

**Submission  
No 24**

## **DEBT RECOVERY IN NSW**

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Director Committees  
Legislative Assembly  
Parliament House  
Macquarie Street,  
Sydney,  
NSW 2000

Dear Sir/Madam

**Legislative Assembly Committee on Legal Affairs  
Enquiry into Debt Recovery in New South Wales  
Submissions from ClarkeKann Lawyers.**

The following submissions relate to the effectiveness of the current legislation and administrative arrangements in relation to debt recovery in New South Wales. These submissions will focus primarily on the practical issues faced by legal practitioners in the recovery of money using the current system in New South Wales. The paper will focus on the enforcement of Judgments once obtained; specifically, the range and effectiveness of current options available to Judgment Creditors.

**1. Examination of Debtor**

In New South Wales once a Judgment Creditor obtains a Judgment against a Debtor, they may apply for an examination of the Debtor. The purpose of this examination is to ascertain the current assets and liabilities of the Debtor which should, in theory, allow for the Judgment Creditor to better glean available assets to satisfy the Judgment.

In our experience, however, we find that in over 90% of cases Judgment Debtors do not attend the Local Court to complete the Examination Notice or indeed do not return the Examination Notice if it is sent to them. The Courts are reluctant to arrest a Judgment Debtor especially if the amount being recovered by the Judgment Creditor is relatively small. Further, this process is reliant on the honesty of the Judgment Debtor in truthfully completing the Examination Order. This means it is open to the Judgment Debtor to be dishonest when completing the Examination Order.

Even if a Judgment Debtor is compliant an Examination Order does not allow a Judgment Creditor to enforce against any of the Judgment Debtor's property as further steps need to be taken by a Judgment



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Creditor in order to recover money due. Accordingly, the Examination of a Debtor is, in my experience, often costly and not effective in order for Judgment Creditors to recover a Judgment Debt.

## **2. Writ for the Levy of Property**

A writ is a Court Order which allows the Sheriff of the Court to seize and sell property belonging to the Judgment Debtor. Pursuant to Section 106 of the *Civil Procedure Act* the following property may be seized:-

- i. Any goods in which the Judgment Debtor has a beneficial interest;
- ii. Money;
- iii. Cheque, billed exchange, promissory note, bonds other securities;
- iv. In action or equitable interest in goods or land held by the Judgment Debtor; and
- v. Land.

A Judgment Creditor may apply for a writ by filing a Notice of Motion in the Local Court. The Registrar will then issue a writ to the Sheriffs Office closest to the address of the Debtor. In theory, the Sheriff then attends the Judgment Debtors address and executes the writ. However, in our experience it is rare that a Sheriff will seize goods of the Debtor.

The cost involved in issuing a writ is \$77.00 and if any property is seized (by tagging), the Judgment Creditor must pay a further fee of \$50.00 to the Sheriff within 14 days, otherwise the Sheriff will withdraw from seizing the goods. In the event the Debtor does not satisfy the debt within 4 weeks of the goods being seized, the Sheriff may proceed to sell the goods at auction.

In my experience it is rare a Sheriff will actually seize any goods of a Judgment Debtor. The effectiveness of this recovery process is accordingly diminished. This is despite the fact that the Judgment Debtor may have significant assets which could, in theory, satisfy the debt. The reluctance of the Sheriff to seize and sell property of the Debtor results in Judgment Creditors wasting \$77.00 every time the Sheriff attends the premises of the Debtor.

Another issue is that quite often assets, such as plasma tvs, boats or motor vehicles, which could be used to satisfy the Judgment Debt are stated to be owned solely by or in conjunction with other parties such as the Debtor's spouse. Often without checking the veracity of such asserted ownership, Sherrifs will not seize such goods (even though they may well be owned by the Debtor).

## **3. Garnishee Orders**

When information reveals money is owed to a Judgment Debtor from a third party, proceedings may be commenced to attach the debt. This means that a third party will be compelled to pay his or her debt to the Judgment Creditor instead of the Judgment Debtor. Debts which may be attached are governed by section 117 of the *Civil Procedure Act*.

Applying for a Garnishee Order is done by way of Notice of Motion in the Local Court. There is no filing fee. The Garnishee Order can be quite effective especially in circumstances where it is revealed that a Judgment Debtor is gainfully employed and not self employed. This enforcement mechanism does have its downfalls, which includes where an individual is self employed.

## **4. Bankruptcy Proceedings**

As bankruptcy proceedings are covered by Federal Legislation, I will not make submissions in relation to same.

## **5. Instalment Orders**

A Judgment Debtor may make an application for an Instalment Order pursuant to *Uniform Civil Procedure Rule 37.2*. When an application for payment by instalments is made, execution of the Judgment is stayed pending a determination by the Court. This means that if recovery proceedings are on foot, such as a Garnishee Order or Writ for Levy of Property the execution of the Judgment is stopped until such time as the Court makes a determination in relation to the application to pay by instalments.

The process of making an application to pay by instalments delays the recovery proceedings. It also means that the Judgment Debtor can frustrate the recovery of a Judgment Debt by making an application to pay by instalments and offering a low instalment arrangement.

Notwithstanding the quality of an application to pay by instalments any Judgment Debtor is afforded the same rights. This often means that low offers to pay by instalments need to be heard by the Court and a Judgment Creditor is precluded from enforcing their debt until such time as the application to pay by instalments is heard.

It is observed that quite often Courts are favourable to the Judgment Debtors in circumstances where they make an application by instalments. Whilst I appreciate the importance of natural justice in the operation of debt recovery proceedings, I also submit that the concerns of a Judgment Creditor who has not been paid and incurred the expense of obtaining a Judgment and then attempting to enforce the Judgment should be considered equally as a Judgment Debtor in such an application.

### **Conclusions**

I submit:

- (i) The Examination Order procedure should be reformed to have greater utility in forcing attendance and disclosure by a Debtor (with the sanction of penalties for default) or dispensed with as it is currently not effective in servicing the needs of Judgment Creditors.
- (ii) In relation to the enforcement by way of Writ for Levy of Property, I submit that Sheriffs should be directed to attempt to satisfy Judgment Debts more aggressively in that rather than just leaving a calling card and waiting for a Debtor to return a call they should persist and actually attempt to recover property for the satisfaction of the Judgment Creditor. Whilst I do not currently think the Writ for Levy of Property procedure should be changed, I do submit that the way the Sheriffs enforce the Writ for Levy of Property should be more regimented to better service a Judgment Creditor.
- (iii) I believe that the Garnishee Order process is working quite well and is an effective way for Judgment Creditors to obtain payment.

Should you have any queries in relation to these submissions, please do not hesitate to contact Mr Raymond Roser of our Sydney Office.

Yours faithfully,

**Raymond Roser**  
**Senior Associate**  
**Litigation & Insolvency**