Report on the Statutory Review of the

Civil Procedure Act 2005

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Glossary

Act	Civil Procedure Act 2005
CCLC	Consumer Credit Legal Centre NSW
Department	Department of Justice
NSWTG	New South Wales Trustee and Guardian
ROGS	Report on Government Services
UCPR	Uniform Civil Procedure Rules 2005

Executive Summary

The *Civil Procedure Act 2005* (**the Act**) was enacted to provide a uniform set of procedures to govern civil litigation in New South Wales. The Act consolidated a number of disparate civil procedure provisions. It also authorised the unification of pre-existing court rules in the Uniform Civil Procedure Rules (**UCPR**).

The Act does not contain a specific objects clause. However, Part 6, Division 1 of the Act sets out a number of guiding principles. In particular, section 56 states that the overriding purpose of the Act is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. All parties, including legal representatives and any other person with an interest in the proceedings, have a duty to further the overriding purpose.

Section 7 of the Act requires the Minister to review the Act to determine whether its policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives. The report is to be tabled in each House of Parliament. This report is the result of the review process.

The report concludes that the policy objectives of the Act remain valid and that the terms of the Act generally remain valid for securing those objectives. Submissions to the review agreed that the Act has had a positive influence on the conduct of civil proceedings. However, the report notes that while legal professionals and the courts are increasingly embracing the case management principles set out in the Act, there remains room for improvement in the way that the guiding principle is being implemented by some participants in the legal system. Further cultural change will be required in future years if the Act's objectives are to be fully realised.

The report also makes a number of recommendations relating to particular provisions of the Act. These recommendations are intended to clarify provisions that stakeholders consider ambiguous, or to make adjustments to promote the efficient operation of the Act. It is recommended that the Government bring forward certain minor amendments. More substantive amendments should be the subject of further consultation with the debt collection industry and other interested stakeholders before the Government determines whether the proposed reforms should be implemented.

This report is an important assessment of the Act. However, it is important to note that the report is not a wholesale review of the civil justice system. Nor is it intended to limit further debate about the Act or potential amendments to it. Other inquiries have recently taken place that may generate further discussion about the terms of the Act. These include Productivity Commission Report No. 72 entitled *Access to Justice Arrangements*, and the Legislative Assembly Committee on Legal Affairs Report 2/55 entitled *Debt Recovery in NSW*. This report should be read with this broader context in mind.

Addendum

Following the finalisation of the statutory review report but prior to its release, the Legisative Assembly Committee on Legal Affairs released Report 2/55 entitled *Debt Recovery in NSW*. The two reports should be read alongside each other, as the following Committee recommendations overlap with recommendations made by this review:

- Ensure that a minimum protected amount is maintained in bank accounts that are subject to bank garnishee orders (Recommendation 8),
- Allow bank garnishee orders to operate on term deposits (Recommendation 9),
- Clarify that administrative charges for garnishee orders may be deducted in addition to the amount being garnished (Recommendation 10),
- Bring the items protected from seizure under a property writ in line with items protected under the *Bankruptcy Act 1966 (Cth)* (Recommendation 11), and
- Allow creditors to ascertain the whereabouts of judgment debtors after judgment has been made (Recommendation 16).

While the recommendations of the two reports generally align, there are some minor variations. In particular, this review recommends that further consultation occur in order to determine whether certain reform proposals can be implemented. While it is acknowledged that the Committee consulted widely during the course of its inquiry, further consultation is still recommended to ensure that all potentially affected stakeholders have an opportunity to comment.

Summary of Recommendations

This review recommends that:

1.	a) Section 76 of the Act be amended to provide that the court is not required to approve a settlement where a person was under legal incapacity only due to age when proceedings commenced but is no longer under legal incapacity due to age at the time of settlement b) The Department establish a working group including the NSW Trustee and Guardian, District Court, Supreme Court and legal profession, to review provisions of the Act that govern the payment of legal costs from money that is awarded to people under legal incapacity in court proceedings.
2.	The Government**:** a) Task the Sheriff to review and simplify the information that is provided to judgment debtors regarding the right to direct the order in which property seized under a writ for the levy of property may be sold b) Task the Sheriff to review and simplify the language and format of the standard 'letter of notice to a debtor advising them that a writ has been received' to improve clarity and readability.
3.	The Government consult further with the debt collection industry, NSW Small Business Commissioner and other interested stakeholders on the following proposals: a) Re-instate a provision similar to section 59(2A) of the repealed *Local Court (Civil Claims) Act 1970* to grant discretion to the Sheriff to decline to execute a writ for the levy of property where the cost of seizing, removing, storing and selling property is likely to exceed the total sale price b) Amend section 106 of the Act to align the definition of protected personal property with that contained in the *Bankruptcy Act 1966* (*Cth*) c) Amend the Act to require the Sheriff to send a letter of notice to a debtor at least 21 days before further enforcement action is taken.
4.	In relation to garnishee orders: a) s121 of the Act should be amended to ensure that the rules governing the payment of money where a debtor is subject to multiple garnishee orders are simple and clear b) The Uniform Rules Committee should be asked to review UCPR form 71 'Garnishee orders for wages or salary' to ensure that the information provided to employers and payroll managers is clear and simple.

5.	The Government consult further with the debt collection industry, NSW Small Business Commissioner and other interested stakeholders on the following proposals: a) Extend the period within which a garnishee must comply with a garnishee order from 14 to 21 days from the relevant date (see sections 118 and 120 of the Act) b) Require the subject of a garnishee order to notify the debtor at least seven days before money is paid to a creditor c) Prescribe a minimum protected amount in relation to garnishee orders for debt, similar to that prescribed in relation to garnishee orders for wage/salary d) Discourage the inefficient use of court and banking resources caused by the issuing of multiple untargeted garnishee orders by introducing a small fee for certain types of garnishee orders e) Amend section 106 of the Act to enable garnishee orders for debt to operate in relation to funds held in a term deposit without requiring expiration of the term, where the term deposit allows the account holder to access the funds prior to maturity f) Amend section 119(3) of the Act to provide that a garnishee order for wages/salary expires 24 months after it is granted unless refreshed g) Amend section 119 of the Act to provide the court with discretion to vary garnishee orders in special or exceptional circumstances.
6.	Insert a note at the end of section 126 of the Act to make it clear that charging orders are not available in the Local Court.
7.	Section 123 of the Act should be amended to clarify that the administrative charge for garnishee orders may be deducted in addition to the amount that is garnished.
8.	The Government consult further with the debt collection industry, NSW Small Business Commissioner and other interested stakeholders on the following proposals: a) Enable garnishee orders for debt to operate for a period of 28 days, rather than at a single point in time b) Allow a creditor to seek an Order for Discovery to ascertain the location of a judgment debtor.

1. Introduction

Background to the legislation

The courts have long recognised that the efficient conduct of civil litigation can deliver benefits to all participants in the litigation process. Justices Bergin and McClellan provide a history of the numerous case management initiatives that have been pursued by the courts in recent decades[1]:

> 'Case management procedures were initially controversial but are now generally accepted. First introduced in the Construction List of the Supreme Court, they were subsequently adapted for the Commercial List. The use of written submissions increased. Courts began to recognise the value of alternative dispute resolution processes, particularly mediation, and parties were encouraged to explore the possibility of settlement before embarking on costly litigation.'[2]

However, prior to the enactment of the *Civil Procedure Act 2005* (**the Act**), the development and use of case management principles was restricted by the legislative framework under which the courts operated. For example, legislation provided limited formal recognition of the courts' case management powers. Courts were also required to develop separate rules and procedures, which encouraged the proliferation of disparate rules, even where proceedings were substantively similar in nature.

The development and passage of the Act was a significant project, commencing in 2003 and concluding with the commencement of the Act in August 2005. As the then Attorney General noted in the *Civil Procedure Bill 2005* second reading speech[3], the development of the Act was primarily driven by:

1) a 2002 Public Accounts Committee report on court waiting times which recommended rationalising civil court rules
2) the need for common processes to support the development of a digital case management system for the courts.

The Act created a unified legislative framework for civil litigation in New South Wales. In doing so, it introduced a single set of procedures for most civil matters. Court rules were also brought together and simplified under the Uniform Civil Procedure Rules (**UCPR**).

The Act and UCPR were drafted using phrases that had a settled meaning. This approach was taken to save time and costs for the courts, legal profession and the public and to avoid unnecessary confusion. Rules dealing with similar subject matters were grouped together and were also maintained in the same general order for the sake of familiarity.

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[1] Bergin, PA and McClellan, P., 'The Civil Procedure Act 2005 and Uniform Civil Procedure Rules 2005: Have they lived up to expectations?'. Judicial Officers Bulletin, Vol. 22, No. 8, Sept 2010: 61-64.
[2] Ibid.
[3] Second Reading Speech, Civil Procedure Bill 1995 (NSW), Legislative Assembly, 6 April 2005 (Bob Debus, Attorney General of NSW), accessed online on 30 June 2014 at: http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/6a5e9d61a5437c11ca256fda002023ab/$FILE/A2805.pdf

The importance of case management in improving efficiency and reducing court costs was explicitly recognised in the Act. The Act set out specific provisions for active case management and placed a positive obligation on parties to promote the 'just, quick and cheap' resolution of proceedings. Case management was also given prominence in the UCPR.

The then Attorney General tabled a paper during the second reading speech on the Bill entitled 'An Introduction to the Civil Procedure Bill 2005 and the Uniform Civil Procedure Rules 2005'. It provides more detailed information on the Act and can be found at www.lpclrd.lawlink.nsw.gov.au

Conduct of the review

Section 7 of the Act requires the Attorney General to commence a review of the Act as soon as practicable after the period of five years from the date of assent to the Act. The review is to determine whether the policy objectives of the Act remain valid and whether the terms of the legislation remain appropriate for securing those objectives. The Act received assent on 1 June 2005.

Advertisements were placed in the Sydney Morning Herald and Daily Telegraph newspapers in February 2011 calling for submissions to the review. Notices were also placed on the Department's website.

Letters were sent to key stakeholders, including professional organisations and the heads of jurisdiction of all NSW Courts, inviting submissions to the review. Thirteen submissions were received. Most submissions were from professional associations, departmental agencies and the courts (a list of submissions is at Appendix C).

The Department formed a Reference Group to consider and advise on issues raised in submissions. The Reference Group consisted of:

- Mr Justice Basten SC (Court of Appeal)
- Her Honour Judge Truss (District Court)
- His Honour Judge Townsden (then Magistrate of the Local Court)
- Ms Carol Webster SC (NSW Bar Association)
- Mr Gary Ulman (Law Society of NSW)
- Ms Alice Lin (Community Legal Centres NSW)
- Mr Richard Pender (then Deputy Sheriff of NSW)
- Ms Jill Day (NSW Trustee and Guardian)
- Ms Monique Hitter (Legal Aid NSW)
- Mr Nick Sandrejko and Mr Marcel Savary (departmental representatives).

This report is the outcome of the review process. It takes into account submissions received, as well as comments and recommendations made by the Reference Group. However, this review is not a wholesale assessment of the civil justice system in New South Wales. It examines the operation of the Act only. The review did not examine the UCPR or Regulations, except where they were directly raised in submissions or by the Reference Group.

2. The policy objectives of the Act

2.1 Are the policy objectives of the Act still valid?

While there is no specific section in the Act that articulates its object, section 56 sets out its overriding purpose:

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

In addition, section 57 states that proceedings in any court should be managed having regard to the following objects:

(a) The just determination of the proceedings,
(b) The efficient disposal of the business of the court,
(c) The efficient use of available judicial and administrative resources,
(d) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

The Act's second reading speech also emphasised that the object of the Act is to encourage civil proceedings to be dealt with in a manner that is just, efficient, timely, at a cost proportionate to the dispute and, ideally, affordably[4].

Conducting proceedings in a manner that is just, quick and cheap for all parties is not a straightforward task. Parties will have differing views on what the term 'just, quick and cheap' means. Given the diversity and complexity of litigation that comes before the courts, it is also inevitable that the objects of the Act will come into conflict from time to time. Where this occurs, the objects of the Act must be balanced against each other.

Nevertheless, all submissions to the review which referred to the policy objectives of the Act agreed that the objectives remain valid[5]. This review agrees that the objective of facilitating the just, quick and cheap resolution of the real issues in proceedings remains valid. However, all participants in the civil justice system must continue to actively promote the guiding principle if the objective is to be achieved in a consistent and meaningful way.

2.2 Are the terms of the Act appropriate for securing its objectives?

Apart from specific proposals to amend particular sections of the Act, which are discussed in detail below, submissions to the review and the Reference Group agreed that the terms of the Act generally remain appropriate for securing its objectives.

It is important to note that a number of instruments contribute to securing the Act's objectives beyond the terms of the Act itself. These include the UCPR, as well as Practice Notes issued by heads of jurisdiction. While the UCPR and Practice Notes do not form part of the Act and were therefore not examined in

[4] Ibid, Second Reading Speech, *Civil Procedure Bill 1995* (NSW), Legislative Assembly, 6 April 2005 (Bob Debus, Attorney General of NSW).
[5] For example, the submission of the NSW Young Lawyers' Civil Litigation Committee 'considers that these objects remain valid, and that the operation of the Act generally accords with those objectives.'

detail by this review, the importance of these instruments in achieving the Act's objectives should not be underestimated.

The Act itself does not directly govern the UCPR or Practice Notes, but rather provides high level guidance to the courts. However, it is these instruments that set out the day to day rules governing the progress of cases through the courts. While this could be perceived as limiting the ability of the Act to achieve its objectives, it is appropriate that this structure remain in place. It is noted that the courts do not have an unlimited discretion when drafting court rules and other instruments. Section 56 of the Act requires the courts to seek to give effect to the guiding principle when it exercises any power given to it by the Act, including the drafting of court rules.

The Uniform Rules Committee, which administers the UCPR, includes representatives from the courts and members of the legal profession. Enabling the courts and the legal profession to develop procedural rules collaboratively encourages a high level of commitment and enables best practice to be adopted across participating courts. The UCPR is kept under regular review by the Uniform Rules Committee and adjustments are frequently made to improve the operation of the rules and respond to changing circumstances.

2.3 Has the Act increased efficiency?

Submissions to the review supported the view that the formalisation of case management principles in the Act has been a positive development in terms of efficiency. For example, in its submission, the Injury Compensation and Litigation Law and Practice Committees of the Law Society stated that:

> 'the case management regime enacted in sections 56-60 of the Act have clearly been a success. Prior to the introduction of these provisions, matters were delayed for many years…matters would take up to 6 years to be heard from the date they were certified as being ready.'[6]

What is case management?

Case management is a conscious decision on the part of the legislature and the courts to overcome unacceptable delay and costs, and promote the civil legal system as an administrator of justice for all. Case management involves:

1. An obligation to engage in case preparation at a very early stage.
2. Requiring parties to exchange documents and information within set timeframes.
3. The use of different 'tracks' or lists for different types of cases.
4. The promotion of alternative dispute resolution.
5. Regular review by judges and registrars to ensure compliance.

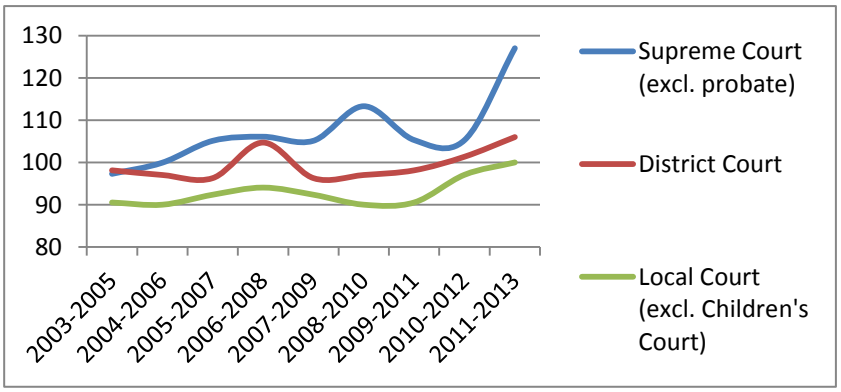
In order to measure efficiency gains, this review compared statistical data from before and after the commencement of the Act using data from the Productivity Commission's annual Report on Government Services (**RoGS**). While RoGS provides a relatively simplistic measurement of macro changes only, it is a useful comparison tool. Caution is required in relation to data produced before

[6] Law Society of NSW, *Submission* (8 April 2011).

2005, as the courts' digital case management system was still being developed at that time.

Figure 1 below shows the moving two year average of the clearance indicator in the Local, District and Supreme Courts. The clearance indicator is the ratio of new lodgements to finalisations and is a key measure of whether the courts have capacity to meet time standards in future. Figure 1 indicates that, while there were fluctuations in clearance rates between July 2003 and June 2013, there has been a general improvement across jurisdictions during this period.

Figure 1: **Moving two-year clearance indicator – civil finalisations/lodgments (RoGS)**



'Backlog indicators' for the Supreme Court and District Court also show improvements in the timeliness of courts' processing of civil matters since July 2003. The backlog indicator measures the number of pending cases older than applicable reporting standards (12 months and 24 months), divided by the total pending caseload (multiplied by 100 to convert to a percentage). Reductions in the backlog indicator indicate that timeliness is improving.

Figure 2: **Supreme Court civil backlog indicators – 2003-2013 (RoGS)**

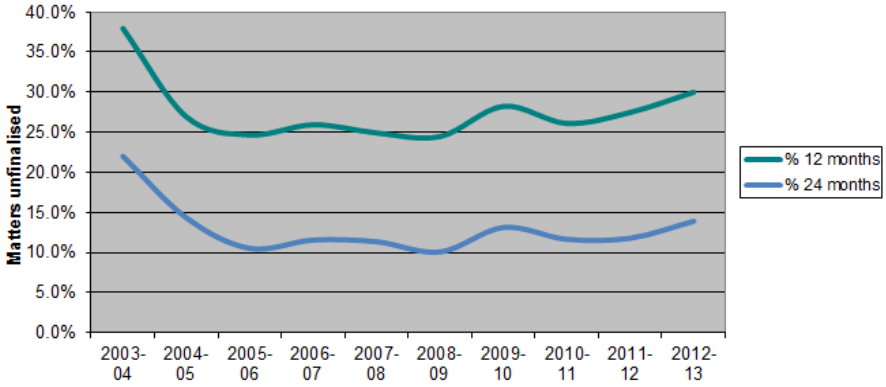
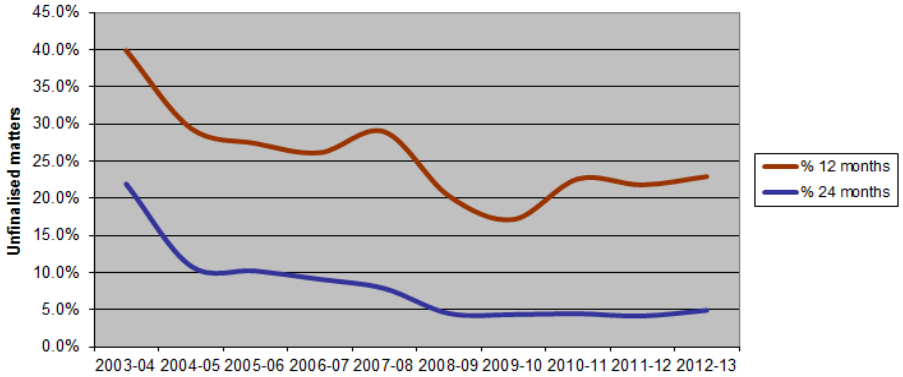


Figure 2 above indicates that the backlog of civil matters in the Supreme Court improved significantly after the introduction of the Act and has remained relatively steady since. Figure 3 below indicates that the District Court backlog also improved significantly after the Act commenced and continued to improve after 2005, although in the last few years it has increased in relation to the 12

month reporting standard. There are no Local Court backlog statistics for the relevant time period.

Figure 3: **District Court civil backlog indicators – 2003-2013 (RoGS)**



It is unlikely that the efficiency gains outlined in Figure 1 can be solely attributed to the introduction and implementation of the Act. The efficient conduct of matters before the courts is influenced by a number of factors, including the number of judicial officers and court staff employed by the courts, the attitudes and behaviours of lawyers and litigants, and the mix of cases coming before the courts. For example, a significant change in the number and type of actions coming before the courts occurred following the civil liability reforms of 2002.

Nevertheless, there is some evidence that a cultural shift has taken place within the legal profession since the Act's introduction. Practitioners and litigants are increasingly choosing Alternative Dispute Resolution (**ADR**) options such as mediation and arbitration in order to resolve civil disputes in a cost effective way. By providing an overarching framework that encourages the quick and efficient conduct of proceedings, the Act plays an important role in supporting and encouraging the use of innovative dispute resolution techniques.

2.4 The importance of cultural change

Submissions to the review agreed that, overall, implementation of the Act and its objects has been positive. However, some stakeholders are of the view that there is still room for improvement in the way that the guiding principle is implemented by some participants in the civil justice system. Some Reference Group members, for example, believe that some members of the judiciary, registrars and practitioners may not have fully adjusted to the new regime. This may be the case. However, cultural change on the scale encouraged by the Act is not a straightforward process. This is not due to a deficiency in the Act itself, but rather stems from the inherent challenges associated with changing traditional working practices and embracing new and innovative case management techniques.

The Act itself provides high level guidance only. It is a legislative framework that places a range of flexible tools in the hands of the Uniform Rules Committee, individual judges, legal practitioners and parties to facilitate the just, quick and

cheap resolution of the real issues in proceedings. However, the achievement of this objective ultimately depends on the willingness of these actors to embrace the guiding principle and implement it in their daily interactions with the justice system. The courts, as well as legal practitioners, must also continue to play an active role in emphasising the importance of the guiding principle in their daily interactions with clients.

There is evidence that solicitors, barristers and other participants in the justice system are increasingly aware that section 56 of the Act is 'a deliberate government policy designed to change past practices that have sometimes brought the law into disrepute[7].' While rarely imposed, personal costs orders awarded against legal practitioners who incur costs improperly or without reasonable cause signal the willingness of courts to robustly apply the guiding principle. Such orders have been made by the Supreme Court where practitioners have failed to lodge affidavits or other key documents in accordance with the court's timetable, causing delays.[8] Judges have also expressed the view that the courts should be proactive in preventing common 'mischiefs' which may be contrary to the guiding principle in relation to costs, such as the inclusion of unnecessary or irrelevant documents in judges' bundles,[9] and the issuing of subpoenas in an 'unrestrained and prolific' way.[10] Continuing professional development may also assist in bridging any knowledge gaps within the profession. The Law Society of New South Wales, for example, educates practitioners about the risks associated with incurring unnecessary costs in its *Costs Guidebook* and other materials.

A review of teaching material for university students and young lawyers also shows that case management principles have become a key feature of most civil litigation subjects. The importance of conducting litigation in a manner that promotes the guiding principle is emphasised in teaching materials. The use of **ADR** in appropriate cases is also encouraged. If the next generation of legal practitioners are supported to implement these teachings, a more significant cultural shift may be observed in future years.

3. Amendments proposed by stakeholders

This review has concluded that the terms of the Act are generally appropriate to secure its objectives. However, during the course of the review a number of stakeholders proposed amendments to clarify or adjust the operation of particular provisions of the Act. These proposals are considered below.

3.1 Division 4 of Part 6 – NSW Trustee & Guardian

3.1.1 Costs where a person is under legal incapacity

NSW Trustee & Guardian (**NSWTG**) raised concerns during the course of the review regarding its ability to authorise the payment of party/party and

[7] Pembroke, J., 'Dancing to a new tune', *Law Society Journal*, (51; 5 – June 2013), p 52.
[8] *Lemery Holdings Pty Limited v Reliance Financial Services Pty Ltd* [2008] NSWSC 1114.
[9] *SDW v Church of Jesus of Letter-Day Saints* [2008] NSWSC 1249, per Simpson J at [35].
[10] *Tobin v Ezekiel – Ezekiel Estate* [2008] NSWSC 1108, per Palmer J at [39].

solicitor/client costs. In particular, NSWTG noted that section 78(2) of the Act appears to require it to seek directions from the Supreme Court before it authorises any payment. NSWTG also submitted that, as it is generally not a party to the proceedings that give rise to payments, it can be difficult for it to assess whether particular costs sought are appropriate.

Discussion

Section 77 of the Act provides for the payment of money that is recovered on behalf of a person who is under legal incapacity following the conclusion of court proceedings. Section 77(3) provides that the court may order that such money be paid to the NSWTG under certain circumstances (for example, if the person is a minor or if the person is a protected person and the NSWTG is the manager of the protected person's estate).

Sections 78 and 79 of the Act govern the manner in which such money can be applied by the NSWTG. Section 78(1) states that, subject to a court order, money paid to the NSWTG under section 77(3) is to be held and applied for the maintenance and education, or otherwise for the benefit of, the minor. Section 78(2) states that the NSWTG may apply to the Supreme Court for directions as to the administration of any such money. Section 79 provides that, subject to a court order, money paid to the NSWTG under s77(3) is to be held and applied by the manager as part of the protected person's estate.

Costs orders are generally made on a party/party basis (that is, costs that are necessary to enable the adverse party to conduct the litigation and no more[11]). If parties cannot agree on the quantum of party/party costs, costs are determined under the assessment process set out in the *Legal Profession Act 2004*. In these circumstances it would normally be unnecessary for the NSWTG to assess whether costs are reasonable, as an assessment will have already occurred.

The NSWTG is more likely to encounter difficulties in relation to the payment of solicitor/client costs (that is, costs that are incurred by a client in relation to work performed pursuant to the retainer between solicitor and client). Solicitor/client costs are normally a matter for the plaintiff's tutor and solicitor and will not always be disclosed to the judge who approves the settlement. This means that in many cases, the tutor will seek to have solicitor/client costs reimbursed from the monies that are paid to NSWTG.

The Reference Group agreed that the NSWTG's power to authorise costs should be clarified. The Reference Group discussed the following possible solutions:

(i) that the NSWTG determine the appropriate payment,
(ii) that the matter be referred to a costs assessor, or
(iii) that the trial judge determine the appropriate payment.

[11] *Smith v Buller* (1875) 19 Eq., at p.475

The NSWTG considered that it should not be responsible for determining solicitor/client costs, as it does not have the requisite knowledge to determine what level of payment is reasonable or appropriate. The Reference Group also discussed whether it might be appropriate to have a costs assessor assess solicitor/client costs at the same time that party/party costs are assessed. However, it was noted that this would create additional expense.

It was suggested that it may be preferable for the trial judge to determine the appropriate payment. That is, the the trial judge would make his or her own assessment as to solicitor/client costs and give a direction as to payment (either when approving the settlement or at a later date). It was noted that the practice of the Common Law Division of the Supreme Court when approving settlements could be used as a model.

Supreme Court judges commonly make an assessment of the appropriateness of the amount being deducted from the body of the settlement for solicitor/client costs. In order to make an assessment, a judge will request an estimate of the maximum solicitor/client costs so that he or she can make a recommendation. If the estimate is too high, the court will make a recommendation to this effect and highlight the issue as a matter for the NSWTG to pursue. However, the Supreme Court advised that in the majority of cases, solicitor/client costs are not found to be unreasonable in light of the complexity of the matters. This procedure is not set out in rules of court, but is undertaken as a matter of good practice.

The Supreme Court noted that it would be important to include an express power for the trial judge to refer the issue to a costs assessor, especially where the judge does not consider that he or she is in a position to assess the reasonableness of the costs. Judges would only exercise such a power where the solicitors cannot agree, or if the judge has doubts as to the amount of the proposed deduction but is not in a position to determine whether it is excessive.

Conclusion

As the amount of the approved legal costs will ultimately reduce the final quantum of payment made to persons under legal incapacity, it is important that decisions as to the payment of costs are made quickly and accurately. This review therefore recommends that the NSWTG's power to authorise costs under s78 be clarified. Further consultation should occur with relevant stakeholders, including disability advocacy groups, in relation to the particular form of the required amendment. However, the amendment would likely involve:

- Providing the trial judge with authority to make a recommendation on the appropriateness of solicitor/client costs at the time of settlement/judgment,
- Providing the court with an explicit power to refer solicitor/client costs to an assessor in appropriate circumstances, and
- Clarifying that the NSWTG can make payments in relation to solicitor/client costs without seeking specific authorisation from the Supreme Court.

3.1.2 Incapacity due to age under section 76 of the Act

A further issue was raised by the Reference Group regarding the approval of settlements under sections 76 and 77 of the Act. The District Court submitted that if a person was under a legal incapacity when proceedings commenced only due to age and is otherwise of full legal capacity at the time of settlement, he or she should be able to exercise the decision making power of a competent adult to settle a matter.

Discussion

Section 76 relates to proceedings commenced by or on behalf of, or against, any of the following:

- A person under legal incapacity (e.g. a child under the age of 18 years)
- A person who, during the course of the proceedings, becomes a person under legal incapacity (as defined in section 3 of the Act)
- A person whom the court finds, during the course of the proceedings, to be incapable of managing his or her own affairs.

It is relatively common for plaintiffs who were under 18 years of age when proceedings commenced to reach the age of 18 by the time the matter is settled. However, the District Court advised that some defendants argue that because the plaintiff was under a legal incapacity when proceedings were commenced, the court is required to approve the settlement under sections 76(1) and (3).

Conclusion

This review agrees that a person who was under a legal incapacity only due to age when proceedings commenced and is otherwise of full legal capacity at the time of settlement should be able to exercise the decision making power of a competent adult to settle a matter. Accordingly, this review recommends that the Act be amended to clarify that section 76(3) does not apply if, at the time of settlement, the plaintiff is 18 years of age and is not otherwise a person under legal capacity as defined or incapable of managing his/her own affairs.

Recommendation 1

a) That the Government amend section 76 of the Act to provide that the court is not required to approve a settlement where a person was under legal incapacity only due to age when proceedings commenced but is no longer under legal incapacity due to age at the time of settlement, and

b) That the Department establish a working group, including the NSW Trustee and Guardian, the District Court, Supreme Court and the legal profession, to review provisions of the Act that govern the payment of legal costs from money that is awarded to persons under legal incapacity in court proceedings.

3.2 Section 87 – self-incrimination certificates

The Local Court submitted that s 87 of the Act should be amended to clarify its interaction with s 128 of the *Evidence Act 1995*, and in particular whether a broad or narrow interpretation of an 'objection' to the giving of evidence should determine the grant of a certificate protecting a person from self-incrimination. The Local Court submitted that there appears to be a potential overlap between 'providing evidence' by way of affidavit under section 87 and 'giving evidence' by way of affidavit under section 128.

Discussion

The Reference Group considered this issue and found that there may be an inconsistency between sections 87 of the Act and 128 of the *Evidence Act*. This has arisen because the interpretation of s 128 of the *Evidence Act* has evolved more narrowly than that in relation to s 87. Under s 87 a certificate is likely to be granted when a person provides evidence by affidavit, but will not be granted in a similar situation under s 128.

The notes on the *Civil Procedure Bill 2005* explain that section 87 extends the protection against self-incrimination contained in section 128 of the *Evidence Act 1995* to interlocutory orders for disclosure, such as search and freezing orders. When s 128A was inserted into the *Evidence Act* in 2007, s 87(2A) was inserted into the Act to exclude the operation of s 87 when s 128A of the *Evidence Act* applies.

Section 87 assumes that s 128 does not apply to all evidence given to a court 'or to a party to a proceeding before the court'. The Reference Group considered that there appeared to be an anomaly in the legislation, as the *Evidence Act* applies to 'all proceedings in a NSW court', including 'interlocutory proceedings or proceedings of a similar kind': see s 4(1) of the *Evidence Act.*

Conclusion

The Reference Group considered, and this review agrees, that there appears to be an inconsistency between the operation of section 87 of the Act and sections 128 and 128A of the *Evidence Act*. The Department is aware of this issue and will seek further advice about an appropriate legislative solution.

3.3 Part 8 Enforcement of judgments and orders

3.3.1 Discretion to seize goods

The Office of the Sheriff of NSW (**'the Sheriff's Office'**) submitted to the review that it should have discretion as to whether goods are seized under a writ for the levy of property. The Sheriff's Office submitted that the absence of such a discretion can result in an inefficient use of the Sheriff's time and resources, as the value of property seized can be minimal.

Discussion

Under the law in force prior to the enactment of the Act, Sheriff's Officers had discretion as to whether goods were seized under a writ for the levy of property. Section 59(2A) of the *Local Court (Civil Claims) Act 1970* provided that:

> 'If, in the opinion of the Sheriff or a bailiff of any court, the cost of seizing, removing, storing and selling property to be seized or taken under a writ of execution is likely to exceed the total sale price of that property, the Sheriff or bailiff concerned may decline to execute that writ.'

There is presently no equivalent provision to the former section 59(2) of the *Local Court (Civil Claims) Act 1970* in the Act. As a result, judgment creditors can request that Sheriff's Officers enforce the law strictly. In some cases, this can result in the seizure of goods without consideration of their quality or value. The practice of seizing property in this manner can compound the financial problems of certain debtors, who may be required to forfeit personal property which has little financial value but which is of ongoing use.

The Reference Group unanimously supported the re-instatement of a provision in the Act with similar effect to section 59(2A) of the repealed *Local Court (Civil Claims) Act 1970*.

Conclusion

This review agrees that the seizure of property where the cost of storing and selling the goods outweighs the sale price of the property appears to be an inefficient use of the Sheriff's resources. However, it is important that all relevant stakeholders are given an opportunity to comment on this proposal. This review therefore recommends that further consultation with stakeholders, including debt collection agencies, occur before this amendment is progressed.

3.3.2 Definition of protected personal property

In its submission to the review, the Consumer Credit Legal Centre NSW (**CCLC**) submitted that the definition of protected personal property in the Act and UCPR should be aligned with Commonwealth bankruptcy law.

Discussion

Section 106(3) of the Act and UCPR 39.46 provides that personal property protected from forced seizure and sale by creditors includes clothing, bedroom and kitchen furniture, and up to $2,000 worth of tools of trade in use by the debtor or debtor's family.

This definition is more limited than the categories of personal property that are protected under Commonwealth bankruptcy law. Commonwealth bankruptcy law defines 'protected personal property' as including necessary household property, tools of trade and other professional instruments, and a motor vehicle that does not exceed a set value[12]. The creditor must also consider any special

[12] See section 116 of the *Bankruptcy Act 1966* and clauses 6.03 and 6.04 of the *Bankruptcy Regulations 1996*.

medical needs of people in the debtor's household, whether the property is reasonably necessary for the functioning of the bankrupt's household and the likely sale value of the property.

The CCLC noted that, in its experience, it is not uncommon for debtors to declare personal bankruptcy rather than being subjected to a writ for the levy of property under the Act. This is because a person could be permitted to retain more of their personal property if they were to declare bankruptcy. The CCLC argued that aligning the definition of personal protected property in the Act with Commonwealth bankruptcy law would therefore remove an incentive for debtors to declare bankruptcy.

The CCLC further submitted that the amended definition would also benefit creditors, as the amendment would permit creditors to claim more property under the Act than they otherwise could if a debtor were to seek the protection of bankruptcy. The CCLC emphasised that the proposal would also help vulnerable/isolated people, especially those who live in rural areas or have disabilities. For example, a common example of need which is not met under the Act's definition is the ability to retain a vehicle. In many rural and regional areas, a car is a vital resource that permits people to secure employment and access other essential services (including education and medical care).

The Reference Group noted the distinction between the enforcement of a judgment debt and enforcement for the purposes of bankruptcy. As bankruptcy is a long-term arrangement, it is arguable that excluded goods should be more extensive (as it would cause greater hardship for a person to be without these items for the entire period of a bankruptcy). The Reference Group also noted that it may seem unjust for a person that is subject to a judgment debt to have their personal property protected in an equivalent manner to bankrupts, but not be subject to the same restraints. However, the Reference Group agreed that, other things being equal, it would be rational to remove perverse incentives for people to declare bankruptcy.

Conclusion

This review considers that aligning the definition of protected personal property with the Commonwealth definition appears to be rational. Given that the seizure and sale of personal property generally provides a minimal return, alignment of the definitions should not have a material impact on creditors. Nevertheless, it is important that all stakeholders are provided with an opportunity to comment on the proposal before legislative amendments are pursued. This review therefore recommends that further consultation occur with stakeholders, including debt collection agencies, before an amendment is progressed.

3.3.3 The role of judgment debtors' in directing the Sheriff's discretion to seize and sell goods

The CCLC also submitted that there is some confusion amongst judgment debtors regarding the ability to direct the Sheriff's discretion to seize and sell goods. The CCLC suggested that information given to judgment debtors could

be simplified and improved in relation to the rights of debtors to direct the order in which property seized under a writ for the levy of property may be sold.

Discussion

UCPR 39.6(2)(a) provides the Sheriff with discretion to sell seized property 'in such order as seems to the Sheriff best for the speedy satisfaction of the judgment without undue expense'. Subject to UCPR 39.6(2)(a), the Sheriff may sell seized property 'in such order as the judgment debtor may direct'. This rule enable judgment debtors to provide input into the sale of seized property, whilst ensuring that the process is conducted as efficiently as possible.

It is important that ultimate discretion over the order in which seized property may be sold continues to lie with the Sheriff. However, the fact that the CCLC has identified confusion about debtor rights indicates that some debtors may not sufficiently understand their ability to make directions in relation to the sale of seized property. The Reference Group considered that the Sheriff should consider improving the information provided to debtors in relation to this issue.

Conclusion

This review agrees with the conclusions of the Reference Group and recommends that the Sheriff's Office review its communications to ensure that the information provided to debtors in relation to the order in which seized goods may be sold is as simple and effective as possible.

3.3.4 Authority to enter property to execute a writ for the levy of property

In its submission to the review, the Sheriff's Office proposed that the Act be amended to provide officers with:

- The right to remain on or within the property/premises that cannot be revoked until execution of the judgment/order has been completed
- The authority to use such force as necessary to execute the writ, and
- The authority to obtain the assistance of the NSW Police Force (similar to the authority outlined in section 7A (1 & 2) of the *Sheriff Act 2005*).

Alternatively, the Sheriff's Office proposed that the courts be empowered to give directions with respect to the enforcement of its judgments (including orders to allow entry to premises) at the time that it issues a writ for the levy of property.

Discussion

At common law, Sheriff's Officers have the right to enter a property to enforce a writ for the levy of property. However, if the gate to the property is locked or a sign states that a Sheriff's Officer is not permitted access, the officer may not enter the property to enforce the writ.

Similarly, if a Sheriff's Officer enters a property to enforce a writ of execution and is instructed to leave, he or she must do so immediately. Where a Sheriff's Officer is denied access to the property, the creditor must seek a court order

under section 135 of the Act. This order authorises the Sheriff's Officer to enter premises to take possession of the property under the writ.

The intention of this proposal is to prevent debtors from avoiding enforcement action by using 'no entry' signs. However, the Sheriff's Office stated that this occurs in approximately 5–10 per cent of cases where a Sheriff's Officer attends a property and someone is at home. The Sheriff's Office also advised that approximately 30–40 per cent of judgment debtors state that they have not received notice of a judgment debt against them. While it is standard practice for the Sheriff's Office to send a notice to a debtor, the Sheriff's Office nevertheless considers most of these claims to be genuine.

The Reference Group noted that the current requirement to seek a court order for enforcement directions under section 135 can delay enforcement efforts and place an administrative burden on the Sheriff's Office and the courts. However, it also noted that the requirement to seek a court order provides debtors with important protections by affording debtors an opportunity to seek legal advice and to consider entering into alternative payment arrangements.

Given the relatively high proportion of debtors who report that they are not aware that default judgment has been entered against them, the Reference Group considered that it would not be appropriate to alter the common law right of a debtor to refuse entry. Nor did the Reference Group consider that it would be appropriate for the court to issue directions to enter property at the same time that default judgment is entered.

Conclusion

The requirement for the Sheriff to seek a court order for enforcement directions where an officer is denied entry can create inefficiencies. However, the review notes that entry is refused in a relatively small proportion of cases and that the proposal may have a disproportionate impact on debtors. On balance, this review considers that the abrogation of common law rights is not justified in such circumstances.

3.3.5 Service of default judgment and statements of claim

The Sheriff's Office advice that approximately 30–40 per cent of judgment debtors state that they have not received notice of a judgment debt against them was the subject of further discussion at the Reference Group. Some members of the Reference Group suggested that it may be necessary to review the practice of serving notice by post in the Local Court. Others considered that the Sheriff's practice of sending a letter of notice to the debtor prior to enforcement should be codified and a statutory minimum period of notice prescribed in the Act.

Discussion

Service by post

Any originating process in the District Court, Supreme Court, Industrial Relations Commission, Land and Environment Court and Dust Diseases

Tribunal must be served personally, except as otherwise provided in the rules (UCPR 10.20(2)(a)). Originating processes in the Local Court may be served in a number of ways, including by post (UCPR 10.20(2)(b)).

The issue of whether postal service of court documents and statements of claim is effective was considered by the then Department of Attorney General and Justice (**DAGJ**) and Better Regulation Office (**BRO**) joint review of debt recovery processes. That review noted that the introduction of postal service in the Local Court was intended to reduce costs and improve convenience for parties. It also noted that the previous system of personal service relied on:

- Sheriff's Officers, which could be slow and costly
- Process services, which were more costly, and
- Plaintiffs themselves, which required unrepresented parties to comply with cumbersome processes and required individuals to try several times before finding the defendant at home or at their place of business.

One member of the Reference Group suggested that it may be useful to calculate whether the overall cost to the system of reintroducing personal service may be outweighed by the costs associated with unsuccessful service. However, the DAGJ/BRO review found that postal service is both convenient and effective for parties and is rarely challenged in court.

Codification of notice requirements

The Sheriff's Office practice of sending a letter of notice to a debtor before sending officers to enforce writs was unanimously supported by the Reference Group. The Reference Group considered that there would be benefit in codifying this requirement in the Act. It was further recommended that a statutory minimum period of notice be prescribed in the Act and that the letter be reviewed to ensure that it is drafted in clear and simple terms.

Conclusion

This review notes that the rules governing postal service are a matter for the Uniform Rules Committee to consider. It is beyond the scope of this review to conduct a whole of system analysis of the costs of postal service. Nevertheless, this review considers that service by post continues to provide judgment creditors and other parties to Local Court proceedings with a convenient and cost-effective means of effecting service.

This review agrees that the Sheriff's Office should be asked to review the letter it sends to judgment debtors to ensure that it is clear and simple. The review also agrees that the Sheriff's Office practice of notifying debtors that a writ has been received should be codified in the Act. However, it is noted that the Sheriff does not send notice to debtors where there is an identified risk that the debtor will use the period of notice to hide or dispose of assets. This discretion should be preserved. Further consultation should also occur with the debt collection industry, the Small Business Commissioner and other interested stakeholders regarding the minimum period of notice that should be afforded to debtors.

Recommendation 2

That the Government:

a) **Task the Sheriff to review and simplify the information that is provided to judgment debtors regarding the right to direct the order in which property seized under a writ for the levy of property may be sold, and**

b) **Task the Sheriff to review and simplify the language and format of the standard 'letter of notice to a debtor advising them that a writ has been received' to improve clarity and readability.**

Recommendation 3

That the Government conduct further consultation with the debt collection industry, NSW Small Business Commissioner and other interested stakeholders regarding the following proposals:

a) **Re-instate a provision similar to section 59(2A) of the repealed *Local Court (Civil Claims) Act 1970* to grant discretion to the Sheriff to decline to execute a writ for the levy of property where the cost of seizing, removing, storing and selling property is likely to exceed the total sale price**

b) **Amend section 106 of the Act to align the definition of protected personal property with that contained in the *Bankruptcy Act 1966* (*Cth*), and**

c) **Amend the Act to require the Sheriff to send a letter of notice to a debtor at least 21 days before further enforcement action is taken.**

3.4 Garnishee Orders

A garnishee order is a court order that enables judgment creditors to reach the property of judgment debtors. In practice, court registrars consent to such orders, which are reviewable by a judicial officer. Rules governing garnishee orders are contained in Part 8, Division 3 of the Act and Rules 39.34 – 39.43 of the UCPR[13]. A garnishee order allows a creditor to recover a judgment debt by taking money from or garnishing:

- The debtor's wages or salary (wage/salary order), or
- The debtor's bank account or money held by other people who owe money to the debtor, such as a real estate agent who collects rent on behalf of the debtor (debt order).

Debt orders are the most common type of garnishee order issued by the courts. A debt order is different from a wage/salary order in that it operates for a limited time. That is, it attaches to all debts that are due or accruing from the garnishee

[13] See the following link for an overview of the enforcement process from the perspective of the debtor: http://www.lawlink.nsw.gov.au/lawlink/LawAccess/ll_lawassist.nsf/pages/lawassist_test_flowcharts6

to the debtor at the time of service of the order. In contrast, a wage/salary order instructs the debtor's employer to take a sum of money from the debtor's income and pay it to the creditor. The order will continue to operate until the debt is paid or employment ceases.

3.4.1 Notice to debtors

The CCLC submitted that debtors should be given notice before their wage, salary or bank account is garnished. The CCLC noted that this would give a debtor time to seek legal advice, put their finances in order before the order takes effect and/or make a time to pay arrangement or dispute the order.

Discussion

An application for a garnishee order is usually made without notice to the debtor (UCPR 39.34). A 'without notice' application is permitted if the creditor has the debtor's financial details (for example, from affidavits and documents the creditor or debtor lodged in earlier court proceedings).

There is no requirement to give the debtor notice that a court has granted a wage/salary order. Once the order is served on the garnishee (that is, the bank or employer), the garnishee has 14 days to pay the creditor from the date the wage or salary is due to be paid to the debtor. This means that a debtor will often be unaware of the garnishee order until the money is deducted from their wage, unless their employer advises them of the order. Once aware of the garnishee order, the debtor can apply to the court to pay by instalments (also known as an application for 'time to pay').

There is also no requirement to notify the debtor when the court grants a debt order. Debt orders require the garnishee to pay money to the creditor within 14 days of the date when the order is served on the garnishee. If the order attaches to a debt that falls due after that date, the money must be paid within 14 days after the date when the debt falls due. Usually the debtor will not know that a debt order has been granted until after an account is garnished.

Comparable Victorian court rules[14] state that the court may make an attachment of earnings order in the absence of the judgment debtor only if satisfied:

(a) the debtor has been served with a copy of the application; and
(b) the debtor has had a reasonable opportunity to attend the hearing; and
(c) the judgment debtor is employed by a known employer; and
(d) as to the earnings of the judgment debtor.

Ordinarily, procedural fairness would dictate that a debtor should be given notice that an application for a garnishee order is being sought, with an attendant opportunity to put submissions to the court. However, the absence of a notice period serves a pragmatic purpose, as it prevents a debtor from attempting to frustrate the operation of the debt order by pre-emptively withdrawing money from accounts. This rationale is less readily applicable to

[14] Rule 72.04(4) of the *Magistrates Court General Civil Procedure Rules 2010* (Vic.).

wage/salary orders. It is less likely, for example, that a debtor would resign from regular employment in order to frustrate a wage/salary order.

There is no record of a notice requirement having existed in New South Wales legislation. The introduction of such a provision would therefore represent a significant policy shift. A number of practical issues would need to be resolved before a notice period could be prescribed, including:

- Whether the creditor or the garnishee would be required to serve the notice
- How and when such a notice would be served, and
- The effect of non-service.

It is the responsibility of the creditor to arrange service of the garnishee order on the garnishee. If notice were to be mandated, the responsibility to serve notice would therefore logically remain with the creditor. However, as noted above, many debtors state that they are unaware that default judgment has been entered. It is likely that notice would also be ineffective in these cases, particularly if the creditor does not have the debtor's current address.

The Reference Group noted that, if the responsibility for service lies with the creditor, it may also be difficult for the garnishee (that is, the employer) to know whether service has been properly effected. A more realistic option may therefore be to place the obligation for service on the garnishee, as employers are more likely to have current information as to an employee's current address.

Alternative proposals

As an alternative, the Reference Group proposed that a provision similar to section 55 of the repealed *Local Court (Civil Claims) Act 1970* be inserted into the Act. The repealed section 55 required the garnishee to serve notice on the debtor that an amount was to be transferred before paying a creditor. It would also be possible to extend the period that a garnishee has to pay to 21 days, rather than the current 14 days, to afford the debtor additional time. This may give a person enough time to apply to have money paid into court under section 135 of the Act if there were a dispute as to the validity of the order.

The Reference Group noted that these proposals may not be supported by the debt collection industry or organisations that represent the interests of creditors. It was acknowledged that the proposals may be perceived as negatively impacting on the effectiveness of enforcement options and increasing the regulatory burden and cost of doing business in NSW. However, the Reference Group noted that similar protections exist in several other jurisdictions, including Victoria, Queensland and South Australia (see Appendix D – Notice provisions in other Australian jurisdictions).

Conclusion

This review notes that the CCLC's proposal to introduce a notice requirement for garnishee orders would represent a significant policy shift in New South Wales. Changes to the time at which a garnishee order takes effect may also have consequences on questions of preference in bankruptcy law. Before any

definitive recommendations are made, this review recommends that further consultation occur with interested stakeholders and that recommendations for change also be discussed with experts in insolvency and bankruptcy law.

3.4.2 Protected amount for garnishee orders for debt

The CCLC also proposed that a protected amount be prescribed in relation to garnishee orders for debt, which would be equivalent to twice the workers compensation weekly minimum amount.

Discussion

Where a wage/salary order is granted, the debtor must be left with a minimum amount of money to live on. The prescribed minimum amount is the standard workers compensation weekly benefit (currently $458.40 per week[15]). However, where a debt order is granted (UCPR 39.36), all funds held in the account at the date of the order may be garnished. If this amount does not cover the entire judgment debt, the creditor may apply for another garnishee order. There is no minimum protected amount and no limit to the number of orders for debt which can be sought.

The CCLC submitted that the absence of any protected amount in relation to debt orders can lead to significant hardship, particularly where an order is executed shortly after a person is paid wages or receives Centrelink payments. Where all funds are removed from a bank account, a debtor may not have sufficient funds to reach their next payday. This can have a flow-on effect for emergency and charity services. In general, Centrelink payments are not protected from being garnished[16]. Only a 'saved amount' is protected (see **Appendix F**).

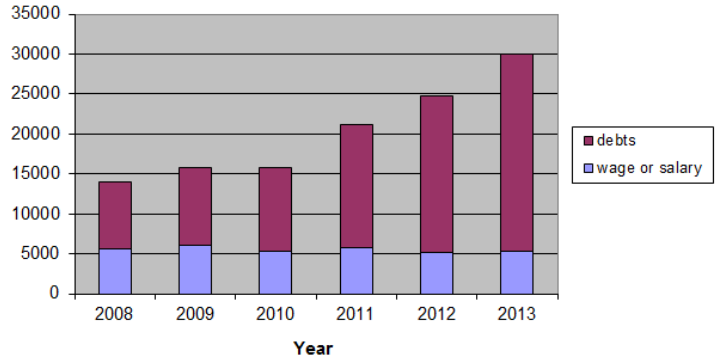
It is arguable that wage/salary orders should be differentiated from debt orders on the basis that wage/salary orders continue to operate until the debt is repaid in full, whereas a debt order operates only at a single point-in-time. However, as there is no limit to the number of, or frequency with which, debt orders can be issued, both types of orders operate to extract monies until the debt is satisfied.

Local Court registry staff provided some evidence that some less scrupulous debt collectors may use a 'scatter-gun approach' when issuing debt orders. For example, there is evidence that in some instances up to 20 debt orders have been issued to different banks at the same time without supporting evidence that a debtor holds an account. This practice shifts the cost of debt recovery to the banking system and the State, as the courts must expend resources to issue multiple unnecessary orders and banks must expend resources to process them. The practice may also result in more money being garnished than is actually owed, which will result in banks incurring further transactional costs to return surplus monies.

[15] See section 122(1) of the Act. The statutory rate is the amount as adjusted under Division 6 of Part 3 of the *Workers Compensation Act 1987* and is indexed twice each year in April and October. The statutory rate from 1 April 2014 is $458.40.
[16] Sections 60 and 62 of the *Social Security (Administration) Act 1999* (Cth).

Court statistics show that over the past six years, the number of garnishee orders for debt sought in the Local Court has increased, while the number of garnishee orders for wage/salary sought has remained relatively steady. As a result, the proportion of debt to wage/salary orders has risen from 60 per cent to over 80 per cent (see Figure 4 below).

Figure 4: Number and proportion of garnishee orders granted in the Local Court[17]



The Reference Group considered that the proposal to create a protected amount for debt orders has merit, but must take into account the differing circumstances of debtors. For example, the Reference Group noted that not all debtors experience financial hardship. Courts regularly issue debt orders against companies and businesses. The purpose of a debt order in relation to a small business may well be to obtain priority over other creditors. Protected amounts in these circumstances may not be justified.

In order to implement the CCLC's proposal, concerns about debtors splitting savings into multiple accounts would also need to be addressed. Section 123(3) of the Act requires a bank to provide the judgment creditor with a statement showing the amount attached under the garnishee order, how much has been retained by the garnishee and the amount paid to the judgment creditor. The creditor would need to be entitled to use this statement as evidence that the protected amount has been retained and that they are able to demand the full account balance from any other accounts.

Conclusion

This review notes that no other State or Territory currently provides for protected amounts in bank accounts. However, as noted in Appendix D (Notice provisions in other Australian jurisdictions), in South Australia any application made by a creditor without notice results in proceedings being adjourned to give the debtor and garnishee an opportunity to be heard. Any move toward such a model in New South Wales should be subject to further consultation with relevant stakeholders.

Further investigation should also take place regarding possible strategies to limit the inefficient use of court and banking resources that result from the issuing of multiple untargeted debt orders. A small fee for these orders, as is

[17] Statistics provided by the Department of Justice's Courts and Tribunal Services

common in other jurisdictions, may provide a price signal to frequent applicants to use the system more efficiently. This proposal should also be the subject of further consultation with the debt collection industry and other stakeholders.

3.4.3 Priority of garnishee orders

The Reference Group also suggested that the Act and UCPR should provide additional guidance regarding the priority that will be afforded to garnishee orders where multiple orders are attached to a persons wages/salary or bank accounts. The Reference Group suggested that the Uniform Rules Committee may also wish to consider amending UCPR form 71 'Garnishee order for wages or salary' to ensure that employers and payroll officers receive clear instructions in relation to multiple garnishee orders.

Discussion

Section 121(2) of the Act states that:

> 'Unless the court orders otherwise, the amount payable by a garnishee under a garnishee order that is not a limited garnishee order must not, in respect of any wage or salary attached by the garnishee order, exceed the greatest amount payable by the garnishee under any limited garnishee order that attaches the same wage or salary.'

A limited garnishee order is one that is subject to an instalment order. Instalment orders are amounts agreed between the creditor and debtor in a particular case that are sufficient to satisfy the creditor. Section 122 provides that the amounts attached under one or more orders must not, in total, reduce the net weekly amount of any wage or salary to less than the standard workers compensation weekly benefit.

For wage/salary orders, concurrent payments must be made subject to the rule in section 122. In relation to debt orders, common law rules regarding priority apply. Effectively, these rules provide that the order served first in time has priority, and that a second garnishee order served on the same third party does not take effect until the first has been paid in full. A review of provisions in other Australian jurisdictions indicates that statute law is also complex or silent in relation to this issue (see Appendix F).

The Reference Group agreed that it appears appropriate to clarify the operation of section 121(2). The Reference Group also supported the referral of Form 71 to the Uniform Rules Committee for consideration.

Conclusion

This review agrees that the current formulation of section 121(2) is complex. Accordingly, it is recommended that the Government consider clarifying the provision. This review also supports the Reference Group's suggestion that UCPR form 71 be referred to the Uniform Rules Committee for its consideration.

3.4.4 Garnishee orders attaching to term deposits

A submission to the review argued that term deposits held on behalf of a judgment debtor should be able to be garnished before the deposit matures or is terminated by the account holder. The submission argued that funds held in a term deposit are an asset of the debtor, just as funds held in a transaction account are, and that it is therefore reasonable that such an asset be accessible to judgment creditors.

Discussion

Subject to the UCPR, a garnishee order operates to attach (to the extent of the amount outstanding under the judgments) all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order[18]. Money held in a financial institution to the credit of the judgment debtor is taken to be a debt owed by the judgment debtor by that institution. However, a term deposit held in a bank account on behalf of the judgment debtor cannot be garnished until the deposit matures or is terminated by the account holder.

There is no other jurisdiction in Australia where orders operate on funds in a term deposit without requiring expiration of the term. The Commonwealth practice[19] is that where a garnishee notice is issued to a financial institution in relation to a term deposit, the notice immediately attaches to that account. However, the financial institution is not liable to pay the garnished amount until the term deposit matures or is terminated by the recipient.

Concerns were raised at the Reference Group as to whether this proposal may unfairly penalise debtors. For example, some members considered that it would be unjust to provide a judgment creditor with greater access to the funds than is afforded to the judgment debtor. Contractual arrangements between the judgment debtor and the financial institution with which the account is held are also a relevant consideration. Judgment debtors may suffer loss of interest and other financial penalties if a deposit is accessed prior to reaching term.

However, it may be possible to allow bank orders to operate in relation to funds in term deposits without requiring maturity of the term where the terms and conditions of the term deposit allow for the account holder to access the funds prior to maturity. This is the approach adopted in relation to notices issued by the Australian Government's Child Support Agency under section 72A of the *Child Support (Registration and Collection) Act 1988* (Cth), which have some similar characteristics to garnishee orders.

Conclusion

This review considers that, while it may be appropriate to allow creditors to access term deposits where the terms and conditions of the account allow the account holder to access funds, it would not be appropriate to provide creditors with greater access to funds than is afforded to the debtor. Further consultation

[18] See section 117 of the Act.
[19] See section 89 of *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth)

with experts on banking and financial law will be needed to determine whether this proposal is viable.

3.4.5 Duration of wage/salary orders

In its submission to the review, the CCLC proposed that section 119(3) of the Act be repealed and that the position under section 48(3) of the *Local Court (Civil Claims) Act 1970* be reinstated. Section 48(3) of the *Local Court (Civil Claims) Act 1970* provided that garnishee orders could operate for a period of four weeks only, at which point they could be renewed.

Discussion

Wage/salary orders in all jurisdictions in Australia now remain in force until the balance of the judgment debt is paid or employment is terminated. The CCLC suggested that this may encourage some people to declare bankruptcy rather than continue to be the subject of an unlimited garnishee order, as the alternative is that wages may be deducted years into the future.

The Reference Group considered that it would be appropriate to restrict the length of time for which wage/salary orders may operate. However, the Reference Group acknowledged that the previous provision which required creditors to refresh orders every four weeks imposed a significant administrative burden and cost on creditors and the courts. As an alternative, the Reference Group considered that wage/salary orders should run for a maximum of 24 months.

Conclusion

This review agrees that re-instating a provision to require garnishee orders to be reissued every four weeks is not desirable, as it would unnecessarily increase the administrative burden and cost for both creditors and the courts. The proposal would also create additional cost for debtors, as costs incurred by a creditor will ultimately be transferred.

However, the Reference Group's suggestion that wage/salary orders be refreshed at the expiration of 24 months appears to strike an appropriate balance between the interests of creditors and debtors. This review recommends that the Government consider progressing such an amendment, subject to further consultation with the debt collection industry.

3.4.6 Discretion to vary garnishee orders

The Chief Magistrate submitted that it is of concern that there is no ability for the courts to ameliorate wage/salary orders. The Chief Magistrate noted that, while it is appropriate for wage/salary orders to continue in force until a debt is satisfied in the majority of cases, there may be benefit in providing the courts with discretion to suspend a payment or vary the amount of a payment in demonstrated instances of special or exceptional circumstances.

Discussion

The courts currently have no discretion to vary or suspend payments under a garnishee order. The CCLC separately submitted that it has become common practice for applicants to automatically specify that a debtor only retain the minimum protected amount when applying for a wage/salary order, without taking into account the circumstances of the debtor. As a result, the CCLC submitted that the minimum protected amount now represents the standard income for a person that is subject to a garnishee order.

The discretion to order payment by instalment orders under s119(1)(b) of the Act is intended to a certain level of protection to debtors, as is the presence of the minimum protected amount. Nevertheless, the Reference Group agreed that it would be desirable to provide the court with a discretion to vary or suspend payments in special or exceptional circumstances.

Conclusion

This review considers that the Chief Magistrate's proposal has merit and should be progressed. Further consultation with the Chief Magistrate and other relevant stakeholders should occur.

Recommendation 4

That the Government make the following amendments in relation to garnishee orders:

a) Amend s121 of the Act to ensure that the rules governing the payment of money where a debtor is subject to multiple garnishee orders are simple and clear, and

b) Request that the Uniform Rules Committee review UCPR form 71 'Garnishee orders for wages or salary' to ensure that the information provided to employers and payroll managers is clear and simple in relation to multiple garnishee orders.

Recommendation 5

That the Department should conduct further consultation with the debt collection industry, NSW Small Business Commissioner and other interested stakeholders on the following proposals:

a) Extend the period within which a garnishee must comply with a garnishee order from 14 to 21 days from the relevant date (see sections 118 and 120 of the Act)

b) Require the subject of a garnishee order to notify the debtor at least seven days before money is paid to a creditor

c) Prescribe a minimum protected amount in relation to garnishee orders for debt, similar to that prescribed in relation to garnishee orders for wage/salary

d) Discourage the inefficient use of court and banking resources

caused by the issuing of multiple untargeted garnishee orders by introducing a small fee for certain types of garnishee orders

e) Amend section 106 of the Act to enable garnishee orders for debt to operate in relation to funds held in a term deposit without requiring expiration of the term, where the term deposit allows the account holder to access the funds prior to maturity

f) Amend section 119(3) of the Act to provide that a garnishee order for wages/salary expires 24 months after it is granted unless refreshed, and

g) Amend section 119 of the Act to provide the court with discretion to vary garnishee orders in special or exceptional circumstances.

3.5 Charging orders

The Chief Magistrate proposed that a note be added after section 126 of the Act to make it clear that charging orders are not available in the Local Court.

Discussion

Section 106 of the Act provides that, in the case of a judgment of the Supreme Court or District Court, a judgment debt may be enforced by means of a charging order. Charging orders are not available in respect of judgments of the Local Court, as a charging order operates as an equitable charge and the Local Court does not exercise equitable jurisdiction.

The Chief Magistrate stated that a number of parties who appear in the Local Court nevertheless seek to apply for a charging order under section 126 of the Act. The Reference Group agreed that it may assist practitioners and applicants to insert a note at the end of section 126 to make it clear that charging orders are not available in the Local Court.

Conclusion

This review agrees that a note should be inserted at the end of section 126 to make it clear that charging orders are not available in the Local Court.

Recommendation 6

That the Government insert a note at the end of section 126 of the Act to make it clear that charging orders are not available in the Local Court.

3.6 Other submissions

3.6.1 Local Court Small Claims Division

A practitioner who regularly appears in the Small Claims Division of the Local Court submitted to the review that the Small Claims Division should adopt standard directions or rules to avoid the simultaneous exchange of affidavits.

Discussion

The Small Claims Division of the Local Court provides a forum in which parties can resolve minor civil disputes in a straightforward and informal manner. Section 35 of the *Local Court Act 2007* provides that proceedings in the Small Claims Division are to be conducted with as little formality and technicality as proper consideration of the matter permits. The rules of evidence do not apply and witnesses may not be cross-examined except in certain circumstances.

In order to support the quick and informal resolution of disputes, standard directions in the Small Claims Division require each party to file and serve documentary material 14 days prior to hearing. In contrast, standard directions in the General Division of the Local Court require the sequential exchange of documentary material (that is, the plaintiff provides documents to the defendant four weeks prior to hearing and the defendant provides a reply two weeks prior).

Requiring parties to exchange documents 14 days prior to hearing is intended to limit the costs to parties, as it avoids the need for parties to prepare evidence in reply. It also allows the court to determine the case based on an assessment of the version of events presented by each party at hearing. The Court has discretion to depart from those standard directions if it is appropriate to do so (for example, where the defendant is genuinely unaware of the case that is brought against him or her).

Conclusion

The standard directions which apply in the Small Claims Division are a matter for the Local Court. This review therefore makes no recommendations in relation to this matter. However, it is noted that the simultaneous exchange of documentary evidence supports the efficient conduct of proceedings in the Small Claims Division. It is appropriate that standard directions support that objective.

3.6.2 Rules 42.34 and 42.35 of the UCPR

In its submission to the review, the NSW Bar Association proposed that Uniform Civil Procedure Rules 42.34 and 42.35 should be repealed.

Discussion

Rules 42.34 and 42.35 were inserted into the UCPR by the *Uniform Civil Procedure Rules Amendment No 36* 2010. These Rules relate to costs recovery restrictions in the Supreme Court and District Court.

42.34 Costs order not to be made in proceedings in Supreme Court unless Court satisfied proceedings in appropriate court

(1) This rule applies if:

(a) in proceedings in the Supreme Court, other than defamation proceedings, a plaintiff has obtained a judgment against the defendant or, if more than one defendant, against all the defendants, in an amount of less than $500,000, and

(b) the plaintiff would, apart from this rule, be entitled to an order for costs against the defendant or defendants.

(2) An order for costs may be made, but will not ordinarily be made, unless the Supreme Court is satisfied the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted.

Rule 42.35 is drafted in similar terms but applies if, in proceedings in the District Court, a plaintiff has obtained judgment of less than $40,000. The effect of these rules is that an order for costs will not ordinarily be made by the court if the judgment amount is below the threshold, unless the plaintiff can satisfy the court that the proceedings were commenced in the correct jurisdiction.

The Bar Association submitted that these rules may operate unfairly. In particular, the Bar Association submitted that the rules may have unforeseen consequences, as the rules may leave legal representatives without a means of recovering costs or lead to plaintiffs being undercompensated. The Bar Association also stated that defendants could use the rules as a means of forcing plaintiffs to settle or remain in a potentially inadequate jurisdiction.

In order to determine whether these rules are operating unfairly, the review sought information on the number of judgments made in the District Court and Supreme Court that would fall within the operation of Rules 42.34 and 42.35. Between 2011 and 2013, JusticeLink statistics show that there were 11 District Court matters in which costs orders were made where the judgment awarded was below $40,000. Over the same period, there were seven Supreme Court matters in which costs orders were made where the judgment awarded was below $500,000.

The Reference Group agreed that these numbers suggest that the rules are not operating unfairly and that it would not be appropriate to recommend that the Uniform Rules Committee consider reviewing the rules. The Bar Association noted that it would continue to monitor the situation and would make a further submission to the Department if necessary.

Conclusion

Based on the statistics above, this review considers that there is insufficient evidence to conclude that Rules 42.34 and 42.35 are operating unfairly. As a result, no recommendation is made in relation to this proposal at this time.

3.6.3 Notification to Sheriff regarding writs for possession of land and levy of property

The Sheriff's Office submitted that Rule 39.3A(2) of the UCPR should be amended to require the judgment creditor or other person for whose benefit a writ has been issued to notify the Sheriff as to the nature of the tenancy of the person in occupation of the land.

Discussion

Rule 39.3A (2) of the UCPR provides that a judgment creditor must, if requested, inform the Sheriff whether land is occupied pursuant to a right of occupation under a residential tenancy agreement. The judgment creditor is not required to provide the information unless a request is received from the Sheriff. This rule applies to writs for the possession of land and writs for the levy of property in respect of which a notice of sale of land has been filed.

Normally, the Sheriff must give an occupier of land 30 days notice that such a writ is to be enforced. This provides the Sheriff with an opportunity to ascertain the level of risk that may be associated with enforcing an order, including by liaising with the NSW Police Force. However, the 30 day notice period does not apply where the NSW Civil and Administrative Tribunal (**NCAT**) issues an immediate warrant under the *Residential Tenancies Act 2010*.

Where an immediate warrant is issued, the Sheriff's Officer who attends a property will not always know whether the property is an owner-occupied residence, a derelict building or a tenanted address. Nor will the Sheriff's Officer always know the identity of the person who is occupying the property. For example, in some cases a property may be sublet to a person, who may or may not be aware that proceedings have been taken against the landlord or tenant. This situation may put the Sheriff's Officer at risk.

The Sheriff's Office submitted that if the judgment creditor or other person for whose benefit the writ has been issued were required to inform the Sheriff of the nature of the tenancy without being asked, the Sheriff would be in a better position to carry out an appropriate risk assessment. However, the Reference Group noted that the judgment creditor or other person may not always be in a position to know what the nature of the tenancy is. For example, the creditor will not always know whether a property has been sublet.

In light of this, the Reference Group agreed that it would not be practical to impose an obligation on the judgment creditor to advise the Sheriff as to the nature of a tenancy. The Reference Group also agreed that, in situations where the judgment creditor does not have the required information, it is preferable that the Sheriff continue to conduct the required research rather than require the judgment creditor to do so.

Conclusion

This review agrees that it would not be practical to require judgment creditors or other persons for whose benefit the writ has been issued to inform the Sheriff of the nature of a tenancy if the creditor or other person may not have the required information. The existing power under rule 39.3A(2), which enables the Sheriff to request the information, would appear to be sufficient in these circumstances.

3.7 Review of Debt Recovery Processes

In July 2013, DAGJ (as it was then) finalised a joint review of debt recovery processes with the former BRO. The final report on that review recommended that six matters be considered as part of this statutory review:

1. That the Act be amended to extend the lifespan of a bank garnishee order to 28 days
2. That bank garnishee orders operate in relation to funds held in term deposit without requiring expiration of the term
3. That the Sheriff be authorised to enter premises to execute a writ for the levy of property

4. That the definition of protected personal property in the Act and UCPR be aligned with the definition used in federal bankruptcy law,
5. That the Act be amended to allow a creditor to seek an order for discovery to ascertain the whereabouts of a judgment debtor.
6. That the Act be amended to clarify that an administrative charge for garnishee orders should be deducted in addition to the amount being garnished.

Items 2, 3 and 4 were the subject of separate submissions to this review and have been considered above at 3.4.4, 3.3.4 and 3.3.2 respectively. The remaining three recommendations are considered below.

3.7.1 Extending the lifespan of garnishee orders

The DAGJ/BRO review found that, as a garnishee order for debt only takes effect on the day it is served and bank account balances tend to fluctuate according to a person's pay cycle, a garnishee order that is timed towards the end of a pay cycle is more likely to be unsuccessful. The DAGJ/BRO review noted that if a bank garnishee were to operate over an extended period of time, rather than at a single point in time, it would reduce the need for a creditor to return to court to obtain successive garnishee orders.

The DAGJ/BRO review recognised that an indefinite order would not be effective or desirable, as it would:

- be onerous for debtors
- defeat the purpose of the limitation period for enforcing a judgment,
- impose an unreasonable administrative burden on financial institutions, and
- not prevent debtors from changing their banking arrangements or closing their account to avoid the operation of the order.

Instead, it was recommended that garnishee orders for debt operate for 28 days. A creditor would still have the option of filing and serving a further garnishee order upon the expiration of the first order if the judgment debt is not satisfied. The DAGJ/BRO review noted that the debt collection industry supported this option. However, the CCLC and Legal Aid NSW did not support the proposal on the basis that it would reduce debtor protections by exposing all deposits to a debtor's account to the garnishee order within the relevant period.

This review agrees that any extension of the period of operation for garnishee orders for debt should be for a short and defined period. The period of 28 days appears to strike a reasonable balance between the interests of creditors and debtors. The proposal has the potential to improve the usefulness of garnishee orders for debt as an enforcement tool, without imposing an unreasonable burden on debtors or financial institutions. However, further consultation should occur with the banking industry and other relevant stakeholders before the proposal is implemented.

3.7.2 Clarification of administrative charge for garnishee orders

When a bank or employer executes a garnishee order, section 123(2)(a) of the Act and UCPR 39.42 permit the bank or employer to retain up to $13.00 to cover the cost of processing the order[20]. Section 123(2)(a) provides that "out of each amount attached under the garnishee order, the garnishee … may retain up to the amount prescribed by the uniform rules to cover the garnishee's expenses in complying with the garnishee order …". Section 123(2)(b) provides that the balance of the garnished amount is to be paid to the judgment creditor.

The DAGJ/BRO review noted that there is some confusion among stakeholders as to whether this administrative charge should be deducted from the amount that is garnished or in addition to it. This can result in different organisations taking different approaches. Where a bank or employer deducts the charge from the amount that attached under the garnishee order, the judgment creditor will be underpaid. This can create a loop of debt and enforcement activity, as the creditor may need to seek a further garnishee order to recover the outstanding debt. Where the outstanding amount is not pursued, the creditor will bear the cost of executing the garnishee order.

Section 123(2) is intended to ensure that the debtor's bank or employer can recoup the administrative costs associated with executing a garnishee order. It should not operate to place a burden on the creditor. This review therefore recommends that section 123 be amended to clarify that the administrative charge may be deducted in addition to the amount that is garnished.

It is acknowledged that the debtor may not always possess sufficient funds to satisfy both the amount to be garnished and the administrative charge. Where this is the case, the debtor's bank or employer should be permitted to deduct the administrative charge as soon as funds become available (for example, when the debtor is next paid or money is deposited in the debtor's account). This will ensure that the bank or employer is not left out of pocket.

3.7.3 Ascertaining the whereabouts of absconding debtors

The DAGJ/BRO review received submissions stating that it is common for judgment creditors to experience difficulties in locating a judgment debtor for the purposes of pursuing enforcement action. In order to address this issue, the DAGJ/BRO review recommended that the Department consider whether the Act should be amended to allow a creditor to seek an order for discovery to ascertain the whereabouts of a judgment debtor.

The DAGJ/BRO Review noted that preliminary discovery procedures already enable an application to be made to the court to order a person to disclose the whereabouts of a prospective defendant in order to serve a Statement of Claim. However, this procedure is only available when commencing legal action and only in relation to claims valued at over $10,000. It was noted that introducing a similar arrangement to allow creditors to locate judgment debtors would

[20] See item 4 of Schedule 3 of the UCPR.

increase the workload for the courts. However, it would also improve the likelihood of successful enforcement and reduce the frustration experienced by creditors that have attained judgment against a debtor but cannot locate them.

It may be possible to reduce the potential increase in workload for the courts by prescribing a threshold of reasonable steps that must be taken before a creditor could seek an order for discovery. For example, information in credit reports would often be precise and up-to-date enough to enable a creditor to locate a debtor. The Department provides public information to credit reporting agencies on court judgments and bankruptcy orders for use in credit reporting. The *Privacy Act 1988* (Cth) expressly enables a person involved in debt collection to receive information contained in a credit report from a credit provider under sections 11B(5) and 18N(1)(c)(iii)(A) which is reasonably necessary to identify an individual subject to debt collection action.

Recommendation 7

That the Government amend section 123 of the Act to clarify that the administrative charge for garnishee orders may be deducted in addition to the amount that is garnished.

Recommendation 8

That the Department conduct further consultation with the debt collection industry, NSW Small Business Commissioner and other interested stakeholders on the following proposals:

a) Enable garnishee orders for debt to operate for a period of 28 days, rather than at a single point in time

b) Allow a creditor to seek an Order for Discovery to ascertain the location of a judgment debtor.

Appendix A – Part 6 Division 1 of the Act

56 Overriding purpose

(cf SCR Part 1, rule 3)

(1) The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3):

(a) any solicitor or barrister representing the party in the dispute or proceedings,

(b) any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

(6) For the purposes of this section, a person has a ***relevant interest*** in civil proceedings if the person:

(a) provides financial assistance or other assistance to any party to the proceedings, and

(b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note. Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

57 Objects of case management

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

58 Court to follow dictates of justice

(1) In deciding:

(a) whether to make any order or direction for the management of proceedings, including:

(i) any order for the amendment of a document, and

(ii) any order granting an adjournment or stay of proceedings, and

(iii) any other order of a procedural nature, and

(iv) any direction under Division 2, and

(b) the terms in which any such order or direction is to be made,

the court must seek to act in accordance with the dictates of justice.

(2) For the purpose of determining what are the dictates of justice in a particular case, the court:

(a) must have regard to the provisions of sections 56 and 57, and

(b) may have regard to the following matters to the extent to which it considers them relevant:

(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,

(iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),

(v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the

proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,

(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,

(vii) such other matters as the court considers relevant in the circumstances of the case.

59 Elimination of delay

(cf Western Australia Supreme Court Rules, Order 1, rule 4A)

In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

60 Proportionality of costs

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

Appendix B – Uniform Rules Committee

Section 8 of the Act provides for the establishment of the Uniform Rules Committee ('the Committee'), whose members are:

- The Chief Justice or a Judge of the Supreme Court nominated by the Chief Justice;
- The President of the Court of Appeal or a Judge of Appeal nominated by the President;
- Two Judges of the Supreme Court appointed by the Chief Justice;
- The Chief Judge of the District Court or a Judge of the District Court nominated by the Chief Judge;
- A Judge of the District Court appointed by the Chief Judge;
- The Chief Magistrate or a Magistrate nominated by the Chief Magistrate;
- A Magistrate appointed by the Chief Magistrate;
- A practising barrister appointed by the Bar Council; and
- A practising solicitor appointed by the Law Society Council.

The composition of the Committee was largely based on the model used for Queensland's Uniform Rule Committee. The Committee's constitution and procedure is dealt with in Schedule 2 of the Act.

Appendix C – Submissions to the Review

The review considered 13 submissions, only one of whose authors wished to remain anonymous. The following stakeholders made submissions:

1. The Honourable T F Bathurst QC, Chief Justice of the Supreme Court of New South Wales
2. The Honourable R P Boland, President of the Industrial Relations Commission of New South Wales
3. His Honour Judge G L Henson, Chief Magistrate of the Local Court of New South Wales
4. NSW Bar Association
5. Law Society of NSW (Injury Compensation Committee and the Litigation Law and Practice Committee)
6. Law Society of NSW Young Lawyers (Civil Litigation Committee)
7. NSW Trustee and Guardian
8. Australian Collectors & Debt Buyers Association
9. Consumer Credit Legal Centre NSW
10. Phillip C. Roberts – Solicitor Advocate & Advisor
11. Director, ADR Directorate & Community Justice Centres, Department of Attorney General and Justice
12. Office of the Sheriff of NSW
13. Anonymous

Appendix D – Garnishee notice provisions in other Australian jurisdictions

State	Legislation	Wage/salary	Debts / Bank Account
NSW	*Uniform Civil Procedure Rules*	Debtor is not required to receive notice (*39.34*).	Debtor is not required to receive notice (*39.34*).
VIC	*Magistrates Court General Civil Procedure Rules 2010*	Where order is granted it must be served on debtor and employer (*72.06*) Order does not come into force until 7 days after service on employer.	Debtor is not required to receive notice. Order binds debts on service (*71.04*)
QLD	*Magistrates Court Rules 1960*	An enforcement hearing *may* be required (*Rule 856*). If an order is granted, it must be personally served on both debtor and employer. Enforcement warrant comes into force 7 days after service on employer (*Rule 859*).	No provision requiring debtor to be notified.
WA	*Civil Judgment Enforcement Act 2004*	Application can be made without notice (s19). If an order is made, it need only be served on the debtor's employer (*s36*)	Debtor is not required to receive notice (*s19*).
TAS	*Magistrates Court (Civil Division) Rules 1998*	A provisional order must be served on the employer and debtor. Debtor and employer have 21 days in which to lodge a dispute to the claim. Order becomes final after 21 days if no objections are lodged. (*Division 2A*)	A provisional order for garnishment of debt must be served on garnishee and debtor. The debtor has 21 days to dispute the debt. After 21 days the money is paid from the court to the creditor, or if no payment has been made the provisional order is made final. (*Division 2*)
SA	*Enforcement of Judgments Act 1991*	An order cannot be made without the debtor's consent (*Section 6(2)*)	If an order is made on an application made without notice, the hearing must be adjourned to give both garnishee and debtor a chance to be heard (*section 6(3*))

Appendix E – Garnishee priority provisions in other Australian jurisdictions

State	Legislation	Income (wage/salary)	Debts / Bank Account
NSW	*UCPR* or *CPA*	Silent.	Silent.
VIC	*Magistrates Court General Civil Procedure Rules 2010*	If earnings become payable to a judgment debtor and there are in force 2 or more attachment of earnings orders, whether made under these Rules or otherwise, in relation to those earnings, the person to whom the orders are directed: (a) Must comply with those orders according to the respective dates on which they took effect and must disregard any order until the earlier order has been complied with; and (b) Must comply with any order as if the earnings to which the order relates were the residue of the earnings of the judgment debtor after the making of any payment under an earlier order. (*s72.12*)	Silent.
QLD	*Magistrates Court Rules 1960*	The employer must comply with the warrants according to the respective dates on which they were served on the employer and disregard a warrant served later in time until a warrant served earlier in time ceases to have effect. (Rule 864)	If more than 1 application for an enforcement warrant against the same enforcement debtor is made to a court, the court must issue the warrants in order of the times written on the applications. (*Rule 823*)
WA	*Civil Judgment Enforcement Act 2004*	A garnishee order must not be made against a judgment debtor if another garnishee order is in effect. (*Section 35*) A subsequent order made in respect of another monetary judgment and addressed to the same person to whom the first order is addressed has no effect.	If 2 or more debt appropriation orders addressed to the same third person are in effect at one time in respect of separate monetary judgments, the orders have effect consecutively according to when they are served on the third person. (*Section 23*)
TAS	*Magistrates Court Division) Rules 1998*	Where 2 or more garnishee orders in respect of a judgment debtor have been served, those orders have priority according to the order in which they were served, subject to the following: (a) Where 2 or more orders are served on the same day, each order is to have the same priority	Where two or more garnishee orders in respect of a debt have been served on a garnishee, priority is accorded to whichever order was served first.

		and you are to deduct one prescribed amount only and make an equal distribution of that amount to each relevant judgment creditor; (b) In any other case, you are to comply with any later order as if the net earnings to which that order relates were the residue of the judgment debtor's earnings after the deduction of the prescribed amount under any earlier order. (*Rule 129N*)	The first garnishee order must be satisfied in full before payment is made on any later order. (*Rule 129E*)
SA	*Enforcement of Judgments Act 1991*	No guidance. This is probably because the debtor's consent is required.	Silent.

Appendix F – Commonwealth garnishee legislation

Social Security (Administration) Act 1999 (Cth), sections 60 and 62

Section 60 Protection of social security payment

(1) A social security payment is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise.

(2) This section has effect subject to:

(a) sections 61 and 238 of this Act; and
(aa) Part 3B of this Act; and
(b) sections 1231 and 1234A of the 1991 Act.

Section 62 Effect of garnishee or attachment order

(1) If:
(a) a person has an account with a financial institution; and
(b) either or both of the following subparagraphs apply:
(i) instalments of a social security payment payable to the person (whether on the person's own behalf or not) are being paid to the credit of the account;
(ii) an advance payment of a social security payment payable to the person (whether on the person's own behalf or not) has been paid to the credit of the account; and
(c) a court order in the nature of a garnishee order comes into force in respect of the account;
the court order does not apply to the saved amount (if any) in the account.

(2) The saved amount is worked out as follows:

Step 1. Work out the total amount payable to the person in respect of the social security payment that has been paid to the credit of the account during the 4 week period immediately before the court order came into force.

Step 2. Subtract from that amount the total amount withdrawn from the account during the same 4 week period: the result is the saved amount .

(3) This section applies to an account whether it is maintained by a person:
(a) alone; or
(b) jointly with another person; or
(c) in common with another person.