

DEBT RECOVERY IN NSW

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Redfern Legal Centre



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Legislative Assembly
Committee on Legal Affairs

Parliament of NSW
Macquarie Street,
Sydney NSW 2000

Inquiry into debt recovery in NSW

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Dear Committee Members

Thank you for the opportunity to contribute to the inquiry into debt recovery practices in NSW.

Redfern Legal Centre ('RLC') welcomes the inquiry into debt recovery in NSW. Our submissions will focus upon the issues faced by vulnerable and disadvantage consumers navigating the debt recovery process. Our clients regularly face financial hardship and experience the stress and anxiety imposed by debt recovery practices. Our submission will examine the difficult balance between the enforcement of creditor's rights and the protection of vulnerable consumers. RLC has proposed a number of measures, which we believe will make the debt recovery process fairer and more efficient.

We would welcome the opportunity to appear before the inquiry panel or to meet with you to discuss our submission further.

Yours faithfully,

Redfern Legal Centre

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Jacqui Swinburne
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SUBMISSION:

Inquiry into debt recovery in NSW

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Executive Summary

- The inquiry into debt recovery in NSW (the “Inquiry”) presents a genuine opportunity to consider and respond to the impacts of current debt recovery process in NSW. Redfern Legal Centre’s (‘RLC’) central concern is the effect of debt recovery process upon vulnerable and disadvantaged consumers.
- We recommend that the Inquiry examine practical measures to improve efficiency and enhance accountability in debt recovery process.
- The fair and proper appraisal of financial hardship, consumers’ genuine capacity to make repayments and their need to cover basic living expenses is key to an equitable and efficient process.
- Debt recovery process and enforcement often occurs before consumers have had an opportunity to seek advice about their rights under the National Credit Code and Australian Consumer Law. In RLC’s casework experience, the authoritative assertions of debt recovery process can preclude consumers from investigating or exercising their rights in these key areas.
- Consumers in receipt of Centrelink income are the most vulnerable members of our society and are poorly equipped to deal with a complex and adversarial civil process. We have an obligation to ensure subsistence welfare payments are protected from austere garnishee enforcement.
- In RLC’s casework experience, debt recovery disputes are most effectively and efficiently resolved through External Dispute Resolution schemes (‘EDR’). We recommend that the Government and industry members provide greater support for industry codes of conduct and external dispute resolution initiatives.

1. Introduction: Redfern Legal Centre

Redfern Legal Centre (‘RLC’) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC’s work in Credit & Debt

RLC recognises that the protection of financial and consumer rights is an important mechanism to secure other rights and freedoms such as secure housing, effective education and social and economic participation. RLC runs a specialist practice, which focuses on credit & debt and consumer law issues. We also provide a direct line of inquiry for Financial Counsellors across NSW.

3. Inquiry into debt recovery in NSW - Context and Objectives

The inquiry into debt recovery in NSW (the “Inquiry”) presents a genuine opportunity to assess the equity and efficiency of current mechanisms to regulate debt recovery in NSW. RLC welcomes the Inquiry’s broad terms of reference. We recognise that a recurring hindrance to efficient debt recovery process is the pursuit of ‘unrecoverable’ debts – situations where consumers are long-term welfare dependent with low prospects of full time employment, increased earning capacity or improved future financial position. Our submissions to the Inquiry are informed by our regular interaction with the experience of

financial hardship and the impact of current debt recovery process upon vulnerable consumers. RLC submits that the debt recovery process must be adapted for vulnerable and disadvantaged people, with low levels of financial literacy and with a long-term dependence upon Centrelink income. We believe that there are a variety of adjustments that can be made to improve both the protection of vulnerable people and the efficiency of debt recovery process. RLC submits that Inquiry should consider improved debt recovery practices and protections for vulnerable consumers. Other jurisdictions have legislated for fairer and more efficient debt recovery process. NSW should follow their lead.

4. Summary of RLC submissions

- RLC recommends a review of NSW civil procedure, particularly garnishee orders, and the impact of the debt recovery process upon acutely vulnerable and disadvantaged consumers.
- RLC strongly recommends the adoption of legislative protections, which prevent the garnishee of Centrelink income, equivalent to s12 of the *Judgment Debt Recovery Act* (Vic), s6 of the *Enforcement of Judgments Act 1991* (SA), s48.01 *Local Court Rules* (NT) and s72.05 *Supreme Court Rules* (NT).
- RLC strongly supports initiatives like the National Hardship Register, which can streamline an equitable method to appraise hardship applications.
- RLC recommends a review and revision of the ACCC / ASIC Debt Collection Guidelines (2005) to reflect changes informed by the recent updates to the Australian Consumer Law and the National Credit Code.
- RLC strongly recommends the creation of a debt recovery 'industry code of practice', with mandatory membership for all agency and third party collectors. The code of practice should reflect the updated Debt Collection Guidelines and international best practice and the Australian Consumer Law.
- RLC recommends an independent EDR scheme, to administer and regulate an industry code of practice, with mandatory membership for all debt recovery organisations. The terms of reference for the EDR scheme should include a right for consumers to have civil proceedings stayed whilst their matter is determined in EDR.

Specific Issues and Recommendations

5. Review of civil procedure for debt recovery, in particular the garnishee power and its impact upon vulnerable and impecunious consumers.

RLC opposes any expansion of powers for creditors to garnishee of wages in NSW. RLC strongly opposes the expansion of garnishee powers for creditors to readily obtain garnishee orders without fair procedure and a proper appraisal of debtors' minimum costs of living. RLC is also concerned with the wide-ranging powers of NSW State Debt Recovery Office ('SDRO') to identify and garnish the bank accounts of fine defaulters for breach of civil laws¹. RLC is concerned that the garnishee power of the SDRO can be exercised without proper regard to the subsistence nature of Centrelink payments or legislative protections for social security². NSW civil procedure currently prescribes a 'net weekly amount' (indexed, at 14 April 2014, \$458.40³) as the maximum weekly benefit a garnisheed may retain. In our casework experience, the SDRO has garnished bank accounts of impecunious and vulnerable debtors, solely in receipt of Centrelink income, without regard to this net weekly amount.

¹ s73 *Fines Act 1996* (NSW)

² s60 *Social Security (Administration) Act 1991* (Cth)

³ s122 *Civil Procedure Act 2005* (NSW)

RLC is concerned that the civil procedure of NSW provides prioritizes a creditors right garnishee above a proper appraisal of the cost of living. In our casework experience creditors will pursue the maximum possible amount as their default claim without regard to the varied personal circumstances of the debtor. Debtors' minimum weekly costs of living can be affected by a range of circumstances including supporting young children and keeping up mortgage payments. Garnishee orders are often not reviewed by a Magistrate but approved by a court registrar without a proper appraisal of diverse personal and financial circumstances. RLC supports a change in NSW law, which mandates a judicial assessment that includes a proper appraisal of personal and financial circumstances before determining the amount prescribed by the garnishee order.

RLC is particularly concerned with attempts to garnishee the wages of social security recipients. In our casework experience, garnishee orders can be granted to creditors without sufficient regard to the intent of protections afforded by the *Social Security (Administration) Act 1991* (Cth). This act provides that social security payments are 'absolutely inalienable'⁴ and should not be forfeited under any circumstances. RLC is concerned that any garnishee social security income is incompatible with this legislative protection. The improper exercise of this garnishee power often leaves people destitute, unable to buy food or pay the rent.

Case study: impact of garnishee upon vulnerable debtors

Jane had a history of drug addiction and homelessness but had been drug free for 7 years. She has been diagnosed with HIV and has significant medical expenses. Her sole source of income was the Centrelink Disability Support pension. Jane has two children in protective custody. Jane had outstanding fines with the SDRO.

Jane attended RLC after she notice that her bank account had been garnished by the SDRO. The balance of Jane's account at the time of the SDRO garnishee was \$150. The entire balance of her account was withdrawn by SDRO garnishee. Jane presented at RLC in a very distressed state. She had no money to visit her children and had a scheduled visit coming up for Mother's day. Upon an appraisal of Jane's situation and a lengthy discussion with the SDRO Advocacy line, RLC lodged a hardship application on Jane's behalf. The money was refunded into Jane's account 2 days later.

In this case, there was no judicial appraisal of Jane's personal or financial circumstances. The SDRO failed to properly investigate or consider Jane's personal and financial circumstances. The SDRO failed to comply with the garnishee order requirements under the fines act or the NSW civil procedure rules. Jane's case is one that regularly presents at RLC. While Jane's money was eventually refunded, RLC's professional time was not.

6. Practice of debt recovery actions in other jurisdiction.

RLC strongly supports a change to NSW law, which provides broad protection for social security payments, particularly against garnishee orders and enforcement process. We draw the Inquiry's attention to equivalent legislative provisions in Victoria⁵, which provides that no instalment order can be made without the consent of a judgment debtor where their income is solely derived from social security benefits. RLC also supports a change in law, which requires a proper judicial appraisal of an individual's personal and financial affairs

⁴ s60 *Social Security (Administration) Act 1991* (Cth)

⁵ s12 *Judgment Debt Recovery Act 1984* (Vic)

such that an accurate assessment of capacity to repay, and a fair garnishee or instalment amount, is determined before any garnishee order is made. Civil process in the Northern Territory and South Australia include these precautions⁶. The SA legislation⁷ requires a proper consideration of the following factors before a garnishee order is made:

- (a) the judgment debtor's means of satisfying the judgment; and
- (b) the necessary living expenses of the judgment debtor and his or her dependants; and
- (c) other liabilities of the judgment debtor.

NSW civil process fails to make this assessment properly or fairly.

Social security benefits barely cover basic costs of living. Disadvantaged recipients, and their diminutive income, should be afforded the full protection of the law. RLC strongly submits a change to NSW law, which provides proper protection for social security income against garnishee and an accurate appraisal of genuine capacities to make repayments.

RLC also notes that responsible lending principles⁸ provide that many consumers in this position should not be afforded credit. In RLC's casework experience, many are afforded this credit, particularly through small amount credit contracts, without a genuine capacity to repay the original debt and interest. Where these forms of credit have been afforded, it is often in dubious circumstances without a proper or responsible appraisal of the debtors' capacity to repay. NSW law currently prioritises such a creditors' entitlement to garnishee over the protection of social security payments for society's most vulnerable people. RLC submits that the protection of vulnerable consumers, and subsistence welfare payments, should be paramount.

RLC strongly supports the adoption of equivalent legislative protections in NSW, which improve protections for impecunious debtors and proscribes improperly appraised garnishee of social security income.

7. National Hardship Register

RLC regularly encounters clients who experience long term, entrenched financial and personal hardship. Many RLC clients who experience financial hardship also have low prospects of, or capacity to obtain, full-time employment with secure tenure. RLC often assists clients to articulate the same circumstances of disadvantage to a range of different creditors and debt collectors. The process of reiterating the same circumstances of disadvantage to each and every creditor for each and every debt is inherently inefficient. RLC submits that establishing the veracity of severe and long-term financial hardship need only be done once. Hardship should also be assessed according to uniform criteria.

The National Hardship Register ('NHR') (<https://www.nhr.org.au/>) is an important pilot project, which proposes an alternative method for parties to establish and verify circumstances of long-term severe financial hardship.

Financial counselors and CLCs currently experience a substantial administrative burden when proving long-term financial hardship to creditors of debt agencies. For a hardship application to be considered, each creditor or debt agency generally requires:

- Signed authority to act and release information

⁶ s48.01 Local Court Rules (NT), s72.05 Supreme Court Rules (NT), s6 Enforcement of Judgments Act 1991 (SA)

⁷ s6 (4) Enforcement of Judgments Act 1991 (SA)

⁸ Ch. 3 National Consumer Credit Protection Act 2009 (Cth)

- Copies of Centrelink income statements
- Statements of financial affairs - full accounting of income assets, liabilities and average weekly expenditure, prepared by a financial counselor.
- Medical certificates
- Letters detailing receipt of support services, eg. social worker
- Detailed account of personal hardship

This information must be submitted to each creditor or debt agency and the verification process can take weeks and months. This administrative burden is substantial. It reduces the efficiency of all parties and prevents the early resolution of long-term hardship matters. A Hardship Register can help to streamline the process for verifying long-term financial hardship and improve the efficiency of determining unrecoverable debt. The NHR model would create a verified register, which can be accessed by creditors and collection agencies. Avoiding the inefficient process of verifying and reiterating the same circumstances to each and every creditor would benefit creditors, collection agencies and consumers.

Case Study: negotiating to improve debt recovery process

John was 62. His only source of income was the Disability Support Pension. He lived in social housing, had no substantial assets and expected to receive the aged pension in the next few years. He was a mechanic for most of his working life.

Around 13 years ago he obtained a loan of \$1000, to pay for expenses around Christmas time, from his industry credit union. Shortly afterwards his financial situation spiraled downhill. He lost his job and divorced from his wife. He incurred significant costs involved with this family breakdown including having to sell the family home and pay child support. John had made one repayment but was otherwise unable to service the loan after he lost his job.

In early 2014, John came to RLC with escalating letters of demand from a debt collection agency. They sought repayments on the debt, which had grown to over \$6,000. They sought to enforce a court judgment obtained by the creditor 11 years earlier. John had no capacity to repay this amount. He was desperate to clear the fog of debt, which had been looming for 13 years. RLC assisted John to articulate his personal and financial circumstances. The original creditors were then able to recognise that this debt was unrecoverable and enforcement futile. John was overwhelmed by the escalation of the debt, but felt it important to make some repayment on the original loan. RLC help John to negotiate a settlement figure with his creditors, which he could manage on his limited income. John scraped together \$500, and the creditors accepted this as full and final settlement.

If, 13 years ago, John been able to get hardship assistance, or assistance from a No-Interest Loan Scheme, this protracted and inefficient recovery process could have been avoided. John's decade long experience of anxiety, and the time expended by each of the lender, debt collector, Local Court and RLC could have been assuaged.

The NHR provides and opportunity for creditors and debt agencies to check the veracity of hardship claims simply and efficiently. The NHR provides a genuine opportunity to improve the early and efficient resolution of unrecoverable debts. RLC supports the NHR pilot program and submits that the Inquiry should strongly consider this program as a realistic measure to make the debt recovery process more efficient. RLC commends the Australian Collectors and Debt Buyers Association ('ACDBA') in their support for this scheme.

8. Debt Collection Guidelines, Codes of Practice and EDR Schemes

The joint publication of the ACCC & ASIC Debt Collection Guidelines ('Debt Collection Guidelines' or 'Guidelines')⁹ provided a clear set of principles and protocols governing permissible behavior by debt collectors. Many collections agencies have adopted these guidelines as their own policy. The Debt Collection Guidelines represent current industry best practice on debt recovery process, but there is still room for improvement.

RLC notes however that the guidelines were published in 2005 and do not take into account recent changes to the Australian Consumer Law ('ACL') and the National Credit Code ('NCC'). RLC recommends that the Guidelines be updated to reflect recent changes to the ACL and NCC, particularly the obligations under s72 of the Credit Code in relation to hardship notices and applications for hardship variation. A timely review and update of the Debt Collection Guidelines should focus upon establishing a standardized hardship policy. The Guidelines should mandate a requirement not to pursue debtors who demonstrate long term and intractable reliance upon Centrelink income, with low prospects of obtaining full time employment. The Guidelines should mandate a strict requirement not to pursue statute barred debts or garnishee orders against Centrelink income.

RLC submits that the debt recovery industry in NSW should endorse the Debt Collection Guidelines as an industry code of practice. An industry code of practice will have a greater self-regulatory effect on the debt recovery industry than the current piecemeal adoption of the Guidelines by some of collection agencies. RLC submits that subscription to a Debt Collection Code of Practice should be mandatory for all agency and third party debt collectors. RLC hopes to see all debt collection agencies demonstrate a genuine endeavour to develop, and comply with, an industry code of practice.

In RLC's casework experience, industry codes of practice can provide a public and enforceable minimum standard of protection for vulnerable consumers. We draw the Inquiry's attention to the General Insurance Code of Practice¹⁰, Code of Banking Practice¹¹ and the Telecommunications Consumer Protections Code¹² by way of example.

In concert with a code of practice, RLC strongly supports the adoption of mandatory EDR scheme for the debt collection industry. Currently, not all debt collection agencies have IDR processes or EDR membership. We believe this should be a uniform mandatory requirement for all operators within the industry. In our view, the independent EDR process is the most effective and efficient dispute resolution option.

An alternative to the establishment of a debt recovery EDR scheme is for the expansion of the terms of reference of current EDR schemes – Financial Ombudsman Service and the Credit Ombudsman Service Limited – are expanded to give greater consideration to treatment of financial hardship applications by financial service providers and debt collection agencies. EDR schemes currently provide an important mechanism for consumers to have proceedings stayed a debt recovery dispute is resolved through a non-adversarial process.

⁹ see ASIC Regulatory Guide 96 at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ACCC-ASIC_Debt_Collection_Guideline.pdf/\\$file/ACCC-ASIC_Debt_Collection_Guideline.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ACCC-ASIC_Debt_Collection_Guideline.pdf/$file/ACCC-ASIC_Debt_Collection_Guideline.pdf)

¹⁰ <http://www.codeofpractice.com.au/>

¹¹ <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice/Code-of-Banking-Practice>

¹² <http://www.acma.gov.au/Industry/Telco/Reconnecting-the-customer/TCP-code/the-tcp-code-telecommunications-consumer-protections-code-acma>

Conclusion

RLC is concerned with the impact of debt recovery process upon vulnerable consumers. The law should not permit the myopic enforcement of creditors' rights at the expense of impecunious and disadvantaged consumers. Social welfare, and a basic living wage, must remain quarantined from creditors. It is the obligation of creditors to properly assess a debtors' capacity to repay before extending any form of credit to them. In RLC's casework experience, many actions by creditors involve unresolved credit and consumer complaints. We should ensure that there are appropriate mechanisms for these complaints to be investigated and resolved before a creditor is permitted to enforce a debt. In our experience, EDR is the most effective and accessible process to properly investigate and resolve these complaints. In addition to the EDR safeguards, we need legislative protections which ensure that no garnishee is ordered without a proper appraisal of financial and personal circumstances and no garnishee ordered against Centrelink income.