Submission No 28

DEBT RECOVERY IN NSW

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THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Civil Litigation Committee

Submission to the New South Wales Parliament Legislative Assembly Committee on Legal Affairs:

Inquiry into Debt Recovery in New South Wales

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About New South Wales Young Lawyers

New South Wales Young Lawyers (**NSWYL**) is a division of the Law Society of New South Wales whose membership consists of over 15,000 law students and legal practitioners in their first 5 years of practice and/or under the age of 36. The NSWYL supports young practitioners and law students in their early stages of their career.

About the Civil Litigation Committee

The New South Wales Young Lawyers Civil Litigation Committee (**the Committee**) is comprised of members from the NSWYL who practice or have an interest in civil litigation.

Issues addressed in this submission

The Committee has had the opportunity to read and consider the Terms of Reference released by the NSW Parliament Legislative Assembly Committee on Legal Affairs (**the Terms of Reference**).

In this submission, the Committee will respond generally to the Terms of Reference under the following headings:

1. The effectiveness of current legislation and administrative arrangements;
2. Any barriers to the debt recovery process and impacts on third parties responding to debt recovery actions;
3. Possible measures to make the debt recovery process more efficient; and
4. Practice in debt recovery in other jurisdictions.

The Committee's submissions in relation to the above questions and proposals are set out in detail below.

The effectiveness of current legislation and administrative arrangements

The Committee is of the view that there is room for improvement in respect of administrative arrangements (flowing from the relevant legislation) in New South Wales with respect to debt recovery matters, particularly in respect of smaller claims and unrepresented litigants.

The Committee's views are summarised below.

Any barriers to the debt recovery process and impacts on third parties responding to debt recovery actions

The Committee notes that the debt recovery process can often be protracted and expensive, despite the intentions of section 56 of the *Civil Procedure Act* 2005 (NSW) to facilitate the just, quick and cheap resolution of the real issues in the proceedings. Such by-products of the New South Wales legislative framework may serve to frustrate the ultimate objectives of parties to debt recovery proceedings, which is to recover unpaid funds or to effectively defend against claims for the payment of funds.

Whilst there may be many barriers to the efficiency of debt recovery proceedings, in the Committee's view, the two primary barriers are formality and expense.

Formality and procedure

Formality and prescribed procedure are necessary and ingrained in litigation practice in all Courts. Whilst such formality and procedure are integral to litigation to ensure staged progression of proceedings, compliance with rules of evidence, and to bring an order to what may be complex or emotionally-charged legal argument, such formality and procedure can result in relatively simple debt recovery matters taking years to resolve.

Debt recovery proceedings are often more simple than other commercial matters. The debtor/creditor relationship, at least in the commercial sphere, is usually governed by a seemingly unassailable contractual arrangement that requires the debtor to pay monies to the creditor by a certain time. If the creditor can prove even one unjustifiable default, then the debtor is deemed liable.

In the case of mortgage relationships for example, such liability can be especially crippling given the often standard mortgage agreement terms whereby the debtor indemnifies the creditor for any legal fees that it incurs in enforcing the debtor's contractual obligations. On the other hand, even if the debtor is so liable, the creditor may not recoup the principal debt or reimbursement of its expenses if the debtor is forced into bankruptcy.

Given the relatively simple contractual relationship between creditors and debtors, the Committee considers that the formality and procedure surrounding debt recovery proceedings should be modified, which may reduce the time taken to reach judgment. In the Committee's view, all parties to debt recovery proceedings could benefit substantially from reduced formality and curtailed procedural steps, in order to ensure that parties' costs are ultimately kept to a minimum.

Debt recovery in the Small Claims Division

The Small Claims Division of the Local Court of New South Wales has largely dispensed with formal litigation procedures in debt recovery proceedings. In fact, it is a general principle of that Division that proceedings will be conducted with as little formality and technicality as possible in the circumstances[1]. In this regard, the general progression for a contested claim involves only four primary steps, being:

[1] Local Court of New South Wales, Practice Note Civ 1 – Case Management of Civil Proceedings in the Local Court, 7 January 2013, [19.2]

a) Filing and service of a statement of claim;
b) Filing and service of a defence;
c) Pre-trial review; and
d) Hearing.

There may be additional steps to the above depending upon the circumstances of each case and the conduct of the parties.

In any event, the proceedings will usually be listed for a pre-trial review within six weeks of the date that the defence is filed[2]. The pre-trial review is the forum at which the parties are required, if the proceedings are not settled, to identify the issues in dispute and disclose any documents or witness statements[3], and to make any interlocutory applications including for leave to orally examine witnesses at trial[4] or leave for subpoenas to be issued[5].

Further, parties do not generally have the right to call oral evidence at trial[6] and the rules of evidence will not usually apply[7]. The assessor or magistrate presiding at the trial has the power to determine the procedure of the hearing as he or she thinks fit[8].

The consolidation of so many steps into one hearing, and the lack of comparative formality at the hearing itself, serves to expedite the proceedings as a whole and bring them to a quick resolution.

The *Uniform Civil Procedure Rules* 2005 (NSW) (**UCPR**) allows service of an originating process filed in the New South Wales Local Court to be effected by Court post[9]. Whilst this may be seen as a beneficial cost-reducing mechanism for a creditor to recover a debt, it is not without its issues. The UCPR provides[10] that where a document is sent by Court post but is returned as undelivered, service is not considered to have been effected, and any judgment on the basis of service is to be set aside. This presents itself as a barrier in the debt recovery process as there is no limit prescribed on the length of time for which the letter can be returned. A creditor may have taken steps and incurred the costs of obtaining and enforcing a judgment before the document is returned, and has no means of recovering the costs they have incurred in doing so. The Committee recommends restriction on the time for which a document can be returned before it is deemed unserved, to ensure that creditors are not deterred from commencing recovery actions as a result of the possibility of incurring unnecessary and unrecoverable costs.

Debt recovery in the higher Courts

Proceedings maintained in the Small Claims Division however only represent a portion of the debt recovery actions commenced in New South Wales Courts. Particularly, most mortgage and loan disputes exceed the monetary jurisdiction of the Small Claims Division and therefore proceedings must be commenced in other jurisdictions.

Debt recovery processes in such higher courts involve greater formality, a greater number of interlocutory steps, and often take a longer period of time to resolve.

[2] Ibid, [20.1]

[3] Ibid, [20.6]

[4] Ibid, [20.7]

[5] Ibid, [26.1]

[6] Ibid, [23.2]

[7] Ibid, [20.9] and [Annexure D]

[8] Ibid, [23.6]

[9] *Uniform Civil Procedure Rules* 2005 (NSW) r10.1(2)

[10] Ibid r10.20(3)

Depending upon the circumstances of the individual case, and the conduct of the various parties, a trial may not be reached for many months or years.

Debtors' knowledge of formality and procedures

The formalities and complexities of proceedings in higher courts can be difficult for litigants to understand and, given the circumstances and subject matter of debt recovery proceedings (particularly in respect of mortgage and loan enforcement proceedings), debtors may often be unrepresented. This may result in inequality between parties to proceedings, which may serve to disadvantage the parties, including by rendering the debtor unable to make delicate or tactful legal arguments, or by extending the proceedings due to the debtor's inability to follow procedural steps accurately or at all (and thereby increasing the creditor's legal costs).

Expense

The Committee notes that many debtors are not in a position to access legal representation in debt recovery proceedings. Lawyers generally charge for their time spent to undertake work on behalf of a client and as such, formalities in debt recovery proceedings can result in substantial time being spent by lawyers, which increases costs for all parties. The Committee however notes Schedule 2 of the *Legal Profession Regulation* 2005 (NSW), which facilitates the capping of professional costs for recovery of certain debts and enforcement of certain judgments.

Creditors may be drawn to significant expense in maintaining proceedings, enforcing judgment and/or commencing bankruptcy proceedings. These are often all expenses for which the debtor is liable, on an indemnity basis, by contract. If the debtor enters bankruptcy, the creditor may be unable to recover those expenses.

The debtor would also be disadvantaged in the case of lengthy debt recovery proceedings, in circumstances where they are required to indemnify the creditor's legal fees and if interest continues to accrue in respect of the debt owed.

The Committee considers that each party's ultimate risk exposure and financial liability could be significantly reduced by adopting alternate procedures for debt recovery proceedings, especially when commenced in respect of debts owed by financial institutions or other lenders.

Possible measures to make the debt recovery process more efficient

The Committee notes that existing case management procedures have improved the progression and monitoring of litigious matters generally in recent years, however there is still room for improvement with respect to debt recovery matters, which are often quite factually simple.

As discussed in this submission, one common issue in debt recovery is the self-represented debtor who is unfamiliar or completely uninformed of the legal process. The lack of knowledge and the nature of the proceedings bring about a substantial amount of confusion to the debtor, delay to all parties and cost. The very nature of the formal adversarial style of the Court substantiates this problem because the proceedings run in a manner which requires the parties to have presumed knowledge of how the proceedings are to run.

A common result of this is the debtor having the incorrect documentation, or failing to file and/or serve the required documentation. Such a result provides a substantial amount of delay and cost to all parties, particularly in respect of adjournments.

A debt recovery tribunal for unrepresented debtors is a measure which could assist with this inefficiency. Less formal proceedings may facilitate the prompt resolution of matters,

and may assist communication with parties, understanding of the process by unrepresented litigants, and therefore case flow. The tribunal would not only help facilitate in resolving these disputes but would also help in facilitating efficiency with debt recovery in the Court system.

Alternatively, the Local Court of New South Wales may adopt systems at each Registry to monitor documents as they are filed and to provide greater assistance to unrepresented litigants, to facilitate the smoother flow of matters towards a prompt resolution. This would not only be required at the commencement of the proceedings, but throughout the progress of a case.

Practice in debt recovery in other jurisdictions

Small/Minor Claims

The jurisdictional limit of the Small Claims Division of the Local Court of New South Wales is $10,000.00, and is consistent with that adopted by most other states and territories around Australia. There are however some exceptions, with South Australia and Queensland having a jurisdictional limit of $25,000.00 and Tasmania having a limit of $5,000.00.

The proper forum to commence proceedings varies between the states. In more recent times, there has been a transition of small claims divisions to state tribunals. These tribunals are set up as no-cost or low-cost jurisdictions to facilitate simple and inexpensive ways to resolve claims:

a) In Queensland, small claims are generally dealt with in the Queensland Civil and Administrative Tribunal (since December 2009, replacing the state's Small Claims Tribunal); however a creditor maintains an option to have their matter heard in the Magistrates Court of Queensland.

b) In the Australian Capital Territory, an application to commence debt recovery proceedings is filed in the Australian Capital Territory Civil and Administrative Tribunal, which commenced operation in February 2009.

c) In Victoria, a claimant may commence proceedings for recovery of a contractual debt in the Victorian Civil and Administrative Tribunal, however if the debt is related to non-contractual damages, a complaint is required to be filed in the Magistrates Court of Victoria.

d) Proceedings are commenced in the relevant Magistrates Court in all other states (Western Australia, South Australia, Northern Territory and Tasmania), in the same way as would be done in New South Wales. Similarly to New South Wales, the rules of evidence do not apply in all other jurisdictions.

There are a number of procedural differences between the jurisdictions:

a) In Western Australia, an applicant is required to provide a description of the claim upon filing. It is only once a Notice of Intention to Defend has been filed by the third party that the applicant is required to file and serve a Statement of Claim. This approach is a particularly innovative way to reduce costs in circumstances where these matters are heard in no-cost or low-cost jurisdictions, and a debtor may admit liability or not defend proceedings.

b) In an alternative to the pre-trial review regime of New South Wales, a number of jurisdictions including Victoria, South Australia and Queensland require the parties to attend a compulsory conference or mediation ordered by the relevant body. This form of alternative dispute resolution provides the parties with a low-

cost opportunity to explore the issues with a tribunal member or mediator. The benefits of these "without prejudice" discussions provide the parties with a means to ventilate and clarify issues, and an opportunity to work through alternative resolutions to the dispute.

Judgment enforcement options

The Committee is not aware of any notable differences between the Australian jurisdictions as to enforcement options.

Pre-litigation Steps

Whilst not specific to debt recovery matters, there is a focus on facilitating early resolution of claims in a number of jurisdictions:

a) In Victoria, section 34 of the *Civil Procedure Act* 2010 (Vic) sets out the obligations on parties wishing to commence proceedings that is, they must attempt to resolve the dispute or clarify the issues in dispute by taking reasonable steps, such as exchanging information that would assist in resolving the dispute or engaging in genuine negotiations.

b) In South Australia, the *Supreme Court Civil Rules* 2006 (SA) and *District Court Rules* 2006 (SA) require a plaintiff to provide to the intended defendant, 21 days before filing a claim, an offer to settle the matter, as well as provide details of the claim and supporting documentation to enable them to assess the reasonableness of the claim and the offer. In the Magistrates Court, there is only a requirement to put the defendant on notice of the claim 21 days before filing.

These initiatives may assist in facilitating early resolution of claims, narrowing of the issues in dispute, and act as cost-saving measures for the parties in debt recovery matters.

Summary

Whilst the Committee is of the view that existing case management procedures have improved the progression and monitoring of litigious matters generally in recent years, there is still room for improvement with respect to debt recovery matters, which are often quite factually simple. This is particularly important for unrepresented litigants, and the parties opposing unrepresented litigants.

The Committee thanks the New South Wales Parliament Legislative Assembly Committee on Legal Affairs for the opportunity to comment on the Inquiry into Debt Recovery in New South Wales and would be very pleased to provide further information or submissions as required.

Sincerely,

[redacted]

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