

ENFORCING CIVIL OBLIGATIONS IN LOWER COURTS

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Background

The history of sanctions to force payment of debt

Roman law was unsympathetic to debtors:

‘Originally there was no execution upon the debtor’s assets at all. In the event of non payment, the creditor’s only resort was execution upon the person, whom he could kill or imprison as a hostage or hold as a bond-servant or sell as a slave; where there were several creditors, they could as the Twelve Tables show, cut him into pieces. The creditor could also establish himself in the home of the debtor, and the latter would have to serve and provide for him (*Einleger*); but this already marks the transition to liability of the debtor’s assets. (Max Weber 1978 p.680)

The Romans did become more commercially pragmatic:

‘Traditionally a *lex Poetelia* dated at 326 B.C. ...is reported to have prohibited the chaining and the killing of the debtor and to have compelled the creditor to accept the debtor’s willingness to ward off the debt.’ The date is said to be uncertain. (Max Weber 1978 footnote 38 p. 738)

However the continental European civil codes have moved on and:

‘In Germany by Bundesgesetz of 29 May 1868, as in probably all countries of Western and Central Europe, ... imprisonment for debt has been radically and completely abolished by nineteenth century legislation. Public opinion would not support it even as a means of enforcement of duties of family support.’ (Max Weber 1978 footnote 39 p.738)

Victorian England regularly gaoled debtors but recently this century in Australia gaol for debt only has been available under the guise of contempt of court. Commonly orders for imprisonment obtained for contempt have been suspended conditional upon future payments being made. To the sophist this may not be gaol

for not paying debt but a last leniency to purge the contempt. To the debtor it must look like gaol for not paying debt. In the South Australian Magistrates Court imprisonment for debt is not available. However imprisonment for contempt of court orders for payment without proper excuse is available (Enforcement of Judgments Act 1991 s. 8). Such orders for imprisonment cannot be suspended conditional upon future payments being made but can be used to sanction past defaults being remedied.

The role of lower courts in debt collection

‘If the extension of credit is the lifeblood of the dynamic commercial society, the forcible collection of unpaid debts is its backbone.’(Kagan 1984 at p.324)

Verifying uncontested debt claims and enforcing them is the bulk of the work of the South Australian Magistrates Court in terms of volume and revenue. In the financial year 1998/9 51,793 claims were commenced in the Magistrates Court and in the same year only 4,861 defences were filed. Of the defended cases only about 500 went to verdict after trial. Only about 10% of filed claims are defended and 1% of filed claims receive a judgment after trial. In the calendar year 1998 judgment creditors issued 39,421 processes enforcing judgments. Often this effort was ineffective in actually collecting the outstanding debt. Much of the work of the court is not what it seems. This has been described colourfully (describing a similar English court):

‘So by a number of devices of which the organisational segmentation is the most important each group is able to maintain its discreet occupational view of the work of the court, despite evidence to the contrary. Thus the research court was indeed a paradise island in which each achieved her heart’s desire. Judges saw themselves as settling disputes, which is high status judicial and social work. Administrative staff saw themselves as collecting debts which at least gave their work a tangible purpose. Plaintiffs indeed got what they wanted - a judgment in nearly every case which was not settled after issue and defendants by and large, well they may not have got their problem solved, at least quite often did not have to pay! The court was not as punitive as might

have been feared. No-one would be fool enough to seek to reform such an institution! (M. Cain 1986)

The proper purpose for this activity bears some thought before an ideal system is designed. The design of debt collecting functions of the court in South Australia is little different than that which was inherited from England. The names of some processes have been changed but the underlying design has not. Cases are dealt with on individual basis as part of a system also designed to deal with the determination of factual and legal disputes in contested cases.

It is useful to define what the creditors need from the process. A survey in England identified four reasons for plaintiffs taking cases to court (Cain 1986 at p. 110):

- a. Point of principle: certain that right and the court will vindicate;
- b. To gain redress in the specific case (specific redress);
- c. To get money back insofar as this is cost-effective otherwise to write it off (cost-effective redress);
- d. To deter other potential debtors, non-payers etc. (general deterrence).'

Business repeat plaintiffs may have more realistic expectations and different needs than 'one shotters' (Ramsay 1986 at p. 96).

'The enforcement of judgment debts is only one part of the operation of the credit market. Changes in enforcement procedures will affect all stages of the market and all debtors, not just those who default. Lenders make a number of interlinked decisions when they extend credit. They must decide what type of potential borrower will receive a loan, how large that loan will be and what the repayment terms are and what action will be taken if the borrower defaults. ... Changes in the availability cost or efficacy of County Court remedies will affect not only their choice of remedy but will also influence the other decisions that they take. The authors go on to point out that shifting costs

from debtors back to creditors might increase the use of informal collection procedures and less readiness to extend credit to marginal risks.’

Nearly 50% of the plaintiffs interviewed indicate general deterrence was one of their reasons for taking cases to court. It was fear from large players that if they did not take action, word would get around which would increase the amount of defaulting.

The court process falls logically into two stages, verifying the existence and extent of debt and having done so enforcing it. I shall briefly review some European systems for dealing with each of these stages that I have recently studied.

Verifying debt

Some systems separate claims that plaintiffs expect to be uncontested from those they expect to be contested. In Germany the main collection procedure for liquidated sums is a notice of uncontested debt or Mahnverfahren (§ 688-703d. ZPO). This can be filed at the court nearest the defendant’s place of residence by oral, internet or written application. Documentary evidence can be named without being actually produced. The Registrar checks compliance with procedural requirements but not the merits. The Registrar issues a final notice (Mahnbescheid) giving the other party two weeks to pay or to lodge a written or oral objection. If an objection is received the plaintiff must then proceed by way of an ordinary claim at the court which can be done without additional fee. If an objection is not received, the plaintiff can, within six months of service of the final notice, apply for an enforceable payment order (Vollstreckungsbescheid). This is in effect a judgment. The defendant can lodge an appeal against the enforceable payment order without reasons and, again, in that event the case is removed to the competent court (§ 700(3) ZPO). Where the process is commenced electronically the Registrar does not need to sign this but a “hallmark” is put on instead (§ 703 (b)(1) ZPO).

The risk of unchecked procedures is the inclusion of invalid claims, which become a judgment for the plaintiff and if they are eventually contested by then the costs in

the proceedings may overwhelm the original issues. The potential of abuse is acknowledged by some commentators. The collection procedure can be abused by “surprise attacks on defendants lacking experience in court proceedings. In particular the surprise attacks by ‘repeat players’ e.g. in the mail order or credit business led in the past to a number of abuses in the collection proceedings because of the lack of check of the merits which had to be solved by the BGH (the appeal court) crushing the Writs of Executions being already *res judicata* by invoking the notion of a malicious tort contrary to public policy...”(Koch and Deidrich 1998 at para. 179).

Research shows that the objection rate to Mahnverfahren notices is about 12 per cent and in consumer credit only about five per cent. However in only about ten per cent of cases did the default summons proceeding lead to monetary success for the creditor. Why do it? Firstly, because the State adds its stamp on the creditor’s claim, secondly, the judgment order can result in execution for a period of thirty years. (G. Hörmann 1986 at p. 169)

In the Netherlands uncontested debt can be dealt with by direct enforcement by licensed bailiffs. This venerable office come from the Huissiers in the late middle ages in France. Known as Deurwaarders they are a profession of relatively high status and standards. They need to be because they in effect assess the merit of contests by the debtor. They return the claim to the creditor if it is contested and the creditor who still seeks to pursue it has to commence a claim in court. They also act for landlords and other creditors in the lower courts (Kantongericht). However to adopt a practice of sheriffs officers or bailiffs also assessing the merits of the contest of the debt by alleged debtors involves a conflict because they often have a vested interest in the successful collection of the debt. The Dutch system would not transport readily to our present sheriff’s infrastructure.

In practical effect the default judgment procedures in the SA Magistrates Court allow a plaintiff to obtain a judgment without any independent checking of the claim. If the claim is for a liquidated sum its accuracy and merit is not checked. Registry staff only ensure it complies with procedural requirements before

allowing judgment to be signed if it is not defended. In a claim for damages to a motor vehicle from an accident if the repair quote is attached to the claim, again it is accepted at face value. It is only claims for other damages that are referred to a magistrate for assessment. The consequence of the court not differentiating its procedure for contested and uncontested claims is to allow the uncontested debt to attract the same court and more expensively, lawyer's fees for filing the claim. These are \$20 + 11% up to a maximum of \$264 in small claims up to \$6,000 and 4.4% of the judgment sum in general claims (Magistrates rules 1992 3rd Schedule). However they cannot be charged unless formal notice of the intention to file a claim at court has been served on the defendant at least 21 days before doing so. (Magistrates rules 1992, rule 20A). Lawyers routinely do this by a letter of demand. The court also provides a final notice to creditors on the internet (www.claims.sa.gov.au). In addition to a last warning to a debtor the court notice also offers a pro bono mediation service and advice from court experts on technical issues. This scheme was implemented on 5/7/99. At the present rate we are receiving over 5,000 of these per year.

The Mahnverfahren procedure also requires a prior warning from the creditor if it is to claim its costs. The manner of service and general warnings in claim in the South Australian Magistrates Court and a Manhnverfahren notice are not substantially different. Of course the other side of this coin is that German lawyers receive an additional half fee unit if they use a Manhverfahren procedure which may encourage some to build costs on contested claims by using the mahnverfahren first. The fact that the level of mahnverfahren that are objected to is only 5-12% (see above) suggests this is not a major problem. The fee payable to a lawyer for a mahnverfahren of 5,000DM is 160DM and a court fee of 80DM compared to A\$200 to the lawyer and A\$55 court fee for a claim in the South Australian Magistrates Court, a similar amount (1DM is slightly less than A\$1). In practical terms there is little difference between an unchecked default judgment upon service of an SA Magistrates court claim and the same consequence from service of the specialised Mahnverfahren procedure. One difference is that the magistrates in the South Australian Magistrates Court deal with applications to set

aside judgments and in this function abuses come to their attention. The organisation is small enough for this to allow an auditing role against abuse.

Some commentators suggest that all claims should be assessed by an independent court official or a judge to ensure that there is no inflation of claims, nor any possible defence available. (T.G.Ison 1979). Ison also suggests that there should be no indirect collection of debts because pressure is applied to pay regardless of the legitimacy of the claim. Such a view is condescending of debtors and against the general view of courts in our society that the engagement of them is up to the parties. However it may well be true that many defendants are poorly advised or unable to mount a legitimate defence due to social pressures or alienation from society's machinery. Courts currently assess only general damages claims. The long held acceptance of default judgments to include acceptance of the amount (quantum) of liquidated claims is based on the assumption that because they usually arise from invoiced transactions their amount is clear. In fact the invoiced amount may be inflated by debt collecting fees and interest or be an agreement obtained by unenforceable means (eg door to door selling without giving a cooling off period). The 1987 Law Reform Commission rejected checking each file as too expensive, suggested an audit under which a proportion of all default judgments are fully investigated to ensure that creditors are only signing judgment to the extent of claims to which they were entitled.

If magistrates in a court exchange information about any apparent abuses that come to their attention that should be sufficient check against abuse. This may seem obvious but in fact it involves a substantial departure from the traditional common law role of judicial officers which is very insular. In the Adelaide Magistrates court Civil registry we accept this more proactive and co-operative approach that I am recommending.

Enforcing judgments

Courts can do little to successfully enforce judgments against people or companies without identifiable assets or income streams. Policies to bankrupt or liquidate these and how easy and onerous that should be are outside the work of lower

courts. I mention that in Germany a condition of commencing a private company is a minimum capitalisation of approximately \$50,000, half of which must be paid in to the company. This limitation is now under challenge by local entrepreneurs setting up companies in England and freely trading under EU rules as foreign companies in Germany. Private bankruptcy is hard to access as a trustee only being financed from the estate so those with no assets cannot afford a trustee. Bankruptcy lasts for seven years and all income greater than the dole must be paid to the trustee. Recently a cheaper scheme of arrangement has been introduced but it was too early in its operation to assess when I was there.

Methods of enforcement

There is little difference in Germany, The Netherlands, France and SA in the ways of extracting money from debtors who are identified as having assets or income beyond their basic needs. One difference is whether attachment of wages can be forced on a debtor. In Germany wages can be attached. Provisions are in place to prevent employers disadvantaging a debtor when wages are attached and to ensure that attachments leave sufficient in the debtors' hands for legitimate household expenses. In SA prior to 1992 attachment of wages was not possible. Now attachment of wages is subject to the debtor's consent. (Section 6(2) of *The Enforcement of Judgments Act 1991 (SA)*) This makes attachment a convenience of the debtor to aid in regularity of payment rather than a coercive measure. Since its introduction attachment on this consent basis has been rarely used. Whether this is due to the lack of coercive power, lack of a tradition of such orders or some other reason has not been researched. Attachment of wages does occur in Tasmania and Victoria. It is only permitted for short periods or single pays in NSW, Qld and ACT (Law Reform Commission 1987 para 86).

The extent that joint property or property of other members of a household can be accessed to satisfy a judgment debt varies. In South Australia it cannot be accessed. One useful exception we do have in SA, which in my research is unique, is that the interest of a debtor in joint property can be charged with a debt which prevents the debtor dealing with the asset without a court order, or discharging the debt. This effectively ties up the joint, non debtor's ownership because in practical

terms one cannot deal with one portion of joint property. However if a debtor places all assets in another person or a company's ownership he or she may retain use of houses, cars and other goods whilst those assets remain immune from court processes. In Germany there is a presumption that personal property of a matrimonial relationship is owned solely by the debtor. Separation ends the presumption and property intended for the exclusive personal use of either spouse is exempt from the presumption (BGB §1362). Although this would be unlikely to be acceptable in Australia, nor would it solve many potential ways debtors can hide assets from creditors, it does suggest that ways of defeating schemes to hide assets within economic groups are possible to devise. It would be a useful field of research to assess the extent of this problem of shielding ownership of assets from creditors and devising ways of penetrating such schemes. However the worst examples of such abuses occur way above the modest jurisdiction of lower courts as the excesses and spectacular collapses of the 1980s demonstrated.

Imprisonment of debtors

Various reports have recommended the abolition of imprisonment of debtors. Although the 'cunning debtor' might not be the main denizen of the debtors court, they certainly exist and for them any lesser threat is ineffective. It would bring the court into disrepute if it had no effective sanction with which to threaten and deal with such hard cases. However courts should distinguish between imprisonment for non co-operation, or in effect contempt, which may be necessary, and imprisonment for genuine inability to comply with an order for payment of debts which should not occur. Hence a gaol order for contempt should not be suspended as a sanction to ensure future payments because the circumstances that might legitimately prevent payments being made are not yet known. This is just a backdoor way of using the imprisonment order to ensure payment and will inevitably result in people in fact being gaoled for non payment of debt rather than only for contempt. Further, there might be an intervention of circumstances, through no fault of the debtor, which makes a promise of payment impossible to perform. In similar vein powers to deal with people leaving, or moving assets from the jurisdiction of the court to defeat creditors should remain for the same reason that courts should have the power to deal with rogues but with the same rider that

they should use the power only on rogues. The recommendation of the second Law Reform Report to the contrary (LRC1987 at p.xxv) does not address how courts should deal with such people. If courts are to enforce society's standards they must have the power to do so.

Policies where collection is unsuccessful

Chronic debtors often do not pay their creditors and indeed may pay less than the amount incurred for court and lawyer' fees with no benefit to the creditor except general deterrence. There is no joy in this for any creditor and especially the one off creditor who may on occasions owe more to the debt collector than is collected from the debtor. I have had some figures extracted on chronic debtors in the Adelaide registry of the Magistrates Court..

Figure 1: Debtors summonsed to the Adelaide Magistrates Court civil registry on 8 August 1999 analysed by age and reduction of debt

Date of Orig.Claim	Date I-Summons	Amount of Orig Debt	Present Value Debt
10/05/94	4/08/94	\$376	\$543
17/02/95	29/03/95	\$1,137	\$795
24/09/98	21/05/99	\$10,685	\$9,391
9/03/99	21/05/99	\$2,074	\$2,173
19/08/97	13/10/97	\$376	\$683
24/03/99	21/05/99	\$583	\$233
25/11/96	19/03/97	\$381	\$640
11/02/98	6/05/98	\$5,053	\$5,194
8/04/99	12/05/99	\$2,843	\$2,843
30/01/96	4/08/97	\$2,600	\$3,115
8/07/98	18/09/98	\$3,607	\$3,880
26/02/98	19/06/98	\$1,035	\$1,410
9/10/98	21/05/99	\$1,520	\$1,582
17/07/95	6/09/96	\$5,590	\$6,240
1/04/99	21/05/99	\$719	\$776
9/07/98	9/09/98	\$4,841	\$5,156
29/03/99	21/05/99	\$597	\$654
24/09/98	7/04/99	\$1,198	\$877
27/10/94	20/05/99	\$1,082	\$739
15/01/99	17/03/99	\$366	\$366
18/03/99	21/05/99	\$2,688	\$2,878
10/03/99	23/04/99	\$1,041	\$1,041
11/12/97	7/04/98	\$1,038	\$301
12/05/98	26/06/98	\$442	\$289
29/03/99	21/05/99	\$423	\$475
10/11/98	19/01/99	\$2,262	\$2,377

18/09/96	8/11/96	\$1,273	\$1,010
12/10/98	18/11/98	\$1,071	\$1,071
17/02/99	13/05/99	\$2,322	\$2,322
19/06/98	15/02/99	\$5,883	\$6,213
16/09/96	4/08/97	\$3,305	\$3,190
19/01/99	21/05/99	\$579	\$640
28/04/97	21/10/97	\$1,492	\$1,567
29/08/97	25/11/97	\$9,827	\$10,315
29/03/99	21/05/99	\$2,706	\$3,009
17/07/98	25/08/98	\$4,712	\$5,516
8/09/98	13/10/98	\$136	\$432
9/06/98	29/07/98	\$1,148	\$896
16/12/97	15/01/98	\$6,851	\$7,220
29/08/97	26/11/97	\$431	\$241
8/10/97	29/04/98	\$2,650	\$2,591
25/11/98	12/01/99	\$6,143	\$6,995
29/03/99	4/05/99	\$1,116	\$292
13/02/97	2/07/98	\$1,659	\$1,017
25/03/99	25/05/99	\$1,531	\$1,549
12/04/99	25/05/99	\$7,320	\$7,491
8/12/97	26/10/98	\$3,669	\$1,234
24/02/99	24/05/99	\$2,372	\$2,460
12/03/99	25/05/99	\$904	\$978
20/04/99	24/05/99	\$2,766	\$3,088
21/04/99	25/05/99	\$655	\$871
total		\$127,078	\$126,859

Source court files. Thanks to Nick Clark a CLE final year law student who collected and collated this data.

This is not a successful profile although by nature these are hard to collect debts and as a sample ignore a great many more who paid earlier in the process. Strategies that minimise the expense to creditors of dealing with chronic debtors and distribute that which is collected fairly amongst creditors need to be considered. A different approach to managing debt collection has been adopted in Northern Ireland, in part to eradicate endemic corruption amongst bailiffs, but also as a new policy in debt collection. It removes control over collection processes from individual creditors and places management of collection in the hands of the Enforcement of Judgment Office (EJO).

In Northern Ireland a specialist body, the Enforcement of Judgments Office (EJO) controls all enforcement processes. The office examines a debtor and decides which type of process is best suited to the debtor. The EJO is largely self-funding from fees and enjoys a reasonable success rate.

There are several notable consequences from this centralised control of enforcement processes. One is the collection of information about debtors, both from the EJO's examination of debtors and also that it collects from other government agencies, subject to privacy limitations. All activities against a particular debtor are managed in the light of this information. Only one set of processes are on foot at one time against each debtor, resulting in substantial savings to both debtors and creditors. The office still observes the usual Common Law rule of first come first served and subsequent creditors are dealt with in the order of lodging with the office.

The EJO makes information about debtors available to potential claimants for a small fee before accepting their claim for enforcement. This has the considerable benefit of avoiding unrealistic expectations and may save the creditor wasted expense enforcing a judgment against an indigent debtor. Further where a debtor is found to be indigent the EJO may make a declaration to that effect and refuse to accept further processes unless there is some reason to believe the debtor's circumstances have changed.

I do not suggest that we should adopt an EJO but some of the desirable features of the EJO operation may be adopted within court supervised enforcement.

The idea of managing a debtor so that more information about his or her position is available to potential claimants and judgment creditors has obvious advantages and no obvious disadvantages, except to the debtor's credit rating which is not an unfair inference. The idea of refusing to accept processes where existing information indicates they will be a waste of time would be controversial to creditors, but much wasted effort might be achieved by making the results of an investigation hearing available to all later creditors. Processes with no prospect of

success could be discouraged by not allowing cost shifting against the debtor where it was obvious that the debtor had no prospect of payment.

There also is no objection in principle why a court should not gather its own information about a debtor's ability to pay. The court at this stage is not performing a judicial function of choosing between competing versions of the parties in a case. It has determined the merits and is performing the function of ensuring that its own judgment is obeyed to the extent of the ability of the judgment debtor. Subject to the usual limitations on accessing information imposed by privacy laws courts have an interest in having the best information available to assist in making appropriate enforcement orders.

Priority

Priority between creditors is theoretically determined on a first come first served basis (*Re Broughton 1917, General Credits 1982*) and each defendant is dealt as if they only had one case when in fact a significant proportion may be chronic debtors with no assets or actual ability to pay. The EJO policy highlights the fact that under the adhoc system in South Australia, where the creditor decides what process is to be tried and when to use it, priority is in fact determined by the extent of leverage obtained by each creditor. Where the assets of the debtor are less than his debts some defacto sharing of the limited assets between creditors in fact occurs as the debtor makes promises (often unrealistic) to competing creditors. Here priority between creditors may be determined by the extent of pressure and sometimes the most recent may be receiving priority over the rest whose enthusiasm may have dimmed. In fact the build up of costs may result in no payments going to the creditors, but only to expenses of collection as the above table indicates.

Fair determination of priority might sensibly take into account more factors than have generally been considered. Age of debt might be more important than date of enforcement. Payments might be proportionate to the total debt, i.e. larger creditors receive a larger proportion than smaller creditors. Other factors might include the circumstances of the debt arising in the first place. Creditors who

advanced credit that resulted in the debt after the debtor had unpaid court judgments might sensibly have later priority than creditors who suffered damages caused by the debtor where they had no chance to assess the risk.

Where a court determines that the debtor cannot repay all of several creditors, it should manage all judgment creditors, determine fair priority and consider an informal scheme of repayment to be distributed between them. This occurs on a defacto basis already and in many situations will be a fairer distribution than either a first come first served, or a most aggressive takes most basis as occurs with ad hoc management of debtors.

Creditworthiness as a sanction

The practice of the court making its record of judgments available for credit referencing is not unusual in common law countries. In the United Kingdom a national register of judgments is kept by Registry Trust Ltd. In contrast in Germany debt blacklisting is circumscribed by privacy concerns. The practice needs scrutiny to ensure no unfair damage is done to parties' credit. Much adverse credit reporting is done outside of the court system. This carries the risk that an adverse report on a debt that has not been verified by a court may be defamatory. Even within the court system the fact of an adverse judgment may have nothing to do with willingness and ability to pay debts as they fall due. For example many parties in insurance related litigation are a party in name only in a battle fought by the insurer under its rights of subrogation. A matter of principle may be fought and lost and the judgment paid. In either of these circumstances, and perhaps others, an adverse judgment is no indication of credit worthiness. Any use of court records for blacklisting needs to eliminate such records.

However once a proper measure of creditworthiness is established experience in the South Australian Magistrates Court is that the threat of publishing a court judgment is a substantial sanction which could be used to the benefit of both creditors and debtors. Rather than regarding credit referencing as a defence creditors could also regard it as a weapon to encourage payment. In South Australia a record of court judgments are sold to a private credit referencing

agency. Many defendants are concerned to ensure that settlements are framed to avoid a judgment whilst payments are made. A practice has developed of noting that a settlement has occurred and adjourning the case whilst the payments are made. With many defendants the threat of a judgment which will affect their credit rating is a greater threat than traditional enforcement procedures. This is especially the case with debtors who have no substantial assets against which the court can execute its processes. This concern could be used by the court in the process of debt collection to sanction payment arrangements.

This could be used at two levels. The first is before a claim is commenced. Many claims are defended because the defendant needs time and achieves it by raising specious defences all the way to a surrender at the court steps. We have a final notice procedure which offers an agreement for delayed payments of an agreed sum sanctioned by an agreement that if the debtor fails to comply the terms of payment the creditor can enter a summary judgment for that agreed sum. A similar procedure is used to record agreements reached at mediation, or at any stage of the court process by an agreement to refrain from entering a judgment on the court record provided payment terms are kept. The sanction is an agreement that judgment can be entered for an agreed sum if there is a default of payment. This prevents the debtor raising specious defences. Annexed to this paper is the form of such an agreement.

Other issues

Finally it is accepted but worth reiterating that given that a debtor typically has limited means, enforcement processes should be in a venue where the debtor can appear. Video links, phone and related technology should be used to achieve this to compensate for any reduction of the number of regional court venues. Hearings to investigate the means of debtors should be heard in private. The public humiliation of debtors, which was a common feature of debtors' courts in South Australia twenty years ago amply met the objective of general deterrence. If it is correct that most debtors are not the 'cunning debtor' but arrive at the hearing due to misfortune, public humiliation is an inappropriate response. The 'cunning debtor' is likely to be robust enough to withstand a dose of public humiliation.

Reports from Registrars in South Australia, who conduct these hearings is that they achieve a much more detailed and frank view of the debtor's circumstances in private with only the creditor, or its representative, present than they used to in a public hearing.

Summary

- Verifying the existence of debt should remain a function of the lower courts. Courts need not check the validity of each uncontested claim. However, courts should not deal with debt in an adhoc way but should use its collective information to watch for abuses by claimants and to correct them and to identify chronic debtors and manage collection against them.
- Lower courts should make proven information about lack of credit worthiness available to those who seek it.
- The threat of an adverse report on credit worthiness should be recognised as a means of enforcing debt and used by courts both before and after court proceedings have commenced to enforce repayment arrangements.
- Where a court determines that a debtor has no means to pay it should make that information available to creditors and discourage creditors from filing pointless enforcement processes by preventing shifting the expense of further enforcement processes onto the debtor unless the creditor can show proper cause for the process.
- Priority between creditors should not automatically follow a first come first served basis but a wide range of factors should be taken into account such as-
 - ⇒ priority on the basis of the age of the debt is to be preferred to priority on the time of the enforcement process being requested.
 - ⇒ creditors who advanced credit that resulted in the debt after the debtor had court processes that demonstrate inability of unwillingness to pay judgment debts should have lower priority than creditors who suffered damages where they had no chance to assess the risk.
 - ⇒ where a debtor is unable to discharge his debts the court should consider an arrangement sharing the available funds between the creditors. Such sharing might be proportionate to the debt owed.

- Business should be encouraged to minimise the risky advance of credit rather than resorting to courts after the event.
- Debt collection hearings should generally be conducted in private.
- Imprisonment for contempt is a necessary sanction but it should be used sparingly and not to sanction future payments.

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ZPO is an acronym for the *Zivilprozessordnung* (1887), the German Civil Code.

References are to sections.

ENFORCEABLE PAYMENT AGREEMENT

I/We (full name of **debtor**) _____
 of (address) _____

acknowledge that I/we owe the following sums of money to
 (full name of **creditor**) _____
 of (address) _____

Original sum owed	\$ _____	
Interest (if any)	\$ _____	
Costs (if any)	\$ _____	
Total	\$ _____	called the Agreed Sum

Note: the creditor is not entitled to any interest nor collection costs unless it has an agreement that the debtor will pay them. Costs for filing a court claim can only be recovered if 21 days prior notice of the claim was given.

The **Agreed Sum will be paid by** instalments of \$_____ per week/fortnight/month (delete as appropriate) with the first payment due on the _____ day of _____ 200 and thereafter on the _____.

Payments are to made by/to (specify method and place of payments)

The creditor has not made an adverse report to any credit referencing agency and shall not do so, nor take any steps to collect the Agreed Sum for as long as the debtor does not at any time fall into arrears by two instalments.

In consideration of the creditor not requiring immediate payment of the Agreed Sum in full the debtor agrees that **if the debtor at any time falls into arrears by two instalments, then without prior notice the creditor is entitled to file a claim at the Magistrates Court** for such of the Agreed Sum which is at that time unpaid plus the court filing fee and if a solicitor is used the lawyers' fee allowed on the court scale (in total **called the Judgment Sum**). Upon service of that claim and proof of this agreement and of the failure to make two instalment payments **the debtor irrevocably consents to the creditor obtaining a summary judgment which is a final judgment against the debtor for the Judgment Sum and will not raise any counter claim nor set off against it.**

Do not sign this if you do not agree that you owe all of the Agreed Sum and that you have no counter claim nor set off against it.

Signed by the debtor _____
 witness _____ (name and address of witness)
 date _____

Signed by the creditor or its duly authorised agent _____
 witness _____ (name and address of witness)
 date _____