Submission No 7

DEBT RECOVERY IN NSW

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Date Received: 16/05/2014

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16 May 2014

Committee on Legal Affairs
NSW Legislative Assembly
By email: legalaffairs@parliament.nsw.gov.au

Dear Legislative Assembly Committee on Legal Affairs,

Inquiry into Debt Recovery in NSW

Thank you for the opportunity to put in a submission on this issue.

Consumer Credit Legal Centre has made many prior submissions to the Attorney General department regarding debt collection, most substantively in the review of the Civil Procedure Act 2005 and consequent Statutory Review Reference Group meetings in 2011, also attended by representatives from the Local, District and Supreme Courts, NSW Sheriff's office and Legal Aid NSW. We are disappointed that despite apparent support for many of our proposals, none of our recommendations were ultimately implemented.

We continue to support our previous submissions and repeat them here.

About our service

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, and referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 20,477 calls for advice or assistance during the 2012/2013 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

General Comment

In our experience, the vast majority of debtors do not just choose not to pay a debt. Most times, they are forced into a position of being unable to pay due to illness or unemployment, factors outside their control. Many remain willing to pay a debt, but cannot afford what the creditor is demanding.

NSW currently has the lowest protections for debtors, well below the equivalent statutory protections in other jurisdictions. In our experience, current debt recovery practices can be harsh and oppressive and lead to unfavourable outcomes including:

1. Increasing demand on welfare, community and health services, and support from charities; and

2. Consumers considering bankruptcy despite being willing to repay their debt, but being unable to afford to survive on the tiny amounts left to them after court enforcement action is taken by the creditor. Bankruptcy is generally unfavourable for the creditor as well, severely limiting the creditor's rights of recovery

Summary of Recommendations

We believe there are 4 core areas where reform is required:

Procedural fairness

1. Debtors should be provided with notice when a court judgment is entered, and prior to enforcement action taking effect

Garnishee of wages

2. The protected amount debtors can retain for essential living expenses should be increased from the current level of $458.40 per week
3. Courts should exercise discretion in determining the appropriate proportion of wages to be garnisheed, taking into account an individual's particular circumstances (such as number of dependents, living expenses and other financial commitments)
4. The length of time a garnishee can operate should be limited to 6 months
5. There should be legislative protection against a debtor losing their job as a result of a garnishee being issued

Garnishee of debts

6. There should be a minimum protected amount reserved for a debtor's essential expenses that creditors cannot access, set in line with the minimum protected amount for wage garnishees
7. Courts should be given discretion as to the appropriate amount to be garnisheed, considering the debtor's whole circumstances
8. There should be greater court oversight over the use of debt garnishees in an oppressive manner, or as a fishing expedition

Writs for the levy of property

9. The categories of personal items not available for forced seizure and sale by the sheriff, should be aligned protections provided under the federal Bankruptcy Act 1966
10. Sheriffs should have discretion to seize and sell property to balance the need to avoid delay and expense with minimising hardship to the debtor or other persons.

1. Procedural Fairness

Recommendation 1: Debtors should be provided with notice when a court judgment is entered, and prior to enforcement action taking effect

Notice of Default judgment

Our service regularly receive calls from consumers whose first notice that there has been legal action against them is their employer taking out money from their wages, the sheriff standing on their doorstep or on finding their bank account empty.

The ability for Statements of Claim for the Local Court to be served by post to the last known address creates ample opportunity for consumers not to receive notice of the proceedings. There is currently no obligation for the courts or creditors to notify a consumer that a judgment has been obtained by default after no defence is filed.

While a notice that judgment has been entered sent to a similarly wrong address may serve little purpose, in some cases an absence from the address may have been temporary, or the statement of claim may have been lost or even intentionally concealed by another interested party (such as a co-borrower). In such cases a notice that judgment has been entered may provide another opportunity for the debtor to be made aware of the proceedings and respond in a timely manner.

Notice of enforcement

A judgment allows 12 years for enforcement, and there can be a considerable period of time between the alleged service of a statement of claim and the commencement of enforcement action.

Debtors have no legislated right to notice before enforcement action commences. The impact on debtors varies depending on the type of enforcement.

For writs for the levy of property, the NSW Sheriff's office notify debtors about the writ as part of the process, and also provide information and referrals to appropriate services for advice. Sheriffs will generally make two visits, the first to inspect what items can be taken and the second to seize the items after an opportunity for the debtor to get advice on options and for any third parties affected to claim ownership of goods. We commend this practice, and would submit that these practices should be cemented in legislation. Legislation in the ACT requires an enforcement officer to give the debtor written information about obtaining legal or financial advice and assistance and seeking interpreting assistance if required[1].

[1] Rule 2204, Court Procedures Rules 2006

For garnishees on wages, only the employer must be served. This means that a debtor can have no notice that their next pay will continue at $458.40 per week until their debt is paid. We submit that NSW should introduce a similar provision to what is in place in Victoria, where both the debtor and employer must be served a copy of the garnishee, and the garnishee does not take effect until 7 days after the debtor and the employer are served[2].

For garnishees on debts (including on bank accounts), there is no provision for any notice to be given at all, before a person's bank account can be completely emptied. We acknowledge that it can defeat the purpose of a garnishee on bank accounts for a debtor to be provided notice beforehand - the debtor will simply transfer all the funds out, prior to the garnishee taking effect. However this lack of notice must be considered with our recommendation for allowing a minimum protected amount, further discussed below.

A notice period will allow for people to obtain legal advice about the proceedings, or to otherwise organise their affairs by negotiating repayment arrangements with their creditors, putting in an application to pay by instalments through the court, consider refinance or sale of assets and/or obtain advice from a financial counsellor.

2. Garnishee of wages

***Recommendation 2*: The protected amount debtors can retain for essential living expenses should be increased from the current level of $458.40 per week**

Wage garnishees allow creditors to be paid a proportion of the debtor's income directly from the employer. Under NSW law the protected income a person is allowed to keep for their own use and support is the standard workers compensation weekly benefit (s122(1) *Civil Procedure Act 2005 (NSW)*).

We appreciate that legislation was introduced several years ago to increase the protected amount from 80% to now the full worker's compensation amount. However, this full amount still equates to just $458.40 per week (as at 1 April 2014) regardless of how many dependents the debtor has, what the debtor's living expenses are, and other financial commitments the debtor may have. This amount is already under the median rent in Sydney of $490 per week[3].

Applications for garnishee orders generally are not inspected by a Magistrate but simply consented to by a court Registrar, resulting in creditors developing the practice of automatically specifying that the debtor retain only this minimum amount. Therefore, instead

[2] S72.02 and 72.06 Supreme Court (General Civil Procedure) Rules 2005 (Vic)

[3] March quarter 2014, Department of Housing's Rent and Sales Report (No. 107 ISSN – 1440 – 0049)

of the threshold constituting the minimum protected income, it has come to more resemble the standard income for a person subject to a garnishee order.

We contend that at a minimum this amount has to be reviewed and increased significantly based on costs of living, or alternatively be set as a percentage of net income – such as 95% of net income for people earning under $500 per week, decreasing to 80% of income for people over $1000 net per week. Our preference however is for a discretionary system, as discussed below. We note Tasmania combines elements of both - a creditor can first apply for a provisional garnishee on 20% of a person's net wages, and this becomes final garnishee if the debtor does not object within 21 days[4].

Recommendation 3: Courts should exercise discretion in determining the appropriate proportion of wages to be garnisheed, taking into account an individual's particular circumstances (such as number of dependents, living expenses and other financial commitments)

Legislation in Victoria, South Australia, Queensland, Western Australia and the Northern Territory facilitate a judicial assessment of the totality of a person's financial and personal circumstances takes place before the proportion of a person's income that can be garnished is determined[5]. The Northern Territory goes further, in that the court cannot set the protected earnings at less than 80% of net income, unless the court receives income and expense information from the debtor[6]. The ACT provides that in determining the amount and timing of the orders, the court must be satisfied the order will not impose unreasonable hardship on the debtor or their dependents[7]. South Australian legislation does not allow a garnishee on wages unless the debtor consents[8]. These types of provisions allow courts to ensure that debtors and their families are not forced into living in poverty and into defaults on other loans, and ensure that people are given fair leeway to repay their debts over a reasonable timeframe.

In NSW, the debtor can apply to the court to pay by instalments to reduce the amount of the garnishee. However this leads to the absurd outcome that if the court rejects the instalment application because the court is not satisfied the debtor can afford to repay the debt within a reasonable timeframe, the result is that the garnishee continues on at a rate higher then the court deems the debtor can afford.

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[4] Rule 921 and 923, Supreme Court Rules 2000 (Tas), section 129G Magistrates Court (Civil Division) Rules 1998 (Tas), FORM 25F Tasmania Magistrates Court (Civil Division)

[5] S72.02 and 72.05 Supreme Court (General Civil Procedure) Rules 2005 (Vic), s72.04 Supreme Court Rules (NT), s6 Enforcement Of Judgments Act 1991(SA), s856 Uniform Civil Procedure Rules 1999 (QLD), s21 and 26 Civil Judgments Enforcement Act 2004 (WA)

[6] Rule 72.05 Supreme Court Rules (NT)

[7] Rule 2352 Court Procedures Rules 2006 (ACT)

[8] Section 6, Enforcement Of Judgments Act 1991(SA)

We submit a discretionary system is required and that the discretion be exercised before a garnishee takes effect. This has the potential to produce side-benefits to lenders since all debts will be considered when garnishee orders are put into place. This will allow a judge to determine a garnishee order for one creditor that does not impinge upon the ability of a borrower to repay debts to other creditors. Creditors will not be in a rush to commence court proceedings on a first-in, best-dressed principle, giving debtors more time and leeway to negotiate repayment arrangements.

Recommendation 4: The length of time a garnishee can operate should be limited to 6 months

Currently, a wage garnishee can continue until the full debt is repaid, and could carry on for years. We have had callers express concerns about the impact of this on their continued employment, which is an essential component to them being able to maintain repayments in the medium to long-term.

We believe a maximum period of 6 months should be set, after which the creditor should re-apply. This will give debtors more room to negotiate directly with the creditor, outside the court system and without a negative impact on their employment.

Recommendation 5: There should be legislative protection against a debtor losing their job as a result of a garnishee being issued

Many of our callers express a concern about the security of their employment as a result of the garnishee order. We submit that NSW should introduce a similar provision to that in the ACT and Queensland[9] to ensure that this cannot happen, and that the employer would bear the onus of showing the dismissal was not due to the garnishee.

3. Garnishee of debts / bank accounts

Recommendation 6: There should be a minimum protected amount reserved for a debtor's essential expenses that creditors cannot access, set in line with the minimum protected amount for wage garnishees

There is currently no minimum protected amount under a debt garnishee, meaning that it can be used to completely empty a person's bank account without any prior notice. In practice, any garnishee issued results in a person's bank account being completely emptied.

This lack of a protected amount is in stark contrast with $458.40 per week protected under a wage garnishee. While this is some recognition that people must have some base level of

[9] Section 298 Magistrates Court Act 1930 (ACT), Section 99, Civil Proceedings Act 2011 (QLD)

income to try and survive on, these same wages lose that protected status as soon as it reaches a person's bank account and can be completely taken under a debt garnishee. This imbalance creates a perverse incentive for creditors to opt for debt garnishees.

This also affects Centrelink recipients, due to a problem with the Commonwealth Social Security Acts[10] which our office has lobbied for amendments. Under Commonwealth legislation, the amount of Centrelink benefits which is protected is the 'saved amount' which the person has not used over the previous four weeks - so where a person is living week to week and unable to save any part of their Centrelink, the entirety of their next Centrelink payment can be taken under a debt garnishee once it reaches their bank account. Centrelink welfare payments should not be garnisheed at the expense of a person's ability to pay for their basic living requirements, but the legislative protection in place rarely benefits anyone in practice.

The situation can cause enormous hardship, particularly where the garnishee is executed shortly after a person is paid their wages or Centrelink benefits, as it can leave a person with no funds to survive on until their next payday (which could be a month or more away). This creates unnecessary reliance and pressure for emergency and charity services to fill this gap.

Case study

Mr A was on Centrelink benefits. His bank account was completely emptied after the SDRO issued a garnishee on his bank account. This happened only days after his Centrelink went into his account, and he had close to another fortnight left until his next Centrelink payment would come in.

He had not received any recent notices or demands for the debt. He had been living with his mother but due to her mental health issues, he had to leave at short notice. He was living temporarily in backpackers accommodation at the time the garnishee took effect and was forced to leave as he did not have any money left to pay to stay there. He was left homeless and seeking emergency accommodation. This was eventually provided by the Department of Housing at a cost of $90 per day.

Mr A was unable to afford his anxiety medication for several days and suffered a seizure, which required medical attention.

SDRO does have policies in place to return some of the garnisheed funds if hardship grounds can be established, though the process can take days, but had the creditor been a non-government department, Mr A would generally have no such recourse.

[10] see for instance s62, Social Security (Administration) Act 1999, s1061ZZBO of the Social Security Act 1991

The significant proportion of our callers with bank garnishees are either on Centrelink or are low income earners who earn less than the minimum amount protected from wage garnishees and suffer immense hardship as a result, as illustrated in the case studies below:

- Ms D was a low income earner. She had her bank garnisheed but had never heard of or had dealings with the judgment creditor. The judgment was issued for one person under alternative names, one of which was a name identical to Ms D's marital name (a reasonably common name), but the alleged debt was incurred years prior to Ms D getting married and taking on that name. Ms D sent an affidavit to the creditor stating she was not the correct judgment debtor. The creditor then issued a wage garnishee on her employer.

- Ms O had a $30,000 debt owing as a shortfall loan after her car was sold. She was on Centrelink benefits and had been keeping money aside for the next two week's rent in her bank account. When she received the statement of claim, she applied to the lender to pay off the debt by instalments but did not receive a response. The lender issued a bank garnishee which emptied her bank account

- Ms H's business had failed, she lost her house, had family problems and suffered a nervous breakdown as a result. Her sole source of income was reduced to Centrelink benefits. She had only $120 sitting in her bank account, which was just enough to pay her phone and internet bill. A garnishee was issued and completely emptied her account. Ms H was unaware of any court proceedings against her and did not know who the creditor was when she called our service for advice.

- A financial counsellor rang for advice on a client who was on Centrelink benefits, and had his account garnisheed for a telecommunications debt. The client was seeking advice on bankruptcy so that he would have enough money to feed his family.

- Ms S was working and earned a medium income. A bank garnishee took the entire balance of her bank account leaving her with no money for the next fortnight to feed her children or pay rent. She was referred to charities to ask for assistance including food vouchers.

While there may be scope to argue that a wage garnishee should be differentiated on the basis that it continues to operate until the debt is repaid in full, it should be noted that there is no limit to the number or frequency with which bank garnishees which can be issued and this creates scope for creditors to specifically target a person's pay or Centrelink benefits long-term, as illustrated in the case studies below:

- Mr L had a default judgment obtained against him in 2004 for around $6400 for unpaid telecommunications fees. The alleged debt was largely for services incurred for a period over which Mr L was not living at the relevant property and was also likely statute barred, however Mr L was harassed into entering into consent orders for a repayment arrangement with the creditor after two agents of the creditor attended Mr L's workplace. Mr L later lost his job, became reliant on Centrelink benefits and was unable to afford repayments. The creditor issued **49 garnishees** on his bank account.

- In another case involving the same creditor, there were **over 40** garnishees issued over one person's bank account (the court registry officer stopped counting after reaching 40 as there were just too many to count)

Another point of difference between bank garnishees and wage garnishees is that there is typically no notice by the creditor or the bank before a bank garnishee takes effect. This ensures that consumers do not have opportunity to move their funds, however it also means that consumers who have no prior knowledge of the court proceedings against them or who have a genuine dispute about the debt have no notice or opportunity to obtain information or seek advice about postponing the enforcement action before their bank accounts are emptied. With wage garnishees, the employer or payroll officer can give employees some notice to prepare for the reduced income and to seek advice. With bank garnishees, there is no notice that the person will have no further funds until their next payment of wages or Centrelink benefits. This makes it vital for consumers to have a minimum amount which is also protected from debt garnishees.

Any concerns about consumers splitting savings into multiple accounts should be able to be dealt with procedurally, to make sure the consumer only has the benefit of the protected amount once. For instance, under s123(3) of the Civil Procedure Act, a bank needs to provide the judgment creditor a statement showing the amount attached under the garnishee, how much has been retained by the garnishee and the amount paid to the judgment creditor. The Act could allow the creditor to use this statement as evidence the protected amount has already been retained and therefore be permitted to then demand the full account balance from any other accounts for the next two week period etc.

We propose that the minimum protected amount be set at 4 weeks worth of the workers compensation amount, which at today's level would total $1833.60. We nominate this 4 week period on the basis that it is fairly common for workers to have monthly pay cycles, to ensure that these debtors still have the same amount to live off as a debtor who is subject to a wage garnishee.

***Recommendation 7*: Courts should be given discretion as to the appropriate amount to be garnisheed, considering the debtor's whole circumstances**

In addition to setting a base minimum protected amount as above, we submit that the courts must be given discretion to adjust the protected amount based on the financial and personal circumstances of the debtor. Queensland has a provision which requires the court to consider factors including necessary living expenses of the debtor and their dependents, other known liabilities and the amount of hardship to the debtor[11]. ACT legislation requires the court to be satisfied the order will not impose unreasonable hardship on the debtor or their dependants, before the order is made[12].

Recommendation 8: There should be greater court oversight over the use of debt garnishees in an oppressive manner, or as a fishing expedition

[11] Section 840 Uniform Civil Procedure Rules 1999 (QLD)

[12] Rule 2303 Court Procedures Rules 2006 (ACT)

There should be some judicial oversight of matters where an excessive number of debt garnishees have been issued over the one matter. At the moment, our understanding is that the courts practice is normally to process the applications administratively and without regard to the number of previous applications – as illustrated by over 40 garnishees being issued in two of the case studies above.

We submit that there should be a limit set on the number of different financial institutions (eg. three times) a debt garnishee can be issued on within a set timeframe (eg. a year), but that the court also be allowed the discretion to permit further garnishees if the creditor is able to satisfy the court that it is otherwise appropriate (by putting on affidavit evidence). The onus of challenging these numerous garnishees cannot rest on debtors, since they have no prior notice of debt garnishees before it takes effect. Further by the time a debtor discovers these garnishees, the financial institutions involved will normally have already wasted resources in compliance efforts.

Garnishees should also not be used as "fishing expeditions" to locate a debtor's bank account, particularly as the costs of enforcement are invariably added onto the debtor's outstanding balance. Creditors have an existing system to compel disclosure of this type of information by issuing Examination Notices and Orders, non-compliance of which can lead to the debtor's arrest. If the creditors want to argue exceptional circumstances, this should be an application brought before the court to consider on its merits.

4. Writs for the levy of property

***Recommendation 9*: The categories of personal items not available for forced seizure and sale by the sheriff, should be aligned to protections provided under the federal Bankruptcy Act 1966**

***Recommendation 10*: Sheriffs should have discretion to seize and sell property to balance the need to avoid delay and expense with minimising hardship to the debtor or other persons.**

In NSW, the list of property protected from forced seizure and sale by creditors includes only clothing, bedroom and kitchen furniture and $2,000 worth of tools of trade in use by the debtor or the debtor's family (s106, *Civil Procedure Act 2005 (NSW)*).

In bankruptcy, the items a person is permitted to keep includes a car up to a prescribed limit - currently $7350 and tools of trade up to $3600 (s116(2) Bankruptcy Act 1966 (Cth)) and basic essential household items including 1 washing machine, 1 telephone, and educational or sporting equipment for kids or students (under 6.03 Bankruptcy Regulations 2006).

The bankruptcy trustee can also exercise discretion on whether they will take other personal possession having regard to other personal circumstances such as health or medical needs and geographical isolation.

In our experience the asset people are most eager to protect is usually the family car, particularly people living in rural and regional areas who have no further means of transport, and people who have medical or health issues or care for family with such issues who cannot risk losing their car. These people are generally already disadvantaged and under financial pressure. Depriving them of a car can equate to loss of essential medical or community services, lack of opportunity to obtain or continue work, and the creation of additional expenses adding to their hardship eg. by forcing them to shop at the only grocer in town.

Most households are not able to function without essential household appliances such as a washing machine. With smaller items such as one telephone or one radio, the resale value of these second-hand items are usually miniscule particularly once the sheriff's time and costs are taken into account. This enormous disadvantage to the consumer and the use of sheriff's department resources in this way, needs to be weighed against the little (if any) overall financial gain to the creditor of having these items seized. The sheriff should have the ability to exercise the same discretion as a bankruptcy trustee, in balancing the interests of the creditor with disadvantage to the consumer and the potential costs of enforcement compared to the likely proceeds on sale.

This also creates a burden on community and charity services to replace essential items taken by the sheriff. In one call to our office, a charity was able to replace an essential household item seized by the sheriff, only to have the creditor issue a new writ of possession to seize the item donated by the charity.

There is a genuine need for consumers to have essential household items protected from creditors. This has been recognised in the Bankruptcy Act. While one distinction is that bankruptcy generally lasts for three years, it has to be noted that low-income earners would save for years to accumulate essential household belongings and the family car, and these could take years to replace. Further creditors have at least twelve years from the date of judgment to enforce a debt.

The present state of the law only penalises the consumers who do not want to go bankrupt. Forcing a person to go bankrupt to simply protect essential household items is not in the public interest, nor does it assist creditors. Once a person goes bankrupt, their essential household items are protected and the creditor's rights to recovery are severely restricted. The current discrepancy in the law hurts the consumers who genuinely want and intend to pay off their debts but require more time to do so.

Implementing this change would bring NSW in line with Victoria, Queensland, ACT and South Australia, where what constitutes protected personal property is defined by reference to federal bankruptcy legislation[13].

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[13] S42, Supreme Court Act (Vic) 1986; s7 Enforcement Of Judgments Act 1991 (SA), s828, Uniform Civil Procedure Rules 1999 (Qld) with exempt property as defined under Civil Proceedings Act 2011 (Qld), Rule 2200 Court Procedures Rules 2006 (ACT)

Tasmania and Queensland also have legislation which explicitly gives the Sheriff executing a seizure and sale some discretion to determine the appropriate order for the seizure and sale of property[14].

Other comments

We would also like to add we are very supportive of the role of the NSW sheriff's office in executing writs for the levy of property. We appreciate it can be a challenging role to approach people under financial stress in their homes and to seize household items. We strongly commend their efforts to:

1. Provide consumers with general information and referrals to appropriate services for advice; and
2. Act with fairness and impartiality, as a part of the court and justice system

If you have any questions or wish to discuss our submissions, please do not hesitate to call us on the contact numbers provided below. We would be very pleased to meet to elaborate on the contents of this submission further.

Yours faithfully,

Consumer Credit Legal Centre

Katherine Lane
Principal Solicitor

Karen Cox
Co-ordinator

[14] Regulation 906 of the Supreme Court Rules 2000 (Tas), s829, Uniform Civil Procedure Rules 1999 (Qld)