

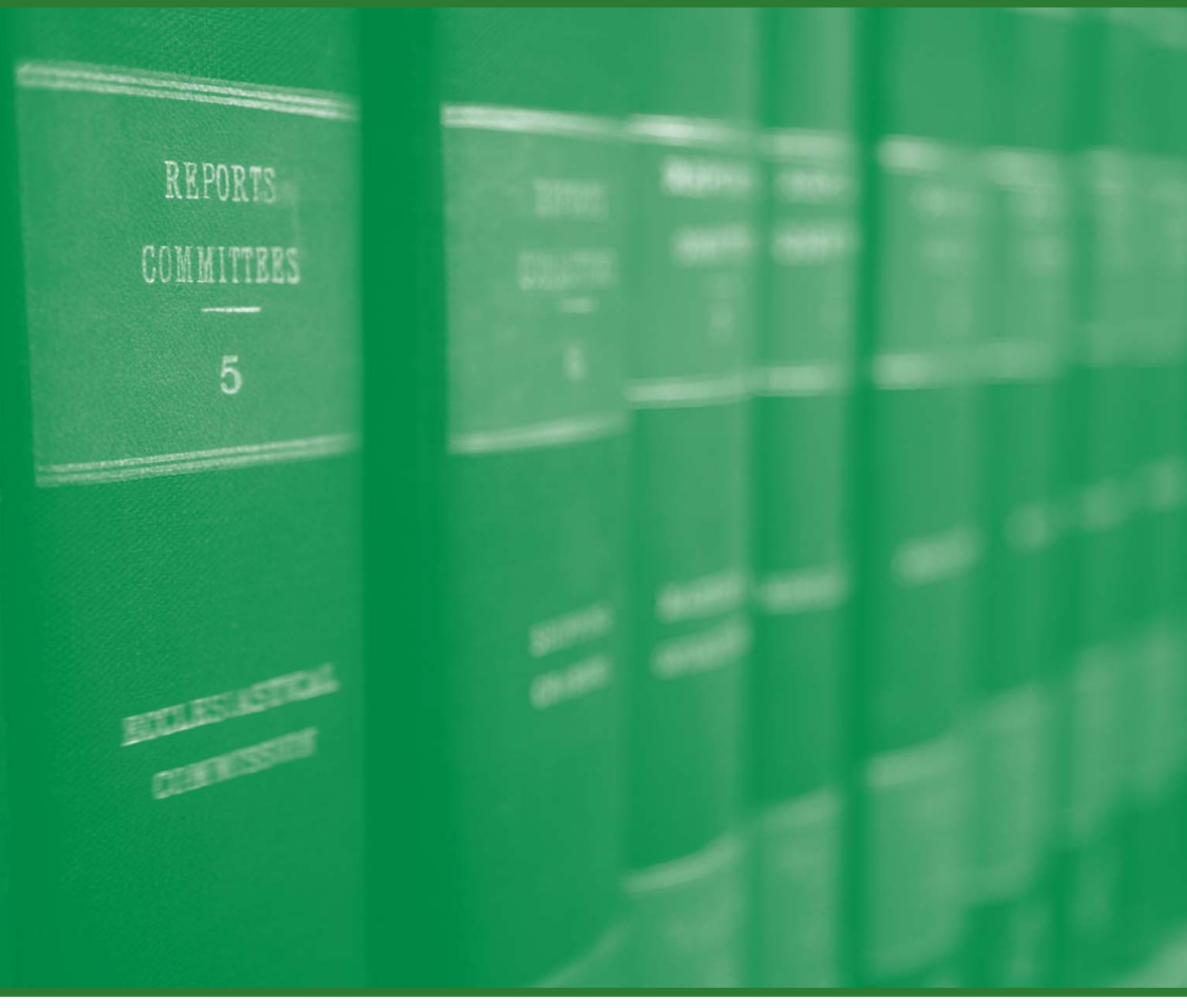


LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES

Legal Affairs Committee

REPORT 2/55 – NOVEMBER 2014

DEBT RECOVERY IN NEW SOUTH WALES



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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Membership

| | |
|------------------------|--|
| CHAIR | Mr Bryan Doyle MP |
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Terms of Reference

That the Committee inquire into, and report on, the debt recovery framework in NSW and in particular:

- i. The effectiveness of current legislation and administrative arrangements;
- ii. Any barriers to the debt recovery process, and impacts on third parties responding to debt recovery actions;
- iii. Possible measures to make the debt recovery process more efficient;
- iv. Practice in debt recovery in other jurisdictions; and
- v. Any other relevant matters.

Chair's Foreword

The inquiry into debt recovery in New South Wales was prompted by concerns about the adequacy of current legislation and administrative processes for the collection of debts, with the Committee particularly focused on removing barriers to debt recovery and exploring measures to make the debt recovery process more efficient.

The Committee's inquiry focused on a number of key areas. The first of these areas considered the current licensing system for debt collectors in New South Wales, including current training requirements, costs and oversight of commercial agents. The Committee has made two recommendations in this area to streamline the licencing requirements for agents in the debt collection industry and support the introduction of a negative licensing scheme for commercial agents.

The effectiveness of current processes for the recovery of debts in the court system and the enforcement of court judgments were subjects of concern for inquiry participants. The Committee has made a total of thirteen recommendations in these areas, including: expanding the jurisdiction of the Small Claims Division of the Local Court; introducing simple, plain English information and pro forma documents to simplify the processes associated with filing court documents; and outsourcing the enforcement functions of the Office of the Sheriff to reduce delays and bring greater flexibility.

The third area examined by the Committee was that of the difficulties that creditors and debt collectors face in attempting to locate debtors. The Committee was concerned to ensure that the right of creditors to locate debtors was balanced with the debtor's right to privacy. The Committee has made four recommendations to enable creditors to more easily ascertain the whereabouts of debtors.

Finally, the Committee examined the activities of the State Debt Recovery Office in recovering debts owed to the New South Wales Government and considered the impact of debt recovery processes on the more disadvantaged members of our society and examined poor practices that sometimes occur in the debt collection industry. The Committee has made several recommendations to protect vulnerable and disadvantaged individuals by recommending a minimum balance be retained in debtors bank accounts and encouraging debt collectors to offer referrals to external, independent financial counsellors.

I believe that the recommendations made in this report will greatly improve current practices for the recovery of debts while at the same time ensuring that the most vulnerable members of our community are protected.

As part of this inquiry, the Committee consulted with members of the debt collection industry, the judiciary, and legal practitioners. I wish to thank all those contributed to the inquiry by way of making a submission, appearing at a public hearing or briefing the Committee privately. I acknowledge my Committee colleagues for their work on this inquiry and I also wish to thank Committee staff for their work and support.

Bryan Doyle MP
Chair

List of Recommendations

| | |
|--|----|
| RECOMMENDATION 1 | 26 |
| The Committee recommends that the NSW Government introduce negative licensing for commercial agents who have no face-to-face contact with debtors, while positive licensing is retained for field agents. | |
| RECOMMENDATION 2 | 31 |
| The Committee recommends that responsibility for the oversight and licensing of commercial agents and private inquiry agents be transferred from the Security and Licensing Directorate of the NSW Police Force to Fair Trading NSW. | |
| RECOMMENDATION 3 | 40 |
| The Committee recommends that the Attorney General consult with stakeholders on the process of serving Statements of Claim by post and explore the option of allowing creditors to serve, and debtors to respond to, Statements of Claim via electronic means. | |
| RECOMMENDATION 4 | 43 |
| The Committee recommends that the Attorney General increase the jurisdiction of the Small Claims Division of the Local Court to \$30,000 and that the Small Claims Division be funded and resourced to manage the subsequent increase in cases. | |
| RECOMMENDATION 5 | 48 |
| The Committee recommends that the Attorney General review the fixed costs awarded in the Small Claims Division of the Local Court. | |
| RECOMMENDATION 6 | 52 |
| The Committee recommends that concise, plain English information be made available at registry offices on court processes for debt recovery procedures and that this information is consistent with information available online. | |
| RECOMMENDATION 7 | 52 |
| The Committee recommends that pro forma documents be created for court forms associated with debt recovery matters and that these be easily accessible at registry offices and online. | |
| RECOMMENDATION 8 | 64 |
| The Committee recommends that the <i>Civil Procedure Act 2005</i> be amended to ensure that a minimum balance is maintained in bank accounts that are the subject of a bank garnishee order, and that this minimum balance aligns with the net weekly amount that must be retained for debtors subject to wage garnishee orders. | |
| RECOMMENDATION 9 | 65 |
| The Committee recommends that the <i>Civil Procedure Act 2005</i> be amended to allow bank garnishee orders to operate on term deposits of judgment debtors, irrespective of when the term deposit falls due. | |
| RECOMMENDATION 10 | 65 |

The Committee recommends that the Uniform Civil Procedure Rules 2005 be amended to clarify that an administrative charge for garnishee orders may be deducted in addition to the amount being garnished.

RECOMMENDATION 11 _____ **68**

The Committee recommends that the *Civil Procedure Act 2005* be amended to bring the items protected from seizure under a property writ in line with the items protected from seizure under bankruptcy proceedings in the *Bankruptcy Act 1966* (Cth).

RECOMMENDATION 12 _____ **76**

The Committee recommends a review of the enforcement fee structure, with a view to improving enforcement activities.

RECOMMENDATION 13 _____ **76**

Particularly in light of the Committee’s view that delays in enforcement action by the Office of the Sheriff is an area of concern, the Committee recommends that the Auditor General conduct a performance audit of the enforcement functions of the Office of the Sheriff.

RECOMMENDATION 14 _____ **81**

The Committee recommends the Government and any performance audit strongly consider outsourcing the enforcement functions of the Office of the Sheriff.

RECOMMENDATION 15 _____ **81**

The Committee recommends that the Government and any performance audit also considers whether the level of resources for the enforcement functions of the Office of the Sheriff are adequate for the job required.

RECOMMENDATION 16 _____ **109**

The Committee recommends that the Uniform Civil Procedure Rules 2005 be amended, mindful of privacy principles, in order to:

- a) allow creditors to ascertain the whereabouts of a judgment debtor after judgment has been made, and
- b) allow applicants to the Small Claims Division of the Local Court to ascertain a defendant’s whereabouts.

RECOMMENDATION 17 _____ **109**

The Committee recommends that the Attorney General ensure that clear and simple guidelines and information is made available to small claims litigants, which will allow them to understand and make use of the amended discovery procedure.

RECOMMENDATION 18 _____ **109**

The Committee recommends that the Attorney General ensure that court costs associated with the amended discovery procedure are able to be recovered by creditors.

RECOMMENDATION 19 _____ **110**

The Committee recommends that the NSW Government work with the NSW Privacy Commissioner to examine ways of making greater use of consent in relation to how personal

information is managed and disclosed by government agencies - particularly in relation to how personal information may be used to assist in debt recovery processes.

RECOMMENDATION 20 _____ **128**

The Committee recommends that the NSW Government ensure that all agencies issuing fines and penalty notices have systems in place to monitor the way cautions and penalty notices are issued, as well as how internal review requests are managed.

RECOMMENDATION 21 _____ **128**

The Committee recommends that the NSW Government require all agencies issuing fines and penalty notices to report data in their Annual Reports about the number of cautions and penalty notices issued, internal review requests received, outcomes of internal review requests and any additional data which would assist in evaluating the impact of fines on vulnerable sections of the community.

RECOMMENDATION 22 _____ **136**

The Committee recommends that the NSW Government:

- a) Encourage and strongly consider requiring debt collectors to offer referrals to external, independent financial counsellors when contacting debtors and attempting to recover debts; and
- b) review the level of government financial assistance available to not-for-profit financial counselling services to ensure there are adequate resources to meet the demand for these services.

Glossary

| | |
|-------|---|
| ACCC | Australian Competition and Consumer Commission |
| ACDBA | Australian Collectors and Debt Buyers Association |
| ADR | Alternative dispute resolution |
| AIPD | Australian Institute of Private Detectives |
| ASIC | Australian Securities and Investments Commission |
| CAPI | <i>Commercial Agents and Private Inquiry Agents Act 2004</i> |
| EDR | External dispute resolution |
| FRLC | Financial Rights Legal Centre (formerly Consumer Credit Legal Centre) |
| HRIP | <i>Health Records and Information Privacy Act 2002</i> |
| NCAT | New South Wales Civil and Administrative Tribunal |
| OSR | Office of State Revenue |
| PPIP | <i>Privacy and Personal Information Protection Act 2002</i> |
| RLC | Redfern Legal Centre |
| SDRO | State Debt Recovery Office |
| SLED | Security Licensing & Enforcement Directorate, NSW Police Force |

Chapter One – Introduction

CONDUCT OF THE INQUIRY

- 1.1 On 26 March 2014, the Committee resolved to inquire into and report on the debt recovery framework in New South Wales. The inquiry was self-referred.

Submissions

- 1.2 The Committee called for submissions by writing directly to key stakeholders. The Committee also advertised the inquiry on the Committee website, and in the *Sydney Morning Herald*. The closing date for submissions was 16 May 2014.
- 1.3 In total, the Committee received 35 submissions from a broad range of sources including debt recovery industry associations, legal representatives and the New South Wales Government. A full list of submission authors can be found at Appendix One and copies of the submissions and answers to questions on notice are available on the Committee's website.

Public hearing and briefings

- 1.4 The Committee held a public hearing at Parliament House on 16 June 2014. Evidence was taken from 16 witnesses representing 9 organisations. A list of witnesses who appeared before the Committee can be found at Appendix Two. The transcript of evidence from the public hearing can be found on the Committee's website.
- 1.5 The Committee conducted a site visit to the Office of the Sheriff on 31 July 2014 to gain a practical understanding of the role of the Sheriff in carrying out enforcement activities for debt recovery.
- 1.6 To gain an understanding of debt recovery practices in other jurisdictions, the Committee held briefings via teleconference with representatives of the Western Australian Sheriff's Office and the Queensland Department of Justice.

WHAT IS DEBT RECOVERY?

Debt

- 1.7 Debt refers to monies owed by one party (the debtor) to another party (the creditor). Debt may arise through a variety of transactions including: a business extending credit to a customer for the supply of goods or services; a financial agreement (such as a loan or credit card); or the outcome of a compensation claim (such as a car accident). Debt is a major issue for the community and a leading contributor to homelessness¹.

¹ Ms Monique Hitter, Executive Director, Civil Law Division, Legal Aid NSW, Transcript of evidence, 16 June 2014, p 29.

An overview of debt recovery

- 1.8 Debt recovery, or debt collection, refers to the steps taken by a creditor to recover the money they are owed by a debtor. In-house debt collection refers to creditors who undertake to recover debts themselves. Out-sourced debt collection refers to debt collection undertaken by a third party such as an agent or debt buyer. It is common for a creditor to attempt in-house debt collection first, resorting to out-sourced debt collection if the debt is not recovered within a certain period of time.
- 1.9 Out-sourced or third-party debt collection is undertaken by two main groups:
- Contingent debt collectors (also known as mercantile or commercial agents), who act as an agent for, and collect debt on behalf of, the original creditor for a fee. The debt is still owned by the creditor.
 - Debt purchasers, who buy the outstanding debt from the original creditor at a discount from the original value of the debt. The original creditor ceases to own the debt once the debt has been purchased.
- 1.10 There are over 900 debt collection businesses in New South Wales, with many businesses conducting a mix of contingent debt collection and debt purchasing. Contingent debt collection accounts for 68 per cent of the debt collection market; however, debt purchasing is becoming increasingly common, and accounts for 22 per cent of the market.²
- 1.11 If both in-house and out-sourced debt collection methods fail, creditors can take legal action to recover the debt. The steps involved in the debt recovery process are discussed in greater detail below.

Direct contact

- 1.12 Creditors, or a third party agent appointed by the creditor, can make direct contact with a debtor by telephone, email or through face-to-face contact to establish if the debtor has the means to repay the debt and make arrangements for payment of the debt. Consumer protection laws and *Debt Collection Guidelines* issued by the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) provide guidance about reasonable contact and prohibitions against misconduct such as harassment, coercion and misleading conduct.

Letter of demand

- 1.13 If direct contact is unsuccessful, a creditor may issue a letter of demand, containing a formal request to pay the money owed by a certain date with a warning that legal action may proceed.

Mediation

- 1.14 Before legal action is undertaken, creditors and debtors may choose to attend mediation to settle their debt recovery dispute. Community Justice Centres provide a free mediation service for debt recovery disputes.

² Consumer Affairs Victoria, *Debt Collection Harmonisation Regulation Options Paper*, October 2011.

*Legal Action*³

1.15 If direct contact, letter of demand and mediation options are unsuccessful a creditor may pursue legal action. The size of the debt will determine which court hears the claim, as outlined in the following table:

Table 1: Court jurisdiction in debt recovery claims

| Value of Claim | Appropriate Court |
|------------------------|------------------------------------|
| Less than \$10,000 | Small Claims Division, Local Court |
| \$10,000 - \$100,000 | General Division, Local Court |
| \$100,000 - \$750,000 | District Court |
| Greater than \$750,000 | Supreme Court |

1.16 The rules governing commencement of legal action and court procedures are contained within the *Civil Procedure Act 2005* and the Uniform Civil Procedure Rules 2005. To commence legal action in the Small Claims Division of the Local Court, a creditor is required to file a Statement of Claim at the nearest Local Court, pay the filing fee and send or give a sealed copy of the Statement of Claim to the debtor (this is known as ‘serving’ the Statement of Claim).

1.17 If a debtor does not respond to the Statement of Claim within 28 days the creditor will need to complete an Affidavit of Service form. An Affidavit of Service describes how and when the Statement of Claim was served and may be used as evidence by the court that the Service of Claim was indeed served. The creditor may then apply to the Court for a default judgment. A default judgment is a judgment made against a debtor without the matter going to a court hearing.

1.18 Where a debtor files a Defence, the creditor will be required to attend court for a Pre Trial Review. If the matter is unable to be settled at the Pre Trial Review, the matter will proceed to a hearing.

1.19 If a creditor’s hearing is successful, the court will make a judgment that a debt is owed and how much the debtor owes. It is up to the creditor to enforce both court judgments and default judgments. Creditors have up to 12 years from the date of a judgment to enforce the judgment.

Enforcement of legal action if the creditor is successful

1.20 There are a number of options for enforcement of a court or default judgment:

- a) Seeking an examination summons – intended to help a creditor to examine the debtor’s financial position.
- b) Garnishee order – a garnishee order directs that funds which would have been paid to a debtor are paid to the creditor instead.

³ LawAccess guide to starting or defending claims of \$10,000 or less in NSW.
< http://www.lawassist.lawaccess.nsw.gov.au/lawassist/lawassist_debt_small_claims_home.html>, viewed 21 July 2014.

- c) Writ of execution – a court order that directs the Sheriff to seize and sell a debtor’s personal assets.
- d) Writ against land – a court order that directs the Sheriff to seize and sell real property owned by a debtor. This applies only to debts greater than \$10,000.
- e) Seeking bankruptcy (for individuals) if the debt exceeds \$5,000 or liquidation (for companies) if the debt exceeds \$2,000.

Previous reports and reviews

1.21 A number of reviews issues associated with the debt recovery process have been conducted in recent years including:

- The 2010 Review of the Debt Recovery Process conducted by the Better Regulation Office and the Department of Attorney General and Justice (now known as Department of Justice);⁴
- The 2010 ASIC/ACCC report, *Debt Collection Practices in Australia*;⁵ and
- The 2010 Consumer Affairs Victoria report, *Debt Collection Harmonisation Regulation Options Paper*.⁶

Report structure

- 1.22 This report has been organised in seven chapters. Chapter two provides an overview of the current licensing requirements for debt collectors in New South Wales, and considers proposals for reforms of the licensing system.
- 1.23 Chapter three examines debt recovery procedures in the court system, and considers proposals for reform of the court management of debt recovery.
- 1.24 Chapter four considers the enforcement of court judgments in relation to private debt, and examines the role of the Office of the Sheriff in enforcing court judgments and whether this role should be outsourced.
- 1.25 Chapter five addresses the difficulties that creditors and debt collectors face in attempting to locate alleged debtors, and considers the need to balance creditors’ rights with the right to privacy.
- 1.26 Chapter six focuses on the activities of the State Debt Recovery Office which is responsible for the receipt and collection of outstanding debts owed to the New South Wales Government, including fines, penalties and taxes.

⁴ The final report of the review may be found as an attachment to Submission 33, Department of Justice.

⁵ Australian Competition & Consumer Commission, <[www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/REP155-debt-collection-report.pdf/\\$file/REP155-debt-collection-report.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/REP155-debt-collection-report.pdf/$file/REP155-debt-collection-report.pdf)>, viewed 8 October 2014.

⁶ Consumer Affairs Victoria, <www.consumer.vic.gov.au/library/publications/resources-and-education/legislation/public-consultations-and-reviews/debt-collection-harmonisation-regulation-options-paper.doc>, viewed 8 October 2014.

- 1.27 Chapter seven assesses the impact of debt recovery processes on vulnerable individuals and considers the level of complaints and poor practices that occur in the debt collection industry.

Chapter Two – Licensing

2.1 This chapter addresses the licensing of debt collectors in New South Wales. It first examines the current licensing scheme that is in place, as well as outlining the concerns that were raised about the current training requirements, licensing costs, delays and mutual recognition across jurisdictions. The chapter then considers proposals to reform the licensing system, such as introducing negative licensing and transferring oversight of commercial agents and private inquiry agents to Fair Trading NSW. The chapter notes previous reviews of licensing that have been undertaken, as well as considering the Australian Competition and Consumer Commission (ACCC)/Australian Securities and Investments Commission (ASIC) debt collection guidelines for collectors and creditors.

CURRENT LICENSING SCHEME AND THE CAPI ACT

2.2 The licensing of debt collectors in New South Wales is regulated by the *Commercial Agents and Private Inquiry Agents Act 2004* (CAPI Act) and the subordinate *Commercial Agents and Private Inquiry Agents Regulation 2006*. The Security Licensing & Enforcement Directorate of the NSW Police Force (SLED) has responsibility for enforcing the legislation and issuing licenses.

2.3 The CAPI Act requires persons carrying out debt collection activities to hold a commercial agent's licence. Debt collection is defined in the Act as being:

(a) any activity carried out by a person on behalf of a second person... in the exercise of the second person's rights under a debt owed by a third person, or

(b) any activity carried out by a person on his or her own behalf in the exercise of rights acquired from a second person... under a debt owed by a third person.

being an activity that involves finding the third person or requesting, demanding or collecting from the third person money due under the debt.⁷

2.4 There are two types of licences for commercial agents: master licences and operator licences.

2.5 A master licence is required for a person to run a business as a commercial agent, whereas an operator licence is required for a person to undertake commercial agent activities. That is, a master licence should be held by an employer running a business and operator licences should be held by the employees of the business. A self-employed person is required to hold both master and operator licences.

2.6 The Act also provides for a probationary licence to be issued for the first year of an operator licence. The probationary licence requires a person to work under the supervision of another person who holds a master or operator licence.

⁷ *Commercial Agents and Private Inquiry Agents Act 2004*, s 4.

2.7 The costs for operator and master licences for commercial agents are outlined in the following table:

Table 2: Licensing costs⁸

| Operator Licences | |
|--------------------------------------|---|
| \$130.00 | 1 year term |
| \$480.00 | 5 year term |
| Master Licences (5 year term) | |
| \$480.00 | Nil employees, self-employed individual or corporation (owner/operator) |
| \$910.00 | 1-10 employed CAPI licensees |
| \$1,940.00 | 11 or more CAPI licensees |

2.8 Certain persons are exempt from the requirement to hold a commercial agent's licence under the CAPI Act. These include police officers, public servants, legal practitioners, company auditors and employees of authorised deposit-taking institutions and insurance companies, among others.⁹

2.9 During the public hearing, Mr Cameron Smith of SLED explained that his directorate was responsible for licensing debt collectors and outlined some details of what this entailed:

The Commissioner of Police administers the *Commercial Agents and Private Inquiry Agents Act* and regulation. So, my area represents the Commissioner in that in regulating the industry. Debt collection is a licensable activity under that legislation. My area is primarily responsible for licensing...

The applications for licences are processed by a team who process also, and primarily, security licensing. Then a determination is made by what I call the adjudication team, which decides who should be issued and who retains licences.¹⁰

2.10 Mr Smith further explained that, in relation to commercial agents, awarding licences and monitoring the ongoing probity of licensees are the main tasks that his directorate undertakes:

It really is the awarding of the licenses and then we monitor the probity of individuals who are issued a licence throughout the term of their licence. For example, if a licensee is charged with an offence we will be notified of that within 24 hours and then we will make a determination of whether the licence should be cancelled.¹¹

2.11 Mr Smith noted that the legislation prescribes the grounds on which a person's licence can be disqualified and that they typically relate to offences that people

⁸ Submission 21, Institute of Mercantile Agents, p 5.

⁹ *Commercial Agents and Private Inquiry Agents Act 2004*, sch 1.

¹⁰ Mr Cameron Smith, Director, Security Licensing & Enforcement Directorate, NSW Police Force, Transcript of evidence, 16 June 2014, p 53.

¹¹ Mr Cameron Smith, Evidence, 16 June 2014, p 54.

have committed.¹² Potential circumstances that may lead to cancelling a licence are highlighted by running checks of licence holders against the policing system:

We remove licences as we refuse licences—on probity grounds. As I indicated, when we issue a licence to someone we currently use within Police what we call the Integrated Licensing System—it is ‘Integrated’ because it is integrated with our operational policing system. Every night a full list of licence holders is run across the policing system and in the event that there is a charge or even, for that matter, an information report that we think would be of relevance, my adjudication team is aware of that the next day and we will see whether that activates any grounds under the legislation to cancel the licence and we will take that action accordingly.¹³

2.12 Licensees are also required to have their fingerprints taken prior to being awarded a licence.¹⁴

2.13 Some stakeholders, such as Alan Harries of the Australian Collectors and Debt Buyers Association (ACDBA) and the Institute of Mercantile Agents (IMA), were critical of the CAPI Act and current licensing scheme in New South Wales. Mr Harries considered that the CAPI Act has failed to adapt to changes in the debt collection industry and told the Committee of his concerns during the public hearing:

From our organisations—and I speak for both of them in this regard—the biggest problem for our members in our organisations is about licensing. Being a commercial agent there is no doubt that the Commercial Agents and Private Inquiry Agents Act 2004, which is a rewrite of the 1963 Act, is inadequate and bureaucratically very difficult for people to get their head around. Time has moved on; we do not collect debts by riding on bicycles around town, we do not write up debts on an 8 x 5 index card; we do use computer systems, we do use autodiallers, we do have big call centres that would be the envy of most large organisations. The legislation does not quite understand how to regulate that and that is one of the reasons both groups have come to this view that we need to do something about licensing in regard to the people that never see a debtor face to face—they talk to them on the phone, they email them and they SMS them.¹⁵

2.14 The Australian Institute of Private Detectives (AIPD) was also critical of the current licensing scheme in New South Wales, suggesting that licensing has been a failure:

State licensing has failed debt collection/mercantile-commercial agents and private investigators in every state of Australia and provides no special benefits of any sort by a person or company holding a licence. The licensing regime and fees are essentially a fraud as well as unnecessary invasion of civil liberties requiring them to be fingerprinted for no valid reason. One may as well fingerprint accountants and

¹² Mr Cameron Smith, Evidence, 16 June 2014, p 56.

¹³ Mr Cameron Smith, Evidence, 16 June 2014, p 55.

¹⁴ NSW Police Force,

www.police.nsw.gov.au/services/security_licensing_and_enforcement_directorate/commercial_and_private_inquiry_agents_capi/frequently_asked_questions#5, viewed 18 September 2014.

¹⁵ Mr Alan Harries, Chief Executive Officer, Australian Collectors and Debt Buyers Association; Executive Director, Institute of Mercantile Agents, Transcript of evidence, 16 June 2014, p 21.

lawyers? What is the difference? Fingerprinting should be ceased and such records destroyed.¹⁶

- 2.15 The following sections provide further detail about some of the specific issues, such as training requirements, licensing costs and delays, that stakeholders raised in relation to the current licensing scheme.

Training requirements

- 2.16 In addition to having to satisfy the probity requirements for licences, applicants must complete a training course in order to be issued with an unrestricted licence. Mr Cameron Smith of SLED outlined the training requirements for operator licences, as follows:

A person who applies for what we call an operator licence, or an employee licence, under the legislation is first issued a probationary licence. There are no training requirements associated with that, but there is a requirement that they work under supervision. If they wish to transition off that probationary licence to an unrestricted licence, they are required to undertake a training course, which, in the case of commercial agents, is a Certificate III in Mercantile Agents.¹⁷

- 2.17 Applicants for a master licence must also complete a training module on managing trust accounts.
- 2.18 Some stakeholders claimed that the training requirements for commercial agents are overly onerous, limited in availability, not based on current industry practices and a mismatch with requirements of the modern industry, especially for call centre-based debt collection.
- 2.19 The ACDBA, for example, made the following comments on the training requirements for commercial agents:

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 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.¹⁸

¹⁶ Submission 10a, Australian Institute of Private Detectives, p 1.

¹⁷ Mr Cameron Smith, Evidence, 16 June 2014, p 54.

¹⁸ Submission 15, Australian Collectors and Debt Buyers Association, pp 9-10.

- 2.20 Similar comments were made by the IMA, who concluded that ‘the competency based qualifications required by the CAPI Act are a total and excessive mismatch to the needs of the persons working in the modern collection industry.’¹⁹
- 2.21 Both the ACDBA and the IMA also highlighted that staff turnover was a further factor in the mismatch between the legislative requirements and the realities of the industry. The ACDBA reported that new staff turnover in NSW can range from 35 per cent to greater than 60 per cent, and argued that commercial agent businesses should be permitted to determine the appropriate level of initial and ongoing training of employees to ensure organisational competence.²⁰
- 2.22 The Australian Finance Conference expressed its position in regard to training requirements, noting that it was not aware of any need for the imposition of statutory training requirements beyond those which already applied to debt collectors under the *National Consumer Credit Protection Act 2009* (Cth).²¹
- 2.23 The Mortgage and Finance Association of Australia were critical of the training requirements for individual employees who are required to hold a licence, arguing that this created an unnecessary burden on both employers and employees:
- ...when new employees commence, they have to undertake a training course and there is a significant delay before they can obtain their personal licence.
- This has a negative effect because prospective employees who are not already licensed are disadvantaged and employers are put to the cost of employing people who cannot undertake work while waiting for their individual licence.
- This seems an unnecessary impost when employers are directly responsible for the conduct of their employees. The requirement for individuals to hold a licence only arises in NSW and Northern Territory whereas in other states we understand (but have not checked) corporate licences are sufficient.²²
- 2.24 When questioned by the Committee about the availability of training courses for commercial agents, Mr Cameron Smith advised that SLED did not regulate the provision of training but that it was provided by registered training organisations. Mr Smith explained that the time frame and format of the training was determined by the training organisation, noting that the training might be offered as face-to-face training or with an online component.²³ He also commented on the availability of training, noting that it would be dictated by demand:
- ...the offering of the training is by commercial organisations, obviously it will reflect market demand—a supply and demand situation. For instance, if the training

¹⁹ Submission 21, Institute of Mercantile Agents, pp 4-5.

²⁰ Submission 15, Australian Collectors and Debt Buyers Association, pp 9-10.

²¹ Submission 9, Australian Finance Conference, p 5.

²² Submission 2, Mortgage and Finance Association of Australia, p 2.

²³ Mr Cameron Smith, Evidence, 16 June 2014, p 54.

organisations are not seeing a huge demand for that training to occur then no doubt courses will be rarely offered.²⁴

2.25 In his evidence, Mr Smith also pointed out that there was the option for employees to operate on a probationary licence without completing the training qualification, provided they are supervised by a licensed person. He suggested that this model was common in certain environments:

...licensees do have the option, as I indicated: they can stay on the probationary licence scheme with no qualification requirements but there is a supervision requirement, but anecdotally that is not too onerous—for the commercial agents debt collection industry, where a lot of it is happening within offices and call centre type environments—for a licensed person to be there to provide that supervision.²⁵

Licensing delays and costs

2.26 Details of the current costs of licenses were outlined in Table 2, earlier in this chapter. The IMA claimed that licensing costs have risen significantly over time and compared the current licence fees with the costs applicable under the previous act:

The cost of obtaining and renewing an Operator Licence or Master Licence under the CAPI Act has increased exponentially from the 1987 Act where licences were on an annual basis: Agent's Licence \$110.00 and Sub-agent's Licence \$15.00.²⁶

2.27 The ACDBA, meanwhile, reported that 'the high costs for the licensing of collectors' were one of a number of barriers to the effective and efficient collection of debt.²⁷

2.28 The IMA also suggested that the CAPI Act had created 'excessive bureaucracy fraught by lengthy and unreasonable delays directly and detrimentally affecting the efficiencies and cost structures of collection businesses in NSW' and provided evidence of a number of specific issues, including:

- Lengthy delays in the processing of licence applications – new licences routinely take between 4 to 8 weeks – during that time, the person is not able to engage in any licensed occupational activities so it will be immediately seen this is an immense problem in terms of recruiting persons to the industry as few quality applicants will wait for such a period before they can start to earn an income from employment in the industry.
- Problems in applicants having their fingerprints taken – this responsibility is divested to certain police stations to undertake but it is never any particular officer's responsibility to do the task and so often avoided by duty officers – further, fingerprinting scanning equipment is usually located in what is known as the 'lock up' areas of the police stations and in the event there are any prisoners in the area, the duty police refuse to take civilian applicants into the area to attend to fingerprinting – members report having to attend their local police station on repeated occasions to get their

²⁴ Mr Cameron Smith, Evidence, 16 June 2014, p 54.

²⁵ Mr Cameron Smith, Evidence, 16 June 2014, p 55.

²⁶ Submission 21, Institute of Mercantile Agents, pp 3-4.

²⁷ Submission 15, Australian Collectors and Debt Buyers Association, p 4.

fingerprints taken and until such task is completed and reported back to the Registry, the licence is not issued.²⁸

- 2.29 Both the IMA and the ACDBA flagged concerns about delays in renewing licenses if a minor error was inadvertently made on the licence renewal form. The ACDBA described the following scenario, as an example of the problems faced:

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.²⁹

- 2.30 In addition to the scenario described above, the Committee received evidence from a former commercial agent, Mr Dennis Powell, who was reapplying for a licence after a prolonged absence from the industry. Mr Powell advised that he submitted his application for a master licence on 4 July 2014. Nine weeks later, on 5 September 2014, Mr Powell wrote to the Committee advising that his application had still not been processed. Mr Powell expressed his frustration at the delay and explained that it left him 'paying wages, rent, overheads, and receiving no income.'³⁰

- 2.31 Mr Powell, who had previously been licenced between 1988 and 2004, indicated that processing times were longer now than in previous years, writing that 'under the old 1963 Act handled by the Attorney General's Department 4 weeks was the maximum wait for licence issue.'³¹

- 2.32 On 18 September 2014, Mr Powell wrote to the Committee again advising that his company had, finally, received its master licence, almost 11 weeks after he had originally submitted his application.³²

Mutual recognition

- 2.33 Mutual recognition of licenses between states was another area of concern raised by the ACDBA. It found that mutual recognition did not work for commercial agents who were from states which have negative licensing or no licensing scheme:

When an individual residing outside the State of NSW makes an application for a CAPI operator's licence, he or she is required by the regulator to provide evidence

²⁸ Submission 21, Institute of Mercantile Agents, p 5.

²⁹ Submission 15, Australian Collectors and Debt Buyers Association, p 10; see also Submission 21, Institute of Mercantile Agents, p 4.

³⁰ Submission 35, Power Collections, p 2.

³¹ Submission 35, Power Collections, p 2.

³² Submission 35, Power Collections, p 15.

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.³³

- 2.34 The AIPD similarly raised this issue and suggested that mutual recognition between states needed to be properly addressed in order for commercial agents or private investigators to be able to cross state borders to complete their duties. The AIPD proposed that agents licensed in one state should be able to conduct occasional work in another state without having to be licensed in that state, but if working regularly in that state, then they should apply for a license in the state.³⁴

Committee comment

- 2.35 The Committee acknowledges the concerns raised by inquiry participants about the existing licensing regime for commercial agents and private inquiry agents. The existing regime appears to be unduly onerous, imposing unnecessary costs and delays, and does not appear to have adapted to changes in the modern debt collection industry. The Committee is concerned about the potential for burdensome licensing regulations in this State to encourage debt collection businesses to relocate to other jurisdictions with simpler licensing regimes.
- 2.36 The following section of this chapter will consider some of the reviews of licensing that have been undertaken at a state and federal level and later in the chapter the Committee will consider a number of proposals for reforming the licensing system in New South Wales.

Review of the CAPI Act

- 2.37 The State Government initiated a review of the CAPI Act in late 2007. Mr Cameron Smith of SLED advised that the review was commenced by the Ministry for Police and Emergency Services. However, the review was put on hold before its completion, pending the outcome of a national harmonisation project on debt collection regulation.³⁵
- 2.38 Mr Smith went on to say that the CAPI Act review had recently recommenced, following the cessation of the national harmonisation project, and that the Ministry of Police and Emergency Services was going to look into the issues and recommendations which had been raised before the review was halted.³⁶
- 2.39 In its answers to questions on notice, the Department of Justice similarly noted that the review of the CAPI Act had recommenced and that the Ministry of Policy and Emergency Services was currently considering a number of reforms, which it would present to Government in due course.³⁷

³³ Submission 15, Australian Collectors and Debt Buyers Association, p 10.

³⁴ Submission 10a, Australian Institute of Private Detectives, p 1.

³⁵ Mr Cameron Smith, Evidence, 16 June 2014, p 57.

³⁶ Mr Cameron Smith, Evidence, 16 June 2014, p 57.

³⁷ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 1.

- 2.40 The Department of Justice did not provide details of what reforms were being considered in the review of the CAPI Act. However, the Australian Finance Conference claimed that the previous incarnation of the review had culminated in a range of draft recommendations being proposed, including the following:
- a. A nationally consistent regime;
 - b. A new Commercial Agents Act administered by the Office of Fair Trading to regulate commercial agents;
 - c. Removal of licensing requirement for supervised call centre operators;
 - d. Clarification that in-house debt collecting is excluded (although debts purchased from another party would be included);
 - e. Exclusion of loan managers, loan servicers, debt factoring and invoice discounting;
 - f. Extension of the ADI [Approved Deposit Institution] exemption to all financial service organisations regulated under the Corporations Act and/or the Financial Sector (Collection of Data) Act; and
 - g. Exemptions for off-shore call centres if their contract requires compliance with the ACCC/ASIC Debt Collection Guidelines.³⁸

Definition of debt in the CAPI Act

- 2.41 The Law Society of NSW identified a concern over the lack of a definition of debt in the CAPI Act suggesting that this could lead to doubt about whether commercial agents were operating within the Act when they pursued debts arising from motor vehicle accidents. The Law Society proposed amending the Act to include a definition of debt to clarify the matter, writing:

...there are instances where solicitors receive instructions from commercial recovery agents licenced under the *Commercial Agents and Private Inquiry Agents Act 2004* (CAPI Act) to recover damages arising from motor vehicle accidents.

The instructions given by the commercial agent will generally be to recover either the repair costs or in some instances to recover car hire costs arising from the motor vehicle accident. The instructions to recover 'damages' are not synonymous with instructions to recover a 'debt' and therefore fall outside the term 'debt collection' provided for within the CAPI Act.

The authority of a commercial recovery agent to act on behalf of a person to recover damages arising from a motor vehicle collision should be clarified. The CAPI Act should be amended to make it clear that a commercial agent either does have or does not have the ability to receive and act on instructions to recover damages for motor vehicle repair costs or car hire costs (perhaps in the same terms as Rule 14.13 of the *Uniform Civil Procedure Rules 2005* or in accordance with the definition of debt in the *Local Government Act 1993*).³⁹

³⁸ Submission 9, Australian Finance Conference, p 6.

³⁹ Submission 25, Law Society of NSW, p 3.

- 2.42 The Law Society did not nominate whether it considered that the definition of debt should or should not include damages from motor vehicle accidents, but simply that it should be made clear in the legislation, one way or the other.
- 2.43 In response to a question from the Committee about this matter, the Department of Justice replied that submissions to the review of the CAPI Act had expressed conflicting views regarding whether debts arising from motor vehicle repairs were covered by the Act. The Department noted that the review was considering further whether this issue should be clarified in the Act.⁴⁰

National harmonisation project

- 2.44 The licensing of debt collectors is regulated by the state and territory governments in each jurisdiction around Australia. Licensing regulations can vary significantly between states. Victoria, for example, has a negative licensing scheme, and in May this year Queensland introduced negative licensing for debt collectors that have no face-to-face contact with debtors. The Australian Capital Territory does not licence debt collectors, though it regulates their conduct via the Australian Consumer Law. New South Wales, along with Western Australia, South Australia, Tasmania and the Northern Territory have positive licensing schemes, though the particular licensing requirements vary from one jurisdiction to the next. Table 3 below lists the relevant legislation governing debt collectors in Australian states and territories.

Table 3: Debt collection legislation around Australia

| State/territory | Relevant act |
|------------------------------|--|
| New South Wales | <i>Commercial Agents and Private Inquiry Agents Act 2004 (NSW)</i> |
| Victoria | <i>Australian Consumer Law and Fair Trading Act 2012 (Vic)</i> |
| Queensland | <i>Debt Collectors (Field Agents and Collection Agents) Act 2014 (Qld)</i> |
| Western Australia | <i>Debt Collectors Licencing Act 1964 (WA)</i> |
| South Australia | <i>Security and Investigation Industry Act 1995 (SA)</i> |
| Tasmania | <i>Security and Investigation Agents Act 2002 (Tas)</i> |
| Northern Territory | <i>Commercial and Private Agents Licencing Act 2002 (NT)</i> |
| Australian Capital Territory | <i>Australian Consumer Law (ACT)</i> |

- 2.45 In 2010, the Ministerial Council of Consumer Affairs agreed to pursue research on the regulation of debt collection around Australia and to consider the feasibility of harmonising regulations across all Australian states and territories.
- 2.46 The project was undertaken by Consumer Affairs Victoria and led to the release of an options paper in October 2011, '*Debt collection harmonisation regulation: Options paper*'. The Paper examined options for harmonising debt collection regulations across a range of issues, including: licensing, conduct, trust

⁴⁰ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 3.

accounting, complaint handling, administration, information standards and educational requirements.⁴¹

2.47 The Australian Finance Conference provided the following information about the context and content of the options paper:

The Paper included a broad overview of the debt collection regulatory framework with a view to endeavouring to arrive at proposed options for reform for national take-up. The Paper acknowledged the context of the various State Governments' reform objectives; namely (1) to develop an understanding of the new NCCP Act credit regulation model and what it means for debt collection regulation and (2) to develop consistent regulation for debt collection having regard to the NCCP Act and the National Occupational Licensing System. The Paper acknowledged that the issues being considered encompassed a broader debt collection context than just NCC-regulated debt and the need to take account of variation in business models adopted to collect debt (e.g. in-house vs external collectors; contingent vs assignee collectors). Two significant problems in relation to the current regulatory framework were identified:

- legislative inconsistency across jurisdictions; and
- the ineffectiveness of the consumer protection elements of the current regulatory framework (e.g. relating to the use of physical force, undue harassment or coercion; misleading or deceptive conduct; a lack of consumer and industry education; inaccurate, incomplete or misinformation).

A range of options to address these were proposed. Topics covered include: licensing, conduct, complaint handling, administration/appropriate regulator, information standards and educational requirements.⁴²

2.48 Following the publication of the options paper, feedback was sought from stakeholders and a number of submissions were received and published by Consumer Affairs Victoria. However, no final report was published and the project was discontinued in March 2013.⁴³

2.49 Mr Rod Stowe of NSW Fair Trading explained why the project was discontinued:

That particular exercise... was meant to try and see if there was potential to have harmonisation across the jurisdictions. They came to the conclusion that because there were significant differences that it was not worth pursuing... So it was really a case of Ministers thinking it was not worthwhile to continue with the exercise because of the significant differences in the regime.⁴⁴

⁴¹ Consumer Affairs Victoria, 2011, *Debt collection harmonisation regulation: Options paper*.

⁴² Submission 9, Australian Finance Conference, p 5.

⁴³ Consumer Affairs Victoria, < www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/debt-collection-harmonisation-regulation-options-paper>, viewed 18 August 2014.

⁴⁴ Mr Rod Stowe, Commissioner, NSW Fair Trading, Transcript of evidence, 16 June 2014, p 57.

- 2.50 The Department of Justice similarly noted that the national harmonisation project had been discontinued and advised that it was ‘not aware of any progress or discussion on national harmonisation since that time.’⁴⁵

Support for national harmonisation

- 2.51 Despite the above comments from NSW Fair Trading and the Department of Justice, the Committee heard from a number of stakeholders who supported the national harmonisation of debt collection laws.
- 2.52 For example, the Mortgage and Finance Association of Australia (MFAA) wrote that it was ‘strongly in support of harmonisation of laws around Australia.’ The MFAA indicated that harmonisation was on the COAG agenda, but that consideration had stalled. It also reported that Western Australia had ‘ceased monitoring and supervising its legislation pending the outcome of the COAG unification of laws process.’⁴⁶
- 2.53 The Australian Finance Conference (AFC), meanwhile, argued that that the existing assortment of debt collection laws around the country were inconsistent and confusing:

The AFC acknowledges that the regulatory framework for debt collection in Australia at present is a patchwork approach characterised by intrastate inconsistencies for laws designed with the same aim of protecting both creditors and debtors. Such inconsistencies can lead to unnecessary costs for creditors and confusion for both debtors and creditors as to their rights and obligations in relation to debt collection.⁴⁷

- 2.54 The AFC considered that ‘it would be appropriate for regulatory inconsistencies to be addressed by the promotion of harmonised national debt collection laws.’⁴⁸
- 2.55 In its submission to the inquiry, the Australian Credit Forum similarly called for harmonised licensing arrangements, writing that across Australia there should be uniformity in:

Licensing requirements for debt collection agents and their staff members which are consistent with and impose no greater burdens than ASIC’s Debt Collection Guidelines.⁴⁹

Committee comment

- 2.56 The Committee considers that there would likely be advantages in having nationally uniform debt recovery regulations and concurs with the views of some stakeholders that the current inconsistency between states can lead to unnecessary costs and confusion for both creditors and debtors.
- 2.57 However, the Committee also notes that the previous attempt to harmonise regulations across Australian states and territories was discontinued due to the

⁴⁵ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 6.

⁴⁶ Submission 2, Mortgage and Finance Association of Australia, p 1.

⁴⁷ Submission 9, Australian Finance Conference, p 6.

⁴⁸ Submission 9, Australian Finance Conference, p 6.

⁴⁹ Submission 4, Australian Credit Forum, p 2.

significant differences between jurisdictions and the inability to reach a universally accepted regime.

- 2.58 The Committee is not convinced of the need for it to revisit the national harmonisation project, given the failure of the last attempt at achieving national change. Having said that, the Committee is not opposed to a nationally consistent debt recovery regime and would be generally supportive of future attempts to achieve national harmonisation in debt recovery legislation.
- 2.59 In the more immediate future, the Committee considers that there is scope for changes to be made to the New South Wales licensing regime and the next section of this chapter outlines some of the proposals for change that were submitted by inquiry participants.

PROPOSALS FOR CHANGE

- 2.60 A number of inquiry participants proposed changes to the regulation and licensing of debt collectors in New South Wales. The suggested proposals included: introducing a negative licensing scheme, a self-regulated integrity and certification scheme, and a proposal for oversight of the industry to be transferred from the Police Force to Fair Trading NSW.

Negative licensing

- 2.61 Two states in Australia have adopted negative licensing schemes for debt collectors or commercial agents. Negative licensing, also known as mandatory exclusion, removes the requirement for debt collectors to hold licences. Instead, any individual is permitted to carry out debt collection activities unless they are excluded by legislation.
- 2.62 In Queensland, negative licensing applies to debt collection on a non face-to-face basis and excluded individuals include anyone who:
- is under 18 years; or
 - is an insolvent under administration; or
 - has been suspended or disqualified from holding a field agent licence or sub-agent certificate; or
 - has been convicted, in Queensland or elsewhere, within the preceding 5 years of a serious offence.

Where 'serious offence' means any of the following offences punishable by 3 or more years imprisonment: (a) an offence involving fraud or dishonesty; (b) an offence involving the trafficking of drugs; (c) an offence involving the use or threatened use of violence; (d) an offence of a sexual nature; (e) extortion; (f) arson; (g) unlawful stalking.⁵⁰

⁵⁰ *Debt Collectors (Field Agents and Collection Agents) Act 2014* (Qld), s 102, sch 3.

Support for negative licensing

- 2.63 A number of inquiry participants expressed support for the introduction of a negative licensing scheme in New South Wales to replace the existing licensing scheme under the CAPI Act.
- 2.64 The Australian Finance Conference, for example, noted that it supported negative licensing and had expressed this support in its submission to the national harmonisation project:

We supported a negative licensing option. In doing so we noted that Victoria had already introduced a negative licensing regime in 2011. We understand that this represented the results of recent research on the necessity for, and appropriateness of, the licensing of debt collectors. We would support a negative licensing approach under harmonised laws, or deemed licensing under the NCCP Act for consumer debts.⁵¹

- 2.65 The Mortgage & Finance Association of Australia similarly supported the introduction of a negative licensing scheme such as the one in place in Victoria:

We are not aware of any compelling reason to continue the so-called CAPI Act licensing regime and commend the Victorian model for consideration. This is particularly so given the regulation of debt collection as described in the next heading.

The imposition of licensing is contrary to the spirit of deregulation and adds costs to the operation of debt collection businesses which is inefficient for the economy and is inevitably passed onto debtors or society as a whole.⁵²

- 2.66 The efforts made by the industry to bring the problems with the existing licensing scheme to the attention of NSW regulators were highlighted by the IMA. The IMA argued that in comparison to New South Wales, neighbouring jurisdictions such as Queensland, Victoria and the ACT had introduced 'regulatory regimes for the collection industry which more fairly and appropriately recognise the modern realities of the industry'. The IMA noted the following details about licensing schemes operating in those jurisdictions:

I. In ACT there has never been any licensing regime for commercial agents;

II. In Victoria since July 2011 the former Private Agents Act, 1966 was repealed and a negative licensing regime introduced through the Fair Trading Act, 1999; and

III. In Queensland the Debt Collectors (Field Agents and Collection Agents) Bill was passed as an Act by that State's Parliament on 6 May 2014 for a system of negative licensing for collectors whilst retaining a positive licensing regime for field agents.⁵³

- 2.67 The ACDBA summarised the problems of positive licensing schemes and suggested that the negative licensing schemes introduced by Victoria and Queensland made them more appealing places for debt collectors to locate their businesses:

⁵¹ Submission 9, Australian Finance Conference, p 4.

⁵² Submission 2, Mortgage and Finance Association of Australia, p 1.

⁵³ Submission 21, Institute of Mercantile Agents, p 6.

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.

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.⁵⁴

2.68 The risk of jobs moving to other jurisdictions with simpler licensing regimes was similarly underlined by the IMA. The IMA wrote that the industry had seen ‘a decrease of collectors and field agents in NSW in recent years’ and that the trend of jobs moving interstate was ‘destined to continue in the absence of a timely and appropriate response to modernisation of NSW industry licensing.’⁵⁵

2.69 Mr Harries of the ACDBA and IMA contended that a further reason for introducing a negative licensing scheme was that there were a range of other rules and laws that regulate the industry, rendering licensing unnecessary:

Debt buyers are actually licensed under the ASIC regulations with an Australian credit licence, so they are very heavily regulated—no question about that. On the collection side, an agent is exactly that: the agent of a principal. The bank, the creditor, is the principal responsible for all of the reasonable and inferred actions of the agent. So if there is a problem with anything that the agent does, a debtor or any other member of the public can always go back to the principal to make a complaint. So that is the first thing, but we do not operate in a vacuum.

We have fair trading laws, we have the criminal code, we have corporations law—we have a myriad of legislation that commercial agents are obliged to meet, just like every other good corporate citizen is obliged to meet. If they are doing something wrong and they intimidate somebody or act in some sort of assault, there is a criminal law that will apply for assault. I do not think there is any evidence of persons ever being licensed under the 1963 and then the 2004 Commercial Agents Act where people have been taken to account for their behaviour. If there was anyone taken to account for any sort of behaviour, it would generally be done under the criminal law anyway for assault.⁵⁶

2.70 A comprehensive list of reasons for adopting a negative licensing scheme was outlined in the submission from ACDBA, as follows:

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;

⁵⁴ Submission 15, Australian Collectors and Debt Buyers Association, p 8.

⁵⁵ Submission 21, Institute of Mercantile Agents, p 6.

⁵⁶ Mr Alan Harries, Evidence, 16 June 2014, p 23.

- 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.⁵⁷

2.71 In his evidence to the inquiry, Mr Harries of the ACDBA reported that in 2011 the then Minister for Police made a submission to the national harmonisation project indicating support for negative licensing.⁵⁸ Mr Cameron Smith of SLED recounted that the NSW Police Force had made similar comments, though he noted that any decision on licensing in New South Wales would be a matter for the current Minister to consider:

... if a negative licensing scheme was to be adopted in New South Wales that would be a matter for the Minister, but I could comment that a couple of years ago there was a harmonisation project looking at harmonising regulation of the industry across Australia and the NSW Police Force was asked for its views on which of the options were being considered. Our recommendation was that negative licensing, or I think it was phrased as mandatory exclusion arrangements, would be the best option to deal with a number of issues. But, again, that was looking at a national model. What model might best suit New South Wales in isolation would be a matter for the Minister.⁵⁹

2.72 When asked by the Committee about whether it supported negative licensing, the Department of Justice noted that it was one of a number of options being considered as part of the review of the CAPI Act, while further noting that

⁵⁷ Submission 15, Australian Collectors and Debt Buyers Association, p 8.

⁵⁸ Mr Alan Harries, Evidence, 16 June 2014, p 23.

⁵⁹ Mr Cameron Smith, Evidence, 16 June 2014, p 55.

Victoria and Queensland had adopted negative licensing schemes in recent years.⁶⁰

Support for negative licensing for non face-to-face collectors and positive licensing for field agents

2.73 A variation on the proposal to introduce negative licensing for all debt collectors was a suggestion to establish a negative licensing scheme for debt collectors who have no face-to-face contact with debtors, while retaining positive licensing for field agents. Field agents, under this proposal, would include anyone working in the industry who visited debtors in person, rather than communicating solely via telephone, correspondence or email.

2.74 Mr Alan Harries of ACDBA and IMA advised that this model had been recently introduced in Queensland and explained the reasons that both the IMA and ACDBA supported the proposal:

We believe they should be negatively licensed as they are currently in Victoria and, more recently, an Act has been passed in the Queensland Parliament on 6 May introducing negative licensing for those engaged in telephone debt collections with no face-to-face contact with debtors. But the difference in Queensland—our organisations were successful in encouraging the Attorney General up there to introduce or retain positive licensing for field agents. We believe there is still a requirement that when people knock on a door a debtor is entitled to understand who it is that is knocking on his door: is it a fit and proper person? For that reason, we think there should be positive licensing when you have a face-to-face dealing with debtors. That is about making sure that you look after the public interest. We all live in a home, we are all a little bit anxious when somebody knocks on the door after hours; we want to know what their bona fides are. That is the reason we are suggesting that field agents should be positively regulated.⁶¹

2.75 In its submission to the inquiry, the IMA referred to the sector of the industry which does not have face-to-face contact with debtors as the 'collections sector'. The IMA advocated for the following actions to be undertaken, to establish a negative licensing scheme for the collections sector in New South Wales:

1. The repeal of the *Commercial Agents & Private Inquiry Agents Act 2004*;
2. The introduction of a negative licensing scheme for those in the collections sector where the work involves no face to face contact with debtors; and
3. The introduction of a positive licensing scheme for those in the field agents sector (engaged in process serving and repossession activities) where the work involves face to face contact with debtors.⁶²

2.76 The ACDBA supported the IMA's position on licensing, recommending the introduction of negative licensing for the collections sector and a positive licensing regime for the field agent sector. The ACDBA further explained its support for the model:

⁶⁰ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 1.

⁶¹ Mr Alan Harries, Evidence, 16 June 2014, p 21.

⁶² Submission 21, Institute of Mercantile Agents, p 6.

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 dysfunction 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.⁶³

2.77 Collection House was another inquiry participant that proposed a negative licensing scheme for commercial agents that have no face-to-face contact with debtors. Collection House indicated that adopting this type of licensing regime would align New South Wales with Victoria and Queensland, and outlined the following points in support of their proposal:

- To achieve economies of scale, debt collection activities are call-centre based with little, if any, face to face debtor contact;
- Calls are usually monitored or recorded for quality control purposes;
- The call centre model operates across all jurisdictions;
- Complaint levels are very low in relation to the number of debtors contacted;

⁶³ Submission 15, Australian Collectors and Debt Buyers Association, p 8.

- The industry and Collection House Limited have adopted the ASIC/ACCC Debt Collection Guidelines as the benchmark for collection standards;
- Our clients, in protection of their brand reputation and in accordance the Code of Banking Practice (where applicable), contractually require compliance standards that meet or exceed the ASIC/ACCC Debt Collection Guidelines;
- There is a range of Federal regulation which covers governance, market practices and consumer (debtor) protection. Further regulation simply duplicates Federal obligations and those mandated within client contracts;
- Regulatory enforcement action:
 - remains at both the State or Commonwealth level; and
 - is extremely rare;
- Many CAs are existing members of External Dispute Resolution Schemes, which provide consumers an external mechanism to resolve disputes and complaints; and
- Both Victoria and Queensland recognise that there are no, or insufficient, grounds to justify the expensive and legislatively burdensome positive licensing regimes that previously existed in those states.⁶⁴

2.78 American Express was another stakeholder that criticised the current NSW licensing scheme for failing to distinguish between telephone-only debt collection activities and in-person collection activities. American Express recommended that debt collectors who solely conduct telephone-based collection should be exempt from CAPI Act licensing requirements, or at least have less stringent standards of compliance. It felt that this should particularly apply for credit providers who were licensed under the *National Consumer Credit Protection Act* and were members of an external dispute resolution scheme, as these providers already offered a high standard of consumer protection.⁶⁵

Concerns about negative licensing

2.79 Not all inquiry participants expressed support for establishing a negative licensing scheme in New South Wales. As outlined below, some stakeholders either opposed negative licensing or proposed introducing additional customer protection safeguards if a negative licensing model was adopted.

2.80 Mr Mark Vine of the Australian Creditors Alliance indicated that he was opposed to negative licensing. However, he agreed that the current licensing scheme was onerous and needed to be overhauled and simplified:

There are some suggestions also, I note, that they should go to what is called negative licensing. I am not too sure about that. We used to have an old system, the 1963 legislation, where it was a fairly simply procedure to get licensed through the local police station; you would pay \$50 or \$60 and then you would have a licence

⁶⁴ Submission 19, Collection House, pp 2-3.

⁶⁵ Submission 8, American Express Australia, pp 2-3.

and people knew who was doing this collecting and who was not. I consider the current system to be draconian; it is just too burdensome on the industry. I do not personally support zero licensing; I think some small amount of licensing should be introduced, and part of that licensing procedure should be a fit and proper person check through the police and they should be required to sign an undertaking that they will comply with these guidelines, especially if they are compulsory.⁶⁶

2.81 Legal Aid NSW considered that all debt collectors should be required to hold a licence and did not support a mandatory exclusion or negative licensing scheme:

All third party debt collectors should be required to hold a licence either under the National Consumer Credit Protection Act or a separate act that imposes the same conditions (including mandatory EDR). We consider that this licensing requirement should extend to all debt collectors and not just those who collect debts arising from credit. We have assisted a number of clients in relation to issues with collection of debts for school fees and medical bills and it is our experience that the collection of these types of debts can involve the same issues as the collection of debts in relation to the provision of credit.

We do not support mandatory exclusionary requirements in this area given the high potential for mistreatment and harassment of consumers in a self-regulated industry. We consider that the imposition of license conditions, such as mandatory training requirements, is likely to be more effective with external regulation.⁶⁷

2.82 The Financial Rights Legal Centre (FRLC) noted its preference for a positive licensing scheme for debt collectors. However, the Centre acknowledged that a distinction could be drawn between agents who have face-to-face contact with consumers and those who do not. It acknowledged the potential for introducing a negative licensing scheme for debt collectors who do not have face-to-face contact with consumers and proposed that if a such a scheme were introduced, then it should include three safeguards to protect consumers:

- a. Mandatory standards of conduct, including mandatory compliance with the ASIC/ ACCC debt collection guidelines;
- b. Mandatory membership of an ASIC approved EDR scheme, to ensure consumers have access to redress if the standards of conduct are breached. This needs to be paired with a public register of all debt collectors and the name of their EDR scheme so that consumers can readily find the right complaints service; and
- c. Oversight by a government regulatory body such as ASIC with appropriate investigative and sanctioning powers to discipline and revoke licenses on an individual level, and deal with systemic issues.⁶⁸

2.83 In a similar response, Legal Aid reiterated its abovementioned preference for the existing licensing scheme over negative licensing. Legal Aid wrote that it had 'observed some improvements in the conduct of debt collectors' but it still had 'ongoing concerns about the tactics employed and behaviour directed towards vulnerable consumers by debt collectors.' Despite these concerns, Legal Aid

⁶⁶ Mr Mark Vine, Director and Solicitor, Australian Creditors Alliance, Transcript of evidence, 16 June 2014, p 3.

⁶⁷ Submission 29, Legal Aid NSW, p 15.

⁶⁸ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 1.

conceded that there was room to improve the current licensing system and supported the FRLC's propositions regarding consumer safeguards, if a negative licensing regime was to be introduced.⁶⁹

Committee comment

- 2.84 The Committee supports the introduction of a negative licensing scheme for commercial agents in New South Wales.
- 2.85 The evidence from inquiry participants highlighting the range of other regulations in place to protect debtors, as well as the contention that the existing scheme does not match the realities of the modern collection industry and the potential loss of jobs and businesses to neighbouring jurisdictions with simpler licensing regimes has convinced the Committee of the need to reform licensing in this State.
- 2.86 The Committee acknowledges the concerns raised by some participants about eliminating licensing; however, the Committee considers that the low number of complaints made about debt collectors (which is addressed further in Chapter Seven), and the various legislative protections that are presently in place for debtors, provide sufficient safeguards to address their concerns. The Committee notes also that negative licensing has been in operation in Victoria for some years and was introduced this year in Queensland.
- 2.87 Of the negative licensing schemes proposed, the Committee prefers the scheme put forward by the ACDBA, the IMA and Collection House, which would introduce negative licensing for collections agents who have no face-to-face contact with debtors, while maintaining positive licensing for field agents who have direct contact with debtors.
- 2.88 The Committee agrees that there is value in retaining positive licensing for those agents who are in the field and visiting people at their homes or places of business, as a physical licence can add a level of confidence that the agent is a licenced and authorised person. But for collection agents, who have no face-to-face contact with debtors and operate primarily from call centres or via correspondence, there is less justification for imposing a positive licensing regime and the Committee considers that negative licensing provisions, such as those recently introduced in Queensland would be more appropriate.

RECOMMENDATION 1

The Committee recommends that the NSW Government introduce negative licensing for commercial agents who have no face-to-face contact with debtors, while positive licensing is retained for field agents.

AIPD National Code of Practice and National Certification Scheme

- 2.89 An alternative proposal for reforming the NSW licensing regime was put forward by the AIPD. The AIPD proposed that the Government adopt an 'industry self-regulated integrity scheme' which would ensure legal compliance by commercial

⁶⁹ Legal Aid NSW, Further Answers to Questions on Notice, 29 July 2014, pp 1-2.

agents and private investigators, as well as enforcing standards and ongoing improvement.⁷⁰

- 2.90 The AIPD explained that its proposal would involve adopting a National Code of Practice, which the AIPD had originally drafted in 2005 and which it had reviewed in 2008, following public consultation. The AIPD proposal also included a National Certification Scheme, under which agents would be registered. The AIPD would act as the administrator for the scheme, issuing National Practising Certificates to industry participants who met competency requirements.⁷¹
- 2.91 The AIPD further explained that the National Code of Practice was ‘essentially a single document containing the present laws, compliance and educational standards and business standards’ for commercial agents and private investigators. The Code also incorporated a ‘Continuing Professional Development’ scheme, as well as a ‘3-tier Dispute Resolution Scheme (an escalating process) to address and mediate all issues and disputes between all stakeholders.’⁷²
- 2.92 The AIPD drafted a proposed Private Investigators Bill in 2005 for the federal Parliament, which outlined the regulatory provisions required for its proposals to be implemented. In its submission to this inquiry, the AIPD noted that the draft bill was a ‘fairly comprehensive document and although it was suggested for Federal legislation... it could also be quite simply used for any proposed State legislation.’⁷³

Committee comment

- 2.93 It is the view of the Committee that the preferred scheme for the licensing of commercial agent and private inquiry agents involves the introduction of a negative licensing scheme for non-face-to-face agents, as outlined in the previous section. Therefore the Committee does not support the proposal put forward by the AIPD.

Oversight by Fair Trading instead of the Police Force

- 2.94 As noted earlier in this chapter, the Security Licensing & Enforcement Directorate of the NSW Police Force (SLED) is the government agency responsible for the licensing of commercial agents and private inquiry agents. The licensing of these agents, however, accounts for only a small proportion of the work that SLED carries out. Mr Cameron Smith of SLED informed the Committee that the primary focus of the directorate was the security industry, noting that the licensing of commercial agents and private inquiry agents accounts for less than 10 per cent of the total licences that his area is responsible for.⁷⁴
- 2.95 Some inquiry participants suggested that the work of commercial agents and private inquiry agents is unrelated to the security industry and argued that

⁷⁰ Submission 10a, Australian Institute of Private Detectives, p 2.

⁷¹ Submission 10a, Australian Institute of Private Detectives, p 3.

⁷² Submission 10a, Australian Institute of Private Detectives, pp 2-3.

⁷³ Submission 10b, Australian Institute of Private Detectives, p 3. For further details of the proposed bill see the AIPD website, <www.aipd.com.au/Private_Investigators_Bill-2005.pdf>, viewed 18 September 2014.

⁷⁴ Mr Cameron Smith, Evidence, 16 June 2014, p 53.

oversight of these agents should not fall under the jurisdiction of SLED, but should instead be conducted by Fair Trading NSW.

- 2.96 Mr Harries of ACDBA and IMA stressed that commercial agents and private inquiry agents are completely unrelated to the security industry, explaining to the Committee:

Commercial agents and private agents have absolutely nothing to do with security—never have and never will. It is just some nonsense that somebody has decided that security agents and private investigators are doing the same work; they do not do the same work, there is nothing in common between the two except in New South Wales where they are regulated out of the same department.⁷⁵

- 2.97 Mr Harries stated that he felt that ‘commercial agents have more of an affinity with Fair Trading legislation than they do with policing.’⁷⁶

- 2.98 The AIPD made a similar argument, writing that ‘Commercial agents and Private Investigation work has no relationship with the Security industry at all.’ The AIPD argued that the government had incorrectly bundled these industries together and that the current arrangements needed to end, suggesting that licensing and control of commercial agents and private investigators should be ‘reverted to the Attorney General’s Department or Fair Trading.’⁷⁷

- 2.99 When questioned by the Committee about whether there was a compelling reason for SLED to retain oversight of commercial agents and private inquiry agents, Mr Cameron Smith noted that any decision to transfer responsibility for licensing would be a matter of policy for the Government to decide. However, he also reported that when this matter had been considered in a previous review of the legislation, the NSW Police Force had recommended that the responsibility for commercial agents be transferred to Fair Trading.⁷⁸

- 2.100 Mr Smith further explained that he considered commercial agents and private inquiry agents to be two disparate industries that were ‘for some reason sitting under a single piece of legislation’. He indicated that the Police Force had recommended that private inquiry agents should remain under the oversight of the Police, while oversight of commercial agents should be transferred to Fair Trading.⁷⁹

- 2.101 The Committee heard that the oversight and licensing of the commercial agents and private inquiry agents varies across Australian jurisdictions but in a number of other states the oversight of commercial agents sat within the remit of the relevant Fair Trading or Consumer Affairs agency.⁸⁰

⁷⁵ Mr Alan Harries, Evidence, 16 June 2014, p 22.

⁷⁶ Mr Alan Harries, Evidence, 16 June 2014, p 22.

⁷⁷ Submission 10a, Australian Institute of Private Detectives, p 1.

⁷⁸ Mr Cameron Smith, Evidence, 16 June 2014, p 54.

⁷⁹ Mr Cameron Smith, Evidence, 16 June 2014, p 56.

⁸⁰ Mr Alan Harries, Mr Cameron Smith, Mr Rod Stowe, Evidence, 16 June 2014, pp 22, 54, 56.

2.102 Mr Rod Stowe of Fair Trading NSW advised the Committee that the potential transfer of responsibility to Fair Trading had previously been considered and that there would be resourcing implications if the transfer were to be effected:

There have been some discussions at agency level between the departments in terms of a possible transfer of responsibilities and any transfer we have will be predicated on the provision of resourcing to enable that to happen. For instance, the licensing system is not currently on the government licensing system and all of our licences are and it would cost them hundreds of thousands of dollars to convert to our system. So we would want to see those things in place should they come to our agency for administration.⁸¹

2.103 In response to the Police Force's proposal for oversight of commercial agents to be transferred to Fair Trading NSW while oversight of private investigators was retained by SLED, the Committee heard a strongly opposing view from the AIPD. The AIPD submitted that oversight of both industries should remain together and that SLED was not the appropriate agency to control either industry. The AIPD argued that all commercial agents also hold private investigator's licences and that it would be inappropriate to separate the oversight of these two inter-related activities:

It is our understanding that SLED (which now has the responsibility for overseeing the CAPI Act) has suggested that the Commercial Agents be possibly referred to the Fair Trading Department for their management and control however, that the Private Investigators be retained under SLED. This is in complete contradiction of the CAPI Act which states that if a commercial agent makes enquiries he has to have a private investigators licence. It is completely inappropriate to separate these inter-related activities to two different government departments, resulting in further costs to industry members, and further complicating these already poorly government managed industries. Further, it is vitally important to understand that neither activity has any relationship to the Security Industry and needs removal from that regime. Referral back to the control of the Attorney General's Department or even Fair Trading for both would be sensible and acceptable.

It must be stated quite clearly that all Commercial Agents also hold a Private Investigator's licence otherwise they simply could not trade, due to the previously mentioned requirement in the NSW CAPI Act.⁸²

2.104 However, the AIPD's claim that all commercial agents must hold a private investigator's licence was disputed by evidence received from SLED, which showed that only about 28% of commercial agents hold a private inquiry agent license. SLED acknowledged that some agents hold both licenses, but considered that it was not required for most debt collection activities:

It is true that a number of licensed commercial agents (approximately 28%) are also licensed as private inquiry agents, however the reasons for that are unclear and may simply be due to the fact that the industries are currently regulated via a shared licensing scheme, allowing an application to be made for both classes of licence for a single fee.

⁸¹ Mr Rod Stowe, Evidence, 16 June 2014, p 55.

⁸² Submission 10b, Australian Institute of Private Detectives, p 2.

The authority of a debt collection licence encompasses activities related to 'finding the third person [i.e. the debtor]', so a private inquiry agents licence is not separately required by a debt collector unless they are also involved in 'investigating a third person's business or personal affairs' or 'the surveillance of a third person'. Given the nature of the industry... this seems unlikely.⁸³

2.105 Similarly, evidence from the ACDBA indicated that not all commercial agents hold private investigator licenses. The ACDBA advised that legislative changes introduced under the CAPI Act negated the need to hold two licences for standard debt recovery matters:

The amendments introduced by the definitions of private inquiry agents and commercial agents under the Commercial Agents & Private Inquiry Agents Act, 2004 were quite deliberate in obviating the need for commercial agents to concurrently hold a private inquiry agent licence for parts of their work.

The 2004 Act replaced the 1963 Act which previously effectively compelled commercial agents to concurrently hold a private inquiry agent licence in order to complete their work.⁸⁴

2.106 The ACDBA explained that under the 2004 Act, commercial agents are now permitted to find a person in order to collect debts from that person and wrote that 'upon this introduction of amended definitions, the number of persons concurrently holding both a commercial agent licence and a private inquiry agent licence in NSW dropped.'⁸⁵

2.107 The ACDBA wrote that it supported the proposal for commercial agents to be regulated by Fair Trading, while oversight of private inquiry agents was retained by the Police Force, even though it would mean that some firms had to deal with two regulators:

Whilst the splitting of the regulatory oversight such that commercial agents move to NSW Fair Trading whilst private inquiry agents remain with the NSW Police Force may mean some firms who hold both licences will need to deal with two regulators, the upside of those arrangements is that the regulators with oversight responsibility will be more appropriately aligned to the area of industry endeavour.

The move to NSW Fair Trading for the regulatory oversight of commercial agents will be welcomed by operators providing debt collection, process serving and repossession services in NSW.

Further the splitting of the regulatory oversight of commercial agents and private inquiry agents such that it creates the need to deal with two regulators, we expect will result in further rationalisation of the industry such that some businesses will critically examine whether they continue to maintain both licences as we understand some businesses which currently hold both licences only undertake licensed activities in one area of industry endeavour.⁸⁶

⁸³ Mr Cameron Smith, Answers to Questions on Notice, 30 July 2014, p 2.

⁸⁴ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 5.

⁸⁵ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 7.

⁸⁶ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 7.

Committee comment

- 2.108 The Committee notes that the licensing of commercial agents and private inquiry agents does not appear to be the core business of the Security Licensing and Enforcement Directorate of the NSW Police Force, whose resources are mostly focused on the security industry. SLED appear to have little capacity to investigate or oversight the industry outside of conducting background checks for licence applicants and being alerted when a licensee has been charged or reported by the Police operational system. The Committee also notes that a previous review of the licensing legislation led NSW Police to recommend that oversight of commercial agents be transferred to Fair Trading NSW.
- 2.109 In view, also, of the recommendation made earlier in this chapter to introduce a negative licensing regime in New South Wales, which would eliminate the main tasks that SLED undertakes in its licensing role, the Committee is of the opinion that responsibility for the oversight of commercial agents fits better with Fair Trading NSW than with SLED.
- 2.110 The Committee notes that the AIPD's claim about the proportion of commercial agents who simultaneously hold private investigator licences was disputed by evidence provided by SLED, which showed that less than 30% of commercial agents hold private inquiry agent licenses. However, while there was disagreement about the degree of cross-over between the commercial agent and private inquiry industries, there appeared to be agreement by both parties that the security industry is quite separate to either of the commercial agent or private inquiry industries. The Committee is therefore recommending that the oversight of private inquiry agents also be transferred to Fair Trading NSW.

RECOMMENDATION 2

The Committee recommends that responsibility for the oversight and licensing of commercial agents and private inquiry agents be transferred from the Security and Licensing Directorate of the NSW Police Force to Fair Trading NSW.

ACCC/ASIC GUIDELINE FOR DEBT RECOVERY

- 2.111 The ACCC and ASIC have a role in enforcing Commonwealth consumer protection laws, including laws relevant to debt collection.⁸⁷
- 2.112 The ACCC is responsible for enforcing laws contained in the Australian Consumer Law that are relevant to debt collection activities. This includes responsibility for dealing with misconduct associated with debt collection activity when a debt relates to goods and services other than a financial service or product.⁸⁸
- 2.113 ASIC, on the other hand, is responsible for dealing with misconduct associated with debt collection activity when a debt relates to a financial product or service. This includes credit cards, home loans, personal loans and loans for motor

⁸⁷ Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), 2014, *Debt collection guideline for collectors and creditors*, p 1.

⁸⁸ Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), 2014, *Debt collection guideline for collectors and creditors*, p 56.

vehicles or other purposes, as well as fees for providing financial advice, insurance and other financial products and services.⁸⁹

2.114 In 2005, the ACCC and ASIC published joint guidance, titled *Debt collection guideline for collectors and creditors*, to assist creditors and collectors to understand their legal obligations and comply with the law. That publication was reviewed and an updated version was published in 2014 in order to ‘update the existing guidance to reflect recent changes in the law and other relevant developments.’⁹⁰

2.115 The ACCC/ASIC guideline explains the application of Commonwealth consumer protection laws, as well as other laws that are relevant to debt collection, including:

- the Australian Consumer Law, which is a schedule to the Competition and Consumer Act 2010 (Cth),
- Part 2, Division 2 of the Australian Securities and Investments Commission Act 2001 (Cth),
- the National Consumer Credit Protection Act 2009 (Cth), which includes the National Credit Code,
- Commonwealth privacy laws, which are enforced by the Office of the Australian Information Commissioner,
- state and territory fair trading laws, which include conduct prohibitions mirroring those of the Commonwealth consumer protection laws and are enforced by the state and territory consumer protection agencies, and
- the Bankruptcy Act 1966 (Cth).⁹¹

2.116 The Australian Bankers’ Association provided some further information about the background and purpose of the ACCC/ASIC guideline:

The Guideline is intended, in part, to guide industry about compliance with a number of consumer protection laws including, for example, prohibitions on creditors and debt collectors engaging in undue harassment collection practices, unconscionable conduct and misleading and deceptive conduct. A debtor’s rights to privacy are also reflected in the Guideline.

The Guideline also provides information to debtors about their responsibilities concerning payment of their debts.

The current Guideline states that it has been developed with particular reference to collecting debts from individual debtors. However, many of the laws and principles

⁸⁹ Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), 2014, *Debt collection guideline for collectors and creditors*, p 57.

⁹⁰ Submission 27, Australian Securities and Investments Commission, p 2. See also the ACCC website: *Debt collection guideline for collectors & creditors*, <www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors>, viewed 1 August 2014.

⁹¹ Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), 2014, *Debt collection guideline for collectors and creditors*, p 2.

covered in the Guideline will also be relevant to the collection of corporate or business debts.⁹²

- 2.117 The Australian Bankers' Association considered that the ACCC/ASIC guideline helped to provide a nationally consistent approach to the legislation governing debt collection activities and provided a 'greater certainty of compliance with those laws for financial institutions and other businesses.'⁹³
- 2.118 The Redfern Legal Centre (RLC) was also of the view that the ACCC/ASIC guideline provided 'a clear set of principles and protocols governing permissible behaviour by debt collectors.' The Centre noted that many collection agencies have adopted the guideline as their own policy and stated that the guideline represented 'current industry best practice on debt recovery process'. However, the Centre also indicated that there was still room for improvement.⁹⁴

Making the ACCC/ASIC guideline a mandatory code of practice

- 2.119 A number of inquiry participants suggested that the ACCC/ASIC guideline should form the basis of a mandatory code of practice for the debt collection industry.
- 2.120 The RLC strongly recommended the 'creation of a debt recovery "industry code of practice", with mandatory membership for all agency and third party collectors.' The Centre stated that the code of practice should reflect the updated Debt Collection Guidelines, international best practice, and the Australian Consumer Law.⁹⁵
- 2.121 The RLC outlined its support for implementing the guideline as a mandatory code of practice for the industry, explaining that enforceability was a key reason for its view:

RLC strongly supports the ACCC/ASIC guidelines on debt collection (the 'Guidelines') becoming a mandatory code of practice for the industry. We note that many of the larger and more reputable collection agencies have already undertaken to self-regulate and have incorporated the Guidelines as part of their own policies and procedures. We believe that an industry wide endorsement of these guidelines would increase consumer protections, remove the current gaps in access to EDR schemes and improve the overall efficiency of the debt recovery process.

The essential argument for the Guidelines to become an industry code of practice is enforceability, and the behavioural change this promotes. We believe that for the Guidelines to have 'teeth', they must become a uniform obligation for all players in the debt collection industry. We draw the Committee's attention to the success of industry codes of practice in the banking, insurance and telecommunications sectors.⁹⁶

- 2.122 Legal Aid and the FRLC were also strong advocates for establishing a mandatory code of practice for the industry. Legal Aid considered that the current

⁹² Submission 22, Australian Bankers' Association, p 2.

⁹³ Submission 22, Australian Bankers' Association, p 2.

⁹⁴ Submission 12, Redfern Legal Centre, p 9.

⁹⁵ Submission 12, Redfern Legal Centre, p 5.

⁹⁶ Redfern Legal Centre, Answers to Questions on Notice, 14 July 2014, p 6.

ACCC/ASIC guideline had 'proven to be insufficient and inadequate' and suggested that 'external monitoring and enforcement is required in order to provide effective and sufficient protection for consumers.'⁹⁷

2.123 Legal Aid later added that there was little value in having a code of practice that did not apply to all debt collectors and was largely unenforceable. It wrote that, at the moment:

...not all debt collectors are covered by the code of practice and it is difficult for individual consumers to assert any rights that might arise following a breach of the code. A mandatory code of practice would enhance the accountability of debt collectors and better regulate the practices and standards of the industry.⁹⁸

2.124 The FRLC indicated that the ACCC/ASIC guideline provides clearer boundaries of conduct in a variety of scenarios than is provided by the current legislative framework. The Centre argued that making the guidelines mandatory would mean:

- a. The regulator ASIC will be better placed to identify and enforce breaches. Confidence in the operation of the regulatory framework will drive compliance and further improvements in debt collection practices
- b. Consumers are better informed about exactly what debt collectors should and should not do
- c. EDR schemes are better placed to provide remedies to consumers and discourage debt collectors from continued breaches.⁹⁹

2.125 Some other stakeholders, however, considered that there was no need for the ACCC/ASIC guideline to be a mandatory code of practice enshrined in the legislation. The ACDBA stated that the ACCC/ASIC guidelines were already widely adopted throughout the industry as standard operating guidelines and were often incorporated into contractual agreements, as well as noting that the enforcement powers of ACCC and ASIC provide additional weight to the guidelines:

The ACCC/ASIC Debt Collection 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 as 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.

⁹⁷ Submission 29, Legal Aid NSW, p 15.

⁹⁸ Security Licensing & Enforcement Directorate, NSW Police Force, Further Answers to Questions on Notice, 30 July 2014, p 2.

⁹⁹ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 8.

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.¹⁰⁰

- 2.126 Another concern, flagged by Mr Alan Harries, was that incorporating the ACCC/ASIC guideline into legislation could make it less likely for the guideline to be reviewed and updated to adapt to a changing industry:

I do not think there is any problem with making them law other than they are a living and breathing document that is constantly reviewed. One of the problems with taking a version of a document as it exists today and putting it in legislation is that it sits there, the legislation never gets updated and it continues on.¹⁰¹

Committee comment

- 2.127 The Committee considers the ACCC/ASIC guideline provides valuable guidance to debt collectors, as well as informing debtors and their representatives of the types of debt collection practices that are considered legal and appropriate.
- 2.128 The Committee was pleased to learn that an updated version of the guideline was released in July 2014, in order to reflect the changes in the law that have occurred since the guideline was originally published in 2005. The Committee encourages industry participants to avail themselves of this updated guidance.
- 2.129 However, the Committee is not convinced of need to establish a mandatory code of practice based on the ACCC/ASIC guideline. The Committee notes that the guideline is a reflection of existing legislation and that existing legislation provides the enforceability sought by stakeholders. The Committee also recognises the widespread use of the guideline as standard operating guidelines and its utilisation in contractual agreements between the debt collection industry and their clients. Therefore the Committee finds that it would be unnecessary to implement further legislation to establish a mandatory code of practice based on the ACCC/ASIC guideline.

¹⁰⁰ Submission 15, Australian Collectors and Debt Buyers Association, p 7.

¹⁰¹ Mr Alan Harries, Evidence, 16 June 2014, p 23.

Chapter Three – The Court System

- 3.1 The various options that creditors have to recover money owed to them were outlined in Chapter One. In circumstances where creditors are unsuccessful in obtaining money from a debtor, they initiate proceedings in the court system. In this chapter the Committee outlines the views of inquiry participants on the effectiveness of current processes for debt recovery in the court system.

COURT MANAGEMENT OF DEBT RECOVERY

- 3.2 As outlined in Chapter One, the size of a debt determines which court will hear a debt recovery claim:

Court jurisdiction in debt recovery claims

| Value of Claim | Appropriate Court |
|------------------------|------------------------------------|
| Less than \$10,000 | Small Claims Division, Local Court |
| \$10,000 - \$100,000 | General Division, Local Court |
| \$100,000 - \$750,000 | District Court |
| Greater than \$750,000 | Supreme Court |

- 3.3 The *Civil Procedure Act 2005* (CPA) together with the *Uniform Civil Procedure Rules 2005* (UCPR) set out the provisions for the management by the court of debt recovery proceedings.
- 3.4 The Local Court hears over 100,000 civil matters annually, with a significant proportion of those matters relating to debt recovery.¹⁰² The Small Claims Division hears approximately 80% of Local Court cases. The majority of claims in the Small Claims Division are not defended, with approximately 3,000 to 3,500 claims proceeding to a defended claim each year.¹⁰³
- 3.5 The Committee received evidence supporting the work of the Small Claims Division in resolving debt disputes. Proceedings in the Small Claims Division are less formal and less technical than other divisions, and the rules of evidence don't apply. Submission authors informed the Committee that they found the Small Claims Division was relatively cost effective, the informality of proceedings helped to expedite the debt recovery process, and the court's case management system had improved in recent years.¹⁰⁴
- 3.6 While many inquiry participants expressed satisfaction with the Small Claims Division, there were those that noted that there was room for improvement in

¹⁰² Submission 11, The Chief Magistrate of the Local Court, p 1.

¹⁰³ NSW Local Court, <http://www.localcourt.lawlink.nsw.gov.au/localcourts/cases/civil_cases.html>, viewed 4 August 2014.

¹⁰⁴ See, for example, submissions 21,22,26,28.

the court's management of debt recovery processes and the issues they raised are addressed in the following sections.

THE STATEMENT OF CLAIM

- 3.7 To make a claim in the court against someone for money or goods, a creditor is required to file a Statement of Claim with the court registry office or online with the Online Registry, pay a filing fee and send or give a sealed copy of the Statement of Claim to the debtor (this is known as 'serving' the Statement of Claim).
- 3.8 The Committee received evidence that for those people without legal representation, completing the Statement of Claim was sometimes confusing and time consuming. For example, a small business owner noted that they were required to make several return visits to the courthouse to clarify points of the Statement of Claim form before it could be filed.¹⁰⁵
- 3.9 The launch of the Online Registry has allowed for the filing of a number of common court forms, including Statements of Claim, online. NSW Justice informed the Committee the system provides 'step by step guidance to parties on how to fill in court forms, ensuring that the court receives all the information it needs to process the matter quickly'.¹⁰⁶
- 3.10 The creditor may serve the Statement of Claim themselves, or have a representative, such as a debt collection agency or process server, serve it on their behalf. The Statement of Claim may be served in the following ways:
- a) by handing it to the defendant
 - b) leaving it in the presence of the defendant and explaining what it is
 - c) leaving it with a person at the defendant's home or work address who appears to be over the age of 16 years and living or working at that address
 - d) asking the Local Court to post it to the defendant. There is a fee of \$39.00 (as at July 2014) per defendant for each address that it is posted to.¹⁰⁷
- 3.11 A defendant has 28 days in which to respond to a Statement of Claim. If a debtor does not respond to the Statement of Claim within this time period the creditor is able to apply to the Court to get a judgment for the whole amount of the claim. This is known as a default judgment. Once a default judgment has been obtained the creditor may commence enforcement action to retrieve the debt.
- 3.12 While serving a Statement of Claim by post rather than in person can save time and costs for a creditor, inquiry participants representing both creditors and debtors raised issues with serving by post.

¹⁰⁵ Submission 16, name suppressed, p 2.

¹⁰⁶ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 5.

¹⁰⁷ Department of Justice, LawAccess, <www.lawassist.lawaccess.nsw.gov.au/lawassist/lawassist_debt_small_claims_home/lawassist_does_someone_owe_you_money_home/lawassist_starting_the_case/lawassist_serving_a_statement_of_claim.html>, viewed 4 August 2014.

- 3.13 When a Statement of Claim is served by post, it is difficult to determine whether the Statement of Claim has been received; a debtor may have moved, the Statement of Claim may have been lost in the mail or sent to the wrong address. Aside from a letter being returned as undelivered mail to the Court, nothing will alert the creditor that the debtor has not received the Statement of Claim, however the creditor is able to apply for a default judgment 28 days after the Statement of Claim was served.
- 3.14 Vulnerable debtors are at particular risk of not receiving a Statement of Claim in the mail. Legal Aid NSW noted that, in their experience, vulnerable debtors often had issues with housing in addition to their issues with creditors:
- It is common for a client who has a consumer issue with creditors to also have problems with housing, mental health or drug and alcohol problems.¹⁰⁸
- 3.15 The FRLC pointed to a lack of procedural fairness for debtors who did not receive a Statement of Claim:
- The ability for the Statement of Claim for the Local Court to be served by post to the last known address creates ample opportunity for consumers not to receive notice of the proceedings. There is currently no obligation for the courts or creditors to notify a consumer that a judgment has been obtained by default after no defence is filed.¹⁰⁹
- 3.16 Confusion about how to respond to a Statement of Claim, particularly in the case of disadvantaged members of the community, may lead people to ignore the Statement of Claim, leading to a higher rate of default judgments. The Law Society of NSW Young Lawyers noted that while a creditor could apply for a default judgment, the judgment could be put aside at any time if the Statement of Claim was returned as undeliverable mail, causing expense and delay for the creditor:
- A creditor may have taken steps and incurred the costs of obtaining and enforcing a judgement before the document is returned, and has no means of recovering the costs they have incurred in doing so.¹¹⁰
- 3.17 The debt collection agency, Collection House Limited, commented that the ability of a creditor to apply for a default judgment when the debtor had not received the Statement of Claim was a 'significant prejudice to the debtor' and could impact on the debtor's credit rating.¹¹¹
- 3.18 The submission of Legal Aid NSW recommended that this could be improved by including a plain English cover sheet on all Statements of Claim that contained: explanations of the court process, and contact details for central referral points where debtors can gain access to financial counselling and low-cost legal advice.¹¹²

¹⁰⁸ Submission 29, Legal Aid NSW, p 2.

¹⁰⁹ Submission 7, Financial Rights Legal Centre, p 4.

¹¹⁰ Submission 28, The Law Society of NSW Young Lawyers, p 4.

¹¹¹ Submission 19, Collection House Limited, p 6.

¹¹² Submission 29, Legal Aid NSW, p 20.

- 3.19 The Committee notes that as part of the recent the Review of Debt Recovery Process, the Better Regulation Office recommended that:

Department of Attorney General and Justice develop a plain English fact sheet to be sent to alleged debtors with the Statement of Claim. The fact sheet should make alleged debtors aware of the consequences of judgement being entered; their options for responding to the claim (such as ADR [alternative dispute resolution] processes, including EDR [external dispute resolution]); and resources for more information and assistance.¹¹³

- 3.20 The Committee notes that the development of a plain English fact sheet is at the project scoping stage.¹¹⁴

Committee comment

- 3.21 The Committee considers that disadvantaged members of the community are less likely to respond to a Statement of Claim due to a lack of understanding of legal processes or how to engage with the court system and a lack of awareness of where to obtain support. Introducing a cover sheet for all Statements of Claim with information on what steps to take next and contact details for financial counselling and legal advice is a low-cost and effective method of improving the efficiency of the debt recovery process.

- 3.22 The Committee supports the positive response of the former Department of Attorney General and Justice (now Department of Justice) to the recommendation of the Better Regulation Office Review of the Debt Recovery Process to develop a plain English fact sheet to be sent to debtors with the Statement of Claim. However the Committee is disappointed that four years after the review this is not yet completed.

- 3.23 The Committee acknowledges that serving a Statement of Claim by post is cost effective and time saving for creditors, however the this process can be unfair to those debtors who never receive the Statement of Claim and only become aware of legal action against them once enforcement proceedings have commenced. There is also a cost to creditors in those instances where a default judgment is set aside.

- 3.24 Serving a Statement of Claim by post can be ineffective when debtors have changed their home or work address, and vulnerable debtors are at particular risk of not receiving a Statement of Claim.

- 3.25 The recent successful implementation of the Online Registry has enabled people to file many court forms electronically. The implementation of the Online Registry appears to be working well, and the Committee believes that there is room to consider further expansion of online and electronic resources.

- 3.26 Given the issues raised in relation to serving Statements of Claim by post, the cost of serving Statements of Claim in person and the successful implementation of the Online Registry, the Committee considers that the Government should

¹¹³ Submission 33, Annexure A, p 33.

¹¹⁴ Submission 33, Annexure B, p 3.

further explore the option of allowing creditors to serve Statements of Claim electronically.

RECOMMENDATION 3

The Committee recommends that the Attorney General consult with stakeholders on the process of serving Statements of Claim by post and explore the option of allowing creditors to serve, and debtors to respond to, Statements of Claim via electronic means.

Time limit for responding to a Statement of Claim

- 3.27 A debtor has 28 days in which to respond to a Statement of Claim. The debtor can respond in a number of ways:
- a) Pay the total amount owing, in which case the legal action is considered completed
 - b) File a defence, setting out the reasons why they believe they should not pay the debt
 - c) File an Acknowledgement of Liquidated Claim, acknowledging that they owe the debt. The debtor may also make application to pay the debt off in instalments
 - d) Ignore the Statement of Claim and choose not to pay any money owing
- 3.28 A number of submissions from creditors and the debt collection industry recommended that the time limit to respond to a Statement of Claim be reduced from 28 days to 21 days, which they state would bring New South Wales in line with other jurisdictions.¹¹⁵
- 3.29 The submission of the Hunter Community Legal Centre opposed this recommendation, commenting that it was extremely important for consumers to be given adequate notice of a Statement of Claim:
- Defendants in debt recovery matters need to be given adequate notice of a claim so that they can consider their options, including whether to settle the claim early, or to defend it at EDR or at court. For reasons outlined above, measures taken to streamline the debt recovery process could have effects detrimental to the rights of consumers, and could lead to vulnerable members of the community being less able to participate in the dispute.¹¹⁶
- 3.30 The Uniform Rules Committee does not support reducing the timeframe from 28 days to 21 days. The submission of the Department of Justice and Police noted that, in response to a recent review of debt collection by the Better Regulation Office, the Uniform Rules Committee did not support reducing the time frame from 28 days to 21 days, on the basis that:
- The current 28 days period is a standard that has existed for many years and any change could cause confusion.

¹¹⁵ See, for example, submissions 16, 26.

¹¹⁶ Submission 14, Hunter Community Legal Centre, p 14.

- The 28 day period applies to defences other than debt claims and applying different time periods to file defences in different types of proceedings could cause confusion.
- 21 days is unlikely to be regarded as sufficient time for defendants to obtain legal advice and that the shortened timeframe would result in an increase in applications to set aside default judgements.¹¹⁷

Committee comment

- 3.31 The Committee considers that the current time limit of 28 days to respond to a Statement of Claim is adequate. A reduced time limit would likely to lead to a greater number of default judgments, which would create further inefficiencies and expense when application is made to put the default judgment aside. Reducing the time limit to 21 days may not provide sufficient time for vulnerable debtors or those debtors involved in complex disputes to obtain assistance and legal advice.

THE SMALL CLAIMS DIVISION

- 3.32 The Small Claims Division of the Local Court hears claims for matters up to \$10,000, while the General Division of the Local Court hears matters from \$10,000 to \$100,000. Proceedings in the Small Claims Division are less formal, less technical and less costly than other divisions, and people do not require legal representation. The jurisdictional limit of the Small Claims Division was last increased in 2000.

- 3.33 A wide range of submission authors were in favour of increasing the jurisdiction of the Small Claims Division of the Local Court. A number of submission authors pointed out that increasing the jurisdiction would address the effects of inflation. The submission of the Chief Magistrate of the Local Court noted that an adjustment would address the erosion of the small claims jurisdiction due to CPI increases:

..an adjustment would be timely to simply address the effective erosion of the small claims jurisdiction due to CPI increases since the last increase in 2000; \$10,000 then would, in today's terms, amount to over \$15,000.¹¹⁸

- 3.34 The Committee received evidence that costs and procedures associated with debt recovery in other divisions of the Courts were prohibitive for those businesses and individuals wishing to pursue debts of more than \$10,000. For example, Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre (RLC), noted cases where unrepresented litigants decided not to claim the total amount owing to them in order to keep the claim in the Small Claims Division:

Certainly for unrepresented litigants I think the risk of being pushed over into the General Division is something where I have seen people actually decide to not claim the total amount of the money they are pursuing to keep things in the Small Claims Division.¹¹⁹

¹¹⁷ Submission 33, Department of Justice, Annexure B p 2.

¹¹⁸ Submission 11, The Chief Magistrate of the Local Court, pp 2-3.

¹¹⁹ Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 31.

- 3.35 The submission of the Chief Magistrate of the Local Court recommended expanding the monetary jurisdiction of the Small Claims Division to \$20,000, noting a number of benefits if the jurisdictional limit were to be increased:
- More time and resources would be freed up in the General Division to finalise more complex or higher value disputes
 - An expansion in the number of proceedings in which the relatively informal procedures of the Small Claims division could be utilised.¹²⁰
- 3.36 The Australian Collectors and Debt Buyers Association (ACDBA) and Institute of Mercantile Agents supported increasing the monetary jurisdiction to \$20,000. Mr Alan Harries, CEO and Executive Director, stated that \$20,000 was not an 'excessive amount of money' and 'the vast majority of debts are going to be under \$20,000'.¹²¹
- 3.37 Judge Henson commented that increasing the jurisdiction would allow more people across New South Wales to access the cost effective and time effective procedures of the Small Claims Division:
- It is a cost effective and time effective process which is available right across the State, and that of course is the great advantage of the Local Court, that it does sit state-wide, so you provide more people with access to justice in respect of civil claims at a local level or a cheaper cost.¹²²
- 3.38 The 2010 Better Regulation Office and Department of Attorney General and Justice review of the debt recovery process recommended increasing the monetary jurisdiction of the Small Claims Division to \$30 000.¹²³ The review claimed that increasing the monetary jurisdiction of the Small Claims Division would 'provide easier, less costly and faster court processes for creditors and debtors'.¹²⁴
- 3.39 The Law Society of NSW considered that the current limit of \$10,000 in the Small Claims Jurisdiction was appropriate and did not support an increase. However, the Law Society did recommend that proceedings be transferred from the General Division to the Small Claims Division in the following circumstances:
- Where evidence is available that the disputed amount is less than the jurisdictional limit of the Small Claims Division notwithstanding that the amount claimed by the plaintiff may exceed the jurisdictional limit; and
 - Where the parties by consent agree to the proceedings being transferred to the Small Claims Division.¹²⁵

¹²⁰ Submission 11, The Chief Magistrate of the Local Court, pp 2-3.

¹²¹ Mr Alan Harries, CEO Australian Collectors and Debt Buyers Association; Executive Director, Institute of Mercantile Agents, Transcript of evidence, 16 June 2014, p 24.

¹²² Judge Graeme Henson, Chief Magistrate of the Local Court, Transcript of evidence, 16 June 2014, p 59.

¹²³ Submission 33, Department of Justice, Annexure A, p 19.

¹²⁴ Submission 33, Department of Justice, Annexure A, p 16.

¹²⁵ Submission 27, The Law Society of NSW, pp 4 -5.

3.40 There are varying jurisdictional limits for debt recovery claims in Small Claims Divisions of other states in Australia, as shown in the following table:

Table 4: Jurisdiction limits for Small Claims Divisions around Australia

| State | Tasmania | NT | Victoria | WA | NT* | Queensland | SA |
|-------|----------|----------|----------|----------|----------|------------|----------|
| Limit | \$5,000 | \$10,000 | \$10,000 | \$10,000 | \$10,000 | \$25,000 | \$25,000 |

* A 2014 review by the NT Department of Attorney General and Justice recommended that the jurisdictional limit be increased to \$25,000

Committee comment

- 3.41 There has been no change to the jurisdictional limit of the Small Claims Division since 2000, and an increase would address the effects of inflation and a greater number of debt recovery cases would be efficiently resolved in the less expensive and relatively informal environment of the Small Claims Division.
- 3.42 Increasing the jurisdictional limit of the Small Claims Division would allow businesses and individuals who may have previously given up on pursuing debt due to the barrier of cost and complexity of having matters heard in the General or higher divisions to have their matter resolved.
- 3.43 The Committee supports the Better Regulation Office review of the debt recovery process recommendation to increase the jurisdictional limit of the Small Claims Division to \$30,000. The Committee notes that increasing the jurisdictional limit will lead to an increase in the number of debt recovery cases seen by the Small Claims Division each year, and the Committee recommends that the Small Claims Division be resourced accordingly.

RECOMMENDATION 4

The Committee recommends that the Attorney General increase the jurisdiction of the Small Claims Division of the Local Court to \$30,000 and that the Small Claims Division be funded and resourced to manage the subsequent increase in cases.

Commercial agents appearing in court

- 3.44 The submission of the ACDBA recommended that commercial agents be allowed a right of appearance in civil proceedings in the Small Claims Division of the Local Court and that the fees of commercial agents be added to the judgment debt in lieu of solicitor’s costs. The submission noted that 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 if commercial agents were allowed to appear in court.¹²⁶
- 3.45 The Association outlined the elements of this proposal:
- Collectors would only be interested in taking civil proceedings through judgment and enforcement stages – wherever a matter was defended or in

¹²⁶ Submission 15, The Australian Collectors and Debt Buyers Association, p 20.

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.¹²⁷

3.46 The Financial Rights Legal Centre (FRLC) was opposed to the proposal for commercial agents to appear on behalf of creditors in court, and gave a number of reasons for their concern:

1. Solicitors are officers of the court and have a paramount duty to maintain the integrity of the justice system, including an obligation to certify that there are reasonable prospects of success when filing proceedings. Professional debt collectors have no such obligation.
 2. Only solicitors can provide legal advice on whether to commence or continue proceedings, and this is important particularly where a debtor has previously raised a dispute or filed a defence. The more experienced a professional debt collector becomes in court, the more likely there is to be a blurring of the boundary against a debt collector giving legal advice.
 3. The legal profession is highly regulated. The privileged place solicitors have in being able to provide legal advice and provide representation in court carries with it copious amount of training and education requirements and strict rules governing professionalism and appropriate contact with third parties. Solicitors face personal disciplinary processes from the Law Society and the Legal Services Commissioner for breaches.
- In contrast, the ASIC/ ASIC debt collection guidelines are not mandatory, enforcement is subject to ASIC resourcing, and where enforcement does occur it may not impact the individual debt collectors responsible or provide any remedy to the consumers affected.
4. Excessive or unreasonably incurred solicitor costs are subject to an independent Costs Assessment scheme, which allows third party payers such as debtors to challenge these amounts.

¹²⁷ Submission 15, The Australian Collectors and Debt Buyers Association, pp 20-21.

5. Any cost savings to consumers are theoretical, and cannot justify the removal of the protections afforded by the use of solicitors. Imposing additional obligations on professional debt collectors to afford more protection will erode the theoretical costs savings to the consumer as well. It should also be taken into account that solicitor firms are likely to be employing paralegals or junior solicitors for routine administrative work, subject to more senior oversight.

6. The efficiency and resourcing of the court system is a perennial issue, and unlikely to be assisted by having greater numbers of non-solicitor litigants.¹²⁸

3.47 Legal Aid and RLC were opposed to the proposal. Ms Monique Hitter, Executive Director, Civil Law Division, Legal Aid NSW expressed concern that allowing collection agents to appear on behalf of creditors could create a power imbalance for unrepresented parties.¹²⁹ Mr Will Dwyer, Credit and Debt Solicitor with RLC, commented that it could be an intimidating experience for people who had been chased by collection agents to then face the debt collection agent in court:

I know from the experiences of some of our clients they are already very intimidated and anxious about dealing with a debt collector. They get escalating letters of demand and quite often the reason they do not respond to them and the default judgement is entered is because they are apprehensive about going to court and getting involved in the legal system. I think there is a risk that where they feel they have to go to court and speak directly with a debt recovery agent that that might add to that sort of anxiety and disengagement in the process.¹³⁰

3.48 The Chief Magistrate of the Local Court commented that in the Small Claims Division there was little requirement for anyone to appear on behalf of a creditor and questioned whether a commercial agent appearing in court was empowered to make decisions on behalf of their client:

There is very limited need for anybody to appear in small claims. In the general division predominantly they are lawyers who appear. Commercial agents, as I understand it, are generally people who collect liquidated debts or small amounts. The difficulty is the relationship between the commercial agent and the plaintiff as to whether the commercial agent is empowered to make decisions or statements to the court which effectively bind the plaintiff in subsequent proceedings.¹³¹

3.49 Mr Mark Vine of the Australian Creditors Alliance expressed concern that commercial agents appearing in court would not be covered by the negligence insurance that lawyers were required to have:

... if you are going to allow commercial agents to appear as if they are solicitors, you have got to start wondering about insurance requirements for negligence, negligent advice and all that sort of stuff, and what quality of work you are going to get out of them. It is a difficult position.¹³²

¹²⁸ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, pp 6-7.

¹²⁹ Ms Monique Hitter, Executive Director, Civil Law Division, Legal Aid NSW, Transcript of evidence, 16 June 2014, p 31.

¹³⁰ Mr Will Dwyer, Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 31.

¹³¹ Judge Graeme Henson, Evidence, 16 June 2014, p 60.

¹³² Mr Mark Vine, Solicitor and Director, Australian Creditors Alliance, Transcript of evidence, 16 June 2014, p 10.

Committee comment

- 3.50 The Committee acknowledges the submission of the ACDBA that many debt recovery proceedings before the court are routine and follow a predictable path. However the Committee finds that the arguments of the ACDBA are outweighed by concerns expressed by a number of submission makers questioning whether collection agents have the requisite training to provide legal advice to clients or make decisions on behalf of clients.
- 3.51 The Committee notes that legal professionals are bound by strict codes of conduct in relation to appearances on behalf of clients in court, with sanctions applying for breach of conduct. However collection agents are bound by no such codes. The Committee considers that allowing collection agents to appear in court on behalf of creditors is a reform that would be contrary to current accepted standards for legal representation in the justice system.

Costs in the Small Claims Division

- 3.52 The Small Claims Division was established as an informal, low-cost method of obtaining justice in civil matters. Recoverable costs in the Small Claims Division of the Local Court are fixed in order to ensure that the legal costs incurred when recovering debts of up to \$10,000 are not disproportionate to the size of the debt being recovered. Schedule 2 of the Legal Profession Regulation 2005 sets out the costs that may be awarded; recoverable costs are the same whether cases are defended or proceed to default judgments.
- 3.53 The Committee received a number of submissions that argued that the regulations that governed the recovery of costs were unclear and that the limit on the recovery of costs in the Small Claims Division was unreasonable and unrealistic.
- 3.54 The Australian Credit Forum submitted that in those cases where debtors defended an action in the Small Claims Division, the current recoverable legal costs allowed for creditors were ‘nominal’ and presented a barrier to debt recovery. The submission claimed that it was uneconomical for businesses to pursue defended claims and many chose instead to write such debts off. The submission recommended that the cost provisions for claims of up to \$20,000 in the General Division be adopted by the Small Claims Division:
- ... an adoption of the 25% fixed costs regime imposed by Local Court Practice Note Civ 1 dealing with defended claims in the General Division between \$10,000 and \$20,000.¹³³
- 3.55 The submission of the Law Society of NSW noted that there was currently an ‘unrealistic limit on the recovery of costs’ in the Small Claims Division, and recommended that cost provisions be amended to award one quarter of the amount claimed, in line with the practice in the General Division:

¹³³ Submission 4, Australian Credit Forum, p 3.

The costs provisions should be amended so that the court has the power to award one quarter of the amount claimed (as that formula is set for matters less than \$20,000 under Local Court Practice Note Civ 1) or the amount which would otherwise be awarded on default judgement, whichever is the greater.¹³⁴

- 3.56 However the Committee also heard that costs in the General Division were too high and the risk of being pushed over into the General Division meant that some people did not claim the total amount of money they were owed, in order to keep proceedings in the Small Claims Division.¹³⁵
- 3.57 The Australian Creditors Alliance submitted that the existing system of fixed costs in the Small Claims Division was good in theory; however in practice the current regulations relating to the awarding of costs were confusing and ambiguous and open to misinterpretation. The submission provided the example of a claim of \$10,000 in the Small Claims Division, and suggested that with different interpretations of what legal costs applied, the costs awarded could be \$481.60, \$697.70 or \$1,179.20.¹³⁶
- 3.58 However the Chief Magistrate of the Local Court believed that the regulations for awarding costs were sufficiently clear and he did 'not see why there would be any confusion'.¹³⁷
- 3.59 The Australian Creditors Alliance submission also claimed that the current fixed costs are 'unrealistically low'. The submission recommended that a new scale of fixed costs for every step of the Small Claims Process be introduced:

Create a realistic scale of fixed costs for each step of the Small Claims process. On top of the usual costs for issue, \$300 to deal with a Defence to the stage of having conducted the Pre-trial Review, \$600 for preparation, filing and exchange of witness statements and \$300 to conduct the hearing or to adjourn. Such amounts are clear, simple and severable.¹³⁸

Committee comment

- 3.60 In the Small Claims Division the lack of formality and technicality in proceedings, coupled with the fact that the rules of evidence don't usually apply, suggests that cases are less complex for legal representatives to prepare and run than cases in other court divisions. The current scheme of capping costs to a fixed amount in the Small Claims Division is a reflection of this.
- 3.61 Fixed costs allow creditors to know up front what expenses they will be liable for and what costs they will be able to recover. The Committee considers that fixed costs are appropriate in the Small Claims Division and a system of awarding costs on a percentage basis is unwarranted. However, the Committee considers that the regulations setting out the costs that may be awarded may be inadequate in some instances. The Committee therefore considers that a review of current costs is warranted.

¹³⁴ Submission 25, The Law Society of NSW, p 2.

¹³⁵ Ms Elizabeth Morley, Evidence, 16 June 2014, p 31.

¹³⁶ Submission 26, The Australian Creditors Alliance, pp 8-9.

¹³⁷ Judge Graeme Henson, Evidence, 16 June 2014, p 61.

¹³⁸ Submission 26, The Australian Creditors Alliance, p 9.

RECOMMENDATION 5

The Committee recommends that the Attorney General review the fixed costs awarded in the Small Claims Division of the Local Court.

COURT REGISTRIES AND COURT FORMS

3.62 When people take action to recover debts through the Local Court, their first point of contact is with the Local Court registry. Many Local Court registries employ a registrar or deputy registrar who can provide information and assistance in relation to: court procedure; application to have a matter heard by the court; preparation of court forms; and witnessing of court documents. Registry staff cannot provide legal advice or give an opinion on whether or not to proceed with a case or what the outcome of a case might be.¹³⁹

3.63 There are over 150 registries across New South Wales and in 2013 Local Court registries processed over 100,000 civil actions.¹⁴⁰ Most debt recovery matters in the Small Claims Division of the Local Court are not defended and are dealt with by assessors:

At the bottom of it is the small claims division of \$10,000. That is primarily presided over by assessors. They are not members of the judiciary; they are employees of the Attorney General's Department. They deal with matters on an informal basis and a cost-effective basis.¹⁴¹

3.64 The Department of Justice launched the Online Registry in February 2014. The Online Registry allows for the electronic filing of more than 55 forms for civil actions in the New South Wales Courts, including Statements of Claim and applications for default judgments, and enables parties to track the progress of their case online. The Department of Justice informed the Committee that since the launch of the Online Registry, over 10,000 users have registered and approximately 1,500 filings are lodged each week.¹⁴²

3.65 While the Committee did not receive any feedback from inquiry participants in relation to the new Online Registry, a number of submission authors raised concerns in relation to court registry offices. Delays in processing documents, inconsistent advice and communication difficulties were some of the issues raised.

3.66 The debt collection agency, Collection House Ltd, submitted that they had experienced delays in the production of certain documents which could lead to information originally supplied becoming out-dated and inaccurate:

In our experience, significant delays occur within the Court registry for the production of certified copies of judgment and the entry of default judgments. These delays are openly recognised by the Courts, particularly the Local Court. Such delays are not only inconvenient for the creditor, but can lead to significant difficulties for

¹³⁹ NSW Local Court, <<http://www.localcourt.lawlink.nsw.gov.au/localcourts/registries.html>>, viewed 28 August 2014.

¹⁴⁰ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 4.

¹⁴¹ Judge Graeme Henson, Evidence, 16 June 2014, p 59.

¹⁴² Department of Justice, Answers to Questions on Notice, 22 July 2014, pp 4-5.

the parties. We are aware of circumstances where a debtor pays or part-pays a debt while the application for default judgment is working its way through the Court's system. An affidavit of debt which was accurate when sworn is therefore inaccurate by the time the Court processes the file due to the delay. Once again, the parties may subsequently need to make an application to set aside the default judgment as a result of the Court's delay, taking up more of the Court's and parties' resources.¹⁴³

3.67 Australian Credit Forum submitted a number of issues that had arisen in relation to registry offices:

Training and knowledge levels of court staff are inconsistent and responses can vary depending on which staff member is attending to your query.

No acknowledgement of errors from court staff and to rectify court staff errors usually involves an additional fee as well extra time.

No communication from court staff before documents are rejected as opposed to other interstate registries. No communication that certain items had been actioned by court staff, waiting for a response.

Co-ordination between Local Court registries and JusticeLink is poor, as is co-ordination between Local Court registries and Sheriff's Office.¹⁴⁴

3.68 Collection House Ltd considered that a lack of advice from registry staff led to inadequate or flawed documents being filed in debt recovery cases, causing delays and unnecessary expense for parties:

The Court registry has noticeably moved away from being a gatekeeper with respect to the filing of documents. The registry frequently accepts even overtly flawed documents, leaving the parties to bring a dispute based on procedural issues as part of the substantive matter. The result is that there have been cases where, for example, a defence has been filed admitting the debt, but stating the debtor needs time to pay. A defence that admits the debt is a contradiction. Nevertheless, upon presentation of this defence, the Court registry does not prevent the document from being filed and the matter subsequently gets listed for hearing. This is time consuming for all parties, a waste of the Court's time and resources and expensive for the parties to litigate.

We appreciate that registry staff often do not have legal training, however the availability of a chamber magistrate that such matters could be referred to for immediate assistance to the debtor would represent a significant time and cost saving in the long run.

Similarly, the presence of a community legal centre within the Court precinct or an expansion of the pro bono scheme to make community advocates readily available to answer such queries would also be an effective tool to manage those matters that ought not ever have entered the Court's system.¹⁴⁵

¹⁴³ Submission 19, Collection House Ltd, p 9.

¹⁴⁴ Submission 4, Australian Credit Forum, p 2.

¹⁴⁵ Submission 19, Collection House Ltd, p 7.

3.69 The submission of the Law Society of New South Wales Young Lawyers noted that delays were sometimes due to the self-represented debtor and their lack of familiarity with the legal process or understanding of court procedures:

... one common issue in debt recovery is the self-represented debtor who is unfamiliar or completely uninformed of the legal process. The lack of knowledge and the nature of the proceedings bring about a substantial amount of confusion to the debtor, delay to all parties and cost. The very nature of the formal adversarial style of the Court substantiates this problem because the proceedings run in a manner which requires the parties to have presumed knowledge of how the proceedings are to run.

A common result of this is the debtor having the incorrect documentation, or failing to file and/or serve the required documentation. Such a result provides a substantial amount of delay and cost to all parties, particularly in respect of adjournments.¹⁴⁶

3.70 The Law Society of New South Wales Young Lawyers noted that case management procedures had improved in recent years; however, there was room for further improvement. They submitted that the creation of a debt recovery tribunal for unrepresented debtors or systems to provide greater assistance to unrepresented litigants would bring greater efficiency to debt recovery processes:

A debt recovery tribunal for unrepresented debtors is a measure which could assist with this inefficiency. Less formal proceedings may facilitate the prompt resolution of matters, and may assist communication with parties, understanding of the process by unrepresented litigants, and therefore case flow. The tribunal would not only help facilitate in resolving these disputes but would also help in facilitating efficiency with debt recovery in the Court system.

Alternatively, the Local Court of New South Wales may adopt systems at each Registry to monitor documents as they are filed and to provide greater assistance to unrepresented litigants, to facilitate the smoother flow of matters towards a prompt resolution. This would not only be required at the commencement of the proceedings, but throughout the progress of a case.¹⁴⁷

3.71 The Australian Credit Forum recommended that court staff be provided with consistent training, an email service for queries be attended to on a daily basis and that all court documents be available online and up-to-date.¹⁴⁸

3.72 Registry staff cannot provide legal advice, however the Department of Justice informed the Committee that their department offers a number of services to assist unrepresented litigants including:

- LawAccess: a free telephone helpline which provides a legal information and referral service, and also legal advice in some cases.

¹⁴⁶ Submission 28, New South Wales Young Lawyers, pp 5-6.

¹⁴⁷ Submission 28, New South Wales Young Lawyers, p 5.

¹⁴⁸ Submission 4, Australian Credit Forum, p 4.

- LawAssist: an online service which provides information and practical advice to assist unrepresented litigants, including step by step guides and instructions for filling out court forms.¹⁴⁹

Court Forms

3.73 In terms of the complexity of court documents, the Committee heard that prior to the introduction of the *Uniform Civil Procedure Rules* in 2005, many court forms were less complex and easier to complete. The submission of the Australian Creditors Alliance gave the example of the Notice of Motion: Writ for the Levy of Property form, a four page document requiring 42 pieces of information. Prior to the introduction of the *Uniform Civil Procedure Rules*, this form was a single page document requiring only 15 pieces of information.¹⁵⁰

3.74 The Committee also heard that there was no guidance for the user on expected content for many court forms:

... I was in the Small Claims Division waiting for my matter to come up and there were two self-representing parties and they were drowning. They had no idea what they were doing or what they were supposed to do. They had been given directions by the court but they did not understand them, and they had no parameters to work from. The court says, "You go away and prepare a witness statement." One of these people had no witness statements, just a pile of invoices in a folder and the assessor was going, "I can't make any sense out of this."

There is no form of witness statement. ... if I gave you a blank piece of paper and said, "Do a development application for Campbelltown City Council" you would not know where to start. But if I give you a form and say, "Fill out the blanks" it is easy. The department is giving people a blank sheet of paper and saying, "Be your own lawyer."¹⁵¹

3.75 The Chief Magistrate of the Local Court acknowledged this issue and noted that information on how to complete forms and a pro forma document would assist people to understand and complete forms:

Perhaps it could be in plain English and a pro forma might assist unrepresented and quite often people whose education is perhaps not as it might otherwise be. It is an issue, I accept that.¹⁵²

Committee comment

3.76 The Committee notes the frustration expressed by some inquiry participants in relation to their interactions with court registry offices and difficulties in completing court documents. However the Committee considers that the introduction of the Online Registry shortly before the commencement of this inquiry will go some way to increasing the efficiency of the debt recovery process by reducing the burden on registry offices. The Committee notes that there has been a significant uptake in the use of the Online Registry since commencement in February 2014.

¹⁴⁹ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 5.

¹⁵⁰ Submission 26, The Australian Creditors Alliance, pp 17-18.

¹⁵¹ Mr Mark Vine, Evidence, 16 June 2014, p 8.

¹⁵² Judge Graeme Henson, Evidence, 16 June 2014, p 62.

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- 3.77 In terms of the provision of advice on court processes and how to complete and file documents, the Committee notes that the Online Registry provides step by step guidance and the Department of Justice provides online information and advice on completing forms through the LawAssist website.
- 3.78 The Committee recognises that with over 100,000 cases before the Local Courts each year in New South Wales, registry staff face a high volume of work. In terms of delays, inquiry participants acknowledged that delays often occurred due to creditors' or debtors' lack of understanding of court processes and their unfamiliarity with the legal system.
- 3.79 The Committee considers that to further improve the efficiency of court management of debt recovery processes, easily accessible information should be available both online and at registry offices to help people understand court procedures and their obligations. This information would be of particular value to unrepresented parties with little knowledge of the legal system. For those parties who are unable to access the Online Registry or LawAssist, it is important that registry staff are able to provide advice and assistance that is consistent with the advice available online.
- 3.80 The availability of practical step by step advice would give unrepresented parties a greater understanding of court processes, enable them to complete court forms accurately and would reduce some of the burden on registry staff. Provision of easily accessible sample or pro forma documents would assist people to complete forms quickly without the need to make repeat requests for advice from registry staff.
- 3.81 For this reason the Committee recommends that increased printed information be made available on court processes for debt recovery action in registry offices and that this information is consistent with the information available through the Online Registry and LawAssist websites. The Committee also recommends that pro forma documents be created to assist people to understand expected content of all court documents associated with debt recovery matters.

RECOMMENDATION 6

The Committee recommends that concise, plain English information be made available at registry offices on court processes for debt recovery procedures and that this information is consistent with information available online.

RECOMMENDATION 7

The Committee recommends that pro forma documents be created for court forms associated with debt recovery matters and that these be easily accessible at registry offices and online.

ALTERNATIVE DISPUTE RESOLUTION SCHEMES

- 3.82 Alternative dispute resolution schemes are an alternative to using the courts as a means of settling debt recovery disputes. The Committee examines two forms of

alternative dispute resolution, external dispute resolution and mediation, in this section.

External Dispute Resolution

- 3.83 Membership of an external dispute resolution (EDR) scheme is mandatory for those organisations that provide consumer credit and financial services under the *National Consumer Credit Protection Act 2009* (Cth). The Australian Securities and Investments Commission (ASIC) regulates EDR schemes for these organisations. The ASIC/Australian Competition and Consumer Commission (ACCC) *Guidelines for Debt Collection* support the use of EDR schemes by debt collectors; however, membership of such schemes is not mandatory.¹⁵³
- 3.84 EDR schemes are seen as a cost effective alternative to pursuing debt through the courts. The FRLC submitted a range of benefits that would follow from the greater use of EDR schemes, including a reduction of pressure on court lists and allowing consumers to run their own complaints without requiring legal representation:
- a. Reduced barriers to access. Consumers are generally very hesitant to use the courts for a range of reasons, including that it is too intimidating, too risky because of legal and court costs, or too difficult because of the formalities.
 - b. EDR schemes are set up to allow consumers to run their own complaints, without requiring legal representation
 - c. EDR schemes place a very strong emphasis on complaint resolution by negotiation and conciliation, and are very successful in this
 - d. EDR schemes can reduce pressures on court lists, and are generally a cost-effective alternative to the court
 - e. EDR schemes have proven successful in a range of different contexts- FOS [Financial Ombudsman Service] and COSL [Credit Ombudsman Service Limited] in the financial services areas, the Energy and Water Ombudsman and Telecommunications Industry Ombudsman in utilities and telecommunications.¹⁵⁴
- 3.85 RLC submitted that in their experience, EDR schemes provided a fair and efficient means of recovering debt:
- The EDR process of investigation and conciliation provides an impartial and accessible mechanism to review credit disputes, and the lending practices that precipitate them. The EDR investigative process is an important mechanism for the full and proper examination of financial service providers' conduct. This investigative process is available to consumers in an accessible way and without the need for complex and costly litigation discovery. The EDR process plays a crucial role in the early and efficient resolution of these matters and can preclude the resort to litigation. RLC believes that litigation should remain the 'forum of last resort' and

¹⁵³ The Australian Securities and Investments Commission (ASIC) and Australian Competition and Consumer Commission (ACCC) *Debt Collection Guidelines 2014*, p 44, <[www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg96-published-8-July-2014.pdf/\\$file/rg96-published-8-July-2014.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg96-published-8-July-2014.pdf/$file/rg96-published-8-July-2014.pdf)>, viewed 14 August 2014.

¹⁵⁴ Financial Rights Legal Centre, *Answers to Questions on Notice*, 14 July 2014, pp 4-5.

that EDR schemes are best structured to fairly and efficiently resolve debt recovery disputes. EDR schemes can also properly assess debt collector conduct, and compliance with ACCC/ASIC guidelines, as part of the overall picture when resolving credit disputes.¹⁵⁵

3.86 However the ACDBA submitted that EDR schemes were not efficient or effective, but often slow, and sometimes costly to consumers.¹⁵⁶

3.87 The Committee received evidence that misuse of EDR schemes was a growing problem, and that debtors sometimes sought to use EDR schemes as a 'de-facto court of appeal':

Allowing consumers to drag out disputes via belated complaints to EDR as a means to frustrating legitimate claims made by credit providers also potentially impacts upon the likely realisable value of any underlying security.¹⁵⁷

3.88 Mr Alan Harries of the ACDBA gave evidence of abuse of external dispute resolution schemes by debtors, including instigating EDR action to hamper court processes:

One of the requirements of the [EDR] schemes is that if a complaint is lodged by a consumer, the member must automatically stop all collection activity regardless of the stage of the activity, except in the event of a statute of limitations going to bar the debt. That means you could be down the track with default judgement, you could be with the sheriff on the doorstep taking the property and the consumer then raises through their consumer advocate a complaint.

It goes to FOS or COS [EDR schemes] and immediately the creditor must stop all action. One of the greatest EDR schemes we have has been around for a long time. It is called the court. That is what a court is. Many in my industry would say to you that the EDR scheme is very much taking over what the jurisdiction of the court is to do.¹⁵⁸

3.89 However, the FRLC submitted that misuse of external dispute resolution schemes was limited to a 'small minority of debtors', and noted that there were safeguards and deterrents in place to minimise abuse.¹⁵⁹

3.90 Referral to an EDR scheme where the dispute was already in court was not in the best interests of either party submitted ACDBA:

The reality is the consumer concerned will have had many opportunities to dispute the debt prior to the stage of judgement given the collections process involves collections calls, default notices, hardship applications, enforcement postponement applications, IDR/EDR processes, summons (statement of claim) and finally judgement. Once judgement is entered, we submit the involvement of an EDR scheme is neither legally feasible nor in anyone's interests.¹⁶⁰

¹⁵⁵ Redfern Legal Centre, Answers to Questions on Notice, 14 July 2014, p 2.

¹⁵⁶ Submission 15, Australian Collectors and Debt Buyers Association, p 19.

¹⁵⁷ Submission 15, Australian Collectors and Debt Buyers Association, p 18.

¹⁵⁸ Mr Alan Harries, Evidence, 16 June 2014, p 27.

¹⁵⁹ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 5.

¹⁶⁰ Submission 15, Australian Collectors and Debt Buyers Association, p 18.

- 3.91 Debt buyers in New South Wales have been required to have membership of an ASIC approved EDR scheme as part of their licencing requirements since January 2011.¹⁶¹ While the RLC supported mandatory membership of EDR schemes for debt collection agencies, it did not support mandatory membership for all organisations who offer credit:

We do not believe that it is practical or appropriate to extend mandatory EDR schemes to the types of credit offered by small business creditors such as builders and tradespeople. Disputes about these types of credit remain most effectively and efficiently resolved through NCAT [NSW Civil and Administrative Tribunal] and Local Court process.¹⁶²

Mediation

- 3.92 Before legal action is undertaken, creditors and debtors may use mediation to settle their debt recovery dispute. Parties may use privately arranged mediation services or alternatively, the Community Justice Centre provides a free mediation service for debt recovery disputes.
- 3.93 In instances where legal action has already commenced and the debtor has filed a defence, the Small Claims Division may encourage both parties to attend mediation prior to the pre-trial review, however this is not obligatory. During the pre-trial review stage the Small Claims Division will also attempt to settle the debt recovery dispute. The pre-trial review can be conducted by a registrar, assessor or magistrate. If agreement cannot be reached the court will give directions for the parties to file witness statements by a certain date.
- 3.94 The Better Regulation Office Review of the Debt Recovery Process noted that approximately 10 per cent of matters are settled at the pre-trial review stage in the Small Claims Division of the Local Court; however, the Community Justice Centre has an overall settlement rate of 80 per cent for mediation matters.¹⁶³
- 3.95 Speaking at the public hearing, the Chief Magistrate of the Local Court noted that mediation was not as relevant to proceedings in the Small Claims Division as in higher divisions, because the Small Claims Division did not have the same delays or lengthy cases as higher court divisions:

... where you have access to justice and the ability to hear and determine a matter in the hands of a member of the judiciary in very short order, I question whether alternate dispute resolution is as relevant as it might be in the Supreme Court or the District Court where the delay between the commencement of proceedings and the resolution is measured in years rather than months.¹⁶⁴

- 3.96 The Australian Credit Forum noted that in the absence of a dispute, for example an undefended claim, mediation schemes were not able to be utilised:

The high percentage of debt recovery actions which are undefended means that it will be a case of the 'tail wagging the dog' to mandate referral to NCAT or external

¹⁶¹ Submission 15, Australian Collectors and Debt Buyers Association, p 7.

¹⁶² Redfern Legal Centre, Answers to Questions on Notice, 14 July 2014, p 3.

¹⁶³ Submission 33, Department of Justice, Annexure B, p 21.

¹⁶⁴ Judge Graham Henson, Evidence, 16 June 2014, p 61.

dispute resolution schemes. Those schemes exist only to resolve disputes – in the absence of a dispute they can serve no purpose.¹⁶⁵

- 3.97 Mr Mark Vine of the Australian Creditors Alliance argued that the use of mediation before going to court could be an efficient way of reducing the number of cases that needed to go court:

You can have a situation where ... you do not come to the court until you have complied with the certificate of readiness and one of those certificates of readiness requirements could be external dispute resolution to say, "I have served the statement of claim or statutory demand. I have received the defence. We have together defined the issues. We exchanged particulars and documents and we went to mediation on such and such a day." If mediation does not work go to the court, put it all on the table, pay the court fee, \$900, and say, "Give me a hearing date".

You will find that the number of matters going before the court will be greatly reduced because right now the model we have is—the defence is filed with the court, the court gives us a date for call over, they then try to force us into court as quickly as possible to make the statistics look good and there is no time to mediate, no time to exchange, no time to deliberate.¹⁶⁶

- 3.98 New South Wales Young Lawyers submitted that development of alternate procedures could reduce the financial liability for both parties:

The Committee considers that each party's ultimate risk exposure and financial liability could be significantly reduced by adopting alternate procedures for debt recovery proceedings, especially when commenced in respect of debts owed by financial institutions or other lenders.¹⁶⁷

- 3.99 The Better Regulation Office Review of the Debt Recovery Process noted that a Victorian trial of mandatory mediation for matters up to \$10,000 led to greatly increased settlement rates and a reduction in delays in the civil list. The trial proved so successful that it was expanded to cover all defended civil matters of up to \$40,000.¹⁶⁸

- 3.100 The Better Regulation Office Review concluded that mandatory mediation would lead to a decrease in the number of matters proceeding to hearing in New South Wales and recommended that the former Department of Attorney General and Justice investigate whether a trial should be conducted of mandated mediation for defended matters in the Small Claims Division of the Local Court, other than matters dealt with under an EDR scheme.

- 3.101 The Committee notes that the trial of mandated mediation recommended by the Better Regulation Office has not commenced, however the trial is under consideration by the Department of Justice.¹⁶⁹

¹⁶⁵ Submission 4, Australian Credit Forum, p 1.

¹⁶⁶ Mr Mark Vine, 16 June 2014, p 10.

¹⁶⁷ Submission 28, New South Wales Young Lawyers, p 5.

¹⁶⁸ Submission 33, Department of Justice, Annexure A p 22.

¹⁶⁹ Submission 33, Department of Justice, Annexure B, p 2.

Committee comment

- 3.102 The Committee notes that many debt collection agencies and all debt buyers already have membership of ASIC regulated external dispute resolution schemes, and that membership of such a scheme is considered industry best practice.
- 3.103 The Committee was concerned to hear of the misuse of EDR schemes by consumers in those instances where judgment debts had already been entered. The Committee considers that EDR schemes can provide an effective means of settling many forms of debt recovery disputes, however on balance, the Committee considers that expanding membership of EDR schemes to cover all organisations who collect debts is not warranted and would not increase the effectiveness or efficiency of the debt recovery process.
- 3.104 The figures provided by the Better Regulation Office Review show that mediation offered by Community Justice Centres is an effective method of settling debt recovery disputes. Successful mediation allows parties to avoid the expense associated with court action and subsequent enforcement. The Committee notes the positive results of the trial of mandatory mediation in Victoria and welcomes the recommendation of the Better Regulation Office to conduct a trial of mandated mediation in New South Wales.

Chapter Four – Enforcement

- 4.1 Where legal action undertaken by a creditor in relation to a debt is successful, the Court will issue a judgment that the debtor is obliged to repay the creditor the debt and any filing, service and legal fees accrued by the creditor. If the debtor does not pay the creditor, it becomes the creditor's responsibility to enforce the debt.
- 4.2 Enforcement of court judgments was a major source of concern to inquiry participants, and the Committee will examine the issues raised by participants in relation to enforcement of private debt in this chapter. State debt and fines collection will be dealt with in Chapter Six. Issues considered include: examination summons, garnishee orders, writs for property, instalment applications, the Office of the Sheriff and the outsourcing of enforcement activities.

ENFORCEMENT PROCESSES

- 4.3 A judgment may be enforced any time within 12 years of the date of the judgment. Enforcement of judgments is governed by the *Civil Procedure Act 2005* and the Uniform Civil Procedure Rules. There are a number of enforcement options for creditors, each of which involve court attendance and certain fees:
- seeking an examination summons - if the creditor is uncertain of the debtor's financial status they can require the debtor to attend court and provide information on their income and assets.
 - seeking a garnishee order – a garnishee order is made by the court to allow the creditor to recover debt from a debtor's bank account, wages or from people who owe money to the debtor.
 - applying for a writ for the levy of property - this is a court order authorising the Sheriff to seize and sell property belonging to the debtor to pay the debt.
 - applying for a writ against land - this is a court order authorising the Sheriff to seize and sell real property owned by the debtor. Applying for a writ against land only applies for debts greater than \$10,000 in New South Wales.
 - seeking the debtor's bankruptcy (for individuals) if the debt exceeds \$5000 or liquidation (for companies) if the debt exceeds \$2000. Seeking bankruptcy can be expensive and complex for the creditor.¹⁷⁰

¹⁷⁰ Department of Justice, LawAccess, <www.lawassist.lawaccess.nsw.gov.au/lawassist/lawassist_debt_small_claims_home/lawassist_does_someone_owe_you_money_home/lawassist_after_the_case/lawassist_enforcing_a_judgment_debt.html#Examination_Notice>, viewed 3 September 2014, and Submission 33, Department of Justice, Annexure A, p 53.

Examination Summons

4.4 Inquiry participants expressed dissatisfaction with the high rate of non-attendance by debtors who had been issued with an examination summons. Outstanding Collections submitted that, in their experience, defendants did not appear at examination summons approximately 70 per cent of the time.¹⁷¹ Other submission authors, such as ClarkeKann Lawyers, found that the rate at which defendants did not appear at examination summons was as high as 90 per cent.¹⁷²

4.5 The submission of the Australian Creditors Alliance considered that the informality of court procedures did not encourage compliance of debtors in attending examination summons:

Allowing too much informality in the conduct of Examination hearings has undermined the power and force of the court. Formality has an intimidatory effect on recalcitrant debtors and encourages them to have greater respect for the court, its power and processes. They are more likely to attend Court. They are more likely to tell the truth.¹⁷³

4.6 The submission of Collection House Limited stated that examination summons were ineffective, and to improve their effectiveness, courts should ensure attendance and require debtors to properly answer the questions posed in the examination summons and provide sworn evidence in support of their replies.¹⁷⁴

4.7 Outstanding Collections submitted that where a warrant was issued for the arrest of a debtor who did not appear at an examination summons, the majority of the time the arrest warrant was not able to be executed execution was usually attempted during working hours:

In our experience around 70% of the time the defendant does not turn up to be examined. A warrant is issued for the defendants arrest and the arrest warrant is executed between the hours of 9am-5pm. The defendants are predominantly at work and therefore the majority of time the warrant is not executed.¹⁷⁵

Committee comment

4.8 The Committee notes the concerns expressed by submission authors in relation to current processes for examination summons. Submission authors have argued that the current system is not effective. However the Committee considers that there are circumstances where an examination summons can be a useful tool.

4.9 The Committee does not propose change to the current examination summons, and considers that there is greater scope to improve debt recovery processes by focusing on garnishee orders, writs for the levy of property and the functions of the Office of the Sheriff.

¹⁷¹ Submission 20, Outstanding Collections, p 2.

¹⁷² Submission 24, ClarkeKann Lawyers, pp 1-2.

¹⁷³ Submission 26, Australian Creditors Alliance, pp 6-7.

¹⁷⁴ Submission 19, Collection House Limited, p 7.

¹⁷⁵ Submission 20, Outstanding Collections, p 2.

Garnishee orders

- 4.10 Many inquiry participants considered that current arrangements for garnishee orders on wages or bank accounts were unsatisfactory. Participants drew the Committee's attention to the disparity between protections afforded to subjects of wage garnishee orders versus the subjects of bank account garnishee orders, and suggested reforms to garnishee orders on term deposits, joint bank accounts and administration charges. The inquiry participants' views and their suggestions for reform are outlined in this section.

Identification of bank accounts

- 4.11 Creditors may apply to have funds taken from the wages or bank accounts of debtors in order to recover the money owed to them; however, this requires that the creditor is able to identify the bank account or the employment details of the debtor.
- 4.12 Some creditors who participated in this inquiry recommended that a system be established to enable creditors to identify the bank account details of debtors similar to the existing system used by the State Debt Recovery Office (SDRO) to recover fines.¹⁷⁶
- 4.13 The Committee notes that identification of bank accounts was an issue considered in the Better Regulation Office review of the debt recovery process. The Better Regulation Office review did not support the proposal due to the privacy and civil liberty impacts on debtors.¹⁷⁷

Minimum protected amount in bank accounts

- 4.14 Under the *Civil Procedure Act 2005*, when a debtor is subject to a wage garnishee order, the debtor's weekly wage or salary must not be reduced to less than the workers compensation weekly benefit, as set in the *Workers Compensation Act 1987*. (This amount is currently set at \$458.40 per week). However, if a debtor is subject to a bank account garnishee order, there is no minimum protected amount required to be retained in the debtor's bank account. This issue and the effect on more vulnerable members of the community was of concern to a number of inquiry participants.
- 4.15 Historically, most people received their wages as cash, and bank accounts tended to be used only by wealthier people for savings, according to Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre (RLC). This accounted for the differences in protection afforded to the subjects of wage garnishee orders versus the subjects of bank account garnishee orders:

... we would point out that a lot of the recovery process is based on historic patterns of, for instance, pay—when people took their pay packet home in an envelope in cash. When a bank account, for instance, was something very different—a bank account was a savings account that only the relatively well-off had. Now, of course, your pay packet or your Centrelink payment goes straight into that bank account.

¹⁷⁶See, for example, Submission 4, Australian Credit Forum, p 5, and Submission 21 Institute of Mercantile Agents, p 10.

¹⁷⁷Submission 33, Department of Justice, Annexure A, pp 34-35.

Unfortunately, your bank account is available to the garnishee whereas your pay packet has some protection on it.¹⁷⁸

- 4.16 The effects of bank account garnishing have a particular impact on those debtors who are in receipt of Centrelink income assistance. Mr William Dwyer, Principal Solicitor, Redfern Legal Centre noted that under the *Social Security Administration Act (Cth)*, all Centrelink income is protected. However, once Centrelink income is deposited into a bank account, Mr Dwyer suggested that, while in theory there are protections for Centrelink income, in practice the whole of that amount is liable to be garnished if the Centrelink recipient is the subject of a bank account garnishee order:

... the protection for Centrelink income is calculated is that up until the time it is paid into a bank account it is protected under section 60 of the Social Security Administration Act, that it is inalienable and cannot be garnished. The moment it hits someone's bank account it is then characterised as regular funds; at that point it can be garnished by creditors or the State Debt Recovery Office but for this saved amount which is calculated in accordance with a formula, which is outlined in section 62 of the same Act.

That formula does not really properly account for a fortnightly payment cycle of Centrelink income ... Quite often we see clients who present with their bank statement, they might have been paid 10 days ago and their whole bank account is essentially cleaned out and they are left with a lengthy period of time in which they have nothing to live on. The protection is not properly calculated in accordance with the principle which I think the legislation enshrines.¹⁷⁹

- 4.17 Legal Aid NSW informed the Committee that they frequently encountered people whose bank accounts were garnished without prior notice, leaving them without enough funds to cover basic living expenses:

Legal Aid NSW frequently encounters clients who have had their bank accounts garnished without any prior notice. These clients are often in receipt of Centrelink benefits and when money is deducted from their accounts they can be left with insufficient funds to meet their basic needs. People in this situation are also unable to seek advice about the possibility of postponing the enforcement action before the money is removed from their account.¹⁸⁰

- 4.18 The lack of a protected minimum amount for the subjects of bank account garnishee orders could lead to a greater reliance on charity groups and other emergency services, according to the submission of the Financial Rights Legal Centre (FRLC):

The situation can cause enormous hardship, particularly where the garnishee is executed shortly after a person is paid their wages or Centrelink benefits, as it can leave a person with no funds to survive on until their next payday (which could be a

¹⁷⁸ Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 30.

¹⁷⁹ Mr William Dwyer, Credit and Debt Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 34.

¹⁸⁰ Submission 29, Legal Aid NSW, p 12.

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month or more away). This creates unnecessary reliance and pressure for emergency and charity services to fill this gap.¹⁸¹

- 4.19 This is an issue for both the SDRO and debt recovery generally. There is scope for the SDRO to refund an initial amount of \$100 to the bank accounts of people who suffer financial hardship when their bank accounts are garnished to repay fines, and a further amount if an individual supplies supporting documentation demonstrating hardship.¹⁸² The process for returning funds was outlined by the Office of State Revenue (OSR) at the public hearing:

I know that our office has a process for people whose bank account is, as you say, cleaned out to make application to have the funds returned to them. I have seen one submission where there was a case study which indicated that the person only got a small part of their money back. I could not really comment on an individual case but we do have a process for people to get their money back if we have overstepped the mark.¹⁸³

- 4.20 However this protection is only applicable for the repayment of fines to the SDRO, not to private debts. The submission of the NSW Ombudsman also pointed out that the most disadvantaged members of the community were unlikely to take the steps required to request a refund:

It should be noted that many of the SDRO's vulnerable clients would not be able to take the necessary steps in order to pursue a request for a refund and that an amount of \$100 may not be sufficient to cover necessities. For those that do request a refund, the SDRO has to then commit resources to assessing and processing their application.¹⁸⁴

- 4.21 With regard to the appropriate minimum balance that should be protected for those people who are the subject of a wage garnishee order, the Committee received submissions suggesting that the current minimum amount was inadequate.
- 4.22 The submission of the FRLC noted that the median rent in Sydney was \$490 per week, which was greater than the current protected minimum amount of \$458.40 per week.¹⁸⁵ The FRLC advocated a discretionary approach for calculating the amount of money that should be retained, 'where a court can look at the person's overall circumstances, the number of dependents and other liabilities, before determining what is the appropriate amount to be taken.'¹⁸⁶
- 4.23 Legal Aid NSW recommended a judicial assessment of a person's financial and personal circumstances to ensure the welfare of the subject of the garnishee order and their household, as occurs in other Australian jurisdictions:

¹⁸¹ Submission 7, Financial Rights Legal Centre, pp 7-8.

¹⁸² Submission 32, NSW Ombudsman, p 5.

¹⁸³ Mr Ian Phillips, Principal Advisor, Technical and Advisory Services, Office of State Revenue, Transcript of evidence, 16 June 2014, p 66.

¹⁸⁴ Submission 32, NSW Ombudsman, p 5.

¹⁸⁵ Submission 7, Financial Rights Legal Centre, p 5.

¹⁸⁶ Ms Alice Lin, Solicitor, Financial Rights Legal Centre, Transcript of evidence, 16 June 2014, p 35.

We support a change of law which would require a judicial assessment of the totality of a person's financial and personal circumstances to take place before the proportion of a person's income that can be garnished is determined (section 48.01 *Local Court Rules (NT)*, section 72.05 *Supreme Court Rules (NT)*, section 6 *Enforcement Of Judgments Act 1991 (SA)*). This type of provision allows judges to ensure that people and their entire households are not forced into living in poverty and into defaults on other loans, and ensure that people are given leeway to steadily repay their debts over a reasonable time without excessive hardship in the short-term.¹⁸⁷

Garnishee orders on joint accounts

- 4.24 Whether or not joint accounts should be garnished was an issue raised by inquiry participants. The Australian Creditors Alliance recommended that garnishee orders should be allowed to apply to joint accounts.¹⁸⁸ However the FRLC gave a number of reasons for the continued protection of joint bank accounts from garnishee orders, including:

Joint bank accounts are often used by families, and separate sources of income go into that account. Garnishing all or even half of the household account would likely result in hardship for the whole family and default on other expenses like mortgage payments or utility bills.¹⁸⁹

- 4.25 The Committee notes that the 2010 Better Regulation Office review of the debt recovery process considered that extending bank garnishee orders to jointly held bank accounts would not be appropriate, noting that:

There are many instances where a joint account holder would not benefit from or even be aware of the debt that was owed. It would be unfair to such individuals or entities to allow their savings to be garnisheed to repay the debt.¹⁹⁰

Garnishee orders on term deposits

- 4.26 The Australian Creditors Alliance submitted that one improvement to the enforcement process would be to allow garnishee orders to attach to term deposits irrespective of when they fall due. Under current legislation, term deposits of judgment debtors cannot be garnished as part of the bank account garnishing process unless the deposit has matured. The submission of the Australian Creditors Alliance suggested that regardless of the debtor suffering the penalty of lower interest, money in term deposits should not be withheld from garnishee orders.¹⁹¹
- 4.27 The 2010 Better Regulation Office review of the debt recovery process considered this issue and recommended that bank garnishee orders be allowed to operate on term deposits, without requiring an expiration of the term.¹⁹²

¹⁸⁷ Submission 29, Legal Aid NSW, p 13.

¹⁸⁸ Submission 26, Australian Creditors Alliance, pp 4-6.

¹⁸⁹ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 4.

¹⁹⁰ Submission 33, Department of Justice, Annexure A, p 38.

¹⁹¹ Submission 26, Australian Creditors Alliance, p 5.

¹⁹² Submission 33, Department of Justice, Annexure A, p 37.

Administrative Charges

- 4.28 Under the Uniform Civil Procedure Rules, when banks or employers execute a garnishee order, they may charge \$13.00 to cover administrative costs.¹⁹³ The submission of the Australian Creditors Alliance noted that the Uniform Civil Procedure Rules are not clear on whether the charge is to be deducted from the garnishee amount or is an additional cost:

The regulation makes it clear that the administration fee does not act to reduce the amount of the debt. However, most banks, if served with a Garnishee Order for, say \$500, will remove \$13 for themselves and send the creditor \$487. The problem with that approach is that it makes the judgement creditor carry the banks' administrative costs which means that the judgement debt will always be underpaid by \$13.00.¹⁹⁴

- 4.29 The Better Regulation Office review of the debt recovery process also found that it was unclear whether the fee was additional to the amount being deducted or if it was to be deducted from it and recommended that this be clarified.¹⁹⁵

Committee comment

- 4.30 There is asymmetry in the protections granted to the subjects of wage garnishees versus the subjects of bank account garnishees. Debtors subject to wage garnishing are protected from financial hardship with a rule that ensures that a minimum amount equal to the workers compensation weekly amount is not deducted from their wage. However debtors subject to bank account garnishing have no such protections.
- 4.31 Existing arrangements have a particular impact on the most vulnerable members of the community due to a gap in the legislation that does not allow for the protection of bank accounts in the same way that wages are protected.
- 4.32 The Committee considers that protections afforded to those people who are the subject of wage garnishee orders should be extended to those people who are subject to bank account garnishee orders. The Committee therefore recommends that a minimum amount should be retained in bank accounts of people subject to bank account garnishee orders.

RECOMMENDATION 8

The Committee recommends that the *Civil Procedure Act 2005* be amended to ensure that a minimum balance is maintained in bank accounts that are the subject of a bank garnishee order, and that this minimum balance aligns with the net weekly amount that must be retained for debtors subject to wage garnishee orders.

- 4.33 With regard to the appropriate minimum balance that should be retained by those people subject to wage garnishee orders, the Committee notes that some inquiry participants recommended that this be determined on a case-by-case basis. The Committee considers that this recommendation would be costly and

¹⁹³ Uniform Civil Procedure Rules 2005, Schedule 3.

¹⁹⁴ Submission 26, Australian Creditors Alliance, p 5.

¹⁹⁵ Submission 33, Department of Justice, Annexure A, p 37.

time-consuming to implement and considers that a minimum balance equivalent to the workers compensation weekly benefit is appropriate. The Committee notes that the workers compensation weekly benefit is indexed every six months.

- 4.34 The Committee considers that it is inconsistent that funds held in term deposits are not accessible to creditors in the same way that other funds are. The Committee therefore recommends that bank garnishee orders be extended to include term deposits of debtors.

RECOMMENDATION 9

The Committee recommends that the *Civil Procedure Act 2005* be amended to allow bank garnishee orders to operate on term deposits of judgment debtors, irrespective of when the term deposit falls due.

- 4.35 The Committee notes the evidence that the current Uniform Civil Procedure Rules concerning administration fees that may be charged to administer a garnishee order are unclear and applied in different ways by different organisations. The Committee supports the recommendation of the Better Regulation Office review to clarify the way the charge is applied and the Committee recommends that the administrative charge should be deducted in addition to the amount being garnished.

RECOMMENDATION 10

The Committee recommends that the Uniform Civil Procedure Rules 2005 be amended to clarify that an administrative charge for garnishee orders may be deducted in addition to the amount being garnished.

Writs for property

- 4.36 A writ for the levy of property authorises the Sheriff to seize and sell property belonging to the debtor in order to repay the debt. In 2013-14 the Sheriff received 20,805 writs. Of these, 46% were actioned within two months of receipt. The Sheriff provided the Committee with the outcomes of those writs that had been actioned:

8% received no response

7% resulted in payments – that is part or full satisfaction of the debt

10% resulted in a physical call to gather an inventory of assets for liquidation

75% resulted in other outcomes, which may include: initiation of an instalment payment or payment plan directly with the creditor; liquidation or bankruptcy proceedings; and stays or suspended actions.¹⁹⁶

- 4.37 The Australian Creditors Alliance submitted that writs for the levy of property could be more effectively executed if the Sheriff worked extended hours, noting that 'the vast majority of homes are empty during the day and execution of a writ cannot proceed'. The submission also noted that the requirement for Sheriffs to

¹⁹⁶ Department of Justice, Answers to Questions on Notice, 22 July 2014, pp 2-3.

telephone and write to debtors before attending allowed debtors time to hide their assets.¹⁹⁷

4.38 ClarkeKann Lawyers submitted that, in their experience, Sheriffs rarely seized goods under writs for property, and the effectiveness of the procedure was therefore diminished. ClarkeKann Lawyers did not recommend changes to the current procedures for enforcing writs of property, but did recommend that writs be enforced more aggressively.¹⁹⁸

4.39 Speaking at the public hearing, Ms Elizabeth Morley, Principal Solicitor, RLC, commented that seizure of goods under a writ for property could amount to penalising vulnerable individuals and their families rather than act as a means of debt recovery:

... more property is protected under bankruptcy than it is under writs of execution, and things that you might think of as essential for a family—like a washer and dryer—are not protected and families can be left severely disadvantaged for a very little return. These are things that are seized and barely cover the cost of the sheriff going along and producing anything. They are just a form of punishment; they are almost a penalty rather than an actual, genuine debt recovery. Our clients quite often would happily go bankrupt at that point to protect their goods, except they cannot even afford these days to pay the cost of going bankrupt because there is a fee for bankruptcy.¹⁹⁹

4.40 Section 106(3) of the *Civil Procedure Act 2005* provides that certain property is protected from seizure under a writ for the levy of property. Kitchen and bedroom furniture, clothing and tools of trade (to the value of \$2000) in use by the debtor or their family are excluded from seizure.

4.41 A number of inquiry participants noted that the list of personal possessions protected from seizure when a writ for property was executed was less extensive than the list of personal possessions protected from seizure in a bankruptcy situation.

4.42 The submission of the FRLC noted that under section 116 of the *Bankruptcy Act 1966* (Cth), protected items included a car up to a prescribed limit, tools of the trade up to \$3600, basic essential household items including a washing machine, telephone, and educational or sporting equipment for students. The submission stated that the ability to keep the family car under bankruptcy proceedings was an important protection, particularly in rural and regional New South Wales:

In our experience the asset people are most eager to protect is usually the family car, particularly people living in rural and regional areas who have no further means of transport, and people who have medical or health issues or care for family with such issues who cannot risk losing their car. These people are generally already disadvantaged and under financial pressure. Depriving them of a car can equate to

¹⁹⁷ Submission 26, Australian Creditors Alliance, pp 3-4.

¹⁹⁸ Submission 24, ClarkeKann Lawyers, pp 2-3.

¹⁹⁹ Ms Elizabeth Morley, Evidence, 16 June 2014, p 37.

loss of essential medical or community services, lack of opportunity to obtain or continue work, and the creation of additional expenses adding to their hardship.²⁰⁰

- 4.43 However FRLC noted that ‘forcing a person to go bankrupt to simply protect essential household items is not in the public interest, nor does it assist creditors’.²⁰¹
- 4.44 Legal Aid NSW submitted that the list of exclusions for writs of property was too limited, and could leave vulnerable debtors without the use of basic, essential household items, such as children’s toys and educational equipment. The submission recommended that the list of items of property protected from seizure under a property writ be increased to match bankruptcy regulations.²⁰²
- 4.45 The Committee heard that the Office of the Sheriff does exercise discretion when executing writs for the levy of property, and the Sheriff would not seize property such as a washing machine if the seizure left the debtor facing hardship:
- The legislation covers sacrifice and hardship and for the officers to attend and they take an inventory of the goods. Yes, we do that on the first call so it allows then for a third party to make a claim on those goods if need be, and then for an assessment to be made. Is it viable for the creditor to spend any more money to return just to pick up a washing machine, considering the fact that the recovery rate at an auction, when you include auctioneers fees—they make \$30 or \$40 in it? Effectively you are just depriving the debtor of an asset for no purpose whatsoever. So hence the hardship rule would apply so the sheriff would not follow that one through.²⁰³
- 4.46 According to the submission of the FRLC, increasing the list of protected items from seizure in property writs to match those items protected under Federal bankruptcy regulations would bring New South Wales in line with Victoria, Queensland, ACT and South Australia.²⁰⁴

Committee comment

- 4.47 Under current legislation, greater protections are afforded to debtors who are the subject bankruptcy proceedings than to debtors who are the subject of property writs. While debtors who are the subject of bankruptcy proceedings are able to keep the washing machine, telephone, educational or sporting equipment for children, and the family car, debtors who are the subject of property writs may lose these items. The sale of such items may bring little in the way of payments to the creditor; however, doing without the items could bring significant hardship to debtors and their families.
- 4.48 The Committee considers that encouraging a debtor to seek bankruptcy in order to protect basic personal possessions is not in the best interests of either the debtor or the creditor. The Committee therefore recommends that the list of items of property that are protected from seizure under a property writ be

²⁰⁰ Submission 7, Financial Rights Legal Centre, p 12.

²⁰¹ Submission 7, Financial Rights Legal Centre, p 12.

²⁰² Submission 29, Legal Aid NSW, pp 11-12.

²⁰³ Mr David Dodds, Assistant Sheriff, Regional Manager South, Office of the Sheriff, Transcript of evidence, 16 June 2014, p 51.

²⁰⁴ Submission 7, Financial Rights Legal Centre, p 12.

increased to match the list of items protected from seizure under current Federal bankruptcy regulations.

RECOMMENDATION 11

The Committee recommends that the *Civil Procedure Act 2005* be amended to bring the items protected from seizure under a property writ in line with the items protected from seizure under bankruptcy proceedings in the *Bankruptcy Act 1966* (Cth).

- 4.49 The Committee notes the frustration expressed by inquiry participants that existing arrangements for executing property writs are an ineffective means of recovering debt. Consideration of more effective methods of enforcing property writs is warranted and will examine this issue later in this chapter in the section entitled Office of the Sheriff.

Writ on title (land)

- 4.50 The Law Society of NSW commented that the current processes for enforcing a writ on title were 'complicated and unwieldy'. The submission also noted that judgement debtors could stop the process at any time by filing a Notice of Motion to Pay by Instalments.²⁰⁵
- 4.51 Collection House Limited considered that writs on title would be more effective if they were valid for 12 months rather than six months:
- In our view, the effectiveness of lodging a writ on title is undermined by the writ's short lifespan and that this enforcement remedy would be more effective if an extended period of time applied. Notably, bankruptcy notices are valid for 12 months.²⁰⁶
- 4.52 The Australian Credit Forum submitted that the current lower limit of \$10,000 for writs on title should be abolished. The submission noted that 'no other state has a monetary limit on this enforcement option'.²⁰⁷

Committee comment

- 4.53 While the Committee received some criticisms from submission authors in relation to writs against land, many submission makers were silent on this issue. The Committee is therefore not convinced that there is a need to review the current processes for writs on title.

Instalment applications

- 4.54 In many instances, debtors may be unaware that a garnishee order or writ has been authorised against them. Upon discovering that they are the subject of a garnishee order or writ, they may apply to the court to repay the debt by instalments.

²⁰⁵ Submission 25, Law Society of NSW, p 4.

²⁰⁶ Submission 19, Collection House Ltd, p 7.

²⁰⁷ Submission 4, Australian Credit Forum, p 5.

- 4.55 The Australian Collectors and Debt Buyers Association (ACDBA) submitted that the repeated use of instalment applications impacted on the effectiveness of debt recovery actions:

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 judgement... it seems reasonable to impose a maximum number of applications to pay a debt by instalment per judgement debt per year, say a maximum of three applications.²⁰⁸

- 4.56 However, Mr Mark Vine of the Australian Creditors Alliance, commented that there was no need for there to be a limit on the number of instalment applications that a person could make, as registrars were effective at dealing with repeated instalment applications:

There does not need to be because the registrar will normally look favourably on the first, think twice about the second and simply refuse the third. So they can make as many applications as they like, but after a while the court will stop listening if they have been lying to us all along.²⁰⁹

- 4.57 NSW Justice informed the Committee that if a cap on the number of instalment applications was introduced, it would be important to ensure that those people whose financial circumstances had changed were not penalised:

The Department acknowledges that it can be burdensome for creditors if they are required to attend court in circumstances where a debtor makes repeated instalment applications. However, in considering whether it is appropriate to place a cap on the number of times a debtor may apply to the court to pay by instalments, it would be important to ensure that such a cap did not operate to unfairly penalise persons whose financial circumstances have genuinely changed.²¹⁰

- 4.58 While the Australian Creditors Alliance did not consider that there was a need to limit the number of instalment applications that a debtor could make, they submitted that there were no guidelines or training available to inform court registrars on a consistent approach to responding to instalment order applications. The submission recommended creating and publishing guidelines for the processing of instalment applications.²¹¹

- 4.59 The Better Regulation Office considered this issue as part of its review of the debt recovery process, and recommended an amendment to the Uniform Civil Procedure Rules 2005 to provide guidelines for the processing of instalment applications. However, in response to this recommendation, the Uniform Rules Procedure Committee indicated it was not aware of any widespread problem in processing instalment applications, and did not support the recommendation.²¹²

²⁰⁸ Submission 15, Australian Collectors and Debt Buyers Association, p 14.

²⁰⁹ Mr Mark Vine, Solicitor and Director of Australian Creditors Alliance, Transcript of evidence, 16 June 2014, p 6.

²¹⁰ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 4.

²¹¹ Submission 26, the Australian Creditors Alliance, p 7.

²¹² Submission 33, Department of Justice, Annexure A, p 48 and Annexure B, p 6.

Committee comment

- 4.60 The Committee acknowledges that it can be time consuming for creditors to have to return to court on multiple occasions to respond to applications made by debtors to pay by instalments. However it is the view of the Committee that the ability of a debtor to make more than one application to pay by instalments is an important protection against financial hardship if there is a genuine change in a debtor's financial circumstances.
- 4.61 The Committee notes the response of the Uniform Rules Procedure Committee to the recommendation of the Better Regulation Office review to provide guidelines for registrars on consistent processing of instalment applications and considers that no change to instalment applications is warranted at this time.

THE OFFICE OF THE SHERIFF

- 4.62 The Office of the Sheriff was established in New South Wales in 1823. At that time the Sheriff had a responsibility to carry out decrees and orders of the Supreme Court. Today the Sheriff has responsibility for providing law enforcement activities such as serving warrants, summons, enforcement and other orders, court security and administration of the jury system on behalf of New South Wales courts and tribunals.²¹³
- 4.63 In terms of responsibilities in relation to enforcement of debt recovery, the Office of the Sheriff executes writs for the levy of property and writs against land. The Committee received evidence from many inquiry participants that the Office of the Sheriff conducts its enforcement responsibilities with professionalism and impartiality, taking care to approach debtors and their families in a dignified and respectful manner.²¹⁴
- 4.64 Representatives of RLC and the FRLC spoke in support of the Sheriff's enforcement work at the public hearing:
- Ms MORLEY: From either side we have found them to be diligent in their duties and fair. They are pretty good on the whole.
- Ms LIN: I do not recall any substantiated complaint against any conduct by the Sheriff's office and we strongly support the way they give people notice about proposed seizures to give them time to get advice and financial help—just to organise their affairs generally.²¹⁵
- 4.65 However, many inquiry participants expressed strong dissatisfaction with delays in the execution of enforcements by the Office of the Sheriff. The ACDBA noted this in their submission, stating that 'a common and recurring frustration with the debt recovery process is the challenge of the translation of a judgement in civil

²¹³ Department of Justice, <http://www.courts.justice.nsw.gov.au/cats/history/history_sheriff_nsw.html>, viewed 11 September 2014.

²¹⁴ See, for example, submission 7, submission 12 and submission 26.

²¹⁵ Ms Elizabeth Morley, Ms Alice Lin, Evidence, 16 June 2014, p 37.

proceedings into a positive final outcome.’²¹⁶ The Committee examines these concerns in the following section.

Delays in the execution of writs

4.66 The Institute of Mercantile Agents and the ACDBA informed the Committee that their members reported lengthy delays waiting for the Office of the Sheriff to exercise writs.²¹⁷ The ACDBA submitted that the delays were so substantial that creditors were opting to discontinue enforcement processes, choosing instead to commence bankruptcy proceedings:

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.

4.67 Outstanding Collections submitted that, in their experience, writs were a ‘waste of money’, and could not be effective unless Sheriffs operated outside of normal business hours, including weekends, to be able to execute writs when people were most likely to be home.²¹⁸

4.68 The Office of the Sheriff submitted that the average response time for a Sheriff to make a visit to an address to execute a writ was 47 days.²¹⁹ However, speaking at the public hearing, the Sheriff conceded that some of the 55 Sheriff locations across New South Wales, experienced ‘significant’ delays, particularly in the central business district of Sydney:

It would depend on the centre because there are 55 locations across New South Wales that the Sheriff’s office works out of, so it would depend on the location. The timing would be different at every single place, depending on the amount of work that they have at that location. However, if you look at the city central business district [CBD], which is one of our biggest areas, there is a significant delay and we prioritise the work in relation to the nature of the matter, the debt, so it would depend on the number of matters that are pending, whether they are property seizure orders or writs for levy of property, whether they are evictions. All of those things have different priorities. Evictions get a certain time frame and Mr Dodds might be able to talk about the time frame, but there are evictions that we have to schedule and carry out. Seizures of property are listed on certain day to go out and seize and remove the property. A number of different functions have different priorities.²²⁰

4.69 In terms of the reasons for the delays in executing writs, the Committee received evidence of a number of contributing factors, including: competing priorities at

²¹⁶ Submission 15, Australian Collectors and Debt Buyers Association, p 11.

²¹⁷ Submission 15, Australian Collectors and Debt Buyers Association, p 11 and Submission 21, Institute of Mercantile Agents, p 8.

²¹⁸ Submission 20, Outstanding Collections, pp 1-2.

²¹⁹ Department of Justice, Answers to Questions on Notice, 22 July 2014, p 4.

²²⁰ Ms Tracey Hall, Sheriff, Office of the Sheriff of New South Wales, Transcript of evidence, 16 June 2014, p 45.

the Office of the Sheriff; resourcing issues; work practices; and issues with information technology infrastructure.

Competing Priorities

- 4.70 As noted earlier in this chapter, enforcement work is just one of a number of responsibilities of the Office of the Sheriff. The Committee heard that priorities for the Sheriff's responsibilities had shifted in recent years with the main focus now being provision of court security:

The Government set priorities back in 2005 in relation to where the Sheriff's activities need to lie: with court security the priority, jury management and then enforcement. When we get to the stage of looking at the competing interests of enforcement or a court security matter, unfortunately, staff are pulled from the field to go and assist in court security matters. To give a bit of background to that, it was following 11 September 2001 when obviously there was a greater awareness or focus on security-related matters. As a result consideration was given to how to secure courts—we had nothing at that stage.²²¹

Restricted Hours of Operation

- 4.71 A number of inquiry participants considered that delays in the execution of writs were due to the restricted office hours of the Sheriff. Collection House Limited submitted that the limited hours impacted on the effectiveness of debt recovery:

... the office hours of the NSW Sheriff's Office, being 9:00am to 4:30pm Monday to Friday, mean that the effectiveness of that office is undermined since debtors who work ordinary business hours will never be at home at the times the Sheriff attends. An appropriate solution would obviously be to expand the office hours of the NSW Sheriff's Office.²²²

- 4.72 The Sheriff informed the Committee that occasionally the Sheriff's Office had offered overtime to staff to enable them to conduct enforcement activities on the weekend:

We had a blitz, for want of a better word, in the CBD area a few months ago where we had overtime for staff who went to a lot of locations over the weekend so that there was a better chance of getting people at home during the weekend than during business hours when our sheriffs operate—that is another issue.²²³

- 4.73 However, the Sheriff noted that the issue of the hours of operation was principally an award issue, and past attempts to change the pattern of working hours had not been successful:

That is an award issue. To change the hours of the sheriffs operating would be to address the award. I am happy for that review to take place but we have tried in the past and it has led to a little bit of agitation from the union.²²⁴

²²¹ Ms Tracey Hall, Evidence, 16 June 2014, p 47.

²²² Submission 19, Collection House Limited, p 5.

²²³ Ms Tracey Hall, Evidence, 16 June 2014, p 47.

²²⁴ Ms Tracey Hall, Evidence, 16 June 2014, p 49.

Information Technology

- 4.74 The ACDBA reported their members' experience of being unable to reach the Office of the Sheriff by telephone:

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.²²⁵

- 4.75 In terms of telephone calls going unanswered, the Sheriff responded that there had been a problem with the phone system in the Sydney central business district, but the system was being updated:

In relation to complaints about people not being able to get the voicemail of the Sheriff's office, in particular we have a problem with the system that is down in the Downing Centre which seems to be the biggest area of complaint. When I spoke to the officer in charge there it has some archaic telephone system that has a queue that if you have one phone, one call or something, it blocks it up. I think it takes five calls and then after that that is the end, it is blocked, and you cannot get a message through. So I have asked them to replace it so hopefully the Downing Centre should not have that problem, but that is an archaic telephone system.²²⁶

- 4.76 Another issue affecting debt recovery is the outmoded information technology system that does not provide adequate support for the Office of the Sheriff:

... we have got a legacy system that is over 20 years' old now and really does not support the needs of the operations. It does not give us any provision to get any valuable data and analysis from the reporting capabilities, there are not any. In fact, it is limping away until we can actually find some other way of operating through that.²²⁷

Committee comment

- 4.77 Delays in executing writs are the consequence of a shift in priorities of the Office of the Sheriff, with functions such as court security requiring much of the existing time and staff resources. Other factors contributing to delays include the inflexible hours that the Office of the Sheriff works. Successful execution of writs require that the debtor be home at the time the Sheriff visits, however the Committee has heard that, in the main, Sheriffs visit debtors homes during normal working hours, meaning it is highly likely that debtors will not be home when Sheriffs attend their property.

- 4.78 The Office of the Sheriff cannot function effectively without the support of sound telephone and information technology infrastructure. The existing information technology infrastructure and telephone systems are out-dated, inadequate and contribute to delays in the conduct of enforcement work.

²²⁵ Submission 15, Australian Collectors and Debt Buyers Association, p 11.

²²⁶ Ms Tracey Hall, Evidence, 16 June 2014, p 48.

²²⁷ Ms Tracey Hall, Evidence, 16 June 2014, p 50.

- 4.79 The Committee notes that the Sheriff has conceded that significant delays in the execution of writs are an issue in some offices. The Committee considers that delays in the execution of writs and other enforcement functions is a widespread problem. The Committee finds that delays in enforcement action by the Office of the Sheriff is an area of major concern in New South Wales.

Other issues in the Office of the Sheriff

- 4.80 Inquiry participants raised concerns about other areas of the Sheriff's current practices and these are examined in the following section.

Fees and access to premises

- 4.81 Under the *Civil Procedure Act 2005*, the Office of the Sheriff charges fees for the conduct of enforcement activities. The Committee heard that the current system was not fee-for-service and fees had not been reviewed for a considerable period of time:

Ms HALL: In relation to fees that would probably be something else that would need to be reviewed in the area of enforcement if the Sheriff's office is to stay in that space because I do not think the current fees have been addressed or looked at for—

Mr DODDS: We have not had a fee increase for some years other than CPI.

Ms HALL: Just the CPI. It makes it very cost inefficient for the Sheriff's office. It is not really a fee for service. We just do it and there is a cost to the Government in doing that so a fee structure that would suit the work that we are doing would be something that would need to be looked at.²²⁸

- 4.82 The Public Service Association submitted that a 2005 review of the enforcement fee structure recommended that fees be increased; however, the recommendation was not implemented. The Public Service Association submitted that a review of fees and other matters should be considered, including the recovery of levies and adjustment of costs:

A review of other matters needs to be considered. This includes:

- That the 3% levy cannot be recovered when payments are made direct to the creditor, even after a call has been made.
- Costs of removal of seized goods have not been adjusted for more than 15 years²²⁹

- 4.83 The Australian Credit Forum submitted that, in their experience, while the current fees charged by the Office of the Sheriff were low, creditors did not always get service for their payment, due to a lack of resources:

The Sheriff's Office has no resources (staff or vehicles) to have the officers attend the judgement debtors' properties at an hour that the judgement debtor would be

²²⁸ Ms Tracey Hall, Evidence, 16 June 2014, p 50.

²²⁹ Submission 18, Public Service Association of NSW, p 4.

at the premises ... at the moment you are paying a small amount but still not getting any service for the payment.²³⁰

- 4.84 Collection House Limited submitted that an increase in fees would be acceptable to creditors if the increase enabled the Office of the Sheriff to more effectively carry out enforcement work:

At present, the cost of the Sheriff executing or attempting execution of a writ for the levy of property under Part 8 of the *Civil Procedure Act 2005* is \$76.00 plus 3% of the proceeds of enforcement ... we propose that the cost of these changes be reflected in an increased fee plus an increased percentage of the proceeds of enforcement.

It is our submission that creditors would be willing to pay a higher fee and a greater percentage for the levy if the NSW Sheriff's office was adequately funded to enable it to effectively carry out its statutory obligations.²³¹

- 4.85 The current fee structure is such that when a Sheriff attends an address to attempt to execute a writ, a fee is charged to the creditor regardless of whether or not the visit is successful. If no one is home, a fee is charged by the Sheriff for a return visit. If entry is refused, the creditor must return to court to obtain a further writ, and further payment is required from the creditor. The Sheriff informed the Committee it would be beneficial for Sheriff Officers and creditors if this issue could be addressed:

When we are executing writs of levy of property and we are refused entry to a premise there is a difficulty because we do have to step away. We then have to get the creditor to go back to court to get a section 135 order for us to return to those premises. That would probably benefit if that was looked at for Sheriff's officers. Working outside business hours would benefit the creditors.²³²

Notice of intention to serve a writ

- 4.86 The current practice of the Sheriff is to notify judgment debtors by letter that they will be attending their premises to execute a writ. The Committee heard from some inquiry participants that this was prejudicial to creditors and allowed debtors to be unavailable when the Sheriff visited or to hide their assets in advance of the Sheriff's visit.

- 4.87 The ACDBA submitted that the practice of providing advance notice of the intention to execute a writ should change:

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.²³³

²³⁰ Submission 4, Australian Credit Forum, p 2.

²³¹ Submission 19, Collection House Limited, p 5.

²³² Ms Tracey Hall, Evidence, 16 June 2014, p 50.

²³³ Submission 15, Australian Collectors and Debt Buyers Association, p 11.

- 4.88 Collection House Limited submitted that the effectiveness of enforcement activities was undermined by the Sheriff sending advance notice of their intention to execute a writ, and recommended that this be reviewed:

By providing the debtor with prior warning, the debtor can then simply either fail to answer the Sheriff's expected knock at the door or deny ownership of the property within the premises upon the Sheriff's arrival. It is our submission that the requirement to send a letter to the debtor in advance of a Sheriff's visit should be reviewed.²³⁴

Committee comment

- 4.89 The Committee considers that the existing fee structure does not adequately cover the costs of conducting enforcement activities, and this is further compounding resource issues of the Office of the Sheriff. The fee structure is inflexible and allows only for a single visit by the Sheriff to the premises, irrespective of whether or not that visit was successful. The Committee notes that a number of stakeholders indicated that creditors would be satisfied with a fee increase if higher fees reduced delays in the execution of writs and a more flexible approach was established, with features such as multiple visits to a property.
- 4.90 The Committee notes the submissions of creditors who found that the current practice of the Office of the Sheriff of notifying judgment debtors by letter that they will be attending their premises to execute a writ could be a barrier to creditors receiving money owed to them. The Committee also notes that fees have not been reviewed for some time.
- 4.91 The Committee will consider further proposals for change, including outsourcing of debt recovery work to private bailiffs in the following section of this chapter. However, irrespective of where the debt recovery function eventually resides, the Committee considers that it is timely that a review of fees and a review of enforcement activity methods takes place. The Committee considers that the Audit Office is the most appropriate agency to conduct a review of enforcement activities.

RECOMMENDATION 12

The Committee recommends a review of the enforcement fee structure, with a view to improving enforcement activities.

RECOMMENDATION 13

Particularly in light of the Committee's view that delays in enforcement action by the Office of the Sheriff is an area of concern, the Committee recommends that the Auditor General conduct a performance audit of the enforcement functions of the Office of the Sheriff.

²³⁴ Submission 19, Collection House Limited, p 5.

Outsourcing

- 4.92 One solution proposed to address the issues facing the Office of the Sheriff was to outsource debt recovery functions to private contractors. The Committee examines this proposal in this section.

Previous reviews

- 4.93 The issue of outsourcing is not a new idea and has been considered in previous reviews. The Better Regulation Office review of the debt recovery process recommended that the Department of Attorney General and Justice (now the Department of Justice) review the costs and benefits of private bailiffs undertaking debt enforcement activities in relation to writs for the levy of property.²³⁵

- 4.94 In response to the Better Regulation Office review, discussions have taken place between the Office of the Sheriff and mercantile and commercial agents regarding the viability of outsourcing enforcement work:

In 2011 there were some discussions with the Sheriff's office and the mercantile and commercial agents industry about testing the appetite of whether they were prepared to take on enforcement functions. So those inquiries have been made with that industry. There was varied responsiveness to that. Obviously because of the nature of the work they were very interested in taking on the property seizure orders, which is the easy work to do; they were not so happy to take on evictions and the not-so-nice work, and probably the process that was easier to get the best value for money. Unfortunately, some of the work the Sheriff's office does is not the nicest sort of work. Those discussions met with varying degrees of responsiveness.²³⁶

- 4.95 The duplication of debt recovery functions of the Office of the Sheriff and the OSR was examined as part of an Office of Finance review in 2012. The Sheriff informed the Committee that the review considered the transition of all debt recovery activity, for both government and private debt, from the Office of the Sheriff to the OSR:

Then there was the Office of Finance Review in 2012. Those findings were along the lines of whole-of-government debt recovery with a centre of excellence to provide a superior service to the New South Wales public and not to replicate debt enforcement activities. In that space we have a debt enforcement process and so does OSR. That is a real duplication of that work and, as a result, in 2012 we started discussions with OSR. That was in keeping with the Government's principle of priority of security over enforcement. So we had those discussions with OSR and it was for them to take on all of the enforcement work for the Sheriff's office.

The function of executing the specific enforcement functions is quite remarkably complex and logistically demanding. We have been discussing with OSR for quite some time. We have developed a joint business case to go to Treasury to support the transition of enforcement work from the Office of the Sheriff NSW to the Office of State Revenue. We are expecting that business case to go to Treasury by

²³⁵ Submission 33, Department of Justice, Annexure A, p 44.

²³⁶ Ms Tracey Hall, Evidence, 16 June 2014, p 47.

September this year, which will have a whole-of-government approach to debt recovery—not just State Debt Recovery but civil debt recovery as well.²³⁷

State Debt Recovery Office

- 4.96 The SDRO is the fines division of the OSR, responsible for the receipt and processing of fines issued by various government agencies and authorities, and administering the fine enforcement system for the collection of unpaid fines.
- 4.97 The SDRO currently outsources some of their debt recovery work to the Office of the Sheriff and private agents. Property seizure orders are given to the Office of the Sheriff for enforcement and private debt collectors are used to find debtors who have gone ‘missing’.

We use private sector debt collectors for tracking down people that we have been unable to find; they are the people who go missing.²³⁸

- 4.98 The Committee examines the existing role of the SDRO in greater detail in Chapter Six.

Other jurisdictions

- 4.99 In Western Australia, the Sheriff is responsible for the appointment of private bailiffs who conduct enforcement activities on the Sheriff’s behalf.²³⁹ In the north of the state there are a number of individual private bailiffs; while in the southern region, BayCorp Australia has a contract to act as the bailiff, with BayCorp employees working as assistant bailiffs.²⁴⁰ Private bailiffs recover both private debt and government debt in Western Australia.

- 4.100 The Committee heard that the West Australian model appears to be working well:

Western Australia outsourced the Sheriff’s function about four and a half years ago. A public company by the name of BayCorp Australia Pty Limited is the licensee that has that function in Western Australia and they collect not only the enforcement of debts over there but they also collect all the State’s fines and penalties in that jurisdiction and my understanding is that their first period of contract is coming up for renewal—I think it was a five-year contract—and it certainly seems to be working, from all reports.²⁴¹

- 4.101 In Queensland, private bailiffs are appointed by the courts to enforce court orders, including judgements in relation to debt recovery. In addition to court work, private bailiffs may conduct their own private work. Each court district employs their own bailiffs.²⁴²

²³⁷ Ms Tracey Hall, Evidence, 16 June 2014, p 48.

²³⁸ Mr Ian Phillips, Evidence, 16 June 2014, p 64.

²³⁹ WA Department of Attorney General and Justice, <www.courts.dotag.wa.gov.au/S/sheriff_s_office.aspx>, viewed 22 September 2014.

²⁴⁰ BayCorp Australia, <www.baycorp.com.au/Clients/WACivilandFinesEnforcement.aspx>, viewed 22 September 2014.

²⁴¹ Mr Alan Harries, CEO Australian Collectors and Debt Buyers Association; Executive Director, Institute of Mercantile Agents, Transcript of evidence, 16 June 2014, p 24.

²⁴² s41 *District Court of Queensland Act 1967*.

Inquiry participants' views on outsourcing

4.102 The ACDBA suggested that the execution of Writs be outsourced to private contractors, as occurs in other states of Australia. Their submission considered that outsourcing would reduce pressure on the Sheriff's office by making use of established commercial agent networks:

In other jurisdictions including Queensland, Western Australia and the Northern Territory the work of enforcing judgements 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 tending to similar responsibilities such as the service of court process and repossession of goods and chattels.²⁴³

4.103 Speaking at the public hearing, Mr Alan Harries commented that outsourcing could solve the issue of the restricted hours worked by staff at the Office of the Sheriff:

I can understand why sheriffs would want to go out to do some of that work because it is confronting work. That does create logjams. If you are only working eight till five, we all understand no-one is at home. So we have to do something around that and our view is that outsourcing to private enterprise will open the doors to get coverage outside those hours because commercial agents do that now. They go out and they serve process and they repossess cars and equipment at all hours and they do it responsibly.²⁴⁴

4.104 However, the FRLC was opposed to outsourcing, noting that Sheriffs had certain professional obligations to act appropriately and no commercial incentives, whereas commercial agents would have a commercial incentive and therefore be at risk of inappropriate actions or behaviour in order to deliver returns:

Firstly, the role that the sheriff is exercising is one where they go into a person's home to look inside the home to see if there are any items that can be sold off. So that is very intimidating for consumers but the sheriff as an officer of the court has professional obligations to act appropriately. Also, there is no other kind of incentive that a commercial debt collector would have to make sure that they have to provide a return. They are more objective; they are independent in that sense. We believe that that provides better protection for consumers. That kind of enforcement action is the role of the court, so we see it as appropriate that an officer of the court being a sheriff is the one to exercise that function. We also have concerns about the culture generally of debt collectors because there is that commercial incentive to get as big a return as possible. So we have concerns about how appropriately they will act and also in terms of actually monitoring whether or not the appropriate standards are being met, because if you are talking about a person inside a consumer's home, how can you monitor that what is happening in that context is appropriate?²⁴⁵

²⁴³ Submission 15, Australian Collectors and Debt Buyers Association, p 13.

²⁴⁴ Mr Allan Harries, Evidence, 16 June 2014, p 27.

²⁴⁵ Ms Alice Lin, Evidence, 16 June 2014, p 35.

- 4.105 The Public Service Association of NSW did not believe that the Sheriff's enforcement functions should be outsourced; their submission highlighted difficulties that other jurisdictions such as the United Kingdom had experienced:

Experience in other jurisdictions where debt collection has been out-sourced to the private sector has proved ineffective and highly problematic. These examples highlight the fact that debt collection should remain a public service provided by certified law enforcement officers. Sheriff Officers exercise their duties as agents of the court, acting in the public interest. By contrast private debt collecting agents work on behalf of the creditor.²⁴⁶

- 4.106 Mr Mark Vine, Solicitor and Director of Australian Creditors Alliance was concerned that outsourcing could create difficulties in terms of control:

One of the problems with outsourcing is control. If you have a sheriff, you have control. He is a public servant and the Government theoretically has control over what goes on—disciplinary control, et cetera. Many years ago, in the 1960s, we had private sheriffs in remote areas of New South Wales. The local fire station manager or something would also be the sheriff and, once in a blue moon, he would go out to Lightning Ridge and execute a writ or do whatever he had to do. They were abolished over time ... If you privatise—and I do not have any strong feelings one way or the other—the problem is how do you control private organisations that are a few steps away from Government?²⁴⁷

Committee comment

- 4.107 The Committee notes that previous reviews have examined whether outsourcing the debt recovery function of the Office of the Sheriff is appropriate for New South Wales, and have recommended that outsourcing be considered. Debt recovery is currently undertaken by both the Office of the Sheriff and the OSR; the Committee is convinced that such duplication is unnecessary and supports the development of a whole of government approach.
- 4.108 Outsourcing of some debt recovery work already takes place in New South Wales, with the OSR outsourcing their more difficult debt recovery activity – that of tracking down missing debtors. The Committee did not receive any evidence in this inquiry to suggest that the execution of this debt recovery work by private contractors has been problematic. Additionally, outsourcing of debt recovery activity has been in place for many years in other jurisdictions around Australia, including Western Australia and Queensland.
- 4.109 The Committee considers that concerns raised by inquiry participants in relation to the ethics of, and control over, private contractors would be mitigated with an appropriate oversight framework. A suitable oversight framework would take into account factors such as: a Government agency having responsibility to ensure that suitably qualified candidates pass criminal background checks; providing the public with easily accessible avenues for complaint about private contractor activity; ensuring that a Government agency be responsible for responding to complaints in a timely manner.

²⁴⁶ Submission 18, Public Service Association of NSW, p 5.

²⁴⁷ Mr Mark Vine, Evidence, 16 June 2014, p 4.

- 4.110 Outsourcing of debt recovery work would address the major issues of delays in the execution of writs due to restricted hours of operation, competing priorities and outmoded information technology infrastructure, and have the added advantage of allowing the Office of the Sheriff to focus on core duties such as court security and jury management. The Committee considers that the Western Australian model of outsourcing would be an appropriate model for New South Wales to follow.

RECOMMENDATION 14

The Committee recommends the Government and any performance audit strongly consider outsourcing the enforcement functions of the Office of the Sheriff.

- 4.111 The Committee further considers that the Government and any performance audit should consider whether the level of resourcing for the enforcement functions of the Office of the Sheriff is adequate, as some inquiry participants have indicated that current resourcing was insufficient to effectively conduct enforcement functions.²⁴⁸

RECOMMENDATION 15

The Committee recommends that the Government and any performance audit also considers whether the level of resources for the enforcement functions of the Office of the Sheriff are adequate for the job required.

²⁴⁸ See, for example, Submission 4 and Submission 18.

Chapter Five – Privacy and locating debtors

- 5.1 This chapter addresses the difficulties that creditors and debt collectors face in attempting to locate alleged debtors, as well as considering the need to balance creditors' rights with debtors' rights to privacy. The chapter explores the concerns raised by the industry about locating debtors and examines existing privacy legislation and principles, which guide government agency decisions about disclosing personal information and impact on the ability to find missing debtors. The chapter then outlines a number of reforms proposed by inquiry participants, as well as reviewing criticisms directed at such reforms by other stakeholders. The chapter also considers the level of access to information which is accorded to the Office of State Revenue (OSR) when collecting fines and taxes.

DIFFICULTY IN LOCATING DEBTORS

- 5.2 One of the key issues raised repeatedly throughout this inquiry has been the difficulties that creditors face when locating debtors and how attempts to locate debtors are affected by privacy regulations. Numerous inquiry participants highlighted the problems that creditors and debt collectors encounter when attempting to locate alleged debtors in order to recover debts.
- 5.3 The Australian Collectors and Debt Buyers Association (ACDBA) explained the importance of being able to locate debtors in the debt recovery process, writing that 'the location of debtors is an essential element for all debt recovery processes'. The ACDBA noted that if a debtor cannot be found then a creditor cannot recover monies owing for goods and services.²⁴⁹
- 5.4 Difficulty in locating debtors was highlighted as one of the key barriers to the debt recovery process, with some stakeholders claiming it was the number one obstacle when attempting to collect debts. The Australian Institute of Private Detectives (AIPD), for example, noted this and claimed that federal and state privacy legislation make it virtually impossible to locate debtors:

The main reason that it is difficult to collect debts is because amongst other things it is virtually impossible to locate a debtor because both the Federal and state Privacy Acts prohibit the locating of a debtor or a witness.²⁵⁰

- 5.5 Mr John Bracey, President of the AIPD, also stressed the extent of this issue during his appearing at a public hearing on 16 June 2014:

A lot of our members are involved in the debt collection industry and I am getting calls the whole time. They can't find witnesses and they can't find the debtors. They can't find the people if they want to repossess a motor vehicle because they have moved. It is a massive, massive problem.²⁵¹

²⁴⁹ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 4.

²⁵⁰ Submission 10, Australian Institute of Private Detectives, p 3.

²⁵¹ Mr John Bracey, President, Australian Institute of Private Detectives, Transcript of evidence, 16 June 2014, p 14.

5.6 The prevalence of such concerns about locating debtors was also highlighted by the Department of Justice who provided the Committee with a copy of the Department's 2013 report on their *Review of the Debt Recovery Process*. The report noted that 34 per cent of the complaints received by the Department in 2010, in relation to debt recovery matters, had identified problems when a debtor could not be located and privacy protections prevented creditors from obtaining information regarding a debtor's whereabouts. The report also noted that an individual creditor had no means of finding out the extent of debts that a particular debtor owes to other parties.²⁵²

5.7 Mr Barry Sweet of Pacific Credit Services provided the Committee with an example of the type of problems that commercial agents can come up against when trying to locate debtors:

My biggest difficulty is trying to locate people who owe money. For example, I have a significant number of schools for which I do collection.

In ... a prominent member of the ... society disappeared owing a school \$30,000-odd. The statement of claim was out for service and had \$444 fees for the court attached to it plus the commercial agents fee of \$60.50 which is equal to the Sheriff's fee which we are allowed to charge. However, on calling at the place it was up for lease. This prominent member of ... society, in fact, was renting. He had no finance of any significance and he had disappeared. He was a prominent cycle rider and normally it would be ideal if a commercial agent had the ability to make inquiries that might help to locate that person. As it was I made inquiries with just about every cycling club in New South Wales to try to see whether he had joined another club. In fact, he had joined a cycling club at ... but that is as far as it went because under the Federal Privacy Act they are not required to talk to anybody. In fact, they use that as an excuse not to talk to anybody so there is an amount of revenue that a school has lost.

That is not the only one, of course, but the common finding in the industry is if both debtors and genuine hardship debtors move their address it is difficult to locate them and collect the money.²⁵³

5.8 Mr Alan Harries of the ACDBA and the Institute of Mercantile Agents (IMA) similarly explained that the biggest issue for creditors who sell debt on to debt buyers is that they cannot locate the debtors. He further reported that debt buyers often struggle to locate a significant proportion of debtors due to privacy regulations, revealing that almost a third of such debt remains unpaid:

...typically when they buy a batch of debts, 30 to 35 per cent of the debtors can never be located due to being lost in the privacy world—hidden from any record keeping at all that is accessible to commercial agents.²⁵⁴

5.9 Mr Harries argued that privacy regulations should not provide people with an excuse or opportunity to avoid repaying debts:

²⁵² Submission 33, Department of Justice, p 20.

²⁵³ Mr Barry Sweet, Pacific Credit Services, Transcript of evidence, 16 June 2014, p 15.

²⁵⁴ Mr Alan Harries, Chief Executive Officer, Australian Collectors and Debt Buyers Association; Executive Director, Institute of Mercantile Agents, Transcript of evidence, 16 June 2014, p 22.

At the end of the day, I do not believe privacy is about allowing people to escape their responsibilities. When I borrow money from Westpac, RAMS or whatever, I give an undertaking that I am going to repay my debt. I do not do that knowing or with an expectation that I could move house and hide behind privacy to avoid paying that debt. I think most of us who have a mortgage do expect that we are all paying our fair cop of that mortgage and that we are not paying for those who do not. Unfortunately, a consequence of privacy is that a lot of records are not available.²⁵⁵

5.10 In an attempt to describe the impact that privacy regulations have on the work of commercial agents and private investigators, Mr John Bracey of the AIPD gave the following analogy to illustrate his point, claiming that that privacy legislation had effectively taken away their ‘tools of the trade’:

If you called in a carpenter to put up some shelves or cupboards in a kitchen he would say ‘Yes, I can do that. It will cost you \$900.’ ‘Oh, that’s great. When can you start?’ ‘Monday.’ ‘Yes, that’s fine but, by the way, you can’t use a hammer, nail, screw or saw.’ He says, ‘How the hell can you expect me to do the job when you take the tools of my trade away from me?’ What has happened is the tools of the trade of a commercial agent and a private investigator have been taken away from them. They cannot find a witness, they cannot find a debtor...²⁵⁶

5.11 The submission from the AIPD referred to the same analogy and wrote that: ‘If you take the tools of trade away from a private investigator or a commercial agent (as the case is presently), then they simply cannot conduct their occupation properly’.²⁵⁷

EXISTING PRIVACY LEGISLATION AND ACCESS TO INFORMATION

5.12 The relevant NSW legislation governing privacy and the protection of personal information are the *Privacy and Personal Information Protection Act 2002* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act).

5.13 The PPIP Act regulates the way in which NSW public sector agencies manage personal information. The HRIP Act governs the way that the health sector (including both public and private health providers) manages health information.

5.14 The PPIP Act includes 12 Information Protection Principles which describe the responsibilities of NSW public sector agencies when they handle personal information. The Information Protection Principles detail how personal information must be collected, stored, used and disclosed as well as an individual’s rights to access their own personal information. The following table provides an overview of the Information Protection Principles, explaining the obligations that agencies have in relation to personal information.

Table 5: Information Protection Principles.²⁵⁸

| Principle | Agencies Must: |
|-------------------|----------------|
| <i>Collection</i> | |

²⁵⁵ Mr Alan Harries, Evidence, 16 June 2014, p 25.

²⁵⁶ Mr John Bracey, Evidence, 16 June 2014, pp 15-16.

²⁵⁷ Submission 10b, Australian Institute of Private Detectives, p 4.

²⁵⁸ Information and Privacy Commission, <www.ipc.nsw.gov.au/ppip-act>, viewed 27 August 2014.

| | |
|----------------------------|--|
| 1. Lawful | Only collect your personal information for a lawful purpose. It must be needed for the agency's activities. |
| 2. Direct | Collect the information from only you, unless exemptions apply. |
| 3. Open | Tell you that the information is being collected, why and who will be using it and storing it. You must be told how to access it and make sure it's correct. |
| 4. Relevant | Make sure that your personal information is relevant, accurate, current and non-excessive. |
| <i>Storage</i> | |
| 5. Secure | Store your personal information securely. It should not be kept longer than needed, and disposed of properly. |
| <i>Access and Accuracy</i> | |
| 6. Transparent | Provide you with details about the personal information they are storing, reasons why they are storing it and how you can access it if you wish to make sure it's correct. |
| 7. Accessible | Allow you to access your personal information in a reasonable time frame and without being costly. |
| 8. Correct | Allow you to update, correct or amend your personal information when needed. |
| <i>Use</i> | |
| 9. Accurate | Make sure that your personal information is correct and relevant before using it. |
| 10. Limited | Only use your personal information for the reason they collected it. |
| <i>Disclosure</i> | |
| 11. Restricted | Only release your information if you consented. An agency, however, may also release your information if it's for a related reason and can be reasonably assumed that you would not object. Or your information is needed to deal with a serious and impending threat to someone's health and safety including your own. |
| 12. Safeguarded | Not disclose your sensitive information without your consent. Such information includes: health, racial, ethnic information, political, religious and philosophical beliefs, sexual orientation and activity and trade union membership. Your information may only be released without consent to deal with a serious and impending threat to someone's health and safety. |

5.15 Dr Elizabeth Coombs, the NSW Privacy Commissioner, explained that the objective of the NSW privacy regime is 'to give citizens confidence that NSW public sector agencies manage their personal information appropriately in all circumstances.'²⁵⁹

5.16 The Commissioner also noted that the NSW privacy regime does not regulate entities beyond NSW public sector agencies. Commercial and non-government sector organisations are not covered by the PPIP Act and privacy implications of personal information and debt recovery in a private context is a Federal issue.²⁶⁰

²⁵⁹ Submission 31, NSW Privacy Commissioner, p 2.

²⁶⁰ Submission 31, NSW Privacy Commissioner, p 2.

5.17 During the public hearing, Dr Coombs explained how NSW privacy legislation relates to debt recovery, noting that some creditors or debt collectors wish to make use of personal information held by public sector agencies to assist them in locating debtors. She also further explained the distinction between state and federal privacy regimes, noting that many medium and large commercial organisations are covered by federal privacy legislation:

...it comes down to the location of debtors, and that is where it is felt that a government agency which holds information which may assist in the identification of the location of a debtor could be accessed by private commercial collection agencies. That is an interesting point. Those private collection bodies would not be covered by New South Wales privacy legislation but the public sector bodies that hold that personal information will be. The Federal privacy legislation applies to businesses over the size of \$3 million turnover per annum, so quite a number of them would be caught there.²⁶¹

5.18 One of the key NSW privacy principles that impacts on debt recovery is the limit on the use and disclosure of personal information. Dr Coombs explained that the provisions of the PPIP Act require that agencies should use information for the purpose it was provided, and referred to recent research which demonstrated widespread support for such a principle:

In terms of New South Wales privacy legislation, one of the principles is very much concerned—and this is section 17 of the Privacy and Personal Information Protection Act—that information should be used for the collection for which it was provided. That is a provision. There is also community expectation that when they provide information for a particular purpose, that it will not be used for a purpose other than for which it was provided. I think it is something like 95 per cent of Australians think that it would be a misuse of their personal information if information that they gave for one purpose, was used for another. That is from the research report of October 2013...²⁶²

5.19 The Privacy Commissioner advised that under the existing legislation government agencies, such as Roads and Maritime Services (RMS), must not use information for purposes other than that for which it was collected, and that disclosing information to debt collectors would contravene the privacy principles:

Generally, as it relates to debt recovery, unless personal information was collected for the purposes of debt recovery by a NSW public sector agency, it would be unlawful for that agency to use or disclose that information for the purposes of recovering a debt. This would be in breach of the IPPs which require personal information that is used or disclosed by a NSW public sector agency to be directly related to the purpose for which the information was collected.²⁶³

5.20 There are, however, some exemptions to the privacy principles which are permitted under the current legislation. One of the exemptions noted by the

²⁶¹ Dr Elizabeth Coombs, NSW Privacy Commissioner, Information and Privacy Commission NSW, Transcript of evidence, 16 June 2014, p 40.

²⁶² Dr Elizabeth Coombs, Evidence, 16 June 2014, p 40. The research report referred to is: Office of the Australian Information Commissioner, 2013, *Community Attitudes to Privacy survey, Research Report 2013*.

²⁶³ Submission 31, NSW Privacy Commissioner, p 2.

Privacy Commissioner was that that personal information may be used to protect public revenue and to collect taxes and fines:

... in collecting personal information the underlying assumption is that personal information may be used to recover government taxes or fines. This is recognised in the NSW privacy regime as the disclosure of personal information for the purposes of protecting public revenue is permissible in spite of the general limitation on NSW public sector agencies to use and/or disclose personal information for purposes other than for which it was collected.²⁶⁴

- 5.21 The above exemption is outlined in section 23 (4) of the PPIP Act. In her evidence to the Committee, Dr Coombs explained that there is also scope within the PPIP Act for the Privacy Commissioner to exempt agencies from complying with privacy principles in certain circumstances, when the Commissioner considers that it is in the public interest to do so:

Underneath the PPIP Act there is what we call public interest directions. That is section 41 of the Act whereby the Privacy Commissioner can develop a public interest direction which weighs up the public interest and can modify the application of an information protection principle and we do have a number of those. There is one, for example, that enables the Department of Police and Justice [now known as Department of Justice] to provide personal information to credit reporting agencies so that information can be provided and therefore is not a breach of the PPIP Act. There are also codes of practice which can be developed, and that is another tool. In some cases the Privacy Commissioner has the role to make the section 41 public interest direction after consultation, and most certainly with the Attorney General, and in the case of codes of practice the Attorney General would make that after consultation with the Privacy Commissioner.²⁶⁵

Access to information held by government agencies

- 5.22 The Committee was advised that in the past it was much easier to access personal information that was held by government agencies. For example, Mr Alan Harries of the ACDBA and IMA noted that electoral rolls used to be a standard tool used by debt collectors to locate people, but that was no longer the case due to privacy:

Previously, electoral rolls used to be stock in trade. You just go out and buy a copy of the rolls and you would have it in your office and you would work through the local roll. When the new election came in you would race down to the Electoral Office with a whole list of names to see where they have moved to, to see if you could jag the debtor to find where they have gone. Nowadays those rolls are not available and the Electoral Commissioner has taken the view that people could only look at their own records and correct their own record.²⁶⁶

- 5.23 Mr Mark Vine of the Australian Creditors Alliance made similar comments at the hearing in June:

The other problem is the privacy laws. The privacy laws have created a situation where you just cannot find anybody anymore. You used to be able to go to the

²⁶⁴ Submission 31, NSW Privacy Commissioner, p 2.

²⁶⁵ Dr Elizabeth Coombs, Evidence, 16 June 2014, p 41.

²⁶⁶ Mr Alan Harries, Evidence, 16 June 2014, p 25.

Electoral Office. When I was in chamber people would come in and say, 'Someone owes me some money. I've got a court judgement; how do I find this guy, he's done a runner?' You would simply say, 'Go up to the Electoral Office and check the electoral roll. Just keep checking until he shows up'. The electoral legislation basically has already said you are not allowed to do that, but they have never enforced it until the last 18 months. Now if you go to the Electoral Office, in most electoral offices they will tell you that you are only allowed to look at your own entry and nobody else's, and if you take a court file with you and say, 'I'm trying to find Mr Schdelze', they will say, 'You are not allowed to look for Mr Schdelze's name'. The penalty is \$110,000 for looking at somebody's address for a commercial purpose.

So ordinary members of the public—and they are a lot of our members—are forced into the hands of commercial organisations who want money to go searching for people. In the old days you could go to the courthouse and issue a statement of claim over the counter and there were reasonable chances of finding people. The ability to find people today is getting worse and worse. I have read every submission that has been put before the Committee today. I support most of them but the fixation about privacy, allowing privacy to interfere with the administration of justice I find unconscionable.

- 5.24 The evidence of the Privacy Commissioner, Dr Elizabeth Coombs, concurred with Mr Harries' and Mr Vines' assessment that information was more easily available in previous years, but questioned the legitimacy of such access to personal information in the past. She noted that it was only in recent years that the Government had begun to consider the purpose for which information was collected and to ensure that personal information was only used or disclosed for the purpose it was originally collected. Dr Coombs stated that in the past:

...people were able to access personal information, and it has only been in recent years that we are now looking to the purpose for which information was collected... So if they were getting access to information earlier you would have to query the basis on which that was being collected.²⁶⁷

- 5.25 In relation to accessing personal information held on electoral rolls, the Privacy Commissioner provided the following response when asked about a proposal to release identifying information on electoral rolls to debt collectors:

The Electoral Commission is subject to the Information Protection Principles of the NSW privacy regime. A public sector agency that holds personal information must not disclose the information to a person or other body unless the disclosure was directly related to the purpose for which the information was collected (s18 of the PPIP Act).

Moreover, an electoral roll is a public register within the meaning of the PPIP Act. Section 57 of PPIPA provides that, 'the public sector agency responsible for keeping a public register must not disclose any personal information kept in the register unless the agency is satisfied that it is to be used for a purpose relating to the purpose of the register or the Act under which the register is kept'.

I understand that under section 41 of the Parliamentary Electorates and Elections Act 1912 requests can be made to the Electoral Commissioner seeking access to the electoral roll information. The Electoral Commissioner must identify the public

²⁶⁷ Dr Elizabeth Coombs, Evidence, 16 June 2014, p 40.

interest in providing the information or make a finding whether or not the public interest in providing information outweighs the public interest in protecting the privacy of personal information in the context of the request.

The NSW State Electoral Commission's policy on 'Disclosure of Enrolment, Electoral and Election Information' (available on the Electoral Commission's website) sets out its approach and the public interests at the core of accessing the electoral roll for purposes other than electoral matters.

The Electoral Commissioner's position as outlined in this policy, reflects a view stated as a custodian of personal information. The Electoral Commissioner's responsibilities to protect the privacy of personal information receive specific attention in this piece of legislation due to the nature and quantum of the personal information contained on the electoral roll. NSW electors have a right to expect that the disclosure and use of their personal information is restricted according to the legislation. I recommend further consultation with the Electoral Commissioner on this issue.²⁶⁸

5.26 As noted above, the Electoral Commission's policy on disclosing enrolment information is outlined in '*Disclosure of Enrolment, Electoral and Election Information*'. This policy states that enrolment information cannot be disclosed unless there is a public interest supporting the disclosure. The public interest test is described below:

The NSWEC is not permitted to disclose enrolment information to other persons or organisations (for purposes unrelated to electoral administration or the democratic process) unless the public interest in disclosure outweighs the public interest in protecting the privacy of personal information.

In making this assessment, the Electoral Commissioner must ensure that he exercises his functions so as to promote the objects of the PEEA and to observe the information protection principles under PPIPA as supplemented by Codes of Practice and Directions.

The result of this regime is that disclosure of enrolment information to third parties for other than electoral purposes is very limited and strictly controlled. The Electoral Commissioner will generally not accede to requests for enrolment information made under section 41 of the PEEA unless disclosure is for one of the following purposes:

- public health and safety;
- criminal law enforcement by authorised agencies; and
- protection of the public revenue.²⁶⁹

5.27 The policy further states that 'the Electoral Commissioner takes his responsibilities to protect the privacy of personal information very seriously and NSW electors have a right to expect that the disclosure and use of their personal information is restricted.'²⁷⁰

²⁶⁸ NSW Privacy Commissioner, Answers to Questions on Notice, 9 July 2014, p 2.

²⁶⁹ Electoral Commission NSW, 2014, *Disclosure of Enrolment, Electoral and Election Information*, p 13.

²⁷⁰ Electoral Commission NSW, 2014, *Disclosure of Enrolment, Electoral and Election Information*, p 13.

5.28 While the control of personal information held by government agencies is typically regulated by the PPIP Act, another act – the *Government Information (Public Access) Act 2009* (GIPA Act) – regulates public access to information held by government agencies. Together these two acts maintain a balance between the protection of personal information held by government agencies and the transparent release of government information.

5.29 The GIPA Act promotes the proactive release of government information in order to promote open, accountable and responsible government. The Act also governs applications for information, held by Government agencies, which has not been made public already. The GIPA Act is administered by the NSW Information Commissioner of the Information and Privacy Commission NSW.

5.30 The NSW Information Commissioner provided some detail about GIPA Act, noting that while there is a presumption in favour of releasing government information, there can be circumstances in which other factors override that presumption. The protection of individuals' privacy and rights are examples of factors that may need to be considered:

The GIPA Act encourages proactive release of government information and provides the public with the ability to access their personal information held by a government agency.

The GIPA Act recognises there are circumstances where there an agency may take into account public interest considerations against disclosure determining an application under the Act. Generally, as it relates to a GIPA Act access application, individuals' rights would be a consideration in which agencies may take into account for the purpose of determining whether there is an overriding public interest against disclosure of government information. The considerations are detailed in section 14 and Schedule 1 of the GIPA Act.²⁷¹

5.31 There are a number of public interest considerations that may override the presumption of disclosure of government information. Section 14 and Schedule 1 of the GIPA Act outline the public interest considerations against disclosure. One of the public interest considerations is the protection of an individual's personal information, as is shown in the following excerpt from Section 14 of the Act:

14 Public interest considerations against disclosure

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

(2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

(3) The Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information, for the assistance of agencies, but cannot add to the list of considerations in the Table to this section.

²⁷¹ Submission 30, NSW Information Commissioner, p 2.

(4) The Information Commissioner must consult with the Privacy Commissioner before issuing any guideline about a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to this section).

Table

...

3 Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

(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*.²⁷²

5.32 The Committee heard that applications under the GIPA Act have been used into the past to help locate debtors. One of the main sources of information that debt collectors previously made use of was Roads and Maritime Services (RMS), formerly the RTA.

5.33 The Australian Creditors Alliance reported that, for matters that are related to roads and maritime issues (such as motor vehicle accidents), applications could be made to RMS under the GIPA Act (which replaced the *Freedom of Information Act 1989*) to access licence and registration information. The Australian Creditors Alliance noted though that this procedure could not be used for debt collection that was unrelated to roads and maritime matters:

The simplest approach is that used by the NSW Roads and Maritime Service which currently has a system under the Freedom of Information laws that allows members of the public, agents and solicitors to access license and registration information by written application. The application is reviewed by a senior officer of the RMS to see that the need for the information is sufficiently connected with road and maritime issues (such as a victim seeking information in order to sue the driver of a 'hit and run' incident). Fees for this service are prescribed and, if the application is granted, the information is supplied directly to the member of the public. That member of the public can then use the information to contact the debtor directly or take the information to the Court House and issue a Statement of Claim to sue for damages arising from the car accident. The form includes a Statutory Declaration that the information is sought for and will be used only for the purposes of seeking legal redress arising from the car accident. RMS will not supply license and registration information for simple debt collecting that does not have a motoring or maritime connection. The RMS has little means of policing the use of the information once it is released.²⁷³

²⁷² *Government Information (Public Access) Act 2009*, s 14.

²⁷³ Australian Creditors Alliance, Answers to Questions on Notice, 22 July 2014, p 1.

5.34 The submission from the ACDBA suggested that applications to RMS under the GIPA Act for the name and last known address of the owner of a registered motor vehicle had been successful in the past, but a policy change in recent years led to the refusal of such applications now. The ACDBA stated that RMS no longer released personal information in response to applications made under the GIPA Act and outlined some of the reasons provided by RMS for refusing applications:

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.

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.²⁷⁴

Office of State Revenue’s access to personal information compared with private sector access

5.35 As noted by the Privacy Commissioner earlier, one of the exemptions to the information protection principles is that personal information may be disclosed if it is reasonably necessary for the protection of public revenue.

5.36 Mr Ian Phillips of the OSR also noted this exemption during his evidence to the Committee, explaining that the PPIP Act and other legislation provided for the disclosure of information to OSR for the collection of public revenue, i.e. fines and taxes:

²⁷⁴ Submission 15, Australian Collectors and Debt Buyers Association, pp 15-17.

I note that the Privacy Commission has accepted that the use of personal information in debt recovery may be justified to protect the public revenue. That is certainly built into our legislation and into the Commonwealth and the other States legislation. Both the Fines Act and the Taxation Administration Act allow information to be exchanged between fines administration and tax administration for the purposes of those particular Acts.²⁷⁵

- 5.37 The difference between the collection of civil debts and enforcement action for fines and penalties was remarked on by Ms Alice Lin of the Financial Rights Legal Centre (FRLC). Ms Lin noted that access to information by SDRO (State Debt Recovery Office, within the OSR) for the purpose of collecting fines and taxes was clearly distinct from debts related to civil actions:

I think in terms of the information being sought, with some of the submissions that the creditors or the debt collectors' representatives have made, it seems to me that what they are seeking access to would be things like electoral rolls and records from Roads and Maritime Services, which the SDRO has access to for the purposes of their enforcement action for fines and penalties. With the SDRO, they need to be distinguished on the bases that it is not a civil action whereas when you are talking private debt collectors they are pursuing a civil course of action rather than a breach of the laws.²⁷⁶

- 5.38 The Committee was informed that there are occasions when OSR makes use of private debt collectors to assist in enforcing fines, if OSR has been unable to collect the fine.²⁷⁷ However, Mr Phillips of OSR explained that under current regulations, if OSR outsources fine/tax recovery, then any personal information that OSR may have received from Roads and Maritime Services or other government agencies cannot be used by the private debt collectors for any other purposes, such as their other debt collection activities.²⁷⁸

- 5.39 Mr Phillips also responded to questions of how OSR would deal with the privacy implications of the distinction between enforcement of private debt and the collection of fines and taxes, if OSR were to become responsible for the civil enforcement functions currently carried out by the Sheriff's Office. Mr Phillips compared the privacy issues of that potential scenario to legislation that was currently under consideration which would transfer responsibility for collecting NSW Ambulance Service debt to OSR. He noted that the legislation being considered included limitations on how information related to the collection of ambulance fees could be used, explaining that it could not be used by OSR for collecting fines or taxes:

...the Committee may know that there is some legislation before the Parliament for OSR to start taking responsibility for collecting ambulance debts. The privacy issues there were addressed by limiting the use to which information we obtained in collecting ambulance debt could be used. So it prevents it being used for tax administration or fines administration. That sort of control or rule can be imposed

²⁷⁵ Mr Ian Phillips, Principal Advisor, Technical and Advisory Services, Office of State Revenue, Transcript of evidence, 16 June 2014, p 66.

²⁷⁶ Ms Alice Lin, Solicitor, Financial Rights Legal Centre, Transcript of evidence, 16 June 2014, p 32.

²⁷⁷ Mr Ian Phillips, Evidence, 16 June 2014, p 64.

²⁷⁸ Mr Ian Phillips, Evidence, 16 June 2014, p 67.

on any new function we take over. We developed the legislation in consultation with the Privacy Commissioner and the Commissioner was happy with the outcome.²⁷⁹

Committee comment

- 5.40 The Committee acknowledges the difficulties faced by creditors and debt collectors when attempting to locate debtors, in situations where a debtor has absconded or simply when the creditor/collector does not know the address of a debtor.
- 5.41 It is clear to the Committee that some methods which were previously used to assist in identifying and locating debtors, such as seeking information from Roads and Maritime Services (RMS), the Electoral Commission or other government agencies, are no longer available due to privacy legislation which restricts the disclosure of personal information.
- 5.42 The Committee notes that the OSR has a special exemption from the abovementioned privacy restrictions, which allows it to make use of information held by RMS and other agencies when collecting fines and taxes. However, it is the Committee's view that there is a clear distinction between the collection of fines and taxes (which fall under the protection of public revenue) and the collection of debts arising from civil disputes.
- 5.43 The following part of this chapter will outline some of the reforms proposed by inquiry participants to assist creditors in their attempts to locate debtors.

PROPOSED REFORMS TO ASSIST LOCATING DEBTORS

- 5.44 A number of stakeholders proposed reforms to assist creditors and debt collectors in locating missing debtors. Some of these proposals are outlined in further detail below, including suggested changes to court discovery procedures, the introduction of information brokers with access to government information, and exempting commercial agents and private investigators from privacy legislation.

Court discovery procedure

- 5.45 The Australian Creditors Alliance (ACA) recommended making changes to court procedures to expand the scope of the existing preliminary discovery process. The ACA noted that preliminary discovery provided a mechanism for courts to order the disclosure of a defendant's whereabouts, but that it was only available at the beginning of a case and it was unavailable in the Small Claims Division. The ACA proposed that the court's discovery procedures should be available at any time in a court case and in any jurisdiction:

The single largest problem with enforcement is finding absconding debtors. You obtain judgment, issue a Writ and the sheriff reports back that the debtor has left his address and no one seems to know where he has gone. Privacy laws prevent organizations from volunteering that type of information but they allow that it may be volunteered to a Court. Few organizations will volunteer such information. They all say that they need a Court order before they will supply. The problem is that

²⁷⁹ Mr Ian Phillips, Evidence, 16 June 2014, p 66.

there is no simple, cheap way of obtaining such an order and most people agree that the supply of that type of information needs to be supervised by the Court. The 2005 reforms created a new extended procedure for Preliminary Discovery in which application can be made to the Court for an order to be made to any person to disclose the whereabouts of a defendant so that a Statement of Claim may then be served upon them. The problem is that this procedure only applies to the commencement of actions and only in relation to claims over \$10,000. Around half of all claims in NSW are under \$10,000. It also does not apply to attempts to find absconded debtors after judgment. This is very strange. At the commencement of an action a defendant may ultimately be found to be 'innocent' of owing a debt yet their privacy is readily voided by this procedure. After judgment the defendant has been found 'guilty' of owing the debt yet their privacy is then protected!!!!

...

SOLUTION: Change the rules to allow an order for Discovery as to a party's whereabouts to be made at any time in all jurisdictions.²⁸⁰

5.46 The ACA explained the current procedures for preliminary discovery in court:

Under the Uniform Civil Procedure Rules, 2005, a process for Preliminary Discovery already exists for debt recovery claims over \$10,000. This involves a creditor filing a Notice of Motion with a Court seeking an order that specific information be supplied by a specific person or organisation in order to be able to issue and serve a Statement of Claim. The Notice of Motion requires a supporting affidavit setting out what information is sought, from whom and for what purpose. The Court polices the process and decides if the information sought is sufficiently focused and relevant to the cause of action that the creditor is seeking to commence. The creditor may obtain that information and use it to negotiate a settlement without substantive legal action needing to be commenced. The problem is that it does not extend to the enormous number of Small Claims matters under \$10,000 which make up just over half of all matters.²⁸¹

5.47 The ACA also outlined details of its proposal for a discovery procedure that would extend to the Small Claims Division of the Local Court, as well as other courts, and which would allow discovery to occur any time before, during, or after a matter was before the court. The ACA argued that their proposal would be the best method to assist locating debtors while maintaining a level of supervision over the process:

My view is that having the information supplied to a Court is the best process. An application could be made at any time under a relatively simple and cheap Notice of Motion for Discovery. The fee for a Notice of Motion is currently \$78.00 (\$156.00 for a corporation). There is currently no fee in the Small Claims Division. Such a procedure means that it would be closely supervised by the Registrar at a reasonable cost. It could be dealt with in chamber or, perhaps, listed before the Registrar with commercial agents given the right to appear just as they now do with an Examination Order. It would allow solicitors and self-representing persons to engage as well. The Notice of Motion would require a simple affidavit setting out basic facts and relating the information sought and the agency from which it is sought to the legal action that is under way or being contemplated. It would contain a standard

²⁸⁰ Submission 26, Australian Creditors Alliance, p 3.

²⁸¹ Australian Creditors Alliance, Answers to Questions on Notice, 22 July 2014, p 2.

undertaking not to use the information for other purposes. Abuses might therefore be less likely to take place and nefarious persons are likely to keep away from a Court. The procedure would most often be associated with an existing Court action and the fees and costs could readily form part of the judgment just as the costs of enforcement actions do at the moment. There would be one file in one place with one agency containing all the information, thereby making review of the process much easier. The Court would see the information that came in and would see how it was used.²⁸²

- 5.48 Marrickville Legal Centre was another stakeholder that highlighted concerns over locating debtors, especially for small claims, and made a similar recommendation to the one put forward by the ACA to introduce a low cost discovery procedure in the Small Claims Division of the Local Court:

We sometimes give advice to creditors, particularly in small claims. One of the issues that often occurs is difficulty in identifying and/or locating a debtor. In the past we have advised clients to check the electoral roll to ascertain a debtor's address for service of legal process. However, the Australian Electoral Commission now takes the view that the general public may not view the Electoral Roll for purposes unrelated to electoral issues.

An alternative procedure for preliminary identity discovery is set out in rule 5.2 of the Uniform Civil Procedure Rules (NSW). However it is complex and expensive. A low cost procedure for small claims should be available in the Local Court and NSW Civil and Administrative Tribunal.

Recommendation: Introduce a low-cost procedure in the Local Court and NCAT to replace UCPR rule 5.2.²⁸³

- 5.49 The FRLC expressed concern over any proposed changes to the debt recovery system which would impact on existing privacy provisions. The Centre's objections will be outlined later in this chapter, and while the Centre had reservations about introducing such a system, it expressed a preference for using court discovery to assist locating debtors over any alternative system that would provide debt collectors with direct access to personal information held by government agencies. The FRLC's comments also restricted the scope of the proposal to the period after a judgment has been made, rather than at any time during in a court case:

In relation to post judgment matters, we acknowledge that debt collectors currently have no access to discovery mechanisms to determine a debtor's location. We prefer the expansion of the court discovery mechanisms for post judgment enforcement processes, over a more informal system of allowing debt collectors to directly access RMS or electoral records.

Again, we believe that any abrogation of privacy rights on personal information held by the government should be subject to court oversight and be limited to the purpose of enforcement through the court system. Discovery orders are traceable, being part of the court record, and use of information gained through court

²⁸² Australian Creditors Alliance, Answers to Questions on Notice, 22 July 2014, p 2.

²⁸³ Submission 5, Marrickville Legal Centre, p 4.

discovery is subject to UCPR 21.7. The courts also have a general power to impose penalties and imprisonment for contempt of court or abuse of court processes.²⁸⁴

- 5.50 As noted earlier, the difficulties encountered when debtors cannot be located was one of the issues addressed in the Department of Justice's *Review of the Debt Recovery Process*. That Review had also received submissions proposing to permit Orders for Discovery to be made at any time to ascertain the whereabouts of judgment debtors. The Review noted that introducing a discovery mechanism which allowed creditors to locate absconding debtors would increase the workload for the courts, but also claimed that it would improve the prospects of enforcing judgment debts.²⁸⁵ The Review made the following recommendation in its final report:

That, as part of its statutory review of the Civil Procedure Act 2005, DAGJ [Department of Attorney General and Justice] consider amending the Act to allow a creditor to seek an Order for Discovery to ascertain the whereabouts of a judgement debtor.²⁸⁶

- 5.51 In their submission to this inquiry, the Department of Justice advised that the current status of the above recommendation was that it was 'In progress.' The Department advised that the review of the *Civil Procedure Act 2005* was being finalised at the time their submission was made.²⁸⁷

Commercial agent access to information held by government agencies

ACDBA proposal

- 5.52 An alternative proposal to address the problem of creditors being unable to locate absconding debtors was put forward by the ACDBA. The ACDBA suggested introducing a system in which commercial agents could access personal address information held by government agencies in order to help them locate debtors.
- 5.53 Mr Alan Harries of the ACDBA explained that, under their proposed system, information brokers could act as an intermediary, receiving information from the Government and providing it to commercial agents on request in a system that could be audited to trace information requests:

You could certainly introduce a system whereby commercial agents have access to information. That could be a fully auditable system of access and indeed it could even bring income to the Government... that sort of information could be on-sold to credit bureaus or other similar information brokers who would then on-sell to a very clear client list of commercial agents providing a list and identifying for every transaction as to the reason why information was gathered, what was released and at any time having an audit trail as to who got that information, and I can tell you that commercial agents and their clients would pay a commercial fee to get that information because they cannot commence on any recovery action unless they find the debtor.²⁸⁸

²⁸⁴ Financial Rights Legal Centre, *Answers to Questions on Notice*, 14 July 2014, pp 8-9.

²⁸⁵ Submission 33, Department of Justice, p 53.

²⁸⁶ Submission 33, Department of Justice, p 73.

²⁸⁷ Submission 33, Department of Justice, p 73.

²⁸⁸ Mr Alan Harries, *Evidence*, 16 June 2014, p 21.

5.54 During the hearing, the Committee questioned whether there would be appropriate controls in place and capacity to penalise people who misused such information, especially if licensing regulations were relaxed. In response, Mr Harries of the ACDBA answered that there were numerous other laws that regulated the actions of commercial agents, and suggested that while most agents would act appropriately, there would need to be mechanisms in place to ensure agents were accountable for their actions:

I can assure you that in mainstream commercial agency, if they get the opportunity to make those searches, it will be done in a proper and business-like fashion. That is not to say that, like in any other occupation, there will be others who might try to do the wrong thing, but we as an industry group would be encouraging the relevant regulator—in this case it would be, as I suggested, the credit bureaus or an information broker—would have to be responsible for who they give access to and be held accountable for that. I think there are ways around it. I am not saying it is easy, but I do not think it is insurmountable.²⁸⁹

5.55 In their answers to questions on notice, the ACDBA further outlined the controls that would be needed if their proposal was introduced:

In the event access to locator information is made available this could be facilitated through information brokers such as credit reporting bureaus (i.e. Veda, Dun & Bradstreet and Experian).

Credit bureaus only provide information to businesses who have joined their membership, thereby allowing each bureau to confirm the bona fides of the individual business and its entitlement to the range of information sought before any information is released.

All access to the credit bureaus by their members leaves an auditable electronic footprint – this is used for both compliance purposes and billing by the bureau to the customer business for each specific search enquiry.

If locator information of individuals held by a NSW Government entity was provided pursuant to a commercial agreement to the credit bureaus acting as Information Brokers their existing processes would allow for:

- Verification of the bona fides of the applicant prior to commencement of any access;
- Electronic access on a password protected basis with the applicant required to input a file reference for both billing and compliance purposes;
- In the event of any consumer complaint for the verification of who access was provided to and for what stated purpose;
- Sanctions to be imposed upon any applicant found to have made inappropriate access to specific locator information.²⁹⁰

²⁸⁹ Mr Alan Harries, Evidence, 16 June 2014, p 26.

²⁹⁰ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 4.

- 5.56 In their submission to the inquiry, the ACDBA also provided evidence of a similar system already in place in Queensland, noting that in that state access to motor vehicle records is coordinated through information brokers:

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.²⁹¹

AIPD proposal

- 5.57 The AIPD put forward a somewhat related proposal, suggesting that commercial agents and private investigators should be exempt from privacy regulations and permitted to access information held by government agencies via a system that would be administered by the AIPD.

- 5.58 In a submission to the inquiry, the AIPD argued that commercial agents and private investigators required access to personal information in order to be able to locate debtors, as well as other tasks undertaken by agents, and that they should be exempt from privacy regulations, as per the current exemption that applies to law enforcement officers:

Mercantile-Commercial Agents/Private Investigators require controlled access to so called 'confidential information' (i.e. special exclusion from the Privacy Act/s similar to law enforcement provisions) in order for them to conduct their occupations:- locate debtors, locate witnesses, locate goods to be repossessed by law, locate parties to mediate disputes and for the Court process to be available to the private sector and government, not only for debt collection but all other matters of dispute, including statutory schemes such as Worker's Compensation, CTP, Insurance claims, and also the criminal jurisdiction as presently the law prevents the locating of witnesses and potential witnesses and property. At present no one can be located in Australia for any purpose, other than by law enforcement agencies who are exempt from the Privacy Act/s.²⁹²

- 5.59 During the public hearing, Mr Bracey of the AIPD outlined in simple terms, his organisation's proposal for commercial agents to access information via the AIPD:

The solution is to give us some legislation so we can access the information. I have put it in my submission there in our draft legislation back in 1993—it is on our website—whereby the AIPD would access the information on behalf of the commercial agents. There would be a file number, a claim number on the file and they would access the information and there will be an audit trail so that if anybody was accessing it unlawfully—out of business, finished. Their licence will be taken away from them and, clunk, that was it. Their practising certificate would be removed. In that way we could do the job.²⁹³

- 5.60 The AIPD explained that the system would form part of a National Certification Scheme, under which commercial agents and private investigators would apply for certification under a scheme managed by the AIPD. Once certified, agents would have controlled access to confidential information held by government

²⁹¹ Submission 15, Australian Collectors and Debt Buyers Association, p 15.

²⁹² Submission 10a, Australian Institute of Private Detectives, p 2.

²⁹³ Mr John Bracey, Evidence, 16 June 2014, p 16.

agencies. Access to the information would be facilitated through a central portal maintained by the AIPD, which would allow for searches to be traced and audited.²⁹⁴

5.61 In their answers to questions on notice, the AIPD outlined the controls that would be in place under this system:

Every Certified Mercantile Agent/Private Investigator is issued with an Information Access Identity number and all applications for information come thru AIPD/(AFP) computer system.

Each application must be supported with the client information and purpose/s evidence before acceptance.²⁹⁵

5.62 The AIPD advised that their proposal was modelled on a proposal they had put to the federal Government some years previously, and provided the following benefits to government that would be realised if their proposal was implemented:

- The Federal Government retains complete control of the said Confidential Information.
- Confidential Information is 'controlled' by allowing the said searches to be conducted only via the Federal Police and overseen by the Commonwealth Ombudsman.
- All Private Investigation search request are to be directed through the AIPD computer then to the Federal Police computer.
- The funds for the said searches are transferred automatically by electronic transfer each month from the AIPD secured computer database to the Federal Police. Conservative estimate income to the Federal Government or Federal Police would be around \$300,000 per week; \$1,200,000 per month.²⁹⁶

Arguments against releasing personal information

5.63 While there were a number of reforms proposed by stakeholders wishing to allow creditors or debt collectors access to personal information held by Government agencies, the Committee also heard arguments against this type of reform. The following section outlines the concerns raised about the abrogation of privacy, as well as criticism of some of the particular reforms described earlier.

The right to privacy

5.64 The fundamental right to privacy was highlighted by the FRLC, who stressed the level of public concern about how governments and corporations store and use their personal information. The Centre warned that ordinary consumers do not expect their details to be released by government agencies for the purpose of civil debt recovery:

²⁹⁴ Submission 10a, Australian Institute of Private Detectives, pp 3-5.

²⁹⁵ Australian Institute of Private Detectives, Answers to Questions on Notice, 24 June 2014, p 1.

²⁹⁶ Submission 10b, Australian Institute of Private Detectives, p 14.

The fundamental starting principle should be that consumers are entitled to privacy, unless there are real and pressing reasons for abrogation of that right.

There is already public concern over the usage and security of personal information held by governments and corporations. New amendments were made to the Privacy Act in March 2014 after widespread consultation to improve consumer rights and particularly awareness of how their information is to be used and disclosed.

Consumer mistrust of providing information to government agencies can frustrate policy objectives in other areas.

An automatic right of access to electoral rolls and RMS records should not be permitted for private actions taken for a civil debt. The ordinary consumer would not and should not have to expect their personal details to be released for this purpose.²⁹⁷

- 5.65 The importance of taking privacy into account when considering reforms to the debt recovery framework was stressed repeatedly by the Privacy Commissioner in her evidence to the inquiry. The Commissioner noted that there was a public expectation that citizens would be advised on how their personal information would be accessed and used when they provide that information:

NSW Citizens would expect to be clearly advised if their information will be accessed, collected, used and retained for debt recovery purposes. This would require NSW public sector agencies to outline the type of personal information and reasons for its collection, and how that information is collected, accessed and stored. I would consider that NSW citizens would have the same expectations of private organisations handling personal information for debt recovery purposes.

Generally, for NSW public sector agencies and private organisations responsible for debt recovery, the debt recovery process and access to information can be managed appropriately in the context of the right to privacy. The Committee's inquiry and any review that will be undertaken on the debt recovery framework should ensure that the privacy of individuals that may be affected by debt recovery action is thoroughly considered.²⁹⁸

- 5.66 The Commissioner also referred to research undertaken by the Office of the Australian Information Commissioner in 2013 about community attitudes to privacy. The research, which was published in a report titled *Community Attitudes to Privacy survey, Research Report 2013*,²⁹⁹ found that providing personal information for purposes other than it was collected for was considered a misuse of information:

The Report noted universal agreement by Australians on activities that they considered a misuse of information. This was:

- (a) revealing personal information to other customers
- (b) using personal information for a purpose other than the one it was provided and;

²⁹⁷ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 3.

²⁹⁸ Submission 31, NSW Privacy Commissioner, p 2.

²⁹⁹ See Office of the Australian Information Commissioner, 2013, *Community Attitudes to Privacy survey, Research Report 2013*.

(c) the collection of personal information by an organisation that a person has not dealt with before.³⁰⁰

5.67 The Commissioner went on to say that, in the context of citizens providing personal information to the NSW Government, the research indicated that people would not expect their personal information to be provided to debt collectors, if that was not the purpose for which the information was collected. And, further, that to disclose personal information for reasons other than the purpose it was collected was a misuse of information.³⁰¹

5.68 During the public hearing the Privacy Commissioner provided a straight forward example of what she considered would be an inappropriate use of information in relation to debt collection:

If you, or myself, are providing information for a driver's licence, but then that is subsequently provided elsewhere for a purpose of checking to see whether I have a debt, I think that is not an appropriate use of the personal information that was provided.³⁰²

5.69 Other stakeholders raised the concerns about the potential for personal information to be accessed and used for the wrong reasons if privacy protections are relaxed. For example, Ms Elizabeth Morley, Principal Solicitor of the Redfern Legal Centre (RLC), suggested that there are a range of issues to be taken into account when considering amendments to privacy legislation and highlighted the potential misuse of personal information:

I think one of the fears of allowing a lapse in private protection is the misuse of that information and whether it is accessed for the wrong reasons, to find someone in domestic violence, et cetera. Those protections are in place for a number of reasons, not just to frustrate debt collectors. I think we have to take into account that we would not want to see protections weakened, certainly not for our client base.³⁰³

5.70 Ms Morley spoke further of her organisation's experience with victims of domestic violence and explained that she would not like to see any watering down of privacy protections that could allow easier exploitation of such clients:

Certainly, going back to our domestic violence clients, it is the constant concern that their ex-partner has a connection in Telstra who will leak their information, et cetera. As I said, those privacy protections are in place for a lot of reasons... looking at our domestic violence practice—we run the Sydney Women's Domestic Violence Court Assistance Scheme across Balmain, Waverley, Newtown and Downing Centre Local Courts—it is not beyond a perpetrator of a domestic violence matter to commence litigation in a civil case deliberately to get access to that kind of data and to use the court process for recovery. Again, these are extreme cases but they are real. I would be reluctant to go down that path of allowing that kind of tracking and access.³⁰⁴

³⁰⁰ Submission 31, NSW Privacy Commissioner, p 2.

³⁰¹ Submission 31, NSW Privacy Commissioner, p 2.

³⁰² Dr Elizabeth Coombs, Evidence, 16 June 2014, p 42.

³⁰³ Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 32.

³⁰⁴ Ms Elizabeth Morley, Evidence, 16 June 2014, p 32.

- 5.71 The FRLC noted that ASIC had recently taken action against a number of major players in the debt collection industry over systemic debt collection issues, and suggested that 'the risk of potential abuse and misuse is real and significant, and will increase if en-masse access to government records is granted.'³⁰⁵

Criticism of court discovery procedure

- 5.72 As noted earlier, there are existing provisions for creditors to use the preliminary discovery process through the court in order to ascertain the whereabouts of a debtor. We also noted, above, that some stakeholders proposed expanding this process so that discovery could be made after a judgment debt had been ordered. However, the Committee also heard evidence from stakeholders who were critical of the court discovery process, suggesting that it added unnecessary costs, delays and procedural problems to the recovery of a debt.

- 5.73 The Australian Institute of Private Detective believed that restricting access to information on a debtor's whereabouts to cases that are before the court would create problems and waste the courts time and costs. The AIPD instead suggested that commercial agents should be able to access information which allows them to locate debtors without having to go through any court proceedings:

It would appear from our brief appearance before the Legal Affairs Committee that consideration might be given for Commercial Agents to have access to information for matters that are already before the Courts, however this causes enormous procedural problems which we will outline in the next paragraph.

When a client approaches a commercial agent seeking the recovery of monies for goods that have been delivered, the first thing that a commercial agent must do is locate the Debtor or/and ascertain whether the Debtor has actually received the goods. If the Debtor has not received the goods then the client has no case, effectively. If the Commercial Agent was able to locate the Debtor and/or the Debtor admits he either owed the money or received the goods then the commercial agent would then negotiate and/or mediate the time payment of the debt or the receiving of the goods.

This will obviously be extremely beneficial as it will save huge amounts of money in relation to wasted Court time and also Court Costs, Court filing fees and that is what Commercial Agents are there to do.³⁰⁶

- 5.74 The Australian Collector and Debt Buyers Association similarly criticised the preliminary discover procedure because of the costs and procedural requirements that are involved:

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

- 5.75 The ACDBA considered that the existing preliminary discovery procedures are costly and inefficient and, as outlined in the previous section, instead proposed

³⁰⁵ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 3.

³⁰⁶ Submission 10b, Australian Institute of Private Detectives, pp 2-3.

that RMS should be permitted to release such information to commercial agents without the need for a preliminary discovery order through the court.

Criticism of providing debt collectors access to personal information

5.76 A number of inquiry participants were opposed to proposals which afforded debt collectors or commercial agents access to personal information held by government agencies to enable them to identify and locate debtors.

5.77 The Australian Creditors Alliance, for example, suggested that any system which limited access to information to commercial agents and private inquiry agents would be unfair and create a barrier to justice for self-represented creditors who were attempting to recover debts:

A number of problems arise simply from the structure of the question. It assumes that only licensed Commercial Agents and Private Inquiry Agents will access the data. This is of course a self-serving request because they run a business and their business is greatly enhanced if they can 'corner the market' on this source of information. Allowing them to corner the market creates yet another barrier to justice. The existing legislation that licenses these people says that a Solicitor need not hold such a license but can do everything that licensed agents can do. So, one must presume that Solicitors will be included. If that is the case, what about the increasing number of self-representing parties who won't use either a solicitor or a Commercial Agent due to the cost. Are they to be shut out of the system and forced into the hands of Agents and Solicitors. How does one afford such information if the debt is, say, \$800, and the cost of using an Agent or a Solicitor to obtain the information is high and cannot be added automatically to the debt? There needs to be equality of access.³⁰⁷

5.78 Legal Aid was also critical of the proposal to allow commercial agents to receive information about the location of debtors in matters that are before a court. Legal Aid noted that the proposal would disadvantage other types of creditors who were pursuing debts and highlighted concerns about the potential misuse of such a system, as well as a potential conflict with federal privacy legislation:

We appreciate that it may be frustrating in some circumstances for debt collectors to locate a debtor. In many circumstances it may also be in a consumer or debtors interests to be made aware of proceedings against them so that they can avoid having a default judgment being entered against them, particularly in situations where they have a viable defence. However, we are opposed to this proposal, both in principle and practice.

This proposal arguably gives some parties greater access to information than others. Licensed agents will be afforded greater access to information than other types of debt collectors, such as private individuals or businesses. It is difficult to identify a policy rationale for treating licensed commercial agents differently to other 'debt collectors'. We are also concerned that this proposal is susceptible to abuse as outlined by Ms Elizabeth Morley from Redfern Legal Centre during the public hearing. It would be very difficult to regulate who was accessing this information and whether they were using the information appropriately and ethically, particularly in light of the fact that not all licensed agents fall within an external dispute resolution scheme.

³⁰⁷ Australian Creditors Alliance, Answers to Questions on Notice, 22 July 2014, p 1.

We also have concerns that this proposal may offend various provisions of the *Privacy Act 1988* (Cth) which would require the Committee's further, detailed attention before recommending any reform to this effect.³⁰⁸

- 5.79 The RLC noted that any move to extend a right to access personal information could create difficulties in regulating the use of that information once it had been disclosed, and questioned whether there would be appropriate controls in place to regulate such a system:

Once personal information has been disclosed, there is a very real difficulty in regulating the use and handling of personal information. We believe that it would be beyond the capacity of the courts to regulate this. In our view there would be inherent risks in trying to regulate 'appropriate purposes' after the information had been disclosed.

We note that the disclosure of personal information is particularly salient in the context of domestic violence, and that it is a real possibility that perpetrators of domestic violence could file claims in the local court to determine the whereabouts of former partners.³⁰⁹

- 5.80 The proposal was not supported by the NSW Privacy Commissioner, who stressed the principle of not disclosing personal information for purposes other than those it was collected for. The Commissioner noted community concerns about the release of personal information to the debt collection industry and considered that appropriate controls would need to be established to address such concerns:

The proposal to allow private entities to receive information from public sector agencies regarding the location of debtors is not supported. Once again, I draw your attention to section 18 of the PPIP Act which outlines that a public sector agency that holds personal information must not disclose the information to a person or other body unless the disclosure was directly related to the purpose for which the information was collected or consent has been obtained from the individual.

Licensed commercial agents and private inquiry agents are not regulated under the PPIP Act and in many cases are also not subject to the Privacy Act 1988 (Cth). I would have significant concerns regarding a proposal for private entities to receive information collected by the courts for a different purpose. The disclosure of personal information to the private entities in the debt recovery industry raises significant community concerns.

...

In order to support the proposal I would require assurance that appropriate risk mitigations, and audit and compliance mechanisms, are incorporated in the proposal to address community safety issues.³¹⁰

- 5.81 The issue of the community's level of trust in debt collectors was also illustrated in a recent research report published by the Office of the Australian Information Commissioner. The report - *Community Attitudes to Privacy survey, Research Report 2013* – was referred to by the NSW Privacy Commissioner in her evidence

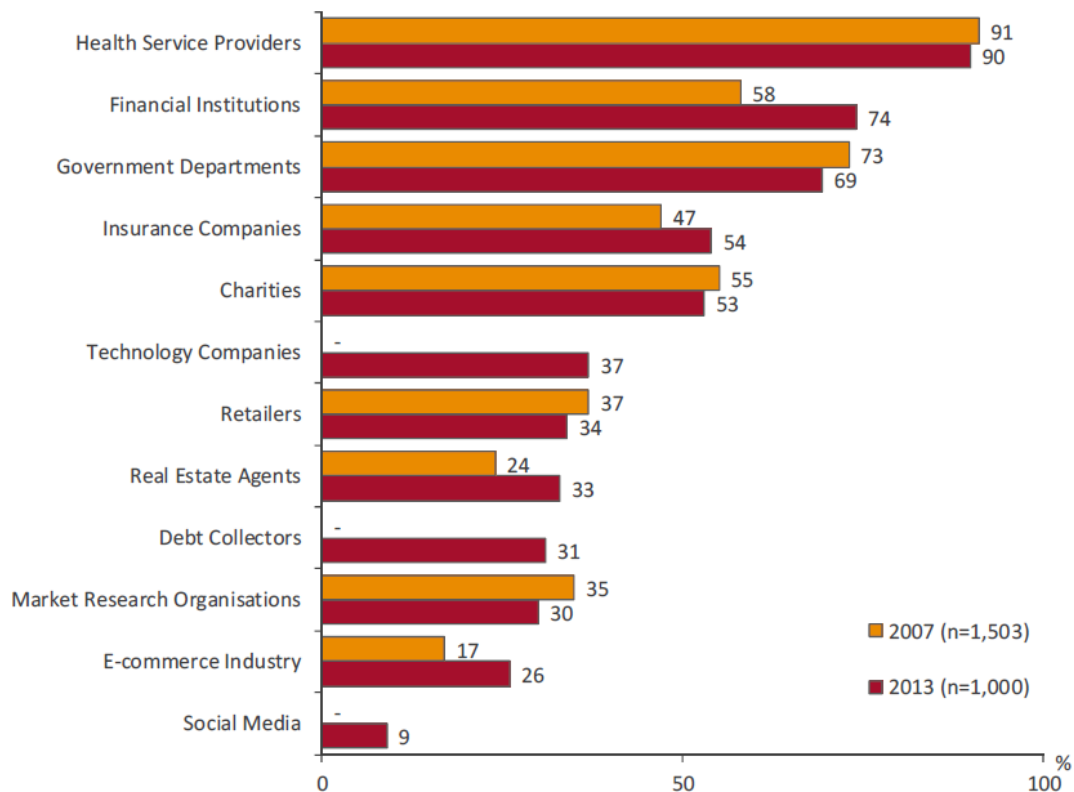
³⁰⁸ Legal Aid, Answers to Questions on Notice, 21 July 2014, pp 4-5.

³⁰⁹ Redfern Legal Centre, Answers to Questions on Notice, 14 July 2014, p 7.

³¹⁰ NSW Privacy Commissioner, Answers to Questions on Notice, 9 July 2014, pp 3-4.

to the inquiry. The following graph is drawn from the report and shows that only 31 per cent of Australians trust debt collectors with their personal information:

Figure 1: Trust in organisations to handle personal information.³¹¹



5.82 The FRLC were completely opposed to the proposal for debt collectors to receive information from Government agencies about the location of debtors and argued that the tracking system discussed in such proposals implied that the system would likely be abused:

The proposal for a ‘tracking system’, where a consumer can find out who has had access their personal information, is no substitute for privacy rights and of very limited use to consumers:

- a. tracking presupposes the scenario where information may be abused or used for unintended consequences, and is used after the fact when the consumer has already suffered the consequences and is trying to locate how their information was released
- b. accountability cannot be assured in instances where more than one debt collector was granted access, or the same information is available from different sources
- c. it is very difficult for consumers to obtain remedies for ‘non-financial’ losses such as breaches of privacy. In a domestic violence context, the consequences may be fatal and we support the views of Elizabeth Morley

³¹¹ Office of the Australian Information Commissioner, 2013, *Community Attitudes to Privacy*, p 28.

on this matter as the Redfern Legal Centre operates a Domestic Violence Court Assistance Scheme.³¹²

- 5.83 The Centre argued that the only appropriate control for releasing personal information on the whereabouts of an alleged debtor is via the existing preliminary discovery procedure through the court. They concluded that ‘any other framework risks serious detriment to natural justice and privacy.’³¹³

Need for balance and use of consent

- 5.84 While the Privacy Commissioner had expressed concerns over proposals put forward to allow debt collectors to access personal information held by government agencies, she also acknowledged that it was reasonable for a person to attempt to recover debts that were owed to them:

Debt recovery is a reasonable exercise for legitimate unpaid debts. However the community has justifiable concerns about the ability for debt collectors to access government information held on ordinary citizens and businesses and the intrusion into their privacy when undertaking debt recovery activities.³¹⁴

- 5.85 The Commissioner told the Committee that she believed that people should not be allowed to hide behind privacy provisions to avoid paying debts, but also that public sector agencies should not breach privacy legislation and share personal information in a manner that would do so:

It is a very difficult situation and, as I said at the outset, where debts are legitimately owed I certainly do not see that people should hide behind privacy provisions to prevent them being paid. But as Privacy Commissioner I have to point out that compliance with the legislation is obviously one of the key focuses that I have when I am advising and speaking with agencies. I do not think it would be appropriate for them to provide information to such bodies which then places them at odds with their requirements underneath the New South Wales privacy legislation.³¹⁵

- 5.86 According to the Commissioner, finding the appropriate balance between the right to privacy and the rights of creditors was not an issue that is going to be easily struck. However, she suggested that it was very important to consider this issue and to consult with the community about where that balance should be.³¹⁶

- 5.87 The importance of consent in relation to privacy was another matter highlighted by the Commissioner. She noted that consent was a powerful tool that could help manage community concerns over privacy as it provided a transparent mechanism to engage people on how their information will be used:

One of the most important things to consider is the actual issue of consent. Yes, there will be those who may wish to avoid paying a debt incurred, for which they do owe money. But if you say to people, ‘You are giving us this information for this purpose, but we also want your consent that it may be used for other purposes’. The

³¹² Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 3.

³¹³ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, pp 8-9.

³¹⁴ Submission 31, NSW Privacy Commissioner, p 2.

³¹⁵ Dr Elizabeth Coombs, Evidence, 16 June 2014, p 40.

³¹⁶ Dr Elizabeth Coombs, Evidence, 16 June 2014, p 40.

consent is a very powerful tool, if you like, when you are seeking to engage the person to manage the privacy implications. Because then they have given consent and if you are clear as to what you intend, on how you are going to use it, it may be one mechanism that could play a useful role...³¹⁷

Committee comment

- 5.88 A number of proposals were put to the Committee to reform legislation and assist creditors and debt collectors in locating debtors. The proposed reforms focused either on expanding the existing court discovery procedure or on providing debt collectors, commercial agents or private investigators with access to personal information held by government agencies.
- 5.89 In response to these proposals the Committee also heard a number of arguments against relaxing privacy regulations or providing new mechanisms for personal information held by government agencies to be disclosed to commercial entities. The Committee acknowledges these concerns, particularly the views of the Privacy Commissioner who stressed the importance of only using and disclosing personal information for purposes related to the reason it was collected, and who highlighted the importance of finding an appropriate balance between the right to privacy and the rights of creditors.
- 5.90 The Committee notes that the existing preliminary discovery procedure in court allows creditors to discover the whereabouts of an alleged debtor in certain circumstances. However, this procedure is only available for matters that have not yet proceeded to trial; it is therefore unavailable at the enforcement stage of debt recovery. Preliminary discovery is also unavailable in the Small Claims Division of the Local Court.
- 5.91 Of the reforms proposed, the Committee considers that the proposal to expand the preliminary discovery procedure in court – so that it is available in the Small Claims Division and can be used at the enforcement stage as well as the beginning of a trial – provides the appropriate balance between privacy and creditors’ rights. As this reform expands an existing court procedure the Committee is confident that it will provide the appropriate controls to ensure that the procedure is not misused or abused.
- 5.92 The Committee therefore recommends that the Attorney General seek amendments to the Uniform Civil Procedure Rules in order to allow creditors to ascertain the whereabouts of a judgment debtor after judgment has been made, as well as allowing applicants in the Small Claims Division of the Local Court to ascertain a defendant’s whereabouts.
- 5.93 The Committee is of the view that, when implementing this recommendation, the Attorney General should be mindful of the concerns raised about the safety of victims of domestic violence and ensure that appropriate safeguards are in place to protect these people.
- 5.94 In order to ensure that litigants in the Small Claims Division are aware of the proposed changes to the discovery procedure and are able to make use of the

³¹⁷ Dr Elizabeth Coombs, Evidence, 16 June 2014, p 41.

updated procedure, the Committee also recommends that the Attorney General ensure that clear, simple guidelines and information is made available to explain the new procedure. The Committee further recommends that court costs associated with the updated discovery procedure are able to be recovered by creditors.

RECOMMENDATION 16

The Committee recommends that the Uniform Civil Procedure Rules 2005 be amended, mindful of privacy principles, in order to:

- a) **allow creditors to ascertain the whereabouts of a judgment debtor after judgment has been made, and**
- b) **allow applicants to the Small Claims Division of the Local Court to ascertain a defendant's whereabouts.**

RECOMMENDATION 17

The Committee recommends that the Attorney General ensure that clear and simple guidelines and information is made available to small claims litigants, which will allow them to understand and make use of the amended discovery procedure.

RECOMMENDATION 18

The Committee recommends that the Attorney General ensure that court costs associated with the amended discovery procedure are able to be recovered by creditors.

- 5.95 The Committee believes that the proposals to allow only certain groups, such as commercial agents or private investigators, to have exclusive access to personal information held by government agencies would disadvantage other parties, such as self-represented creditors. The Committee also considers that such proposals would not provide the same level of assurance and oversight as a mechanism that operates via the court system. For these reasons the Committee was not convinced of the merit of the proposals put forward by the ACDBA and the AIPD, which would have provided commercial agents or private investigators access to personal information held by government agencies.
- 5.96 The issue of consent is significant in considerations of privacy issues. The Committee found the evidence of the Privacy Commissioner compelling in regard to this matter, highlighting the value that consent can have as a mechanism to engage people and assist in managing privacy implications. The Committee considers that there is scope for the NSW Government to further explore how best to make use of consent in relation to how personal information is managed and disclosed by Government agencies.
- 5.97 The Committee therefore recommends that the NSW Government work with the Privacy Commissioner on this matter, to explore new options that may be available to government agencies when they collect personal information from individuals. In particular, the Government should consider whether it would be appropriate to seek a person's consent to use or disclose personal information to

assist in the debt recovery process. For example, examining the feasibility of seeking customers' consent for agencies such as Roads and Maritime Services or the Electoral Commission to disclose personal information for purposes of debt collection.

RECOMMENDATION 19

The Committee recommends that the NSW Government work with the NSW Privacy Commissioner to examine ways of making greater use of consent in relation to how personal information is managed and disclosed by government agencies - particularly in relation to how personal information may be used to assist in debt recovery processes.

Chapter Six – State debt recovery

- 6.1 This chapter focuses on the activities of the Office of State Revenue (OSR) which is responsible for the receipt and collection of outstanding debts owed to the New South Wales Government, including fines, penalties and taxes.

OFFICE OF STATE REVENUE

Role and functions

- 6.2 The Office of State Revenue (OSR) is part of the Office of Finance and Services, which sits within the Treasury and Finance cluster of the NSW Government. The debt management role of the OSR is divided into two areas: the fines division which is governed by the *Fines Act 1996* and administered by the Commissioner for Fines Management; and the taxes and grants, which are administered by the Chief Commissioner of State Revenue.³¹⁸
- 6.3 The Chief Executive Officer of OSR is both the Commissioner for Fines Management and the Chief Commissioner of State Revenue. The taxation recovery role of the OSR is governed by the *Taxation Administration Act 1996*. The process for the collection of taxes under this legislation is a very different process from the recovery of fines outlined under the *Fines Act*.³¹⁹ In 2012-13, the OSR made an overall contribution to consolidated revenue of more than \$19 billion from state taxes, duties and fines.³²⁰
- 6.4 The State Debt Recovery Office (SDRO) is the fines division of the OSR. The SDRO is responsible for the receipt and processing of fines issued by various government agencies and authorities, and administering the fine enforcement system for the collection of unpaid fines. The responsibility for collection of fines includes fines from councils and government commercial authorities.³²¹

Revenue from fines collection

- 6.5 The OSR, collected \$598 million in revenue from fines in 2012-13 through the SDRO. The debt from unpaid fines as at 30 June 2013 was \$741 million. In the same period the OSR wrote off \$202 million in uncollected fines. Mr Ian Phillips, Principal Advisor, Technical and Advisory Services, OSR, explained in evidence that this write-off:

...was part, or as a result, of a government decision to take a more commercial approach to write-offs. There always has been a reluctance to write off fines debt because it is part of an extension of the system of enforcing justice. The write-offs are done under guidelines approved by the Minister.³²²

³¹⁸ Mr Ian Phillips, Principal Adviser, Office of State Revenue, NSW Department of Finance & Services, Transcript of evidence, 16 June 2014, p 64.

³¹⁹ Mr Ian Phillips, Evidence, 16 June 2014, p 64.

³²⁰ NSW Department of Finance and Services, *Annual Report 2012/13*, p 5.

³²¹ Mr Ian Phillips, Evidence, 16 June 2014, p 64.

³²² Mr Ian Phillips, Evidence, 16 June 2014, p 64.

- 6.6 The successful collection of fines is closely contingent upon the effectiveness of the collection process and enforcement powers. The OSR has various enforcement powers, which are specified under the Fines Act.³²³
- 6.7 The Committee heard that about 70 per cent of fines are paid within the time allowed under a penalty notice. In addition:
- 5.4 per cent of fines are paid after the issue of an enforcement order (including an additional enforcement charge of \$65);
 - 9.6 per cent of payments are generated through Roads and Maritime Services licence and registration sanctions;
 - 3 per cent are recovered through civil sanctions, including garnishee orders and property seizure orders;
 - 0.9 per cent of fines are recovered by private sector debt collection services;
 - 1.2 per cent is written off as uncollectable debt;
 - 4.5 per cent is paid in instalments; and
 - 5.4 per cent remains unpaid.³²⁴
- 6.8 Mr Phillips also informed the Committee that the collection of a year's fines can take several years.³²⁵
- 6.9 Property seizure orders are sent to the Sheriff's Office for enforcement and the Committee heard that in a financial year, the Commissioner of Fines Management issues:
- ...something like 20,000 property seizure orders which go to the Sheriff for service. They tend not to be very effective simply because they are directed at people who really do not have much in the way of assets and there are flaws in the system because a knowledgeable debtor can fairly easily evade the Sheriff....The debtor claims not to be the owner or has no visible assets or simply avoids being there at the appropriate time.³²⁶
- 6.10 The Committee was also advised that in the 2012-13 financial year, the OSR increased garnishee orders for fines debtors from 7,000 to 24,000 per month, through improved systems and arrangements with banks.³²⁷

³²³ Mr Ian Phillips, Evidence, 16 June 2014, p 64.

³²⁴ Mr Ian Phillips, NSW Department of Finance and Services, Correspondence to the Committee, 19 September 2014; and Mr Ian Phillips, Evidence, 16 June 2014, p 64.

³²⁵ Mr Ian Phillips, Evidence, 16 June 2014, p 64.

³²⁶ Mr Ian Phillips, Evidence, 16 June 2014, p 65.

³²⁷ NSW Department of Finance and Services, *Annual Report 2012/13*, p 32,

<http://www.finance.nsw.gov.au/sites/default/files/pdfs/DFSAR2012-13_Final_All.pdf>, viewed 11 August 2014.

Revenue from tax collection

- 6.11 Under the *Taxation Administration Act 1996*, the OSR administers State taxation and revenue programs. The Committee heard that, in contrast to revenue collected by the SDRO through the pursuit of outstanding fines and the management of overdue debt, tax recovery is a quite different process. Most taxes are paid by return or self-assessment. When assessments are issued, the taxpayer has a chance to object and appeal so that disputes are typically settled at this stage and this results in the debt level being much lower for taxes.³²⁸
- 6.12 The taxation legislation provides built-in incentives to encourage the payment of duties and taxes. For example, in the case of duties, documents have to be stamped in order to be used in legal proceedings. NSW Land & Property Information (LPI) will not register a transfer of land unless the duty is paid. Land tax is a first charge on land and the OSR can lodge caveats if it is not paid. These must be cleared before the land can be sold.
- 6.13 Various other powers are also available to the OSR under the Taxation Administration Act to minimise citizens' avoidance of responsibilities. It can issue demands on third parties such as employers and banks in a similar process to garnishee orders. It can leverage the joint and several liability applying to grouped companies and businesses. For example, it can impose a company's liability on the director. If the tax is not paid, the director must either arrange for the company to be put into liquidation or administration within 21 days. Non-compliance would result in the director personally incurring debt.
- 6.14 Interest charges and penalty taxes are additional strong incentives which help achieve successful recovery of revenue from unpaid tax. For example, interest and penalty tax accrues on unpaid tax at a rate of about 10.5 per cent. Annually, this includes an eight per cent premium and a market rate which is currently 2.6 per cent. In extreme cases, where companies fail to lodge a tax return, the Chief Commissioner of State Revenue can also impose penalty tax.³²⁹

The financial cost of debt recovery

- 6.15 The OSR monitors its expenditure on recovering debt through key performance indicators. Mr Phillips informed the Committee that from 2013 to 2014:
- For the cost to collect \$100 in tax our target was 53 cents, year to date it is 49 cents per \$100. For the cost to administer \$100 in fines the target is \$13.12, year to date it is \$9.37 per \$100.
- 6.16 OSR monitors the efficiency and effectiveness of its fines enforcement activity against equivalent agencies in other jurisdictions. However, at this stage, benchmarking in relation to fines collection is a work in progress. OSR informed the Committee that it participates in benchmarking in relation to fines administration through the Australia and New Zealand Fine Enforcement Reference Group (ANZFERG) which meets annually and is in its tenth year. However, the jurisdictions, while having similar functions are subject to different legislation and other factors which have posed challenges to effective

³²⁸ Mr Ian Phillips, Evidence, 16 June 2014, p 64.

³²⁹ Mr Ian Phillips, Evidence, 16 June 2014, p 65.

benchmarking. This has promoted a review of ANZFERG benchmarking measures and definitions, with the goal of formalising new collaborative measures.³³⁰

- 6.17 In relation to tax administration, the revenue offices across all jurisdictions in Australia participate in benchmarking of their respective performances. A benchmarking report is prepared annually by an external consultant.³³¹

Assessing capacity to repay and mechanisms to recover outstanding fines

- 6.18 OSR informed the Committee that it uses a number of mechanisms to determine the capacity of individuals to pay and to recover outstanding fines. These include:

- Assessment by contact centre operators of an individual's circumstances to determine if they are able to pay in full, pay by instalments, or qualify for a Work and Development Order (in the case of an unpaid fine);
- Procedures which include a repayment matrix (a set of procedures to ask a client) used by contact centre operators to work out a suitable payment plan that meets the needs of the individual;
- Use of Examination Notices that permit OSR to call a person to be examined by a court or by authorised OSR staff (in the case of an unpaid fine) to examine the client under oath;
- Asset search capability via Land Titles or ASIC for Directorships;
- Property Seizure Orders that are executed by the Sheriff's Office, who are governed by the Civil Procedures Act, Regulations and Rules;
- Access to information about a fine defaulter's credit information file, including information that is reasonably necessary in order to identify the individual to whom the file relates, the person's address and employment details;
- Use of Garnishee provisions under the Fines Act;
- Use of orders under the Taxation Administration Act, similar to a Garnishee Order, permitting the Chief Commissioner to recover a tax debt from a third party, including financial institutions and employers.³³²

- 6.19 OSR also advised the Committee of its plans to increase the effectiveness of existing procedures. OSR listed the following issues, which were being considered in order to further enhance the debt recovery process:

- Taking advantage of the Whole of Government approach to client services provided by the Government to enable OSR to have access to up to date address and contact information;

³³⁰ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, cover letter.

³³¹ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, cover letter.

³³² Office of State Revenue, Answers to Questions on Notice, 17 July, Attachment 'A', p 2.

- Allowing OSR to access details of financial institutions that appear on an individual's or company's credit history file to permit more efficient application of the garnishee provisions;
- Relaxing the requirements for penalty notices and penalty reminder notices to be served within specified limitation periods where a fine defaulter fails to update address and contact details with RMS.³³³

6.20 In explanation of why it seeks relaxation of the specified limitation periods for penalty notices and reminder notices to be served, OSR informed the Committee that the service requirements limit OSR's powers to enforce fines once the relevant limitation period has expired. The limitation provisions enable fine defaulters to avoid enforcement action if they fail to provide changes in their address to RMS for the purposes of driver's licences and vehicle registrations, or if they return notices, unopened, to OSR as unclaimed mail.³³⁴

Committee comment

6.21 Although the Committee appreciates the obligation of the OSR to maximise its efficiency and effectiveness in enforcement of debt recovery, it holds concerns with regard to the impact of these proposed reforms on vulnerable consumers. In the light of the considerable amount of evidence received pointing to the need for improved debt recovery practices and protections for vulnerable consumers, the Committee urges the OSR to further consult with advocacy organisations on the possible impact of its proposed reforms.

THE SOCIAL COST OF DEBT RECOVERY - VULNERABLE INDIVIDUALS

6.22 Concern about the impact of SDRO measures to recover fines debts on vulnerable and disadvantaged consumers experiencing acute economic hardship, homelessness, unemployment, disability or illness was an important issue re-iterated by many of the advocacy organisations which made submissions to this inquiry.³³⁵ For example, Legal Aid drew the Committee's attention to research conducted by the Law and Justice Foundation of NSW, which indicates that fines have a disproportionate impact on some of the most disadvantaged members of the community and that unpaid fines further compound disadvantage.³³⁶

6.23 The OSR applies a range of methods to assist vulnerable people who incur fines and tax debts. In the case of taxes and recovery of grants incorrectly paid, OSR is able to enter into instalment arrangements tailored to the client's financial circumstances. Taxpayers who are not satisfied with payment arrangements offered by OSR may apply to the Hardship Review Board established under the Taxation Administration Act. The Board has representatives of the Chief Commissioner, the Auditor General and the Secretary of the Treasury.³³⁷

³³³ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, Attachment 'A', p 2.

³³⁴ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, Attachment 'A', p 2.

³³⁵ Submission 12, Redfern Legal Centre, p 2; Submission 29, Legal Aid NSW, pp. 4, 6 & 13; Submission 7, Financial Rights Legal Centre, p 8; Submission 5, Marrickville Legal Centre, pp 2-3; Submission 32, NSW Ombudsman, pp 2, 5, 6 & 7; Submission 14, Hunter Community Legal Centre, cover letter, p 1.

³³⁶ Submission 29, Legal Aid NSW, p 6.

³³⁷ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, Attachment 'A', p 1.

- 6.24 In the case of fines, the OSR listed the following options to assist vulnerable consumers:
- The (Fines) Hardship Review Board which has a representative from each of the Secretaries of the Treasury, the Office of Finance and Services and Police and Justice.
 - Relief available under Ministerial Guidelines issued under s. 120 of the Fines Act dealing with writing off unpaid fines, the issue of fine enforcement orders or community service orders and the taking of other enforcement action under the Act;
 - Work and Development Orders which are available to fines debtors who have a mental illness, an intellectual disability or cognitive impairment, are homeless, experiencing acute economic hardship, or have a serious addiction to drugs, alcohol or volatile substances;
 - Instalments arrangements which are available through Centrepay in the case of people receiving Centrelink benefits, or OSR's call centres or using an on-line self-service facility.³³⁸
- 6.25 OSR informed the Committee that it deals with a significant number of individuals with fines debts that are receiving Centrelink benefits and that many of these debtors manage to finalise their outstanding fines over time, paying as little as \$20 per fortnight.³³⁹
- 6.26 The current legislative and administrative arrangements for state debt recovery are the culmination of a reform process which has been evolving since the 1980s.³⁴⁰ Legal Aid NSW has welcomed the reforms, observing that:
- The State Debt Recovery (SDR) system has improved significantly over the last few decades. The NSW debt recovery system now has in place robust systems for quarantining and identifying vulnerable clients, systems to enable voluntary enforcement without an enforcement fee and Centrepay arrangements. There are processes in place to enable clients to apply for a stay of an enforcement order or an annulment and in appropriate circumstances; clients can apply to have a fine written off. The SDR have also significantly improved their service delivery model, which now includes an advocacy hotline and outreach to Aboriginal communities. As a result, disadvantaged clients who once might have spent time in custody to 'cut out' their debt now have available to them a number of options to pay their fines. The Work and Development Order scheme ... is a particularly effective option which provides the most disadvantaged clients with an alternative way to settle their debt with the community.³⁴¹
- 6.27 Particular aspects of the SDRO's service were commended in submissions. For example, the Marrickville Legal Centre expressed its appreciation of the SDRO

³³⁸ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, Attachment 'A', p 1.

³³⁹ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, Attachment 'A', p 1.

³⁴⁰ Submission 29, Legal Aid NSW, p 4.

³⁴¹ Submission 29, Legal Aid NSW, p 4.

Advocates Hotline noting that it has been helpful to solicitors and advocates to understand quickly a client's state debt issues and repayment options.³⁴²

Committee comment

- 6.28 The Committee is pleased to note that the reforms in debt recovery since the passage of the *Fines Act 1996* and the establishment of the SDRO have had a beneficial impact on the overall process of debt collection in NSW. It is particularly encouraging to note that many of the reforms to date have been perceived as beneficial not only to the SDRO but also to the most financially vulnerable debtors. On the other hand, evidence provided by the advocates for debtors has pointed to the harmful social impact of some SDRO practices on people who simply cannot pay their fines. The Committee has heeded the principal concerns about SDRO debt recovery methods raised by advocacy organisations. These concerns are outlined and commented upon individually in the following sections.

Impact of licence sanctions

- 6.29 SDRO sanctions imposed by Roads & Maritime Services (RMS) usually involve the fine recipient's driver's licence being suspended or car registration cancelled. If the fine recipient does not have a car registered in his or her name, and does not possess a driver's licence, he or she will be restricted from dealing with RMS so that it is not possible to obtain a licence or transfer registration of a car.³⁴³
- 6.30 Loss of a driver's licence or the inability to obtain one can have a range of detrimental impacts, as the NSW Ombudsman has reported, including reduced employment options or termination of employment; limited access to essential services; and social isolation.³⁴⁴
- 6.31 Former NSW Member of the Legislative Council, Dr Arthur Chesterfield-Evans, drew attention to the structural unemployment and marginalisation of unemployed youths who do not qualify for driving licenses because they are unable to pay transport fines.³⁴⁵ In his submission, Dr Chesterfield-Evans pointed to the seeming lack of concern by the SDRO that its debt recovery enforcement measures might be connected with such social problems:

Some time after the inquiry into the riot in Macquarie Fields, upper house members were given a presentation by the Office of State Revenue stressing how well their revenue collection was going since the new policy had been implemented that people could not get licences until all fines had been paid. I asked if they had considered the cost of criminalising those who were unable to pay relatively small fines. The Office of State Revenue officers had obviously never considered this and were somewhat embarrassed by the question, to which they had no answer. The

³⁴² Submission 5, Marrickville Legal Centre, p 2.

³⁴³ Submission 32, NSW Ombudsman, Attachment to submission: copy of the submission of the NSW Ombudsman to the NSW Legislative Assembly Committee on Law and Safety Inquiry into Driver Licence Disqualification Reform, dated 25 July 2013 p 2.

³⁴⁴ Submission 32, NSW Ombudsman, Attachment to submission, p 3.

³⁴⁵ Submission 23, Dr Arthur Chesterfield-Evans, p 2.

impression given was that their job was to collect revenue and if there were other issues associated with this, it was not their job to deal with them.³⁴⁶

- 6.32 Concerns about the harmful implications of SDRO practices associated with licence sanctions were also raised in submissions received from Marrickville Legal Centre³⁴⁷ and the NSW Ombudsman.³⁴⁸ For example, Marrickville Legal Centre observed that:

The preferred method of enforcing unpaid fines in NSW seems to be placing RMS restrictions on the fines debtor. However, if the fines debtor does not have a driver's licence, the SDRO will sometimes proceed to more severe methods of enforcement under Part 4 of *the Fines Act 1996* (NSW). This is done without any reference to the financial or health circumstances of the fines debtor. For example, we have given advice to distressed clients about SDRO property seizure and garnishee orders, when it is clear that the client has no income or assets to seize or garnishee.³⁴⁹

- 6.33 In cases where the fine recipient's driver's licence has been suspended or their car registration cancelled, the NSW Ombudsman has noted that:

While the SDRO does have the discretion to lift restrictions in exceptional circumstance if the fines remain outstanding, vulnerable people with limited ability to understand and negotiate the administrative processes associated with the fines system are more likely to experience difficulties applying for this dispensation.³⁵⁰

- 6.34 With regard to current arrangements for dealing with unauthorised driving offences, the Legislative Assembly Committee on Law and Safety has acknowledged in its report on Driver Licence Disqualification Reform, tabled in November 2013, that these can have significant impacts on specific community groups particularly vulnerable groups, those living in regional, rural and remote areas, Aboriginal people and young people. The Committee has also reported that licence sanctions for fine default can exacerbate any social or economic exclusion that such communities already suffer.³⁵¹

- 6.35 The Law and Safety Committee further noted that the NSW Government has also introduced mechanisms to assist disadvantaged communities to address their fines, such as the Work and Development Order (WDO) scheme and Centrepay. The Committee strongly encouraged the NSW Government to continue to expand on existing programs of this nature and to identify and develop new alternatives for financially disadvantaged individuals to address their unpaid fines through mechanisms other than licence sanctions.³⁵²

³⁴⁶ Submission 23, Dr. Arthur Chesterfield-Evans, p 2.

³⁴⁷ Submission 5, Marrickville Legal Centre, p 3.

³⁴⁸ Submission 32, NSW Ombudsman, Attachment to submission, pp. 2-3.

³⁴⁹ Submission 5, Marrickville Legal Centre, p 3.

³⁵⁰ Submission 32, NSW Ombudsman, Attachment to submission, p 2.

³⁵¹ NSW Legislative Assembly, Committee on Law and Safety, Report 3/55, November 2013, p. 23.

[www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/925282e84b35c5b0ca257c2a001b7b4c/\\$FILE/Driver%20licence%20disqualification%20reform%20report.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/925282e84b35c5b0ca257c2a001b7b4c/$FILE/Driver%20licence%20disqualification%20reform%20report.pdf), viewed 7 August 2014.

³⁵² NSW Legislative Assembly, Committee on Law and Safety, Report 3/55, November 2013, pp 23-24.

Committee comment

- 6.36 The Committee is mindful that advocacy organisations have expressed concern about the difficulties which can arise for already vulnerable consumers as a result of sanctions imposed by the SDRO on drivers' licences. The Committee received persuasive evidence about the adverse social consequences of unduly harsh enforcement measures such as licence sanctions. These may include reduced employment options; termination of employment; limited access to essential services and social isolation. The Committee therefore endorses the view of Legislative Assembly Committee on Law and Safety in its 2013 Report on Driver Licence Disqualification Reform that the NSW Government should continue to expand on programs such as the WDO scheme and Centrepay for the repayment of debt by financially disadvantaged individuals and that it should further explore alternatives to licence sanctions in the case of the most vulnerable debtors.

Impact of SDRO garnishee practices

- 6.37 There was considerable evidence expressing concern about the wide-ranging powers of the SDRO to identify and garnish the bank accounts of fine defaulters.³⁵³ While there are some legislative protections regarding the amount that a creditor can remove from a bank account, the incongruence between the legislative requirements creates an unreasonable adverse impact on those people whose bank accounts are garnished to the point where they are emptied out.³⁵⁴

- 6.38 Redfern Legal Centre (RLC) has expressed particular concern that the garnishee power of the SDRO can be exercised without proper regard to the subsistence nature of Centrelink payments or legislative protections for social security.³⁵⁵ RLC informed the Committee that :

In our casework experience, the SDRO has garnished bank accounts of impecunious and vulnerable debtors, solely in receipt of Centrelink income, without regard to this net weekly amount.³⁵⁶

- 6.39 Mr William Dwyer, Credit and Debt Solicitor, RLC, told the Committee that:

We think it is important to increase the current protections for vulnerable consumers, particularly against garnishee orders, both through the Local Court process and also through the State Debt Recovery Office garnishee power. We think that it is very important that there is a proper appraisal of a consumer's actual financial circumstances before a garnishee order is made. There needs to be an assessment of someone's financial capacity, what their basic living expenses are and what dependents and other basic costs they have such as rent, food and keeping the power on. That should be done before any garnishee amount is arrived at.³⁵⁷

³⁵³ Submission 12, Redfern Legal Centre, pp 2-4; Submission 5, Marrickville Legal Centre, pp 3, 4, 6, 7, 8 & 10; Submission 29, Legal Aid NSW, pp 12-13; Submission 32, NSW Ombudsman, p 5; Submission 7, Financial Rights Legal Centre, pp 5-8 and p 10.

³⁵⁴ Submission 32, NSW Ombudsman, pp 6-7.

³⁵⁵ Submission 12, Redfern Legal Centre, p 2.

³⁵⁶ Submission 12, Redfern Legal Centre, p 2.

³⁵⁷ Mr William Dwyer, Credit and Debt Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 34.

- 6.40 For garnishes on bank accounts, there is no provision for any notice to be given before a person's account can be completely emptied. The Financial Rights Legal Centre (FRLC)³⁵⁸ and NSW Legal Aid³⁵⁹ have expressed concern about the added difficulties this creates for already vulnerable people. Legal Aid NSW has recommended that Centrelink and the SDRO should have to notify a client if Centrepay arrangements have been cancelled. As explained by NSW Legal Aid, this would enable a person to make alternative arrangements to pay the debt and avoid a garnishee order, or to make arrangements to ensure that sufficient funds were available to meet their immediate needs such as rent and food.³⁶⁰
- 6.41 A number of submissions proposed that in the case of garnishee of bank accounts, there should be a minimum protected amount to be reserved for a debtor's essential expenses and that this should be set in line with the minimum protected amount for wage garnishees. In addition, courts should be given discretion as to the appropriate amount to be garnished, considering the debtor's whole circumstances.³⁶¹
- 6.42 Under the *Fines Act 1996*, the SDRO is entitled to issue a garnishee order to a bank or to an individual's employer in order to recover outstanding debt. Under section 122 of the *Civil Procedure Act 2005*, where a garnishee order has been issued to an employer the debtor's weekly wage of salary must not be reduced to less than \$447.70. The Committee was informed that there is no such equivalent legislation in terms of a garnishee order on a bank account issued by the SDRO directly to a bank.³⁶²
- 6.43 The NSW Ombudsman informed the Committee that:
- ...The SDRO has advised my office that under the current legislation, it is unable to instruct banks to retain a protected amount or minimum amount to be left in an account because a garnishee order attaches to all debts due and accruing. The incongruence between the legislative requirements relating to the two garnishing options leads to an unreasonable adverse impact on those people whose bank accounts are garnished, particularly as we understand most garnishee orders are issued on accounts and not employers.³⁶³
- 6.44 SDRO has assured the Committee that there is a process for people whose bank account is 'cleaned out' to make application to have the funds returned to them.³⁶⁴ However, the NSW Ombudsman has expressed dissatisfaction with this process. Although it has welcomed the SDRO's publication of a policy and factsheet for a full or partial refund of money deducted under a garnishee order, it notes that the policy allows SDRO officers the discretion of granting an initial refund of \$100 over the telephone to alleviate urgent financial hardship. Any

³⁵⁸ Submission 7, Financial Rights Legal Centre, p 5.

³⁵⁹ Submission 29, NSW Legal Aid, p 12.

³⁶⁰ Submission 29, NSW Legal Aid, p 13.

³⁶¹ Submission 7, Financial Rights Legal Centre, p 3; Submission 12, Redfern Legal Centre, p 4; Submission 29, Legal Aid NSW, p 12; Submission 32, NSW Ombudsman, p 5.

³⁶² Submission 32, NSW Ombudsman, p 5.

³⁶³ Submission 32 NSW Ombudsman, p 6.

³⁶⁴ Mr Phillips, Evidence, 16 June 2014, p 66.

further refund would require an individual to submit supporting documentation.³⁶⁵

- 6.45 In the view of the NSW Ombudsman, legislative change to ensure a protected minimum amount be retained in a bank account in the case of a garnishee order is preferable and more efficient than a refund policy. As the Ombudsman has observed:

...many of the SDRO's vulnerable clients would not be able to take the necessary steps in order to pursue a request for a refund and that an amount of \$100 may not be sufficient to cover necessities. For those that do request a refund, the SDRO has to then commit resources to assessing and processing their application.³⁶⁶

Committee comment

- 6.46 A substantial amount of evidence has been presented to this inquiry by advocacy groups regarding the adverse impact of the SDRO's debt collection procedures on vulnerable consumers, in particular those consumers who are solely in receipt of Centrelink income. The Committee notes that it received evidence indicating that the garnishee power of the SDRO can be exercised without proper regard to the subsistence nature of Centrelink payments.
- 6.47 The Committee holds concerns about the garnishee practices of the SDRO in view of the evidence presented by advocacy organisations. Chapter Four of this report provides further discussion of garnishee orders and recommends changes to better shield vulnerable consumers from any adverse impacts of garnishee practices.

Work and Development Orders

- 6.48 Work and development orders (WDOs) are made by the SDRO to allow eligible clients to reduce their fines through unpaid work with an approved organisation and through certain courses or treatment. WDOs are available to only the most vulnerable members of the community, for example, those who have mental illness, intellectual disability or cognitive impairment as well as those who are homeless, have a serious addiction to drugs, alcohol or volatile substances or are experiencing acute economic hardship. To apply for a WDO, such debtors need to find an approved sponsor organisation or health practitioner to support their WDO activity.³⁶⁷ The scheme operates in partnership with a range of organisations and health practitioners who support and supervise people who are carrying out work and development orders.³⁶⁸
- 6.49 NSW Legal Aid further explained the rationale for the establishment of the WDO scheme:

³⁶⁵ Submission 32, NSW Ombudsman, p 5.

³⁶⁶ Submission 32, NSW Ombudsman, p 5.

³⁶⁷ State Debt Recovery Office, <www.sdرو.nsw.gov.au/fines/eo/wdo.php> , viewed 1 August 2014.

³⁶⁸ New South Wales, Legislative Assembly, *Debates*, 3 August 2011, p. 3514, (Mr Greg Smith, Attorney General and Minister for Justice), <[www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LA20110803/\\$File/551LA026%20\[030811\].pdf](http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LA20110803/$File/551LA026%20[030811].pdf)>, viewed 4 August 2014.

The current scheme was designed to mitigate the individual and social impact of fine default, including licence suspension, secondary offending and the futility and cost to government of chasing unrecoverable debt. A WDO is a regulated 'exchange' between the state and the individual that serves mutual interests. An individual can clear debt, get their licence back and avoid further enforcement action. In return, social capital is enhanced through increased volunteering, participation in education and training, compliance with treatment programs for mental health or serious addiction and reduced offending. The benefits flow directly to the community,³⁶⁹ hence the widespread support for the scheme in the NGO and health sectors.

- 6.50 The WDO scheme was initially established as a two-year pilot. The evaluation of the pilot was very positive, finding that the WDO scheme helped to reduce re-offending. Over 80 per cent of people who were given a work and development order had not had another fine or penalty notice enforced against them. The evaluation also found that the scheme provides a strong incentive for fine recipients to engage in activities such as vocational courses and mental health, drug and alcohol treatment. The mental health of many WDO participants improved. Furthermore, through participating in the scheme, many participants developed new skills, and increased their employment opportunities.³⁷⁰
- 6.51 Following the successful two-year trial, the WDO scheme was made permanent in June 2011.³⁷¹ The positive benefits of the WDO scheme were a recurring theme in the evidence presented by advocacy organisations.³⁷² NSW Legal Aid attributed its effectiveness to its underpinning by effective legislation and administrative arrangements; and to the fact that it was developed by the Department of Attorney General and Justice (now the Department of Justice) and because it has been implemented in conjunction with Roads and Maritime Services, NSW Police, the SDRO, Legal Aid NSW and a range of non-government organisations.³⁷³
- 6.52 The FRLC commented that:

The introduction of Work Development Orders as an alternative for people unable to afford monetary penalties (fines) imposed by the State has been a wonderful development, retaining the penalty aspect by requiring some compulsory activities (work or otherwise) on the part of the offender that is within their capacity (unlike payment of money which is often not) and giving them an opportunity to re-engage with the community in a positive manner. The alternative was often an accumulation of other consequences such as loss of licence and registration, loss of employment and in some cases imprisonment, all of which lead to disengagement with the community and productive workforce and likely re-offending. Fines have insufficient impact on those who can easily afford them and impact far too greatly on those who cannot.³⁷⁴

³⁶⁹ Legal Aid NSW, Answers to Questions on Notice, 21 July 2014, p 5.

³⁷⁰ New South Wales, Legislative Assembly, *Debates*, 3 August 2011, p. 3514, (Mr Greg Smith, Attorney General and Minister for Justice).

³⁷¹ NSW Department of Finance and Services, *Annual Report 2010/11*, p 19, <<http://www.osr.nsw.gov.au/info/publications/annual>>, viewed 1 August 2014.

³⁷² Submission 29, Legal Aid NSW, p 6; Submission 5, Marrickville Legal Centre, p 2; Submission 32, NSW Ombudsman, p 3.

³⁷³ Submission 29, Legal Aid NSW, p 6.

³⁷⁴ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, pp 1-2.

- 6.53 The Committee also heard about the positive social impact which WDOs have on previously marginalised individuals.³⁷⁵ Legal Aid NSW has indicated its support for an expansion of the WDO scheme with a view to further developing opportunities to assist vulnerable debtors. As stated in its submission:

Legal Aid NSW advocates strongly for the NSW Government to commit to the expansion of the WDO program and similar debt recovery programs that provide meaningful and effective alternatives to enable disadvantaged people to 'pay back' their unpaid fines.³⁷⁶

- 6.54 Marrickville Legal Centre also agreed that the WDO scheme had proved an invaluable option for its clients. However, it noted that the number of WDO providers who can assist non-English speakers is limited. Another problem was that the full list of WDO providers was not available to solicitors and advocates. This made it difficult to ensure that the centre's clients were linked up successfully with a WDO provider.³⁷⁷

Committee comment

- 6.55 The Committee agrees with Legal Aid NSW and other advocacy organisations that the WDO scheme is a highly effective debt recovery program which has positive social benefits both for vulnerable debtors and for the community as a whole in terms of re-engaging previously marginalised groups. With regard to the positive benefits of WDOs, the Committee supports the expansion of the WDO and similar debt recovery programs which enable vulnerable and marginalised people to 'repay' unpaid debts by methods which do not exacerbate their already disadvantaged situation and which positively help them to develop their skills.
- 6.56 In considering how the WDO scheme might be expanded, the Committee urges the NSW Government to include the needs of non-English speakers and to ensure that information about the scheme and the approved providers is accessible to all stakeholders including clients, solicitors and advocates.

Work and Development Orders and private debt

- 6.57 During the public hearing for the inquiry, the Committee was interested to find out whether advocacy organisations felt that WDO's could be effective in assisting debtors to pay off civil debts which may not otherwise be paid.³⁷⁸
- 6.58 While Legal Aid NSW had described WDO's as being 'incredibly effective' in relation to fines, it pointed out that this was because of the non-financial support of community and government agencies that were prepared to offer those activities for people in order for them to work off their fines. Whether current partner organisations would give the same level of commitment to include

³⁷⁵ Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 33 and Ms Monique Hitter, Executive Director, Civil Law Division, Legal Aid NSW, Transcript of evidence, 16 June 2014, p 34.

³⁷⁶ Submission 29, Legal Aid NSW, p 11.

³⁷⁷ Submission 5, Marrickville Legal Centre, p 2.

³⁷⁸ Mr Robert Furolo MP, Transcript of evidence, 16 June 2014, p 34.

defaulters who have incurred debts in the private sector was, in the view of Legal Aid NSW, open to question.³⁷⁹

6.59 NSW Legal Aid did not support broader application of the WDO scheme to private debt. At present, commercial businesses are not permitted to sponsor WDOs and activities must be supervised by not-for-profit organisations, government services or registered health practitioners. In the view of NSW Legal Aid, vulnerable clients performing unpaid work under the WDO scheme need to be protected from commercial exploitation; and the supervision of clients should be performed by practitioners who have experience in supporting vulnerable clients with complex needs.

6.60 Legal Aid NSW also pointed out that the scheme, as currently established, allows fine defaulters to return 'in kind' service to the community rather than to the private sector. Legal Aid NSW warned that expansion of WDOs to the private sector as a means of 'working off' private debt could risk the good will and support that underpins the current scheme – particularly if the debt arose in the first place from dubious or improper lending practices.³⁸⁰

6.61 In addition, Legal Aid NSW believed that broader application of the WDO scheme was impractical, would be difficult to operationalize and would:

...place an enormous burden on organisations that are already stretched and who are meeting supervision, reporting and compliance obligations within existing resources.³⁸¹

6.62 The misgivings of Legal Aid NSW concerning expansion of the WDO scheme to the private sector were re-iterated by the FRLC. The Centre opposed this proposal on the grounds that:

...asking debtors to submit to Work Development Orders in order to pay off civil debts is:

- Contrary to general public policy in relation to civil debt in NSW and Australia more generally by applying a quasi-criminal penalty system;
- At odds with the right to go bankrupt and likely to drive people into bankruptcy unnecessarily, which is not in the interests of the government of other creditors
- At odds with responsible lending obligations which require creditors to ensure consumers have the capacity to repay debts prior to lending.³⁸²

6.63 The FRLC went on to observe that creditors 'already have a range of enforcement options for pursuing those debtors who have sufficient property to pay their debts.'³⁸³

³⁷⁹ Ms Monique Hitter, Transcript of evidence, 16 June 2014, p 34.

³⁸⁰ Legal Aid NSW, Answers to Questions on Notice, 21 July 2014, p 5.

³⁸¹ Legal Aid NSW, Answers to Questions on Notice, 21 July 2014, pp. 5-6.

³⁸² Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 2.

³⁸³ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, p 3.

Committee comment

- 6.64 The Committee shares the views of advocacy organisations which opposed suggestions that the WDO scheme might be expanded to include work options for disadvantaged consumers to 'pay off' civil debt. The Committee believes that such a proposal is contrary to general public policy in relation to civil debt in NSW and Australia. The Committee finds merit in the fact that the scheme, as currently established, allows debt defaulters to return 'in kind' service to the community rather than to the private sector. It also agrees that the extension of the scheme to include civil debtors would place an enormous burden on existing resources in terms of supervision and meeting reporting and compliance obligations.

THE DIFFERENCES IN RECOVERY OF STATE DEBT AND CIVIL DEBT

- 6.65 As stated in the introduction to this chapter, the State Debt Recovery Office (SDRO) is the fines division of the OSR. It is authorised by the *Fines Act 1996* to receive and process fines issued by various government agencies and authorities, and to administer the fine enforcement system for the collection of unpaid fines issued by those agencies.³⁸⁴
- 6.66 The OSR has distinct advantages in collecting debt on behalf of the State of NSW as a result of its use of garnishee provisions under the Fines Act and its use of orders (similar to garnishee provisions) under the Taxation Administration Act.³⁸⁵ The OSR has additional distinct advantages to implement licence sanctions on the driving licenses of fines debtors³⁸⁶ and, as a public sector agency, access to personal information held about the fines debtor by RMS.³⁸⁷
- 6.67 The Committee heard evidence indicating that some organisations within the private sector viewed this situation as inequitable. For example, Mr Alan Harries of the Australian Collectors & Debt Buyers Association (ACDBA) suggested that the Government had an unfair advantage in collecting debt in this State, 'which is over and above commercial enterprise or individuals.'³⁸⁸
- 6.68 Mr John Bracey, President of the Australian Institute of Private Detectives (AIPD), submitted correspondence which he had undertaken with the former NSW Treasurer, the Hon. Mike Baird MP, in which he suggested that:
- New South Wales government might give consideration to the State Debt Recovery Office being able to collect debts on behalf of companies and the general public...³⁸⁹
- 6.69 In his correspondence, Mr Bracey referred to the advantage which was available to the SDRO as a result of its power to cancel licenses and registrations for the

³⁸⁴ Office of State Revenue, <<http://www.sdرو.nsw.gov.au/about/>>, viewed 4 August 2014.

³⁸⁵ Office of State Revenue, Answers to Questions on Notice, 17 July 2014, Attachment 'A', p 2.

³⁸⁶ Submission 5, Marrickville Legal Centre, p 3.

³⁸⁷ *Fines Act 1996* No 99 (NSW), Part 8, Section 117 and Mr Ian Phillips, Evidence, 16 June 2014, p 67.

³⁸⁸ Mr Alan Harries, CEO Australian Collectors & Debt Buyers Association; Executive Director, Institute of Mercantile Agents, Transcript of evidence, 16 June, 2014, p 25.

³⁸⁹ Submission 10, Australian Institute of Private Detectives, letter to the NSW Treasurer and Minister for Industrial Relations, 4 June 2013, p 6.

non-payment of debts, without having to prove the debt and get a judgment debt through the courts as other companies and individuals have to do.³⁹⁰

- 6.70 The Committee notes that it was the view of the former Treasurer, in his response to the AIPD, that it would not be appropriate to enforce bad debts through the SDRO. As noted by the Treasurer in his correspondence, debt enforcement requires a judgment about the validity of the claims for monies owed and this function is appropriately performed by courts. The Treasurer also noted that increasing penalties for business failure, for example, by cancelling licences, could also act to discourage entrepreneurial activity.³⁹¹

Committee comment

- 6.71 The Committee does not support the proposition put forward in evidence by the AIPD that the SDRO be authorised to collect civil debts in addition to its current role of enforcing the repayment of fines owed to the State of NSW. The Committee agrees with the view expressed by the former Treasurer in correspondence with the AIPD that the validity of the claims for monies owed is a matter for the courts. The Committee also agrees that the application of sanctions available to the SDRO, such as the cancellation of licenses, would not be appropriate in cases of business failure as this could discourage entrepreneurial activity.

MONITORING OF FINES AND PENALTIES

- 6.72 Following a comprehensive review of the complaints it has received about the SDRO, the NSW Ombudsman has observed that many of the complaints are about the way in which the SDRO or the issuing authority have handled an individual's request for a fine to be reviewed. Other common complaints relate to concerns about the enforcement action the SDRO is taking, for example, the use of garnishee orders, or decisions the SDRO has made in relation to fine mitigation.³⁹²
- 6.73 The NSW Ombudsman has noted the importance of external scrutiny of the way fine issuing agencies issue fines as well as how they exercise their discretion to issue cautions.³⁹³ He believed that the fines enforcement system would benefit from having ongoing monitoring of the way fines are issued and reviewed, rather than ad-hoc review by disparate bodies.³⁹⁴
- 6.74 In the view of the Ombudsman, ongoing monitoring would consist of internal monitoring by issuing agencies as well as external oversight and support. Internal monitoring would require all agencies issuing fines and penalty notices to report data in their Annual Reports about the number of cautions and penalty notices issued, internal review requests received as well as the outcomes of internal

³⁹⁰ Submission 10, Australian Institute of Private Detectives, letter to the NSW Treasurer and Minister for Industrial Relations, 4 June 2013, p 6.

³⁹¹ Submission 10, Australian Institute of Private Detectives, letter from the NSW Treasurer and Minister for Industrial Relations, 31 July 2013, p 7.

³⁹² Submission 32, NSW Ombudsman, p 2.

³⁹³ Submission 32, NSW Ombudsman, p 2.

³⁹⁴ Submission 32, NSW Ombudsman, p 3.

review requests. Such data would help to evaluate recent reforms and help to assess whether the fines system is working fairly and effectively.³⁹⁵

- 6.75 Data collected and reported by issuing agencies would also help to evaluate the impact of the fines system on vulnerable people, for example, information about where penalty notices are issued, and demographic data such as Aboriginality, homelessness, disability and age.³⁹⁶
- 6.76 In relation to external monitoring, the Ombudsman expressed support for a recommendation for the establishment of a Penalty Notice Oversight Agency, which was submitted by the NSW Law Reform Commission to the Attorney General following its 2012 Inquiry into Penalty Notices.³⁹⁷
- 6.77 In the view of the Ombudsman, an external monitoring body would have ongoing responsibility for monitoring the fair and effective use of fines and penalty notices in NSW and provide advice on opportunities for continual improvement. The Ombudsman also proposed that a separate oversight agency could help to co-ordinate targeted programs aimed at reducing debt accumulation and foster co-operation between issuing agencies, the SDRO and advocate agencies. The Ombudsman further noted that this could assist in identifying the causes of offence types or reasons why particular individuals might repeatedly receive penalty notices.³⁹⁸

Committee comment

- 6.78 Having considered the range of concerns presented in evidence with regard to the impact of SDRO debt collection measures on the very poor and vulnerable, the Committee agrees with the NSW Ombudsman that additional monitoring and transparency within the fine enforcement system is required to ensure that fines and penalty notices are enforced fairly and effectively.
- 6.79 The Committee endorses the view of the Ombudsman that there is a need for internal monitoring, requiring all agencies issuing fines and penalty notices to report data in their Annual Reports which would help to evaluate how the fines system is working and to formally monitor the impact on vulnerable debtors.
- 6.80 However, the Committee is not convinced of the need for an external monitoring body to be established. The Committee instead considers that monitoring the way fines are issued and implementing systems to ensure that fines are issued appropriately and that internal reviews are conducted fairly and accountably should be the responsibility of all agencies that issue fines and penalty notices. The Committee also believes that agencies have a responsibility to take into consideration the impacts that the enforcement of fines can have on vulnerable sections of the community.

³⁹⁵ Submission 32, NSW Ombudsman, p 3.

³⁹⁶ Submission 32, NSW Ombudsman, p 3.

³⁹⁷ Submission 32, NSW Ombudsman p 4.

³⁹⁸ Submission 32, NSW Ombudsman p 4.

RECOMMENDATION 20

The Committee recommends that the NSW Government ensure that all agencies issuing fines and penalty notices have systems in place to monitor the way cautions and penalty notices are issued, as well as how internal review requests are managed.

RECOMMENDATION 21

The Committee recommends that the NSW Government require all agencies issuing fines and penalty notices to report data in their Annual Reports about the number of cautions and penalty notices issued, internal review requests received, outcomes of internal review requests and any additional data which would assist in evaluating the impact of fines on vulnerable sections of the community.

Chapter Seven – Consumer issues: vulnerable individuals and complaints

- 7.1 This chapter addresses consumer issues including the impact of debt recovery processes on vulnerable individuals and the assistance that is available to vulnerable debtors, such as financial counselling and the National Hardship Register. The chapter also considers the level of complaints and poor practices that occur in the debt collection industry.

VULNERABLE INDIVIDUALS

- 7.2 Vulnerable and disadvantaged individuals constitute a particular section of the community that can be severely affected by debt recovery processes. These debtors have complex needs, little income or assets and are often within a cycle of disadvantage with no means of repaying their debts now or in the foreseeable future.

- 7.3 Mr William Dwyer, Credit and Debt Solicitor for the Redfern Legal Centre (RLC), described the vulnerable clients that his organisation regularly interacts with and outlined the types of debt issues that such clients can encounter:

We see vulnerable and disadvantaged clients who are struggling to make ends meet—most are dependent on Centrelink as their sole source of income—and where they have incurred debts to basic services: utilities, telcos and types of consumer credit products, and a range of other basic living expenses. They are often faced with great difficulty in being able to maintain basic living expenses and to repay those debts.³⁹⁹

- 7.4 Ms Monique Hitter of Legal Aid NSW added the following:

We are talking about a particular section of the community who have complex needs, who are reliant on a safety net and who are in a cycle of what we would call disadvantage in terms of the issues that they are having to deal with where their needs are not being met; their basic needs for shelter, for income...⁴⁰⁰

- 7.5 In its submission to the inquiry, Legal Aid discussed research conducted by the Brotherhood of St Laurence on the experience of debtors in Victoria. The research report observed that the causes of debt and financial hardship are complex and often related to other forms of disadvantage or vulnerability. The report also identified that poor health, reliance on income support, loss of income, mental health and drug and alcohol problems can increase the risk of financial crisis and expose individuals to debts they are unable to repay. Legal Aid observed that the report's findings were:

³⁹⁹ Mr William Dwyer, Credit and Debt Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 30.

⁴⁰⁰ Ms Monique Hitter, Executive Director, Civil Law Division, Legal Aid NSW, Transcript of evidence, 16 June 2014, p 29.

...consistent with our experience in providing assistance to vulnerable clients at Legal Aid NSW. It is common for a client who has a consumer issue with creditors to also have problems with housing, mental health or drug and alcohol problems.⁴⁰¹

- 7.6 Vulnerable individuals who find themselves with problem debts, while dealing with a range of other problems in their lives, may be more severely impacted by debt recovery processes. Ms Elizabeth Morley of the RLC provided an example of the kinds of stressors that such individuals may face and stressed the importance of acting sensitively and reasonably with vulnerable debtors:

...looking at our clients, very often they have got so many problems on their plate at that time. We had one client recently who had a number of suicide attempts related to his debts. A person in that situation often will not open their mail and will probably only take phone calls from someone they know. Of course, then there are clients who cannot maintain their telephone connection anyway. So I think that one of the difficulties in this situation, and it is difficult for us to keep in contact with our clients as much as it is difficult for debt collectors, but any form of communication needs to be done reasonably sensitively to take into account those kinds of issues. But it is the quantity and the intimidation that happens with repeated calls at all times of the day from a different person from a different call centre, et cetera, that one person who has called you does not know what you discussed with the person you spoke to before. You write letters, they are never responded to et cetera.⁴⁰²

- 7.7 Ms Monique Hitter of Legal Aid noted that debt was a leading cause of homelessness, among other issues, and stated that the problems caused by debt are ultimately borne by the government:

We recognise that debt is a major issue for the community. Debt is a leading contributor to homelessness. Homelessness is a leading contributor to recidivism and family breakdown and other issues such as that. As economic times get tougher, this will no doubt lead to more pressure on those who cannot repay debts but also on the commercial, government and community sectors. Ultimately the cost is borne by government in the form of both the loss of revenue for businesses and in needing to provide support for people in hardship.⁴⁰³

- 7.8 Advocates for vulnerable individuals, such as the RLC and Legal Aid NSW, stressed the importance of striking a balance between protecting the rights of creditors and protecting vulnerable consumers. The RLC wrote of its concerns on this matter:

RLC is concerned with the impact of debt recovery process upon vulnerable consumers. The law should not permit the myopic enforcement of creditors' rights at the expense of impecunious and disadvantaged consumers.⁴⁰⁴

- 7.9 Legal Aid similarly stressed the importance of seeking an appropriate balance between the rights and interests of creditors and the protection of vulnerable individuals, writing that:

⁴⁰¹ Submission 29, Legal Aid NSW, p 1.

⁴⁰² Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre, Transcript of evidence, 16 June 2014, p 32.

⁴⁰³ Ms Monique Hitter, Evidence, 16 June 2014, p 29.

⁴⁰⁴ Submission 12, Redfern Legal Centre, p 10.

It is important to ensure that the legislative and administrative arrangements are fair and just for all parties and provide appropriate safety nets for particularly vulnerable consumers.⁴⁰⁵

- 7.10 The RLC also pointed out that pursuing unrecoverable debts from people who have no capacity to repay is inefficient:

We recognise that a recurring hindrance to efficient debt recovery process is the pursuit of 'unrecoverable' debts - situations where consumers are long-term welfare dependent with low prospects of full time employment, increased earning capacity or improved future financial position.⁴⁰⁶

Current approach to individuals experiencing financial hardship

- 7.11 The Australian Collectors and Debt Buyers Association (ACDBA) informed the Committee of a number of processes that its members had in place to identify and respond to debtors experiencing financial hardship. Identifying financial hardship included noting hardship triggers or indicators, which could include:

...natural disasters; unemployment; business failure; injury; illness; bereavement; relationship breakdown; domestic violence/economic abuse; maternity/paternity; over commitment; alcohol or substance abuse; incarceration; gambling; mental health issues; and complaints or aggression.⁴⁰⁷

- 7.12 The ACDBA advised that once a hardship trigger is noted, its members' staff would attempt to tactfully gather information about the debtor's situation, if he/she is willing to discuss the matter, and then complete a statement of position (noting the debtor's income and expenditure details).⁴⁰⁸ The ACDBA also noted the regulatory guidelines regarding dealing with financial hardship and requirements for debt collectors to be flexible and fair in their treatment of people experiencing financial hardship:

When dealing with hardship, the ACCC/ASIC debt collection guideline requires arrangements to be "flexible, fair and realistic" with collectors required to adopt a flexible approach for meaningful and sustainable arrangements that reasonably take into account the debtor's ongoing living expenses. In addition, members when dealing with hardship are mindful of other codes or hardship policies which might have application for the specific debt such as: the Banking Code of Practice; the Telecommunications Consumer Protection Code; Local government rates; or the Office of State Revenue.⁴⁰⁹

- 7.13 The ACDBA outlined the following traditional paths of action available to debtors undergoing long-term financial hardship:

- Hardship variation under the National Credit Code such as a moratorium or repayment arrangement;
- Bankruptcy/Debt Agreement;

⁴⁰⁵ Submission 29, Legal Aid NSW, p 1.

⁴⁰⁶ Submission 12, Redfern Legal Centre, p 4.

⁴⁰⁷ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 1.

⁴⁰⁸ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 1.

⁴⁰⁹ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 2.

- Avoidance;
- Bulk Debt Project (this project has now concluded);
- Approaching each creditor separately for a debt waiver; and
- Seeking the assistance of a for-profit debt mediator or credit repairer.⁴¹⁰

7.14 In addition to the above options, the ACDBA also noted that debt collectors may also refer a debtor undergoing financial stress to a not-for-profit financial counsellor. A financial counsellor may, in turn, submit an application for the debtor to the National Hardship Register.⁴¹¹ Referrals to financial counsellors and the National Hardship Register are considered further in the following section.

Financial counselling and the National Hardship Register

7.15 The ACDBA informed the Committee that its members had processes in place to refer debtors to independent financial counsellors if the debtor is in distress, lacks capacity to repay their debt, or if their hardship is likely to be long term in nature. The ACDBA noted that not-for-profit financial counsellors provide 'free and independent advice and support to consumers in financial difficulty' and explained that an independent financial counsellor may:

- assist the debtor to prepare a budget;
- discuss difficult options with the debtor (including surrender of security, sale of property or bankruptcy);
- identify other issues e.g. mental health/gambling and where appropriate refer the debtor to suitable support services; and
- possibly act on the debtor's behalf in dealing with creditors.⁴¹²

7.16 Ms Monique Hitter of Legal Aid reported that her organisation regularly referred debtors to financial counsellors, noting that financial counselling can be of significant assistance to people in debt:

We are always referring people to financial counselling. It is one of the first things that we do and we also work very closely with financial counsellors—all our organisations do—in resolving the issues of people because we see their legal issues very much related to those other issues with which financial counselling can greatly assist.⁴¹³

7.17 Ms Alice Lin of the Financial Rights Legal Centre (FRLC) supported a proposal to refer debtors to financial counselling assistance, suggesting that this should happen early in the debt recovery process, and noting that a number of creditors already make these sort of referrals:

⁴¹⁰ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 2.

⁴¹¹ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, pp 2-3.

⁴¹² Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 2.

⁴¹³ Ms Monique Hitter, Evidence, 16 June 2014, p 29.

...I think that should occur as early in the process as possible. A lot of our referrals to our credit and debt hotline are actually from creditors, from the major banks, from utility providers because they recognise that the earlier a person gets assistance in working out what they afford the more likely they are to manage all their debt and also to keep to the repayment arrangement that they are trying to negotiate as well.⁴¹⁴

- 7.18 Ms Elizabeth Morley of the RLC agreed that financial counsellors were helpful, but raised a distinction between external, independent financial counsellors and counsellors that may be linked to a creditor's organisation:

I am not sure if I understood you correctly; if you are talking about a financial counsellor being within the creditor's organisation or the financial counsellor being an external financial counsellor. I think if it is the latter I would strongly support that. If it is an internal counsellor I think there are things that our clients would not necessarily want to talk about, the sexual assault they have experienced or something like that, with their creditor.⁴¹⁵

- 7.19 On balance, Ms Morley supported the idea of debt collectors providing contact details or links to independent financial counsellors early in the debt recovery process, though she also raised the potential concern of whether there were enough financial counsellors 'on the ground' to deal with referrals from debt collectors.⁴¹⁶

- 7.20 Legal Aid was another inquiry participant that endorsed greater use of financial counselling services for disadvantaged debtors and recommended providing additional resources for financial counselling services – including both face-to-face and telephone financial counselling. Legal Aid also recommended that statements of claim should include the contact details for 'central referral points where debtors can gain access to financial counselling and low-cost legal advice (such as government websites or the national financial counselling hotline).'⁴¹⁷

National Hardship Register

- 7.21 The National Hardship Register was another initiative raised by inquiry participants in conjunction with the forms of assistance available to vulnerable debtors. The ACDBA explained that the National Hardship Register was currently a 12 month pilot program with a dual purpose: (1) to protect consumers experiencing severe financial hardship from unnecessary debt collection, and (2) to act as an efficient, cost-effective mechanism for the industry to avoid futile debt collection activity.⁴¹⁸ The ACDBA outlined how the National Hardship Register (NHR) works:

1. A not-for-profit financial counsellor identifies the consumer in long-term hardship;
2. The financial counsellor submits an application to the NHR;

⁴¹⁴ Ms Alice Lin, Solicitor, Financial Rights Legal Centre, Transcript of evidence, 16 June 2014, p 33.

⁴¹⁵ Ms Elizabeth Morley, Evidence, 16 June 2014, p 32.

⁴¹⁶ Ms Elizabeth Morley, Evidence, 16 June 2014, p 32.

⁴¹⁷ Submission 29, Legal Aid NSW, p 20.

⁴¹⁸ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 2.

3. The consumer is included on the NHR if he/she meets the strict eligibility criteria;
4. The NHR listing is distributed to participating creditors;
5. The participating creditors will provisionally finalise the debts relating to the listed consumer – this means no selling and collecting (an effective moratorium) subject to a right of challenge by the participating creditors; and
6. The participating creditors will unconditionally finalise the debts relating to the listed consumer at the earlier of: the creditor choosing to waive the debt; three years from the date of listing; or in accordance with the statute of limitations period.

The NHR project is an evolution and refinement of the former National Bulk Debt Project and offers relief from collection activity for those vulnerable consumers in long term and severe financial hardship listed on the NHR after demonstrating meeting strict criteria, which in general terms involves:

- Sole source of income is basic Centrelink benefits (Disability Support Pension/Aged Pension)
- No assets other than those protected in bankruptcy
- No likely prospect of the financial situation improving.

Once an applicant is listed on the NHR, details of the applicant and not his/her debts are circulated to the participating creditors to allow them to check their accounts to isolate any accounts relating to the listed applicant – the creditors undertake not to collect or sell debts relating to listed NHR applicants.⁴¹⁹

7.22 The ACDBA further explained that the National Hardship Register was industry funded and was developed following consultation with stakeholders including industry, financial counsellors, consumer lawyers, regulators and EDR schemes. The ACDBA also noted that the National Hardship Register was not a credit reporting bureau and, as such, debtors' credit files are neither advantaged nor disadvantaged when they appear on the National Hardship Register.⁴²⁰

7.23 The National Hardship Register was discussed and supported by both debt collector organisations, such as the ACDBA, and advocacy organisations, such as Legal Aid⁴²¹ and the RLC. The RLC, for example, wrote that it strongly supported initiatives like the National Hardship Register and explained how it solved some of the inefficiencies faced by both debtors, creditors and financial counsellors in submitting and processing financial hardship applications:

The National Hardship Register is an important pilot project, which proposes an alternative method for parties to establish and verify circumstances of long-term severe financial hardship.

⁴¹⁹ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 2.

⁴²⁰ Australian Collectors and Debt Buyers Association, Answers to Questions on Notice, 18 July 2014, p 2.

⁴²¹ Ms Monique Hitter, Evidence, 16 June 2014, p 29.

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

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

This information must be submitted to each creditor or debt agency and the verification process can take weeks and months. This administrative burden is substantial. It reduces the efficiency of all parties and prevents the early resolution of long-term hardship matters. A Hardship Register can help to streamline the process for verifying long-term financial hardship and improve the efficiency of determining unrecoverable debt. The NHR model would create a verified register, which can be accessed by creditors and collection agencies. Avoiding the inefficient process of verifying and reiterating the same circumstances to each and every creditor would benefit creditors, collection agencies and consumers.⁴²²

- 7.24 The RLC stressed the efficiency of such a system, which required a debtor to apply only once to establish the veracity of their financial hardship, thereby avoiding the necessity to reiterate the same details and circumstances to each and every creditor for each and every debt. The Centre also noted that the established uniform criteria for assessing hardship and concluded that the National Hardship Register provided 'a genuine opportunity to improve the early and efficient resolution of unrecoverable debts'.⁴²³

Committee comment

- 7.25 The Committee notes that vulnerable individuals can be severely affected by debt and the debt recovery process. For such individuals, debt and financial hardship are often related to other forms disadvantage or vulnerability, and various factors such as poor health, reliance on income support, and mental health problems can increase the risk of an individual being unable to repay their debts.
- 7.26 The Committee acknowledges the need to balance the rights of creditors with the need to ensure that appropriate protections are in place for vulnerable individuals. The Committee further notes that establishing systems to help identify and assist vulnerable debtors can improve the efficiency of the debt recovery system, saving both creditors and debtors time and money.
- 7.27 The referral of debtors to financial counsellors was widely supported by both debt collection organisations and advocacy groups, with the proviso that such counsellors should be external and independent from the creditors. The

⁴²² Submission 12, Redfern Legal Centre, pp 7-8.

⁴²³ Submission 12, Redfern Legal Centre, pp 7-8.

Committee is of the view that this practice should be further encouraged and therefore recommends that the Government promote the practice of debt collectors providing debtors with referrals to independent financial counsellors.

7.28 The Committee further recommends that the Government review the level of government support and financial assistance that is made available to not-for-profit financial counselling services to ensure that they are adequately funded. The Committee is of the view that providing financial counselling to vulnerable debtors has the potential to resolve issues in their early stages and thereby avoid the more severe impacts and compounded problems that arise from long-term financial hardship. The Committee considers that the benefits of financial counselling will ultimately defray other costs to government, such as costs related to homelessness, health services and other support services, that the Government would otherwise outlay.

7.29 The Committee also acknowledges and supports the efforts of the ACDBA and the industry in establishing the National Hardship Register to identify debtors experiencing long-term financial hardship and to protect them from unnecessary debt collection activity, while also increasing efficiency and cost-effectiveness for the industry by avoiding futile debt collection activity.

RECOMMENDATION 22

The Committee recommends that the NSW Government:

- a) Encourage and strongly consider requiring debt collectors to offer referrals to external, independent financial counsellors when contacting debtors and attempting to recover debts; and**
- b) review the level of government financial assistance available to not-for-profit financial counselling services to ensure there are adequate resources to meet the demand for these services.**

COMPLAINTS AND POOR PRACTICES IN THE INDUSTRY

7.30 During the inquiry the Committee sought information from stakeholders about the number of complaints made about debt collectors and the types of poor practices that exist within the industry. The following section outlines the evidence received about complaints and poor practices.

7.31 The Committee was informed by the ACDBA of the small number of complaints that were received by its members in 2012-13, as compared with the number of contacts that those members made with debtors:

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.⁴²⁴

- 7.32 This evidence about the small number of complaints appeared to be supported by comments from Mr Cameron Smith of the Security Licensing and Enforcement Directorate of the NSW Police Force, who advised that his area received very few complaints about debt collectors:

I would say, in relation to complaints that my area would receive, no more than, on average, about 12 complaints annually are about debt collectors, and the vast majority of those—we are probably talking 10 out of the 12—would be in relation to people operating without a licence...⁴²⁵

- 7.33 However, Mr Smith also noted that his Directorate was primarily responsible for licensing and was not resourced or empowered to handle complaints about the industry. He advised that when complaints were received they were referred to police local area commands for investigation.⁴²⁶

Poor practices in the industry

- 7.34 The Committee heard from a number of stakeholders who were able to provide examples of some of the poor practices of debt collectors that they had encountered or identified.

- 7.35 As noted in Chapter Five, the Australian Securities and Investments Commission (ASIC) is one of the federal regulators of debt collection activities. In its submission to the inquiry, ASIC highlighted some examples of poor practices and potentially unlawful conduct in recent years, along with the action taken by ASIC in response to that conduct:

ACM Group Limited

In 2011 ASIC commenced proceedings in the Federal Court of Australia against one of Australia's largest debt collection groups in relation to their recovery practices. It was alleged the ACM Group Limited had engaged in misleading or deceptive conduct and undue harassment or coercion while carrying on a debt collection business.

In 2012 the Court found the conduct to be 'widespread' and 'systemic'. It found the ACM debt collector training manual made it very plain that debtors should be threatened with litigation. It also found that the tone of one of ACM's supervisors was rude, condescending and vicious.

The Court declared that ACM had engaged in misleading and deceptive conduct and undue harassment and coercion in relation to eight debtors, in breach of the ASIC Act. The Court also ordered that ACM be restrained from engaging in misleading and deceptive conduct and undue harassment and coercion in the future and that these orders operate permanently.

⁴²⁴ Submission 15, Australian Collectors and Debt Buyers Association, p 2.

⁴²⁵ Mr Cameron Smith, Transcript of evidence, p 56.

⁴²⁶ Mr Cameron Smith, Evidence, p 53.

GE Money

In 2008 ASIC took action over the debt collection practices of the GE Money consumer credit businesses. ASIC accepted an Enforcement Undertaking (EU) from GE Money to address concerns arising from consumer complaints about harassment, including excessive or inappropriate contact with customers, contact at unreasonable hours and an inflexible approach to repayment arrangements.

The EU required GE Money to engage an independent expert to review and assess its debt collection processes to ensure that it complies with the Guide and make recommendations to correct any deficiencies, provide ASIC with an Action Plan to implement any recommendations, pay compensation to affected customers in accordance with guidelines prepared by the then Banking and Financial Services Ombudsman, and arrange and pay for an industry workshop to promote best practice in the debt collection industry.⁴²⁷

7.36 The FRLC provided the following examples of some of the poor debt collection practices that they had encountered:

- a. A rental company for whitegoods and household items chasing consumers for statute barred debts. These leases purported to be indefinite, and some consumers were being chased more than a decade after the last lease payment was made. The lease company made threats to refer debtors to police for larceny by bailee, presumably alleging some kind of dishonesty in the disposal of damaged items or after the item's lifespan. Our service has successfully defended a client in civil court matter, reached consent orders in another, raised a systemic issue with the main credit reporting agency over default listings being placed, and have another matter still pending
- b. A major debt collector pursuing debts that would be statute barred, save for one random payment the debtor had no knowledge of. There was no logic or consistency why the debtor would make a single once-off payment out of the blue after many years, and then cease payments straight after. We have referred many of these matters to ASIC to investigate
- c. A debt collector routinely commenced court action for debts that were statute barred on its own pleadings. These proceedings were commenced in one particular Local Court that continued to accept these despite a complaint being lodged. The same debt collector issued over 40 bank garnishees on two occasions that we are aware of, but we suspect this is common practice for this debt collector. In one case the person was only on Centrelink benefits
- d. A debt collector telling a debtor to go steal things to pawn, to get the money to pay the loan
- e. Car park companies chasing fees using notices that resemble official fines
- f. A major bank using bankruptcy proceedings against homeowners for small unsecured credit card and personal loan debts
- g. Debt collectors offering to remove default listings in exchange for large upfront payments, which would not occur after payment was made

⁴²⁷ Submission 27, Australian Securities and Investments Commission, p 3.

- h. Debt collectors refusing to accept any repayment arrangements, unless a large lump sum payment was made
- i. Debt collectors not providing debtors with payment details so they can start repayments, insisting only large lump sums would be accepted.⁴²⁸

7.37 The RLC advised that it often encountered clients who had complaints about debt collection practices and the conduct of individual debt collection agents. It advised that the scope of complaints was wide-ranging, noting that they included the use of threats, intimidation and false claims about enforcement powers:

When we speak with clients experiencing financial hardship, we are regularly told about threats and intimidation over the phone, particularly in relation to inflated enforcement rights. We are told about thinly veiled threats about powers to 'send the Sherriff around' to seize property and false claims about powers to cancel driving licences and vehicle registration. Our clients' common experience is a fear that debt collectors will disclose information about debts to their partner, their family and friends and their workplace. We regularly hear of conduct, which is designed to exploit these fears, to intimidate and humiliate. Our clients tell us that they are ashamed about being in debt and are reluctant to complain about this conduct because they fear that debt collectors will follow through on threats to make these debts public knowledge. We note that some debt collection practices are working towards improving their 'customer service' but unfortunately, there is still some way to go.

We also have experience of improper practices in 'letters of demand' and other correspondence. Again, the central concern is related to claims about inflated enforcement powers. We regularly see correspondence, which claims an indemnity for legal costs arising out of threatened litigation. These types of claims are misleading and do not have any proper basis at law.⁴²⁹

7.38 Legal Aid similarly provided a number of examples of the poor practices that had been encountered in the industry, while noting, however, that there had been improvement in the conduct of debt collectors:

Our lawyers have observed an overall improvement in the conduct and compliance of debt collectors with the ACCC/ASIC Guidelines. However, our lawyers do continue to encounter debt collectors who engage in improper practices with clients, and with the lawyers themselves.

Example 1

A senior Legal Aid NSW solicitor assisted a client after they received a number of threatening phone calls from a debt collector. The client has recently arrived in Australia and speaks limited English. The client did not know what the alleged debt related to. Not only did the debt collector refuse to give her any information about the debt, he threatened to visit her at home the next day to seize property if she did not agree to pay the debt. The client was so worried that she went straight to her TAFE English teacher who contacted Legal Aid NSW immediately for urgent advice. It became evident that the credit card was applied for and used by her violent ex-husband without her knowledge.

⁴²⁸ Financial Rights Legal Centre, Answers to Questions on Notice, 14 July 2014, pp 7-8.

⁴²⁹ Redfern Legal Centre, Answers to Questions on Notice, 14 July 2014, p 5.

Example 2

A specialist consumer lawyer from Legal Aid NSW was assisting a client who was receiving rude, threatening phone calls from a debt collector which involved swearing, yelling and threats to take her home if she does not pay her debt. The client gave the Legal Aid lawyer's contact details to the debt collector and they had a number of phone conversations. The debt collector was very rude and antagonistic when speaking to the lawyer. On request, the lawyer resent a previous written request for documentation about the alleged debt to the debt collector, and asked him for time to provide appropriate advice to the client once documentation is received. The debt collector stated that he would ignore her requests because he had already referred the matter to the legal team. When the lawyer asked to speak to the legal team to discuss the matter, the request was rudely refused. The debt collector also refused to inform their legal team about the legal aid lawyers request for documents, and stated that he would be instructing the legal team to file a statement of claim immediately. The lawyer lodged an urgent complaint on behalf of her client to the Financial Ombudsman Service.⁴³⁰

Committee comment

- 7.39 The Committee notes that there are a very small number of complaints made about the activities of debt collectors. However, there still appear to be a minority of debt collectors who exhibit poor practices and fail to comply with legislation and the guidelines set out by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC).
- 7.40 The Committee is of the view that existing consumer protection laws, along with the ACCC/ASIC guidelines, provide sufficient protection for consumers against poor practices by debt collectors, as well as providing appropriate guidance to debt collectors on how to carry out debt recovery activities. It is important, however, that these laws continue to be enforced and that consumer protection agencies, such as the ACCC and ASIC, continue to provide mechanisms for the oversight of debt collection industry.

⁴³⁰ Legal Aid, Answers to Questions on Notice, 21 July 2014, pp 3-4.

Appendix One – List of Submissions

| | |
|----|--|
| 1 | Confidential |
| 2 | Mortgage & Finance Association of Australia |
| 3 | Mr Peter Coorey |
| 4 | Australian Credit Forum |
| 5 | Marrickville Legal Centre |
| 6 | Name Suppressed |
| 7 | Financial Rights Legal Centre [formerly Consumer Credit Legal Centre (NSW) Inc.] |
| 8 | American Express Australia Limited |
| 9 | Australian Finance Conference |
| 10 | Australian Institute of Private Detectives |
| 11 | The Chief Magistrate of the Local Court |
| 12 | Redfern Legal Centre |
| 13 | Water Directorate Inc. |
| 14 | Hunter Community Legal Centre |
| 15 | Australian Collectors & Debt Buyers Association |
| 16 | Name Suppressed |
| 17 | Suncorp Group |
| 18 | Public Service Association of NSW |
| 19 | Collection House Limited |
| 20 | Outstanding Collections (Aust) Pty Ltd |
| 21 | Institute of Mercantile Agents |
| 22 | Australian Bankers Associations' Inc. |
| 23 | Dr Arthur Chesterfield-Evans |
| 24 | ClarkeKann Lawyers |
| 25 | The Law Society of NSW |
| 26 | The Australian Creditors Alliance Pty Ltd |
| 27 | Australian Securities and Investments Commission |
| 28 | New South Wales Young Lawyers |
| 29 | Legal Aid NSW |
| 30 | NSW Information Commissioner |
| 31 | NSW Privacy Commissioner |

LEGAL AFFAIRS COMMITTEE
LIST OF SUBMISSIONS

| | |
|----|---|
| 32 | NSW Ombudsman |
| 33 | Department of Justice [formerly Department of Police and Justice] |
| 34 | Confidential |
| 35 | Power Collections |

Appendix Two – List of Witnesses

Monday 16 June 2014, Macquarie Room, Parliament House

| Witness | Organisation |
|---|---|
| Mr Mark Vine, Director and Solicitor | Australian Creditors Alliance |
| Mr John Bracey, President | |
| Mr Barry Sweet, Owner, Pacific Credit Services | Australian Institute of Private Detectives |
| Mr Frank Hoare, Owner, Rapid Response | |
| Mr Alan Harries, CEO (ACDBA) and Executive Director (IMA) | Australian Collectors and Debt Buyers Association, Institute of Mercantile Agents |
| Ms Monique Hitter, Executive Director Civil Law | Legal Aid NSW |
| Ms Elizabeth Morley, Principal Solicitor | |
| | Redfern Legal Centre |
| Mr Will Dwyer, Credit and Debt Solicitor | |
| Ms Alice Lin, Solicitor | Consumer Credit Legal Centre |
| Dr Elizabeth Coombs, NSW Privacy Commissioner | Information and Privacy Commission NSW |
| Ms Tracey Hall, Sheriff of NSW | |
| | Office of the Sheriff NSW |
| Mr David Dodds, Assistant Sheriff, Regional Manager South | |
| Mr Cameron Smith, Director | Security Licensing & Enforcement Directorate, NSW Police Force |
| Mr Rod Stowe, Commissioner | NSW Fair Trading |
| His Honour Judge Graeme Henson, Chief Magistrate | Local Court of NSW |
| Mr Ian Phillips, Principal Advisor, Technical and Advisory Services | Office of State Revenue |

Appendix Three – Extracts from Minutes

Minutes of Proceedings of the Legal Affairs Committee (no. 15)

9.30 am, Wednesday 26 March 2014

Room 1153, Parliament House

Members Present

Mr Doyle (Chair), Mr Bromhead, Mr Perrottet, Ms Hornery

Staff in attendance: Elaine Schofield, Abigail Groves, Sasha Shevtsova

1. Apologies

An apology was received from Mr Barr

2. Confirmation of minutes of meeting nos. 13 (23 May 2013) and 14 (19 September 2013)

Resolved, on the motion of Mr Bromhead, seconded by Mr Perrottet: That the minutes of meetings no. 13, held on 23 May 2013, and no. 14, held on 19 September 2013, be confirmed.

3. xxxx

4. xxxx

5. Proposed inquiry into debt recovery in NSW (draft terms of reference attached)

Resolved, on the motion of Mr Bromhead, seconded by Ms Hornery: That the Committee:

1. Adopt the proposed terms of reference for an inquiry into debt recovery in NSW, and write to the Attorney General to advise of the Committee's inquiry;
2. Advertise the inquiry and call for submissions in the Sydney Morning Herald, with a closing date of Friday 16 May 2014; and,
3. Write to relevant stakeholders inviting them to make a submission to the inquiry.

The secretariat will circulate a list of proposed stakeholders to the Committee for comment and suggested additions.

6. xxxx

7. Next meeting

The committee adjourned at 9.37am until a date and time to be confirmed.

MINUTES OF PROCEEDINGS OF THE LEGAL AFFAIRS COMMITTEE (NO. 16)

10.30am, Monday 26 May 2014

Room 1153, Parliament House

Members present

Mr Doyle (Chair), Mr Bromhead, Mr Furolo, Mr O’Dea, Ms Hornery

Officers in attendance

Elaine Schofield, John Miller, Jenny Whight, Jacqueline Isles, Mohini Mehta

The Chair commenced the meeting at 10.30 am.

1. Changes in committee membership

The Chair reported the changes in Committee membership as recorded in the Votes and Proceedings, No.201, Wednesday 14 May 2014, entry 12, previously circulated:

- That Mr O’Dea and Mr Furolo be appointed to the Committee in place of Mr Perrottet and Mr Barr, discharged.

The Chair thanked Mr Perrottet and Mr Barr for their contribution to the Committee and welcomed the new members of the Committee.

2. Election of Deputy Chair

Pursuant to Standing Order 282, resolved on the motion of Mr Bromhead, seconded Mr Furolo, that Mr O’Dea be elected Deputy Chair of the Committee.

3. Confirmation of minutes of meeting no.15

Proposed on the resolution of Mr Bromhead, seconded by Ms Hornery, that the minutes of meeting no. 15, held on 26 March 2014, be confirmed.

4. xxxx

5. Inquiry into debt recovery in NSW

(a) Submissions received

i. Public submissions

Resolved on the motion of Mr Furolo, seconded Mr Bromhead, that the Committee authorise the publication of submissions 2, 4, 5, 7-15, and 17-31.

ii. Partially confidential submissions

Resolved on the motion of Mr Bromhead, seconded Mr Furolo, that the Committee

- authorise the partial publication of submission 3, with the names of third parties subject to potentially defamatory comments omitted.
- authorise the partial publication of submission 6, with the author’s name and company details omitted.

- authorise the partial publication of submission 16, with the author's name and attachments 1 and 2 omitted.

iii. *Confidential submissions*

Resolved on the motion of Mr Furolo, seconded Mr Bromhead, that submission 1 remain confidential to the Committee and is not to be published.

(b) Public hearing

Resolved on the motion of Ms Hornery, seconded Mr Furolo, that the Committee hold a public hearing on 16 June 2014 at Parliament House; and that the following organisations be invited to appear as witnesses:

- Justice Policy Division, Department of Police and Justice
- Security Licensing & Enforcement Directorate of NSW Police Force
- NSW Fair Trading
- Australian Collectors & Debt Buyers Association
- Institute of Mercantile Agents
- Legal Aid
- Redfern Legal Centre
- Consumer Credit Legal Centre
- Australian Institute of Private Detectives
- Australian Creditors Alliance
- State Debt Recovery Office, Office of State Revenue
- Office of the Sheriff NSW
- Chief Magistrate of the Local Court
- Information and Privacy Commission NSW

6. General business

Resolved on the motion of Mr Furolo, seconded by Mr O'Dea, that the Chair write to Consumer Affairs Victoria inviting them to make a submission to the inquiry and seeking further information about the national harmonisation of debt collection regulations.

7. Next meeting

The committee adjourned at 10.50 am until 9.15 am on 16 June 2014.

MINUTES OF PROCEEDINGS OF THE LEGAL AFFAIRS COMMITTEE (NO. 17)

8.45 am, Monday 16 June 2014

Macquarie Room, Parliament House

Members present

Mr Doyle (Chair), Mr O'Dea (Deputy Chair) Mr Bromhead, Mr Furolo, Ms Hornery

Officers in attendance

Helen Minnican, John Miller, Jenny Whight, Jacqui Isles, Mohini Mehta

The Chair commenced the meeting at 8.52 am.

1. Confirmation of minutes

Resolved, on the motion of Mr Furolo, seconded by Mr Bromhead: That the minutes of meeting no. 16, held on 26 May 2014, be confirmed

2. Correspondence

Received:

1. Letter received from the Office of the Australian Information Commissioner (OAIC) re the OAIC will not make a submission but happy to answer written questions, dated 3 June 2014.
2. Emails from Mr Phillip Downey re Victorian Sheriff's Office, dated 5 & 6 June 2014.
3. Email from Justice Policy, Department of Police and Justice re unavailable to attend public hearing, but happy to answer written questions, dated 10 June 2014.

Sent:

1. Letter sent to Consumer Affairs Victoria, dated 27 May 2014

Resolved, on the motion of Mr Furolo, seconded by Mr Bromhead, that:

- the Committee note the correspondence received;
- Committee members send the secretariat any questions they wish to send to the OAIC and Justice Policy, Department of Police and Justice;
- the secretariat circulate a list of proposed questions to the Committee for approval;
- the Chair write to the agencies seeking written answers to the questions.

3. Inquiry into debt recovery in NSW

a. Submissions received

i. Public submissions

Resolved, on the motion of Mr Furolo, seconded by Mr Bromhead: that the Committee authorise the publication of submission 32.

b. Public hearing

Resolved, on the motion of Mr Furolo, seconded by Mr Bromhead, that:

- the Committee approve the schedule for today's public hearing, as amended;
- the Committee authorise the audio-visual recording, photography and broadcasting of today's public hearing in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees;
- answers to questions taken on notice and additional questions are required within 21 days of the questions being sent.

4. General Business

The Chair noted that, following consultation between the Clerk-Assistants of the Legislative Assembly and Legislative Council, the Clerk-Assistants contacted the author of submission 23, who has agreed to provide a revised submission to the inquiry. The submission will remain unpublished until the revised version is received.

The committee adjourned the deliberative meeting at 8.56 am.

5. Public hearing – Inquiry into debt recovery in NSW

The Chair opened the public hearing at 9.00 am.

The press and public were admitted.

The following witness was affirmed and examined:

- Mr Mark Vine, Director and Solicitor, Australian Creditors Alliance

Evidence concluded. The witness withdrew.

The following witnesses were sworn and examined:

- Mr John Bracey, President, Australian Institute of Private Detectives
- Mr Barry Sweet, Pacific Credit Services
- Mr Frank Hoare, Rapid Response

Mr Frank Hoare presented the following document:

- NSW Bad Debt Inquiry

Mr John Bracey presented the following document:

- Unfair and restrictive trade practices in the investigation industry in Australia

Evidence concluded. The witnesses withdrew.

The following witnesses were affirmed and examined:

- Mr Alan Harries, CEO of the Australian Collectors & Debt Buyers Association; and and Executive Director of the Institute of Mercantile Agents

Evidence concluded. The witnesses withdrew.

The following witnesses were affirmed and examined:

- Ms Monique Hitter, Executive Director Civil Law, Legal Aid NSW
- Ms Elizabeth Morley, Principal Solicitor, Redfern Legal Centre
- Mr Will Dwyer, Credit and Debt Solicitor, Redfern Legal Centre
- Ms Alice Lin, Solicitor, Consumer Credit Legal Centre

The following witness was affirmed and examined:

- Dr Elizabeth Coombs, NSW Privacy Commissioner, Information and Privacy Commission NSW

Evidence concluded. The witnesses withdrew.

The Committee adjourned the public hearing to deliberate in private.

The witnesses, public and media withdrew.

The Committee deliberated.

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery: that the updated submission from Legal Aid be accepted and replace the previous submission, and that the updated submission be published on the Committee's website.

Deliberations concluded, the Committee resumed the public hearing.

The witnesses, public and media were readmitted.

The following witnesses were affirmed and examined:

- Ms Tracey Hall, Sheriff of NSW, Office of the Sheriff NSW
- Mr David Dodds, Assistant Sheriff, Regional Manager South, Office of the Sheriff NSW

Evidence concluded. The witnesses withdrew.

The following witnesses were affirmed and examined:

- Mr Cameron Smith, Director, Security Licensing & Enforcement Directorate, NSW Police Force
- Mr Rod Stowe, Commissioner, NSW Fair Trading

Evidence concluded. The witnesses withdrew.

The following witnesses were affirmed and examined:

- Judge Graeme Henson, Chief Magistrate, Local Court of NSW
- Evidence concluded. The witnesses withdrew.

The following witnesses were affirmed and examined:

- Mr Ian Phillips, Principal Advisor, Technical and Advisory Services, Office of State Revenue
- Evidence concluded. The witnesses withdrew.

The Chair closed the hearing at 5.54 pm.

6. Whole-of-Government submission

The Secretariat advised that that the Committee had not received a whole-of-Government submission prior to the hearing, though a submission was expected at some point in the future.

Resolved, on the motion of Mr Furolo, seconded by Mr Bromhead: that the Committee express its disappointment in the lack of a whole-of-Government submission to date, and that the Chair pass on this concern to the relevant minister.

7. Next meeting

The committee adjourned at 4.30 pm until a time and date to be determined.

MINUTES OF PROCEEDINGS OF THE LEGAL AFFAIRS COMMITTEE (NO. 18)

10.00 am, Wednesday 25 June 2014

Room 1136, Parliament House

Members present

Mr Doyle (Chair), Mr O’Dea (Deputy Chair) and Mr Bromhead via teleconference;
Mr Furolo and Ms Hornery in person.

Officers in attendance

John Miller, Jacqui Isles, Mohini Mehta

The Chair commenced the meeting at 10.00 am.

1. Confirmation of minutes

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery: That the minutes of meeting no. 17, held on 16 June 2014, be confirmed

2. Correspondence

Received:

1. Email from Dr Arthur Chesterfield-Evans re his revised submission.

Sent:

1. Letter to Attorney General, dated 23 June 2014
2. Letter to Secretary of the Department of Police and Justice re written questions for inquiry into debt recovery, dated 23 June 2014.

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery: That the Committee note the correspondence received.

3. Inquiry into debt recovery in NSW

a. Documents tendered at 16 June hearing

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery: That the Committee accept the following documents presented during the public hearing and that these documents remain confidential:

- NSW Bad Debt Inquiry, presented by Mr Frank Hoare
- Unfair and restrictive trade practices in the investigation industry in Australia, presented by Mr John Bracey.

b. Public hearing transcript

Resolved, on the motion of Ms Hornery, seconded by Mr Furolo: That the Committee authorise the partial publication of the corrected transcript of evidence given on 16 June 2014, with the following details kept confidential:

- street name and suburb name on page 3
- individual's name on page 6
- town names on page 15

and that the redacted transcript be posted on the Committee's website.

c. Submissions

Resolved, on the motion of Mr Furolo, seconded by Mr O'Dea, that the Committee:

- authorise the publication of Submission 33 - Department of Police and Justice;
- accept the revised version of Submission 23 from Dr Arthur Chesterfield-Evans to replace his previous submission, and that the revised submission be published on the Committee's website.

4. General Business

The Committee considered seeking additional information about the operation of private bailiffs in other jurisdictions.

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery: That the Committee request a briefing from relevant Government agencies in Western Australia and Queensland regarding the operation of bailiffs in those states.

Resolved on the motion of Mr Bromhead, seconded by Ms Hornery: That the Committee conduct a site visit to the Office of the Sheriff of NSW, prior to receiving a briefing from agencies in Western Australia and Queensland.

5. Next meeting

The committee adjourned at 10.10 am until a time and date to be determined.

MINUTES OF PROCEEDINGS OF THE LEGAL AFFAIRS COMMITTEE (NO. 19)

9.30 am, Thursday 31 July 2014
Parkes Room, Parliament House

Members present

Mr Doyle (Chair), Mr O’Dea (Deputy Chair), Mr Furolo and Ms Hornery.

Officers in attendance

John Miller, Jenny Whight, Jacqui Isles

The Chair commenced the meeting at 9.30 am.

1. Apologies

Apologies were received from Mr Bromhead.

2. Confirmation of minutes of meeting no. 18

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery: That the minutes of meeting no. 18, held on 25 June 2014, be confirmed

3. Correspondence

Received:

- i. Emails from John Bracey, Australian Institute of Private Detectives, dated 1 July, 3 July 2014.
- ii. Letter from Dr Claire Noone, Director, Consumer Affairs Victoria re national harmonisation of debt collection regulations, dated 24 June 2014.
- iii. Letter from Hon Adele Farina MLC, Chair of Committees, Legislative Council of Western Australia re scrutiny of legislation conference which has been deferred until July 2015, dated 24 June 2014.
- iv. Letter from Hon Jarrod Bleijie MP, QLD Attorney General and Minister for Justice re teleconference briefing with Queensland court staff, dated 24 July 2014.

Sent:

- i. Letter to Hon Jarrod Bleijie MP, QLD Attorney General and Minister for Justice re teleconference briefing with Queensland court staff, dated 15 July 2014.

Resolved, on the motion of Mr Furolo, seconded by Mr O’Dea: That the Committee note the correspondence received and sent.

4. Inquiry into debt recovery in NSW

a. Questions taken on notice and supplementary questions

Resolved on the motion of Mr Furolo, seconded by Ms Hornery: That the Committee note receipt of and authorise the publication of answers to questions taken on notice and supplementary questions received from:

- Australian Institute of Private Detectives, 24 June 2014
- The Chief Magistrate of the Local Court, 27 June 2014 and 11 July 2014
- Redfern Legal Centre, 14 July 2014
- Financial Rights Legal Centre, 14 July 2014

- NSW Fair Trading, 17 July 2014
- Office of State Revenue, 17 July 2014
- Australian Creditors Alliance, 22 July 2014
- Australian Collectors & Debt Buyers Association, and Institute of Mercantile Agents, 18 July 2014
- Legal Aid NSW, 21 July 2014

and that the answers be posted on the Committee's website.

b. Late submissions

The Chair advised that the following late submissions have been received:

- Submission no 10a, Australian Institute of Private Detectives
- Submission no. 10b, Australian Institute of Private Detectives
- Submission no. 10c, Australian Institute of Private Detectives
- Submission no 34, confidential

Resolved, on the motion of Mr O'Dea, seconded by Ms Hornery:

- That the Committee authorise the publication of submission nos. 10a, 10b and 10c, and that the submissions be published on the Committee's website; and
- That submission no. 34 remain confidential.

c. Site inspection and briefings

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery:

- That the Committee meet with Mr Mark White of the Office of State Revenue and staff of the Office of the Sheriff NSW during today's site visit to the Sheriff's Office; and
- That the Committee agree to be briefed by the following parties during a teleconference briefing on Monday, 4 August 2014:
 - Ms Julie Steel, Executive Director, Supreme, District & Land Courts' Service;
 - Mr Paul Marschke, Executive Director, Magistrates Courts Service;
 - Mr Craig Chapman, Registrar (Civil), Brisbane Magistrates Court; and
- That the Committee agree to be briefed by the following parties during a teleconference briefing on Tuesday, 5 August 2014:
 - John Klarich, Sheriff, WA Sheriff's Office;
 - Glenn Thorneloe, Manager Enforcement Services, WA Sheriff's Office.

5. ACCC & ASIC Debt Collection Guideline

The Chair advised that on 8 July 2014 the ACCC and ASIC released their updated *Debt collection guideline*.

6. Other business

a. Late items

The Chair noted that some additional answers to questions had been received after the meeting papers were originally distributed.

Resolved, on the motion of Mr Furolo, seconded by Ms Hornery:

- That the Committee note receipt of and authorise the publication of answers to questions received from:
 - Department of Justice, 22 July 2014
 - Legal Aid, 29 July 2014
 - Security Licensing & Enforcement Directorate of NSW Police Force, 30 July 2014; andthat the answers be posted on the Committee's website; and
- That the Committee authorise the partial publication of the answers to questions received from the Privacy Commissioner, and with the exception of the answer to Question 2, which is to remain confidential, and that the redacted answers be posted on the Committee's website.

The Committee adjourned at 9.40 am until the site visit due to commence at 10.00 am.

7. Site Visit – Office of the Sheriff NSW

At 10.00 am the Committee commenced a site visit to the Office of the Sheriff NSW, Level 2, Downing Centre, 143-147 Liverpool St, Sydney NSW.

The Committee met with the following individuals:

- Ms Tracey Hall, Sheriff of NSW, Office of the Sheriff NSW;
- Mr David Dodds, Assistant Sheriff, Office of the Sheriff NSW;
- Mr Mark White, Chief Recovery Officer, State Debt Recovery;
- Mr Barry Wademan, Acting Chief Inspector, Office of the Sheriff NSW;
- Mr Greg Walton, Senior Sheriff's Officer, Office of the Sheriff NSW;
- Mr Liam Hart, Sheriff's Officer, Office of the Sheriff NSW.

The site visit concluded at 11.40 am.

8. Next meeting

The Committee adjourned at 11.40 am until Monday, 4 August 2014 at 4.00 pm.

MINUTES OF PROCEEDINGS OF THE LEGAL AFFAIRS COMMITTEE (NO. 20)

4.00 pm, Monday 4 August 2014
Waratah Room, Parliament House

Members present

Mr Doyle (Chair), Mr O'Dea (Deputy Chair), Mr Furolo (via teleconference)
Mr Bromhead and Ms Hornery (in person).

Officers in attendance

Elaine Schofield, John Miller, Jenny Whight, Mohini Mehta

The Chair commenced the briefing at 3.56 pm.

1. Inquiry into debt recovery in NSW

a. Briefing with Queensland Court Staff

The Committee conducted a teleconference briefing with the following Queensland Court Staff:

- Ms Julie Steel, Executive Director, Supreme, District & Land Courts' Service
- Mr Paul Marschke, Executive Director, Magistrates Courts Service
- Mr Craig Chapman, Registrar (Civil), Brisbane Magistrates Court
- Mr Jason Webb, Deputy Principal Registrar, Brisbane Magistrates Courts, Registry Operations
- Mr Darren Davies, A/Manager, Legal, Policy & Procedures, Training, Development & Communications Unit, Queensland Courts, Department of Justice & Attorney General

2. Next meeting

The Committee adjourned at 4.46 pm until Tuesday, 5 August 2014 at 1.00 pm.

MINUTES OF PROCEEDINGS OF THE LEGAL AFFAIRS COMMITTEE (NO. 21)

1.00 pm, Tuesday 5 August 2014
Room 1136, Parliament House

Members present

Mr Doyle (Chair), Mr O'Dea (Deputy Chair), Mr Furolo and Ms Hornery.

Officers in attendance

Elaine Schofield, John Miller, Jenny Whight.

The Chair commenced the briefing at 12.56 pm.

1. Apologies

Apologies were received from Mr Bromhead.

2. Inquiry into debt recovery in NSW

a. Briefing with Western Australia's Sheriff's Office

The Committee conducted a teleconference briefing with the following staff of the WA Sheriff's Office:

- Mr John Klarich, Sheriff of Western Australia
- Mr Glenn Thorneloe, Manager Enforcement Services, WA Sheriff's Office.

9. Next meeting

The Committee adjourned at 1.27 pm sine die.

MINUTES OF PROCEEDINGS OF THE LEGAL AFFAIRS COMMITTEE (NO. 22)

9.31 am, Wednesday 22 October 2014
Room 1254, Parliament House

Members present

Mr Doyle (Chair), Mr O’Dea (Deputy Chair), Mr Bromhead, Mr Furolo and Ms Hornerly.

Officers in attendance

Helen Minnican, John Miller, Mohini Mehta and Jenny Whight.

1. Confirmation of minutes

Resolved, on the motion of Ms Hornerly, seconded by Mr O’Dea: That the minutes of meeting nos. 19, 20 and 21, held on 31 July, 4 August and 5 August 2014, be confirmed.

2. ***

3. Inquiry into debt recovery in NSW

a. Correspondence

The Committee noted receipt of the following items of correspondence:

- 5 August 2014 from Mr Craig Chapman, Registrar (Civil), Brisbane Magistrates Court re: Queensland court statistics
- 19 September 2014 from Mr Ian Phillips, Office of State Revenue, re: transcript query – attaching table with breakdown of how debt is collected

Resolved, on the motion of Mr Bromhead, seconded by Ms Hornerly: That the Committee authorise the publication of the table showing a breakdown of how debt is collected from Mr Ian Phillips.

b. Questions taken on notice and supplementary questions

Resolved, on the motion of Mr Bromhead, seconded by Ms Hornerly: That the Committee note receipt of and authorise the publication of answers to questions taken on notice and supplementary questions received from NSW Department of Justice on 3 September 2014, and that the answers be posted on the Committee’s website.

c. Submission

The Chair advised that the following late submission had been received:

- Submission 35, Power Collections

Resolved, on the motion of Mr O’Dea, seconded by Mr Bromhead: That the Committee authorise publication of submission 35 and that the submission be posted on the Committee’s website.

d. Consideration of draft report

The Chair's report, having previously been circulated, was taken as read.

Resolved, on the motion of Mr O'Dea, seconded by Mr Bromhead: That the Committee consider the report recommendations first and then chapter by chapter.

Recommendations 1 to 11, read and agreed to.

Resolved, on the motion of Mr O'Dea, seconded Mr Bromhead: that Finding 1 be omitted and the words instead inserted in the committee comments section at the end of paragraph 4.79.

Resolved, on the motion of Mr Furolo, seconded Mr O'Dea: that recommendation 12 be amended by omitting the words 'irrespective of which agency is responsible for enforcement functions.'

Resolved, on the motion of Mr O'Dea, seconded by Mr Furolo:

- That recommendation 13 be amended by inserting the following words 'Particularly in light of the committee's view that delays in enforcement action by the Office of the Sheriff is an area of concern' before the first word.
- That recommendation 14 be amended by omitting the words 'the enforcement functions of the Office of the Sheriff be outsourced' and inserting instead 'the Government and any performance audit strongly consider outsourcing the enforcement functions of the Office of the Sheriff'.
- That after recommendation 14 a new recommendation be inserted 'The Committee recommends that the Government and any performance audit also considers whether the level of resources for the enforcement functions of the Office of the Sheriff are adequate for the job required.'; and that consequential amendments be made to the Committee comment section preceding the new recommendation, including reference to relevant submissions that raised the issue of resources.

Resolved, on the motion of Mr O'Dea, seconded by Mr Furolo: That recommendation 15 be amended by inserting the words 'mindful of privacy principles' after the word 'amended'.

Recommendations 16 to 20, read and agreed to.

Resolved, on the motion of Mr Furolo, seconded by Mr O'Dea: That recommendation 21 be amended by inserting the words 'and strongly consider requiring' after the word 'encourage'.

Resolved, on the motion of Mr O'Dea, seconded by Mr Furolo:

- That chapter one stand part of the report.
- That chapter two stand part of the report.
- That chapter three stand part of the report.
- That chapter four, as amended, stand part of the report.
- That chapter five, as amended, stand part of the report.
- That chapter six stand part of the report.
- That chapter seven, as amended, stand part of the report.

Resolved, on the motion of Mr Furolo, seconded by Mr O'Dea: That the draft report, as amended, be the report of the Committee and that it be signed by the Chair and presented to the House; and

That the Chair and Committee staff be permitted to correct stylistic, typographical and grammatical errors.

Resolved, on the motion of Mr O'Dea, seconded by Mr Furolo: That, once tabled, the report be published on the Committee's website.

Resolved, on the motion of Mr Furolo, seconded by Mr O'Dea: That, once tabled, the Committee write to the Privacy Commissioner to alert her to the Committee's report, in particular recommendations 16 and 19.

Resolved, on the motion of Mr Furolo, seconded by Mr O'Dea: That, once tabled, the Committee write to the Auditor-General to alert him to the Committee's report, in particular recommendations 13, 14 and 15 and ask him to consider the Committee's recommendations.

4. Other business

Mr Furolo acknowledged Committee staff and thanked them for their work on the inquiry.

Mr O'Dea thanked the Chair for working to reflect the sentiment of the Committee throughout the inquiry process.

The Chair thanked Committee members and staff for their participation and assistance throughout the inquiry.

5. Next meeting

The Committee adjourned at 10.31 am sine die.