AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

16 May 2014

The Hon Mr Bryan Doyle, MLA
The Chair
Committee on Legal Affairs
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir,

Inquiry into debt recovery in NSW

Further to your kind invitation we are pleased to provide this Submission for the Committee's consideration in relation to the abovenamed Inquiry:

Background

The Australian Collectors & Debt Buyers Association (ACDBA) was established in 2009 for the benefit of companies who collect, buy and/or sell debt. Our members (refer Annexure A) represent the majority of the collection market in Australia. Membership is voluntary and open to all collectors, debt buyers and sellers.

The objectives of ACDBA are to:

- represent the interests of members involved in debt collection and debt buying;
- establish and maintain a code of practice for the business activities of members;
- encourage best practice of members in their professional activities;
- provide opportunity for members to discuss and deliberate on matters affecting them professionally; and
- facilitate representation to further the professions of members.

Members are engaged in debt collection and debt purchase activities and use legal action where appropriate as a means of obtaining payment from debtors.

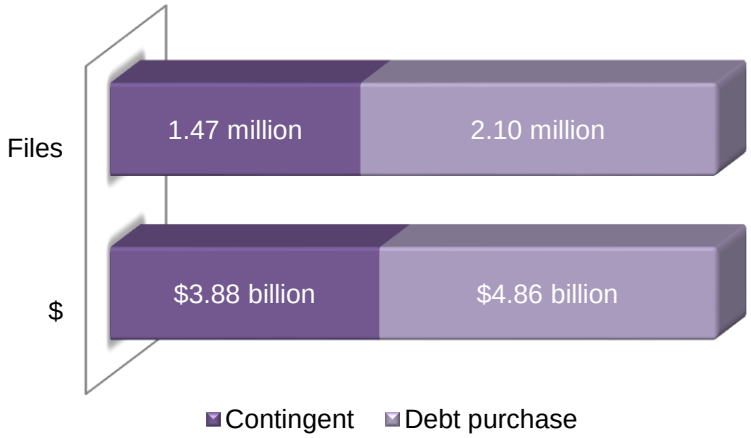
Our members act on behalf of many and varied clients, from large corporations to small businesses, and have a client responsibility to deliver timely and effective debt collection strategies and outcomes.

Members act for in excess of 35,000 small businesses across Australia – many of those businesses lack the necessary scale of infrastructure to have appropriately trained and experienced employees in-house attend to the necessary debt collection functions associated with their businesses.

Ph: 02 4925 2099
Em: admin@acdba.com
Web: acdba.com

PO Box 295
WARATAH NSW 2298
ABN 18 136 508 784

The size of the Australian collection industry is large and growing. Data collected from ACDBA members[1] indicates the cumulative value of debt they had under collection as at 30 June 2013 exceeded $8.74 billion represented by 3.6 million files under management. The debt files by value were handled 44.4% on a contingent collection basis whilst 55.6% were handled as debt purchase collections.



Cumulatively, ACDBA members made more than 49.8 million debtor contacts in FY2013 - contacts included telephone calls, SMS, emails, non-statutory and statutory letters. Our members report collecting a total of $2.18 billion from accounts under management in FY2013.

Member statistics indicate a very low level of confirmed complaints against industry members. Despite the high volume of contacts detailed above for FY2013 incidents against the industry amounted to 1 per 9,175 contacts or 659 accounts under management, or less than 0.011% per total contacts per annum!

Incidents recorded as part of ACDBA member Internal Dispute Resolution processes are considered to be any matter related to alleged unsatisfactory professional conduct and lodged as requiring investigation. These unsubstantiated incidents should not be confused with genuine requests made by debtors for additional information to understand the terms of an account, the balance outstanding or the history of payments made.

Recognising that collections deal exclusively with distressed debt where often the responses received to demands for payment are emotionally charged, an incident rate as low as 0.011% per total contacts made each year is outstanding and would no doubt be envied by many other industries and government departments in respect to their public dealings.

Our members use outside parties such as licensed agents and the courts to facilitate debt collection activities. In this role they act as court advocates, explaining to their client plaintiffs the legal process as it relates to legal recovery, making the appropriate recommendations and explaining the costs and timelines associated with litigation.

In turn members field many complaints from the plaintiffs they act for about the perceived delays, spiralling costs, limited enforcement options and the often redundant nature of securing judgment.

[1] ACDBA Member Data Survey FY2013

ACDBA members have firsthand knowledge of the frustrations of plaintiffs and the limitations within the current court environment within NSW and appreciate this opportunity to share views and observations of its members and the thousands of clients who have been in the position of plaintiffs. Additionally as professional service providers acting pursuant to specific licensing regulation[2] tasked to the activity of debt collection/commercial agency ACDBA members are uniquely positioned to provide a frank assessment of such licensing regulation.

We acknowledge legislators and policy makers in the area of debt recovery systems for the NSW jurisdiction are obliged to consider and balance the competing perspectives and interests of the various stakeholders involved, especially of creditors and debtors. Processes especially when provided by the resources of government must be both efficient and effective however there is an overarching imperative that such processes be fair, reasonable and equitable for all parties involved.

In framing this Submission, we found the Terms of Reference of the Inquiry overlapped and so rather than designing this response to address each of those Terms individually, we have instead decided it will be more informative to provide a narrative as to our concerns about Debt Recovery in NSW within the following framework:

A. Debt Recovery generally

B. Collections Sector and Licensing

C. Sheriff Functions

D. Specific Court Processes

E. The GIPA Act and Road & Maritime Services

F. External Dispute Schemes and the frustration of debt recovery processes

G. The Issues of Cost

A. Debt Recovery generally

Any discussion about the effectiveness of debt recovery processes in NSW requires first a general overview of the activity of “debt recovery”.

Consumers and businesses as debtors widely and in many cases routinely enter into arrangements with creditors for the provision of goods and services including for the provision of finance facilities.

In the vast majority of such transactions, terms are evidenced in writing with the parties acknowledging and agreeing to underpinning obligations which include:

a. The debtor agrees to the amount and any charges to be repaid to the creditor; and

b. In the event of default by the debtor, that the creditor is entitled to recover such amounts as a debt from the debtor.

[2] *NSW Commercial Agents & Private Inquiry Agents Act, 2004 and NSW Commercial Agents & Private Inquiry Agents regulation 2006*

Given the fundamental right in such transactions that a creditor is to be paid, it follows the State has the responsibility to do all things reasonable to assist and not hinder the collection of Debt.

Barriers to effective and efficient collection of Debt include but are not limited to:

- The lack of access to "Location" information;
- The high costs for the licensing of collectors;
- The excessive costs in the area of court filing fees and legal practitioner fees associated with recovery actions;
- The lack of efficacy of the available execution processes for recovering judgments;
- The growing apathy or lack of conscience of the public in respect to obligations to repay Debt when agreements for the supply of goods and service and/or financial agreements are breached; and
- The growing misuse by some consumers and their advocates of the ASIC approved External Dispute Resolution Schemes operated by the Credit Ombudsman Service Limited (COSL) and the Financial ombudsman Service Limited (FOS).

Later in this Submission, we shall reference those barriers as we point out areas where efficiencies can potentially be improved by such initiatives as:

- Allowing the recovery of non-professional collection costs (that is the reasonable costs of the Collection Agency);
- Allowing the recovery of statutory costs from defaulting debtors;
- Improving the operation and responsibilities of the NSW Sheriff's Office; and
- Streamlining the licensing regime to match the actual realities of the modern industry.

B. Collections Sector and Licensing

The licensing regime for businesses engaged in collections in NSW is currently framed by the NSW Commercial Agents & Private Inquiry Agents Act, 2004 [CAPI Act] and supported by the Commercial Agents & Private Inquiry Agents Regulation, 2006 [CAPI Regulation].

The CAPI Act replaced a 1963 Act which until 2004 had seen little real structural change. The CAPI Act however has failed to adapt to the very significant operational changes impacting the Collections Industry most notably by the introduction of technologies such as computers, the internet and mobile telephones.

A stronger, more professional Collections Industry has emerged in Australia as a result of changes to the environment it operates in over the past 10 to 20 years. Those changes include technological impacts on collections practices, industry consolidation, regulatory developments and increased government usage of debt collection services.

The maturity achieved over the past 20 years has led to the emergence of two very distinct sectors within the industry: the Collections Sector and the Field Agents Sector.

In the decade since the CAPI Act took operational effect, the Collections Industry has rapidly evolved from entrepreneurial to professional – the CAPI Act has failed to keep pace. This evolution is directly linked to significant capital investment for wider use of technological solutions to take advantage of economies of scale - consequently the present day activities of the Collections Sector are call centre based, involving little if any face to face contact with debtors[3].

Accompanying the influx of investment and expertise to the Collections Sector was the introduction of debt sale to the market just over 10 years ago. This development further attracted capital and has meant that most of the major players in the Collections Sector are now public companies or owned by professional investors including financial service providers and private equity investors.

The specific fiduciary demands of independent directors and major corporations have meant collection methods, compliance structures and risk management strategies are now fundamentally embedded within the organisations forming the Collections Sector. Combined with the expectations of a more demanding market, Collections Sector participants have had to improve their governance and compliance systems or lose the custom of the major vendors and suppliers.

ACDBA members operate businesses in the Collections Sector. The majority of ACDBA members are large corporations, some of which are listed on the Australian Stock Exchange and most work in multiple jurisdictions. The professionalism of our members is unaffected by jurisdictional differences in licensing regimes. This professionalism is evidenced by an extremely low rate of complaints against members. Any incidents that arise are resolved promptly and efficiently, as evidenced by the absence of enforcement action by regulators against the industry.

By way of explanation, we note the business functions of contingent debt collections and debt purchasers are exactly the same - the only difference between them relates to the ownership of the debt. In terms of licensing:

a. businesses operating as debt buyers are regulated on a national basis by ASIC and required to hold an Australian Credit Licence [ACL] pursuant to the National Consumer Credit Protection Act 2009; and

b. businesses operating as contingent collectors (collecting debt on behalf of third party principals) are regulated pursuant to various state & territory licensing regimes which provide differing regulatory standards.

Technology advances significantly contributing to change in the Collections Sector include:

- Improvements to sector specific software leveraging off new technologies especially communications;
- Telephone call recording linked to sector specific software to verify collector and debtor communications and allow greater transparency in the event of any issue arising;
- Improvements to communications, including:
  - Digital telephony;

[3] *Although the call centre model is prefaced on no face to face contact with debtors, it is rare but nevertheless conceivable individual debtors might choose to personally attend the offices of a collection agency to discuss their affairs, however the traditional model of door knocking at the homes of debtors to collect debt is redundant and not part of the modern day Collections Sector.*

- Improved broadband speed and reliability;
- Improved telephony systems supporting computerised answering, navigation and queuing;
- SMS messaging;
- Customer Information Management technology to manage blended voice, email and web-based communications to improve efficiency of collectors by:
  - Automated dialling to eliminate manual repetitive dialling tasks;
  - Allowing the proving of a telephone number;
  - Facilitating the ability to conduct conference calls between a debtor and his/her appointed third party;
  - Ensuring a correct first party or third party contact;
  - Allowing the debtor to self-navigate the call to:
    - a professional credit consultant/collector;
    - a cashier if it is a payment;
    - a disputes negotiator if a dispute; or
    - a help assistant for other needs.
- Online portals allowing:
  - Clients to independently access their account information including adding new matters and receiving reports securely;
  - Debtors to access their account to:
    - attend to repayments;
    - seek verification of the account being due;
    - approve the use of SMS and email messages on the account;
    - complete and submit a financial statement of position;
    - complete, submit and receive adoption of a repayment plan;
    - complete, submit and implement a “Hardship Application“;
    - message the collector; and
  - Agents to work remotely to deliver services
- Improved secure data transfer technology; and
- Improved auto payment systems.

Compliance obligations for the Collections Sector have also increased significantly over the years although some outside the Sector may well be unaware of the actual reach of obligations imposed or of the significant level of duplication and conflict across state and national jurisdictions.

Currently, the Collections Sector has compliance obligations which include:

- The Sector is subject to a broad range of national regulation, including key laws such as:
  - Corporations Law
  - National Consumer Credit Protection Act – for those collecting consumer credit debt
  - Anti-money Laundering & Counter Terrorism Financing Act
  - Australian Consumer Law

- The ACCC/ASIC Debt Collection Guideline [the Guideline] provides the industry with clear guidance on appropriate debt collection practices. Some observers wrongly downplay the effectiveness of the Guideline on the contention it is guidance only and does not have the same effect as "black letter" law. However, the Collection Sector regards such contentions are unfounded as:
  - Compliance with the Guideline is usually part of the contractual agreement between Collections Sector members and their clients; and
  - Compliance with the Guideline routinely provides the framework on which members base all their collection activities with debtors.

  The ACCC and ASIC both have extensive regulatory powers which allow them to access company sites and files, review activity and compliance systems and negotiate enforceable undertakings or seek penalties or incarceration through the courts. The impact of these powers is that the Collections Sector actually treats its obligations under these guidelines as law and structures its compliance systems with the Guideline at the centre.
- The Collections Sector works under a variety of State and Territory industry regulation depending upon where offices are located.
- The Australian Privacy Act, 1988 regulates how the industry and its clients can collect, use and disclose credit and personal information.
- Debt buyers as assignees are obliged to comply with the National Credit Act, the Banking and Credit Union Codes of Practice and the National Credit Code for consumer credit debt, where relevant, in addition to their contractual obligations to the assignors.
- Debt buyers since January 2011 hold an Australian Credit Licence pursuant to the National Consumer Credit Protection Act, 2009 and as part of such licensing regime are members of an ASIC approved External Dispute Resolution Scheme.
- Collection businesses are subject to strict legal agreements with their creditor clients which cover legal compliance, collector conduct and dispute resolution processes in addition to other contractual arrangements including reporting and auditing requirements. The agreed obligations are generally broader than the current outdated debt collection specific legislation.
- Collections Sector members are in a competitive market where they must protect not only their own brand through quality service provision, but also their clients' brands.

The Collections Sector has responded positively to increased compliance obligations flowing from the Australian Consumer Law which directly impacts upon service and compliance expectations of the Sector's clients, the credit providers.

Almost without exception, detailed service level agreements between credit providers and their collectors determine conduct and service requirements for collectors exceeding legislated obligations.

The extensive use of technology in the Collections Sector underpins its emergence and separation from field agent activities – today's collection businesses rarely have face to face contact with consumers.

Consequentially, ACDBA advocates the introduction of negative licensing in NSW as an appropriate regulatory regime for the Collections Sector, which clearly demonstrates professionalism and is subject to both the requirements of the principals who engage them and a range of other laws.

Further, ACDBA supports the Institute of Mercantile Agents' position for negative licensing of Collectors and a positive licensing regime for the Field Agent Sector.

Such a regulatory approach is not inconsistent but responds to the difference between direct and indirect debtor contact, best illustrated by the reality that:

- For Collectors using technology to make collections demands, consumers/debtors have much more control over how they wish to manage the situation and can choose to negotiate or terminate the call, as they see fit; and
- For Field Agents, a physical licence allows consumers/debtors to be confident they are dealing with someone authorised to make field calls, repossess goods and physically collect debts; and

ACDBA believes there is no present day market place miss-function to warrant licensing at all for the Collections Sector. Mostly, industry standards for the Collections Sector are set by the client principals who engage our members (e.g. conduct standards, trust funds etc) and additionally by a range of market practices and consumer protection legislation. Any additional industry specific licensing regime only duplicates other legislative and commercial obligations.

The Field Agent Sector sees value in a positive licensing regime for its activities so as to provide debtors and principals with confidence the government has some oversight of the integrity of those who are involved in actual face to face consumer contact – consumers in face to face dealings understandably will be more comfortable dealing with a field agent who has met government licensing standards demonstrated by the provision of a government issued licence.

The concept of negative licensing for the Collections Sector and positive licensing for the Field Agents Sector is an appropriate response to accommodate the significant differences between direct and indirect debtor contact. For the Field Agents, a physical licence allows debtors to be confident they are dealing with someone who is authorised to make field calls and collect the debts. For Collectors using technology to make collection demands, debtors have much more control over how they wish to manage the situation and can choose to negotiate or terminate the call, as they see fit.

It is noteworthy the two east coast jurisdictions adjacent to NSW have acknowledged the maturity of the Australian Collections Industry and amended their licensing regimes accordingly
:

- In Victoria, the entire Collections Industry operate under a negative licensing regime[4]; and
- In Queensland, the Collections Sector will soon operate under a negative licensing regime and the Field Agents Sector will operate under a positive licensing regime[5].

Those changes are not surprising given the compelling evidence positive regulatory regimes for the Collection Sector are excessive; unnecessarily costly and burdensome for the industry and government; and very much outdated.

[4] *The Debt Collectors (Field Agents and Collection Agents) Bill was successfully passed by the Queensland Parliament on 6 May 2014 and was expected within the following 2 weeks to receive Royal Assent (to become an Act) – the Act will then commence on a date to be fixed by proclamation.*

[5] *The Debt Collectors (Field Agents and Collection Agents) Bill was successfully passed by the Queensland Parliament on 6 May 2014 and was expected within the following 2 weeks to receive Royal Assent (to become an Act) – the Act will then commence on a date to be fixed by proclamation.*

The recent licensing changes in those neighbouring states effectively have created environments where collection businesses will find it easier and less costly to operate in those jurisdictions compared to operating from business premises located within NSW.

To ensure NSW collection businesses remain competitive in the Australian marketplace and also in the interests of protecting employment opportunities for the citizens of NSW, the Government with the support of all parties should immediately repeal the CAPI Act and enact appropriate legislation to provide for a negative licensing regime for the Collections Sector.

In compelling support for NSW moving to a negative licensing regime for the Collections Sector, we note:

a. The reality is that standards determining the conduct of the Collections Sector are set by existing and functioning Federal legislation with the ACCC/ASIC Debt Collection Guideline in place since 2005 and undergoing regular updating (most recently in 2014) to stay abreast of industry and law developments;

b. A negative licensing scheme will be more cost effective for the Government than maintenance of the existing outdated and burdensome CAPI Act given the small number of persons engaged in the Collections Sector and the clear lack of evidence of systemic conduct problems in the sector;

c. The activities of the modern Collections Sector are a misfit to the areas of policing responsibilities of the Ministry for Police which has current responsibility for the CAPI Act;

d. Adopting a negative licensing regime will ensure NSW remains attractive for businesses operating in the Collections Sector to be domiciled thereby enhancing the employment prospects for the citizens of the State;

e. Adopting a negative licensing scheme in NSW will appropriately respond to remove inconsistencies between jurisdictions;

f. Regulators at State level such as the Department of Fair Trading and NSW Police have existing powers under other legislation to take action in the event of any breach by a collections business or individual collector;

g. National regulators specifically ASIC and ACCC have powers to take action in the event of breaches of Commonwealth legislation by a collections business or individual collector; and

h. Opportunities remain for any unprofessional conduct by a collections business or individual collector to come to the attention of regulators through such avenues as consumer complaints to the Department of Fair Trading or to the NSW Police where appropriate and through consumer action groups and the media.

We shall refrain from including a detailed summary of all that is wrong with the CAPI Act (and there is plenty wrong with that legislation) on the basis we submit the CAPI Act is very much outdated for all the reasons detailed above and should be repealed without undue delay.

Nevertheless, it is appropriate to include in this Submission just a few examples of the burdens routinely imposed upon NSW businesses and operators in the Collections Sector by the continuing regulation under the CAPI Act:

1. The CAPI Act requires individuals who wish to hold an operator's licence to undertake training to achieve the qualification of Cert III Financial Services (Mercantile Agency) despite:
   a. the availability of such qualification through Registered Training Organisations being increasingly difficult to arrange;
   b. the course material for such qualification failing to accord with the modern realities of industry practice; and
   c. the fact that the industry is increasingly specialised such that operators rarely work in situations across the entire spectrum of commercial agency practice.

   ACDBA members accept their responsibility to ensure their employees are adequately trained and competent to engage in the collection activities undertaken. Staff competence is crucial to commercial success. Training requirements, however, will vary across businesses depending on business model and the scope of the duties required.

   Currently, training obligations for the Collectors Sector across State and Territory jurisdictions vary widely. As noted above in NSW collectors are required to complete modules from the Certificate III Financial Services (Mercantile Agents) qualification of the national training framework. ACDBA members mostly regard this specific requirement to be excessive, counter-productive and a significant impediment to the ability of the Collections Sector to employ staff in this state.

   ACDBA's perspective is it is appropriate any training regulations for the Collections sector should always be relevant and cost effective and further that any prescribed training ought to be accessible, especially given the issue of staff turnover. As an example, ACDBA members indicate new staff turnover in NSW can range from a minimum of 35% to in excess of 60% of any intake.

   Accordingly, it is appropriate our members determine what is appropriate for initial and ongoing training of employees to ensure organisational competence. This is consistent with the approach ASIC has taken for members holding Australian Credit licences under the NCCP regime - ASIC views the licensees as being in the best position to determine the training requirements for their staff.

2. When an individual residing outside the State of NSW makes an application for an CAPI operator's licence, he or she is required by the regulator to provide evidence pursuant to the Mutual Recognition Act that he/she holds an equivalent licence in the jurisdiction of residence - no matter how often the regulator requests such evidence, it is impossible to provide if the applicant is resident in a jurisdiction where there is no licensing such as in the Australian Capital Territory or where negative licensing exists such as in Victoria and soon to be introduced in Queensland.

3. In the event a person who holds an operator's licence applies for renewal and in so doing makes an error in the application form it is understandably rejected by the regulator however such rejection is often not communicated to the applicant until subsequent to the expiry date of the current licence together with a warning that the applicant must immediately cease all licensed occupational activities.

The applicant must then lodge a "new" application for an operator licence together with presentation of updated supporting documents as to matters such as proof of identity and evidence of qualifications held - once lodged, the application then follows the slow and tortuous bureaucratic route for new applications such that it can take a further 4 to 8 weeks for the "new" licence to be issued.

C. Sheriff Functions

Improving the effectiveness of enforcement actions performed by the NSW Sheriff's Office as part of the system of debt recovery in NSW is an important initiative and in our view essential for restoring confidence to the process.

For plaintiffs, a common and recurring frustration with the debt recovery process is the challenge of the translation of a judgment in civil proceedings into a positive final outcome.

Collectors and lawyers both report lengthy delays of many months in activity by Sheriff Officers to attempt the exercise of a Writ. These delays are further compounded by increasing difficulties in making telephone contact with the Sheriff's Office with many reports of calls regularly going unanswered before transfer to voicemail boxes which routinely result in an automated message that the specific voice mailbox is full. Anecdotally, we are informed there is a huge backlog of un-actioned court processes in the Sheriff's Office.

In frustration many creditors and their collectors opt to not proceed with the use of a Writ in order to enforce a judgment as to do so involves excessive and unreasonable delays. Some creditors despite considerable expense and effort to have achieved the status of judgment in their debt recovery process simply give up on the enforcement of such judgment. Others dependent upon the size of the judgment debt follow enforcement by commencing bankruptcy or winding up proceedings but these are neither quick nor financially viable options.

Further it is clear from the reports of members that the adopted practice of Sheriff Officers sending a letter to a debtor in advance of an actual attendance at the debtor's place of residence or business defeats the effectiveness of the process by giving advance warning of the pending activity – this allows some debtors to simply either fail to answer the Sheriff's expected knock at their door or else to deny ownership of the property within the premises upon the Sheriff's arrival.

This adopted practice of an advance letter of impending Sheriff action is fraught with some risk of causing unnecessary alarm to the individual concerned.

Specifically, we note a member reports that after obtaining judgment against a debtor, its inquiries identified what was believed to be an updated address for the debtor and so it applied to the Sheriff's Office for a Writ at the updated address. As it transpired the person at the updated address had the same name but an entirely different date of birth and was not the judgment debtor.

The person at the updated address was an elderly frail gentleman who upon reading a letter from the Sheriff's Office advising of an impending visit for the purposes of a Writ became greatly alarmed. He read the letter late on a Friday and became increasingly agitated by worry over the entire weekend before family members were able to explain to the Sheriff's Office the situation of mistaken identity.

Such distress caused to the resident would have been entirely avoided if the Sheriff's Officer had attended at the address in person as expected in the process rather than following the adopted practice of sending a letter to the individual. At a personal attendance, a Sheriff's Officer would have been immediately able to clarify the mistaken identity and provide reassurance to the individual that the matter did not relate to him.
The activity of sorting out mistaken identities is regularly a feature of the work undertaken by commercial agents when they attend to the service of court process. The activity is neither onerous nor difficult and is very much part of their duties in this age of privacy legislation frustrating the ability of creditors and their collectors to pinpoint with total confidence the location of an individual debtor.

It is easy for the uninformed observer to argue the creditor or collector should have been more attentive to proving the identity of the person with the debtor's name at the specific address before applying for a Writ at that address. However, the practical considerations are that contrary to widely held community expectations, collection businesses have no access to up to date address details available through such records as Electoral Rolls maintained by the Electoral Commission of NSW and driver licences records held by the Roads and Maritime Services [RMS].

Later in this Submission we discuss specific difficulties with accessing the records of the RMS.

Any restrictions to parties such as collection businesses to having legitimate access to the electoral rolls imposed upon the Electoral Commission of NSW should be amended to allow such access.

A clear opportunity exists for such access to be made available to collection businesses through Information Brokers able to ensure an audit trail is available for all access and importantly would create an ongoing revenue opportunity for the NSW Government to enter into commercial arrangements to provide and update such data to Information Brokers.

The effectiveness of the Sheriff's Office is also undermined by its office hours being 9.00am to 4.30pm, Monday to Friday which effectively mean debtors who work ordinary business hours will never be at home at times the Sheriff attends. Options to address this problem include:

a. Expand the hours of the Sheriff's Office;
b. Roster some officers to attend to duties outside of the office hours; and
c. Outsource the Sheriff's Office function to private industry as happens in other jurisdictions.

With the problematic and frustrating state of the execution of Writs in NSW, any changes improving the process, reducing the time frame, or increasing the authority of the Sheriff's Office would we believe be positive steps.

The introduction of a Sheriff's Examination Order could also probe/assess the defendant's assets and their location for possible future seizure under a Writ. It could almost work as a notification of non-removal, sale, disposal of itemised assets within say the next 12 months so that should the debt remain unpaid the creditor could short cut the next enforcement step by having some certainty around what assets were available and their location.

We submit that Sheriff Officers should have the same power across all Australian jurisdictions. Increasing the power of NSW Sheriff Officers to be in line with South Australia and Queensland would be welcome.

The ever competing demands on the NSW Sheriff's Office to attend to court security functions together with under-resourcing issues ensures the performance of enforcement responsibilities increasingly fall short of the expectations of plaintiffs already frustrated by the drawn out nature of debt recovery processes in NSW.

In other jurisdictions including Queensland, Western Australia and the Northern Territory the work of enforcing judgments through the exercise of Writs is undertaken by court appointed private bailiffs. Introducing a similar arrangement in NSW would provide immediate relief to the pressures upon the NSW Sheriff's Office by taking advantage of the established and efficient network of licensed commercial agents engaged in field work across the state already attending to similar responsibilities such as the service of court process and repossession of goods and chattels.

Further, we submit the inclusion of actions such as records of enforcement, record of a negotiated settlement, record of any post judgment agreement or non-formal payment arrangement, i.e. not court applied Instalment Orders, as items of public record may increase the adherence to and completion of payment arrangements or settlements by defendants in satisfaction of judgments.

We understand subsequent to the 2010 consultative project[6] by the Better Regulation Office and the Department of Justice and Attorney-General, the NSW Sheriff's Office undertook some industry and other stakeholder consultation to consider the suggestion of outsourcing some of its civil enforcement functions. Unfortunately, to date, despite such consultation and consideration, nothing has as yet materialised by way of actual outsourcing.

There are many compelling reasons why this outsourcing project should be fast tracked into reality both in terms of improving the cost and task efficiencies of the NSW Sheriff's Office but even more importantly to restore integrity and confidence in the debt recovery processes of NSW.

[6] *Issues Paper: "Review of the Debt Recovery Process" October 2010 by the Better Regulation Office and the Department of Justice and Attorney-General*

D. Specific Court Processes

In considering the effectiveness of debt recovery in NSW it is appropriate to consider specific court processes associated with litigated recovery actions:

Instalment Orders

Instalment orders at times thwart the effectiveness of debt recovery actions as there is no restriction to the number of instalment orders a debtor can apply for through the Courts.
Members report experiencing situations where individual debtors make repeated instalment order applications upon earlier applications being rejected by the Court or upon being successfully challenged by the creditor or in the event of attempts by the Sheriff to exercise a Writ to enforce judgment.

Although an application for an instalment order is sworn evidence, the reality is often there are major discrepancies between consecutive applications made by an individual debtor including significant variations in the declared assets and liabilities such as the value of property and the extent of mortgage repayments.

It is suggested these problems which adversely affect debt recovery actions could be overcome by the Court Registrars having the obligation to review and consider the file before agreeing to an instalment order application – that is, reviewing the file to check for major discrepancies in the evidence of the debtor, looking at any history of consecutive applications and any history of defaults of earlier instalment orders. Such material is available to the Registrars through the JusticeLink system and although a concern might be there would be a time impost on the Registrars the reality is that such time would be quickly recouped by a reduction in the number of hearings listed for instalment orders under challenge by creditors.

Further it seems reasonable to impose a maximum number of applications to pay a debt by instalment per judgment debt per year, say a maximum of three applications. In the event those three applications are dismissed by the Court or successfully challenged by the creditor, then any subsequent application in the year should be automatically rejected by the Court Registry – the imposition of a limit should lead to a changed behaviour of debtors and their advocates to offer up fair and reasonable instalment order applications.

Transparency of State & Federal Courts

At the present time, there is no mechanism for the State's Courts to be aware of the status of Federal Court matters such as sequestration orders in relation to bankruptcy. Similarly, the instalment order application process has no overt requirement for the debtor to note on the application that he or she has been bankrupted.

As a consequence, it is possible for a bankrupt debtor to successfully file an application for payment by instalments of a judgment debt upon which he/she has been bankrupted.

Registrars should take into account whether or not a debtor is bankrupt at the time of making any order which will fail due to the bankruptcy status of the debtor.

Presently, creditors bear the burden of opposing Court orders which ought not have been made and importantly would not have been made if the NSW Courts had access to the Federal Court's information. Any cost orders that are made in favour of the creditors are effectively post-bankruptcy debts and cannot be claimed against the bankrupt estate.

These situations could be avoided either by the State Court Registrar checking the database of the Federal Court or the Federal Court notifying the State Courts once a sequestration order is made.

E. The GIPA Act and Road & Maritime Services

The policy of the NSW Road and Maritime Services (previously the Roads & Traffic Authority) [RMS] in dealing with requests lawfully made in accordance with the Government Information (Public Access) Act 2009 [GIPA Act], specifically for the provision of the name and last known address of the owner of a registered motor vehicle is problematic.

From time to time, collectors when acting in the interests of their clients (being banks, financiers and insurers) determine a need to locate the current name and address of a registered motor vehicle for reasons, including:

- To pursue the interests of the principal in recovering an encumbered security asset which has been on-sold by a debtor in circumstances where clear title has not passed to the third party; or
- Where the identity and location of the owner of a vehicle involved in a motor vehicle accident is unknown thereby preventing the recovery of personal and/or property damage from the responsible party,

NSW, unlike other jurisdictions has no mechanism established with the RMS to allow and facilitate the searching and provision of such relevant motor vehicle records[7] for such lawful purposes notwithstanding it is the sole custodian of such necessary records for the jurisdiction.

Instead, a decision as to whether the RMS will release such relevant records is determined on a case by case basis in response to applications made pursuant to the GIPA Act. Past enquiries with the RMS suggest about 3,500 requests per annum are made under this process for the provision of such records.

A policy change within the RMS about 3 years ago has seen subsequent applications under the GIPA Act refused principally for the reason that "there is an overriding public interest against disclosure of the information", whereas for a period of at least the previous 3 years, disclosures pursuant to such applications were not refused.

Decisions by the RMS in respect to applications for the release of information namely the name and address of the owner of a registered motor vehicle pursuant to the GIPA Act indicate refusal of disclosure is appropriate due to "public interest considerations" namely that to do so would:

> *(a) Reveal an individual's personal information;*
>
> *(b) Contravene an information protection principle under the Privacy and Personal Information Protection Act 1998 or a Health Privacy principle under the Health records and Information Privacy Act 2002.*

[7] *In Queensland in contrast such records are available on an audited and commercial fee basis online through information brokers such as CITEC Confirm which has a commercial agreement with the Queensland Transport & Main Roads Authority authorising the release of such information.*

This proposition is then detailed as supported by contention that the RMS "collects a customer's personal information for the purposes of exercising its statutory function to maintain a licensing and registration system for NSW" and further that disclosure of "an individual's personal information to finance companies is not a purpose that is directly related to the original reason the RTA collects personal information from customers".

In one decision for an application, we understand the Corporate Freedom of Information and Privacy Applications Officer, Government Information and Privacy Branch (FOI Officer) noted:

> *"It would certainly seem to me that members of the public, in providing information about their personal affairs to the RTA in order for it to maintain a licensing and vehicle registration system for NSW, are certainly unlikely to have been aware that their personal information will be provided, without their consent, to finance companies."*

This above statement suggests an elevated and skewed meaning is attributed to the nature of the information provided by the owners of motor vehicles to the RMS for the purpose of registering themselves as the owner of the motor vehicle.

The fact that such information may have a secondary function as being the full name of an individual or business and the residential and/or business address of an individual is incidental to the principal purpose for which such name and address was provided to the RMS: namely for the provision of the details of the entity which purports to own a specific motor vehicle.

Owners of registered motor vehicles have various obligations including that the vehicle be used in a lawful manner and also in respect to entitlement to claim ownership of the vehicle. Such obligations necessarily have a direct and appropriate relationship to the records evidencing the registration of motor vehicles in NSW, for which the RMS is the custodian.

In the decision referred to earlier above, the FOI Officer noted the RMS collects and maintains its records in Registers pursuant to statutory functions under the Road Transport (Driver Licensing) Act 1998 [RTDL Act] and the Road Transport (Vehicle Registration) Act 1997 [RTVR Act] and that each act prohibits the disclosure of the Register's contents unless required by law noting that Section 10 (3) of the RTVR Act and Section 12 of the RTDL Act similarly provide:

> *"the Authority must ensure that the information in the Register that is of a personal nature or that has commercial sensitivity to the person about whom it is kept is not released except as provided by the regulations or under another law."*

Further the FOI Officer noted that although the respective regulations of the Acts do permit disclosure of information in certain circumstances, disclosure relating to the name and address of a registered motor vehicle for the reasons outlined earlier are not expressly provided for under the regulations. This is an anomaly and oversight, which we respectively submit should be amended in the regulations of the Road Transport Act 2013 [RT Act] which we understand, incorporates the former RTVR Act and RTDL Act.

We also note for your consideration the implications of NSW Court of Appeal decision in *RTA of NSW v. Australian National Car Parks Pty Ltd* [2007] NSWCA 114 (15 July 2007) [the RTA Case] which centres on the issue of preliminary discovery. In that decision, Mason P noted at paragraph 7, where a subpoena, or FOI request is made, disclosure is "authorised" by law. Similarly, a plaintiff may bring a "suit for discovery" and, in the course of litigation, discovery may be ordered and thus "authorised by law".

The practical problem for collectors and their clients is that disclosure of the "personal information" is usually required prior to the commencement of litigation in order to determine whether litigation is required and yet it is at this stage that the privacy principles operate and in these instances they often operate to prevent disclosure.

In the RTA Case, the respondent, Australian National Car Parks wished to identify the drivers of certain vehicles that had parked improperly in its car parks and applied to the RTA for information held by it in relation to those vehicles. Such application for the information could have been made by way of an FOI request but that procedure was cumbersome and time-consuming. Similarly, the respondent could have obtained information through a suit of discovery, or during the course of litigation, but these routes also presented difficulties not least of which being that until the respondent identified the driver of each car on each relevant day, it could not commence proceedings.

Instead, the respondent in order to overcome those difficulties applied under the uniform civil procedure rules (UCPR) for preliminary discovery. This procedure is designed to enable a party to ascertain a 'prospective defendant's' identity or whereabouts.

The Court of Appeal unanimously upheld the respondent's right to obtain preliminary discovery and to compel the RTA to disclose information it held as to the vehicles' registered owners. Such preliminary disclosure pursuant to the UCPR was disclosure of personal information "pursuant to law" and did not constitute a breach of the privacy principles.

A practical difficulty with preliminary discovery under UCPR is that it requires application to a court with the associated costs and procedural requirements.

A basic requirement to be met in an application to a court for preliminary discovery is that the applicant must have made unsuccessful reasonable enquiries seeking the identity and/or location of the prospective defendant, such as, making approaches to the public authorities (in this case the RMS) who would be expected to hold such information and those approaches have been rejected upon privacy grounds.

In summary, an application made pursuant to the GIPA Act where disclosure was subsequently refused by the RMS would in turn be sufficient grounds for a court to order that under preliminary discovery the RMS release such information to the applicant.

Given these circumstances, we submit it is an unintended consequence of the drafting of the regulations of the former RTVR Act and the RTDL Act and now incorporated in the RT Act that the RMS and applicants generally are exposed to unnecessary inefficiencies and associated significant expenses by the omission in the regulations of appropriate authorisation for the RMS to release such information in the first instance pursuant to the GIPA Act.

F. External Dispute Schemes and the frustration of debt recovery processes

Whilst we appreciate the regulation of External Dispute Schemes is a Federal matter vested with ASIC as the activities of External Dispute Resolution (EDR) processes do impact upon the debt recovery processes within NSW, it is appropriate to include some commentary on EDR within this Submission.

By way of general observations on the workings of EDR in debt recovery matters, we note:

- EDR processes in our members' experiences are very slow.
- Delays associated with EDR processes inevitably result in consumers under collections activity being in a worse financial position as where there is the involvement of credit agreements, it attaches a significant cost to the consumer in being referred to EDR given such delays in dealing with the matter - EDR schemes can take a month or more to refer the matter to a caseworker, let alone referring the matter back to the member for investigation.
- Internal Dispute Resolution (IDR) is regarded by members as being far more efficient than EDR processes, particularly given the time lines imposed by the National Credit Code.
- Complaints often raised with both IDR and EDR during collections/enforcement processes can refer to how the consumer entered the contract or some other aspect of contract management rather than with the actual collections/enforcement process itself.
- Upon an account progressing through debt recovery litigation to the stage where judgment is entered, the National Consumer Credit Protection Act [NCCP Act] no longer applies as in effect, the credit contract no longer exists having merged with the judgment debt. The jurisdiction's civil procedure laws then govern the rights of the parties, so any dispute can only be managed through the Courts in a process to have the judgment set aside. EDR should not be a de-facto court of appeal.
- From a practical perspective, our members regard the referral of a judgment debt to an EDR scheme simply prolongs resolution of the problem and again increases costs. The reality is the consumer concerned will have had many opportunities to dispute the debt prior to the stage of judgment given the collections process involves collections calls, default notices, hardship applications, enforcement postponement applications, IDR/EDR processes, summons (statement of claim) and finally judgment. Once judgment is entered, we submit the involvement of an EDR scheme is neither legally feasible nor in anyone's interests.
- EDR processes can drag on for extended periods contrary to established legal principles and sound commercial practice. Allowing consumers to drag out disputes via belated complaints to EDR as a means of frustrating legitimate claims made by credit providers also potentially impacts upon the likely realisable value of any underlying security.
- ASIC in its Regulatory Guide 139 which deals with the approval and oversight of external dispute resolution schemes has the following provisions in relation to what it requires the schemes to provide by way of operating rules for its members:

  RG 139.72 Where legal proceedings that relate to debt recovery proceedings have already commenced and a complainant or disputant takes their complaint or dispute to an EDR scheme, the Terms of Reference must require the member not to pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.

> *RG 139.73 Such complaints or disputes should be accepted by the scheme at least up until the point where the complainant or disputant has taken no step beyond lodging a defence or defence and counterclaim (however described), unless otherwise excluded from the scheme's jurisdiction under the Terms of Reference.*

- Our members regard the EDR schemes generally fail to meet the principles of "efficiency" and "effectiveness" and further the existing scheme arrangements mostly impose a more costly avenue than court processes.
- As EDR decisions are not reviewable by judicial process, a fair and just outcome is not necessarily always achieved for all parties. Members report there is uncertainty for them where for example an EDR provider may demand information from a member without cause or reason and is able to control the amount of information released back to such member even though the information may well relate to the complaint.
- Courts of equity although not bound by the rule of law, are bound by equitable principles. Our members express concern that EDR providers do not have any such "equitable principles" to guide their decisions, and are completely ad hoc - this is a problem if the EDR provider fails to be compliant with its own terms of reference.
- Complex decisions we submit ought to be made by appropriate authorities rather than by EDR Schemes to ensure fairness and a more efficient and effective system.
- Whether an account is referred to a contingent collector to recover the debt or if the account has been purchased by a debt buyer from the original credit provider, the situation remains the same: the debtor has had many opportunities to raise genuine complaints by accessing IDR and EDR processes. Our members regard it is inappropriate that a debtor is afforded an opportunity to stay legal proceedings by commencing an EDR process.
- Both EDR Schemes (COSL and FOS) have terms of reference as to the way complaints received at the stage of a member having commenced enforcement action on a debt shall be handled - these include requirements that the members cease enforcement actions pending the resolution of the complaint lodged.

G. The Issues of Cost

The last part of our narrative on debt recovery in NSW deals with the issue of costs associated with the processes.

We have for the Committee's consideration included as Annexure B to this Submission details of the current costs (filing fees and professional costs) relating to debt recovery actions for each of the Australian States & Territories.

To understand how NSW fits into the scheme of costs relating to debt recovery across all jurisdictions, we have set out the costs which would apply in relation to recovery of a debt of say $5,000:

	Issue proceedings			Enter default judgment			
Jurisdiction	Court Fees	Professional Costs	Total	Court Fees	Professional Costs	Total	Total Costs
SA	$131.00	-	$131.00	-	-	-	$131.00
WA	$179.70	-	$179.70	-	-	-	$179.70
ACT	$260.00	-	$260.00	-	-	-	$260.00
Tasmania	$109.50	$270.00	$379.50	-	$45.00	$ 45.00	$424.50
NSW	$180.00	$397.32	$577.32	-	$178.20	$178.20	$755.52
Victoria	$273.50	$504.00	$777.50	$38.50	$40.00	$ 78.50	$856.00
Queensland	$205.20	$665.00	$870.20	-	$155.00	$155.00	$1,025.20
NT	$248.00	$358.60	$606.60	-	$434.50	$434.50	$1,041.10

If the debt was say $10,001 the costs would be:

	Issue proceedings			Enter default judgment			
Jurisdiction	Court Fees	Professional Costs	Total	Court Fees	Professional Costs	Total	Total Costs
SA	$131.00	-	$131.00	-	-	-	$131.00
Tasmania	$211.70	$450.00	$661.70	-	$45.00	$ 45.00	$706.70
WA	$458.20	$374.00	$832.20	-	$132.00	$132.00	$964.20
Victoria	$416.00	$605.00	$1,021.00	$38.50	$40.00	$ 78.50	$1,099.50
NSW	$444,00	$529.76	$973.76	-	$237.60	$237.60	$1,211.36
ACT	$260.00	793.00	$853.00	-	$391.00	$391.00	$1,244.00
Queensland	$220.20	$1,154.00	$1,344.20	-	$256.00	$256.00	$1,630.20
NT	$379.00	$573.76	$952.76	-	$695.20	$695.20	$1,647.96

As can be seen from the two examples in the above tables, NSW sits in the middle of the pack in terms of ranking of total costs up to judgment stage across jurisdictions.

It is noteworthy that there is huge disparity between jurisdictions as to the lowest expense and the highest expense when pursuing debt recovery matters.

The costs to creditors (ultimately borne by debtors as the debtor is required to pay the creditor's court and solicitor's costs as part of the judgment debt) could be substantially reduced by amending the Act and Regulations to allow collectors/commercial agents a right of appearance in civil proceedings brought before the Local Court including the right for the fees of collectors/commercial agents to be added to the judgment debt in lieu of solicitor's costs, which as the above tables reveal can be quite a substantial impost.

Matters of consideration in support of this proposition include:

- Collectors would only be interested in taking civil proceedings through judgment and enforcement stages – wherever a matter was defended or in the event of recourse to courts of higher jurisdiction such as for bankruptcy or wind up procedures the collector would pass the proceedings to a legal practitioner to handle.

- Proceedings for most matters referred to collection businesses are straightforward and follow an established template for pleadings, so that the preparation and filing of originating process is a routine procedure rather than requiring any unique or technical drafting by a legal practitioner and similarly the preparation of an Affidavit of Debt in support of default judgment is a routine procedure of establishing and deposing a finite range of facts wholly within the knowledge of the collections business.
- The costs likely to be charged by a collection business for attending to such routine procedural processing tasks would be significantly lower than if the work was undertaken by a legal practitioner especially as collection businesses are well equipped in terms of technology to achieve efficiencies of scale.
- Collection businesses hold professional indemnity cover as protection for their clients.

Further contact

Enquiries in respect to this submission should be directed in the first instance to:

Mr Alan Harries
CEO
Australian Collectors & Debt Buyers Association
PO Box 295
WARATAH NSW 2298

Telephone: 02 4925 2099
Email: akh@acdba.com

The ACDBA and its members thank the Committee for this opportunity to provide its considered views on the current debt recovery processes in NSW and note a willingness to work with the NSW Government in any further detailed review aimed at streamlining and improving the processes which are vitally important for the economic benefit of this State.

Yours faithfully

AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

Alan Harries

CEO

Annexure A

Listing* of Members of Australian Debt Buyers & Collectors Association

- ACM Group Ltd
- Australian Receivables Ltd
- Axess Australia Pty Ltd
- Baycorp (Aust) Pty Ltd
- Charter Mercantile Pty Ltd
- Collection House Limited
- Complete Credit Solutions Pty Ltd
- Credit Corp Group Limited
- Credit Four Pty Ltd
- Dun & Bradstreet (Australia) Pty Ltd
- eCollect.com.au Pty Ltd
- Insolvency Management Services Pty Ltd
- Pepper Australia Pty Ltd
- Pioneer Credit Pty Ltd
- Shield Mercantile Pty Ltd
- State Mercantile Pty Ltd
- The ARMS Group Pty Ltd

**Current as at 1 May 2014*