

**Submission
No 14**

DEBT RECOVERY IN NSW

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Date Received: 16/05/2014

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16 May 2014

The Committee Manager
Legal Affairs Committee
Parliament House
Macquarie St
SYDNEY NSW 2000

Dear Committee Manager,

RE: DEBT RECOVERY IN NSW (INQUIRY)

The Hunter Community Legal Centre (“HCLC”) is an independent, not for profit Community Legal Centre funded by the State and Federal Attorneys General Departments. The HCLC provides free legal advice and assistance services to disadvantaged people who live, work or study in the Newcastle, Lake Macquarie, Hunter Valley, Port Stephens and Great Lakes regions.

This submission has been prepared in response to a New South Wales Parliament Inquiry into debt recovery in NSW, an area affecting many clients of the HCLC. The objectives of this submission are to:

- Raise awareness of the issues facing the HCLC’s clients, and
- Ensure any proposed changes to legislation give consideration to the needs of disadvantaged members of our society.

The terms of reference for the Inquiry include barriers to the debt recovery process, and possible measures to make the debt recovery process more efficient. The HCLC would like to take the opportunity to draw attention to the issues for debtors, and the need to balance the rights of creditors and debtors equally. The HCLC is particularly concerned that streamlining the debt recovery process will create new difficulties for vulnerable members of the community, particularly those who already struggle to access legal services.

The HCLC recommends:

1. There be no change or reduction of the time currently allowed to file a defence.
2. There be increased measures to utilise External Dispute Resolution.

Please find enclosed the HCLC's submission, which explains these issues in further detail.

Yours faithfully

Hunter Community Legal Centre

Ruby Taylor

Community Legal Education and Law Reform Coordinator



INQUIRY INTO DEBT RECOVERY IN NSW

16 May 2014

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1. About the Hunter Community Legal Centre

The Hunter Community Legal Centre (HCLC) was established in 1991. The HCLC is an independent, not for profit, Community Legal Centre (CLC) funded by the State and Federal Attorneys General Departments.

The HCLC provides free legal advice and representation to disadvantaged people who live, work or study in the Newcastle, Lake Macquarie, Hunter Valley, Port Stephens and Great Lakes regions.

The HCLC's Family Law Program (FLP) provides a free duty solicitor service for self-represented litigants in the Newcastle Family Court and the Federal Circuit Court, as well as free legal advice by appointment in separation, divorce and parenting matters, to people who meet the FLP criteria for assistance. The HCLC provides free legal advice to parents undertaking family dispute resolution at the Newcastle and Taree Family Relationship Centres.

The HCLC provides free duty solicitor services for unrepresented parties in the Newcastle Local Court in relation to apprehended violence orders. HCLC solicitors also represent disadvantaged clients in other Local Court matters.

The HCLC provides a Community Legal Education (CLE) program for community groups and community sector workers on a range of legal matters. The HCLC also engages in law reform projects to address inequalities in the legal system which are relevant to the needs of its clients.

2. The Hunter Community Legal Centre and Debt Recovery

The HCLC assists many clients involved in the debt recovery process. Since July 2013 (10 months) the HCLC has provided advice, casework assistance and/or representation to nearly one hundred and eighty clients dealing with debt collection, management and recovery. Many of the HCLC's clients are socio-economically disadvantaged, many receive government assistance, and many struggle to repay their debts or panic at the thought of court action. They often do not understand their obligations, or, perhaps more importantly, their rights in relation to debt collection.

3. Difficulties Accessing Legal Representation and Self-Represented Litigants

The difficulty in accessing legal assistance has been recognized for some time, and has led to ever-increasing numbers of self-represented litigants in all of Australia's court systems. Research conducted between 1998 and 2004 on self-representation in the Family Court focused on the relationship between legal aid funding and the perceived rising numbers of self-represented litigants.¹ More recently, Justice Faulks acknowledged that there is a variety of reason why people appear unrepresented. Some, he said, appear for themselves because they are unable to afford to pay legal representation.² The Consumer Credit Legal Centre attributed the "exponential growth" in self-represented litigants to "the increase in the costs of obtaining legal representation." They stated:

The recent economic downturn, experienced since 2008, means that individuals often have much less disposable income or savings, due to being adversely affected due to the global financial crisis. As a result, individuals are resorting to self-representation in the court system.³

People who cannot access legal assistance can face significant disadvantage within the court system. Parties appearing in Australia's adversarial system are responsible for their own case, for filing their own defence and putting forward evidence to support their case. Court proceedings can be challenging for self-represented litigants. They are comprised of complex rules, procedures, documents and language. Administrative aspects of the court process can also act as barriers for those who cannot access legal assistance, for example, selecting the appropriate forms to commence legal action or respond to a statement of claim.

¹ See, eg, John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000) 78; Rosemary Hunter, Jeff Giddings and Annabel Chrzanowski, 'Legal Aid and Self-Representation in the Family Court of Australia' (Socio-Legal Research Centre, Griffith University, 2003) 33.

² Justice John Faulks, 'Self-Represented Litigants: Tackling the Challenge' (Paper presented at Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013) 5.

³ Consumer Credit Legal Centre (NSW) Inc., "Access to Justice Arrangements: Productivity Commission Submission" (Submission, 6 December 2013) 34.

The complicated process often means that debt recovery claims go undefended and result in default judgments. In 2010, Legal Aid NSW found that, in relation to debt recovery proceedings, disadvantaged people are more likely to be involved in proceedings that proceed to default judgment and are less likely to attempt to represent themselves in legal proceedings.⁴ They found that almost half of all Local Court matters proceeded to enforcement undefended, with many of those being consumer credit matters, and argued that this raised concerns about the capacity of unrepresented defendants in debt recovery matters to participate effectively in the court system.⁵ Further, they argued that an adversarial system would, by its nature, inherently assist the party who can best understand and use court processes to their advantage.

These findings indicate that unrepresented defendants can have a negative impact on the administration of justice by the Courts. The courts and academics have both found that, in relation to self-represented litigants as a broader issue, there is an uneven playing field. For example, Stewart has argued that the “absence of a level playing field impacts upon justice, and perceptions of it.”⁶ He further stated that one “might properly conclude that, subject to few exceptions, the court is simply unable to impart justice when it engages with self-represented litigants.”⁷ In relation to debt recovery and consumer credit matters, Legal Aid NSW argued that the “fact that a creditor has obtained default judgment by no means proves that the substantive rights of the consumer have been resolved.”⁸ The enforcement of debts that are not defended can effectively deny any form of empowerment or redress to the majority of individuals who would not have the knowledge, confidence or resources to defend legal matters.⁹

⁴ Legal Aid NSW, “Response to Review of Debt Recovery Process” (Submission, 10 December 2010) 7.

⁵ Ibid 8.

⁶ Richard Stewart, ‘The self-represented litigant: A challenge to justice’ (2011) 20 *Journal of Judicial Administration* 146, 156.

⁷ Ibid 161.

⁸ Legal Aid NSW, above n 4, 8.

⁹ See Consumer Credit Legal Centre (NSW) Inc., above n 3, 38.

4. External Dispute Resolution

For reasons outlined above, debt recovery matters are often best dealt with primarily outside the court system. Industry based External Dispute Resolution (“EDR”) schemes, such as the Financial Ombudsman Service (“FOS”) and the Credit Ombudsman Service Limited (“COSL”), where membership is required as a condition of licensing, have been described as “the greatest advance for consumer rights in Australia.”¹⁰ The schemes were designed with unrepresented consumers in mind. As stated by Legal Aid NSW:

Processes are informal, flexible and paper-based. The schemes are particularly aware of the difficulties that socially and economically disadvantaged face in dealing with the legal system. Interpreters are provided, for free, where necessary.¹¹

In 2010, Legal Aid NSW found that consumers have close to a 50% chance of winning all matters that proceed to recommendation or determination. Those success rates for consumers are even better for those matters that settle at the early resolution phase of EDR. Those figures were contrasted against Local Court matters, where only 8% of consumers took steps to file a defence. The Consumer Credit Legal Centre (NSW) Inc. has found EDR to be faster than court action in most cases, even faster than defended court action.¹²

¹⁰ Ibid 37.

¹¹ Legal Aid NSW, above n 4, 10.

¹² Consumer Credit Legal Centre (NSW) Inc., above n 3, 38.

5. Defendants Need Time to Prepare

It is extremely important that, in the context of debt recovery matters where consumers are defendants to a claim, consumers are given adequate notice of a claim. The lack of legal knowledge and skill, as discussed above, can mean that consumers are unaware of their rights and obligations in relation to a debt.

Case Study 1

Katherine* owned a farm with her son and daughter-in-law. When her son passed away, her daughter-in-law, Janet*, moved away. Katherine entered into a Personal Loan agreement with a bank in June 2005 to pay for some work to be carried out on the farm. Eventually, she and Janet agreed to sell the farm, and pay out the debt from the proceeds of the sale. Janet took control of the paperwork and the details of the sale, and Katherine trusted that the debt had been repaid. She and Janet lost contact when Janet moved away, but it appeared from later court documents that as of May 2007 Katherine owed the bank \$24,494.00 under the contract. The debt was assigned to a debt collection agency.

In January 2013, the agency filed a Statement of Claim in the Local Court. Katherine was extremely worried, and feared that she would have to sell her house to settle the debt.

The HCLC assisted Katherine to file a defence on the grounds that Katherine had not made any repayments since 5 November 2006, and the claim was therefore statute-barred. After some discussion between the HCLC solicitor and the solicitor acting for the debt collection agency, the other party subsequently filed a notice of discontinuance, and paid Katherine's legal fees.

Case Study 2

Rhiannon* and her ex-husband, Mark*, were in business together. Rhiannon did most of the work for the business and Mark did some work on the business finances.

Mark contacted a law firm in relation to some financing issues. He told them he was speaking on behalf of Rhiannon. The lawyers never confirmed this with Rhiannon, and she had no contact with them until she received Letters of Demand and eventually a Statement of Claim.

The HCLC assisted Rhiannon to file a defence, asserting that Mark lacked any authority to act on behalf of Rhiannon. The other party filed a notice of discontinuance, and paid Rhiannon's legal fees.

Case Study 3

Elizabeth* and her husband were facing financial difficulties, having accrued a number of credit card debts in the course of running their businesses. They were worried about being forced into bankruptcy. Elizabeth approached her friend, Samantha, for assistance with their business finances after Samantha* made numerous offers to help during the preceding 12 months. After agreeing to help Elizabeth, Samantha told her on a number of occasions that she was providing her services for free. Samantha never provided a contract and never discussed fees for her services.

Samantha organised for a real estate agent to sell Elizabeth's residential property to pay out the debts, and negotiated reduced settlements on Elizabeth's credit card bills.

During that process, Samantha obtained the assistance of David*, who worked for a mortgage broker and planner business. Elizabeth attended a meeting with them both, where a contract was produced for Elizabeth to sign. The contract stated that she would be required to pay ten per cent of the money saved by their negotiations (totalling \$20,000.00). David also offered to include in the contract an additional fee of \$5,000.00 for Elizabeth to keep if the Banks took all the money from the sale of the residential property.

Stephanie negotiated for the credit card bills to be settled on the day the sale of the residential property was settled. However, it soon became apparent that she had organised the wrong date and she asked if Elizabeth would be able to pay \$9,000.00 before the sale of the residential property. Elizabeth could not. David then loaned Elizabeth the money, and she agreed to repay the money back from the proceeds of the sale.

In the meantime, Elizabeth discovered that additional fees had been added to the contract during settlement. She was told that she had to sign the contract or she would be in breach, and that she could sort out any inaccuracies after the sale. Stephanie knew nothing about the additional fees, and told Elizabeth's husband to "fuck off" when he asked about them.

After the sale of the residential property, Elizabeth did not pay David or the mortgage broker and planner business any money. She received a Statement of Claim from the mortgage broker and planner company. However, when Elizabeth contacted the company to obtain further details about the money they alleged she owed, or to view the contract that she signed during the settlement period, the company refused to assist her.

Elizabeth contacted the HCLC, and a solicitor advised her to file a complaint with the Credit Ombudsman Service Limited on the grounds of unconscionable conduct. She is waiting for a result.

Case Study 4

In July 2013 Janice* cancelled her phone plan, and was told she would receive a final bill including a cancellation fee. At the same time, she changed her address on record with the telephone company. She heard and received nothing from the telephone company until September 2013, when she received a letter saying that she needed to pay approximately \$1000.00. Janice noted that the letter had originally been sent to her old address.

Janice immediately contacted the telephone company and arranged a payment plan. She made an initial payment of \$150.00 in order to start the payment plan, and further agreed to pay \$50.00 per fortnight to pay off the debt.

A week later, Janice received a letter of demand from a debt collection agency, addressed to her old address, stating that she owed them \$2000.00. Janice contacted the debt collection agency to see if her payment plan organised with the telephone company was being taken into consideration. She was advised that the debt collection company was in contact with the telephone company and the \$150.00 Janice had already paid was being considered. She organised to continue with her original payment plan, and was able to make one payment. When the next payment was due, Janice had no money and was unable to pay. The debt collection company contacted her and advised the payment plan was no longer available to her and the total amount of the debt was now due.

At the time Janice cancelled her phone plan, she fully intended to pay the cancellation fee and her final bill. She did not because the bill was sent by the telephone company to the wrong address, despite the fact that she had provided them with an up-to-date address at the time she cancelled her phone plan. Further, upon finally receiving the bill from the telephone company, Janice immediately took action to arrange a payment plan. Despite these factors, her matter was referred to a debt collection agency without her knowledge and she was levied with an increased fee.

Case Study 6

In April 2013 William* contacted his energy company to tell them he was moving house and to record a new address. In September 2013 he received a letter from the energy company's collection agency, stating he had not paid his final bill. William contacted the energy company directly and he had not received the final bill. They sent the bill, which included a \$95.00 fee labelled only "other". William refused to pay the whole bill unless the energy company could tell him what the "other" fee was for. They could not. William contacted the HCLC in November 2013, and the

solicitor he spokes to advised William to complain to the Energy and Water Ombudsman.

William received daily calls from the collection agency.

There are many instances where consumers receive a Letter of Demand or Statement of Claim from their credit providers or debt collectors, and have a valid defence they are unaware of or do not know how to act to defend the claim. In some instances, due to miscommunication, consumers are unaware of a debt they owe or action being taken against them. Further, debt collection matters are often highly emotional, stressful and frustrating, particularly for members of the community that are already vulnerable. Defendants need to be provided with sufficient time to obtain legal advice and assistance to consider their rights in relation to filing a defence, something made more difficult by the complexity and technicality of drafting a defence and the limited sources of legal advice.

* Case studies included have been drawn from the experiences of HCLC's clients. The names have been changed to protect the clients' anonymity.

6. Recommendations

Recommendation 1: No reduction in time to file a defence

The HCLC notes that the terms of reference for the Inquiry include barriers to the debt recovery process and possible measures to make the debt recovery process more efficient. The HCLC respectfully urges consideration of vulnerable debtors, and in particular recommends that there be no reduction in the time allowed for the filing of a defence. Defendants in debt recovery matters need to be given adequate notice of a claim so that they can consider their options, including whether to settle the claim early, or to defend it at EDR or at court. For reasons outlined above, measures taken to streamline the debt recovery process could have effects detrimental to the rights of consumers, and could lead to vulnerable members of the community being less able to participate in the dispute.

Recommendation 2: Increased measures to utilise External Dispute Resolution

The HCLC respectfully submits that there would be consumers would benefit from measures taken to improve knowledge and understanding of EDR processes within the court system. In addition, the HCLC recommends the creation of guidelines whereby appropriate matters are referred out of the court system to EDR. EDR has been extremely successful, as discussed above, is faster and more efficient than court action, and would allow consumers – particularly those vulnerable members of the community – an increased chance to participate in the debt recovery process.

7. Contact Details

HCLC would welcome the opportunity to provide additional information, comments or an oral submission in relation to the issues raised in this submission if requested to do so. In this case please contact Bronwyn Ambrogetti, Principal Solicitor, at [REDACTED] or Ruby Taylor, Coordinator of the Law Reform and Community Legal Education Program, at [REDACTED]