



ACCC- ASIC Debt Collection Publications Launch

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Debt collection guideline: for collectors and creditors

Dealing with debt: your rights and responsibilities

I would like to begin by thanking the Institute for the opportunity to speak at your National Conference. And, like any good guest, I don't come here empty-handed, as the ACCC and ASIC are taking this opportunity to publicly launch two new publications relating to the debt collection industry.

Before we formally launch these publications, I want to spend a bit of time talking about the ACCC's experiences with the debt collection industry. As most of you know, the ACCC administers the *Trade Practices Act*.

The consumer protection provisions of the TPA are mirrored in the act administered by our colleagues at ASIC, the *Australian Securities and Investments Commission Act*. Professor Berna Collier, ASIC Commissioner, will speak about their role in the debt collection industry shortly.

Although the TPA does not contain any specific debt collection provisions, both the TPA – and the ASIC Act – are directly relevant to how businesses go about collecting debt.

The first section relevant to debt collection is the prohibition on the use of physical force, undue harassment or coercion. Thankfully, instances of physical force are very rare. Unfortunately, harassment and coercion still occur when debts are collected. The guideline goes into some detail about what kinds of behaviour may constitute undue harassment or coercion – things such as excessive communication with the debtor and inappropriate contact with family members and other third parties about a debt.

Secondly, the TPA prohibits misleading and deceptive conduct, or conduct that it is likely to mislead or deceive. It is fair to say that in nearly all cases, a collector or creditor will know more about the debt collection process than a debtor. Furthermore, due to the passage of time or poor record keeping, the creditor or collector may also know far more about a debt than the person who is alleged to have incurred it. In these situations especially, creditors and collectors need to make sure that what they tell a debtor about a debt, or the consequences of not paying the debt, is not misleading or deceptive.

Thirdly, the TPA prohibits unconscionable conduct. Unconscionable conduct in the debt collection industry could best be described as a creditor or collector exerting undue influence or pressure, or using unfair tactics against a consumer who is at a special disadvantage. This category of special disadvantage is particularly relevant to the debt collection context, as the reason many consumers may be in debt could be a serious illness or the loss of the earnings of the main family income or a relationship breakdown, which may put them 'at risk'.

Unconscionable conduct is a complex, and evolving, area of the law. As well as being discussed in some detail in the guideline, the ACCC has also produced a guide to the unconscionable conduct provisions of the act. Again, thankfully, instances of unconscionable conduct appear to be relatively rare, but where they do occur, the consequences for the consumer are almost by definition quite severe. Because of this, the ACCC takes complaints about unconscionable conduct very seriously indeed.

ACCC experience with debt collection complaints

Debt collection activity continues to be a source of complaints to the ACCC. In fact, debt collection was the first trend to emerge in the ACCC's campaign to protect disadvantaged and vulnerable consumers. This campaign scrutinizes complaints that the ACCC receives from 'at risk' consumers.

A few examples of the type of conduct that the ACCC is hearing about include:

- A woman from a non English speaking background obtained a quote from a travel agent for a trip to Melbourne. She ended up purchasing the fare from another agent, only to be contacted by the original agent while she was on her holiday. The original agent contacted the women around four times a day to demand payment, and even contacted the woman's employer to demand payment. Setting aside the fact that the woman was being pursued for a fare that she did not agree to purchase, this type of collection activity raises the serious issue of disclosing the existence of an alleged debt to a third party. This not only raises privacy concerns, but can also constitute undue harassment and coercion of the debtor. Creditors and collectors need to be very careful about their dealings with third parties.
- Another woman had arranged for a payment arrangement with a collector. The woman missed a couple of payments, but soon after recommenced payments in line with the agreement. The collector began calling to request confirmation of payments and receipt details. After requesting that the collector cease making continual phone calls, the woman suggested that collector was actually harassing her and that she was considering making a report about this conduct. The collector became irritated and suggested that he would default list her and call in the entire debt. The collector called back an hour later to

say that he had done just that. Such threats to default list a debtor are not an acceptable way to handle a consumer's complaint, regardless of whether or not the debtor had missed a payment. Even if the collector was permitted to make such a listing, for an employee to use this threat in such a way could constitute unconscionable conduct or undue harassment.

- A third case involved a middle-aged man who was making regular repayments on a \$10,000 debt following a verbal agreement with the collector. The man had strictly adhered to the repayment agreement and had not missed a payment. Despite this, the collector continued to send the man letters stating that payments were overdue, threatening legal proceedings and regularly phoning him demanding payments. The collector later acknowledged that the promised payments had been received, however the man was left upset and shaken by the contacts. This matter highlights the importance for collectors and creditors to make sure that they make a record of such repayment arrangements, and ensure that their communications with a debtor are consistent with any agreements that are in place. Demands for payment can be very stressful for consumers who are already complying with an agreed payment plan.
- The final case study I wanted to share with you relates to a young man who received a letter demanding payment for unpaid video rental fees. The man was not sure if he actually owed the debt and requested some further information about the alleged debt. The collector did not provide this information. This matter highlights those situations where a debtor has some doubt as to whether they actually owe a debt. This is not unusual when the debt was incurred several years or even several months previously. Collectors need to be very sure that the person they are contacting about the debt legitimately owes the amount, otherwise demands for payment could constitute misleading or deceptive conduct. Collectors should provide supporting evidence to the debtor where this is requested. Such evidence would be required in any case should the debt be challenged in court. Also, following a request for information, collectors should suspend further collection activity on the debt being queried – including credit report listing – unless or until the debtor's identity and ongoing liability have been confirmed. It cannot be in the community's best interests for consumers to feel threatened into paying a debt that they are not sure that they owe and may in fact not owe.

The bad news is that complaints about debt collection show little sign of abating. This is of concern to the ACCC, and I know that ASIC shares this concern. This is not to say that all of these complaints are valid, or even relevant to the ACCC's jurisdiction. What it does indicate, I think, is many consumers may be unsure of their rights, or what they can do when they come across debt collection behaviour that they are uncomfortable with. Redressing this lack of information is one of the principal aims of the consumer booklet that we are launching here today alongside the guidelines.

My colleague from ASIC, Commissioner Berna Collier, will talk about this in more detail shortly.

ACCC responses

Of course, some of the complaints that we receive may involve possible breaches of the TPA. In these situations, the ACCC has a range of enforcement options open to it, depending on the type and extent of conduct, and on the level of cooperation, if any, that the ACCC receives from the business subject to an investigation.

Litigation is not something that the ACCC does lightly, but when we see a clear breach of the Act, and business behaviour involving widespread consumer detriment, it is an option that we are more than willing to take. The potential penalties for breaching the TPA or the ASIC Act should not be taken lightly either. If convicted of breaching provisions relating to harassment and coercion, or false or misleading representations, a collector could face fines of up to \$1.1 million for corporations and \$220,000 for individuals.

Where a business is willing to cooperate with the ACCC's investigation, and has a genuine commitment to rectify any harm caused by their conduct, the ACCC can accept a court-enforceable undertaking from the firm. Some of you would be aware of such an undertaking recently provided to the ACCC by Alliance Factoring, following from an investigation into the collection of debts Alliance had purchased from Telstra. Part of this undertaking required Alliance to establish a 1-300 telephone number for consumers who believed that they paid money that they did not owe, or had a default listed against them for such a debt. Alliance agreed to refund any money paid and remove any default listing made, where they were satisfied that the consumer was not liable for the debt.

Of course, prevention is better than cure, and ensuring that breaches of the Act do not occur is better than taking enforcement action after the event. The ACCC is committed to educating consumers and businesses about their rights and obligations under the TPA. That's why, in conjunction with our colleagues at ASIC, we have produced this guideline to assist creditors and collectors.

You don't need me to tell you that the debt collection industry has seen a lot of changes since 1999 when the ACCC produced their previous guideline, entitled *Debt collection and the Trade Practices Act*. The 1999 publication needed to be updated for several reasons.

Firstly, and my colleague from ASIC will talk about this further, ASIC now have responsibility for consumer protection in the area of financial services.

Secondly, case law relating to debt collection has developed. Indeed, at the time of writing the 1999 guideline, section 60 of the TPA - harassment and coercion - had not been tested. A whole part of the guideline being launched today is devoted to explaining the Commonwealth consumer protection laws with reference to recent cases.

Thirdly, the collection industry has undergone changes to its structure and practices, such as the increasing prevalence of outsourced or assigned debt collection.

As a result of these factors, the guideline being launched today is a very different document to the version issued in 1999. Also, with the assistance of the Office of the Privacy Commissioner and the Insolvency Trustee Service Australia, the guideline specifically addresses privacy and bankruptcy issues in the context of the consumer protection laws we administer.

We believe that the guideline provides a comprehensive guide to the law as it relates to debt collection. However, this guideline does not have legal force. ASIC and the ACCC cannot make law in this field—that is the role of parliament. Nor can ASIC and the ACCC provide a definitive interpretation of the law—that is the role of the courts. However the guideline does set out what creditors and collectors should and should not do if they want to minimise the risk of breaching the TPA and ASIC Act. It is always worthwhile remembering that businesses may also be subject to action by private parties if they breach either of these acts.

It is also not correct to describe the guideline as a best practice guide. Instead, the various pieces of consumer protection legislation covered by the guideline set out a *minimum* standard of behaviour that is required.

A requirement of the court enforceable undertaking given by Alliance that I mentioned earlier was for Alliance to host a two day forum for the debt collection industry. This reflects the realisation by some in the industry that there are many issues which need to be addressed which are beyond the scope of this guideline. The ACCC and ASIC would encourage any movement by the industry to develop a code of conduct covering these issues. Of course, such a code will only work if it has the genuine support of the majority of the debt collection industry. The ACCC looks forward to any developments on this front.

I would now like to hand over to ASIC Commissioner Berna Collier. Berna will talk some more about the role that ASIC has in administering consumer protection laws in the debt collection industry, and to also discuss in greater detail the consumer brochure that is being launched today with the guideline.