# UNREPRESENTED DEBTORS IN THE MELBOURNE MAGISTRATES COURT - A Matter of Justice

**REPORT OF THE PROJECT UNDERTAKEN BY CREDIT HELPLINE (VIC) LIMITED**

*Funded by the Consumer Credit Fund*

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**30 JULY 1999**

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# EXECUTIVE SUMMARY

In 1997, Consumer Credit Legal Service (CCLS) became aware of problems faced by judgment debtors in the Melbourne Magistrates Court. The debtors were appearing in relation to a Summons for Examination because they had failed to pay an instalment order. None of these debtors was represented, and many never understood the purpose of the proceedings.

Due to the ignorance of the debtors, and the fact that an order for imprisonment was possible (although most unlikely) debtors were persuaded to deal with a debt collector, rather than be examined by the court. Most debtors were unaware that they had been summonsed to appear before a Magistrate and that they had the right to be heard by the court. It was later observed that the vast majority of debtors would achieve a better result if examined by the Magistrate, than if they were left to "negotiate" with the debt collector.

Court procedures did not help to inform debtors or assist them to exercise their rights. In fact, many debtors were very confused. One of CCLS's clients believed that the purpose of a number of summonses she'd received was so she could be "interviewed by (the debt collector)". Another debtor who had just entered into an agreement with the debt collector, asked a CCLS lawyer whether the debt collector was the "Clerk of Courts".

Procedural problems included:

- The Court Co-ordinator referred debtors to the debt collector, not the court,
- The debt collector sat in an interview room at the court, which had the debt collector's name on the door,
- The Court List was sometimes held by the debt collector. A lawyer who wished to file an appearance on behalf of a debtor was told to see the debt collector who had the Court List,
- No debtors were being examined by the court although this was the purpose of the summons,
- "Agreements" signed by the debtors were put before the court after the debtors had left the court, which made an order based on the agreement,
- Some debtors entered into such agreements again and again, without being examined by the court, increasing their debt many-fold due to costs.

These hearings at the Melbourne Magistrates' Court were a clear example of the experience of unrepresented judgment debtors at court. However, visits to other courts have also raised issues about a "behind doors" approach to many debt matters. For example, at one court, the Registrar refused to allow access to the Court List which should be clearly displayed.

## The Project

CCLS and Credit Helpline share offices and work together in a co-ordinated way - CCLS doing legal casework and policy, and Credit Helpline doing telephone advice and producing information and education materials.

In 1998, Credit Helpline, with the support of CCLS, successfully applied to the Consumer Credit Fund for a one-off grant to have an advisor at the court. James Wilson was employed,

and went to the Melbourne Magistrates Court 3 mornings per week. He has, on occasion, attended other courts. In addition to advising and assisting the debtors, he has raised the issue of court procedures with a number of the Magistrates.

The Purpose of the Project was to:

- offer advice to individual judgment debtors at court
- identify the court practices in relation to judgment enforcement applications which may affect the proper administration of justice,
- identify the specific needs of the debtors,
- identify ways of addressing the problems faced by these debtors.

## Impact of the Project on Court Practices

Since the project commenced 12 months ago, the following changes have been made at the Melbourne Magistrates Court:

- The Court Co-ordinator no longer refers debtors to the debt collector,
- There is now a call-over, where the Magistrate gives the judgment debtors the option of negotiating with the debt collector, or having the matter heard by the court,
- A significant number of debtors (sometimes over half) choose to be examined by the Magistrate,
- Of those examined by the Magistrate, orders are cancelled in about 95% of cases,
- Debtors are given information by the project worker about financial counselling services and other advice services.

## The Future

The project has played a part in initiating other projects, or extending the work of others. These include the mail-out of legal information to judgment debtors (a joint project of Financial and Consumer Rights Council (FCRC) and Victoria Legal Aid), a data analysis project being planned by FCRC in relation to debt enforcement in the courts and the broadening of the work done by the Debt Recovery Working Group of FCRC.

Now that the project has ended, the above projects will go some way to ensure that the gains made are not altogether lost. However, the following recommendations are necessary if the problems identified by the project are to be addressed.

## Recommendations

The project recommends that:

- A duty lawyer should be available to advise judgment debtors at court and to ensure that court procedures uphold the rights of all parties,

- A regular forum should be held in relation to debt enforcement procedures which includes a debtor representative who is aware of court procedures as well as court personnel,

- The court changes practices which remain a concern in relation to Summonses for Examination - failure to examine the reasons for multiple adjournments, acting in any way which may encourage the debtor to deal with the creditor's agent rather than the Magistrate, and continuing to allow the creditor's representative too much control over the conduct of applications.
- Court practices should be changed in relation to the conduct of Attachment of Earnings applications, to ensure that debtors who are at court are given appropriate information and directions to the hearing, and that debtors are given a chance to put relevant matters to the court.

# INTRODUCTION

**"...the adversarial system that prevails in this country assumes the existence of contestants who are more or less evenly matched"** Justice Toohey in Dietrich v The Queen.[1]

The legal profession has made much, in the last few years, of defendants in criminal matters not having representation.

Yet there has been little debate in the community of the problems faced by unrepresented debtors facing debt enforcement applications. It is not sufficient to say that defendants in criminal matters face a powerful state while debtors face another civil litigant.

The gap in power between a consumer debtor with no idea about the law of debt recovery and a large credit provider which hires solicitors and counsel to conduct enforcement proceedings, is no less wide than the gap between defendant and the Crown.

This project has focussed on consumers with relatively small judgments against them in the Magistrates Court.[2]

Perhaps the most significant fact that has emerged from this project is that in 95-98% of enforcement applications there is no debtor present in court. This fact alone indicates debtors' belief that they cannot influence these applications, and is indicative of the effect of the court culture discussed later in this report.

Of those debtors who do not attend court however, there is sufficient commonality of experience to make it clear that the problems faced by debtors are systematic rather than idiosyncratic.

The project's focus has been on the actual experience of the debtors in the court. The worker attended court three days a week for the project period to provide the following services:

- provide basic advice and information about the nature of the enforcement application,
- assist the debtor in engaging with the court administration,
- assist the debtor with referrals where appropriate.

From this integration the worker collected a variety of data, accounts of a range of experiences by debtors, and a body of statistical material that can be used to reach conclusions about the practices of the court and the outcomes relation to these practices.

The project worker also actively engaged with the court, with other parties involved in the

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[1] (1992) 177 CLR 292 at 354

[2] The jurisdictional limit of the Magistrates Court in Victoria is $40,000. In general the findings of the project are of general application especially in relation to debts from the failure of small businesses where the debtor is not incorporated or where the debtor has supplied a personal guarantee for corporate borrowings.

administration of justice, and with the consumer support sector, to find opportunities for influencing and implementing change.

**Enforcement of Judgment in the Courts**

The hearings with which this project was most involved, were Summonses for Examination under Section 17 of the Judgment Debt Recovery Act ("JDRA"). The following puts these hearings into context.

There are two major stages associated with the recovery of a debt through the courts - dispute and enforcement. The dispute stage may sometimes involve the alleged debtor and creditor arguing in court about whether the debt is owed. In reality, there is usually no court case. A default summons is issued, served on the alleged debtor, who does not respond to the summons. After a period of 21 days has expired, the creditor has a right to have judgment entered into the court record.

Once judgment is entered, the creditor can use a range of methods to try to enforce judgment. The creditor may issue a Writ of Possession, which forces sale of the debtor's home to pay the judgment debt, or a Writ of Seizure and Sale which forces the sale of other property owned by the judgment debtor.

Some enforcement procedures may involve the appearance of the judgment debtor in court. For example, in an Attachment of Earnings Application the debtor can appear in court to argue that the court should only order a minimal amount to be deducted from wages.

Under the Judgment Debt Recovery Act, a creditor or a debtor can apply to the court for an Instalment Order. In certain circumstances, either party can also apply for a variation or for cancellation.

If the judgment debtor does not maintain payments under an instalment order, a summons can be issued pursuant to Section 17 of the JDRA against the debtor to be examined by the Magistrate about the reasons for failure to pay.

The intention of the legislation appears quite clear, that following such a summons the debtor is to be examined by the Magistrate about reasons for non-payment, and the Magistrate has the power to confirm, vary or cancel the instalment order. If the Magistrate finds that the debtor has means to pay and persistently and wilfully and without an honest and reasonable excuse defaults in the payments of instalments the Magistrate can order imprisonment. However, this would happen only in the most exceptional circumstances.

Until this project commenced, it is unlikely that any debtor who was summonsed in this way was ever examined by the Magistrate. Fear of imprisonment (often mentioned in a letter from the debt collector) and court procedures meant that the debt collector did the "examination", and debtors agreed to instalments they often could not afford, and to pay an amount for court costs - without any advice, or an examination by the Magistrate.

# THE COURT

*Alan, who has limited education and almost no knowledge of the way civil law works, has judgment entered against him. He has no knowledge of what applications can be brought. He receives a notice from the creditors lawyer. Is it worth getting advice about? Is it worth going to court, and will he be embarrassed that he doesn't know what to do or where to go? Will the creditor's lawyer make him look foolish? Best not to go to court. Anyway what could he do if he does go? He feels powerless and resigned.*

*If he does attend court, it is made clear to him by everything about the court that he is an outsider who is just slowing down the system. He sees the court staff chatting with barristers but when he asks for help he is told to go into the court, or hearing room, and wait. His sense of isolation and powerless is confirmed. He hopes to get the whole thing over with quickly, so he decides to agree with whatever anyone asks him.*

This is an accurate picture of the feeling debtors often have when they are in the court. While these feelings are not necessarily reflective of the objective reality of the court, they are reflective of a common experience of the court.

Justice Toohey in the case of Dietrich (see above) went to the heart of the question when he remarked that our system of justice assumes relatively equal power between adversaries. In enforcement matters between credit providers and consumer debtors any equality of power is illusory, because knowledge of the law and the court as well as confidence and familiarity with administrative staff is power.

As to the role the court plays in this contest, in theory it is that of the disinterested observer, the impartial referee.

In practice the court aids the frequent court user, the creditors representative. This is part of what can be called the court “culture”.

**Court Procedures**

Section 17 of the **Judgment Debt Recovery Act 1984** (The Act) allows a creditor to ask the court to summons the debtor to court to be examined as to why they have defaulted on an instalment order. This application is used by one mercantile agent which regularly has up to forty of these applications in a single day. In some cases the debtor has, in the past, been sent a letter mentioning that the court has power to imprison persons who wilfully do not pay an instalment order. Few know what “wilful” means. Still fewer have received any advice on what could happen to them at court. Things look grim.

Until quite recently debtors were not even being directed into the court, but were sent to an interview where the mercantile agent awaited, though now (because of this project) debtors are brought into court for a brief explanation, then given the choice of staying in court and having the matter heard by a Magistrate or going to talk to the creditor's representatives. Not surprisingly most troop off to the creditor's representatives. They are then invited to reach a consent agreement, often with legal costs for the days' actions included. They pay therefore several hundreds of dollars for the privilege of attending court to meet with the creditor's

representatives. The project worker's presence has changed this scenario, but it is still indicative experiences of debtors in the court.

Often the mercantile agent actually had possession of the court list, the document the court uses to order its business.

Those who refuse to have the matter dealt with by consent in this manner wait around for 3 hours until the mercantile agent's solicitor has completed all the matters they wish - even though the summons says 10 am. and they are on the court list. Instead of being examined by the court, as the Act says, even those who choose to appear in court are questioned by the creditor's solicitor who often determines they have no money, and then either requests the cancellation of the order or watches while the Magistrate does. The solicitor the asks for costs.

There is no limit to the number of these applications requiring the debtor to come to court that creditors can make, as long as there is an instalment order existing, so debtors might be making their fourth or fifth appearance.

It appears that the effect (though not the intent) of this application is to bring debtors to court so that they can be “encouraged” to sign new consent instalment orders which normally include an amount for legal costs which would normally have been the subject of a submission to the court, and therefore not assured. With this arrangement they are.

Given the above, what point does a Section 17 application have, other than to put more pressure and more debt onto debtors who are not paying for whatever reason. What is the courts role in facilitating this outcome? And what is its role in monitoring the proper use of Section 17 applications.

In reality the court, prior to the project, had no effective role but that of a rubber stamp. There was no evidence that it made any effort to look at the circumstances surrounding the default, or of the consent agreement.

It allowed consent orders of a few dollars a week on judgments of thousands of dollars. And it awarded the costs against the debtors as part of the consent agreements. Costs of many hundreds of dollars on matters that had seen multiple adjournments over a period of years.

And there is no limit to adjournments creditors can request or get by “consent”. Five or more adjournments were not uncommon.

The court did this apparently on the basis that the stay on any other debt recovery action that the instalment order gave the debtor was of such value that it justified an order that would have the debtor paying out small amounts of money for many years. It also apparently justified adjournments that had the effect of dragging out matters for years.

This was in situations where proper examination of the debtor, on the day they were in the court, by the court as is required by the law in relation to this application would have demonstrated no capacity for the debtor to pay. While this project has brought about some

changes, the practice even in its modified form raised fundamental questions about the court's

role.

The court seems to give the creditor's representatives the convenience of the court. The court allows them to be late to matters, to determine the order of matters being dealt with, and generally to treat creditors' representatives in a more accommodating manner.

Debtors, like all people dealing with authority, take their cues from the actions of those in authority. Debtors pick up the cues from the way the court treats them, and the way the court treats the creditors' representatives, and are further discouraged from playing any part in the proceedings.

**Case Study One**

*Linda is a single mother, supporting two children. She is employed as a cleaner.*

*Linda was unable to pay $560 owing to a dentist. Judgment was entered against her, and an instalment order was made which she was unable to pay. She was summonsed to be examined by the court, but on attending court was referred to a debt collector who negotiated a new instalment order including costs for the application of $270. Linda was unable to pay.*

*Over the following four years, Linda was summonsed to court for an examination due to failure to pay at least 4 times. Each time she was referred to the debt collector at the court, and each time she "agreed" to a new payment arrangement and to pay additional costs. Each "agreement" became a court order, as these agreements were approved without any examination of the debtor's circumstances by the court.*

*At the end of the four years, Linda had managed to make payments of $950, but court interest was $1,000 and costs exceeded $2,000. Linda still owed over $2,000.*

*Linda never knew that she could be heard by the Magistrate, and didn't understand that the purpose of the summons was so she could be examined by the court. She believed that the summonses she received were so she could be "interviewed by the debt collector".*

**Case Study Two**

*Frank arrives at court to answer a summons for an attachment of earnings. He enters a small hearing room where a registrar is sitting with a large pile of papers in front of them. Barristers are called to the table one by one, and they often have up to ten applications each. The Defendant is asked if they have anything else to say. The physical environment is intimidating as is the administrative atmosphere. There is not a Magistrates who is listening, but rather a registrar with a pile of paper. Frank has not had advice and has no idea what matters are relevant, what he is allowed to say and whether he should even be saying anything at all. He sees most of the applications being made without a debtor present and cannot follow what the registrar and the barristers are doing. He feels out of depth and concerned he will make a fool of himself.*

**Case Study Three**

*Mary gets a summons that tells her the creditor want to take money out of her wages, and that she must come to court. There is no list on the wall to tell her where the matter is being held. She hears a loud speaker message which uses a lot of legal jargon which she doesn't understand. Mary finally finds the correct room but the person sitting at the desk is already talking to someone else so she doesn't approach (the registrar) to tell them she is present. After some time has gone by she tells the registrar that she is here, but he tells her that her matter has already been dealt with. When Mary says that she was present and didn't hear her name, the registrar says that he can't do anything about this.*

The common theme in the above case studies is that the court appears more concerned about the efficient processing of applications than it is with the proper administration of justice.

We have witnessed the registrar actually call for a specific barrister, to find he/she is not in the hearing room to make their application. The registrar then goes for a wander around the court, making the debtor wait, to find the barrister is in another court. No such courtesy is ever extended to debtors. If a barrister is not there when the matter is called the matter should be struck out. This frequently does not happen.

The Magistrates' Court civil division is split into two parts, initiation (ie. pre-judgment) and enforcement (of judgments). It is indicative of its relative importance to the court that in relation to the initiation division there are annual data reports available on a number of aspects of pre-judgment matters including data on complaints, defences filed etc.

No such information is available for the enforcement division. In fact in general the enforcement division seems when compared to initiation to be under resourced.[3]

This apparent under resourcing of the enforcement division underlines the central issue of this report and of the project, that the court views debtors in a different way than it views other persons involved with the court.

[3] No information is readily available in relation to resource allocation between divisions.

# COURT CULTURE

The adoption of court procedures which so unfairly favour the creditor than the debtor in these matters is likely to result from the combination of three factors:

- Lack of resources available to the court makes it economically attractive to have the creditor's representative fulfil part of the role of the court,
- Lack of any legal representation, or of outside observers, means that there is no-one advocating on behalf of the debtors. This leaves these hearings vulnerable to procedures which favour efficiency over justice,
- The court attitude towards judgment debtors affects the way that the court treats debtors.

The treatment of judgment debtors at court strongly suggests a court culture which works to the disadvantage of these debtors. The following assumptions appear to be made by the court:

**Debtor as the Adjudged Loser**

Judgment debtors are "losers", because they have had judgment entered against them by the court. Enforcement applications rely on the judgment, but they are dealt with by the law as though they are a separate proceedings. The court should treat the application as if it is a fresh matter, and properly examine the debtor's ability to pay.

**Debtor as "bad"**

The court appears to operate on the unconscious assumption that the debtor has already been found "guilty" of owing a debt therefore the creditor is "right" to bring an enforcement and should be assisted as much as possible to achieve the order with minimum effort.

**Debtor and Creditor with Equal Power**

There is an assumption in the adversarial system that parties are of equal power, in terms of knowledge and confidence in engaging in the legal system. This is clearly not the case when it comes to a debtor against a barrister. The court should take this into account, but instead, conducts hearings in such a way that further disadvantages the debtor.

**Enforcement Applications as Administrative in Nature**

Applications for enforcement of judgment proceedings are conducted in a more administrative manner than any other matter in the court except, perhaps, for entering judgment in default of defence. Treating these matters as administrative, rather than exercising the court's power according to usual principles, reduces the likelihood that procedural justice will be observed.

This approach to enforcement applications may stem from the above court attitudes to debtors.

# CHANGING THE COURT

## Proper Administration of Justice

The court should aim to ensure the proper administration of justice. It has a duty to implement the principle that has developed within English and Australian common law and equity. The more obvious requirement are those of natural justice, but there should also be a recognition that the process at its core is a judicial one not an administrative one.[4]

## Procedural Rigour

The court must be conscious that its practices develop from the basic principles of administration of justice. The court must be rigorous in its analysis of its own activities as opposed to allowing practices to develop which are rooted in the achievement of administrative efficiency rather than the proper administration of justice.

## Changing Court Culture

An important part of this project has been to identify the specific issues the court should look to when it considers change.

The project worker established a relationship between himself and the court hierarchy, both administrative and judicial. We have formed the view from this that change in court culture in relation to the treatment of debtors is possible, indeed desired, by management of the court who have recognised problems in the enforcement system.

These relationships especially the one established with the most senior Magistrate who deals with such matters, have allowed us to target a number of specific practices, which I will discuss below.

No change in practice of the court will produce the desired long term effect if it is not based on change in the court perception of the debtor.

The court culture must change, but the court like most multi-person entities working within a corporate or public service model, is bureaucratic.

As in most large organisations court staff take cues from management.

Change then would come initially from the top. While one might expect a high level of resistance, if the court had a specific set of practice guidelines to follow by all court staff then those changes become "learned behaviour", and change the relationship between the court and the debtor.

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[4] The issue as to whether the Magistrates Court is "judicial" in the strict sense is a complex one. The Magistrates Court does not have a historical and clear cut jurisdiction, instead gaining its powers by statute. However this difference should not impact on its conduct since it is exercising judicial power. In any case for convenience sake I will refer to the Magistrates Court as a judicial institution. I will therefore distinguish the "judicial" from the "administrative".

# CHANGES TO COURT PRACTICES ACHIEVED

The following is a list of matters that have been partly or fully addressed:

1. In relation to the **Judgment Debt Recovery Act** ("JDRA") matters the court co-ordinator no longer refers debtors to mercantile agents, instead referring them as is proper to the court which has summonsed them.

   The court has instituted a call-over of all JDRA matters at 10:00 am. where a Magistrates explains to debtors the options they have - one of which is to seek advice from the project worker. This legitimises the worker in the debtor's view, and allows the debtor to engage the court more confidently.

2. In relation to matters under section 17 of the JDRA about half of the debtors advised by the project worker insist on being examined by the court. This has resulted in 100% of those persons examined having the instalment order against them cancelled. This has saved debtors further repeated visits to the court, as well as substantial amounts in legal costs being avoided.

3. The worker has been able to help the court reconsider its awards of legal costs against debtors. Previous to the project, especially in JDRA applications, cost orders against debtors were given almost automatically (because they we made by consent by debtors with no information about what was proper).

   The court now examines in some depth costs applications in circumstances where the instalment order has been cancelled. Previously it was no uncommon to see legal costs adding up to 200 or 300% of the judgment of the judgment debt. The imposition of costs became a barrier in themselves to the debtor paying off the debt.

4. There is much less casual accommodation of creditor's representatives by the court. For example, the practice of allowing mercantile agent's counsel in relation to JDRA matters to make debtors who are unwilling to enter consent agreements wait for hours to be dealt with by the court has now been ameliorated (though not eliminated).

   The current practice is to allow some lee-way to counsel, but to call creditor's counsel back to court if a debtor wishes to be examined by a Magistrates (as is proper ad as is the clear intention of the JDRA).

   In general the court has taken back some control over the conduct of applications. This has served to balance the "scales" a little, but the general thrust of practice in the court requires some further improvements to ensure a more even contest, such as representation of debtors, or more control of the matter by the court.

5. The provision of advice both on legal matters of strategy by the project worker, as well as information relating to proper referral has gone a long way to ending the sense that many debtors have that they are alone against the "machinery" of the court.

This feeling of isolation has led many debtors to make decisions that are seriously prejudicial to their legal position. The mere presence of a worker, especially one who can explain to them exactly what will happen and is able to put their previous experience in a procedural context helps debtors maximise the rights they have - rights which have been until now ore honoured in the breach than in the observance.

6. The impact of the heightened awareness that a consumer advocate is operating in the court has been that the court has been required to examine some of its hereto automatic practices. The change can be seen in the conduct of most court staff. It has extended to proper signage in the court so that debtors know where they should be - this is an important practical reform.

7. The involvement that consumer advocates such as financial counsellors have with debtors who have applications against them has changed. Also these financial counsellors have sought the assistance of local community legal services which has increased the access of debtors to advice and advocacy. The court has therefore had to deal with more advocates and seems more conscious of advocate's presence in the court.

8. Previous to this project it has been difficult for people from the consumer sector to access public information from the court. From a position of blanket incomprehension when faced with requests for information, the court (including senior administrative management) are now more susceptible to discourse about the public policy argument for increasing and improving access to court records.

# COURT PRACTICES STILL IN NEED OF REFORM

1. In relation to applications under section 17 of the JDRA, there are still a number of practices which have not been addressed. These include:

   - the reluctance of the court to look behind matters that are adjourned without the debtor being present. When a Magistrates sees a file where a number of adjournments, and sometimes a number of warrants of apprehension, have been granted, alarm bells should rings and the court should be more active in requiring the creditor's counsel to explain why the conduct of the matter has taken so long.
   - while access to the Magistrates for those debtors who wish to be examined has improved, debtors are still in many cases being asked if they wish to see the mercantile agent's representatives even when they have clearly said they do not wish to speak to them.

     While it is not improper for the court to do this, debtors who are in stressful situations take cues from figures in authority, and when Magistrates suggest they should talk to these agents, debtors take this as an indication of the courts preference in dealing with the matter.

     It would be preferable from our point of view if court staff simply gave debtors their options and refrained from expressing a view as to what is the best course. Debtors unfamiliar with courts cannot sort out a suggestion from a recommendation. This disempowers then and makes it more likely they will allow themselves to be pressured by mercantile agents into making agreements that are not in their interest.

   - the court is still giving creditor's representatives too much control over the conduct of applications. While this has improved markedly during the period of the project, these changes have mostly related to compliance with the law or with more formal matters of administration of justice.

     The problem is that the court in its practice still gives a wealth of cues to debtors as to whose convenience the court is more concerned with. This has a direct impact on the experience of the debtor. The court should make every effort to treat debtors and creditor's representatives in the same way, and this goes beyond the formal requirements.

2. The conduct of Attachment of Earnings hearings must be addressed. Currently the conduct of the application proceeds on the papers without any real enquiry as to the appropriateness of the order.

   If the debtor is present they are given only a perfunctory chance to put matters before the court. They are often treated in a perfunctory way which disempowers them.

On the whole the convenience of creditor's counsel is privileged over the debtor. We have seen incidents where debtors are present at court but do not know the application relating to them as proceeding because the registrar has not bothered to call out the name of the parties.

We have spoken above about the practice of registrars delaying matters at the convenience of counsel - occasionally even wandering around the court looking for them.

If proceedings before a Magistrate can be problematic, then those before a registrar are even more problematic for unrepresented debtors since these applications proceed largely on the papers with creditor's counsel sitting next to the registrar. It is also clear that the registrar is rather more comfortable with court users than with debtors.

Debtors feel alienated and powerless unless the registrar makes an effort to draw them actively into the proceeding. Regretfully this is not occurring.

3. There is a need for a regular form to discuss the procedures in use in the court in relation to debt enforcement matters and the necessity to ensure that those procedures comply with the law and requirements of natural justice. Such a forum must include debtor representatives who are familiar with court practices, as well as Magistrates, court staff and credit representatives.

# CHANGE AT THE LEVEL OF GOVERNMENT

On a broader, governmental level there have been a number of inquiries in the last year into various aspects of the enforcement of debt (see Appendix A). Credit Helpline, though the auspices of this project have made submissions to the inquiries, helping to focus on specific problems and identifying our concerns.

Legislative and regulatory change can alter the way an organisation looks at both its social role and its function.

Recent inquiries mentioned above (see Appendix A) give some indication there is a recognition of a need to move towards reform. However, at the time of writing this report it is not clear that any proposals in this regard are of a kind that our organisation would consider positive.

What may emerge is that the project may have some effect on the feed-back given to the government by the court, in terms of needed reforms. As there currently appears to be a reform agenda this represents an opportunity to take part in setting policy by concerns raised with the court.

A key part of the project has been achieving practical outcomes when problems of practice have been observed by the worker, who has attended court three days a week.

# AGENTS FOR CHANGE

The legacy of this project is in a real sense already at work in the manner in which we have been able to encourage court management to consider the issues we have raised, and to make clear changes to court procedures.

But such change is an incremental process, so there is a need for the consumer support sector to continue to bring the court's attention ongoing problems and concerns.

This project has also lead to an increased awareness among financial counsellors (as the "front line troops") but also the consumer support sector as a whole, of the need to change practices, and to challenge the court to change its attitudes.

The project worker has had close contact with a range of financial counsellors, as well as peak bodies associated with them ( see Appendix B). A crucial part of this has been to alert counsellors to the failure of court officials to adhere to the relevant rules and regulations that set procedure.[5] In doing this we have encouraged financial counsellors to increase the pressure on the court for accountability.

This in turn requires court officials to consider the social role they play.

Financial counsellors in general, and the peak body Financial and Consumer Rights Council in particular, have become more active in pushing for reform and we believe this will continue.

[5] The most important being the Magistrates Court Civil Procedure Rules 1989, and specific legislation such as the Judgment Debt Recovery Act 1984.

# WHERE TO NOW?

In addition to advising at court and working to change court procedures, we have either initiated a number of other projects to address the issued in this report, or have suggested to other groups that they might consider whether they could make a contribution.

Below are a list of initiatives and projects which are already underway or are the subject of funding proposals, which relate to this project. They represent the consolidation and continuation of the project.

**Need to Ensure a "Duty Solicitor" for Debt Recovery Matter in the Magistrates Court**

The consumer support sector as a whole, and Consumer Credit Legal Service (CCLS) in particular in concerned that some of the gains made by the current project will be list if there is not some continuing presence in the court.

While it is our view that many of the practical reforms achieved during the project will stay because they are often the subject of practice notes within the court, we recognise that the representatives of credit providers have modified their behaviour because of the presence of the project worker in the court - and this may change when he is no longer present.

As well as this number of the reforms will only work to their maximum effect if they are closely monitored.

For these reasons, and for the reasons of continued reform, it would be desirable for an ongoing presence of a legal advisor/advocate in the court.

CCLS and Credit Helpline have recently discussed this need with the Director of Victoria Legal Aid.

**Mail-Out Project - Financial and Consumer Rights Council and Victoria Legal Aid**

Early in the project the worker observed a fundamental problem - 95% of debtors do not attend court to take part in the enforcement application.

The worker identified a range of reasons for this, but the central reason was identified as a feeling of powerless among debtors and a sense that there was no point in attending court because they (the debtor) could have no impact on the process.

We suspect that this is largely because of the lack of adequate knowledge about civil procedures.

It became obvious that any project that sought to address the issue or powerlessness, and the need to provide information to debtors, was going to be of limited effect if 98% of its target group was unreachable.

The worker over a period of time developed a number of strategies that partly addressed this problem but a broader solution needed to be developed.

After experiencing difficulty in obtaining the necessary data, the worker finally developed a strategy that had the potential to address this problem.

Co-operation with Financial and Consumer Rights Council (FCRC) resulted in Victoria Legal Aid underwriting the costs of implementation of this new project which involved the purchasing of a subscription of a commercial gazette which have information on all judgments entered in the Magistrates Court.

A model was developed to identify and target debtors most vulnerable to enforcement applications by major credit providers, and information has begun to go out. As well as this a statistical and data model has been developed with a view to generating information for further projects and as data for submissions on required reforms.

This mail-out will operate for a least a one year period.

**Data Analysis Project - Financial and Consumer Rights Council**

As a flow on from the above project Financial and Consumer Rights Council have submitted a proposal for funding of a comprehensive project to collect data from the Magistrates Court, ITSA and the Sheriff to establish the patterns of debt recovery actions in Victoria.

It is expected that the result of this project will demonstrate the enormous costs to debtors of the current system, its inefficiency for all parties, and the substantial amount of court resources it uses up.

It is expected that the project will identify the practices of specific credit providers, in order to assess the information needs of debtors.

One of the aims of the project is to identify especially vulnerable debtors of the king spoken of in the body of this report, ie. debtors who have proceedings against them which are dragged out over a long period of time and which result in substantial costs orders against the debtor.

IT is also expected to show who benefits most from the current system of debt recovery and it is unlikely that this is found to be debtors.

This is an important project because it is expected to produce the hard data to support many of the suppositions of the current project. The unavailability has been a frustration for the project worker but also serious public policy implications because calls for reform are difficult to make without proper statistical information.

While the energy for reform in the consumer support sector is important, in the long term legislative reform is needed to fundamentally change the debt recovery system. Qualitative research is therefore required to support policy proposals and submissions.

Part of the project is to encourage debtors who contact financial counsellors because of the mail-out project to take part in this project to gather specific information about conduct of proceedings.
Projects two and three are linked conceptually in that they both seek to address the cause of

the debtors problems rather than the symptoms. They seek to identify the needs debtors have, as well the means by which debtors can be given information before or at the start of their involvement with the enforcement system.

**FCRC Debt Recovery Working Group**

The current projects worker has been supported and resourced by financial counsellors, under the auspices of the debt recovery working group of the FCRC. This group has acted as a means of integrating the project with the broader consumer support sector.

It has also acted as a co-ordinating group for the various proposals that have been generated from the current project.

# CONCLUSION

This project has shown that in the absence of a duty solicitor or vigilant review by legal services and financial counsellors, the court has allowed the administration of debt enforcement matters to be conducted contrary to the better and the spirit of the Judgment Debt Recovery Act.

“The essence of the JDRA reforms was that before an order to remove fear of imprisonment for the inability to pay and to concentrate the mind of the court on the need to examine the capacity of the debtor to pay”.

In our view the proposals for a duty solicitor and a forum of relevant parties will ensure the necessary scrutiny of the court. The other proposals will increase the likelihood that debtors themselves will be made aware of their rights when appearing in these matters.

# APPENDIX A

## Enforcement Application Statistics

I've taken as sample months September and November 1998 to provide a snap shot of debt recovery applications in the Melbourne Magistrates Court.

**Note: The worker was present in court on those days when debtors were most likely to attend (because of bail etc) therefore these figures are skewed. The actual proportion of appearances to total applications in aggregate would be more like 1:45.**

***September 1998***

**APPLICATIONS TO COURT**

| Creditor | Application | Quantity |
|---|---|---|
| NAB | JDRA section 17 | 68 |
| CBA | Attachment of earning | 29 |
| MISCELL | Attachment of earning | 11 |
| AGC | Attachment of earning | 3 |
| AVCO | Attachment of earning | 2 |
| | | --- |
| | | **113** |
| | | --- |

CBA - Commonwealth Bank of Australia
NAB - National Australia Bank

**ADVICE GIVEN**

| Client | Application | Creditor |
|---|---|---|
| 13 | JDRA Section 17 | NAB |
| 12 | Attachment of earning | CBA/AGC |

September saw proportionally more applications for attachment of earnings, and a high proportion of debtors making appearance to application numbers (around 20% versus the usual 2% ie. 1:45).

***November 1998***

## APPLICATIONS TO COURT

| Creditor | Application | Quantity |
|---|---|---|
| NAB | JDRA section 17 | 70 |
| CBA | Attachment of earning | 17 |
| AGC | Attachment of earning | 3 |
| AVCO | Attachment of earning | 1 |
| Ford Credit | Various | 2 |
| Other | Various | 6 |
| | | --- |
| | | **99** |
| | | --- |

## ADVICE GIVEN

Total clients 16

| Matter | Quantity |
|---|---|
| JDRA Section 17 | 13 |
| Attachment of earnings | 3 |

# PROJECT STATISTICS

### Total Applications - An Estimate

As a very general estimate there are around 30 enforcement applications of the type discussed per day in the Melbourne Magistrates Court. As the court sit around 250 days a year the Melbourne court alone possibly has around 8,000 enforcement applications per year. Suburban court might also have significant numbers.

As we have said above unfortunately enforcement is not given sufficient attention to apparently justify the collection of this kind of data in usable and publicly available form.

### CLIENTS SEEN - PROJECT AGGREGATE

| | |
|---|---|
| JDRA section 17 | 125* |
| Attachment of earnings | 43 |
| Other | 6 |
| | --- |
| **Clients** | **174 (total)**** |
| | --- |

* All but a handful of these applications were brought by a major bank.

** Note that for a number of months of the year the court had much fewer enforcement applications as these applications are dominated by major credit providers who tend to bunch applications. The court is also closed for most of January. Further the worker was only in court three days per week although these were the identified busy (enforcement application) days. The worker did not give advice to all debtors who attended (ie. some did not want advice). The actual attendance figure for these three days was somewhere around 200.

This does not affect the ratio or attendance to application significantly.

Note that some creditors are able to achieve an appearance (versus application numbers) ratio of 1:5 or 20%.

One of the means for this is a summons in respect of certain defaults, another is a warrant of apprehension. More informal mechanisms may also exist.

The question is raised as to why some providers seem to take steps to actually have the debtor in court available to them, while other seem happy for proceedings to go ahead with the debtor absent. It seems clear that on a commercial basis the extra expenditure to ensure the debtor is present is perceived to be money well spent ie. it produces a benefit for the creditor.

# APPENDIX B

## Non-Court Activities

### 1. Submissions

- Submission to the review of the system of Civil Justice administration, carried out for the Department of Justice and the Attorney-General, by Richard Wright et. al.

- Submission to the review of the Judgment Debt Recovery Act 1984, carried out by Robert White, of Cleland White Solicitors, for the Department of Justice (joint submissions with Consumer Credit Legal Service and the Financial and Consumer Rights Council.

- Various submission to the Chief Magistrate of Victoria relating to specific practices in the court. A number of these submissions resulted in Practice Notes being issued by the Chief Magistrate to Magistrates and court administrators.

### 2. Training Delivered

- Speech at Eastern Regional Financial Counsellors Meeting dealing with strategies for financial counsellors when in the court with clients. 3 May 1999.

- Training at professional development day for financial counsellors run by Financial and Consumer Rights Council (FCRC), to encourage financial counsellors to be more active in advocating for client with enforcement matters in the Magistrates Court. 16 June 1999.

- On-going meetings with the Debt Recovery Working Group, of the FCRC, to give feedback to financial counsellors about their activities in dealing with clients with Magistrates Court matters.

### 3. Media/Publication

- Article in **The Age** newspaper about the project and about the need for reform. March 1999.

- Up-coming article in the **Consumer Rights Journal** about the findings of the project and the need for reform. August 1999.

- Various articles in the **Devil's Advocate**, the newsletter from FCRC, that is distributed to all financial counsellors statewide, on various matters of law, practice and strategy relating to enforcement applications.

# ACKNOWLEDGEMENTS

The writer would like to thank the following people and organisations for their assistance and support during the project:

- Caroline Rolfe, Penelope Hill, Nina Pereira, Clare Miller, Sam Funnell and the Board of Credit Helpline for their continued support, comments and feedback on this report.

- Virginia Noonan and the staff at the Financial and Consumer Rights Council, and Jan Pentland. Also those financial counsellors who were part of the Debt Recovery Working Group.

- All those financial counsellors who actively supported the project.

- Consumer Credit Legal Service, the staff and Board. Especially Carolyn Bond, Manager of Consumer Credit Legal Service for her unstinting support and unending enthusiasm.

- Mr Bernard Coburn, Magistrates and Mr Michael Adams QC, Chief Magistrates at the Melbourne Magistrates Court.

- Denis Nelthorpe for his insights and enthusiasm.