Launch of Report & Guidelines on undue harassment and coercion in debt collection

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Allan Asher
Deputy Chairman
Australian Competition and Consumer Commission

It is my pleasure to welcome you all to the launch of the Commission's report and guidelines on undue harrassment and coercion in debt collection, which are the outcomes of the Commission's project on section 60 of the Trade Practices Act. Section 60 prohibits corporations from engaging in:

> Physical force, undue harassment or coercion, in connection with the supply of goods or services to a consumer, or in connection with the payment for goods or services by a consumer.

The Commission's project on s. 60 of the Trade Practices Act in the context of debt collection was prompted, in part, by concerns raised by a number of consumer organisations and representatives. These shop front representatives alleged that undue harassment and coercion was systemic in the area of debt collection. Numerous case studies were provided to illustrate the type of conduct that was causing concern.

The Commission also initiated contact with other relevant organisations. The results of these preliminary inquiries suggested that it would be worthwhile for the Commission to examine this issue in so far as it applied to debt collection.

Additionally the Commission considered that this issue was an important one because:

- many of the consumers likely to be the subject of debt collection are on low incomes and/or are otherwise vulnerable or disadvantaged;
- many of those likely to be the subject of debt collection are unlikely to be aware of their rights in this area;
- the consequences of undue harassment can be fairly significant — at the extreme end of the scale it is possible that undue harassment could contribute to serious health, relationship or employment consequences;
- s. 60 is an area untested by law, and there is little or no guidance on its scope and practical application; and
- debt collection is an issue of national relevance and the Commission is, therefore, well suited to examine it.

This report and guideline provided one way of clarifying how s. 60 could be applied, by specific reference to the debt collection context. It is not intended to be an exhaustive list of conduct which is at risk of breaching s. 60. Rather, it provides guidance to the debt collection industry as to the type of behaviour that, in the Commission's view, would potentially amount to 'undue harassment or coercion'.

One reason why this report and guideline focus on debt collection was that the issue of debtor harassment raises particular challenges for consumer protection initiatives. Consumer protection difficulties in other sectors can often be addressed by improved information disclosure, enabling consumers to choose the supplier that best meets their particular needs. However, such mechanisms are likely to be less effective in addressing debtor harassment, as a debtor is not in a position to choose their preferred collector.

The major aims of this project were to:

- review compliance with s. 60;
- provide guidance to business for compliance with s. 60 in the debt collection context; and
- ensure that the provision was effective in protecting consumers.

As part of its enforcement and liaison functions the Commission will monitor the impact of the guidelines on s. 60 compliance in the context of debt collection, and continue to examine s. 60 compliance in the wider context.

The Commission notes that particular harassment issues have been brought to its attention in respect of areas other than debt collection, including:

- issues relating to residential tenancy, including the use of 'blacklists'; and
- issues relating to electricity supply, particularly suspected meter tamper cases, and tree clearing matters.

The Commission has not considered these issues directly in this project. However, it is possible that a number of the principles discussed in this paper may also be relevant for addressing these issues, although the discussion should not be seen as limiting the interpretation of s. 60 as it applies to the supply of goods or services.

The Commission has not been able to definitively assess the level of undue debtor harassment in Australia. However, it has been able to identify some broad indicators that suggest some concern is warranted.

In the past the Commission has not received high levels of consumer complaints about s. 60. But in 1998 over 230 complaints and inquiries were received. While these matters are allegations and have not been tested in court, these figures do give an indication of the level of concern.

The Commission also received submissions from other consumer groups who have daily contact with consumers in debt. Each of these agencies assert that a significant proportion of their clients have experienced debtor harassment. In total, these agencies provided over 65 case studies or examples, highlighting their major areas of concern, including:

- unreasonably frequent telephone calls and/or telephone calls late at night or early in the morning;
- contacts at the debtor's workplace in such a manner that the debtor's employment is threatened;
- deceptive tactics, including misrepresentations about the consequences of non-payment, or about the debt recovery process;
- disclosure of loan information to third parties, such as work colleagues, neighbours and family members;
- threats to disclose information to employers, child welfare agencies, social security agencies, and immigration agencies; and
- use of abusive or threatening language.

There is also some anecdotal information that, for many consumers, the decision to apply for bankruptcy may be at least partially prompted by the protection bankruptcy offers from contact from, and potential harassment by, creditors.

While the level of formal complaints to agencies such as the Commission and State Consumer Affairs agencies may not be as high as for some other trade practices issues, there are many reasons why disaffected consumers are unlikely to complain about undue debtor harassment that may explain this. These include:

- For many consumers debt harassment arises in a context where they are dealing with a major change of circumstances and the resultant financial difficulties. Dealing with an harassment issue comes a poor third to sorting out these difficulties.
- Lack of knowledge on the part of individuals about their rights. Indeed, many consumers feel that badgering, abusive and misleading behaviour is what you must expect if you cannot pay your debts.
- Embarrassment or reluctance (on the part of the consumer) to take a matter further because that would make financial difficulties public.
- Often a consumer who accepts the debt will want to reach an accommodation with the creditor to repay the debt by instalments. They may take the view that instituting a formal complaint would not be helpful in developing an appropriate negotiating arrangement.
- Lack of benefit, or perceived lack of benefit, to the consumer in reporting inappropriate or unlawful behaviour.
- The costs of taking legal action will usually be disproportionate to any benefit to be gained.
- Difficulties of proof. Much harassment is verbal and there will often be no third party witnesses to alleged conduct. This in turn increases the uncertainty and risks of litigation.
- Difficulties in assessing the scope of the legislation. Again this increases the uncertainty and risks of litigation.

- Intervention by an adviser or consumer protection agency may persuade the trader to 'back off' and stop the conduct in an individual instance.

- Other provisions and legislation may be easier to use and to prove (for example, door to door trading legislation, credit legislation).

- Enforcement agencies may place a low priority on debtor harassment issues. In such cases consumer advocates are unlikely to recommend the agencies to consumers seeking redress.

Thus, while the Commission does not have direct evidence of the level of non-compliance with s. 60, it is satisfied there is a justifiable level of concern amongst relevant sectors of the community to warrant the issue being considered.

In the enforcement arm of its project the Commission examined whether a change in its own enforcement approach might change the outcomes, in terms of complaints recorded and enforcement activity. Among other things the Commission:

- made public statements inviting referrals from consumer and community organisations;

- advised its regional offices that staff were to place a high priority on potential s. 60 matters;

- developed a guide and checklist for staff to assist them in identifying possible s. 60 matters;

- appointed an officer in each regional office to have responsibility for any s. 60 matters that were received by that office and to liaise with financial counsellors in that region; and

- in appropriate cases, interviewed complainants in person or by telephone, rather than asking for a formal written letter of complaint.

As at the date of publication the Commission has not instituted proceedings under s. 60. However, the changed enforcement approach has resulted in a number of positive outcomes, including some instances of changed practices by individual collection businesses.

During 1998 the Commission received over 230 complaints and inquiries in relation to s. 60. (This compares to a total of only 57 complaints during 1997.)

In all of these cases the complainants were advised of the Commission's interest in this area and given further information about the Commission's project. Where the party was interested in pursuing their complaint further details were taken, and the matter assessed.

Most complainants indicated that they did not dispute the debt and wanted to repay it as soon as possible. However, their financial circumstances at the time meant that they did not have the resources to repay the debt immediately. This is consistent with the picture of consumer debt given in the earlier discussion.

In some cases complainants were reluctant for the Commission to pursue a matter at the time of contact. Reasons for this reluctance included the fact that the consumer did not want to jeopardise the opportunity to negotiate agreement with the creditor (or creditors). A number of complainants indicated that they would like the Commission to follow up the matter once the debt had been paid off or bankruptcy had been filed for, and indicated they would make contact again at that stage.

Following review and assessment, a number of matters were pursued with the collector concerned. Most were settled with the collector agreeing to amend its practices or standard form letters, agreeing to stop further contact, or with the Commission being satisfied with the collector's explanation of its conduct. A number of matters are still being investigated at the time of this report.

In summary the Commission's enforcement approach to s. 60 has:

- increased awareness amongst both industry and consumers about the existence of s. 60;

- put industry on notice of the Commission's interest in this area, thus encouraging internal review of standard procedures;

- improved practices on the part of individual businesses where the Commission brought specific concerns to their attention; and

- increased the Commission's understanding of debt collection practices.

The Commission will continue to actively review complaints and make s. 60 matters a priority for possible investigation and/or enforcement action during 1999.

The Commission notes that litigation is only one of a number of tools that the Commission has available in matters where contraventions of the Trade Practices Act (including s. 60) are alleged. In any particular matter the Commission's response will depend on the circumstances of the matter and the parties involved.

In general the Commission's enforcement goals are, in order of importance:

- to stop the unlawful conduct;

- to compensate those affected;

- to undo the effects of the contravention; and

- to deter and prevent unlawful conduct occurring or being repeated in the future.

The Commission will not automatically institute litigation when it considers a contravention has occurred, but will assess which of the available tools will best meet the above goals.

However, the Commission believes that if it offers guidance to industry on what it believes will keep companies within the law industry self regulation through compliance is the most preferred option. The Commission believes therefore that the guidelines will set the parameters for acceptable and fair behaviour and, in so doing, lift the level of compliances.