankruptcy status of the debtor. At present, creditors bare the burden of opposing Court orders that ought never to have been made and would not have been made if the state Court had access to the federal Court's information. Further, any cost orders that are made in favour of the creditors are post-bankruptcy debts and cannot be claimed against the bankrupt estate.

The above position could be resolved either by the State Court registrar checking the database of the Federal Court or the Federal Court notifying the State Courts once a sequestration order is made.

Service by Court by Post

We are of the view that the present arrangement whereby statements of claim can be served by the Court by post requires an additional step in order to ensure its effectiveness. At present, there is simply a note on the Court's system that service has taken place. However, many debtors deny receiving the statement of claim. As there is no affidavit of service, it is difficult for the parties to determine whether or not the document was in fact served. In our submission, the person serving the document on behalf of the Court ought to swear an affidavit of service. These simple affidavits are already in use by process servers and parties serving by post.

The obvious problem is that in the event that the Court inadvertently neglects to serve a statement of claim or the statement of claim is served at the wrong address, there is presently nothing to alert the creditor that this has occurred. The creditor can then apply for default judgment. This is a significant prejudice to the debtor and, since the Court also reports all judgments entered to credit reporting agencies, this will affect the debtor's credit rating. Creditors are also disadvantaged by this process. The effect on them is that the debtors may be prevented from borrowing money to repay the debt when, if they had been served with the statement of claim, the subsequent sequence of events would not have occurred. In our experience, many debtors claim not to have been served and apply to the creditor to have the judgment set aside so that their credit rating may be amended, allowing them to borrow to pay the debt.

It is our submission that this process is prejudicial on all parties and could be easily remedied through the use of a simple affidavit of service by the Courts.

Writ on Title

It is our submission that a writ on title ought to be valid for 12 months and not 6 months. In our view, the effectiveness of lodging a writ on title is undermined by the writ's short lifespan and that this enforcement remedy would be more effective if an extended period of time applied. Notably, bankruptcy notices are valid for 12 months.

Examination Summons

It is our experience that issuing an examination summons is all but ineffective. This avenue for enforcement is essentially unavailable to creditors since on the majority of occasions the debtor fails to appear in Court. If the debtor does appear, they frequently do not bring their documents and arrest warrants are not effective or utilised. The result is that through the debtor's behaviour and the Court's apparent reluctance to use arrest warrants, this avenue for enforcement is simply not a viable option.

It is our submission that the Courts should be more vigilant in exercising their existing powers to ensure that debtors attend Court, properly answer the questions posed in the examination summons and provide sworn evidence in support of their replies, including annexing copies of documents upon which they intend to rely.

A change of legislation would not be needed. The results could be achieved through an increased use of the existing powers of the Court.

Filing Inadequate Defences

The Court registry has noticeably moved away from being a gatekeeper with respect to the filing of documents. The registry frequently accepts even overtly flawed documents, leaving the parties to bring a dispute based on procedural issues as part of the substantive matter. The result is that there have been cases where, for example, a defence has been filed admitting the debt, but stating the debtor needs time to pay. A defence that admits the debt is a contradiction. Nevertheless, upon presentation of this defence, the Court registry does not prevent the document from being filed and the matter subsequently gets listed for hearing. This is time consuming for all parties, a waste of the Court's time and resources and expensive for the parties to litigate.

We appreciate that registry staff often do not have legal training, however the availability of a chamber magistrate that such matters could be referred to for immediate assistance to the debtor would represent a significant time and cost saving in the long run.

Similarly, the presence of a community legal centre within the Court precinct or an expansion of the pro bono scheme to make community advocates readily available to answer such queries would also be an effective tool to manage those matters that ought not ever have entered the Court's system.

Delays with the Court Registry

In our experience, significant delays occur within the Court registry for the production of certified copies of judgment and the entry of default judgments. These delays are openly recognised by the Courts, particularly the Local Court. Such delays are not only inconvenient for the creditor, but can lead to significant difficulties for the parties. We are aware of circumstances where a debtor pays or part-pays a debt while the application for default judgment is working its way through the Court's system. An affidavit of debt which was accurate when sworn is therefore inaccurate by the time the Court processes the file due to the delay. Once again, the parties may subsequently need to make an application to set aside the default judgement as a result of the Court's delay, taking up more of the Court's and parties' resources.

This barrier to effective process can be easily remedied by the Courts managing their staff workloads more closely and allocating resources where necessary.

We again thank you for the opportunity to provide input into the inquiry into the debt recovery framework in NSW. Should you have any questions or wish to clarify any aspect of our submission, please contact Patrick Brown, Head of Compliance and Stakeholder Engagement on [redacted] or by email at [redacted]

Yours sincerely
COLLECTION HOUSE LIMITED

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MATTHEW THOMAS
CEO & MANAGING DIRECTOR