



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

30 March 2011

The Director
Legislation, Policy and Criminal Law Review
NSW Department of Justice and Attorney General
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam,

Review of *Civil Procedure Act 2005*

We are pleased to provide this submission to the Review of the *Civil Procedure Act 2005* (Act) tasked to determine “whether the policy objectives of the Act remain valid and whether the terms of the legislation remain appropriate for securing those objectives”.

Background

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

The objectives of ACDBA are to:

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

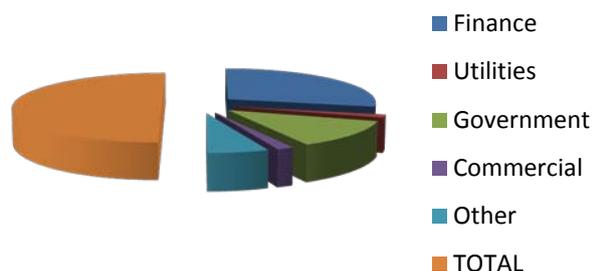
Members are engaged in debt collection and debt purchase and use legal action where appropriate as a means of obtaining payment from debtors.

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

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

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

Finance	\$5.182 billion
Utilities	\$0.247 billion
Government	\$2.270 billion
Commercial	\$0.297 billion
Other	\$1.082 billion



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

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

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

Submission

Whilst appreciating the Review is principally tasked to determine “whether the policy objectives of the Act remain valid and whether the terms of the legislation remain appropriate for securing those objectives”, this Submission is limited to providing a timely observation as to concerns in respect to the soon to be implemented mandatory pre-litigation requirements for civil proceedings.

Similar obligations from 1 January 2011 came into force in Victoria as pre-litigation requirements introduced by the new Victorian Civil Procedure Act 2010 (Vic Act). It is very relevant to note the recently elected Coalition State Government in Victoria after just six weeks of operation of the Vic Act has introduced a new Bill to repeal the requirements and replace them with a general power for the Court to introduce specific protocols for mandatory or voluntary pre-litigation processes in relation to specified civil proceedings or classes of proceedings.

Our members report the vast majority of litigation in debt recovery they are involved in, involve debts which are undisputed, resulting in default judgments in favour of the creditor.

Possibly, the pre-litigation requirements have been proposed as appropriate to introduce because of high level disputes taking years to get to court such as property deals/commercial contracts and the like, however, such disputes are quite different in nature to most debt matters. The majority of collection matters progressing to litigation are not defended on the facts of the claims made – that is, there is no actual dispute beyond a capacity or refusal to pay the amount in dispute.

Put simply, "most debts are won't pay, rather than can't pay" and the requirements for civil procedures should in the view of ACDBA reflect this. The Act should be modified to ensure routine debt related matters where the issue is a situation of a defendant debtor being unable to pay the debt (being undisputed) which is very much different to more complex matters where actual facts are in dispute, are exempt from the "pre-litigation requirements" of the Act.

After careful consideration, ACDBA members believe the effect of mandatory pre-litigation requirements for civil proceedings as in force in Victoria (although expected to be soon amended) and soon to be implemented in NSW under the Act will be to:

1. Increase the legal cost to creditors due to the pre-litigation requirements which are unrecoverable. Currently the debtor receives at the very least three letters of demand often accompanied by a proof of debt, one from the client, one from the agency and a solicitor's letter. The new provisions of the Act will unnecessarily duplicate this process and increase costs to the creditor.
2. Significantly increase the delay in commencing litigation to the benefit of the debtor.
3. Encourage debtors and/or their legal advisors to deliberately adopt delaying tactics to stall the litigation process.
4. Promote a system which potentially encourages debtors to dishonour their contractual obligations to the detriment of creditors who in most instances only turn to the legal system as a last resort.
5. Create a loss of confidence in the justice system because of the barriers facing a creditor arising from:
 - a. irrecoverable legal costs;
 - b. delays in commencing litigation; and
 - c. a potential of delaying tactics of debtors and/or their legal advisors who refuse to honour their contractual obligations entered into by creditors in good faith.

For these reasons, ACDBA believes debt recovery actions for all jurisdictions ought to be exempted from the pre-litigation requirements to be introduced to the Act.

Whilst preferring to see a total exemption in all jurisdictions, we recognise this might prove impractical due to other considerations and so request that as a minimum, steps be immediately taken for debt recovery actions in the Local Court & District Court jurisdictions to be determined "excluded disputes" as provided for in Section 18B (2) (c) either by way of a Regulation made pursuant to Section 18B (4) (a) or a Rule made pursuant to Section 18B (5).

We look forward to your advices in due course.

Yours sincerely,

AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION



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ANNEXURE A

Listing* of Members of Australian Debt Buyers & Collectors Association

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

* *Current at 29 March 2011*