



Launch of Australian Collectors and Debt Buyers' Association

Debt collection, the financial downturn and the ACCC: current issues and challenges

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ACCC Chairman**

I am very pleased today to be speaking at the launch of the Australian Collectors and Debt Buyers' Association (ACDBA).

As Alan mentioned, this new body has evolved from the Australian Collectors Association and will be a subsidiary under the Institute of Mercantile Agents. ACDBA will recognise the distinction between office and field based collection activities.

I have no doubt that the formation of ACDBA is not only good news for the sector but the Australian community as well.

The new association will play an important role in ensuring that best practice is the only practice adopted by its members in their day-to-day debt recovery activities.

Of course the development of a robust and rigorous industry code of conduct will provide a sound foundation.

I understand that later today there will be a session dedicated to discussing the development of a code of conduct for ACDBA members.

The ACCC is happy to provide guidance on the development and implementation of the code of conduct and I look forward to the continuation of the already productive relationship we have with the sector.

To that end I take this opportunity to release a new issues paper, jointly produced by the ACCC and ASIC called *Debt collection practices in Australia*. It will be available online, and I look forward to your responses to it.

The creation of the new peak body also provides a unique opportunity to improve relations with consumers and their advocates about industry conduct.

Over the past five years, there has been considerable improvement in debt collection practices and interaction with consumers.

The ACCC commends the formation of the ACDBA and it is today that I seek your assistance and cooperation in dealing with a matter which is causing great concern to both the ACCC and ASIC.

That is, the continuation of unscrupulous debt collection activities by certain operators in the industry.

In particular, the following behaviour has caught the attention of the ACCC. This includes:

- **Harassment and coercion** – such as subjecting debtors to humiliating or intimidating conduct and/or contacting them excessively especially during unreasonable hours; and
- **Misleading and deceptive conduct including misrepresentations** – such as incorrectly explaining the consequences of non-payment.

The ACCC and ASIC take allegations of this nature seriously and are currently investigating a number of recent consumer complaints. Both agencies will closely scrutinise all complaints and take enforcement action where necessary. Concerns about the potential incentives for poor debt collection activities and poor compliance are heightened with pressures stemming from the global financial crisis.

In recognition of the significant consumer distress that results from poor debt collection practices, the ACCC and ASIC undertook a number of initiatives last year including a debt collection phone-in day, a debt collection industry forum and subsequent consultation with industry and consumer stakeholders.

The information gathered has been included in the issues paper which I mentioned earlier.

It would be most inappropriate to tar the industry with one brush but the reality is the conduct of certain operators has the ability to overshadow the legitimate work done within the sector.

The debt collection industry is vital to the effective and efficient operation of the Australian economy. Not only does it employ thousands of Australians it allows business to better manage cash flow and provides an efficient way of collecting debts that may otherwise result in increased prices for goods and services.

It is estimated that the third party debt collection sector manages about \$6 billion of unpaid debt and represents approximately 12 million accounts each year.

Therefore to promote confidence in the industry, it is vital for consumers to be protected from unscrupulous and illegal behaviour carried out by some operators.

It is of course best if the industry takes the lead and cracks down on those elements by working closely with the ACCC and ASIC in reporting cases of misconduct.

As we have in the past, the ACCC will not hesitate to take action against those parties who breach the law and will be on the lookout for undesirable behaviour.

But let me say, the ACCC's focus on debt collection practices is not an absolution of debtors' responsibilities.

Debtors must be held accountable for their debts but in a reasonable and constructive way that leads to repayment of debts and upholds their dignity.

In today's address I'll highlight some of the key topics raised by the issues paper, and provide an overview of the rules that apply to debt collectors.

Finally, I'll examine how industry, including the ACDBA, can work with debtors in resolving debt repayment disputes and how having a proper complaints handling mechanism in place can improve the reputation of the sector and consumer confidence.

Worrying behaviour

According to Reserve Bank Governor Glenn Stevens, gross household debt has grown from about 50 per cent of the average annual household income in the early 1990s to 160 per cent in 2008.¹

This combined with the arrival of the global financial crisis has exacerbated pressures on Australian consumers and businesses.

Businesses are likely to manage their cash flow more closely in an attempt to weather the tighter economic conditions. This may increase the likelihood of more rapid debt assignment.

In these circumstances, more than ever before, it is imperative that the industry does not take short cuts and risk contravening the law.

Collectors and creditors should be fully familiar with the *Debt collection guideline*, a joint ACCC/ASIC publication that was released in 2005.

And it goes without saying they must comply with the *Trade Practices Act* and the *Australian Securities and Investment Commission Act*.

What worries the ACCC is that there are certain operators who are either not fully aware of their obligations under consumer protection laws, as set out in the guideline, or choose to ignore them.

Members of the ACCC's Consumer Consultative Committee and ASIC's Consumer Advisory Panel confirm that they regularly receive reports of collector misconduct from consumers.

Furthermore, these sentiments are being repeated by debtors contacting the ACCC.

In July last year, the ACCC in conjunction with ASIC held a phone-in-day about consumer concerns relating to debt collection. Of the 145 calls received, about half the callers reported problems with third-party collectors acting as agents or assignees.

The most common complaint was of harassment and coercion.

The feedback also highlighted issues with:

- Disputes about debts;
- Difficulty accessing information about debts;

¹ Reserve Bank of Australia, Governor Glenn Stevens, *The Directors' Cut: Four Important Long-run Themes*, Address to the Australian Institute of Company Directors Luncheon, 17 September 2008, http://www.rba.gov.au/Speeches/2008/sp_gov_170908.html

- Multiple collectors approaching debtors;
- Incorrect identification of debtors; and
- Inflexibility of collectors/creditors in negotiating repayment plans.

From 1 January 2005 to 31 March 2009, the ACCC's Infocentre received nearly 5000 contacts about issues arising from debt collection.

In the lead up to the debt collection phone-in-day, we conducted an analysis of complaints from 2005 to 2008. This analysis revealed similar trends to those observed during the phone-in-day initiative.

Numerous callers disputed the existence or amount of the debt – that is they did not believe they were the debtor, felt that the debt had already been cleared, received unsolicited goods or disagreed with the amount payable in relation to goods or services performed.

A significant number of contacts related to harassment. While some mentioned violent and aggressive behaviour, the majority of callers were concerned with excessive contact from the debt collector, particularly via phone calls.

Callers also complained about debt collection agencies refusing to give details about the debt they were seeking to collect. This includes reports of debt collectors denying debtors access to invoices or information to confirm debts. This frustrated some callers who were willing to settle debts but were unable to find out how much they owed or to whom.

Some callers complained they were being targeted by debt collectors by mistake, usually with someone with a similar name, date of birth and address. Often providing birth certificate and receipts did not cease debt collection activities.

It is important to acknowledge that the number of complaints received is statistically relatively low compared to the volume of debt collection activities. Nevertheless the ACCC has decided further investigation into debt collection practices is warranted due to a combination of the following:

- 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; and
- the lack of awareness by some consumers of their rights or ability to complain.

In consultation with ASIC, the ACCC is assessing the complaints in relation to a number of traders with a view to possible investigation.

And should investigations support allegations of contraventions of the *Trade Practices Act*, the ACCC will not hesitate to take action.

It's in all our interests for your sector to get this right. As I mentioned earlier, the ACCC has developed a close working relationship with the industry and this has been evident with activities such as the debt collection forum and the subsequent industry consultation that took place last year.

That is also why I am here today. I urge you take note of this consumer feedback and apply industry pressure, such as through a code of conduct, against those operators whose misconduct ends up tarnishing the whole industry.

I would now like to highlight some of the rules that apply to debt collection activities.

The rules

Just to reiterate, at the federal level there is dual regulatory regime in place which applies to debt collection activities.

ASIC through the *ASIC Act* is responsible for dealing with misconduct associated with debts that arise from financial services.

The ACCC through the *Trade Practices Act* is responsible for dealing with misconduct resulting from debts concerning non-financial goods and services.

State and territory offices of fair trading also have responsibility for the regulation of debt collection activity in addition to licensing or registration regimes in some cases.

Harassment and coercion

Harassment and coercion is outlawed by s60 in the TPA and s12DJ of the *ASIC Act*.

Unacceptable behaviour includes:

- Contacting the debtor during unreasonable hours such as on the weekend, public holidays or late at night;
- Excessive contact with the debtor – more than 3 times per week;
- Uninvited visits to the debtor's workplace to put pressure and embarrass the debtor in front of work colleagues;
- Pursuing a person when there are no reasonable grounds for believing the person is liable for the debt, or continuing with collection, after liability has been denied, without proper investigation of the debtor's claims;
- Subjecting a debtor to conduct that is humiliating or intimidating such as:
 - using abusive, offensive, obscene or discriminatory language;
 - adopting an aggressive, threatening or intimidating manner; and;
 - threatening to use, or using violence or physical force against a debtor, third party or against property.

For example, it is alleged that one debtor was contacted several times per day by a collector including receiving calls after 9pm. The collector contacted her office, abused and harassed other staff as well as warning the debtor's elderly parents that she would be in big trouble if she did not call them back. This caused significant distress to the debtor's mother. The debtor negotiated a

payment plan but was still being harassed by the collector about the debt repayments.

Another account included parents of a deceased son being harassed by a collector attempting to collect debts the son had incurred. The parents forwarded the death certificate numerous times which was not acknowledged by the collector who continued to pursue the debt and request proof of death.

This above conduct is totally unacceptable and that is why we're focusing our attention on those operators in the industry which break the law.

Misleading and deceptive conduct

Misleading and deceptive conduct is another area that is concerning the ACCC. It is banned by s52 of the TPA and s12DA of the *ASIC Act* including the making of misrepresentations. The guideline states that collectors must not make representations that legal action will be taken, even though a valid defence exists. Collectors must not also make claims that:

- the failure to pay a debt involves an element of criminality;
- they have the ability to seize unsecured household items;
- legal action will be commenced or a judgement has been given when this is not the case;
- legal action will be pursued in respect to statute-barred debts; and
- misrepresent the legal status of the debt;

Let me give you an example:

A debtor was paying off a debt slowly over a number of years in an agreement negotiated with the first collector. The debt was passed on to the second collector who called and intimidated her seeking full repayment and did not take into account the debtor's previous repayment history. The second collector told the debtor her home and car would be repossessed if the debt was not fully repaid by a specified date when he would have known that this was not possible in these circumstances.

Unconscionable conduct

Unconscionable conduct is prohibited under s51AB of the TPA and also under the *ASIC Act*.

Unconscionable conduct comes into play when collectors exert undue influence or pressure on, or unfair tactics, against a debtor who is specially disadvantaged or vulnerable.

For example in the 2003 case of *ACCC v Esanda Finance Corporation*², the Federal Court found that the creditor had acted unconscionably by allowing a car repossession to continue with knowledge that a physical confrontation was likely to ensue on attempts to repossess the vehicle.

² [2003] FCA 1225

The court determined it was unconscionable that the creditor informed the debtor that the car could not be lawfully repossessed without a court order but then subsequently repossessing the car without such an order, by jumping the gate and opening the garage door from the inside.

Privacy laws

Under privacy laws, collectors have obligations to protect the privacy of debtors. When making direct contact, collectors must always be sure they are dealing with the debtor before revealing information about the debt. Debt information must not be disclosed to third parties including the debtor's work colleagues, neighbours, partner or family members.

Debtors have reported concerns that third parties have been provided with information about their financial circumstances implicitly from the collection agency.

A debtor was being pursued by a collector for an outstanding debt. The collector rang the debtor's old address and attempted to obtain his new address from the new occupants.

Debtors' rights to representation

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

Consumer representatives have reported that authorities to act on behalf of a debtor are often ignored by creditors/collectors. This sometimes results in significant emotional and psychological distress for debtors.

A consumer was out of work for six months and fell behind in debt repayments. The consumer was seeing a financial counsellor about his problems and nominated the counsellor as his representative. The collector told him the counsellor would not be recognised and he would be pursued until the debt was repaid.

All these practices are unacceptable and can result in significant penalties for creditors and collectors, which I'll now highlight.

Consequences of breaching the law

Breaching the harassment and coercion provisions of the TPA or *ASIC Act* is punishable by a fine of up to:

- \$220,000 for individuals;
- \$1.1 million for corporations.

These penalties also apply when a collector is convicted of knowingly making false or misleading representations.

The ACCC or ASIC can also apply for civil orders against collectors, including:

- injunctions against future conduct;

- non-punitive orders such as corrective advertising.

Both agencies can also apply for criminal sanctions including adverse publicity orders.

Debtors or third parties, who suffer loss or damage resulting from a collector's breach of the consumer protection provisions of the TPA or *ASIC Act*, can recover the amount of their loss through a private action for damages under those acts.

As I have already said today, the ACCC and ASIC will vigorously pursue those parties who are found to have breached the law. As I mentioned earlier, we are investigating a number of recent complaints from consumers to assess necessary enforcement action.

The next topic I will discuss is the accountability of consumers and collectors.

Accountability of debtors and collectors

As I said earlier, the ACCC is not advocating that debtors be freed of their obligations. What we are supporting is that the circumstances of each individual are considered and that collectors work constructively with debtors to achieve sound outcomes.

It is important not to stereotype debtors as 'irresponsible' or 'ignorant'. What we have to remember is that debtors could be your mum, dad, son, daughter, close friend or relative.

We note that most Australians do not deliberately place themselves in a position to be unable to repay debts. They may not have control over the external factors – such as family breakdown, death, unemployment or other consequences caused by a slowing economy, which contribute to their inability to satisfy the debt in question.

And in most cases, debtors want to make amends and pay off their debts.

However some of the feedback we received from consumers has revealed dealings with particular collectors can be unhelpful and often inflame rather than resolve the matter.

For instance, collectors recommending that debtors should eat less, quit smoking or live in cheaper accommodation represents a disregard for debtors' personal and financial circumstances.

Similarly, insisting that debtors pay off their debts in a lump sum payment in all cases is equally problematic because if debtors were in the position to do this, surely they would have already done so. This behaviour may also border on harassment and coercion.

There is also concern that creditor/collector staff are not adequately trained to recognise debtors experiencing financial difficulty.

Selling on debts and handling complaints

As mentioned earlier, the ACCC has concerns about the processes involved once a debt has been sold to a third party.

For example, one report involved a debtor being contacted by four separate collectors about the same debt as it had been sold multiple times.

The ACCC recognises the responsibilities of original creditors in addition to third party collectors to enhance debt collection practices. It is the ACCC's view that original creditors cannot not wash their hands of the responsibilities of debts once they have been sold.

As set out in the guideline, all correspondence relating to the debt should be provided to the third party collector at the point of sale. We also recommend that information about the debtor received after the sale is forwarded by the creditor to the collector. The creditor should also ensure that financial hardship provisions have been applied and disputes about the debt are resolved prior to sale.

The debtor must also be kept informed about the change in creditor/collector and have explained to them in plain English the relevant implications – such as:

- The identity of the new creditor;
- A statement of the outstanding debt; and
- Arrangements relating to repayment.

The ACCC has received feedback from consumer organisations that the selling of debts by businesses is likely to increase because of the pressures exerted by the financial crisis.

The impact of this process on consumers will be closely monitored by the ACCC and ASIC.

Furthermore, the setting up of proper complaints handling mechanisms is integral to the industry's interaction with consumers.

Consumer groups have told the ACCC that in some cases collectors ignore complaints and proceed with collection activity. A large number of complaints reported problems negotiating with debt collectors or having complaints not considered or resolved.

The guideline recommends the adoption of internal dispute resolution processes consistent with the relevant Australian Standard.

Consumers have indicated detriment resulting from the lack of access to an External Dispute Resolution body or EDR.

The membership of collectors to an independent EDR scheme brings advantages to both consumers and collectors such as:

- An additional layer to a business' complaint handling framework if IDR has been unsuccessful;
- Independent status of EDR which allows a dispute to be viewed objectively; and

- Allowing breakdowns in internal processes to be identified and fixed.

I note that there has been industry concern about potential debtor bias of an EDR body, the potential for vexatious litigants and prohibitive cost implications.

Our view is that those concerns are misplaced, and do not reflect the experiences of those industry sectors that have already embraced EDR. For that reason, I am encouraged to see that Phillip Field from the Financial Ombudsman Service will conduct a session later this morning that will cover the operation of external dispute resolution schemes.

Of course, regulators like the ACCC will remain a forum for complaints which will not be removed by EDR membership.

Conclusion

Once again I'd like to commend the formation of the ACDBA. It's a very positive development for the industry.

The ACCC is more than willing to provide assistance in the development of a code of conduct for the body and also advise on setting up and maintaining a vibrant trade practices compliance program.

Unfortunately, there are some in the industry who have been responsible for causing significant detriment to debtors.

These operators threaten to overshadow the substantial contribution that the industry brings to the Australian economy, and I urge you to ensure the best possible practice proliferates.

My message today is that these operators should be on notice that the ACCC and ASIC will closely scrutinise reports of unscrupulous behaviour and take appropriate action to ensure compliance with consumer protection laws.

I also urge collectors and creditors to develop constructive but fair relationships with debtors as doing this leads to better outcomes for all parties.

I welcome comments and feedback about the issues paper which will be distributed from today to businesses involved in debt collection activities. A copy of the paper is also available on the ACCC's website: www.accc.gov.au

However now it is with great pleasure that I formally launch the ACDBA.

I wish the Association and its members every success. I am confident that ACDBA will help promote the message that "best practice is the only practice in debt collection".

Thank you.