



Australian  
Competition &  
Consumer  
Commission



ASIC

Australian Securities & Investments Commission

# **Debt collection practices in Australia**

**Summary of stakeholder consultation**

May 2009

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

Note: this paper is referenced as REP 155 on the ASIC website.

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## Shortened forms

Australian Collectors and Debt Buyers Association	ACDBA
Australian Competition and Consumer Commission	ACCC
Australian Institute of Credit Management	AICM
Australian Investigators Association	AIA
Australian Mercantile Agents Association	AMAA
Australian Securities and Investments Commission	ASIC
external dispute resolution	EDR
Institute of Mercantile Agents	IMA
internal dispute resolution	IDR
Uniform Consumer Credit Code	UCCC



# Introduction

The Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) continue to receive reports of poor debt collection practices in Australia. This is despite significant efforts by all stakeholders to ensure compliance with consumer protection laws. These reports include serious allegations of harassment, coercion and other problems experienced by debtors when businesses seek to recover outstanding debts.

This paper summarises major issues identified by the ACCC and ASIC during information-gathering activities undertaken in 2008, and reflects the agencies' understanding of feedback provided by a range of stakeholders. The paper aims to promote further discussion among consumers, industry and regulators. Responses to this paper will be used by the ACCC and ASIC to inform the direction of future work in this area.

Some of the issues discussed in this paper may go beyond the scope and responsibilities of either or both agencies and may extend to the jurisdiction of other agencies such as the Office of the Privacy Commissioner or state and territory offices of fair trading.

## Background

The ACCC and ASIC enforce federal consumer protection laws, including laws relevant to debt collection. ASIC is responsible for dealing with misconduct associated with collection of debts that arise from financial services while the ACCC is responsible for dealing with misconduct associated with debts that arise from the provision of non-financial goods and services. Both agencies are interested in engaging with all stakeholders to identify ways to minimise unlawful debt collection practices and the resulting consumer detriment.

In 2005 the ACCC and ASIC jointly released a revised version of the [\*Debt collection guideline: for collectors and creditors\*](#) (the guideline), designed to assist business to comply with the law.

While the response to the guideline from industry and consumer representatives has been overwhelmingly positive, both the ACCC and ASIC continue to receive complaints about unlawful practices by creditors and debt collectors when attempting to recover outstanding debts.

It is important to acknowledge that the number of complaints received is statistically low compared to the volume of debt collection activity undertaken in Australia. Nevertheless the combination of factors outlined below means that further regulatory attention and action is warranted:

- the nature of debt collection complaints received
- the impact of misconduct on consumers, particularly the disadvantaged
- the reluctance on the part of some consumers to complain
- the lack of awareness by some consumers of their rights or ability to complain.

To gather further information about current practices and enhance compliance with consumer protection laws, the ACCC and ASIC collaborated on a number of initiatives in 2008, including:

- A debt collection phone-in day, held on 31 July 2008. This was the first step in capturing intelligence about issues currently being experienced by consumers and identifying problematic patterns of conduct by creditors or debt collectors when seeking to recover outstanding debts.
- A debt collection industry forum, held in Melbourne on 5 September 2008. This was the next step in this process and achieved constructive and open discussion of the major issues affecting both consumers and industry. Representatives from a wide range of stakeholder groups, including consumer advocates, creditors, debt collection organisations and regulators, contributed to the forum dialogue.
- Follow-up meetings with consumer and industry stakeholders were conducted to ensure the agencies were aware of the full range of issues affecting the sector.

Both the ACCC and ASIC recognise that efforts by the debt collection sector have brought about significant improvements in trader conduct in recent years. Despite efforts made by the majority of organisations involved in debt recovery activities to comply with consumer protection legislation, concern remains about the conduct of some organisations engaged in debt recovery activities.

Both the ACCC and ASIC will continue to review all complaints they receive about debt collection practices and will take enforcement action where appropriate.

This paper outlines the major concerns identified by consumer groups, industry and regulators.

## **Industry overview**

A wide range of businesses are involved in debt collection activities. Original creditors across all business sectors may engage in activities to recover outstanding debts as part of their in-house credit management functions. They may also outsource debt collection



activities to third-party agents or sell-off outstanding debts as a cash management strategy<sup>1</sup>.

In general, third-party debt collectors act as:

- mercantile agents—where a business is acting as agent for the original creditor, collecting the debt on their behalf (contingent debts)
- debt purchasers—where a business purchases the right to collect the debt at a discount from the face value of the outstanding debt.

The mix of these activities varies between organisations. Some businesses are predominantly involved in purchased debts while others focus exclusively on contingent debts.

The creditors, collectors, investigators, process servers and repossession agents involved in debt recovery activities are represented through a range of industry associations that promote professional and ethical conduct. These bodies include the:

- Institute of Mercantile Agents (IMA) and its subsidiary associations:
  - Australian Collectors and Debt Buyers Association (ACDBA)<sup>2</sup>
  - Australian Mercantile Agents Association (AMAA)
  - Australian Investigators Association (AIA)
- Australian Institute of Credit Management (AICM).

The third party debt collection industry manages approximately \$6 billion of unpaid debt, which represents approximately 12 million accounts per annum. Industry investigators make more than 60 million debtor contacts per annum (including phone calls, SMS, face-to-face etc.). The industry contributes to the Australian economy by employing thousands of collection professionals, reducing business costs and assisting business to maintain cash flow, thereby allowing access to lower cost goods and services.<sup>3</sup> The industry is expected to grow because of the effects of the global financial crisis.

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<sup>1</sup> References to **industry** and the term **creditors/collectors** in this paper refer to original creditors and debt collection agencies acting as agents or debt purchasers.

<sup>2</sup> Formally the Australian Collectors Association (ACA)

<sup>3</sup> Institute of Mercantile Agents, 'Review of CAPI', *The Agent*, vol. 41, no. 4, 2008, pp. 11–13.

## Regulation of debt collection practices

The ACCC and ASIC regulate debt collection activity at the federal level through the consumer protection provisions of the *Trade Practices Act 1974* and their equivalents in the *Australian Securities and Investments Act 2001*. Both the Trade Practices Act and the ASIC Act include provisions prohibiting:

- the use of physical force, undue harassment and coercion
- misleading or deceptive conduct
- unconscionable conduct.

ASIC is responsible for ensuring activities of creditors/collectors engaged in recovering outstanding debts arising from the provision of financial services are compliant with the ASIC Act. The ACCC is responsible for ensuring compliant collection activity for debts arising from the supply of non-financial products and services under the Trade Practices Act.

State and territory offices of fair trading also regulate the activities of creditors/collectors under fair trading acts and other legislation. In some cases they are responsible for licensing or registration regimes. Provisions relating to undue harassment and coercion in debt collection activities may vary between jurisdictions.

### Legislative changes

Regulation of debt collection activities may be affected by proposed changes to consumer protection legislation.

The new national consumer policy framework will include the introduction of a single national consumer law (Australian Consumer Law). Based on the consumer protection provisions of the Trade Practices Act, the changes, which are expected to take effect from 1 January 2010, will include new provisions regulating unfair contract terms<sup>4</sup>, enhanced enforcement powers and remedies for consumers.

By late 2009 the Uniform Consumer Credit Code (UCCC), currently state and territory legislation, will also be enacted into federal law, with ASIC as its sole regulator. The proposed changes are expected to include the establishment of a national credit regime, which may require credit providers to be registered and licensed with ASIC.

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<sup>4</sup> Under the proposal, a term of a standard form contract will be considered unfair when it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer and it is not reasonably necessary to protect the interests of the supplier.

## Debt collection guideline

A revised edition of the [Debt collection guideline](#) was jointly released by the ACCC and ASIC in October 2005. The guideline provides practical guidance to industry on issues including:

- the roles of the ACCC and ASIC in debt collection activity
- the promotion of a flexible, fair and realistic approach to collection
- information for creditors and collectors about practices they should implement to minimise the risk of breaching the Trade Practices Act or the ASIC Act.

Industry response to the guideline has generally been positive, with the booklet promoted by key industry bodies.<sup>5</sup>

Continued reporting of issues described in this paper illustrates that the substance of the guideline has either not been adopted by all creditors/collectors or is not sufficiently communicated to all levels within some organisations.

The ACCC and ASIC welcome information about issues currently causing concern in the debt collection industry that would benefit from further guidance. Stakeholders are encouraged to advise the ACCC and ASIC of gaps in the current guidelines (e.g. best practice advice for creditors and debt collectors on debt assignment) or areas that could be further clarified (e.g. establishing effective compliance frameworks in smaller organisations).

The guideline is expected to be revised to incorporate proposed amendments to consumer protection laws discussed above. The revised guideline is not expected to be published in 2009.

The guideline can be downloaded at no cost from the [ACCC website](#)<sup>6</sup> or the [ASIC website](#); print copies are available by ordering online or by contacting the ACCC Infocentre on 1300 302 502 or the ASIC Infoline on 1300 300 630.

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<sup>5</sup> Industry bodies such as the IMA, ACDBA, AIA and AICM support and promote the guideline to their members.

<sup>6</sup> To access online, go to ACCC: <http://www.accc.gov.au/content/index.phtml?itemId=733222> or ASIC: [www.asic.gov.au/asic/asic.nsf/byheadline/Debt+collection](http://www.asic.gov.au/asic/asic.nsf/byheadline/Debt+collection).

## Responsibilities of debtors

Although the following discussion focuses on the responsibilities of creditors and debt collectors, it is not intended to minimise the legal responsibility of debtors for paying debts they legitimately owe.

Where they owe the debt in question, debtors should:

- not attempt to avoid the obligation to satisfy debts they have incurred
- promptly contact creditors and debt collectors when they are experiencing financial difficulties
- attempt to establish repayment arrangements
- be candid about their financial circumstances in dealings with creditors/collectors.

The ACCC and ASIC also produced a consumer information booklet, [\*Dealing with debt: your rights and responsibilities\*](#), which contains information to help people experiencing financial difficulties in dealing with creditors/collectors. The brochure is available in English, Arabic, Vietnamese, Chinese, Italian, Greek and Turkish.

Debtors experiencing financial difficulties should seek assistance from a community-based financial counsellor, solicitor or other qualified financial advisor.

## Impacts of the global financial crisis

Some stakeholders raised concerns about a potential increase in unlawful debt collection practices because of the current financial environment. Concerns relate to practices by businesses to more actively manage bad debts and cash flow in response to a tighter economic climate and increased instances of debtor default.

Specific concerns included:

- the potential for businesses to sell off debts more rapidly
- increasing instances of debt assignment generally
- increasing number of defaulting debtors
- a reduction in the provision of hardship policies and access to repayment arrangements.

These factors may provide incentives for creditors/collectors to adopt non-compliant debt collection practices when attempting to recover outstanding debts.

The ACCC and ASIC therefore urge creditors/collectors to pay particular attention to their compliance practices and systems to ensure that they are consistent with the guideline and consumer protection laws.

# Summary of issues and responses

The major issues identified by all stakeholder groups during activities undertaken by the ACCC and ASIC in 2008 are summarised in the following discussion.

Each of the 13 issues summarises the concerns raised by consumer groups, industry response to these concerns and concluding observations from the regulators.

## 1. Harassment and coercion

Using physical force, undue harassment and/or coercion to support a demand for payment for goods or services is prohibited under s. 60 of the Trade Practices Act and s. 12DJ of the ASIC Act. The [Debt collection guideline](#) provides guidance on what is considered unacceptable behaviour, which includes:

- contacting the debtor or a third party at unreasonable hours, such as on the weekend, on public holidays or late at night or early in the morning
- excessive contact with the debtor, beyond what would be considered necessary—for example, contacting a debtor by telephone more than three times per week
- visiting the debtor at their workplace uninvited, potentially putting pressure on the debtor by embarrassing or threatening to embarrass them in front of work colleagues
- pursuing a person when there are no reasonable grounds for believing that they are liable for the debt or continuing with collection activity where liability for the debt has been denied, without properly investigating the debtor's claims
- subjecting a debtor to humiliating or intimidating conduct, such as:
  - abusive, offensive, obscene or discriminatory language
  - embarrassing or shaming a debtor
  - adopting an aggressive, threatening or intimidating manner
  - threatening to use, or using, violence or physical force against a debtor, third party or against property
  - misleading a debtor about the nature or extent of a debt, or the consequences of non-payment.

## **Consumer concerns**

Consumer feedback indicates this type of conduct is not uncommon. In particular, numerous complaints were made about debt collectors and debt purchasers making phone calls to debtors that:

- were excessive in number
- mocked or belittled the debtor
- were aggressive (e.g. threatening to send someone to the debtor's house to take their goods)
- sought to dissuade debtors from making complaints (e.g. refusing to refer the debtor to a supervisor if there is a dispute about the debt).

## **Industry responses**

Industry's view is that harassment or coercion is not common in the sector and noted that significant resources are applied to ensure that compliance programs and training minimises the risk of harassing or coercive conduct being adopted by collection staff.

## **Concluding observations**

Despite the clarity provided by the guideline, allegations of harassing or coercive conduct by creditors/collectors represent the majority of complaints received by the ACCC and ASIC about debt collection activity.

Both agencies consider that complaint numbers could be reduced by the industry developing effective mechanisms to detect and respond early to complaints involving allegations of harassment or coercion.

## **2. Disputes about the debt**

The Trade Practices Act and the ASIC Act also prohibit misleading or deceptive conduct. The guideline provides advice about what is considered misleading or deceptive conduct:

- A creditor/collector continuing with collection activity when a debt has been disputed by a debtor and no investigations have been conducted by the creditor/collector to determine whether the debt is owed.
- A creditor/collector stating or implying that the debtor must prove they are not liable for the debt.

## **Consumer concerns**

Consumer groups note that reports of this type of conduct continue to be received and can occur when:

- the consumer is not the debtor and is not associated with the debt
- the debt does not exist
- the amount reported is incorrect
- the debt has been paid
- the debt is statute-barred
- the goods were not received or services were not performed
- the imposition of fees by the debt collection agency is unfair
- there was general confusion about the source of the debt.

Disputes about the amount owed can arise when a number of traders are involved and where debts have been on-sold to multiple collection agencies. Consumer groups argue that this is because of miscommunication between organisations when debts are subsequently sold.

Debtors have complained that often their complaint is ignored and the creditor/collector takes no steps to resolve the issue but continues to harass them for payment. Debtor frustration is increased further when a debt is disputed and the creditor/collector places the onus on the alleged debtor to prove the validity of the claim.

## **Industry responses**

Industry representatives do not agree that such conduct is widespread but acknowledged that disputes about a debt need to be resolved as quickly as possible. It was also observed that some debtors use disputes as a tactic to avoid their responsibility to repay the debt.

## **Concluding observations**

Both the ACCC and ASIC encourage industry to develop robust and effective complaints and dispute resolution procedures to enable employees to respond to disputes in an appropriate and consistent way. Adoption of such procedures could improve efficiencies for the creditor's/collector's business by allowing them to better allocate resources and by the potential reduction in complaints.

### 3. Debt assignment and/or selling

Debt assignment is the sale or assignment by the original creditor (or previous debt collector) of the right to recover debts to third party debt collectors, the debt purchaser.

The practice of debt assignment appears to be increasing as organisations sell off outstanding debts to manage cash flow in the economic downturn. In line with this trend, members of the ACCC's Consumer Consultative Committee and ASIC's Consumer Advisory Panel have reported an increase in complaints about poor debt collection practices. Broadly, many of these complaints stem from issues relating to the passing of information from the original creditor to the debt purchaser.

Legislation and guidelines regulating information relating to debts include:

- state-based property legislation that prescribes that when a debt is assigned, the assignor must give express notice of the assignment to the debtor in writing
- the *Privacy Act 1988*, which imposes restrictions on the use of a debtor's personal information
- the [Debt collection guideline](#), which includes provisions on:
  - the responsibility of creditors/collectors to provide copies of contracts and related documents to the debtor if requested
  - restricting contact with third parties of the debtor
  - the onus of proving a debt, which falls on the creditor/collector
- the Trade Practices Act and the ASIC Act, which generally prohibit unfair practices and unconscionable conduct.

#### Consumer concerns

Contact by an entity other than the original creditor can be confusing for debtors and can create barriers to the efficient collection of debts not otherwise the subject of dispute. Debtors have reported that they have been unable to identify whether they were dealing with the creditor, an agent or a debt purchaser, which indicates a lack of notification or understanding of the appointment of a third party collector as agent and a lack of notification of the sale of a debt.

Often a debtor will be contacted by multiple collection agencies, which can result in debtors having difficulty:

- identifying which agency to make repayments to
- providing proof of payments previously made to the original creditor or previous collection agency when a debt is subsequently sold to another agency
- having debt repayment arrangements established with one collection agency or the original creditor accepted or honoured by new agencies



- understanding the rights and obligations that exist once a debt has been assigned
- securing information about the debt, such as the original source of the debt, records of payments already made or repayment plans already arranged.

These problems are exacerbated when a creditor/collector is not contactable or refuses to provide supporting documentation or information about the debt when asked.

Consumer agencies have identified the inability of debt purchasers to provide sufficient proof of the existence of a bona fide debt to debtors as a significant issue.

Consumer agencies have also reported instances of debtors being incorrectly identified. This situation can arise when a consumer has the same name as the debtor, moves to an address listed as the debtor's previous place of residence or obtains a phone number previously used by the debtor.

In most cases once the creditor/collector becomes aware of the mistaken identity, they cease contact. However, in some cases consumers are told they need to prove they are not the debtor, leading to some consumers paying outstanding amounts they did not owe after ongoing efforts to prove their identity failed to deter the creditor/collector pursuing them for the debt.

Consumer agencies have also reported instances of creditors/collectors contacting a third party (e.g. neighbours, friends, family members or work colleagues) when attempting to identify or contact the debtor.

## **Industry responses**

Industry considers that these issues often arise from a lack of relevant information being passed on or made available on request to the debt purchasers. Debt collectors have reported often having no access, or limited access, to information that would allow disputes about debts to be resolved. It can then be difficult for a debt purchaser to respond constructively when a consumer denies liability in part or entirely or asserts that the debt is statute-barred.

Industry also asserted that the restrictions imposed by the Privacy Act contribute to the difficulty in accessing information about the debt or the debtor. For example, it can be difficult to obtain basic information such as debtor addresses, telephone numbers or places of work.

## **Concluding observations**

There appears to be a role for the original creditor to ensure the accuracy and completeness of information sold to the debt purchaser. It may be beneficial to set out industry best practice in this area in a guideline that includes:

- benchmark terms and conditions to be used in debt assignment agreements, which clearly establish how assignment will operate under given circumstances

- the nature and extent of information to be provided by the creditor (or debt seller/assignor), including current contact details, repayment history and other relevant information.

The original creditor should also, as obliged under state law, provide the debtor with a notice of the sale of the debt and transfer of information. This practice does not breach the Privacy Act.

## **4. Incorrect credit default listing**

Part IIIA of the Privacy Act and the Credit Reporting Code of Conduct govern consumer credit reporting and the handling of credit-related information about individuals. The credit reporting regime sets rules around access and ensuring that information on a credit file is accurate, up-to-date, complete and not misleading.

In certain circumstances, a credit provider may report payment default to a credit reporting agency, to be recorded on the debtor's credit file. A credit file is a record of a consumer's credit history and is used by credit providers to assess a consumer's credit worthiness and the risks associated with providing credit.

A recorded default will remain on a credit record for five years, unless it has been recorded as a serious credit infringement, in which case it will remain on the record for seven years.

### **Consumer concerns**

Consumer groups are concerned about the number and nature of credit listing inaccuracies.

Credit listing inaccuracies can occur when:

- an individual is incorrectly identified and subsequently refuses to satisfy the debt
- the full debt has been paid out with the original creditor without the knowledge of the debt purchaser
- a debt is incorrectly listed as a serious credit infringement rather than simply as a default.

It also concerns consumer groups that some creditors/collectors report a default before payment is 60 days overdue.

### **Industry responses**

Industry's view is that incorrect credit default listing only occurs on rare occasions and that concerted effort is made to ensure that industry members comply with the requirements of the Credit Reporting Code of Conduct and the Privacy Act.

## Concluding observations

The ACCC and ASIC remind industry members of their obligations under the Credit Reporting Code of Conduct, which states that when an error has been made, a credit provider must:

- take steps to remedy its reporting procedures to ensure that the requirements of the Privacy Act may be complied with in future
- immediately advise the credit reporting agency of the inaccuracy or the existence of prohibited information
- within 30 days, advise the Privacy Commissioner in writing of the action the credit provider has taken to rectify the problem.

The ACCC and ASIC also note that the Australian Law Reform Commission has recently finalised a wide-ranging review of privacy laws and has made a series of recommendations in respect of the credit reporting regime.<sup>7</sup>

## 5. Difficulties negotiating repayment arrangements

The guideline encourages creditors/collectors to negotiate repayment arrangements with those debtors who have difficulties meeting their repayment obligations.

### Consumer concerns

Consumer feedback suggests that creditors/collectors often have unrealistic expectations about payments, requiring an outstanding debt to be repaid in one lump sum even where a debtor is unable to afford such a payment, or being unwilling to negotiate a repayment arrangement that a debtor can reasonably afford.

There are also concerns regarding the level of inquiry some creditors/collectors employ when evaluating a debtor's capacity to repay a debt. When negotiating a repayment plan, some creditors/collectors will require a debtor to provide a statement of income and expenditure. However, in some cases those statements allegedly involve an unreasonable level of detail. For example, debtors have been asked to make unreasonable reductions in their spending such as reducing food intake, giving up smoking or finding cheaper accommodation.

Consumer feedback also suggests some debtors have difficulty in reinstating repayment arrangements established with the original creditor after the debt has been assigned or sold.

### Industry responses

The collection industry views repayment arrangements as the nature of its business and industry members generally agreed that responding constructively to financial hardship

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<sup>7</sup> Australian Law Reform Commission, 'Part G—Credit reporting provisions', *For your information: Australian privacy law and practice*, report no. 108, 2008, vol.3.

is in their best interests. The industry emphasised that mainstream industry practice is to respond to debtor difficulties in meeting repayment obligations by taking appropriate account of a debtor's financial situation.

However, industry feedback also suggests concern that some debtors and consumer agencies expect that if it is asserted that a debtor cannot afford repayment, the debt should be waived without providing further evidence of claims regarding a debtor's financial position.

## **Concluding observations**

The ACCC and ASIC urge all creditors/collectors to take note of the principles covering repayment plans set out in the guideline. A best practice approach to dealing with this issue may be one where industry sets a standard level of acceptable inquiry when assessing a debtor's capacity to repay.

## **6. Representations on consequences of non-payment**

The guideline states that creditors/collectors should not make representations that legal action will or may be taken when a valid defence applies.

A debtor can claim a defence against legal proceedings to collect a debt if the debtor has been declared bankrupt (for unsecured debts) or the relevant state or territory statute of limitations applies to the debt.

## **Consumer concerns**

Some consumer stakeholders reported incidences of creditors/collectors misrepresenting potential legal action and procedures. The misrepresentations include claims that:

- the failure to pay a debt involves an element of criminality
- an ability to seize unsecured household items exists
- legal action has been taken or a judgment has been entered when this is not the case
- legal action will be pursued for statute-barred debts.

Consumer agencies also reported instances where letters to debtors were framed to look like legal documents, giving the impression that legal proceedings were about to commence when this was not the case.

## **Industry responses**

Industry's view is that this practice is not widespread and represents a minority of creditors/collectors.

## **Concluding observations**

Misrepresenting the consequences of failure to repay debts is a highly misleading or deceptive practice. Industry members should ensure that their:

- employees are highly trained in this area
- internal compliance practices are sufficiently robust to maximise compliance with the relevant provisions.

## **7. Jurisdiction in which proceedings are instituted**

Generally speaking, debt recovery proceedings need not be initiated in the jurisdiction in which the debtor resides. If a party to proceedings considers that the jurisdiction is inappropriate or inconvenient, they can apply for those proceedings to be stayed, which allows the matter to be dealt with in the more appropriate jurisdiction. In practice this may not be a genuine option for all consumers, particularly those without legal representation or who are vulnerable or disadvantaged.

## **Consumer concerns**

Consumer groups are concerned that some creditors/collectors are instituting legal proceedings in a state or territory other than the one in which the alleged debtor resides. This can result in significant inconvenience and disadvantage for the debtor because it places an additional practical barrier on their ability to respond to those proceedings.

## **Industry responses**

Industry's view is that creditors/collectors operating across jurisdictions will often select one court in which to lodge all their debt recovery proceedings. Often this decision is based on considerations of cost, convenience or centralisation.

Creditors/collectors also note that litigation is often a last resort, and problems regarding jurisdiction only arise where a debtor seeks, or would have sought, to defend the claim.

## **Concluding observations**

The guideline recommends that debt recovery proceedings should be issued in the jurisdiction in which the debtor lives because choosing another jurisdiction might in some circumstances constitute, or be part of conduct constituting, unconscionable conduct.

## 8. Enforcement responses

Under the *Bankruptcy Act 1966* a creditor may petition for a debtor to be made bankrupt if the amount owed is \$2000 or more. Once a debtor is declared bankrupt, a trustee will be appointed with the authority to sell the debtor's assets; this trustee may garnishee part of the debtor's salary to pay their creditors.

Bankruptcies are generally discharged after three years, but are permanently recorded on the National Personal Insolvency Index.

### Consumer concerns

Consumer groups are concerned that some creditors/collectors use enforcement options disproportionate to the amount of the debt owed or in preference to other options that will less dramatically affect consumers. Some examples of alleged disproportionate enforcement options include:

- obtaining judgments against debtors owing relatively small amounts, which in some cases they have no ability to repay, instead of considering other options such as repayment plans or debt waiver
- bankrupting debtors owing relatively small amounts
- bankrupting debtors who have limited income and few personal assets
- exercising enforcement options on a debtor's home for an unrelated debt (e.g. a credit card account).

As well as placing unnecessary and disproportionate burdens on debtors (e.g. bankruptcy may affect an individual's employment, as well as their ability to access credit in the future), pursuing debts in this manner is rarely beneficial to the creditor/collector.

### Industry responses

Industry acknowledges that ignoring the personal circumstances of debtors is generally not in the best interests of creditors/collectors, and emphasises that industry members generally work with consumers rather than moving quickly to other enforcement options. From a purely commercial perspective, it may not make sense to add enforcement costs to a debt where recovery is already unlikely.

However, if a creditor/collector assesses that using legitimate enforcement rights is in their best interest, they are entitled to pursue such action.

## Concluding observations

It may be beneficial to establish procedures for a creditor/collector to follow when determining an appropriate enforcement response in certain circumstances. Principles may include benchmarks for:

- determining whether a particular course of enforcement action would be of financial benefit for the organisation
- determining whether a course of enforcement action would cause disproportionate hardship for the debtor
- if the above criteria are satisfied, whether any alternative course of action, such as reducing repayments, waiving fees etc., would be of equal financial benefit for the organisation and cause less hardship for the debtor.

Please refer to the **Financial hardship** section in this paper for more information about flexible approaches to debtor circumstances.

## 9. Compliance programs

While most organisations appear to conduct their activities in accordance with consumer protection laws and the guideline, the ACCC and ASIC continue to receive reports of unlawful conduct. Accordingly, industry needs to develop and maintain robust compliance strategies, including active evaluation, to ensure its continued effectiveness in a changing economic environment.

### Consumer concerns

Consumer groups highlighted a number of industry factors, including organisational culture and high staff turnover rates, as contributing to an apparent lack of industry compliance with and understanding of legal obligations.

Organisational culture was highlighted as a key determinant of the process of debt collection and the conduct of the industry more generally.

Some consumer stakeholders observed a lack of basic understanding of consumer protection laws by junior officers (including call centre staff) in the collection industry, even where particular organisations had well documented compliance frameworks. This may be caused by high rates of staff turnover in third party collection agencies, which may in turn affect industry workers' knowledge of their obligations under consumer protection laws or the guideline.

Consumer stakeholders are also concerned that small organisations in the industry may place less priority on compliance and training.

## **Industry responses**

Industry noted that significant efforts have been made in recent years to improve compliance in the collection sector, and expressed a willingness to make further improvements to industry practices.

Industry stakeholders confirmed the importance attached to compliance and training, including requirements imposed on third party collectors and debt purchasers by the original creditor. External compliance audits by original creditors are carried out on a regular basis to ensure these terms and conditions are followed.

Risk to the reputation of firms from reports of unlawful activity and the subsequent loss of business were also cited as strong industry incentives to implement and communicate effective compliance practices.

Compliance frameworks vary in sophistication depending on the nature and size of industry participants. Some agencies use software packages to carry out debt collection activities. These packages contain embedded compliance features to ensure no breach occurs. Other agencies rely on individual collectors' knowledge of consumer protection laws to ensure compliance.

Creditors/collectors are increasingly recording all telephone contact with debtors. This should assist in reviewing compliance breaches by staff and lead to more rapid complaint resolution.

## **Concluding observations**

Continuing and regular review of compliance frameworks to ensure that debt collection activities comply with consumer protection laws and the guideline will assist industry participants to mitigate the risk of breaching the law.

Compliance frameworks must be embedded within the culture of all organisations to ensure unlawful debt collection practices are avoided. A 'compliance culture' ensures that unacceptable practices are communicated to all individuals at all levels of the organisation and that practices compliant with the law are considered to be business as usual. Such a culture also leads to better risk assessment and allows a balance between company needs and consumer welfare to be maintained.

High staff turnover rates highlight the need for regular compliance training for all employees involved in debt collection activities. This may be particularly relevant for smaller operations that have less sophisticated compliance frameworks in place.



## **10. Complaints handling—internal dispute resolution**

Many industry codes of practice, and some licensing regimes, impose obligations and set standards around complaints handling. Complaints handling is an important element of good business practice because it can resolve individual matters when they arise and assist with early identification of compliance problems.

### **Consumer concerns**

Consumer groups identified significant concerns about creditor/collector complaints handling processes. It was suggested that in some cases creditors/collectors simply ignore complaints, pressing ahead with collection activity. A large number of complainants reported problems negotiating with creditors/collectors or having their complaints considered or resolved.

### **Industry responses**

Industry's view is that most organisations have established effective internal dispute resolution (IDR) and complaint-handling processes.

### **Concluding observations**

Failure to respond or respond appropriately to complaints is often an additional component of complaints made to the ACCC and ASIC. Establishing or improving IDR processes may result in fewer complaints being escalated to regulators or dispute resolution bodies.

The guideline highlights the need to establish effective internal processes for logging, assessing and, where appropriate, taking timely action to respond to complaints. Creditors/collectors are reminded that the guideline recommends that they should develop and implement IDR processes that are at least consistent with Australian Standard 4269:1995. It is expected that the new federal credit laws will include obligations regarding IDR.

## 11. Complaints handling—external dispute resolution

Many industry sectors also recognise the value of providing access to a free, independent and informal external dispute resolution body.<sup>8</sup> In some cases membership of an EDR scheme is voluntary; in others, it is a licensing condition.<sup>9</sup>

### Consumer concerns

Consumer groups are concerned about consumer detriment caused by lack of access to EDR, including where debts owing to a creditor that is a member of EDR are sold to an entity that is not. Consumer groups noted that membership of an independent EDR scheme offers a number of advantages to creditors/collectors and consumers, including:

- creating an additional layer to a business's complaints handling framework that can help to resolve disputes where IDR has been unsuccessful
- its independent status, which allows the dispute to be viewed objectively (and the consumer to be satisfied that it has been viewed objectively)
- providing a release valve for consumers who consider the entity they are complaining about is unable or unwilling to resolve their complaint
- allowing breakdowns in internal processes to be identified and motivating enhancements in IDR.

### Industry responses

Some industry stakeholders expressed concern about possible debtor bias, exploitation of EDR by vexatious litigants and the cost implications of EDR membership.

Consumer advocates countered that the costs of EDR should be factored into the strategic decisions of all organisations involved in debt collection activity because of its benefit to all parties.

Some creditors and collectors not required by law to be a member of an EDR scheme have voluntarily joined an EDR scheme.

### Concluding observations

It is expected that the federal credit laws will impose obligations regarding membership of EDR to some industry participants not currently required to provide access to EDR.

The ACCC and ASIC provided preliminary information to industry bodies on the operation and costs of EDR membership and passed on the contact details of the Financial Ombudsman Scheme to encourage further discussion and consideration of industry-wide membership.

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<sup>8</sup> Such as the Financial Ombudsman Service, the Telecommunications Industry Ombudsman and the Credit Ombudsman Service Ltd.

<sup>9</sup> For example, an Australian financial services licence under the Corporations Act.

Regulators will remain a channel for complaints by debtors, which will not be removed by EDR membership. The escalation of complaints to regulators may, however, be minimised by the widespread adoption of EDR by creditors/collectors.

## **12. Financial hardship**

Under the current UCCC legislation, debtors may apply to a creditor or debt assignee to have the terms of their contract altered if they are experiencing financial hardship. Financial hardship is defined as a debtor's reasonable inability to meet contractual obligations due to illness, unemployment or other reasonable causes. In addition, industry codes, such as the Code of Banking Practice, include commitments about the ways in which signatory lenders should respond to borrowers experiencing financial hardship.

### **Consumer concerns**

Consumer agencies expressed concern that the time frames adopted by creditors before considering the sale or assignment of debts have shortened over time. Anecdotal feedback suggests it is not uncommon for accounts receivable to be sold off when outstanding by 60 days or less. One consumer group suggested that there are instances, such as in the insurance industry, where debts against uninsured third parties are sold immediately.

This trend affects the ability of creditors/collectors to respond appropriately to financial hardship. Some stakeholders note that the onus should be on the original creditor to consider issues such as financial hardship and disputed debts before selling debts.

There is concern that creditors/collectors do not understand financial hardship provisions or how to recognise debtors who are in financial hardship. Recent inquiries indicate that different organisations not only take different approaches in helping debtors in financial hardship, but also have different definitions of what constitutes financial hardship.

Some consumer advocates note that different work areas within creditor/collection firms often adopt inconsistent approaches to debtor welfare. Customer service teams managing debtor hardship policies reportedly have a different culture to that adopted by credit management or accounts receivable areas.

Different functional areas—such as credit cards, personal loans or mortgages within the same organisation in the financial services sector—may also apply different identifiers for financial hardship and approaches for managing the debt.

A debtor with each of these financial products experiencing financial difficulty may be offered assistance by the area responsible for mortgages while being threatened with default listing by the credit cards section. The same debtor may also be contacted by each area seeking repayment of discrete debts rather than a single contact by the agency in an attempt to address the consolidated debt.

Consumer groups are also concerned that creditor/collector staff are not adequately trained to recognise debtors experiencing financial difficulty and, consequently, are unable to respond to them appropriately.

It was also suggested that many creditors/collectors do not give debtors adequate information about hardship variations and that often information was given only after debtors had already begun to experience financial hardship. It is also quite common for these organisations to inform debtors of these rights only after the debtor experiences financial hardship.<sup>10</sup>

## **Industry responses**

Industry stakeholders indicated that, in some circumstances, debt assignment can often give increased repayment flexibility to a debtor in financial hardship because the debt purchaser may have a longer collection horizon than the original creditor.

Some industry representatives also indicated that working with debtors to help solve their financial difficulties was also in their best interest.

## **Concluding observations**

Financial hardship is not confined to low income households; it can extend to middle or high income households. Australian households experiencing financial hardship have increased steadily in recent years, and more households are predicted to fall into this category in 2009 because of predicted rises in unemployment and other impacts of the global financial crisis.

Both the ACCC and ASIC expect industry to actively inform debtors of their rights to seek variations, to access other assistance when appropriate and promptly respond to these issues.

It would also be useful if industry members adopted consistent definitions and approaches to financial hardship and enabled coordination between functional areas so that debts could be classified according to the debtor rather than to discrete debts or products.

Original creditors are encouraged to consider approaching debtors who initially default on their repayment obligations to investigate the possibility of a hardship variation before on-selling that debt to a third party collection agency, and to ensure that existing payment arrangements are not affected by sale of a debt.

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<sup>10</sup> For more information, see ASIC, *Helping home borrowers in financial hardship*, at [www.asic.gov.au](http://www.asic.gov.au) or [www.fido.gov.au](http://www.fido.gov.au).

## **13. Third party authorisations**

Debtors have the right to authorise a third party, such as a lawyer or financial counsellor or even a friend or family member, to represent them or act on their behalf.

### **Consumer concerns**

Consumer feedback suggests that third party authorisations are being ignored by some creditors/collectors. Consumer advocates allege that authorities are regularly disregarded by creditors/collectors that continue to contact the debtor directly and refuse to discuss the issue with the authorised person. This often results in significant emotional and sometimes psychological distress for the debtor.

The inconsistent approach to acceptable authorisations between creditors/collectors is also causing concern. Some creditors/collectors will accept verbal authorisations while others consider them invalid and will only recognise written authorisations. Some organisations will only recognise written authorities that have been submitted on the organisation's template 'authority form'.

### **Industry responses**

Industry does not agree that third party authorisations are ignored and suggests some of the frustrations expressed by or on behalf of consumers arise because of measures required to ensure compliance with the Privacy Act.

### **Concluding observations**

Consistency in approach to the establishment of third party authorities across the industry would resolve the considerable frustration currently experienced by debtor advocates. As such, the ACCC and ASIC consider that developing a standardised third party authorisation form may have merit.



## Invitation to provide comment

The ACCC and ASIC invite responses to the issues highlighted in this paper from interested parties, including (but not limited to) consumer advocates, creditors, third-party debt collection organisations acting as agents for creditors and those who purchase debts (assignees).

Responses to the issues outlined in this paper will assist the ACCC and ASIC to form a view of the status of the market and inform the development of mechanisms to assist debt collectors and creditors to achieve greater compliance and address consumer detriment.

Feedback on the issues, responses and observations contained in this paper should be provided to the ACCC and ASIC by **30 June 2009** by emailing [debt@accc.gov.au](mailto:debt@accc.gov.au), or by mail to Debt collection feedback, ACCC, GPO Box 520, Melbourne Vic 3001.