

## Responses to Questions on Notice

1. **A number of recommendations were made as a result of a 2009 review of the *Commercial Agents and Private Inquiry Agents Act*. What is their status now and do you consider that they should still be pursued?**

The Ministry for Police and Emergency Services (**MPES**) recommenced the review of the *Commercial Agents and Private Inquiry Agents Act 2004* (**the CAPIA Act**) after national work to harmonise the regulation of debt collection was discontinued in March 2013. MPES is currently considering a number of reforms, which will be presented to Government in due course.

2. **Do you support negative licensing for debt collectors?**
  - a. **Do you support the ACDBA's proposed model of negative licensing for collection agents (whose contact is restricted to phone calls, letters and email) and positive licensing for field agents (who have face-to-face contact with debtors)?**

The review of the CAPIA Act is considering a number of regulatory options, including negative licensing. Victoria adopted negative licensing for debt collection in 2011. In May 2014 Queensland passed laws which give effect to the regulatory approach proposed by the ACDBA.

3. **Under the current NSW licensing system, debt collectors have to keep trust accounts. Would this continue if NSW follows Victoria and Queensland and adopts negative licensing?**
  - a. **What risks, if any, would arise if trust accounts were no longer required?**

The question of whether NSW debt collectors would be required to keep trust accounts under a negative licensing model is a question about policy and should be directed to the Minister for Police and Emergency Services. The Department notes that trust accounts are sometimes required in sectors where a person deals regularly with other people's money, including in the real estate and legal sectors. Requirements to keep trust accounts are intended to increase transparency and accountability in relation to financial transactions.

#### 4. Are you aware of the National Hardship Register?

##### a. What are the benefits of the register and do you consider that the pilot program should be more widely implemented?

The Department is aware of the National Hardship Register (**NHR**) pilot program. The NHR is a joint initiative between the Australian Collectors and Debt Buyers Association (**ACDBA**) and the community sector, which seeks to provide debt collectors and financial services providers with information about consumers who are experiencing long-term financial hardship. Further information about the initiative can be found at [www.nhr.org.au](http://www.nhr.org.au). The NHR is not a NSW Government initiative. The Department is not in a position to comment on whether the pilot should be more widely implemented, as this is a policy matter.

#### 5. The Redfern Legal Centre recommended adopting legislative protections to prevent the garnishee of Centrelink income, as well as providing for the judicial appraisal of a debtor's finances to determine appropriate garnishee orders. Would you support such recommendations?

##### Garnishing of Centrelink income

In New South Wales, once a Centrelink payment has been deposited into a debtor's account it is not protected from being garnished (see sections 60 and 62 of the *Social Security (Administration) Act 1999* (Cth) (**the SSA Act**)). However, the SSA Act does provide for the protection of a 'saved' amount. The saved amount is calculated as follows:

- the total amount of any social security payment that is paid into a debtor's account during the four week period immediately prior to the garnishee order; minus
- the total amount withdrawn from the debtor's account during the same period.

The Department is aware that some jurisdictions have enacted provisions which provide additional protections against the garnishing of Centrelink payments in certain circumstances. For example, s12 of the *Judgment Debt Recovery Act 1984* (Vic) provides that:

an instalment order shall not without the consent of the judgment debtor be made if the income of the judgment debtor is derived solely from a pension benefit allowance or other regular payment under the Commonwealth Social Security Act 1947 or section 24 of the Children, Youth and Families Act 2005.

The Department is also considering a proposal made by the Consumer Credit Legal Centre (**CCLC**) in its submission to the statutory review of the *Civil Procedure Act 2005*. The CCLC proposed that a protected minimum amount be prescribed in relation to garnishee orders for debt, which would be equivalent to twice the workers compensation weekly minimum amount.

## Judicial appraisal of debtor finances to determine appropriate garnishee orders

The vast majority of garnishee orders in New South Wales are issued by the Local Court. In 2013, 29,987 garnishee orders were issued. In contrast, 196 orders were granted by the District Court and 96 orders were granted by the Supreme Court over the same period.

As a matter of practice, Notices of Motion for garnishee orders in the Local Court are generally granted by registrars. These orders are judicially reviewable. A debtor may also apply to pay by instalments upon being served with the garnishee order, which is known as an application for 'time to pay'. Requiring all garnishee orders to be judicially appraised would have significant resourcing implications for the Local Court.

### **6. Should it be mandatory for all types of debt recovery to be covered by an external dispute resolution scheme?**

The joint review of debt recovery processes conducted by the Department and the then Better Regulation Office (**the debt recovery review**) noted that the expansion of External Dispute Resolution (**EDR**) schemes has been an important development in providing access to justice in consumer credit matters. The debt recovery review recommended that the NSW Government's online information about debt recovery should provide information about EDR and that the Local Court should provide court staff with training and information to enable them to refer appropriate matters. Those recommendations are currently being progressed.

The Department notes that EDR schemes, such as the Financial Ombudsman Service Limited and Credit Ombudsman Service Limited, are regulated by the Commonwealth. The Department cannot express a view on whether such schemes should be mandatory, as this is a policy matter.

### **7. The Law Society of NSW claimed that it is not clear whether or not commercial agents have authority to collect 'debts' arising from motor vehicle collision damages.**

**a. Would you agree with this claim?**

**b. And, if so, how could this be clarified?**

Submissions to the review of the CAPIA Act expressed conflicting views regarding whether debts arising from motor vehicle repairs are covered by the Act. The review of the CAPIA Act is considering whether this issue should be clarified. The Committee's deliberations may assist to progress this matter.

**8. Can you comment on the ACDBA proposal to publish more actions, such as records of enforcement, record of a negotiated settlement, record of any post judgment agreement or non-formal payment arrangement, as items of public record?**

Further information would be required in order to assess the merits of this proposal. The Department will not always hold records of post-judgment agreements, non-formal payment arrangements or settlements that are negotiated out of court. Where information is held by the court, the information is often confidential and commercially sensitive. It is unclear who would collect the information, how it would be collected and where it would be published.

**9. The ACDBA suggested that there should be a limited number of times that a debtor may apply in court to pay by instalments. Do you foresee any potential issues with this proposal?**

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.

**10. A number of submissions have discussed issues regarding the efficiency of court registries. Do you consider that the resourcing of the Local Court Registry is a problem, and do you believe that there is a need for dedicated chamber magistrates or an alternative system, such as a community legal centre within the Court precinct, to assist unrepresented litigants?**

The Local Court has more than 150 registry locations across the State. In 2013, Local Court registries processed more than 100,000 civil actions. The Department notes that some submissions have raised concerns regarding the efficiency of the Local Court Registry. It is unclear whether these concerns relate to particular registries or raise broader concerns with Local Court registry services. The Department welcomes feedback about the services provided by Local Courts. Information about how to provide feedback can be found at <http://www.localcourt.lawlink.nsw.gov.au/localcourts/feedback.html>

The Department has also recently implemented a number of measures to improve the efficiency of Local Court processes in relation to debt recovery and deliver an enhanced service to clients. For example, the Local, District and Supreme Court Online Registry was launched to the public in February 2014. The Online Registry enables litigants to file a number of common court forms online, including statements of claim, applications for default judgment, notices of motion for writs and garnishee orders and examination notices.

The Online Registry also enables parties to debt recovery proceedings to track the progress of their case online, download documents and find out when their matter will be heard. The Online Registry is currently receiving around 1,500 filings each week and more than 10,000 users have registered to use the service. The Online Registry also 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. More information about the Online Registry can be found at [www.onlineregistry.lawlink.nsw.gov.au](http://www.onlineregistry.lawlink.nsw.gov.au)

Where parties opt to attend the Local Court in person, all registries provide a chamber service. This service provides information and assistance to litigants in relation to Local Court procedure. Chamber registrars are not permitted to provide legal advice regarding the merits or otherwise of an application or assist in the drafting of pleadings. Information about the chamber service can be found at <http://www.localcourt.lawlink.nsw.gov.au/aboutus/Localcourtregistries>

While Local Court staff cannot provide legal advice, the Department does provide 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.
- 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.

The Local Court's Small Claims Division also provides a cost-effective and efficient forum to resolve debt disputes where the amount of money in dispute is less than \$10,000. Procedures in the Small Claims Division are generally less formal and less technical, and Local Court assessors and registrars will help parties to reach an agreement without the need for a subsequent hearing. Where a matter does go on to hearing, witnesses are not called unless the court decides otherwise and the rules of evidence do not apply.

**11. Are you aware of any other jurisdictions in which debt recovery processes distinguish between the debts of individuals and business debts?**

**a. Can you comment on the advantages and disadvantages of applying different processes for individual's debts and business debts?**

The Department is not aware of any jurisdictions in which different processes apply for the recovery of individual debt and business debt and cannot provide detailed information on the advantages or disadvantages of implementing such a scheme. The Committee should note that, while commercial 'business to business' debt can involve higher sums of money and more sophisticated debtors, this will not always be the case. Business to business debt can also be incurred by small enterprises that are relatively unsophisticated. A different set of processes may not be justified in such circumstances.

The NSW Government already offers tailored processes to assist creditors and debtors to resolve disputes about unpaid monies depending on the size and complexity of the debt. For example, the NSW Small Business

Commissioner assists small businesses to mediate disputes in order to avoid the expense of traditional court litigation. The Local Court's Small Claims Division also provides a specialised forum in which lower value debts can be resolved quickly and without the formality of traditional court processes.

**12. In 2011 Consumer Affairs Victoria released an options paper on the national harmonisation of debt collection regulation.**

- a. Are you aware of any progress or discussion about national harmonisation since then, and do you believe that national harmonisation should be pursued further?**
- b. Are there any particular policy changes that would move us away from national harmonisation that the Committee should be wary of?**

The 2011 Consumer Affairs Victoria options paper was part of the national harmonisation project led by the then Ministerial Council for Consumer Affairs. This project was discontinued in March 2013, with no positive outcome. The Department is not aware of any progress or discussion about national harmonisation since that time.

The Department is not aware of any policy changes that would move NSW away from national harmonisation. Debt buying activities related to consumer credit are regulated under national consumer credit laws. Individual jurisdictions, such as Victoria and Queensland, have moved towards negative licensing (see answer to Q2).

**13. Are you aware of any concerns about serving parties by post, as opposed to in person?**

Under Schedule 3 of the *Civil Procedure Act 2005*, matters relating to the service of documents are a matter for the Uniform Civil Procedure Rules (UCPR). Provisions relating to service of documents are contained in Part 10 of the UCPR. Any changes to service requirements would be a matter for the Uniform Rules Committee.

The debt recovery review notes that stakeholders representing the interests of both debtors and creditors raised concerns about postal service during the course of that review. Stakeholders noted that where a Statement of Claim is served by standard post, there is a risk that a defendant may not receive it. This can result in default judgment being entered without the defendant being aware of the claim, which can in turn result in applications being made by debtors to set aside the default judgment.

These are valid concerns. However, as the debt recovery review noted, the option of serving by post in the Local Court was introduced to reduce costs and improve convenience for parties. The review noted that the previous system, which required personal service, was both slow and costly. The review also found that postal service is effective in most cases and recommended that the NSW Government's online information about debt

recovery include information about the importance of having the correct address for the defendant and the consequences of non-delivery. This recommendation is in progress.

**14. The Law Society of NSW proposed removing the requirement for a creditor to swear an affidavit to obtain a default judgment and instead allowing solicitors or commercial agents to do so, as is done in the Small Claims Division. Are you aware of any reasons this should not occur?**

Requirements for the swearing of affidavits are located in the UCPR. UCPR 35.3(2) provides that a solicitor or commercial agent may only sign an affidavit in relation to an application for default judgment in the Local Court's Small Claims Division. In the District Court, Supreme Court and Local Court General Division, such affidavits must be signed by the creditor.

Amendments to the UCPR are a matter for the Uniform Rules Committee (**the Committee**). The Committee has previously advised the Attorney General that existing requirements for sworn evidence in relation to default judgments should be retained. The Committee considers that it would not normally be acceptable for a solicitor to verify a debt, as he or she can only do so on instructions. The Committee also noted that requiring plaintiffs to sign affidavits provides an important mechanism by which plaintiffs can be prosecuted for giving false evidence to the court.

**15. The Law Society of NSW suggested allowing the transfer of proceedings from the General Division of the Small Claims Division in certain circumstances, such as when parties by consent agree to the transfer. Can you comment on this?**

Local Court Practice Note Civ 1 permits proceedings to be transferred from the Small Claims Division to the General Division where the court considers that the proceedings should be consolidated with other proceedings that are in the General Division. There is no equivalent mechanism that allows matters to be transferred from the General Division to the Small Claims Division. As the Law Society of NSW notes, differences in procedure between the two divisions, including in relation to appeals and costs orders, would need to be considered.