

**Submission
No 25**

DEBT RECOVERY IN NSW

Organisation: The Law Society of NSW
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THE LAW SOCIETY
OF NEW SOUTH WALES

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16 May 2014

Mr Bryan Doyle
Committee Chair
Legislative Assembly
Committee on Legal Affairs
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

By email: legalaffairs@parliament.nsw.gov.au

Dear Mr Doyle,

Inquiry into Debt Recovery in New South Wales

I write to you on behalf of the Litigation Law and Practice Committee ("the Committee") of the Law Society of New South Wales to provide its submission in relation to the Legislative Assembly Committee on Legal Affairs Inquiry into Debt Recovery in NSW.

The Committee has addressed the issues of the effectiveness of the current legislation and administrative arrangements, barriers to the debt recovery process and impacts on third parties responding to debt recovery actions and possible measures to make the debt recovery process more efficient.

1. The effectiveness of current legislation and administrative arrangements and barriers to the debt recovery process

It is the Committee's view that the current legislative and administrative arrangements provide room for improvement. These arrangements are usefully viewed from three separate perspectives as follows:

- The processes involved which enable a creditor to obtain judgment on an undefended basis.
- The processes involved when a creditor has commenced legal proceedings and a debtor disputes the liability or quantum of the debt.
- The processes which enable a creditor to enforce a court judgment.

The most significant consideration for a creditor attempting to recover a debt, whether the debt is a liquidated or unliquidated debt, is the time and cost of the overall process. The barriers to collection of a debt again require an examination in terms of the three perspectives mentioned earlier.

1.1 Process to obtain default judgment in the Local Court

The processes involved to commence proceedings and to obtain judgment on an undefended basis involve the filing of a statement of claim, service of the statement of claim and then filing of a notice of motion for default judgment. The court will process the notice of motion for default judgment and either enter default judgment for the amount of the debt or otherwise default judgment for damages to be assessed.

The process to obtain default judgment in a liquidated matter commenced in the Local Court Small Claims Division as against a liquidated matter in the Local Court General Division is to a large extent identical but with one exception. When the proceedings are filed in the Small Claims Division a legal practitioner or otherwise a commercial agent may swear the affidavit of debt¹. However when proceedings are filed in the Local Court General Division, District Court or Supreme Court the creditor is required to swear the affidavit of debt, rather than the legal practitioner or commercial agent. This requirement will generally result in delay and additional costs to the creditor.

1.2 Local Court Small Claims Division – Jurisdictional Limit

The Local Court Small Claims Division has a jurisdictional limit of \$10,000.00. The court processes involved where a debtor disputes liability or quantum and the matter is litigated in the Small Claims Division are far less costly to both a creditor and debtor than if the matter is litigated in the General Division. The processes in the Small Claims Division do not generally allow for oral evidence and consequently the time involved to conduct the hearing will always be less than if the proceedings are conducted in the General Division. The trade-off however is that where matters are litigated in the Small Claims Division there is generally no cross examination of witnesses, the rules of evidence do not apply and significantly the rights of a party to appeal are limited to appeals on the grounds of lack of jurisdiction or denial of procedural fairness.²

The Local Court Small Claims jurisdictional limit prevents straightforward matters which exceed the jurisdiction limit from utilising the less formal and costly processes of the Small Claims Division.

1.3 Local Court Small Claims Division – Costs

A significant barrier to a party in Small Claims Division matters is the unrealistic limit on the recovery of costs. Even though the procedure is meant to be relatively informal, it is still the case that a party is required to satisfy their burden of proof. The limitation on awarded costs to only the costs which might be awarded on a default judgment can result in a party being significantly out of pocket for legal expenses in matters which are still within the jurisdiction of the Small Claims Division but are still of sufficient complexity to require legal representation.

¹ Rule 35.3(2)(b)(v) *Uniform Civil Procedure Rules 2005*

² Section 39(2) *Local Court Act 2007*

The costs provisions should be amended so that the court has the power to award one quarter of the amount claimed (as that formula is set for matters less than \$20,000 under Local Court Practice Note Civ 1) or the amount which would otherwise be awarded on default judgment, whichever is the greater.

1.4 Local Court Small Claims Division – Notices to Produce

The current processes in the Small Claims Division do not allow for the parties to serve a Notice to Produce. Part 21 of the *Uniform Civil Procedure Rules 2005* has been excluded from the Local Court Small Claims Division.³

The inability of a party to serve a Notice to Produce requiring the production of documents at the Pre Trial Review will in certain cases impede the ability of the parties to engage in early settlement discussions and to limit issues in dispute.

1.5 Local Court General Division

The Local Court General Division has a jurisdictional limit of \$100,000.00 and up to \$120,000.00 with the consent of the parties. The processes in the General Division are more formal than the Small Claims Division. Matters are frequently litigated in the General Division where the amount claimed exceeds the Small Claims jurisdictional limit but the amount of the dispute is less than the jurisdictional limit. By way of example, a plaintiff in a motor vehicle accident quantum dispute may have sustained damages where the amount claimed is \$20,000.00. The defendant on filing a defence might concede \$15,000.00 still leaving the disputed amount at \$5,000.00. The proceedings are still heard in the General Division because the amount of the claim exceeds the jurisdictional limit of the Small Claims Division.

1.6 Processes undertaken by Licenced Commercial Agents under the *Commercial Agents and Private Inquiry Agents Act 2004*

The Committee advises that there are instances where solicitors receive instructions from commercial recovery agents licenced under the *Commercial Agents and Private Inquiry Agents Act 2004* ("CAPIA Act") to recover damages arising from motor vehicle accidents. The instructions given by the commercial agent will generally be to recover either the repair costs or in some instances to recover car hire costs arising from the motor vehicle accident. The instructions to recover "damages" are not synonymous with instructions to recover a "debt" and therefore fall outside the term "debt collection" provided for within the CAPIA Act.

The authority of a commercial recovery agent to act on behalf of a person to recover damages arising from a motor vehicle collision should be clarified. The CAPIA Act should be amended to make it clear that a commercial agent either does have or does not have the ability to receive and act on instructions to recover damages for motor vehicle repair costs or car hire costs (perhaps in the same terms as Rule 14.13 of the *Uniform Civil Procedure Rules 2005* or in accordance with the definition of debt in the *Local Government Act 1993 (NSW)*).

³ Schedule 1 *Uniform Civil Procedure Rules 2005*.

1.7 Processes which enable a creditor to enforce a judgment debt

The most significant barrier facing a creditor concerns the recovery of the amount of a judgment debt. One of the ways a creditor may attempt recovery of the judgment amount is via a garnishee order served upon a bank or other financial institution. Most banks require the garnishee order to be served via post at the registered office of the bank. The process could be improved by allowing for the service of garnishee orders upon banks or financial institutions via email.

The ability to enforce a judgment debt by registration against a debtor's land is so complicated and unwieldy that it is almost impossible to utilise. It is also the case that some judgment debtors can stop this process at any time by the filing of a Notice of Motion to Pay by Instalments which results in an automatic stay of enforcement on the first such application.

The Committee recommends that the procedure set down in Part 39 Division 2 of the *Uniform Civil Procedure Rules 2005* be streamlined and that the ability for a debtor to obtain any stay of enforcement be limited and only granted by a Magistrate once a period of two weeks has lapsed after service of the judgment creditor's notice under Rule 39.21(2).

2. Possible measures to make the debt recovery process more efficient

2.1 Processes to obtain default judgment

The requirement, except in the Small Claims Division, for the creditor, rather than the solicitor or commercial agent, to swear an affidavit on information and belief to obtain default judgment should be amended as it adds time and therefore costs to the process. The Committee considers that the process to obtain default judgment could be improved by removing the restriction found within Rule 35.3 of the *Uniform Civil Procedure Rules 2005* preventing solicitors or recovery agents from swearing the affidavit of debt.

2.2 Local Court Small Claims Jurisdictional Limit

Consideration should be given to expanding the jurisdiction of the Local Court Small Claims Division in light of the advantages in terms of costs and time achieved when litigating matters in this Division. Any expansion should however ensure safeguards are in place so that appeal rights are not reduced.

The Small Claims Division is presided over by Local Court Assessors or otherwise by Local Court Magistrates. The Small Claims Division process is very similar to the hearing process in the Commercial Division of the New South Wales Civil and Administrative Tribunal.

The Committee recommends that changes are enacted providing for the transfer of proceedings from the General Division to the Small Claims Division in the following circumstances:

- Where evidence is available that the disputed amount is less than the jurisdictional limit of the Small Claims Division notwithstanding that the amount claimed by the plaintiff may exceed the jurisdictional limit; and

- Where the parties by consent agree to the proceedings being transferred to the Small Claims Division.

However, the Committee also recommends that where proceedings are transferred by consent to the Small Claims Division the appeal provisions, enabling either party to appeal on the basis of an error of law be preserved. An amendment to section 39 of the *Local Courts Act 2007* would need to be made to preserve the rights of appeal where the amount of the dispute exceeds the jurisdictional limit of the Small Claims Division but the proceedings were by consent dealt with in that Division.

The Committee does not support any proposal to increase the monetary jurisdiction of the Small Claims Division. The current limit of \$10,000.00 is appropriate.

2.3 CAPIA Act

The Committee has noted earlier the observations of legal practitioners that commercial recovery agents will in some instances provide instructions to solicitors to act in relation to the recovery of damages arising from motor vehicle accidents. Technically, damages for negligence do not constitute a debt and as such, it may be that where a commercial recovery agent has been instructed to recover damages the recovery agent is acting outside the CAPIA Act.

The Committee suggests that a definition of "debt" be included in the CAPIA Act to clarify the authority of a recovery agent to act in relation to the recovery of damages arising from a motor vehicle accident.

The Committee thanks you for the opportunity to provide this submission. Should there be any questions arising from these comments please do not hesitate to contact Leonora Wilson, policy lawyer on [REDACTED] or via email: [REDACTED]

Yours sincerely,

[REDACTED]

Ros Everett
President

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