

DEBT RECOVERY IN NSW

Organisation: The Chief Magistrate of The Local Court
Name: Judge Graeme Henson
Position: Chief Magistrate
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NEW SOUTH WALES

THE CHIEF MAGISTRATE OF THE LOCAL COURT

16 May 2014

The Chair
Legislative Assembly Committee on Legal Affairs
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

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

Dear Mr Doyle

Submission – Inquiry into debt recovery in NSW

I am writing on behalf of the Local Court of New South Wales in response to the Committee's invitation to make a submission in respect of the above inquiry.

Before outlining an area in which change to the legislation regulating civil proceedings (including actions for debt recovery) would be desirable, it may assist the Committee to provide an overview of the Local Court's jurisdiction in this area.

The Local Court is empowered to hear and determine civil proceedings, including money claims, under Part 3 of the *Local Court Act 2007* (LCA). Its Small Claims Division may determine proceedings where the value of the claim is up to \$10,000, while its General Division has a jurisdictional limit of \$100,000 for money claims (or \$120,000, where both parties consent to the higher limit).¹

The Productivity Commission's annual *Reports on Government Services* indicate that over the last decade the Local Court has consistently had the highest level of civil filings of any magistrates' court in the country,² dealing with well over 100,000 matters per year. Observationally, debt recovery matters amount to a significant portion of that caseload.

Overall, the division of matters between the Small Claims and General Divisions is about 80 and 20% respectively. Across both Divisions, the majority of proceedings are not contested and result in the entry of default judgment. Of those matters where a defence is filed, a conservative estimate from data in JusticeLink, the statewide court case management system, indicates that at least 60% settle prior to hearing. Approximately 3,000 to 3,500 matters proceed to a defended hearing per year.

Both the statutory regime for the determination of civil proceedings as set out in the *Civil Procedure Act 2005* (CPA) and the Uniform Civil Procedure Rules (UCPR), together with an approach to court practice and procedure that involves active case management, aim to facilitate the efficient resolution of matters. Indeed, the stated "overriding purpose" of the

¹ Sections 29, 30, 31, *Local Court Act 2007*

² See Productivity Commission, *Reports on Government Services* (2005-2014)

CPA and the rules of court made under it is to “facilitate the just, quick and cheap resolution of the real issues in dispute in the proceedings.”³ The stated objects of case management include “the efficient disposal of the business of the court” and “the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”⁴ The court is empowered to case manage proceedings as it thinks fit to enable “the speedy determination of the real issues between the parties to the proceedings”.⁵ Matters about which directions or orders may be made include the:

- Filing of pleadings or written submissions;
- Service and filing of written evidence;
- Giving of evidence at any hearing;
- Use of telephone, video conference facilities or other technology; and
- Timetable for dealing with a matter, including the conduct of any hearing.⁶

Civil procedure in the Local Court is also regulated by Practice Note Civ 1, which was issued in 2011 to consolidate all practice notes applicable in the civil jurisdiction. Broadly, the Practice Note contains provisions to provide clarity to parties and their legal representatives in relation to:

- The timetable that will ordinarily be followed in the progress of civil proceedings in each of the General and Small Claims Divisions,
- The case management of particular issues such as referral to alternative dispute resolution and determination of interlocutory applications,
- The awarding of costs, including maximum costs orders in General Division proceedings.

The available data on the timeliness of finalisation of civil proceedings is indicative of the legislative scheme and the Court’s procedural arrangements in place to regulate the case management of proceedings being in large part effective in facilitating the efficient resolution of civil claims. The overwhelming majority of all civil proceedings in the Local Court are finalised within 12 months of commencement. JusticeLink data indicates that in 2012, 95% of civil claims in the Small Claims Division and 96% of civil claims in the General Division were completed within a year. The Court also performed strongly in timeliness measures set out in the 2014 *Report on Government Services*, recording the lowest levels of civil matters outstanding after 6 and 12 months of any magistrate’s court in the country.⁷

Notwithstanding the above, one area in which legislative amendment would be desirable is an increase to the jurisdictional limit of the Small Claims Division of the Local Court from \$10,000 to \$20,000. In 2013, I wrote to the former Attorney General to request that consideration be given to such an increase, while leaving the jurisdictional limit of the Court’s General Division unchanged. To my knowledge, the suggestion is under consideration.

In effect, an increase to the Small Claims Division monetary limit would adjust the division of the Local Court’s civil caseload between the Small Claims and the General Divisions. Such an adjustment would be timely to simply address the effective erosion of the small claims jurisdiction due to CPI increases since the last increase in 2000; \$10,000 then

³ Section 56(1), CPA

⁴ Section 57(1), CPA

⁵ Section 61(1),(2), CPA

⁶ Rule 2.3, UCPR

⁷ Productivity Commission, *Report on Government Services* (2014), Table 7.13

would, in today's terms, amount to over \$15,000. At the same time, it would have the ancillary effect of making available more time and resources in the General Division for the more efficient finalisation of complex or higher value disputes.

However, the most significant benefit to parties of an increase to the Small Claims monetary limit lies in the expansion of the number of proceedings in which the Local Court's comparatively informal small claims procedures, which typically involve less rigorous preparatory work for the parties and shorter hearing times where matters are defended, could be utilised. This may be of particular benefit in relatively uncomplicated debt recovery actions.

Under the LCA, small claims matters may be dealt with by a magistrate or an assessor⁸ and there is an emphasis on the settlement of matters prior to a contested hearing. The Court is not to give judgment or make a final order unless it has used its best endeavours to bring the parties to a settlement acceptable to the parties, and is to give judgment or make a final order to give effect to such a settlement if reached.⁹ If a defence is filed, a Pre Trial Review must be held,¹⁰ which also has the primary purpose of providing an opportunity for settlement discussions. The parties are required to be in attendance on the review date, either in person or by a legal representative with authority to negotiate a settlement of the proceedings.¹¹

Informal procedures also apply if a matter proceeds to a hearing, such as:¹²

- Proceedings are to be conducted with as little formality and technicality as the proper consideration of the subject matter permits.
- The rules of evidence do not apply.
- Witnesses are not cross-examined except as may be authorised by the rules of court or a practice note. A direction may be made that a witness attend for cross-examination, such as where credibility is an issue. Ordinarily, a final hearing will proceed by way of written statements and the oral argument and submissions of the parties. An average hearing in the Small Claims Division takes about an hour.
- The Court may inform itself on a matter in the proceedings in such manner as it thinks fit.

Thank you for the opportunity to contribute to this inquiry. Please do not hesitate to contact my office on [REDACTED] should I be able to provide any further assistance.

Yours sincerely,

[REDACTED]
Judge Graeme Henson
Chief Magistrate

⁸ Section 35(1), LCA. There are presently three Assessors who sit at 36 Local Court locations.

⁹ Section 36, LCA

¹⁰ Rule 2.4, Local Court Rules 2009 (LCR)

¹¹ Rule 2.5, LCR

¹² Section 35, LCA