



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 66

ACCC / ASIC debt collection guideline:

For collectors, creditors and debtors (Second draft)

July 2005

Australian Competition and Consumer Commission



Australian Securities and Investments Commission



ACCC/ASIC debt collection guideline

Second draft

Discussion paper

July 2005

Introduction

The Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) invite submissions in response to the second draft of the *ACCC and ASIC debt collection guideline* accompanying this discussion paper.

We seek your feedback by **5 pm Friday 29 July 2005**.

This is the second draft of the guideline we have released for comment. In February 2005 the ACCC and ASIC jointly published a first consultation draft inviting submissions by 31 March 2005.¹ Our intention at the time was to launch the new guideline in May 2005. However, the extent and quality of the submissions we received in response to the draft (over 50 in total)² have prompted us to revise our approach and issue this further consultation draft.

We now propose to finalise and release the guideline in late September–early October.

The guideline

The guideline provides guidance to the Commonwealth consumer protection laws to all involved in debt collection activity. Once finalised, it will replace the ACCC's publication, *Debt collection and the Trade Practices Act*, released in 1999.³

The new guideline reflects the fact that ASIC and the ACCC now share responsibility for debt collection regulation at the Commonwealth level. It also takes account of:

- recent cases that interpret the law governing debt collection
- changes to the structure and practices of the collection industry in recent years
- stakeholder feedback.

For more information about the status of the guideline, see part 1 of the guideline.

¹ See the ACCC website at: <http://www.accc.gov.au/content/index.phtml?itemId=581655> or the ASIC website at: <http://www.asic.gov.au/dcsubmissions>.

² *ibid.*

³ See: <http://www.accc.gov.au/content/index.phtml/itemId/303690>.

How has the guideline changed since the first draft?

Changes to content and organisation

There have been several changes to the content of our guidance on specific issues or aspects of debt collection in response to stakeholder submissions to the first consultation draft. Appendix A of this paper outlines the more important substantive changes made and the rationale for these changes.

The guideline has also been reorganised to a considerable extent. Most of the organisational changes have been made to ‘Part 2: Practical guidance’. In particular:

- the sections of this part have been reordered
- some sections have been split up to enhance conceptual clarity and the user's ability to reference
- a number of section headings have been changed to reflect their revised content and/or to make them more descriptive in character and therefore more easily referenced.

Appendix B is a table designed to facilitate comparison of the various sections of part 2 in the second consultation draft with the corresponding sections in the first consultation draft.

Additional material on other laws

The second consultation draft of the guideline contains a significant amount of additional content on laws administered by other agencies apart from the ACCC and ASIC, as well as issues that arise under those laws. In particular, we have included a new section on ‘Privacy obligations to the debtor and third parties’ (see part 2, section 7), developed in conjunction with the Commonwealth Office of the Privacy Commissioner.

There is also additional material on:

- ‘Contact following bankruptcy or a Bankruptcy Act agreement’ [see part 2, section 15]. This was developed in conjunction with the Insolvency Trustee Service Australia
- relevant provisions of the ‘Uniform Consumer Credit Code’—particularly under the sections dealing with ‘Providing information and documents’ (part 2, section 10) and ‘Repayment negotiations’ (part 2, section 13). References to the UCCC have been reviewed by the Chair of the Uniform Consumer Credit Code Management Committee.

While the guideline remains primarily a guide to the laws administered by ASIC and ACCC, we have decided (partly in response to views expressed in stakeholders’ submissions) that the inclusion of this additional material is appropriate given its importance in the debt collection context and potential usefulness to users of the guideline.

A guideline for collectors and creditors

The first consultation draft was described as being for ‘collectors, creditors and debtors’, and included comment specifically directed to debtors. Some consumer organisations expressed concern that the guideline was too long and technical to be effective as a consumer information document. It was also noted that it failed to provide key consumer information on certain issues—for instance, that unresolved disputes should be referred to an appropriate external dispute resolution scheme or fair trading tribunal before civil proceedings are commenced by the creditor.

Conversely, a number of industry submissions expressed the view that there was insufficient emphasis on debtors' obligations and the need for debtors to enter into arrangements to repay their debts.

We have decided to address these concerns by removing the limited consumer advice element from the guideline—which is, in essence, a compliance guide for industry. Instead, we will jointly publish a separate short guide for consumers/debtors on their rights and responsibilities in the debt collection context. This document will be issued at the same time as the finalised guideline.

Other issues raised in first round submissions

There were a number of consumer, as well as some industry submissions proposing further detailed guidance on aspects of the collection process. These included suggestions to improve debtors' capacity to communicate effectively with creditors and collection agencies, additional measures to ensure that collection activity in relation to settled debts did not occur, and various other suggestions.

ASIC and the ACCC did not consider it appropriate that a document providing guidance to the laws the ACCC and ASIC administer should incorporate these suggestions, many of which are appropriately characterised as good practice proposals. However, a number of the issues raised could be considered in the context of the proposed development of a code of conduct for the debt collection industry.⁴

Finally, several submissions made suggestions for law reform and/or ACCC and ASIC liaison with other government agencies. In the case of industry, the primary concern was with consistency of laws and their administration across jurisdictions. On the other hand, consumer organisations expressed concerns about the adequacy of a number of aspects of the regulatory framework. In addition, the BFSO proposed that a review of the current credit reporting system be undertaken.

As respondents appreciate, the law reform issues raised lie outside the scope of this review, as well as the ACCC and ASIC's powers as regulatory agencies. However, ASIC and the ACCC propose to provide a summary of views expressed on law reform to the state and territory and Commonwealth agencies concerned for their consideration.

⁴ A joint ASIC/ACCC Debt Collection Forum was held in May 2005, during which there was general support from stakeholders for a project which attempts to incorporate many of the good practice issues identified into a code of conduct.

Making a submission

The discussion paper accompanying the first consultation draft of the guideline in February included a series of consultation questions designed to encourage a broad response on issues relevant to the guideline from stakeholders. This approach has not been adopted for this round of consultation. This is because we now regard the structure, parameters and, in large measure, the content of the guideline as settled, and wish to encourage a more focussed and limited response from stakeholders. The briefer consultation period also partly reflects this.

Further to this, we seek comment on, in particular, any aspects of the additional content of the second consultation draft and/or the changes made to our guidance that are of concern to you or that pose implementation issues for your organisation.

When making comments, we encourage you to refer to specific sections and/or paragraphs of the second draft of the guideline (the paragraphs of part 2 are now separately numbered). You should not feel obliged to comment on all changes/additions to the document, but should feel free to limit your comments to matters that are significant from your perspective.

Submissions should be typewritten. Submissions in electronic form are preferred.

Mail or facsimile copies will be accepted, but note, facsimile copies are sometimes difficult to read.

Each submission should include:

- the submitter's name and address (and a contact point if the submission is lodged on behalf of an organisation)
- names of any additional contributors to the submission who may wish to be acknowledged
- contact telephone numbers in case ASIC or the ACCC need to clarify any points, obtain additional information, or advise if the submission appears incomplete (e.g. pages missing); and
- fax and email addresses where available.

Email responses to:

DebtCollectionGuideline@acc.gov.au

Fax responses to:

(03) 9663 3699

Attention: Nick O'Kane

Mail responses to:

Attention: Nick O’Kane

Australian Competition and Consumer Commission

GPO Box 520

Melbourne Victoria 3001

Please note that it is not necessary to separately forward your submission to ASIC —the ACCC will arrange for copies of all submissions to be forwarded to ASIC.

Please ensure your response reaches us by **5pm Friday 29 July 2005.**

Confidentiality – Please indicate if you wish to have your submission treated as a confidential document (in part or in full). Unless otherwise advised, we will assume you agree to your submission being published in full on the submissions web page for this review.⁵

⁵ See the ACCC website at: <http://www.accc.gov.au/content/index.phtml?itemId=581655> or the ASIC website at: <http://www.asic.gov.au/dcsubmissions>.

Appendix A: substantive changes

In response to stakeholder submissions, we have modified a number of aspects of the guidance provided in the guideline. The following list is not intended to be exhaustive, and you should also refer to the table set out in Appendix B and make your own comparison of the two drafts.

Language used

At a number of points we have strengthened the language used to indicate that conduct that is clearly in breach of the statutory prohibitions is proscribed. These changes are a response to concerns expressed by consumer group and other stakeholders that the use of 'avoid' or 'should not' and similar phrases—rather than 'must not'—in certain contexts (for example, the making of misleading representations) may carry an unintended implication that there is an element of discretion available to the collector when this is not the case.

By contrast, the revised draft is more explicit than its predecessor that certain guidance (for example, in relation to the times and frequency of contact with debtors) can only be recommendatory in character—what the ACCC and ASIC recommend if collectors wish to minimise the risk of breaching the laws our agencies' administer.

Contact must be necessary and for a reasonable purpose

The revised draft lays greater stress on the need for all contact to be *necessary*, as well as being for a reasonable purpose. It is clarified that recommended limits on time, frequency, location etcetera of contact must be understood as being subject to this overriding requirement.

Some additional examples of conduct for a reasonable purpose have been added to part 2, section 1.

Contact times

The *1999 guideline* advised against communication with the debtor or a third party between 9 p.m. and 7:30 a.m. local time unless authorised. The first consultation draft proposed a more restricted and differentiated approach to contact hour limits. There was sustained and general criticism of these proposed revised arrangements from industry.

The changes were opposed on the basis, among other things, that:

- evidence of detriment to justify the more restricted approach was lacking
- the approach reduced flexibility, and was inconsistent with the encouragement collectors are given in the guideline to contact debtors at home wherever possible
- the changes would pose particular difficulties for nationally operating businesses
- they would impose additional compliance costs.

Concern was also expressed about the greater complexity of the proposed arrangements, again particularly for businesses operating across more than one time zone. By contrast, time of contact was not of itself a major theme of the submissions of consumer representatives.

As part 2, section 3 indicates, we have been persuaded in part by industry concerns. However, we remain of the view that early morning visits, whether to debtors or third parties, will be excessively intrusive in most circumstances; and that contact by telephone before 9 a.m. on weekends is generally also unnecessary and excessive. The position in relation to public holidays is also clarified.

Frequency of face-to-face contact

There was widespread industry opposition to the proposed limitation on personal visits to one per month. We are persuaded that this may be unduly restrictive if the debt collection process has reached the personal visit phase. In consequence, we have revised our recommendation to one personal visit per fortnight. Again, however, we have put additional stress on the fact that face-to-face contact should only occur to the extent it is reasonable and necessary.

We have also sought to clear-up confusion in the submissions of some industry stakeholders about whether the limitation on personal visits applies to situations involving the recovery of security interests, the service of court process or the enforcement of court orders. Part 2, section 6 (in addition to *Relationship with court debt recovery process* in part 1) now specifically states that our recommendations apply to informal debt collection processes only and that these other situations are not covered.

Frequency of telephone and other contact

We have restricted the application of the recommended three contacts per week or 10 contacts per month limitation to calls where contact is actually made (and letters). This is consistent with the approach of the 1999 guideline, developed at a time when phone answering machines were less ubiquitous. It responds to understandable industry concern about debtors who screen calls to avoid legitimate contact. It also recognises that leaving a message is generally less intrusive than having a phone conversation. Again, however, we emphasise the overriding requirements of necessity and reasonable purpose.

In addition, we have clarified that recommended contact limitations apply per account rather than per debtor: see part 2, section 4.

Location of contact

The issue of location of contact where a debtor gives a phone number (including mobile phone number) as the means of contact is addressed in part 2, section 5.

There is additional commentary on the privacy risks associated with visiting a debtor at their workplace in part 2, section 6.

When a debtor is represented

Additional examples of authorised representatives are given in part 2, section 8. The situation where the representative does not agree to receive correspondence is now addressed in this section.

Settled debts

The guideline gives enhanced emphasis to the need to ensure that a debt has not been paid or otherwise settled before it is assigned or contracted-out for collection.

Provision of information and documents

As well as including detailed references to *UCCC* requirements relating to the provision of information and documents in part 2, section 10, we have more closely aligned our general guidance on this topic to the *UCCC* requirements. This is consistent with views expressed by both industry and consumer stakeholders.

Misrepresentations

Responding to consumer group submissions, the *Repayment negotiations* section [part 2, section 13] as well as sections 19 –21, includes additional examples of misleading representations that may occur in the debt collection context.

Debtors at a special disadvantage

Part 2, section 17 expands the treatment of this theme in the guideline. It has been included, in part, to clarify uncertainty in some industry submissions about collectors' obligations in relation to debtors at a special disadvantage. It stresses that collectors must not knowingly exploit or take advantage of such disadvantage. Specific reference is also made to dealing with non-English speaking debtors.

Role of dispute resolution

Sections 22 and 23 of the revised guidelines give more prominence to the role of internal and external dispute resolution processes as they relate to the debt collection context. This responds to suggestions made by the Banking and Financial Services Ombudsman and consumer organisations. We have also included reference to requirements imposed on Australian financial services licensees in this area.

Appendix B: Part 2 comparative chart

The following chart will help readers compare the two drafts:

Section Headings from Part 2 of the second consultation draft [issued July 2005]	Comparison with the sections of Part 2 of the first consultation draft [issue February 2005]
1. Contact for reasonable purpose only	Reflects the old section 1; some material added
2. Making contact with the debtor	Expands the old section 3
3. Hours of contact	Reflects the old section 6, with revisions; covers third parties
4. Frequency of contact	Reflects the old section 7, with revisions; covers third parties
5. Location of contact	Reflects part of the old section 8, with revisions
6. Face-to-face contact	Reflects parts of the old sections 7 and 9, with revisions
7. Privacy obligations to the debtor and third parties	New section—consolidates, revises and extends privacy material in the first draft [including the old section 10]
8. When debtor is represented	Reflects the old section 11, some revisions
9. Keeping accurate records	Covers parts of the old section 5, with additional focus on settled debts. See also new section 11
10. Providing information and documents	Extensively revises the old section 4, with additional emphasis on the UCCC
11. Consistent and appropriate correspondence	Expands material in the old section 5
12. If liability is disputed	Consolidates the old sections 14 and 15

13. Repayment negotiations	New section – includes part of the old section 12. Includes reference to UCCC and the Banking Code of Practice.
14. Contact when a payment arrangement is in place	Covers material in the old section 12 that was not removed to the new section 13
15. Contact following bankruptcy or a Bankruptcy Act agreement	Expands material in the old section 16
16. Conduct towards the debtor	Consolidates parts of the old sections 2 and 8. Additional focus on responding to debtor aggression; removes special disadvantage focus to new section 17
17. Debtors at a special disadvantage	New section that expands part of the old section 2
18. Conduct towards family members and other third parties	Largely based on the old section 10 with some additional focus on communication with the debtor's child
19. Representations about the consequences of non-payment	Covers the old section 13 with additional examples; includes new material on credit reporting
20. Representations about the legal status of a debt—including statute-barred debt	Covers the old sections 16 and 17
21. Legal action and procedures	Covers the old section 18 with additional examples given
22. Resolving debtor complaints and disputes	Extends section 19
23. The role of independent external dispute resolution schemes	Extends section 19