

# VLRC Civil Justice Review

## Submission

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**Would you like your submission to be anonymous?** No  
**Would you like your submission to be confidential?** No

## Who are You?

It would help us to have information on the background of people making submissions. Please identify which one of the following categories best describes you:

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|--|--|
| <input type="checkbox"/> Judge                                       | <input type="checkbox"/> Insurance industry                        |
| <input type="checkbox"/> Magistrate                                  | <input checked="" type="checkbox"/> Consumer organisation employee |
| <input type="checkbox"/> Court administrator                         | <input type="checkbox"/> Business person                           |
| <input type="checkbox"/> Practising solicitor                        | <input type="checkbox"/> Member of the public                      |
| <input type="checkbox"/> Practising barrister                        | <input type="checkbox"/> Government employee                       |
| <input type="checkbox"/> Recent/current litigant in civil proceeding | <input type="checkbox"/> Legal academic                            |

Other: please specify

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**Deadline for submissions: 30 November 2006**

## Confidentiality

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## Mailing List

If you make a submission we will add your contact details to our mailing list so you will be kept notified of developments in the reference. If you would like to be added to the mailing list, but do not wish to make a submission, please email us.

# Introduction

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## About Consumer Action

The Consumer Action Law Centre (**Consumer Action**) is an independent, not-for-profit, campaign focussed, casework and policy organisation. It is formed by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service, and builds on the significant strengths of these two centres.

Our main experience with the civil justice system relates to the following:

- Representing individuals who are being pursued for payment in relation to credit contracts or for payment for goods and services. Problems often initially present as “inability to pay” however in many cases the individual has a legitimate defence. For example, the debt may be statute barred, or a prescribed notice may not have been provided in relation to a contract signed in the home.
- Issuing proceedings in the Victorian Civil and Administrative Tribunal (VCAT) for consumers who have a dispute with a trader or a credit provider
- Representing individuals who have been issued with a writ of possession in the Supreme Court in relation to a mortgage;
- Representing individuals subject to judgment enforcement procedures such as a visit from the Sheriff or a Creditors Petition for Bankruptcy

Our particular interest in this issue relates to the rights of individuals, particularly those who cannot afford legal representation.

We are aware that one key focus of the Civil Justice Review relates to large, costly disputes that take up Court time and resources, which could have been settled effectively through full disclosure or mediation. We support changes that might address these concerns; however it is important to consider the impact of any reforms on those at the other extreme of the civil justice system. Many individuals go through the system unnoticed – often seeking our assistance after default judgment has been entered, in matters where they may have had a legitimate defence. A fairer system would result in greater attention being paid to this demographic group. It would be unfortunate if additional requirements imposed on litigants to prevent overuse of the Courts resulted in additional barriers for those who already have little access.

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# Questions

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## General

- 1. Are there particular aspects of the civil justice system which you consider are in need of reform? What specific changes should be implemented?**

Our organisation represents individual consumers. Most of our clients have had no prior involvement in the legal system. The other party is a company – often a large company – that usually has considerable resources. This raises a number of broad concerns.

### **A Debt Recovery Factory?**

Has civil procedure – in the Magistrates' Court particularly - been overly determined by the needs of institutional creditors filing large numbers of consumer debt claims in bulk? And most importantly, have the courts become inured to the needs of those consumers who face a genuine dispute regarding their indebtedness to such an institutional creditor? If the circumstances of impoverished debtors are considered, the answer seems to be in the affirmative. In our submission, the domination of the court system by institutional creditors and their solicitors issuing on large books of debts has, in practice, skewed civil procedure in favour of such creditors, to the detriment of the rights of debtors.

Naturally, it is necessary that creditors have recourse to methods of cost-effective debt recovery. However the courts must also ensure that debtors who have a defence to a claim are afforded the opportunity to present their defence before the court. Vulnerable and disadvantaged debtors must not only be afforded an opportunity to do so, but must be positively encouraged.

The status quo appears to result in large numbers of claims proceeding to judgment despite the existence of grounds for filing a defence, and judgment debts are commonly pursued through mechanisms most advantageous to creditors and most onerous to debtors. It is common for Consumer Action to be approached by debtors who have a legitimate defence to a claim which has already proceeded to judgment. In assessing a case for intake, our service has to consider the likelihood of obtaining a successful outcome for the client (the legal merits) as well as the resources our service would need to devote to the matter (our capacity). The fact that judgment has been entered makes it considerably less likely that this simple cost-benefit analysis will be able to justify intercession on behalf of the debtor: see the case studies below.

### **Case study 1**

Our client approached us regarding a dispute with a solicitor regarding costs incurred while that solicitor was acting for the client in a property dispute arising out of the dissolution of a de facto relationship. The client instructed us that a conditional costs agreement had been entered into and, under the terms of that agreement, no costs were payable. However, her solicitor had demanded \$17,000 in costs.

Unfortunately, by the time that the client approached us, the solicitor had obtained judgment in the Magistrates' Court of Victoria for that amount, and a sequestration order had been made under the *Bankruptcy Act 1966*.

The client had represented herself in connection with the dispute up to that point and presented us with a vast array of legal documents which detailed a great number of interlocutory applications launched both by our client and her opponent.

While the client was difficult to deal with and had in our impression exacerbated the situation by striking an overly combative stance, it did appear that her complaint was grounded in genuine injustice. The primary difficulty for our service was that in order to take action to remedy that injustice, a mass of procedural steps would have to have been undertaken. Both the sequestration order and the original Magistrates' Court decision would have to have been set aside before the substantive issues could have been dealt with.

In the circumstances, we were unable to assist. The matter would have consumed too great an amount of our resources, and the prospects of successfully setting aside both the bankruptcy and the original judgment were slim. A major contribution to the matter having advanced so far appeared to be that the client was unrepresented.

### **Case study 2**

Our client incurred a \$300.00 veterinary bill almost two years ago. She was a young mother with two children and solely in receipt of social security for income. However, our client had equity in her home following her Family Law settlement. Without our client ever appearing before a Court, default judgment entered in the Magistrates' Court by the vet had been through the enforcement process and a Warrant for Seizure and Sale over her home had been issued out of the Supreme Court. By the time the matter was referred to Consumer Action, the Warrant was due to be executed by the Sherriff within two weeks and costs had escalated to over \$3,000.00. The client had limited English skills, had no understanding of the legal process and had no capacity to repay the claimed amount with costs. It initially appeared that the sale would go ahead, as the creditor was not prepared to negotiate, however Consumer Action was able to assist the client to reach a negotiated settlement prior to her home being sold.

There are a number of imbalances inherent in the civil justice framework in respect of large and well-resourced institutional creditors proceeding against impoverished individual debtors:

- a) The creditor is likely to be more familiar with the law and court procedure than the debtor.
- b) The creditor is likely to have more financial and legal resources than the debtor.
- c) The debtor is likely to be unrepresented.
- d) The debtor is likely to be under more stress than the creditor.
- e) The debtor is likely to feel more pessimistic about the prospects of mounting a successful defence against a vastly more resourced opponent.

The debtor thus feels that they are fighting a battle on two fronts: against the creditor, and against 'the system', as personified by the court itself.

## Efficient Provision of Justice

### Case Study 3

In the early 1990s, Consumer Credit Legal Service commenced acting for approximately 150 consumers who had a dispute with a timeshare company, and related financier. After years of litigation in the Tribunal, the Magistrate's Court, the County Court and the Supreme Court the decision was made to have each matter heard individually. Although some matters were settled by negotiation each and every proceeding that went to court was decided in favour of our client both at first and second instance. It was a slow process that put pressure on CCLS' resources over many years. We assume that these 150 consumers were only a fraction of those suffering loss as a result of the actions of the timeshare company.

Even when an individual has legal assistance to defend action relating to a consumer dispute, it is often the case that the matter relates to practices by the company that have affected a number of other consumers. For example failure to provide required documents, unconscionable conduct, or that the action is one of a number of proceedings issued for statute barred debts.

While an individual may obtain a just outcome, other affected individuals may not. Unless the company has been identified for action by a regulator (and these are a small minority of matters) the company will benefit from the fact that only a small number of consumers have obtained legal advice or representation. Even where a regulator does take action, it is often the case that individual consumers who have suffered do not receive compensation. For example, in 2003 the Federal Court found that it did not have the power to award refunds to consumers following the ACCC action against Danoz Direct Pty Ltd. See: <http://www.accc.gov.au/content/index.phtml/itemId/362158>

Even where a number of individuals are identified who have suffered loss, a party can still benefit from the inability to identify all those who should be compensated.

#### Representative Actions:

Our service has been involved in a number of proceedings where we represented a large number of consumers involved in similar matters. Consumer Credit Legal Service (CCLS) issued representative proceedings in relation to National Westminster Finance and Esanda during the late 1980s. The Court refused to allow the Esanda matter to proceed, however the State Government responded with further legislative changes to promote the possibility of representative proceedings. The service subsequently issued against National Westminster Finance a matter for over 100 consumers, that was settled out of court but involved significant refunds to the consumers.

However, in the last 15 years, we are aware of only one representative proceeding in relation to a consumer matter. This was issued by Maurice Blackburn Cashman against FAI in relation to the sale of security alarms. CCLS initially identified a number of these cases and referred matters to Maurice Blackburn Cashman.

Issuing these proceedings placed a significant burden on services such as ours, so we are pleased to work with private firms who are prepared to take action. However, we conclude that the cost of issuing this type of proceedings is not warranted for consumer transactions, in part because the proceedings need to be issued in the Federal Court. We believe there is a need for reform to ensure that it is convenient

and economic to issue representative actions, including the capacity to issue representative actions in lower cost forums.

Cy-près schemes and classes of consumers:

As consumer advocates, we often deal with individuals who present with disputes which must logically be only one instance of a systemic issue involving large numbers of customers with the same trader. While representative proceedings are one option for resolving such disputes on a large scale, such proceedings are still likely to fail to capture all affected consumers. In such situations, the doctrine of cy-près should be employed to indirectly effect restitution to affected consumers who were not members of the class of litigants and who are unable to be directly contacted. In such cases, damages payable by a culpable trader can be held in trust and used to fund work which aims to benefit the class that has suffered, as a whole.

The Federal Court Rules prohibit actions to recover relatively small amounts (although what constitutes a small amount has not been defined or tested). However, this restriction overlooks the fact that there are cases where many consumers may have been required to illegally pay what are, individually, very small amounts, and that cy-pres orders would be a better solution than allowing a party to profit from errors or illegal conduct.

### **Dealing with parties facing financial hardship**

Many individuals who seek assistance from the community sector in relation to Court proceedings are simply unable to pay a debt they have incurred. This is often caused by marriage breakdown, illness or unemployment, but may be as a result of irresponsible lending, or a purchase entered into as a response to high pressure selling.

While many individuals fail to access the legal system when they have a genuine dispute, a large number of matters proceedings through the Courts are the result of financial hardship.

Much has been achieved by industry, Government and community organisations, to develop appropriate responses to hardship by industry. Industry Codes – many enforceable by the consumer, commit to dealing appropriately with hardship. For example, Clause 25.2 of the Australian Bankers' Association's Code of Banking Practice states:

With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan. If, at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to your circumstances, we will inform you about them.

Most complaints by consumers under the Code are dealt with by the banks, or through the Banking and Financial Services Ombudsman. This approach proceeds upon a less adversarial debt management, rather than debt recovery, model and can result in benefits for both creditors and debtors in terms of reduced costs and increased likelihood of full payment of the debt. While it can take some time for companies to effectively implement such policies, this approach will ultimately reduce the number of debts recovered through the Courts.

In most cases hardship is best dealt with outside the Court system, however the Courts do have a role to play to ensure that those in hardship are treated fairly.

The rights of a debtor in respect of judgment debt recovery must also be considered. The *Judgment Debt Recovery Act 1984* (Vic) has come some way towards assisting debtors in this respect, however its benefits are limited. Additionally, it is possible for some of its provisions to be abused by judgment creditors and solicitors.

Where a Summons for Examination relates to failure to pay an instalment order, the Judgment Debt Recovery Act 1984 requires the Court to either orally examine the judgment debtor or to be otherwise satisfied that an instalment order should be made or confirmed. Section 12 of the Act states that an instalment order shall not be made without the consent of the judgment debtor if the income of the judgment debtor is derived solely from a regular payment under the Commonwealth Social Security Act 1947.

In practice, judgment debtors are not examined by the Court, but enter into a new instalment order with the creditor, which is then confirmed by the Court. Where judgment debtors are not legally represented, they often sign a new agreement under duress, and they may enter into such agreements without knowing that they must consent to an order if they are in receipt of a pension. In some cases, the debtors have believed that the creditor's solicitor was a court official.

Victoria Legal Aid provided a duty lawyer in the Melbourne Magistrates' Court for these matters, after we raised concerns. In November 2003, we wrote to the Chief Magistrate about similar problems occurring in Benalla, Myrtleford and Wangaratta Courts. We believe the local Courts addressed our concerns as we have not had similar complaints since.

Our experience highlights the problems that can be faced by unrepresented individuals due, in part, to Court processes - even when the law is designed to enable Courts to take a debtor's ability to pay taken into account.

Sadly, we often see consumers in financial hardship, who are unable to pay an, often relatively small, judgment debt, but are faced with the loss of their assets – even their home. These problems are illustrated by case studies elsewhere in the submission.

### **Irresponsible Lending**

Consumer over-indebtedness due to irresponsible lending is an increasing problem in Australia. The *Uniform Consumer Credit Code* (**the Code**) provides a debtor with a right to challenge a regulated credit contract as unjust in the event that it can be established that a credit provider knew, or ought to have known at the time a credit contract was entered into, that a debtor could not pay in accordance with its terms or not without substantial hardship: ss 70(2)(l) and 71. The Banking and Financial Services Ombudsman has published some influential consideration of this principle in its Bulletin No 45, downloadable from its website at [www.bfso.org.au](http://www.bfso.org.au).

There is now increasing concern, in both government and the community generally, over the ease with which credit is available to consumers, and the 'over-commitment' argument articulated by s 70(2)(l) is becoming increasingly relevant to debt recovery of large books of debts by credit providers.

Under the *Consumer Credit (Victoria) Act 1995*, jurisdiction to hear an application under s 71 of the Code is in Victoria conferred exclusively upon VCAT. However, such debts are predominantly recovered by the issuing of proceedings in the Magistrates' Court, which does not have the power to hear a s 71 application: the matter would need to be transferred to VCAT. Such a procedural technicality does much to dissuade a debtor from opposing suit and, while statistics are not available, could account for a considerable proportion of defensible claims remaining uncontested.

With an increase in the overextension of credit, the powers given to VCAT should be extended to the Courts. For example, South Africa's new credit laws (National Credit Act 34 – 2005) define reckless lending as the provision of credit where the lender fails to undertake an appropriate assessment or where the assessment showed that the consumer did not understand the risks and obligations or was over indebted. The National Credit Act allows a Court to set aside all, or part, of the consumer's obligations where a debt has resulted from reckless lending.

Recommendations:

The Courts should have the power to set aside all, or part, of a debtor's obligations where the debt arises from inappropriate or reckless lending.

### **Lack of Legal Advice/Representation and Information**

Our centre provides legal representation to consumers, including in Tribunals and Courts. With eight solicitors providing advice and representation, we are able to assist many consumers. However, those assisted are only a fraction of those who could benefit from such assistance.

While reforms are desperately needed in relation to providing better information and access to justice, once matters are in the Courts many individuals cannot assert their rights without legal representation. More affordable legal representation should be available to defendants in civil matters. It is a plain fact that, no matter what other reforms the system undergoes, an unrepresented, inexperienced defendant will always be at a grave disadvantage when opposed by a plaintiff with legal representation. The provision of legal representation does much to equalise the imbalances articulated above.

Additionally, it may be that defendants served with legal process could be made more aware of existing resources provided by Victoria Legal Aid, the community legal sector and pro bono organisations such as the Public Interest Law Clearing House. Such awareness could be facilitated by, for example, a redesign of the information disclosed on the Form 4A Complaint used in the Magistrates' Court. The needs of defendants may be better served by the Complaint bearing large letters advertising the telephone numbers of Victoria Legal Aid and the Federation of Community Legal Centres. Similarly, information regarding rights and obligations pertaining to judgment debt recovery could be provided to debtors subsequent to the entry of judgment.

## **Commencing and Defending Proceedings**

**6. Do the processes for commencing civil proceedings need reform? If so, what are the problems and what changes should be implemented?**

## ***Service and Execution of Process Act 1992 (Cth) (SEPA)***

We regularly see consumers who have received a Complaint, which has been issued in a Court outside Victoria, in cases where the contract was formed and the consumer has always lived, in Victoria. While convenient for the Complainant, the Defendant can be at a severe disadvantage.

The fact that the name of the Court on the document is in another State, can discourage the Defendant from taking any action at all – even seeking advice.

For centres such as ours, having the matter stayed in the other state can be complex, and involves finding a solicitor in the other state who is prepared to appear on our client's behalf – usually for no fee.

Recommendations:

- The Victorian Attorney General should propose to other State Attorneys General that the SEPA be amended to prevent the issuing of matters outside the appropriate jurisdiction, or alternatively that SEPA be amended to require automatic transfer (unless both parties agree otherwise) to the appropriate jurisdiction once a defence is lodged .

The case studies below illustrate the procedural complexities involved in making an application to stay proceedings under the *Service and Execution of Process Act 1992*. Such complexities render otherwise straightforward factual disputes unable to be defended by an unrepresented party, and increase the likelihood of a genuine dispute being resolved by the entry of judgment in default of defence.

### **Case Study 4**

Our client entered into a contract with Australian Finance Direct to finance the cost of enrolment fees in Henry Kaye's Investment Mastery Program. Our client ceased payment when the company offering the Program ceased trading. AFD issued proceedings in the Local Court of NSW.

Our client was an aged pensioner suffering from a rare form of acute leukaemia and had only months to live.

After CCLS filed an application to stay proceedings under s 20 of the *Service and Execution of Process Act 1992*, the matter was settled on terms favourable to our client.

This was only one of a very great number of disputes arising out of the Henry Kaye matter in which AFD had issued proceedings in NSW in respect of matters where the contracts had been signed in Victoria by Victorian consumers. After discussions with lawyers for AFD, AFD agreed to issue proceedings in Victorian courts where pursuing claims against Victorian consumers.

### **Case Study 5**

Our client was sued by Amex over credit card debts. She disputed quantum. But Amex issued a statement of liquidated claim in the NSW Local Court for recovery of debts owed on our client's credit card. Our client, who lives in Melbourne, disputed quantum. She approached CCLS for assistance. We assisted with drafting an application for stay of proceedings under the *Service and Execution of Process Act 1992*. However, the clients had to combat a considerable volume of interlocutory

process launched by Amex for the apparent purpose of styming our client's application to stay. Accordingly, our client and CCLS spent considerable resources dealing solely with the issue of jurisdiction before having the opportunity to confront the substantive, factual elements of the dispute. Additionally, the complexity of the jurisdictional questions made our client unable to defend the matter without the assistance of solicitors, whereas if the matter had been issued in Melbourne, our client – an educated professional – would have had the wherewithal to defend the matter unrepresented.

### **Case Study 6**

Our client's son forged our client's signature on a loan contract with Capital Finance to finance the purchase of a motor vehicle. The client lived in suburban Melbourne, and all matters pertaining to the dispute occurred in Melbourne.

On 8 January 2002 Sydney-based financier Capital Finance issued a Statement of Liquidated Claim in the Local Court at Downing Centre, Sydney in the state of New South Wales, claiming \$12,710.66, and \$597.18 in costs and interest. On 20 January 2002 the Claim was served at the home address of our client. Our client, who speaks little or no English, did not understand the nature of the served documents and accordingly did not file a defence to the Claim.

On 1 March 2002 judgment in default of defence was obtained against our client for the sum of \$13,711.02.

Our client retained the services of CCLS who prepared and filed in the Local Court a Notice of Motion to Set Aside Judgment and for Stay of Proceedings under s 20 of the *Service and Execution of Process Act 1992*, together with supporting affidavits of the client and of a translator.

The application was successful. While Capital threatened to continue to pursue the matter by issuing fresh proceedings in Victoria, they have not done so and there is no indication that they will do so.

### **Case Study 7**

The client in question was a retiree and an office bearer at a NSW RSL Club. As part of his duties he facilitated the Club's entry into an equipment lease and provided his contact details to the leasing company. Upon the dissolution of the Club, the leasing company sued him personally in the Magistrates' Court of Victoria at Melbourne for the outstanding amounts owing under the lease, despite him having no liability under the contract as contained within the written document.

He approached a Community Legal Centre in NSW for assistance, who filed an application to stay proceedings under the *Service and Execution of Process Act 1992*. As part of that application they sought orders that their client be permitted to appear by telephone, as provided for by that Act.

However, the Court stated that the application to appear by telephone at the hearing would not be determined until the day of the hearing itself. Accordingly, the solicitors had to retain the services of CCLS to act as agents in the matter, to be ready to appear personally on behalf of the client in the event that the application to appear by telephone was rejected. If the application had been determined previously as requested, the considerable effort of retaining and briefing solicitors as agents would have been spared the NSW legal centre.

### **Case Study 8**

A financial counsellor approached CCLS for assistance in defending a matter issued against his client in the Magistrates' Court of South Australia. CCLS prepared a stay of proceedings under s 20 of the *Service and Execution of Process Act 1992*, together with supporting affidavit. The financial counsellor would not have required the assistance of CCLS but for the need to address the preliminary issue of jurisdiction.

### **Case Study 9**

Our client signed a contract to purchase a vehicle with a car dealer in South Australia after seeing an advertisement on the internet. Our client was unable to obtain finance from his preferred lender. The car dealer threatened to issue proceedings seeking specific performance in South Australia should the client not proceed with performance of the contract using credit obtained by the car dealer. CALC prepared documents for the client and issued in VCAT. The matter was settled prior to hearing with most of the client's deposit being returned.

## **Service**

We would be concerned about any changes that might remove the obligation for personal service. Only a small percentage of those served lodge a defence. For many, this is because they have no dispute about the debt. However, as discussed elsewhere, many fail to respond even though they have a valid defence. While it is important to review the current documentation and information provided, we believe that personal service is necessary to ensure that the individual is aware of the existence – and the importance of the Court documents.

### **7. When a person commences a civil proceeding and serves the initiating documentation on the person who is being sued, is there any further information or documentation which you consider he or she should be required to provide to that person before being permitted to proceed? If so, what information or documentation should be required to be provided at this stage?**

#### **Clear and Relevant Information**

Most individuals we see who have been served with a Magistrates' Court Complaint, have little, or no understanding about the default process. It is not unusual for clients to advise our solicitors that they have been sued but they have not yet been advised of a date for the hearing. Some clients believe that when they subsequently receive documents relating to enforcement of the judgment (such as summons to appear in relation to an Instalment Order or Attachment of Earnings), that they will have the opportunity to dispute their liability for the debt.

We assume that many of our clients do not attempt to read the documentation, but even those who do often fail to understand what it means. Judgment by default is not a concept generally understood by those unfamiliar with the legal system, so even if they do read the documentation they often fail to understand its significance.

It is vital that individuals understand their legal position when they are served with Court documents. The current documentation does not achieve the goal of providing straightforward information to the recipient.

Recommendation:

- The Complaint form, and other documentation relating to Magistrates' Court procedures should be reviewed, and redesigned, to ensure that it provides clear information. This should include consideration of whether terms other than "complaint" and "default" might lead to better understanding. Information about legal, and other services (such as free financial counselling) should be included with the Complaint, and other documents relating to enforcement.

### **Enabling the Targeting of Information and Legal Advice**

In addition to ensuring that documentation is simple to understand, individuals being served with a Complaint should receive information about free assistance available. This should include, at a minimum, contact details for Victoria Legal Aid and Community Legal Services. However, the form of the Complaint and the way that information is presented, should be carefully considered to maximise the likelihood that it would be read and understood. Information in languages other than English should be provided.

Once judgment has been entered, most judgment debtors receive information about dealing with their debt problems – but unfortunately this information comes in the form of advertising material from businesses such as finance brokers or Bankruptcy Part IX Administrators. These companies use lists of judgment debtors purchased from commercial organisations. Our experience suggests that in many cases, contact with these services can result in additional problems for the debtor. For example, a finance broker may offer mortgage finance – but in these circumstances fees and interest are usually high (for example \$8,000 fees deducted from a loan of \$20,000 is not unusual – and this doesn't include interest). The conduct of some Part IX Administrators and sales methods employed have recently been recognised by the Attorney General, who has announced some changes to the Part IX regime.

However, the point is that while these people are receiving advertising material from businesses hoping to profit from offering a "debt solution", they do not receive any information about Legal Aid, free community based financial counselling or specialist legal services.

Some years ago, the Financial and Consumer Rights Council (FCRC) undertook a project that examined the details of judgment debts at the Melbourne Magistrates' Court. The project also involved using judgment details to provide information to judgment debtors about their rights relating to enforcement procedures. We understand FCRC received some funding and assistance from Victoria Legal Aid to enable them to access the judgment information.

In some cases, we are aware that legal action is being taken by a company against a number of consumers where either the debts are likely to be statute barred, or the individuals may have another defence – for example due to systemic breaching of consumer laws by the company. Access to information from the Courts relating to proceedings recently issued would allow organisations such as ours to target information to these consumers about their possible right to lodge a defence.

#### **Recommendations:**

- Information about assistance available should be provided to individuals at the time they are served with the Complaint.
- Consideration should be given to allowing access to Court data (for example contact details of judgment debtors as well as details of proceedings recently

issued) by community agencies, to allow the further provision of information and/or offer of assistance.

**9. When claimants wish to commence civil proceedings should there be any legal obligation on them (in addition to those which may already exist) to be satisfied of the merit of the claim before they are permitted to commence the proceeding? If so, what steps should they be required to take?**

### **Statute Barred Debts**

A significant number of our clients are subject to legal procedures to recover an amount that is clearly statute barred. In most cases, we find that the company (or a company that has purchased the debts) has issued proceedings against many individuals where it appears a significant number may be statute barred.

This is one area where only those consumers who have legal representation or advice are aware that they have a defence.

In many cases, legal proceedings are not issued, but individuals pay after a threat to take legal proceedings is made. Unlike New South Wales law, which extinguishes the debt at the conclusion of the statute period, individuals in other States including Victoria, only have the right to defend an action for a statute barred debt.

### **Case Study 10**

The following information about action taken by an individual (represented by Consumer Credit Legal Service in Victoria) and by the regulator against the actions of one large debt collection firm illustrates the problem and indicates the extent of this problem.

In *Collection House v Taylor* [2004] VSC 49, the Supreme Court of Victoria found that attempts made by Collection House to convince the debtor to pay the debt were unconscionable.

In February 2006, Collection House signed a voluntary undertaking with the Australian Competition and Consumer Commission (ACCC) to repay \$660,000 to 504 consumers in New South Wales from whom they had collected statute barred debts. However, consumers from other states, including Victoria, had also paid Collection House in similar circumstances, but the undertaking did not include a refund for Victorian consumers. See: <http://www.accc.gov.au/content/index.php/html/itemId/723465/fromItemId/2332>

Recommendations:

- Victorian law should extinguish a debt at the conclusion of the statute barred period.

**11. When civil proceedings have been commenced, should there be any legal obligation on defendants (in addition to those which may already exist) to be satisfied of the merit of the defence to the claim before they are permitted to file a defence? If so, what steps should they be required to take?**

While we believe there is a need to ensure that legal process is not abused by those who do not have a legitimate defence, we would be concerned if any additional processes were introduced that made it more difficult for those who cannot afford

legal advice and representation, to lodge a defence. It is also important to consider the limited availability of free legal advice and assistance – particular in civil matters - and ensure that processes do not create a burden for those providing this type of legal assistance.

**12. When civil proceedings have been commenced, should there be any legal obligation on lawyers acting for defendants (in addition to those which may already exist) to be satisfied of the legal merit of the defence to the claim before they are permitted to file a defence? If so, what steps should lawyers be required to take?**

See our response to Question 11 above

## **Non-parties**

**21. Is there a need for reform of the rules or procedures which allow non-parties to participate or intervene in civil proceedings? If so, what are the problems and what changes should be implemented?**

### **Amici curiae**

We refer to, and note our support for, the submission of the Human Rights Law Resource Centre (HRLRC) to this review regarding amici curiae.

We note however that the Australian Law Reform Commission has published two reports (ALRC Report 27 – Standing in Public Interest Litigation and ALRC Report 78 – Beyond the Door-keeper: Standing to Sue for Public Remedies) which recommend broadening the rights of standing in connection with such matters. We support the ALRC's views in this respect although we endorse the submission of the HRLRC in so far as it opposes the ALRC's view on the need to abolish the distinction between the roles of intervener and of amicus curiae.

## **Alternative Dispute Resolution**

**23. Are there particular procedural changes that should be implemented for the purpose of facilitating early settlement of civil claims? If so, what should those changes be?**

See our response to Question 25 below.

**24. Are there any processes that parties should be required to engage in to facilitate early settlement of civil claims? If so, what should those processes be?**

See our response to Question 25 below.

**25. Is there a need for judicial officers, court officers or others to play a more proactive role in facilitating:**

- resolution of pre-trial issues without the need for hearings and judicial determination of such issues;
- early settlement of cases?

## **If so, what particular changes should be implemented?**

### **Industry Based Dispute Resolution**

We run a small number of matters in the Magistrates' Court. Most matters resolve quickly, and we don't believe that Court-based ADR would necessarily be of assistance in these cases. However, we take this opportunity to point out that some broadening in the jurisdiction of industry alternative dispute resolution schemes, to handle matters where default proceedings have been issued, would assist the resolution of disputes for some of the consumers we assist.

Many industries with large retail customer bases have now instituted industry-specific alternative dispute resolution schemes (**ADR schemes**) to make it easier for unrepresented parties to resolve disputes with industry members: for example, the Banking and Financial Services Ombudsman, the Telecommunications Industry Ombudsman, the Insurance Ombudsman Service and the Energy and Water Ombudsman Victoria. Membership of such schemes is often compulsory, as a condition of a licence such as a Financial Services Licence.

From time to time we see a consumer who has been served with Magistrates' Court Complaint, where the Complainant is a member of a Scheme. The consumer has not contacted the dispute scheme earlier because they were unaware of the existence of the scheme or unaware that they had a valid legal dispute. By the time they seek advice, they find that their matter is outside the jurisdiction of the scheme.

We submit that the courts should consider instituting a policy of referring appropriate matters to industry-based ADR schemes for resolution outside the court system. Matters involving unrepresented defendants should be of prime candidacy. This would require internal changes within the schemes, as the Terms of Reference of these schemes do not allow resolving of any dispute where legal proceedings have been issued. Such schemes do not provide for the enforcement of monetary orders however, so they could not stand as a complete substitute for the services offered by the courts.

### **Transfers to VCAT under the *Fair Trading Act 1999* (Vic)**

CALC has had several cases where issues relating to costs have caused problems for consumers wishing to transfer matters from the Magistrates' Court to VCAT.

#### **Case Study 11**

In a recent case, the client retained CLCV to act just prior to a pre-hearing conference, in a matter in which they had been sued in the Magistrates' Court by an optometrist for a debt alleged to be owing. In good faith, and with a view to settling the matter as quickly as possible, the client proceeded to pre-hearing conference. The client offered to make part-payment to resolve the matter.

Following the pre-hearing conference, the client applied to VCAT, lodged with VCAT the sum sought by the optometrist, and sought the dismissal of the Magistrates' Court proceeding under s112A of the Fair Trading Act 1999 (Vic). VCAT notified the Magistrates' Court, which issued a letter to the parties offering an opportunity to make application to the court within 14 days, failing which the proceeding would be

dismissed. The Plaintiff made application, seeking to keep the matter in the Magistrates' Court.

The Plaintiff argued that s112A(2)(a) was intended to invoke principles of equitable estoppel and election, and that the Defendant by its conduct had made an election to proceed in the Magistrates' Court, and that the Plaintiff had relied on that election, incurring costs. The Plaintiff sought to rely on a Magistrates' Court Registry procedure document providing that the Registry, in processing a s112A application, must consider whether the matter has been "heard in any way". That being so, it was said that the Magistrates' Court had commenced to hear the matter, and s112A was not operative.

The Defendant argued that in ordinary legal usage, the terms 'hear', 'hearing' and 'heard' all relate to the trial of the issues, out of which a court makes a determination in relation to a proceeding. The Defendant argued that a pre-hearing conference is plainly not a hearing within the ordinary legal meaning of that term, and that there was no basis for the Court to place any interpretation on the words "commenced to hear" other than their ordinary legal meaning. To so depart would fail to give effect to Parliament's clearly expressed intention for the operation of the Fair Trading Act: that small claims be heard in VCAT, and that parties not be subject to costs orders in respect of such claims.

The Magistrate agreed that the words of the statute ought be given their ordinary legal meaning, and that the Magistrates' Court proceeding should be dismissed. However, notwithstanding Parliament's expressed intention, and the decision of President Morris in *The Motel Pty Ltd v Allbern Printing Services Pty Ltd* [2005] VCAT 1389, he determined to award costs in the Plaintiff's favour, in the full amount of the 'costs cap' applicable to a claim of that quantum. No interlocutory steps in the proceeding had been taken, except for the pre-hearing conference. The party-party costs for a preparation for and attendance at a pre-hearing conference, on the relevant Magistrates' Court Scale at the time, would have been in the order of one-third of the 'costs cap'. Thus, the Plaintiff was awarded substantially more than the costs 'thrown away' as a result of the Defendant proceeding to the pre-hearing conference.

Many consumers are unaware that VCAT is the preferred jurisdiction for consumer and trader disputes, and that there is special provision made in the Fair Trading Act to encourage small claims matters to be resolved in VCAT. As a result, many matters proceed to hearing and verdict in the Magistrates' Court unnecessarily, contrary to Parliament's intention and with the result that significant legal costs are unnecessarily incurred.

Even where consumers are aware of the s112A Fair Trading Act procedure, there is uncertainty as to whether they will be subject to an unfavourable award of costs, and as to the amount of such an award, if they seek the dismissal of Magistrates' Court proceedings under that section. Thus, consumers are discouraged from taking advantage of that procedure, and Parliament's intention of encouraging small claims to be heard at VCAT is foiled.

#### Recommendations

- Defendants in Magistrates' Court proceedings – especially where the claim is for less than \$10,000 – should be made aware, by written notice, of their rights in relation to having matters transferred to VCAT.
- The Fair Trading Act should be amended to make it clear that there should not be any award of costs upon the dismissal of a Magistrates' Court proceeding under s112A, save where a purchaser seeking to make use of that section has acted unreasonably or not in good faith, causing the other party to incur costs unnecessarily.

## Fees and Costs

### **52. Is the manner in which lawyers are able to charge or calculate fees in civil litigation in need of reform? If so, what are the problems and what changes should be implemented?**

We are aware of a number of cases where legal action appears to have been issued – or enforcement action taken – for the purposes of claiming costs rather than recovering the debt.

#### **Case Study 12**

Some years ago, we were contacted by consumers who received letters from a legal firm, claiming payment of debts owed to video libraries. The amounts were often less than \$100, and in one case was \$17. The legal firm handling these matters issued in the Magistrates' Court if the amount was not paid – and many consumers paid the amount claimed, including costs, rather than go to a court hearing. Even if consumers did not agree with the claims, it was difficult to recall when a particular video had been returned one or two years earlier. We are aware of one consumer who successfully defended a claim in Court, with the assistance of a solicitor who provided his services pro-bono. However, the collection company concerned made

money from costs, in many cases because consumers were not prepared to defend these claims.

### **Costs on Low Value Claims**

Under s 102 of the *Magistrates' Court Act 1989 (the Act)*, the Court must refer a complaint to arbitration where the amount of monetary relief sought is less than \$10,000.

Under s 102(2)(a), and in conjunction with the Regulations, classes of complaint that are exempt from arbitration are:

- a) a complaint by the Director-General of the Department of Local Government, a municipal council or a person authorised by a municipal council for the recovery of any rates, and
- b) a complaint of any authority under the Water Act 1958 to enforce payment of any rates, charges or sums due to the Authority.

Under s 102(3) of the Act the Court may, on the application of a party or without any such application, order that a complaint be heard and determined by the Court and not referred to arbitration in accordance with this Division if it is satisfied that:

- a) the complaint is not disputed; or
- b) the complaint relates to the enforcement of an order which has not been set aside; or
- c) the complaint involves complex questions of law or fact; or
- d) a question of fraud is in issue; or
- e) the parties agree that the complaint should not be referred to arbitration; or
- f) it would be unreasonable for the complaint to be referred to arbitration having regard to its subject-matter, the circumstances of the parties or the interests of any other person likely to be affected by an award under this Division.

Section 105(1) of the Act provides that if an arbitration relates to a complaint under which monetary relief is sought and the Court awards a party less than \$500, the Court must not award costs unless satisfied that special circumstances make it appropriate to do so.

Order 21 of the Magistrates' Court Rules governs the conduct of arbitrations in the Magistrates' Court. It is not relevant to the question of costs.

Regulation Six in conjunction with Schedule Three of the *Magistrates' Court (Arbitration) Regulations 2000* sets out a scale of costs for those arbitrations where costs are awarded.

Thus, whether or not the matter is disputed appears irrelevant to the question of whether or not costs are payable. Under applicable laws, any complaint seeking under \$10,000 must be referred to arbitration, and any party to an arbitration in which less than \$500 is awarded cannot be subject to a costs order unless 'special circumstances make it appropriate to do so'. The legislation does not clarify the meaning of 'special circumstances'.

Note however that if a matter was not referred to arbitration but nevertheless resulted in an order of less than \$500, costs could still be awarded.

Further, it is not clear how the rules are being applied by Civil Registry staff. Information available on the Court's website makes no mention of the costs

implications of arbitration and the Scale of Costs Ready Reckoner ([http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Civil\\_Scale\\_of\\_Costs/\\$file/Ready\\_Reckoner.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Civil_Scale_of_Costs/$file/Ready_Reckoner.pdf)) provides a scale for complaints seeking less than \$500. While this is not strictly contradictory with the rule in s 105, it is still of concern by virtue of its failure to alert litigants to the existence of said rule.

Recommendation:

- That no legal costs are allowed in relation to claims less than \$500 – including where judgment is entered by default.

**59. Is there a need for reform of the law relating to the tax deductibility of legal fees and expenses incurred in civil litigation? If so, what are the problems and what changes should be implemented?**

When representing our clients in legal proceedings, the power imbalance is exacerbated by knowledge that loss to our client and subsequent costs would cause a major impact on their lives, possibly losing a car – even their home. The other party is almost always a company – often a large corporation. The difference between what both parties have at risk, can make negotiating a fair outcome difficult. However, the fact that should the company lose, its costs are tax deductible makes the imbalance all the more greater. Aside from the fact that tax deductibility could be a disincentive for a company to settle major litigation at an early opportunity, it also adds to the inequality between a company and an individual.