AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

December 2010

Submission to

BETTER REGULATION OFFICE AND

DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL

ISSUES PAPER - October 2010

REVIEW OF THE DEBT RECOVERY PROCESS

Contents

Introduction

The Australian Collectors and Debt Buyers Association (ACDBA) thanks the Business Regulation Office and the Department of Justice and Attorney General for this opportunity to participate as a stakeholder in the NSW Government's Review of the debt recovery process project (the Review).

We would also welcome the opportunity to meet with the Business Regulation Office and the Department of Justice and Attorney General to discuss the Review in more detail.

ACDBA has consulted with other regulators at national, state and territory level and called for national harmonisation generally of the collection industry in Australia and whilst this includes how the industry is regulated it also encapsulates a desire to see consistent effective debt recovery processes in place across all jurisdictions. We look forward to an opportunity to meet to discuss the practical aspects of seeing effective national harmonisation achieved.

ACDBA understands the intent and purpose of the Issues Paper of this Review and broadly supports any changes the NSW Government makes to improve the cost, speed and ease of using the justice system.

The ACDBA

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 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 attend to the necessary debt collection functions associated with their businesses.

The size of the Australian collection industry is large and growing. Interim data collected from ACDBA members indicates the cumulative value of debt they had under collection as at 30 June 2010 exceeded $9 billion represented in type of debt as:

Finance	$5.4 billion
Utilities	$0.6 billion
Government	$1.7 billion
Commercial	$0.3 billion
Other	$1.0 billion

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.

ACDBA members have firsthand knowledge of the frustrations of plaintiffs and the limitations within the current court environment and appreciate this opportunity to share the views and observations of its members and the thousands of clients who have been in the position of plaintiffs.

In this submission, we address where appropriate each of the points (adopting the same numbering system) which were raised for consideration within the Issues Paper and provide a perspective from end users of the debt recovery service.

Option 1: Reduce the need to attend court using online tools

Option 1a: Allow creditors and debtors to make and respond to claims online

Questions posed:

1. **Would the UK Money Claims Online model be appropriate for NSW? If it would be, could the UK model be improved upon or customised to better suit the needs of NSW businesses and individuals?**

2. **What would be the benefits and costs of establishing an online service for the making or responding to debt claims?**

Response:

Any process reducing the need to attend court has merit and should be considered.

While the use of electronic tools may suit corporate and SME plaintiffs this is not necessarily the case of individuals who wish to commence the process of legal action or individuals/consumers who wish to lodge a defence (if an online system eventually includes this option) as this appears to assume such individuals have access to the necessary technology. Member experience with consumer debtors in emailing documentation is that many do not have access to the internet or are reluctant to use it for these types of transactions.

We note the proposed model uses a postal channel for service of the claim. The service of the claim by post is problematic when it relies upon Australia Post to deliver in a timely manner.

Actual physical location and residential address of individuals is increasingly becoming an issue for all credit providers. With the advent of electronic gateways, automated online account application processes, the use of mobile telephone numbers and email addresses being acceptable points of contact, service of legal documents by post is a process which is losing favour.

Address and contact details of consumers are rarely updated after accounts have been opened and relying upon addresses recorded on original credit/account applications for effective service of documents is not commercially practical.

Undelivered packs would need to be returned to the court very promptly with the appropriate Australia Post non delivery reason, such as: “No such address”, “No longer at address” etc. This information is very important when attempting to locate the actual whereabouts of a debtor.

The possibility of a defendant challenging the validity of service at an advanced stage of legal proceedings adds to both the cost and time of the legal action and may undermine the purpose of the move to this model.

The issuing court would need to administer the efficient capture and recording of the non service advice from Australia Post and in turn promptly report this to the plaintiff. Such steps would necessarily require streamlined delivery channels, appropriate administrative resources, superior database management processes and timely communication protocols. Without such an appropriate and necessary infrastructure an online system would not support the delivery of an effective automated alternative to existing processes.

Members have commented their experience of the UK model is that it is not as user friendly as initially assumed and can be difficult to navigate. Overall there is also a concern of the over simplification of the legal process leading to an almost cavalier response from defendants.

In such circumstances, there is an attendant risk defendants may not understand the legal nature of the action taken against them if delivered with what could be perceived as a casual ease or might encourage without due consideration being exercised the lodging of nuisance and misguided defences which will prove ultimately costly to the defendant involved.

Option 1b: Encourage greater use of JusticeLink

Questions posed:

3. **Is JusticeLink an appropriate model for use by claimants in debt recovery matters?**
4. **What guidance should be provided to self-represented claimants to maximize the time savings from the use of JusticeLink?**
5. **Are small businesses and individuals aware of the services offered by JusticeLink? What steps could be taken to improve awareness of these services?**

Response:

In principle the use of JusticeLink would seemingly offer an opportunity to reduce both the cost and time associated with issuing claims.

However, legal representatives acting for our members being well positioned to provide feedback have cited recent adverse experiences in the implementation phase of JusticeLink. While JusticeLink removes the need to physically lodge documents and will likely result in a reduction of court lists, complexities have resulted in obstacles arising, which directly impacted the ability to effectively implement the system.

Wholesale use of JusticeLink would require alternate payment methods. As an example the current requirement of a corporate credit card only for payment is far too limiting for general use.

The addition of personal credit card, BPAY, PayPal and the myriad of verified and secure payment channels used by most commercial entities and individuals is required.

Further, technical support for those attempting to utilise JusticeLink would need to be prompt, responsive and provide the required expertise to solve the majority of queries/problems within acceptable commercial and customer services expectations.

The accountability of such technical support would need to exist within an environment of commercial sensibility and be provided with a genuine customer focus and commitment. Telephone support would require the appropriate telephony technology to allow court staff to deliver service industry acceptable KPI’s.

Whilst most current users of JusticeLink have the benefit of technical resources to support their end to end process and as repeat customers have developed user competency over time, the same situation is unlikely to apply for casual and/or one off users and defendants (if JusticeLink was opened to them). We believe the majority of such occasional users and defendants are likely to struggle to implement many of the user requirements without well thought out and specific user support functions being available and accessible.

Guidance to litigants should not only include information relating to how to use the JusticeLink system as a means to facilitate their claim, but should also contain information protecting and reinforcing such essential litigation requirements as rules of evidence and points of law.

It must be at front of mind that with any process which becomes less formal or rigid, so does the mindset of its users.

To avoid the risk of increasing the number of applications for motions to set aside Judgments, participants of JusticeLink must be cognisant of the factual and rules based nature of legal action and their duty of care and personal responsibilities associated with using the law.

It would be very helpful for JusticeLink to include a process/progress guide for both plaintiffs and defendants with the required detail to explain the steps as well as a capability to measure and report in real time to the user in a highly visible way, his/her progress through the steps and the percentage of completeness achieved.

It is difficult to imagine how a move to position plaintiffs to use JusticeLink will succeed unless there is appropriately staffed information or support desks at the various courts to assist in disseminating information/assistance and awareness to plaintiffs.

Option 2: Reduce the complexity of processes

Option 2a: Build on the effectiveness of the Small Claims Division of the Local Court

Questions posed:

6. **Should the jurisdictional limit for the Small Claims Division of the Local Court be increased? If so, what would be the appropriate threshold? What would be the implications of such a change?**

7. **Are there sufficient assessors available within the Small Claims Division of the Local Court? Would the appointment of more assessors improve debt recovery processes?**

Response:

Without the experience to indicate that more assessors would assist, the current level appears to be sufficient. ACDBA members regard blockages and delays occur in other areas in which revision would be of greater benefit to more users.

We advocate increasing the jurisdictional limit for the Small Claims Division of the Local Court to $30,000. This will allow small business creditors in particular to avoid incurring unnecessary extra costs such as:

- Increased filing fee applicable in the General Division of $410 (as opposed to $166);
- Increased professional costs for counsel (minimum circa $3000 per day for preparation and appearance).

However we are cognizant that an increased caseload for the Small Claims Division would necessitate greater number of assessors to conduct hearings.

Option 2b: Further measures to encourage parties to reach settlement

Questions posed:

8. **Should registrars, assessors and magistrates in the Small Claims Division of the Local Court receive mediation training?**
9. **Would there be an overall benefit in requiring parties (not just their legal representatives) to attend pre-trial reviews?**
10. **Should the NSW Government consider mandating court-annexed mediation? What would be the potential benefits and downsides of mandated mediation?**

Response:

ACDBA considers registrars, assessors and magistrates should receive mediation training – such enhanced skills may broaden their perspectives and enhance their assessments and their contribution to the overall process.

We do not believe requiring the attendance of all parties at pre-trial review would benefit the process. In fact attendance by corporations, whether as defendant or plaintiff, may only add to the costs and time in running the matter. In most situations they will have briefed their legal representatives appropriately regarding the circumstances of the debt and any settlement guidelines. There may be the possibility of the court offering commercially attractive incentives to encourage settlements at this stage, however mandatory court appearances would not seem to be a factor to consider as increasing the likelihood of a settlement.

Mandating the use of mediation is not considered as an appropriate means of conciliation at this point in the legal process. In considering this option, our members cited the many and varied Federal, State, Industry and Consumer agencies, advocates and channels available to aggrieved and/or financially distressed parties to seek guidance, assistance, support and mediation.

The ACCC, ASIC, Fair Trading, Industry Ombudsmen are a few of the offices which parties are encouraged to consult with should they need assistance. A significant part of the responsibilities of these bodies is to provide adjudication and advocacy in the early or initial stages of matters such as monies allegedly owing for the supply of goods and/or services.

Replicating such efforts during the late stages of legal action relating to debt recovery would appear to be an ineffective use of funds that could be deployed elsewhere with greater benefit as well as counteractive to the charter and purpose of these agencies.

Option 2c: Amend court procedures for debt recovery matters

Questions posed:

11. **Is there scope to simplify or otherwise improve existing court procedures for debt recovery matters?**
12. **Are there grounds for introducing different court processes in relation to debt recovery matters, as compared to other matters?**
13. **Would reduction of the 28 day limit for filing a defence or the introduction of a requirement to lodge a "Notice of Intent to File a Defence" reduce debt recovery timeframes and balance the interests of all parties?**

Response:

The use of a tracking and recording tool enabling litigants to track the receipt/issue/progress of matters without the need to phone the court would be of benefit in reducing the time taken in this type of follow up, as well as the frustration experienced in not having access to current information pertaining to a matter's progress. Such monitoring would also provide a mechanism for the identification of systemic errors or problems as well as an objective customer service and delivery measure.

The current 28 day limit for filing a defence is a generous time allotment and could be reduced to 21 days (as is the requirement in Victoria) with no detrimental effect on defendants. Such an amendment also addresses the spirit of many of the UCPR reforms in attempting to create consistencies across state jurisdictions.

Option 2d: Expand the jurisdiction of the Consumer, Trader and Tenancy Tribunal

Questions posed:

14. **Should the jurisdiction of the Consumer, Trader and Tenancy Tribunal be expanded to allow it to hear debt recovery matters instituted by small businesses?**
15. **How would this option compare to increasing the jurisdictional limit of the Small Claims Division of the Local Court?**
16. **Would a $30,000 limit on claims be appropriate if this option were to be pursued?**

Response:

As outlined in the response to Option 2b, there currently exists a multitude of options available to individuals, companies and businesses to have their complaints and queries reviewed by the appropriate regulatory bodies. Adding another arm to the CTTT provides an opportunity to unduly delay processes with the addition of a further mediation type application and its merit is difficult to translate into process improvement outcomes focused on speed, ease and costs.

We therefore do not support the expansion of the CTTT jurisdiction to hear debt recovery matters instituted by small businesses.

In contrast, we would however support increasing the jurisdictional limit of the Small Claims Division of the Local Court to $30,000 as outlined above. We believe that the increased structure of the Small Claims Division provides small business creditors with the most efficient and effective forum for these matters.

Option 2e: Establish a Debt Disputes Tribunal

Questions posed:

17. **Would a separate tribunal focused on debt disputes streamline the recovery of debts?**

18. **What would be the potential downsides of establishing a separate tribunal focused on debt disputes?**

Response:

The ACDBA agrees that this is an interesting option and deserves appropriate consideration.

As referred to previously, the plethora of regulatory and compliance bodies that oversee the broad carriage of commerce within our communities, also have varied powers of adjudication and decisioning.

There already exist very clear and prescribed channels for challenging such things as poor service, contractual violations, supply of faulty or incorrect goods, errors in billing and the like. These processes have been created to protect the rights and support the interests of both consumers and suppliers.

Further, the steps taken in any effective debt recovery process necessarily includes the identification of any dispute or query a debtor may have that is the reason for not paying an account. If a debtor does not agree with the response from the creditor to their stated problem or query they have recourse to use all appropriate regulatory bodies or even to seek legal counsel to challenge the creditor's position.

The introduction of a tribunal at this point of debt recovery processes is an additional step that does not appear to offer the benefit of efficiencies to either plaintiffs or defendants and may in fact be adding to the perceived complexity of layers within the legal process.

Also as an intermediary pre judgment step, the informality of the tribunal may detract from the perceived power and rulings it issues. The observation of our members is that the complexity of some disputes are often not fully understood until the circumstances, supporting documentation, and witnesses have been reviewed by someone experienced in debt recovery matters.

Another observation is that if the costs associated with managing a matter through the tribunal rather than issuing a claim were less it may result in complex matters being reclassified to avoid incurring higher costs.

As disputes of a contractual or evidential nature are in reality often more complex than initially understood and tribunals do not include legal representation, the acumen and knowledge of assessors may not be to a standard appropriate to the diversity and complexity of all debt recovery matters.

At extreme odds with its intent, parties as recipients of tribunal rulings may be adversely affected. In situations of this nature parties may require recourse to challenge a tribunal decision.

Option 3: Improve availability of information on debt recovery

Option 3a: More effective delivery of information on debt recovery

Questions posed:

19. **Does the information that is currently provided meet the needs of debtors and creditors? What additional information should be available?**
20. **How should general information on debt recovery be made available?**

Response:

The view of ACDBA members is that information needs to be centralised, current, written in an easy to understand style and take into account jurisdictional considerations as most commercial entities sell nationally.

Web information sources should be linked to other associated authorities and sources to provide alternate or holistic perspectives, while search optimisation strategies need to be built to increase touch point sites such as Lawlink etc. Information needs to be easily accessed in both electronic and hard copy versions. Traditional centres such as banks, ATO offices and Post Offices could be used as information repositories for those without internet access and/or skills to access such information.

Option 3b: Notifying debtors of their obligations and options

Questions posed:

21. **What information should be provided to debtors about their obligations and the options available to them?**
22. **Should such information be provided at more than one stage of the process? Who should be responsible for providing the information?**

Response:

The members of the ACDBA have daily contact with thousands of debtors and have firsthand experience in the enormous diversity in the understanding of their obligations and the commercial nature of their implied, agreed or written acceptances of the terms of trade they have entered into.

Improvements to the quality and accessibility of information available to debtors would be a very positive outcome of this review.

Information should facilitate an understanding of the commercial liability a debtor has entered into and their obligations to creditors. After reviewing this key, yet often unacknowledged component, should a debtor believe that the claim is erroneous or they wish to dispute the terms and/or conditions of the agreement or supply etc., they require information pertaining to the steps they should take to initiate the appropriate actions to challenge or query their liability.

The basic questions to cover for debtors are: *what can I do if:*

- *I believe I don't owe the money;*
- *I owe the money and wish to pay; or*
- *I understand I owe the money but I can't pay.*

The logical home for this dissemination responsibility would be all or some of the following:

- The Department of Justice;
- Attorney Generals Department;
- ASIC;
- ACCC; and
- The State Regulator (Fair Trading).

It is noted that the ACCC booklets and website information available to consumers outline their rights and how to manage a disputed account. Websites or information desks at the court could be created as access points for the information.

Perhaps an improvement is as simple as the revision of the Form 3A/B (Summons) to include practical information that may assist a defendant or an attachment that can accompany the service copy.

The same disclosures should be afforded and available to creditors, especially SME's and sole traders, to assist them in making informed, compliant and commercial decisions relating to the management of their overdue debtors.

Option 4: Improve enforcement arrangements

Option 4a: Garnishee order charges

Option 4b: The Sheriff's office to offer a suite of enforcement options for a single fee

Option 4c: Give Sheriff's officers the authority to enter a property to execute a writ of execution on goods

Option 4d: Allow a writ against land to be issued for debts under $10,000

Option 4e: Credit and financial counselling post-adjudication

Questions posed:

23. **How could enforcement arrangements for debt recovery matters be improved?**
24. **What would be the pros and cons of changes to garnishee orders?**
25. **Would there be an overall benefit in the Sheriff's Office offering a suite of enforcement options to creditors?**
26. **What would be the advantages and disadvantages of allowing Sheriff's officers to enter premises to enforce a writ of execution on goods?**
27. **Should a writ against land be available as an enforcement option for debts under $10,000? If so, should a minimum judgment amount apply?**
28. **Would post-adjudication credit and financial counselling improve enforcement of debt recovery matters?**
29. **Do any of the options outlines above raise concerns in relation to the civil liberties and/or privacy of debtors that should be balanced against any potential benefit for creditors?**

Response:

Improving the effectiveness of enforcement actions is an important initiative and essential for restoring confidence to the debt recovery process.

For plaintiffs, a common and recurring frustration with the civil procedures process is the challenge of the translation of judgment into a positive final outcome. Revisions and additional options that secure more positive outcomes for plaintiffs would serve the court system well.

The same powers as the State Debt Recovery Office for garnishees would be an effective and a significant improvement on the current process - however what recourse would be available to both the plaintiff and defendant if a defendant claimed not to have been served and was not aware of the debt? If postal service was used as part of an online legal process this could be a real consideration.

Further, would the amended power of the garnishee to cover future credit balances in a bank account require notifying the defendant/account holder?

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 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.

It is agreed that sheriffs should have the same power across all Australian states and increasing the power of NSW sheriffs to be in line with South Australia and Queensland would be welcomed and as mentioned previously, supports the spirit of UCPR.

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

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 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, the inclusion of actions such as records of enforcement, record of a negotiated settlements, record of any post judgment agreements or non formal payment arrangements, 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.

Concluding comments

ACDBA supports the timely review of the NSW Debt Recovery Process and in the preceding pages has provided responses to the questions raised in regard to the options outlined in the Issues Paper.

Whilst technology beckons as an obvious potential solution to enhancing the efficiencies of aspects of the debt recovery process it shouldn't be seen as a complete panacea for all the ills in the existing processes.

Leveraging off technology is regarded and accepted as the immediate opportunity to enhance business systems and understandably has become an integral part of modern day trading. However, it should not be assumed the wider community is as well placed to access and rely upon technological solutions – factors such as age, education and financial resources play a part in the take up and reliance of individuals upon online technologies.

Debt recovery is also an integral aspect of trading. Challenges apply equally to plaintiff and defendants alike. There is wide and appropriate support through various Federal, State, Industry and Consumer agencies and advocates assisting debtors in the event of financial distress and to respond to grievances with creditors.

Plaintiffs drawn from small to medium enterprises are often confronted by the complexity and perceived bureaucracy of debt recovery processes. Generally lacking in-house resources and experience to work their way through the necessary steps to recover amounts legally due to them, they necessarily rely upon intermediaries to assist them though those processes.

Despite the delays associated with court issuing and filing, ACDBA members and plaintiffs more overtly express frustration with the ineffectiveness and delays inherent in the enforcement options currently available in the existing debt recovery process.

Under Option 4, we have made specific suggestions on how enforcement processes can be quickly enhanced with little cost to government, plaintiffs and defendants.

ACBDA would welcome the opportunity to meet with the Business Regulation Office and the Department of Justice and Attorney General to expand on the perspectives detailed in this submission in response to the NSW Government's Review of the debt recovery process.

Contact

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ANNEXURE A

Listing* of Members of Australian Debt Buyers & Collectors Association

- o ACM Group Ltd
- o Austral Mercantile Collections Pty Ltd
- o Australian Receivables Ltd
- o Baycorp (Aust) Pty Ltd
- o Charter Mercantile Pty Ltd
- o Credit Corp Group Limited
- o Dun & Bradstreet (Australia) Pty Ltd
- o EC Credit Control Pty Ltd
- o Insolvency Management Services Pty Ltd
- o National Credit Management Limited
- o Pioneer Credit Management Services Pty Ltd
- o Recoveries Corporation Pty Ltd
- o State Mercantile Pty Ltd
- o The ARMS Group Pty Ltd

** Current at 1 December 2010*