

**Submission
No 2**

DEBT RECOVERY IN NSW

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Submission to the Parliamentary Committee Inquiry into Debt Recovery in NSW

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Introduction

This submission is lodged by Gadens as solicitors for the Mortgage and Finance Association of Australia (**MFAA**).

The MFAA is the peak national body providing service and representation to over 10,000 professional accredited advisers (mortgage and finance brokers, mortgage managers and aggregators) to assist them to develop, foster and promote the mortgage and finance industry in Australia.

The MFAA's members include many lenders and servicers (managers) for lenders. These lenders and their services are involved in collecting debts both in relation to:

- real estate secured finance;
- equipment or other goods finance; and
- unsecured loans,

for both consumer and business purposes.

PART 1 - THE EFFECTIVENESS OF CURRENT LEGISLATION AND ADMINISTRATIVE ARRANGEMENTS

Licensing under the CAPI Acts

Debt collection is defined in the *Commercial Agents and Private Inquiry Agents Act 2004 (NSW)* as 'an activity carried out by a person on behalf of a second person (not being his/her employer) in the exercise of the second person's rights under a debt owed by a third person'. The definition is similar in legislation of other jurisdictions.

The relevant legislation is *Property Agents and Motor Dealers Act 2000 (Qld)*, *Commercial Agents and Private Inquiry Agents Act 2004 (NSW)*, *Security and Investigations Agents Act 2002 (Tas)*, *Security and Investigation Agents Act 1995 (SA)*, *Debt Collectors Licensing Act 1964 (WA)*, and *Commercial and Private Agents Licensing Act 1979 (NT)*

The NSW legislation is similar to legislation in other states and territories of Australia with the exception of Victoria and ACT. Victoria decided that a negative licensing arrangement was more appropriate. The MFAA is strongly in support of harmonisation of laws around Australia. We understand harmonisation of the debt collection legislation is on the COAG agenda, but that consideration has stalled.

Western Australia has indicated that it has ceased monitoring and supervising its legislation pending the outcome of the COAG unification of laws process.

We are not aware of any compelling reason to continue the so-called CAPI Act licensing regime and commend the Victorian model for consideration. This is particularly so given the regulation of debt collection as described in the next heading.

The imposition of licensing is contrary to the spirit of deregulation and adds costs to the operation of debt collection businesses which is inefficient for the economy and is inevitably passed onto debtors or society as a whole.

Duplication of licensing

Most of the MFAA's members involved in debt collection are licensed under the *National Consumer Credit Protection Act 2009* (Cth). There are special provisions in that Act which regulate the activities of debt collectors in relation to collecting debts arising from credit regulated by the *National Credit Code*.

ASIC regulates debt collection under the *Australian Securities and Investments Commission Act*, usually referred to as the ASIC Act, and the *Competition and Consumer Act*). The ASIC Act is most relevant to the collection of credit.

Our members generally are not licensed under the CAPI Act on the basis that debt collection activities are incidental to their activities of lending or servicing. This is similar to real estate agents who we understand are generally not licensed under the CAPI Act but are involved in collection of arrears of rent. If licensing of commercial agents is to continue, incidental debt collection should be exempted and there should be a specific exemption for anyone holding an Australia Credit licence.

For the avoidance of doubt, the exemption for incidental collection should not be limited to Australian Credit Licence holders, as that licence only relates to regulated credit. These servicers also collect unregulated credit.

Requirement for employees to be licensed

Individual licences are required for employees in NSW and Northern Territory. This means that when new employees commence, they have to undertake a training course and there is a significant delay before they can obtain their personal licence.

This has a negative effect because prospective employees who are not already licensed are disadvantaged and employers are put to the cost of employing people who cannot undertake work while waiting for their individual licence.

This seems an unnecessary impost when employers are directly responsible for the conduct of their employees. The requirement for individuals to hold a licence only arises in NSW and Northern Territory whereas in other states we understand (but have not checked) corporate licences are sufficient.

PART 2 – BARRIERS TO THE DEBT RECOVERY PROCESS

Charging order against real property in respect of a monetary judgment

Section 126(1) of the NSW *Civil Procedure Act 2005* gives the NSW Supreme Court the power to make a charging order, following the obtaining of a judgment against a debtor. Our experience is that this method of enforcement has limited application. This is because it is most unusual for a judgment debtor to have **equitable** interests in property, such as cash or shares. It also appears that property in the context of s126 is a reference to personal property, not real property.

We suggest that s126(1) be amended to permit **any court** to make a charging order, and for the charging order to be able to made in respect of a legal or equitable interest (or both) in respect of any kind of personal or real property.

The absence of a strong way of recovering debts waters down the value of a judgement in an inappropriate manner. Courts would still have the power to decide whether it is appropriate to make the charging order in any particular case.

In South Australia a judgment creditor may apply to the court to register a monetary judgment as a charge over real property pursuant to section 8 of the *Enforcement of Judgments Act 1991* (SA) (the **EJA**).

[Section 8](#) of the **EJA** provides that:

(1) A court may, on application by a judgment creditor, charge property of a judgment debtor with a judgment debt or part of a judgment debt.

(2) Where the court makes an order under subsection (1), it may make ancillary or consequential orders-

- (a) requiring registration of the charge;
- (b) prohibiting or restricting dealings with the property subject to the charge;
- (c) providing for the sale of the property and the application of the proceeds of sale; or
- (d) relating to any other incidental or consequential matters.

"Property" is not defined in the EJA, but on its ordinary meaning it would encompass real property, which is consistent with the charge being able to be registered.

Further, section 105 of the *Real Property Act 1886* (SA) provides that:

"...the Registrar-General shall, on being served with a copy of any writ or warrant of execution against land, or of any decree or order ... affecting land issued out of or made by the Court, ... thereby, mark upon such copy the time of such service, and shall enter a memorial of such writ, warrant, decree, or order on the original certificate, which shall operate as a caveat against alienation other than in pursuance of such order while the same remains in force."

This means the judgment debt will be registered on the title of a subject property, with the presence of the charge enabling the creditor to be paid in priority to other unsecured creditors of the debtor.

Debt recovery generally

We submit that a simpler method of debt recovery would serve the community well. Perhaps a form of tribunal or an arrangement similar to the ASIC approved external dispute resolution schemes would provide a mechanism to obtain a prompt cost effective judgement when there is no material issue to be tried.

The large costs associated in court applications and obtaining judgement, plus the delays in obtaining judgement adds costs to the operation of debt collection businesses which is inefficient for the economy and is inevitably is passed onto debtors or society as a whole. Examination of such a model is outside the scope of this submission, but we think that any change should happen Australia-wide. It does seem appropriate that there is a cost efficient system for individuals and businesses alike to be able to promptly and efficiently collect debts.

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