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DEBT RECOVERY IN NSW

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Review of the Debt Recovery Process

A submission to the Parliamentary Inquiry into debt recovery in NSW

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Preamble

"Bob" owns a petrol station in the Southern Highlands of New South Wales. Every few years an armed robber will come into his service station and demand money. Life being more important than money, Bob carefully hands over the contents of the till and lets the robber decamp with it before calling the police.

The police come out as soon as possible and conduct a detailed investigation, taking fingerprints and obtaining witness statements and reviewing closed circuit television footage. Each robbery on average nets one or two thousand dollars but Bob will readily tell you that the amounts stolen by robbers are tiny compared to the money that his business loses through bad debts.

In order to maintain competitiveness and regular clientele, it is necessary for the petrol station to supply credit facilities to local business operators. When these businesses go broke the legal system that throws so many resources into trying to catch an armed robber seems to go into reverse. A police force that will chase a person who steals $1000 at gunpoint doesn't want to know about a trucking company that fails to pay a $10,000 bill for fuel and tyres. They tell the proprietor that stealing $1000 is a crime but that running up a $10,000 bill with reckless disregard for your ability to pay it and then absconding into another State without leaving a forwarding address or "rebirthing" a company in order to avoid payment, is not a crime. They tell him it is a "civil" matter. Turning to the civil legal system the petrol station proprietor soon learns that the system erects barriers to justice as if intent on dissuading him from pursuing his rights to recover his money, thereby assisting debtors to get away with "debt theft".

Of course, some complaints about the debt collection system are based on public ignorance and a lack of understanding of basic human rights to natural justice, proper procedure and even-handed practice. There are, however, myriad complaints that are fully justified thanks to the *ad hoc* way in which the Australian debt collection system has been cobbled together over time. Creditors regularly complain that the legal system has a culture that treats creditors as if they are the villains and debtors as if they are victims. We are expected to "feel sorry" for debtors but never for creditors. Creditors complain that the barriers to collecting debts have been increasing over the years.

Those barriers fall into four categories:

- **(a) ineffective enforcement processes;**
- **(b) inadequate cost recovery;**
- **(c) inappropriate fee structures; and**
- **(d) lengthy and complex processes.**

Thoughtful creditors justifiably complain that the legal system has become increasingly ineffective to the point of being corrupt – a corruption born not of greed or avarice but of faulty thinking. It is in desperate need of repair.

1. Ineffective Enforcement Processes

1.1. Discovery – Absconding Judgment Debtors
The single largest problem with enforcement is finding absconding debtors. You obtain judgment, issue a Writ and the sheriff reports back that the debtor has left his address and no one seems to know where he has gone. Privacy laws prevent organizations from volunteering that type of information but they allow that it may be volunteered to a Court. Few organizations will volunteer such information. They all say that they need a Court order before they will supply. The problem is that there is no simple, cheap way of obtaining such an order and most people agree that the supply of that type of information needs to be supervised by the Court.
The 2005 reforms created a new extended procedure for Preliminary Discovery in which application can be made to the Court for an order to be made to any person to disclose the whereabouts of a defendant so that a Statement of Claim may then be served upon them. The problem is that this procedure only applies to the commencement of actions and only in relation to claims over $10,000. Around half of all claims in N.S.W. are under $10,000. It also does not apply to attempts to find absconded debtors after judgment. This is very strange. At the commencement of an action a defendant may ultimately be found to be "innocent" of owing a debt yet their privacy is readily voided by this procedure. After judgment the defendant has been found "guilty" of owing the debt yet their privacy is then protected!!!!
I ran a test case in the Local Court some time ago. We only had the judgment debtor's mobile telephone number. Telstra confirmed that they held his current address but would only supply it if served with a Court order. After careful legal consideration and research and an expression of sympathy for the judgment creditor's plight, the Court held that they had no power to make such an order. Catch 22! That was in 2003. The judgment debt was for $1200 and is still outstanding. I have a whole filing cabinet full of such matters dating back to 2001.
SOLUTION: Change the rules to allow an order for Discovery as to a party's whereabouts to be made at any time in all jurisdictions.

1.2. Writ for the Levy of Property
The biggest single problem in executing a Writ for the Levy of Property is the fact that sheriff's do not work appropriate hours. Up until the mid 1970s, most women stayed at home as housewives and mothers and "hubby" went to work. If the sheriff went to the house on, say, a Tuesday morning at 11.00am, he was most likely to meet with the wife and thereby execute a Writ to seize and sell the debtor's goods.

Today, most women are in paid employment, the vast majority of homes are therefore empty during the day and execution of a writ cannot proceed. Sheriff's do not normally work outside of the hours of 8.00am to 6.00pm, Monday to Friday. In the outer lying suburbs of Sydney, most commuters are on the railway station before 8.00am and don't get back in the door at night until after 6.00pm. The last 30 years has therefore seen a massive increase in the sheriff's failure rates for executing writs. In order to redress this, sheriff are now required to telephone and writ to debtors before they attend the premises to try and execute the writ. This adds to delay and allows debtor's time to hide their assets. Sheriff used to be plain clothes officers and drove unmarked cars but now wear uniforms and drive cares emblazoned with their emblems. . This gives debtor's sufficient warning not to open the door. Sheriffs used to work alone but not are required to work in pairs. This had the effect of doubling

the cost of providing the service. The word "Writ" means nothing to the public but they know what "warrant " means. As in Victoria, the Writ should be re-named "Warrant to Sell Property".

SOLUTION: Sheriff's officers need to work rostered shifts so that writs can be executed at night and on weekends. They should drive unmarked vehicles and wear plain clothes. They should not warn debtors of an intention to attend and seize goods. They should show their badge, leave a card and the Writ should be renamed a "Warrant to Sell Property".

1.3. Warrant to Apprehend Judgment Debtor

Sheriff's officers attempting to execute a Warrant to Apprehend a debtor who has failed to attend for Examination have no power to hold the person in custody or admit them to bail. They must therefore apprehend them during Court sitting times, allowing sufficient time to transport them to the Court. Court registry hours are 9.00am to 4.30pm. An Examination normally takes 30 minutes to conduct. Registrars get upset if the Sheriff produces a recalcitrant judgment debtor for examination at 4.29pm. Sheriff's Officers therefore try to execute a Warrant to Apprehend Judgment Debtor between 8.30am and 3.30 pm. Most judgment debtors are not home during those times.

Even in a civil case, a witness who fails to comply with a subpoena to attend a hearing and give evidence may be arrested by the police, taken to a police station, held in custody until the next morning's court sessions or admitted to bail to attend court on the next hearing date. This is what can happen to a total stranger who just happened to be a bystander witness to, say, a motor vehicle collision. Why do we afford greater leniency to a judgment debtor who has already been found "guilty" of owing money and has treated the court with a continuing stream of contempt. Such a judgment debtor has, typically, ignored the service of a Statement of Claim, had Default Judgment entered against him, been served with a Examination Notice giving him 28 days to voluntarily respond but failed to do so, then been personally served with an Examination Order to attend court which was not complied with, then sent a notice by the Court giving him 14 days to make amicable arrangement to attend court and failed to do so, all the time being warned that arrest was a possible outcome of failure to comply. Professional debtors are laughing at the court and treating it and the creditors with contempt.

SOLUTION: Have Warrants to Apprehend a Judgment Debtor executed by the police 24/7 under the same rules that apply to warrants to apprehend a witness so that the system works effectively and judgment debtors can no longer get away with treating the courts and judgment creditors with such contempt.

1.4. Bank Garnishee Orders – Joint Accounts

When a sheriff attempts to execute a writ to seize and sell goods they may seize goods that the judgment debtor owns jointly with another. This "other" is usually their spouse or business partner. When a bank, however, is served with a Garnishee Order the bank may not apply the Garnishee Order to any account that the judgment debtor runs jointly with another. This is also usually the spouse or business partner. This is crazy!

Any person who chooses to operate a joint account with another person also chooses to assume a risk that that person might abscond with the cash. This stupid rule allows a judgment debtor to maintain thousands of dollars in a joint bank account and never risk having it garnisheed. Often the joint account holder is a spouse who is enjoying the new home theatre system or the plumbing repairs that weren't paid for and may even be a dependant of the judgment debtor, contributing nothing to the account. Professional debtors use this loophole to get away with debt theft. It needs to be closed.

SOLUTION: Re-write the regulations to make it clear that garnishee orders will attach to accounts even if that account is held jointly with another.

1.5. Bank Garnishee Orders – Term Deposits

A garnishee order only attaches money which is due and payable at the time it is served. Thus an employer cannot be required to divert a debtors wages before they have been earned and a debtor who will owe money to the judgment debtor cannot be required to divert payment before it is due to be paid. It is unfair to the innocent garnishee to require them to pay money before they are due to pay it because they might not then have it.

On a similar basis the law currently requires that a term deposit held in a bank account on behalf of a judgment debtor cannot be garnisheed. The same logic in that case, however, does not follow. The bank does have the money and are not being required to pay out something they don't have. Most term deposit agreements have a provision whereby a customer may withdraw the money in an emergency and suffer a penalty of lower interest. A judgment debtor who owes, say $2000 under a judgment debt, may have $10,000 deposited in a term deposit yet that amount cannot currently be touched under a garnishee order even though the bank would most probably release it to the judgment debtor to pay the debt if the judgment debtor asked..

SOLUTION: Write a regulation that makes it clear that garnishee orders will automatically attach to term deposits irrespective of when they fall due. Prescribe a penalty amount formula that can be retained by the bank to compensate it for its opportunity loss.

1.6. Garnishee Orders – Administration charges

When a bank or employer executes a Garnishee Order and deducts money from the judgment debtor's account or wages, the regulations allow them to charge $13.00 for the cost of administering the order. This fee has not been increased for years. The regulation makes it clear that the administration fee does not act to reduce the amount of the debt. However, most banks, if served with a Garnishee Order for, say $500, will remove $13 for themselves and send the creditor $487. The problem with that approach is that it makes the judgment creditor carry the banks' administrative costs which means that the judgment debt will always be underpaid by $13.00. If I can only rely on garnishee orders, I can keep issuing them forever because the debt will never be paid off. This creates a perpetual loop of never ending debt and enforcement process.

The other problem is that the banks only get paid the $13.00 for administering to a Garnishee Order when they have some money to remove from the account. The vast majority of Garnishee Orders are met with the response that "there are no attachable funds available at this time". This is "privacy speak" for the fact that there is either no money in the account, it is a joint account and can't be garnisheed, it is a term

deposit and can't be garnisheed or there is a charge on the account securing another loan and cannot be garnisheed. The banks currently have to carry the cost of administering these accounts and they pass the cost on to more scrupulous customers such as myself. It is simply inequitable and tends to accommodate bad debtors.
SOLUTION: re-write the regulation to make it clear that the $13.00 Garnishee administration fee is levied <u>in addition</u> to the amount to be deducted and that a bank may charge the fee to the judgment debtor's account as a proper bank charge even in relation to unsuccessful garnishee orders. Increase the fee to $20.00.

1.7. Bank Garnishee Orders – Small amounts
Banks are required to comply with a garnishee order even when the amounts to be deducted are tiny. A typical worker in Australia costs around $0.50 per minute to employ. Add the cost of stamps and envelopes and the whole thing becomes absurd. I've had a bank send me a cheque for $1.34 in response to a Garnishee Order. It cost me $4.00 just to process it.
SOLUTION: Write a regulation that says that a bank need not process a Garnishee Order where the balance of the account is less than, say, $25.00.

1.8. Examination Hearings
When I started working for the N.S.W. Attorney General's Department on 11 February, 1975 (at Liverpool Court House) Examination hearings were conducted in a Court room by the Registrar. Judgment debtors were put in the witness box, placed on oath and then cross examined in open court quickly and efficiently by the Registrar or by the creditor's solicitor. When I resigned from the Attorney General's Department on 11 February, 2000, Examination hearings at Liverpool Court House were not conducted by the Court at all. A junior clerk at the counter would call the parties together and then send them outside to "have a chat". This had become normal practice across the State. At Ryde Local Court "outside" is busy Victoria Road where the parties can barely hear each other above the din of the passing traffic.

A court that shows contempt for its own procedures shows contempt for the society it serves. Allowing too much informality in the conduct of Examination hearings has undermined the power and force of the court. Formality has an intimadatory effect on recalcitrant debtors and encourages them to have greater respect for the court, its power and processes. They are more likely to attend Court. They are more likely to tell the truth. In 1975 around 20% of debtors didn't show up and warrants were authorized for their arrest. Today around 90% of judgment debtors don't show up and warrants are still authorized for their arrest. Around 80% of those debtors are never actually arrested (see 1.2 above). The few who do show up are often shocked or bemused by the informally and are given no reason to take proceeding seriously. The 2005 legislation abolished the requirement that Examination hearings be conducted formally in Court or in Chamber, abolished the provision that the Registrar could be asked to conduct the hearing and yet, at the same time, introduced massive fees (see inappropriate fee structures) to be paid by the judgment creditor to have the privilege of having his needs mocked by a Court system that has lost its way. It is an absolute disgrace!

SOLUTION: Re-introduce the requirement that examinations are to be conducted before the Registrar on oath in Court or in Chamber. Train Registrars to conduct Examination hearings with formality and solemnity. Make conduct of the Examination by the Registrar the default situation unless the judgment creditor or his solicitor attend and wants to conduct it himself and allow parties to agree to conduct examinations informally only by leave of the Registrar.

1.9. Instalment Orders - guidelines

A judgment debtor may make application to pay the judgment debt by instalments at any time. The old convoluted and inefficient procedures of the past were rectified with the 2005 legislation but there have never been any suitable guidelines or training for registrars to follow in relation to how to deal with these applications. Hundreds are dealt with in N.S.W. every day and have been for decades yet the Courts are still "winging it". It is an absolute lottery as to what sort of result anybody can expect. There is little case law, no guidelines and no training available to Registrars.

The Form 46 – Notice of Motion to Pay by Instalments used to contain a requirement in its supporting affidavit for the debtor to advise the name and bank at which they held their bank accounts and name and address of their employer. This meant that, if the debtor failed to comply with the instalment arrangement, it was a cheap and easy process for the creditor to then Garnishee the bank account or employer. This requirement was removed from the forms in 2005 in order to simplify them. Now the creditor needs to issue, serve and conduct an Examination hearing to glean this information, which adds four to five hundred dollars to the debt.

SOLUTION: Create and publish guidelines for the processing of instalment applications and objection hearings. These should be based on the concept of the balance of prejudice and take into account the burdens they place upon or remove from either party. Re-instate the requirement the a debtor to advise details of their bank and branch and of their employer when they apply to pay by isntalments.

1.10. Interpleader Relief – Sheriffs

Where a sheriff makes a seizure of goods under a Writ for the Levy of Property, a person will sometimes come forward claiming that the seized property does not belong to the judgment debtor but is theirs. Unless their claim is absolutely clear, the sheriff will take a claim form from the claimant and send it to the creditor inviting the creditor to accept the veracity of the claim and allow the sheriff to return the goods to the claimant. The problem is that the claim form is poorly designed and does not contain sufficient information for anyone to ascertain the appropriate course of action. The creditor only has 4 days in which to reply! The creditor therefore has little choice but to refute the claim and the sheriff then has to apply to the Court for interpleader relief. The claimant and the creditor then have to attend Court with the sheriff and hear what the claimant has to say about why they say they have a prior claim to the goods. Much of this is a waste of time. A better form would solve the problem

SOLUTION: Prescribe a formal "Notice of Claim to Sheriff" which requires a proper explanation from the claimant as to the basis of the claim for ownership (purchase, gift, construction) why the goods were found in the possession of the judgment debtor and a declaration that

they were not sold or gifted to the judgment debtor. Allow the creditor at least 14 days in which to respond.

2. Inadequate cost recovery

2.1. Restricted Costs: Small Claims Division

Hearings in the Small Claims Division of the Local Court have restricted legal costs applied to them. This is because of the rational desire at the lower end of the debt collection scale that it should be possible to prosecute or defend a claim for a relatively small amount without being intimidated by the threat of incurring legal costs out of all proportion to the claim. For example, if you have a dispute about a debt of $1500, you don't want a solicitor to spend $300 per hour for ten hours preparing the case. Spending and risking $3000 to collect $1500 is obviously crazy.

When the Small Claims Division commenced in the early 1990s, procedures were simplified and stripped back so as to make the whole process cheaper and easier. It was initially thought that most parties would not use a solicitor and would appear themselves. This did not occur in practice. Even with Chamber Magistrates to assist parties with the preparation of cases, the vast majority of parties still employed solicitors. Even with the simplified processes involved, people still found it difficult to grasp basic legal concepts and prepare basic written statements. The vast majority of cases involve corporations who were too busy to teach themselves to be their own lawyers and who continued to brief a lawyer simply because it was more convenient.

The complaint then grew that the limited costs allowable on defended cases in the small claims division are simply too limited and basically unfair. This is even worse now that the N.SW. Local Courts have virtually abolished the Chamber Magistrate service and clear, simple and free legal assistance for parties is now harder to obtain. The regulations limiting costs are also confusing and ambiguous and it seems that they are being misinterpreted.

The regulations say that solicitors costs for the conduct of a defended case in the Small Claims Division will be limited to the amount allowed upon the entry of Default Judgment. The rules in Part 2.9(4), however, go on to say that other fees and costs can be added including other matters for which fixed costs are prescribed. Most courts, however, refuse to consider the "other matters for which fixed costs are prescribed." There is controversy as to what that refers to and what it means. Most courts discount it as meaningless. This is nonsense. The Parliament does not include meaningless terms in its legislation. Some, including myself, say that it means that the scale costs of issuing the Statement of Claim are to be added to the amount that can be ordered for the conduct of the defended hearing.

For the highest possible claim of $10,000 the costs allowed on issue of the Statement of Claim is currently $481.60. The amount that may be awarded on entry of Default Judgment is $697.70 but this includes the $481.60 allowed for commencing the action. The cost of actually applying for Default judgment is therefore $216.00. The controversy, therefore is this: When you win a defended Small Claims hearing are you entitled to costs of $216.00 (costs of applying for default judgment), $697.60 (total costs allowed on Default Judgment) or $1179.20 (costs of issue plus costs on default judgment)? Nobody believes that you only get $216.00. A few Magistrates award the higher amount. The full-time assessors and most Magistrates award the middle amount. The higher amount is the only amount

that makes sense and it seems to be what Rule 2.9(4) is talking about. Adopting the middle amount creates all sorts of distortions.

Suppose, for example, that a plaintiff uses a solicitor to commence the action and pays that solicitor $481.60 in scale costs to do so. The matter is then defended and the plaintiff decides to run the remainder of the case himself in order to save solicitor's costs. If that plaintiff wins and asks to be awarded the $481.60 costs paid for the commencement of the action, the majority of courts will currently refuse to make any costs order at all! They say "But you didn't use a solicitor for the hearing!." What if the party commences action without a solicitor and has a solicitor prepare the witness statement. What if the solicitor only does the Pre-trial review? What if they only do the hearing?

Another crazy distortion is the fact that the Court can order ups $697.60 for an adjournment or on striking out of a pleading. The debtor shows, you win and are awarded costs of $697.60. If the debtor does show up, you are awarded $697.60 for striking out the Defence. Then you go to the Registrt office and apply for Default Judgment and get another $697.60 on top of that!

The usual current procedure is to be award costs of $697.60 for the conduct of a defended case. This is the same amount you would get if it wasn't defended. Given that this includes the $481.60 allowed just for the issue of the Statement of Claim, it means that a defended case has to be prepared and conducted for the remaining price of $216.00. Thanks to the sliding scale, if the claim is $5000 or less it has to be done for $162.00 and if it is $1000 or less it has to be done for $108.00. A defended case requires the perusal of a defence, legal advice on that defence, attendance at a Pre-trial Review, identification to the court of the issues, brief mediation, preparation of draft witness statements, finalisation of those statements, filing them with the court, serving a copy on the defendant, obtaining and reading the defendant's witness statements, advising the plaintiff, attending the hearing, presenting oral submissions and reporting the result to the client. Not even a fraction of this can be done for the amount allowed.

The idea of a simplified system with reduced fixed costs is great as long as the simplification is real and the reduced costs remain realistic for the level of work still required. In the Small Claims Division the simplification is real and works well but the costs remain unrealistically low. The result is that, with the guarantee that costs will be very low, unscrupulous defendants bring bogus defences to see if plaintiffs will give up in fear and frustration and settle for just a small part of what is owed. For example, you are owed $4500, the defendant files a Defence, your solicitor says that you will win easily but he will charge you $1500 to run the case and the court can only order the defendant to pay you a total of $523.20 even if he loses horribly. The system is going to cheat you no matter what so you accept the defendant's offer to settle by accepting $3000 instead of the $4500 you know you are owed. The defendant has risked an extra $523,20 and won the gamble by saving $1500.00. The fact is that the reduced fixed costs are a great idea but are too low and beyond the realms of what is workable. They therefore create a distortion that results in a guarantee of injustice being done in almost every case.

SOLUTION: Create a realistic scale of fixed costs for each step of the Small Claims process. On top of the usual costs for issue, $300 to deal with a Defence to the stage of having conducted the Pre-trial Review, $600 for preparation, filing and exchange of witness statements and $300 to conduct the hearing or to adjourn. Such amounts are clear, simple and severable.

2.2. Witness Expenses – Small Claims Division hearings.

Initially self-representing parties could claim their witness expenses as if they were witnesses in there own case. These witness expenses were not limited but solicitor's costs were. A doctor from South Australia flew to N.S.W. for the Pre-Trial Review and again for the Defended hearing. The Statement of Claim was $900.00 He won and was awarded around $2000 in "witness expenses", complaining that, had he hired a solicitor to attend to it he would have been hundreds of dollars out of pocket. The Regulations were changed to state that self-representing parties could only claim an amount that they would be entitled to under the Legal Profession Act. The Legal Profession Act says that, if you use a solicitor, you c an have the sliding scale costs. Perversely, this has now been interpreted to mean that, because they have not used a solicitor, they can have no witness expenses at all! This is insanity. If the Parliament wanted to say that self representing parties could have no witness expenses, that is what they would have said. The Parliament clearly meant to say that witness expenses would be limited to what they would get if they used a solicitor.
SOLUTION: re-write the regulation to make it clear that self-representing parties are entitled to witness expenses as if they were witnesses in their own case but not exceeding an amount that they would be entitled to if they had used a solicitor.

2.3. Scale costs – Commencing Action

The introduction of the Uniform Civil Procedure Rules in 2005 has thrown into stark relief the stupidity of most of the scale costs allowable to solicitors on the commencement of an action by way of Statement of Claim.

We are now basically using the same forms and similar procedures yet the scale costs are quite different and plainly absurd. If I issue a Statement of Claim and plead a common money count of, say, "Goods sold and delivered" for a claim of, say, $800,000 in the Supreme Court, I get to claim $1020.00 in solicitor's costs. If I fill out the same form in the same way but for $75,000 in the District Court I get to claim $763.00. If I fill out the same form in the same way but for $60,000 in the Local Court I get to claim $584.00. The Local Court will only allow me $467.20 if the claim is $20,000 or less and only $350.40 if it is $5000 or less and $233.60 if it is $1000.00 or less. The work I do as a solicitor in each case is virtually identical but my remuneration moves from the painfully inadequate in the Small Claims Division of the Local Court to the overly generous in the Supreme Court. This is due to the rather simplistic assumption by the law that complexity increases with the size of the claim. That is not true. It has never been true. What rises with the size of the claim is the propensity for the claim to be defended.

An $800,000 claim for non-payment on the sale of a luxury cabin cruiser is a very simple process. A $6,000 claim for loss of goods at sea from a container ship can be mightily complex. The problem is the complexity of the facts and the resultant complexity of the pleading.

Liquidated claims can currently be pleaded in a few lines by way of a simplified form of pleading called a common money count. Common Money Court pleadings includes such thigns "Unpaid Rent", Goods sold and delivered", "Money lent", etc. Unliquidated claims for damages such as car accidents or the repair and cleaning of rental premises, are currently required to be pleaded in formal and intricate detail. They can go on for pages and require detailed legal consideration and legal research. The statistics show that most matters in the Local Courts (around 90%) are not defended and many cannot even be served. Many hours can be invested

in one of these complex pleadings only to have the defendant admit it outright and pay it, declare bankruptcy or disappear and never be found.

Complexity of pleading should only be required at the behest of the defendant when he has been served and indicated an intention to defend. This currently occurs with *common money count* pleadings for liquidated debt claims. A defendant may serve the plaintiff with a Notice to Plead Facts. This requires the plaintiff to then file an Amended Statement of Claim setting out the claim in proper formal pleadings and in great detail. The problem at the moment is that no extra costs are allowed for this extra work. In the Local Court, Notices to Plead Facts are therefore often used as a weapon by the defendant against the plaintiff to frustrate the plaintiff and inflate his costs in the hope that he might run out of money or give up in exasperation. Until 2005, the filing of a Notice to Plead Facts was not permitted in the Small Claims Division. Now self representging plaintiffs in the Small Claims Division can find themselves stranded when they are served with a Notice to Plead Facts but don't know how to prepare a strick legal pleading and cannot afford to pay a solic itor to do so. I think the includsion of this provision in the Small Claims Divsiion was a simple error. How does a solicitor justify spending three hours on a full pleading for a $900.00 claim for damages to a rented house where the court will only allow you $233.60 scale costs? The simple solution is to go back to banning Notices to Plead Facts in the Small Claim Division and leave it to the Registrar to sort out the details of the case at the Pre-trial Review.

Another way around the problem is to require all matters in the Local Court – even unliquidated claims – to be commenced with a common money count pleading and a simple flat rate scale of costs. Costs of $450.00 would be sufficient to commence every action in every court. A car accident claim in the Small Claims Division of the Local Court, instead of requiring twelve paragraphs of fine pleading would simply plead "Damage to motor vehicle XRV-167 at Moorebank on 27/05/10: $927.50." If the debtor simply pays the Statement of Claim, the legal bill is small. If he is one of the 85% who ignores it so that Default Judgment is obtained, justice is still done quickly and cheaply at a realistic price. If the defendant serves the plaintiff with a Notice to Plead Facts, the resulting Amended Statement of Claim would contain pages of proper, detailed pleading but also include an increased scale amount of, say, $900, including the additional cost of pleading the claim in full The defendant would then be required to pay for the level of service he demanded rather than the arbitrary rates currently in force.

SOLUTION: In the Local Court set a fixed rate scale cost of, say, $450.00 for every Statement of Claim issued but require that all matters be pleaded by way of common money count – even claims for damages. Prescribe an increased scale amount of, say, $900 where an amended Claim had to be filed due to the fact that the defendant has indicated a requirement for full pleadings either prior to commencement or after filing a Notice to Plead Facts.

2.4. Scale costs – Default Judgment

When a plaintiff applies for Default Judgment the current scale of cost supplies a strange composite figure that includes the amount originally allowed under the scale plus an amount for applying for Default Judgment. In order to know what is being allowed just for the process of applying for default Judgment one must do some simple maths. For example, for a claim over $20,000 but not more than $100,000 in the Local Court the scale costs allowed on Default Judgment is $847.00. This

includes the amount of $584.00 allowed for the commencement of the action. Subtract the latter from the former and you see that a solicitor is being awarded $263.00 to prepare the required papers and to file them in order to obtain Default Judgment at that level of claim.

The same stupidity previously referred to in relation to scale costs on commencement of action pervades the whole system. Exactly the same process to obtain default judgment in the District Court attracts costs of $374 and in the Supreme Court the exact same process draws costs of $462. The Local Court figure of $263.00 seems inadequate given the unnecessary complexity introduced by the 2005 legislation which now requires the Plaintiff to personally swear or affirm the Default Judgment papers and now precludes the solicitor from doing so on his client's behalf. The Small Claims Division does allow the solicitor to swear or affirm those papers on his clients behalf but the absurd sliding scale that discounts costs for matters in the Local Court as the amount of the claim falls ultimately reduces the costs allowed for obtaining Default Judgment to $105.10. This is clearly inadequate. The work being done is the same in each jurisdiction so the amount allowable should be the same as well.

SOLUTION: Create a flat scale amount in all jurisdictions of around $300 for applying for Default Judgment. This could be reduced to $200.00 if the streamlined procedures suggested in 3.1 below were adopted. Separate it out from the amount allowed for filing the statement to claim so everyone can see what is being charged and why.

2.5. Enforcement costs

At long last the sliding scale for enforcement costs that once applied in the Local Court has been removed and we now have a scale that says that each process in the Local court now attracts one cost regardless of the amount of the claim. Costs of $242 to issue a writ is just about right. Costs on the issue of an Examination Order – more complex than a writ – allowed at $358 are perhaps a little high, especially if streamlined procedures referred to in 3.1 are introduced.

Costs of $258.00 allowed for costs for attending court and conducting the examination seem a little low given that one must travel to the Court (which might be a few suburbs away) and then conduct a cross examination on oath, drive back and then assess and report to the client and advise a course of action. Then it gets worse. If the debtor fails to show up this is reduced to $190. The idea seems to be that if you don't actually have to conduct the examination you will spend less time at the court. This is not true.

Debtors who show up usually show up on time and you then spend 20 minutes conducting the examination. If the debtor doesn't show up, the court requires you to wait 20 minutes or more to see if he shows up late. They rarely do. A non-attendance therefore takes the same amount of time in traveling and waiting as an attendance. The discounted fee for a non-appearance should therefore be abolished.

The major problem is with Garnishee Orders. Despite the fact that it is just as complicated as issuing a Writ, there is still no scale costs at all for issuing a Garnishee Order. A solicitor in the small claims division of the Local Court where most of the work is done is precluded from charging his client any amount greater than the amount allowed under the scale. No amount is allowed under the scale for a Garnishee Order. Therefore a solicitor must either do it for free, breach the law and illegally charge the client for the time it actually took, or refrain from using this powerful enforcement tool. Why is this so? In the general division a solicitor can charge the client any agreed rate but will only be able to claim back from the debtor

the scale amount. There is no scale amount. The creditor loses out again. This is madness!
SOLUTION: Prescribe a scale amount of costs for a Garnishee Order and abolish the reduction made for when a debtor fails to attend for examination. Increase the attendance costs on an Examination Order to $300.00 and reduce the issue costs to $300.00.

2.6. Costs for processing Instalment payments
The law presumes that all debts are required to be paid by the debtor in one lump sum when they fall due. A debtor has to apply to the Court for leave to pay by instalments. It costs around $0.50 per minute to hire a typical clerk. When a court orders a debtor to pay a debt by instalments, that order places an additional administrative cost upon the judgment creditor. A creditor that expected to be paid $40,000 in one lump sum three months ago can find himself having to process more than three hundred payments over the next five years or more. That processing involves not just the account keeping but the calculation of statutory interest on the debt. A weekly instalment order involves 52 processes per year. A monthly instalment order reduces the burden to just 12 per year. Processing each instalment payment costs a creditor around $4.00. It is not unusual for a Court instalment order to impose an administrative cost of more than $1000.00 upon the innocent creditor. Not only does he have to wait years to get paid, he has to pay for the burden of processing hundreds of payments that were not factored into the original quoted cost of the goods or services he provided. His profit margin on the original contract is destroyed.
SOLUTION: Prescribe a fee of $4.00 per payment that may be added to a judgment debt to cover the administrative cost of each instalment payment that needs to be processed. Encourage payments to be made monthly.

2.7. Statutory Interest rates

Most creditors are small businesses. Most small businesses finance the ups and downs of their business accounts through a bank overdraft. A typical bank overdraft rate is currently around 12% compounding monthly. A cash advance on a credit card for a debtor seeking to pay out his debts will currently attract an interest rate of around 19.5% p.a. compounding monthly. The current statutory interest rate on a judgment is 8.5% p.a. simple reducible (non-compounding). This is equivalent to a bank loan of around 5.% p.a. compounding monthly. The current statutory rate varies with movements in the official Reserve Bank rate. That means that it is constantly changing and business people can't keep up with what the court interest rate is supposed to be at any particular time.

The result of all this is that, when the law imposes its statutory interest rate on the parties to an action, it effectively penalizes the innocent creditor by paying him half of what he is incurring on his overdraft and rewards the guilty debtor by effectively giving him a low interest loan at a rate he is unlikely to get anywhere else.

There is therefore no incentive for the debtor to borrow money to pay out his bills. Some unscrupulous debtors effectively finance large parts of their lives this way. Instead of borrowing money at normal rates to finance their activities, they can run up a bill of say, $10,000 and then just don't pay it. When sued, they file a bogus defence and intimidate the creditor at the pre-trial review into giving then a settlement consent judgment of say, $7500 and then they pay it off at an effective commercial rate of around 5%. Many creditors find that calculating the interest, especially on a lengthy instalment order, is too complex and confusing and just not worth the effort.

There is no ready access to a Court interest calculation program. They don't bother and effectively give the debtor an interest free loan!

Court interest rates need to be increased and fixed so that they constitute a penalty interest that properly compensate creditors and encourage debtors to pay out debts as quickly as possible by re-financing them. Statutory interest also currently does not accrue on any claim under $1000.00. This threshold is too high and should be lowered to reduce the degree to which creditors are being left out of pocket. The simple reducible nature of the statutory interest rate should be retained for the sake of simplicity. Consideration, however, might also be given to having the instalment payments deducted first from the principle of the debt in order to speed up the amortisation rate rather than the current situation of having them come off the interest first before any inroads are made on the principle.

SOLUTION: increase the statutory interest rate to a fixed amount of 18% p.a. (simple reducible) claimable on any amounts of $500 or more and have instalment payments applied first to costs, fees and debt before being applied last to the reduction of interest. Put an interest calculation program on the Court website for people to use.

2.8. Missing costs - sale of land, preliminary discovery, substituted service.

There are a range of procedures which are complex yet do not invite the attendance of the debtor before the court. Courts are therefore reluctant to order costs in the absence of the debtor and the creditor is therefore, one again, left out of pocket.

The District Court and Supreme Court prescribe scale costs for a unilateral application to the Court by the plaintiff for an order for substituted service but the Local court has no such scale amount. Why? I thought we were supposed to have uniform rules!

An application to sell real estate under a writ for the levy of property involves a number of fixed, unilateral procedural steps to be carried out by the judgment creditor. There needs to be a scale of costs to deal with compensating the creditor for each step taken.

Similarly, any application made under a proposed provision for Discovery of the whereabouts of an absconding debtor should also invite a scale amount of costs so that the creditor is not constantly left out of pocket and absconding debtors learn that there is a price to be paid for absconding..

SOLUTION: Prescribe a flat fee of $450 in costs for bringing an application for Discovery for an absconding debtor, substituted service and for each step in the process for sale of land.

3. Inappropriate fee structures

3.1. Filing Fees

The court charges plaintiffs a "filing" fee when they present a Statement of Claim at the Court counter to be stamped with the Court seal. Prior to 1978 this really was a "filing" fee. In 1975 each document presented to a court counter in a civil case required the payment of a filing fee. You paid $6.00 to file a Plaint and Default Summons (as a Statement of Claim was then called), $6.00 to file the then Writ of Execution (plus an execution fee for the sheriff's fees), $6.00 for a Garnishee Order, $6.00 to file an Examination Summons, etc. The purpose of the filing fee was to help pay the cost of running the Court Registry. I was told at the time that the wages of the

"Stipendiary Magistrate" were funded from consolidated revenue and that it was considered improper that there should be any connection between a Magistrate's salary and the collection of court fees. Filing fees were to pay for all the clerks slaving away in the office processing all the paperwork. One of those clerks was me and I seemed to spend much of my time writing hundreds of $6.00 receipts to help pay for the costs of my writing those hundreds of $6.00 receipts.

In 1978 it was decided that, in order to substantially reduce the accounting burden on the registry office and solicitor's trust accounts, the number of filing fees would be averaged then charged as one initial global fee. Thus the numerous $6.00 filing fees charged at each stage became a single global $24.00 filing fee paid "up front" when the Statement of Claim was filed and that then encompassed all the filing fees for each process that a plaintiff might require thereafter. Plaintiffs could now come in and apply for judgment, issue an Examination Summons, request a Certificate of Judgment or issue a Subpoena and not have to produce another $6.00 cheque because it had been pre-paid when the Statement of Clam had first been filed.

By the mid 1980s the department stopped pointing this out on the fees schedule when it was increased with the CPI each year. A new generation has since conveniently forgotten that the "filing fee" on the Statement of Clam also pays for the administrative cost of filing all other documents that might be required in the proceeds. That new generation has been progressively re-introducing individual filing fees, starting with the fee for a Certificate of Judgment, then Subpoenae, Notices of Motion and now Examination Orders. The administrative cost of processing these matters is already incorporated in the filing fee which has been increased with the CPI since 1978. We are being charged twice!

The actual cost to the Department of just filing a Statement of Claim in any jurisdiction is around $32.00 being a cost of approximately 10 minutes @ $0.60 per minute plus long term storage and handling and the on-costs of funding the court's enormously expensive new computer system which seems to make everything slower. The Local Court actually charges a "filing" fee of $90.00 in the Small Claims Division, $222.00 in the General Division, the District Court charges $606.00 and the Supreme Court charges $850.00. The process in each case is virtually identical. It costs the Department around $32.00 to process a Statement of Claim in the Supreme Court and District Court just as it does in the Local Court.

If the plaintiff is a corporation the filing fee is automatically doubled! Clearly this "filing" fee is not really a fee at all because it is charged not according to the value of the work provided in return for its payment but is levied according to the status of the court and the status of the plaintiff. It is therefore a tax. The filing fee in the Local Court is the same regardless of whether or not the plaintiff requires the court to prepare the papers for him or he has a solicitor do it on his behalf. A member of the public may walk into any Local Court and have the court staff prepare a Statement of Claim for him. This may take them 30 to 40 minutes to prepare and to explain the court procedures and to glean from him all the information to prepare the document. If it is in the Small Claims Division they will charge him a "filing" fee of $90.00. The action may then go on to be defended, heard in court, and then multiple enforcement proceedings tried and failed over many years before payment is finally obtained (if it ever is). The court staff will be required to prepare and explain all the papers and procedures at each step. The Court only charges the plaintiff that first fee of $90.00.

By way of contrast, a corporation may have its solicitor file a Statement of Claim in the Supreme Court. The court will process it in 10 minutes but charge a "filing" fee of $1700. The Statement of Claim is then served on the defendant who

may immediately pay it in full, including the $1700 charged by the Court for $32.00 worth of actual work. Sometimes it goes the other way. The defendant declares himself bankrupt and the long suffering plaintiff never receives any payment. He paid the Supreme Court $1700.00 for $32.00 worth of work which Federal insolvency laws have now rendered useless. If he asks the Court for a refund of these unearned fees (yes it has been done!) he will be refused.

This "filing" fee is passed on to the defendant and is required to be paid by the judgment debtor. How does one explain to a judgment debtor that the filing fee that has been added to the debt was arbitrarily doubled by the court only because he chose to contract and then not pay a company rather than a sole trader?

When I was a Registrar in the Downing Centre Local Court in Sydney, I was told by a former Director of Local Courts that the civil claims registry on level 5 was the only court registry in N.S.W. that made a profit. He told me that the criminal registry on level 4 made losses because so many criminal cases were exempt from Court fees. I checked the accounts and did a few rough calculations and satisfied myself that that seemed to be true. A few years later the Department introduced doubled filing fees for corporations in the civil registries. At the same time they combined the criminal and civil accounting functions so that the accounting records are now blurred. Is the N.S.W. Attorney General's Department making profits from creditors and debtors in order to subsidise criminal cases?

There is some merit in reducing the number of accounting functions required in a long thread of court processes by averaging and charging global fees. Solicitor's trust accounting is complex enough without multiplying the number of transactions required. The over emphasis on filing fees to fund the court system - especially where those fees seem inflated and are paid by so many plaintiffs and defendants who actually receive little or nothing in return - constitutes economic irrationalism. The system works to fund bureaucratic excess rather than pay for services actually rendered. It subsidises those who make the most demands on the court's services whilst penalising those who make the least demands thereby creating reverse incentives. It forces court clients to pay fees for service that they may never need or use whilst artificially inflating the costs of access to justice. Paying a filing fee of $1700 only to find that you can't serve the Statement of Claim because the debtor has absconded is a slap in the face for any plaintiff and, because it borders upon theft by the court, brings the entire system into disrepute and invites the contempt of the public.

SOLUTION: Undertake an inquiry into Court fees, measuring the real cost of providing the services and stage them so that they build according to each stage of the proceedings – perhaps a small filing fee (if any), a larger global fee to cover default judgment and the processing of enforcement processes and a much larger fee levied before a defended matter is listed for hearing. Eliminate the "double fee" nonsense currently applied to corporations. Introduce a "preparation fee" where unrepresented parties require the Local Court to prepare the papers for them, to be added in place of solicitors costs, similar to the procedure in Victoria. Consider the radical solution of eliminating preliminary filing of documents, with documents only to be filed and fees paid upon application for Default Judgment or Adjudication.

3.2. Service fees

The sheriff's fees include a scale fee for service of process. It is currently $60.50. It has been increased gradually at close to CPI amount since 1970. It is now out of step with reality. The department now admits that it cannot actually serve a piece of process for $60.50 and, in the Local Court, a request for the sheriff to personally serve a Statement of Claim is responded to by them posting it to the Defendant. As a result, most plaintiff's now rely on Licensed Commercial Agents to serve their process.

The problem is that in some of the remoter parts of N.S.W. there are no Commercial Agents available to serve process. Try serving an Examination Summons in Lake Cargelligo!

The problem also is that the scale amount of the service fee is used to set a limit on the amount that will be awarded for private service of a document. Thus, where a private process server charges, say, $77.00 to serve a Statement of Claim, the court will only allow $60.50. This problem was exacerbated by the fact that, when the GST was introduced in 2001, the Department decided to absorb the GST into the service fee whereas private Commercial Agents were required to add it on.

SOLUTION: Increase the amount allowed for person service to not less than $77.00 and get the sheriff back into the business of serving process personally, if only in remote areas..

3.3 Sheriff's Execution fees

The sheriff's execution fee is $76.00 per attempt. There is a crying need to have sheriff's work at night and on weekends when debtors are more likely to be home. Sheriff's fees would need to be increased to cover this cost. In other States, however, higher fees are levied to pay for multiple attempts to execute. In Victoria they charge $178.00 and make four attempts. In the ACT they charge $220.00 for the same number of attempts. The problem with the Victorian approach is that creditors are paying too much for the common circumstance where one attempt is made only to discover that the debtor has absconded.

SOLUTION: maintain the current structure of one small fee for attempt at execution Monday to Friday but allow the levying of a further higher fee ($95?) if execution at night or on weekends then seems to be required.

4. Lengthy and Complex Processes

4.1. Complex Form Design

The introduction of the Uniform Civil Procedure Rules in 2005 was a questionable. The very idea of a "one-size-fits-all" approach was flawed from the outset. Collecting a $900 debt in the Local Court is a very different thing to collecting a $9,000,000 debt in the Admiralty Division of the Supreme Court. As a result, it became clear from the very beginning that the uniform Civil Procedure Rules could not be Uniform. As a result, they aren't. Uniformity is an embarrassing façade. What was needed was not uniformity but greater efficiency. A huge slice of matters arise in the Small Claims Division of the Local Court and procedures there has since been lifted out of the Uniform Civil Procedure Rules and are to found in the Local Court Rules. The uninitiated struggle to understand why they can't find what they are looking for in the Uniform Civil Procedure Rules and often make the mistake of

following Supreme Court procedure in the Local Court. The legislation is now a much larger haystack in which to serve for the same old needles.

The politics of the Attorney Generals Department was such that the negotiations between the three court tiers for the new legislation ended up with the Supreme Court basically dictating procedure to the lower courts. The Local Court had spent forty years honing and improving its systems to make them cheaper and more efficient so that self representing members of the public could cope with them. In one fell swoop all that was swept away. The formality and complexity of the Supreme Court culture was imposed onto the Local Court. The biggest problem was the design of the new forms. They became longer and harder to fill out.

Just to give one example, the old Local Court Form 72 - Application to Issue Execution, was a single A4 sheet requiring 15 pieces of data – dates, amounts, names, addresses, etc. It then had to signed by the creditor or his solicitor and filed with the Court. The Uniform Civil Procedure Rules replaced it with a Form 65 – Notice of Motion: Writ for the Levy of Property. Not only is the title much longer and quite a mouthful, it is now a four page document requiring 42 pieces of data. It has to be signed twice by the creditor who then has to find a Justice of the Peace to witness it. The Local Court operated the old form for 35 years without trouble. During that same time the Supreme Court had been using a longer more complex form. Efficiency suggested that the Supreme Court should have adopted the Local Court approach but politics resolved that it would be the other way around.

It has been suggested that the forms should be re-designed to make them more "user friendly". My experience of such schemes is that it is almost impossible to make a legal form fool proof because fools seem to come up with an endless string of reasons to become confused. "Fool proof" forms tend to be lengthy and involve mountains of explanatory notes that the vast majority of users never need to read and the fools never bother to. The best way to make forms "fool proof" is to design them to be simple and straight forward.

SOLUTION: re-design all the forms from a "time and motion" point of view to make them as efficient as possible. Reduce the level of data entry called for and the number of pages involved. Use the old Local Court Forms as a basis from which to start. Eliminate the need for Justices of the Peace wherever possible. Create separate explanatory notes for the few who need them.

4.2. Signing documents and using Justices of the Peace

The N.S.W. Roads and Traffic Authority undertook a major efficiency drive some years ago to make their system more effective. One of the things they did was to virtually eliminate the use of Affidavits and Statutory Declarations, each of which required the person completing the form to find and bother a Justice of the Peace.

As a result, you can now transfer your registration, change your address and obtain a driver's license in N.S.W. all without worrying a Justice of the Peace. The R.T.A. merely introduced a section into their legislation stating that if you filled out a form for the R.T.A. containing a declaration that the information contained in it was true, and it turned out that it was not true, you could be prosecuted and punished under that legislation. It did away with all the nonsensical and medieval procedures that Affidavits and Statutory Declarations require for enforcement of perjury.

Unlike the R.T.A., the Attorney General's Uniform Civil Procedure Rules of 2005 radically increased the reliance on Justices of the Peace for so many forms, again as a result for the importation of Supreme Court inefficiency into the Local

Court. At some courts, they now use volunteer Justice of the Peace to relieve the pressure on counter staff, most of whom are Justices of the Peace.

We need to eliminate the inefficiency of using Justices of the Peace in every possible court form, merely have them signed and, where thought necessary, including an un-witnessed declaration as to the truth of the contents. This would require the insertion of the "Declaration" rule and the re-design of the forms. As far as possible, most forms should be able to be signed by a party's solicitor on behalf of the party.

SOLUTION: Introduce an internal section in the legislation for un-witnessed declarations to be made so as to all but eliminate the need for a Justice of the Peace and expand the number of forms that may be signed by a solicitor for a party.

4.3. Lengthy time delays – Court documents

It used to be that a defendant served with a Statement of Claim in the Local Court had 14 days in which to respond. The Courts received large numbers of applications to set aside Default Judgments, complaining that the defendant didn't have enough time to respond. As a result the legislation was amended in 1982 to bring it into line with the Supreme Court and defendants were given 28 days in which to respond. "Now there can be no excuses" was the thought at the time. There has been little reduction in the number of applications being made to set aside judgment. It just takes longer for the majority of creditors to get a result out of the court.

The Federal Court rules allow a debtor 21 days in which to respond to a Bankruptcy Notice or Statutory Demand. Some debtors have fallen into the trap of thinking that, because they have received Statements of Claim from State courts giving them 28 days, they assume that a Statutory Demand or Bankruptcy Notice gives them the same time. We need to reduce the State 28 day period down to 21 days to match the Federal system.

Examination Notices have to be posted to a debtor and he be allowed 28 days in which to respond. Only after that 28 day period can an Examination Order be issued. This procedure has simply added to the time delay in enforcing a judgment. Around 98% of them are ignored. We need to reduce the period allowed to 14 days so as to reduce the amount of wasted time.

Examinations Orders are required to be served 14 days prior to the date that the debtor needs to attend. General Summonses and subpoenae need to be served 7, 5 or 3 days prior (depending on the legislation) to the date listed. Debtors receiving an Examination Order have already been sent an Examination Notice by mail which they have ignored. They should not be caught by surprise if served with an Examination Order. We should therefore save some time by reducing the service date prior to attendance from 14 days to 7 days. This will speed everything up.

SOLUTION: reduce the time for responding a Statement of Claim from 28 days to 21 days, reduce to time to respond to an Examination Notice to 14 days and reduce the lead time for service of an Examination Order from 14 days to 7 days.

4.4. Resource based Delays

The largest delays experience in the court are caused by the fact that there never seem to be the staff available to do the work and that civil actions within the Court culture seem to be given the lower priority. I have filed applications to issue a

writ for the levy of property with the Court and it lays in a work tray unprocessed for up to six weeks. The sheriff's office in King Street, Sydney, currently has an 8 month delay in executing writs because they lack the staff, cars and fuel allowances and were too busy carrying out "guard duty" at the door of the Courts.

Creditors are paying millions of dollars of fees into the Courts each year and they want to know what they are getting for their money. Where is that money going?

The vast majority of matters are dealt with administratively by junior clerks issuing default judgments, writs and garnishee orders. The actual cost is rather low. Only around 5% to 10% end up being adjudicated in a Court room and even then it is often by an assessor or a Registrar at a fraction of the cost of a Magistrate. Contrast this to Consumer Claims Tribunals where every matter – defended or not – is listed before a sitting Tribunal to be dealt with. This would lead one to expect that Consumer Claims Tribunal matters, on average, must cost more to run that Court actions most of which never get listed at all. Why, then, do the court's charge so much and the Tribunals charge so little. Is the Consumer Claims Tribunal being more heavily subsidized out of general revenue and, if so, why?

SOLUTION: an inquiry needs to be made into the payment and funding of the resources for civil matters as opposed to the other demands placed upon the courts and tribunals and adjustments need to be made to ensure that fees and charges are linked to service levels provided.

4.5. Missing Interest and lost costs

Until 2005 normal procedure was for a document handed over the counter or received in the mail at a Court registry to be stamped with a "date received" stamp. They were then placed in work trays and processed in strict date order. They were entered onto the computer system when staff and time allowed. The old system noted who processed it and when but gave priority to the date that they were filed and acted as if they were processed when they actually filed. Staff shortages meant that processing delays of many weeks were normal but strict date processing meant that no-one was disadvantaged. The problem was that the computer system was usually not up to date. People would call and ask if a Defence had been filed and a quick look at the screen would produce the answer "No, not yet." The fact was that the Defence may very well have been filed last week. It just wasn't yet on the computer. Staff just didn't have the time to sift through piles of work in work trays trying to see what was on hand waiting to be processed. The efficacy of the computer system relied upon real time processing which staff levels just didn't allow.

The new computer system introduced a few years ago, changed decades of court procedure. In conjunction with the 2005 Rules, matters are deemed filed not when they are actually filed but when they are entered onto the computer system. The computer gives priority to when they are actually processed and not to when they were actually filed. This doesn't really solve the problem that computer is not up to date but distorts it with a fiction. Now when you call and ask "Has a defence been filed yet" it may physically have been filed a week or two ago but the answer "Not, not yet" is deemed to be true even that it is not actually true. The real disaster is that it creates all sorts of other problems.

Most matters require the calculation of interest at each stage of the proceedings. The plaintiff would calculate the interest up to the date of filing and then physically file with the Court. Under the old system the matter was deemed issued or filed when it was date stamped. Now it is deemed issued or filed days of even weeks later when it is entered on the system. The result is an interest gap from when the plaintiff

calculates the interest and files the document to when it actually makes it onto the Court computer.

By way of example, if a matter is accruing daily interest of say, $1.00 per day, you calculate the bulk interest to the date of actually filing. It then sits in the work tray at the Court House for , say, then days before it is entered onto the system. Under the old system it was entered as at the day it was filed. Under the new system it is entered as at the day it is processed – 10 days after it was actually filed. The plaintiff has therefore lost ten days @$1.00 per day. The plaintiff has been cheated of $10.00 in interest. This might happen when you apply for default judgment. It might happen again when you then apply to issue a writ and again when you apply to issue a Garnishee Order and again when you apply to issue a Examination Order. With a claim of say, $1000 you would be losing just $0.23 per day. With a $10,000 claim you lose $2.33 per day. With a $50,000 claim you lose $11.64 per day, and so on. Campbelltown Local Court is currently 13 days in arrears with its work. The civil claims Clerk is on holidays, unrelieved. We are paying for it. What is happening in the Supreme Court? An $800,000 claim in the Supreme Court is losing $186.30 per day. Millions of dollars in interest has been lost to plaintiffs. If the banks were doing this to the public there would be rioting in the streets.

Others matters are now being processed out of time. The debtor has 28 days in which to file a Defence to a Statement of Claim served upon them. I apply for Default Judgment on the 29th day. It lays in a tray for 2 weeks. The defendant may then filed a Defence out of time. Under the old rules my Default Judgment would be processed and his Defence would be rejected. Under the new rules Defence are processed with priority and my Default Judgment is rejected. The problem is that I am allowed to charge my client scale costs of up to $270.00 for preparing the papers for default judgment. I file my Notice of Motion for Default Judgment, charge my client for the work and then the Court rejects it, thereby costing my client $270.00. The court has penalised the creditor for doing the right thing and rewarded the Defendant for doing the wrong thing. This didn't happen under the old system.

This new system also creates uncertainty. Under the old system if you a Writ application last Thursday, you knew that is was deeme3d issued last Thursday. Under the new system, if you filed it last Thursday, you have no idea when the Court is actually going to process it and therefore cannot know when it is deemed filed. I tis therefore hard to take the next step because you don't know what date to calculate from.

SOLUTION: Go back to the old system and ensure that all matters are deemed filed the day they are actually filed rather than the day the court gets around to entering them on the system.

4.6. Case Management Rules

The courts have adopted certain case management rules which are designed to have defended cases pushed through the system as quickly as possible. This is because the current fashions of thought now measure court success by a calendar rather than by a result. The question is no longer one of "did we get a just result" but "how long did it take get a result". The "result" is deemed to be a Judgment. No accounting its made of how long it takes to enforce the judgment or whether the judgment can ever be enforced.. Statistical models exist to measure the speed of judgment. Cases that don't seem to go anywhere are now automatically struck out by the computer to make the statistics look better. Parties are forced into court on a "ready or not" basis to make the statistics look good.

The problem is that much of this makes no sense. At a time when privacy laws make it more difficult to find an absconding debtor, the Uniform Civil Procedure rules reduced the time allowed to find the debtor and serve a Statement of Claim. Those times are not uniform and should have been increased. The District Court requires a Statement of Claim to be served within one month of issue!!!!! The Local Court time for service was reduced from 2 years to six months. Instead of then having 12 months from the date of service in which to apply for Default Judgment, that time was reduced to nine months from the date of issue. The upshot is that Statements of Claim are being issued, can't be served, cases expire, Court fees forfeited and cases have to be started again. Creditors are now prevented to allowing debtor "a few more months" to sort things out. The whole system is being forced along because someone thought it would be easier to measure justice with a calendar.
SOLUTION: Revert to the previous case management rules which allowed parties to prepare the cases as they wished before they sought a date by filing a Certificate of Readiness and that allowed plaintiffs plenty of time to find absconding debtors and to then negotiate private settlements within reasonable time periods.

4.7. Credit Reference Problems

For the past few years the Courts have been selling data about court judgment and debtors to credit reference agencies. The problem is that they have implemented this badly and not explained the system to the public. Parties are afraid that if they settle a matter with the Court it might effect their credit rating but nobody seems to know exactly what is reported, to whom and under what circumstances. It is clear that default judgments are reported to Veda Advantage. Are they reported to anyone else? What if you defend the case and lose? Is that reported? No-one in the Departrment seems to know the answer. What if you are sued for $10,000, defend it saying that you only owe $5,000 and are successful and judgment is entered against you for $5000 which you then pay? Does that ruin your credit rating?

People who have judgment made against them and who subsequently pay, seem to think that payment should be sufficient to clear their credit record. Veda Advantage and may court staff tell the debtors to file a Notice of Discontinuance. Historically a Notice of Discontinuance can only be filed before judgment, not after it yet many courts are accepting them. Theoretically, judgment must be set aside before a matter can be discontinued. Case law says that judgment should only be set aside upon "due cause" being shown. Trying to clear a credit record has never been considered "due cause" yet many people are doing it under the auspices of the Court. If these procedures are carried through I understand that the Credit Reference Agencies then wipe the record so that people who subsequently carry out a credit check will be falsely told that the debtor they are checking up on has a "clean slate".

When a judgment debt is paid I write to the Court and advise them of the fact and ask them to advise any credit reference agency that night have referred the judgment to that the judgment has been paid in full. The old District Court Act, 1973 contained such a requirement. I am told that the Courts now have no procedure to report payment of a judgment to the Credit reference agencies. The whole system seems to be a mess and does not seem to have been thought through.

Many creditors with smallish matters choose not to sue the debtor but simply refer the debt to a credit reference agency. A "debtor" can then find themselves with a bad credit rating without knowing it or being given any opportunity to defend themselves. They can write and complain and cajole but the creditor can simply

ignore them or send them papers and refuse to concede any wrong doing. The debtor's only recourse seems to be to take action in the Supreme Court for defamation. Most people can't afford that. Proper procedures for reporting and subsequently dealing with payments of judgments need to be create and published. A procedure for bringing a wrongly reported non-judgment debt before a Court or Tribunal needs to be set up.

SOLUTION: Develop and publish protocols for reporting judgments to credit reference agencies, dealing with requests to clear the credit record and notifying the agencies of payment. Give the NCAT a power to deal with an application to clear or test a non-judgment debt that has been referred to a credit agency.

4.8. A More Radical Approach

The vast majority of Court actions involve a Corporation, either as a creditor or as a debtor. Recent High Court decisions have made it clear that the Federal Government's Corporations power is to be construed very widely.

Up until the 1940s, State Governments levied income taxes along side the Federal Government. Australians paid two sets of income tax and filled out two annual income tax returns – one State and one Federal. During the war, the High Court gave a very wide interpretation to the Federal Government's power to levy income tax. This was then used to "swamp" the State's power so as to make it politically impossible and administrative inconvenient for the States to continue to do so. Since that time State Governments have not charged income tax. The Federal Government collects it and distributes a share to each State. Australians now only have to deal with one tax office and fill in one tax return.

We currently have a single national Credit Act agreed upon between all the States, Territories and the Federal Government. Unfortunately, we have over 20 different State, Territory and Federal systems of dealing with debt. If the Federal Government announced an intention to enact a "Civil Claims Act" purporting to apply to any matter involving a corporation it would virtually sweep the field and leave the State systems with little to do. The States would be forced to come to terms with the Federal Government and Australia would then get a single national civil legal system. That system could be administered through the existing State Court system by agreement with appropriate fee remuneration going to the States. We could then abolish the barriers that currently exist in relation to enforcing judgments across State borders and the jurisdictional problems that currently bedevil national trade and payment collection.

This would also allow a melding of Federal insolvency law with debt collection laws to create a seamless system that did not contradict itself. Bankruptcy could then become a procedure of last resort for enforcing a judgment or selectable by a judgment debtor when they found themselves drowning in debt.

We could streamline the system even further. Just as currently occurs with corporations, all actions could be commenced by a creditor preparing a prescribed form of Statutory Demand without having to file it with a Court or paying filing fees. They serve it on the debtor and, if it is paid, that is the end of it. If it can't be served, they just keep trying until the Statute of Limitations expires on it. If it was to be defended, the debtor would serve the creditor with a Notice of Intention to Defend setting out his argument. This would require the parties to exchange information and negotiate or mediate. Pre-hearing preparation protocols including mediation and document exchange could be prescribed. The court would not know or be involved in any of this. Should the matter not then be resolved (through a prescribed form of

enforceable deed) or if the Statutory Demand was ignored, the plaintiff would then file it with a court, pay an appropriate court fee and obtain either a date for hearing of the defended case or a default judgment for an undefended one. This would halve the number of matters being filed with the Court and deal with the problem of the cost of the large number of cases that are not served or are quickly paid or settled.

SOLUTION: Have the Federal government use its corporations power to create a single national legal system combining debt collection and insolvency laws. Design the system to reduce or even eliminate the involvement of the Court in the initial "information exchange" part of proceedings so that the court's resources are concentrated more appropriately on adjudication and enforcement.

DEBT COLLECTION – AN OVERVIEW

What is "debt"?

Most people are debtors and owe money to a creditor. Your credit card bill, home loan, car loan and the $20 you borrowed off your friend are all debts. A debt does not become "actionable at law" until the date for it to be paid has passed without payment being made. At the same time and at the most basic level, almost everyone is also a creditor and is owed a "debt". For example, employees extend the credit of their labour to their employer for a fortnight and expect to be paid at the end of that pay period. If the boss does not pay, the employee is owed a debt and becomes a creditor who may then sue the employer for unpaid wages. We sometimes make personal loans to friends who might fail to pay them back by the agreed time. Most debts, however, arise from the normal conduct of trade and business within our society. Effective debt collection is therefore a vital part of the economic efficiency and competitiveness of the nation.

Most debts arise under **contract** from transactions to supply goods, services or loans. A debt that arises from failure to pay an agreed price under a contractual agreement is called a **liquidated claim** and is properly called **an action in debt**. Bringing a liquidated claim for a debt before a court is a relatively simple process.

A smaller number of "debts" arise from a breach of duty called a **tort.** The most common example of a tort is when someone damages your car in a collision or when a landlord seeks compensation from a tenant who has "trashed" rented premises. A tort also arises when someone, either accidentally or on purpose, injures your body. Thus, receiving a punch on the nose is a tort and you can sue for it and obtain a judgment from the court for the payment of money to compensate you for the pain, suffering and affront. In these cases there is no agreement as to price so the creditor seeks assessment of the amount of their loss and payment of that amount as compensation – usually the cost of repair or replacement of property or some assessment as to your physical pain and suffering. This is called an **unliquidated claim** and properly called **an action in damages**.

In a tiny number of cases, the creditor may be seeking the physical return of a particular piece of specific property improperly held by another. This is called an **action in detinue** and is also an unliquidated claim but seeks an order for restitution by way of **specific delivery** or, if delivery cannot be made, an amount of compensation for the value of the lost item.

Bringing an unliquidated claim before a court for damages or specific delivery is a more complex process than pursuing a liquidated debt. All these matters are dealt with under the civil jurisdiction of the Australian legal system as "debt collection". People generally refer to all these matters under a generic use of the word "debt".

The Debt Collection System

Each State has its own multi-layered debt collection system, all doing basically the same things but charging different fees, using different forms and with slightly different rules. On top of this is a Federal legal system largely based on the Federal government's constitutional power to deal with **insolvency**. The State and Federal systems approach the problem of debt from opposite ends of the spectrum. Federal

insolvency rules are supposed to bring relief to debtors while protecting the rights of creditors. State debt collection laws are supposed to bring relief to creditors whilst protecting the rights of debtors. There are areas where State and Federal systems overlap producing apparent contradictions. The Australian Constitution says that where such a contradiction arises, the Federal law shall override the State law.

Historically, the State civil court systems were mainly used so that a supplier of goods or services could commence action against a consumer who fails to pay. The procedure was relatively simple. In the reverse situation, however, where a consumer needed to bring an action for damages against the supplier of faulty goods or services the court procedure was more complex. The 1970s saw the sudden rise of consumer rights as a political issue. Instead of improving the existing court system to expand and simplify a consumer's ability to bring an action for breach of contract or to enforce a warranty within the existing legal framework, governments in the 1970s went off on a strange tangent. They created yet another bureaucratic layer outside the control of the Attorneys General of each state and outside of the conventional court system. These were the various State **Consumer Claims Tribunals** under the control of newly created Departments of Consumer Affairs. The Consumer Claims Tribunals were created as quasi-court systems with simplified procedures with a view to lower costs. They have gradually been expanded over time to encompass some fairly limited areas of debt collection but are focused on dealing with "disputes" and so leave out the vast majority of debt collection which is not disputed. They also have no internal system of enforcing their own orders for the payment of money and therefore rely upon the courts to do that. The normal rules as to pleading and evidence do not apply and they are often criticized, especially by lawyers and business people, as being "kangaroo courts" producing questionable results.

Reacting to the rise of Consumer Tribunals, their successes and failures, in the 1990s some State Courts introduced **Small Claims Divisions** to their lower courts. These adopted some of the simplified procedures pioneered by the Consumer Claims Tribunals but avoided some of the areas complained of. These divisions try to specialise in cheap and simple debt collection.

We therefore have the Federal court dealing with insolvency. We have a Supreme Court, District Court, Local Court, Consumer Claims Tribunal and within each we have special Divisions such as the General Division of the Local Court, the Small Claims Division of the Local Court, the Commercial Division of the Supreme Court, the Building Disputes division of the Consumer Claims Tribunal, the Retail Tenancy Division of the Consumer Claims Tribunal, the …..I could go on ….and this is just in N.S.W.! Each other State has a similar mess.

In the 1980s the Australian Federal Government and the States and Territories reached agreement to introduce a single uniform Credit Act to cover the whole nation. Unfortunately, Australia now has over 30 different legal systems and tribunals to deal with debt collection. The system is complex beyond reason. It has been hobbled together over time without anyone looking at the big picture.

Some Perspective

In a "bumper" year the N.S.W. Court system deals with around 190,000 civil actions for what may be loosely defined as "debt". Around 25,000 go to the Supreme Court,

around 5,000 to the District Court and the balance of around 160,000 are dealt with in the Local Court. On top of that many other matters go straight to the Federal Court under Federal insolvency laws and many more disputes over building, tenancy and consumer complaints are commenced in the Consumer Claims Tribunal. We will be concentrating on the N.S.W. Court system where I worked as a Registrar for exactly 25 years and we will concentrate on the Local Court where most undisputed "debt collection" takes place.

The general trend is that larger claims are more likely to be contested and litigated through a process of judicial hearing and legal litigation. When the "stakes" are higher debtors are more likely to argue the claim because parties see the value in employing lawyers to assist them with their litigation. It is therefore often said that "real"debt collection takes place in the Local Court.

As a general rule only about 20% (approximately 47,000 matters) of Local Court matters are defended. Of those around half (approximately 23,000 matters) are settled before a court is called upon to hear a case and pronounce a judgment. Around 45% of Local Court matters (approximately 85,000 cases) are ignored by the debtor and judgment is entered by default. Around 5% (approximately 9,000 matters) are dealt with by formal Acknowledgment of Debt by the debtor, usually accompanied by an application to pay the debt by installments. The remaining 30% (approximately 48,000 Statements of Claim) are never actioned again once they have been filed! Anecdotal evidence suggests that around half of those un-actioned matters are settled and dealt with without further reference to the Court and the other half (around 24,000 matters) cannot be served because the debtor cannot be found.

The Process of Debt Collection

A creditor has two choices. They may try to "persuade" the debtor to voluntarily make good or they can take legal action to harness the force of the law to compel the debtor to make good. They usually start with persuasion and, when that fails, move on to Court action. The creditor may do all or part of this themselves or they may employ a commercial agent or a lawyer to act for them, either from the very beginning or at any stage through the process.

Commercial Agents specialize in "persuasion" methods and usually follow a regime of multiple telephone calls and letter writing to the debtor. They may even physically visit the debtor to try to persuade them to pay. Many debtors complain that this amounts to "harassment" so rules have been drafted to limit the level of contact by a Commercial Agent.. Commercial agents sometimes charge the creditor a small administration fee to commence their processes and then keep an agreed percentage of any money they managed to cajole from the debtor as "commission". None of this cost burden is readily transferable to the debtor. As a result, even if the debtor pays all that is owed, the creditor will always be out of pocket due to any administration fee and the commission retained by the commercial agent. For that reason, many creditors do their own attempts to "persuade" debtors to pay and, if that proves futile, will proceed straight to legal action. Some creditors have written into their contracts that they will pass on the costs of any such commissions or fees to a client who goes into default in a payment. There are real difficulties in actually making that happen. For that reason, collection of debts by commercial agency usually means that the

creditor can expect to never receive all their money from the debtor as some of it willby siphoned off to pay the commercial agent.

Legal Action is the procedure by which recalcitrant debtors can be forced to pay their debts against their will. Where the debtor demonstrates reluctance, refusal or professes an inability to pay the debt, the creditor either throws his hand is the air in despair and writes off the debt as not worth collecting or he chooses to commence legal action to try to enforce compliance by the debtor. In some cases a creditor may choose to commence **insolvency** action directly in the Federal Court and bypass the State Courts. The Federal Court involves more complex processes and tends to have a lower success rate in securing payment from impoverished debtors. This is because it has a greater emphasis on bringing relief to the debtor than collecting the debt for the creditor. It also charges higher fees and involves higher costs should the action be contested. The Federal Court also has no presence in sub-urban and regional Australia and requires crediors to attend the major cities. For those reasons legal action is usually taken in the State courts by the filing of a Statement of Claim and its serving it upon the debtor.

Legal procedure in a State court moves through **three stages**:-

(a) information exchange;
(b) adjudication and judgment;
(c) enforcement and payment.

Information Exchange

The preparation of a Statement of Claim requires the creditor (called the "**Plaintiff**") to set out in formal legal terms on a prescribed form a pleading that complies with special legal rules and explains the details of his claim. It will claim the amount of the alleged "debt" claimed by the plaintiff, any interest that has accrued since the alleged debt should have been paid, the court filing fee, the expected costs of having the Statement of Claim served upon the debtor and a limited prescribed amount controlled by the government for the costs of having a solicitor prepare the Statement of Claim for the plaintiff. The plaintiff must then pay a prescribed "fee" to the Court. The court office then stamps the Statement of Claim and it then needs to be served upon the debtor (now called the "**Defendant**"). This is how the plaintiff formally and legally tells the defendant how much is owed and why. Once a Statement of Claim is served upon a defendant they have 28 days in which to file a *Defence* and contest the claim.

The defendant who receives a Statement of Claim may then file a *Notice to Plead Facts* seeking a more detailed exposition of the claim or write to the plaintiff asking for further and better particulars. They may seek *Discovery* of documents or ask question of their opponents through *Interrogatories*. They may file a *Defence* setting out their argument as to why they don't owe the money and file and file a *Statement of Cross Claim* setting out the details of any competing claim the defendant might have against the plaintiff. The plaintiff then needs to file a *Defence to Cross Claim*. Either may serve upon the other a *Notice to Admit Facts and Documents* in order to fine tune their understanding of the dispute and know exactly what they will have to prove when the matter gets to court. They may then write to each other and make an informal offer to settle the matter or they may serve a *Offer of Compromise* on the other setting out a formal proposal for settlement. All is designed to thresh out the details of a dispute and define the limits of any court hearing and, by doing so, help

shorten the length of any court hearing and explore the prospects of settlement by agreement..

If a **Defence** is filed the matter is listed before the Court and the parties attend a brief session called either a *Call-over* or a *Pre-trial Review* (depending on which division of the court you are in) in order to check the details, explore settlement prospects and allocate a hearing date suitable to each party and their witnesses and orders are made that the parties exchange written witness statements prior to the date of hearing so no-one can complain that they've been caught by surprise at the hearing.

Adjudication and Judgment

The defended matter then proceeds to hearing on the allocated hearing date, evidence is produced to the court, the court weighs the evidence and makes an order deciding who is to pay whom and how much. Witnesses don't attend for claims of $10,000 or less but have to attend for claims over that amount. The Court's order is a **Final Judgment after Hearing** and is a legally binding and enforceable order of the Court. If, as occurs in the majority of cases, the debtor ignores the service of the Statement of Claim upon them and does nothing about it within 28 days, the creditor may then apply to the Court office for a judgment by filing documents "over the counter" showing that the Statement of Claim has been served on the debtor and that the matter had not been paid in full within the 28 days. A clerk in the Court office then administratively enters up for a **Default Judgment** and it becomes a legally enforceable Judgment Debt between a Judgment Creditor and a Judgment Debtor. If default judgment is applied for in relation to an unliquidated claim for damages or specific delivery as opposed to a liquidated claim for debt, the Court will list the matter before a Judge or Magistrate and the creditor is required to produce to the Court proof as to the value of their actual loss.

Either type of judgment is enforceable for 12 years from the date it is made. A debtor may easily make application to the Court to set aside a Default Judgment by showing that he had a reasonable defence and that there was some reason why he failed to defend in the time he was initially given.

When the courts gives judgment, both after a hearing and by default, it will normally also make an order in relation to the judgment debtor payment the judgment creditor's costs, fees and interest. In relation to a Default Judgment, these amounts are fixed by law. After a hearing in the General Division, they need to be assessed.

A defendant who receives a Statement of Claim may formally admit to owing the amount claimed by filing with the Court an *Acknowledgement of Debt* form. If they do that, the court enters up an enforceable Judgment Debt and adds the appropriate amounts for interest, fees and costs for the judgment creditor.

Up to this point the "debt" has merely been an allegation made by the plaintiff against the Defendant. The amount ordered to be paid is now called a **Judgment Debt**, the person ordered to pay the money is now called a **Judgment Debtor** and the person who is required to be paid is called the **Judgment Creditor**. This is to signify the formal, binding and final nature of the Court's decision. A judgment debt is enforceable in a State Court for 12 years from the date it is made and attracts interest at a statutory rate (currently 10.25% pa. simple reducible.)

Enforcement and Payment

If the judgment debtor does not pay the judgment debt to the judgment creditor the judgment creditor may now take formal action through the court to enforce payment. There are two ways of enforcing a judgment debt. The court may seize and sell the judgment debtor's assets or it may seize and divert to the judgment creditor money otherwise payable to the judgment debtor.

The N.S.W. courts seize and sell goods via a **Writ for the Levy of Property** which commands the Sheriff's Officer (a form of civil police force run by the Attorney General's Department) to attend a particular address and seize the judgment debtor's goods, take them to auction and sell them and then send the proceeds to the judgment creditor in order to cover the amount of the Judgment Debt. For the protection of the judgment debtor, limitations are placed on what may be seized and sold.

In N.S.W. money payable to the judgment debtor is diverted to the judgment creditor through a court order called a **Garnishee Order**. The Garnishee Order is issued by the Court against a nominated person (called the Garnishee) who is said to hold money that is payable to the judgment debtor. This is usually the judgment debtors bank (for a savings account), employer (for wages) or anyone else who owes money to the judgment debtor. It commands the Garnishee to pay the money into the court which will then send it to the judgment creditor. For the protection of the judgment debtor, limitations are placed on what may be garnisheed.

The court does not take enforcement action of its own volition. The judgment creditor applies to the Court for the type of action required and can be required to pay prescribed fees to the court for the enforcement action and supply the information the court may require such as the judgment debtor's current address or where he banks or who he is employed by. If the judgment creditor does not know sufficient details to allow for enforcement, the judgment creditor may apply for the **Examination** of the judgment debtor. This is an attempt to find out from the judgment debtor where he works, what he owns, what he pays, where he banks and what he intends to do to pay the debt. The creditor is required to post an *Examination Notice* to the judgment debtor which gives the judgment debtor 28 days in which to voluntarily fill out a financial questionnaire and return it to the judgment creditor. If that is not done within 28 days, only then may the judgment creditor ask the court to issue an *Examination Order* which must be served on the judgment debtor summonsing him to appear at his nearest Court House to be cross examined under oath about his fiancés and who he intends to pay the judgment debt. Most judgment debtors ignore the service of an Examination Order upon them and fail to attend Court. The court will then authorize the judgment debtor's arrest so that the sheriff may forcible bring the judgment debtor to court to be questioned.

A judgment creditor may obtain a Certificate of Judgment from the Court and take action in the Federal Court to put an individual judgment debtor into **Bankruptsy** or place a corporate judgment debtor into **Liquidation**. The Federal court, instead of dealing with the individual judgment debt, calls in all the judgment debtor's creditors, liquidates its assets and distributes them "equitably" between all the judgment debtor's creditors. This is a far more expensive procedure than that carried out by the Local Court and it restricts what can be sold and gives greater protections to the debtor than those afforded by the State Courts. As a result, it is often the case that

judgment debtors besieged by attempts by judgment creditors to enforce judgment debts in the State court will seek protection by having themselves placed in voluntary Bankruptsy or voluntary Liquidation. Whereas a State judgment debt is enforceable for 12 years with interest, a bankrupt can have all his debts wiped out and be given a "clean sheet" after just three years. Little wonder that many creditors complain that bankruptsy is too lenient on debtors and consider it to be a form of "legalised theft".

The Culture of Debt Collection

Modern society is built on specialization. The average citizen does not conduct their own brain surgery, owner-build their own home, design and construct their own car, birth their own children or educate them at home themselves. They rely on specialists to do this for them. A plumber concentrates on being a plumber. A dentist upon being a dentist. They don't want to teach themselves to be their own lawyer. They want to have someone look after their debt collection problems for them cheaply and efficiently so they can get on with the details of their particular role in life. This is where the first problems arises. Many commentators foolishly suggest that the specialists be eliminated from debt collection and make it something that one does themselves. Most people just don't want to do that and very few do. They usually hire a Commercial Agent or a Solicitor. Sometimes both.

In payment for their services a licensed commercial agent may contract with the creditor to charge a fee and/or retain a percentage of any money recovered. **The cost to the creditor of using a commercial agent cannot normally be passed on to the debtor.** The creditor is therefore guaranteed never to receive all that is owed to them. Using a commercial agent cheats creditors out of part of what is owed to them because the law does not allow them to pass on the costs of collection to the debtor.

In payment for their services, a lawyer cannot claim or retain a percentage of the money that they collect. They bill the creditor under an agreed amount for their work. They usually do this on a "fee for service" basis in which the creditor is required to pay the lawyer at an agreed rate irrespective of success or failure. Less often , the lawyer may agree to bill the creditor on a contingent basis in which the creditor only has to pay the lawyer if the lawyer succeeds in collecting the debt. **The cost of using a lawyer can be passed on to the debtor but usually only in a limited way.** Complex rules exist for doing this but most lawyers charge more than the rules allow for. In some States, the amount allowed for using a solicitor are so tiny as to be ridiculous. As a result or all this, creditors will usually still find themselves out of pocket.

Creditors have now come to believe that collecting their debts is a no-win situation. Debtors object to paying costs as if they are not the cause of the problem in the first place. Creditors, believing they are going to be screwed by the system no matter which way they turn, negotiate deals with debtors that are usually totally unjustified. Regular debtors learn that, if they hold out, the creditor is likely to cave in and settle for a lot less than is owed. This culture has been created largely as a result of a failure by government to carefully design and hone the legal system to the task at hand. Commercial agents exist largely in the hope of avoiding a legal system that is perceived to be unfair to creditors. Debtors are encouraged to see what they can get away with. The solution, therefore, should be to create a legal system that quickly and efficiently offers to provide a zero-cost debt collection solution for creditors at the lowest cost to debtors.