ASIC

Australian Securities & Investments Commission

REPORT 55

Collecting statute-barred debts

September 2005

Contents

© Australian Securities & Investments Commission, September 2005

Executive summary

In my view the fact that any impoverished debtor is willing to pay $5,000 in settlement of a 10 year old statute-barred finance company debt of $11,000 is probably sufficient… to cast upon the beneficiary of the transaction the burden of establishing that the transaction was fair, just and reasonable; and in this case it was not.

Per Nettle J, *Collection House Ltd v Taylor* [2004] VSC 49

The current environment

A recent decision of the Supreme Court of Victoria in *Collection House Ltd v Taylor* has focused attention on the conduct of creditors and debt collectors attempting to collect debts that are statute-barred.[1] This decision highlights the risk that collecting statute-barred debts will involve conduct that is unconscionable or that is misleading or deceptive.

The Australian Securities and Investments Commission (ASIC) regulates financial services and products, including credit. Jointly with the Australian Consumer and Competition Commission (ACCC), ASIC has responsibility for consumer protection for debt collection at the Federal level.

In January 2005, ASIC surveyed mercantile agents, debt collectors and industry peak bodies to explore what approach these agencies took to collecting statute-barred debts, particularly since the decision in *Collection House v Taylor*.

We received a range of responses, reflecting a level of confusion and uncertainty in the industry about collecting statute-barred debts. Some agencies saw the risk of breaching statutory prohibitions as too great, and elected not to collect statute-barred debts, or to do so only rarely. Of the 17 individual agencies contacted, only 6 said that they did collect statute-barred debts, with 4 of those suggesting that they did so only rarely.

Key issues

In addition, the responses to the survey revealed that:

- the effect of *Collection House v Taylor* on collection practices is poorly recognised within the debt collection industry;
- there is widespread failure to adopt processes for identifying whether or not debts are statute-barred;

[1] Statute-barred debts are debts in relation to which a statutory limitation period has expired. For a discussion of the statutes of limitation in each state and territory, see Section 2 of this report.

© Australian Securities & Investments Commission, September 2005

- there is widespread misunderstanding of the laws relating to limitation regimes; and
- agencies that collect statute-barred debts are not doing enough to ensure that their conduct meets the standards set by the law.

In responding to the survey, a number of agencies acknowledged the level of uncertainty in the industry about collecting statute-barred debts and suggested that some clarification from the regulator would be appropriate.

Aim of this report

This report seeks to provide clarification by summarising the law, identifying the type of conduct that places agencies at most risk of not complying with the law, and identifying ways those risks can be addressed through compliance procedures. The report:

- explains ASIC's role (**Section 1**)
- examines how state and territory limitation regimes operate (**Section 2**)
- looks at how the law regulates the collection of statute-barred debts (**Section 3**)
- summarises the results of ASIC's industry survey (**Section 4**); and
- identifies key compliance issues highlighted by the survey and considers the way forward (**Section 5**).

The way forward

ASIC will continue its work on this issue by:

- issuing a joint ASIC/ACCC Debt Collection Guideline for Collectors and Creditors;
- continuing to respond to complaints as they are made;
- taking enforcement action where appropriate; and
- conducting a future review to monitor and assess changes in industry practices.

© Australian Securities & Investments Commission, September 2005

Section 1: ASIC's role

ASIC is the Federal regulatory authority with responsibility for financial services and products, including credit.

ASIC's responsibilities include enforcing the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act**)**. These provisions set standards of conduct for persons and corporations engaged in the supply or possible supply of financial services to a consumer, or engaged in conduct relating to financial services.

Responsibility for debt collection regulation at the Federal level is divided between ASIC and the ACCC. This division has only existed since 11 March 2002, being the date on which Division 2 of Part 2 of the ASIC Act came into effect. Before that date, responsibility for debt collection at the Federal level lay solely with the ACCC.

In general terms, ASIC has responsibility where the debt relates to the provision of a financial service, including a credit facility. The ACCC has responsibility where the debt relates to the provision of other goods and services apart from financial services (e.g. the provision of telephone or utility services).[2]

Concurrently with this report, ASIC and the ACCC are finalising a joint *Debt Collection Guideline*, setting out the respective rights and obligations of consumers, creditors and debt collectors.

[2] See *Complaints about debt collection activity—the responsibilities of Commonwealth agencies* (October 2004) available at www.asic.gov.au under 'Publications'.

© Australian Securities & Investments Commission, September 2005

Section 2: Statutes of limitation[3]

Limitation regimes

Statute-barred debts are debts in relation to which a statutory limitation period has expired. Each jurisdiction in Australia has enacted legislation that sets limitation periods for different types of debts and other legal liabilities. The legislation also prescribes what happens when the relevant limitation period expires.

The rationales underpinning limitation regimes were set out by McHugh J in *Brisbane South Regional Health Authority v Taylor*: [4]

> *The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. … The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.*

While the relevant state or territory legislation for limitation periods is in many respects similar, there are some material differences.

Limitation periods

The key issues in establishing whether a debt is or is not statute-barred are:

- what is the relevant limitation period?
- when did the limitation period start (i.e. when did the time start to run)?
- has the limitation period been re-started?

[3] The following is not legal advice, and should not be relied upon as legal advice.

[4] *Brisbane South Regional Health Authority v Taylor* 186 CLR 541 per McHugh J at 553-553. See also Handford P, *Limitation of Actions: The Australian Law* (Lawbook Co, 2004) p.1, and New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50 at 3.

© Australian Securities & Investments Commission, September 2005

What is the relevant the limitation period?

The limitation periods in Table 1 apply to:

- unsecured personal loans and credit cards (referred to as simple contracts)—the majority of debts sold or referred to debt collectors will arise from simple contracts; and
- debts following a court judgment.[5]

Table 1: Limitation periods by state or territory

State/territory	Limitation period for simple contract	Limitation period for court judgement
Australian Capital Territory	6 years	12 years
New South Wales	6 years	12 years
Northern Territory	3 years	12 years
Queensland	6 years	12 years
South Australia	6 years	15 years
Tasmania	6 years	12 years
Victoria	6 years	15 years
Western Australia	6 years	12 years

When does the limitation period start?

Time starts to run from the date on which the right of action accrued. While it is not always straightforward, a right of action usually accrues when a debt becomes due, either because the contract requires payment by that date or because the debtor defaults on regular instalment payment obligations set out in the contract. [6]

Has the limitation period been re-started?

Time may be re-started, however, if the debtor:

- makes a payment; or
- acknowledges the debt in writing.

[5] The legislation prescribes different limitation periods depending on the nature of the rights involved. For example, a different limitation period may apply to a debt if it arises out of a deed rather than a simple contract, or if the obligations of the debtor are secured by mortgage, with further differences still in some jurisdictions depending on whether the mortgage is in respect of land or personal property. This report assumes that most debts will be founded on simple contracts.

[6] The date on which a right of action accrues is unaffected by the existence of procedural limitations on exercise of that right. For example, the requirement under the Consumer Credit Code that a section 80 default notice be provided, and that the 30 day period of the notice has expired without the default having been remedied before the creditor can begin enforcement action, does not alter the fact that the right of action has accrued on the date of default: *Equuscorp Pty Ltd v Rigert & Anor* [2003] VSC 343.

© Australian Securities & Investments Commission, September 2005

This has been described as giving the right of action:

> *'a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth—and also like the phoenix, it is still itself'*.[7]

To have the effect of re-setting the clock, an acknowledgment must:

- be made by the debtor or a properly authorised agent of the debtor;
- be written and signed; and
- constitute a clear acknowledgment that the debt exists and is unpaid.

Whether a document constitutes sufficient acknowledgment of the debt to re-start time can only be determined on a case-by-case basis. However, a written offer to pay part or all of a debt under protest (or a request for information that implicitly acknowledges the existence of the transaction) may not in themselves constitute a valid acknowledgement.

This re-birthing may occur on numerous occasions (e.g. where a debtor continues to make payments). In this case, the limitation period is calculated from the date of the last payment, and not the original default.

In Queensland, South Australia, Tasmania and Western Australia, a limitation period can be re-started at any time—even if the original limitation period has already expired. In contrast, in the Australian Capital Territory, New South Wales and the Northern Territory, a limitation period cannot be re-started once it expires.

Expiration of the limitation period

NSW

The legislation in New South Wales goes further than legislation in other jurisdictions. It specifically extinguishes the cause of action.[8] As a result, after the limitation period expires, there will be no debt to request or demand payment of.[9]

Other states and territories

In all jurisdictions other than New South Wales, after the limitation period expires, the legislation operates 'to bar the remedy rather than the right'.[10] This means that the debt remains owing, but the legislation limits the enforcement options available to the creditor.

---

[7] *Busch v Stevens* [1963] 1 QB 1, Lawton J at 6

[8] *Limitation Act 1969 (NSW)*, section 63

[9] This general principle is subject to limited exception, as it is possible to seek an extension of a limitation period in certain circumstances. Where legal proceedings have been commenced, section 68A operates to allow the defendant to waive the statutory protection by not pleading the extinction of the cause of action.

[10] Handford P, *Limitation of Actions: The Australian Law* (Lawbook Co, 2004) p.29

© Australian Securities & Investments Commission, September 2005

If court proceedings are started to recover a statute-barred debt, the debtor will be entitled to file a defence pleading expiration of the limitation period. This will be a complete defence to the claim, and if successful, will prevent judgment being obtained against the debtor.

Which legislation applies?

Given the inconsistencies between limitation regimes and the increased centralisation of debt collection by both lenders and debt collectors, one of the key issues in ensuring compliance is knowing which legislation applies to what debts.

In 1993, each state and territory enacted legislation providing a nationally consistent answer to this question. For example, section 5 of the Victorian legislation[11] provides that:

> *If the substantive law of another place being another State, a Territory or New Zealand, is to govern a claim before a court of this State, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the court.*

This means, for example, that if a debt is governed by NSW legislation, the *Limitation Act 1969 (NSW)* will apply regardless of where legal proceedings are commenced.[12]

Several matters determine which state or territory's legislation governs a claim:

- If the debt arises out of credit regulated by the Consumer Credit Code, the relevant jurisdiction will be that in which the debtor ordinarily resided when the credit contract was entered into.[13]
- If the debt is not regulated by the Consumer Credit Code, the relevant jurisdiction will usually be that in which the contract was entered into.
- In some cases, the contract itself may include a clause that constitutes an agreement between the parties that the contract is subject to the laws of a particular jurisdiction. However, such a clause will be ineffective if the contract is regulated by the Consumer Credit Code.[14]

---

[11] *Choice of Law (Limitation Periods) Act 1993 (Vic)*

[12] See also *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503

[13] See section 6 of the Code, which relevantly provides that the Code of that jurisdiction 'applies to the provision of credit (and to the credit contract and related matters) if when the credit contract was entered into… (a) the debtor is a natural person ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction'. It is important to remember that while the Consumer Credit Code operates as a nationally uniform scheme it is actually adopted by each state and territory as the law of that state or territory.

[14] To the extent that it was inconsistent with the operation of section 6 of the Consumer Credit Code, such a clause would be void under section 169(1) of the Code.

© Australian Securities & Investments Commission, September 2005

Section 3: How collection is regulated

Relevant legislation

A range of laws regulate or affect how debts are collected (regardless of whether the debts are statute-barred).[15] These include general fair trading laws that contain prohibitions against certain types of conduct, including conduct that is unconscionable or conduct that is misleading or deceptive.

Part 2, Division 2 of the ASIC Act sets out the prohibitions for which ASIC has regulatory responsibility. These include:

- Sections 12CA and 12 CB (prohibiting unconscionable conduct);
- Section 12DA (prohibiting misleading or deceptive conduct);
- Section 12DB (prohibiting false or misleading representations); and
- Section 12DJ (prohibiting physical force or undue harassment or coercion).

The *Trade Practices Act 1974*, which is regulated by the ACCC, contains materially equivalent prohibitions,[16] as do the fair trading laws of each state and territory.

While no laws specifically regulate how statute-barred debts are collected, particular compliance issues arise where a debt is or may be statute-barred.

Most relevantly, the effect of the limitation regimes raises a critical question for creditors and debt collectors: *If legislation confers on a debtor the right to effectively knock out any legal action for a debt that is statute-barred, what type or level of collection activity will be either appropriate or permissible for that debt?*

This question lay at the heart of the dispute in *Collection House v Taylor*.[17]

---

[15] ASIC and the ACCC are currently finalising a joint *Debt Collection Guideline*, setting out the respective rights and obligations of consumers, creditors and debt collectors. A copy of the draft guideline is available on ASIC's website at www.asic.gov.au, and the final version will be released shortly.

[16] For a discussion of the division of regulatory responsibility between ASIC and the ACCC at the Federal level, see Section 1 of this report. See also *Complaints about debt collection activity—the responsibilities of Commonwealth agencies* (October 2004) available at www.asic.gov.au under 'Publications'.

[17] *Collection House Ltd v Taylor* [2004] VSC 49

© Australian Securities & Investments Commission, September 2005

The law in practice—*Collection House v Taylor*

Summary of the facts

In 1992, Taylor borrowed money from a finance company to buy a car. She subsequently defaulted, the car was repossessed and sold, but as the sale resulted in a shortfall, Taylor remained in debt to the finance company. Some years later, the finance company sold a tranche of aged debt (including this one) to Collection House Ltd.

In early 2001, Taylor was contacted by an employee of Collection House, who advised that he was calling from a legal firm acting on behalf of Collection House. This was the first time she had been contacted about the debt for many years. She was told that the amount of the debt was $10,870, and was told that she was required to pay, preferably in full, and that if satisfactory payment was not made, legal action might be an option.

Taylor advised that she was unable to afford that amount, and she was asked a series of questions about her financial situation. Taylor finally agreed to pay $5,000, $4,500 of which she paid immediately by credit card. She also advised that she would apply to increase her credit card limit to allow for payment of the remaining $500.

The next morning, Taylor sought advice from a community agency, at which point she became aware that the debt was statute-barred. She contacted the person she had spoken with on the previous day, and complained that he had not told her that the debt was statute-barred. His response was that "the statute of limitations does not prevent [us] from pursuing the debt".

Court proceedings

In November 2002, Taylor instituted proceedings against Collection House in the Victorian Civil and Administrative Tribunal, seeking payment of $5,000 on the basis of unconscionable conduct and misleading or deceptive conduct.[18] The Tribunal found in her favour, and Collection House subsequently appealed to the Supreme Court.

The court found that the conduct was unconscionable. The following passages from the judgment of Nettle J explain his reasoning:

> *I also reject the suggestion that there was no evidence that the respondent was pressured to make the decision to pay. In my opinion the fact of someone from a firm of lawyers "cold-calling" a woman of the respondent's socio-economic standing at home at 6.30 in the evening, and interrogating*

[18] The proceedings in *Collection House v Taylor* were brought under relevant provisions of the *Fair Trading Act* 1999 (Vic), including those relating to unconscionable conduct and misleading and deceptive conduct. Such conduct is also regulated by the ASIC Act.

© Australian Securities & Investments Commission, September 2005

> *her as to her personal and financial circumstances while insinuating that in the absence of her agreement to pay legal proceedings may be instituted, is capable of constituting pressure of a very high order. The fact that she bore the burden of a deaf dependent child can only have exacerbated her predicament.*
>
> *In my view the fact that any impoverished debtor is willing to pay $5,000 in settlement of a 10 year old statute-barred finance company debt of $11,000 is probably sufficient without more to raise in the mind of a reasonable person the possibility that the debtor does not know of the limitation period and might not have agreed to pay it if they had known. In any event, the facts would be sufficient to cast upon the beneficiary of the transaction the burden of establishing that the transaction was fair, just and reasonable; and in this case it was not. Once one adds to the equation the impecuniosity and ignorance and perhaps also emotional difficulties of the kind from which the respondent was known or believed to suffer, the case becomes a clear one.*

Due to its finding on the issue of unconscionable conduct, the court did not make a final decision about whether the employee's statement to Taylor that Collection House was not prevented from pursuing the debt was misleading or deceptive.

It did, however, refuse to accept the arguments put by Collection House and noted that it was 'not persuaded that it was not open to the Tribunal, on the evidence which was before it, to find that the statement was misleading or deceptive or likely to be so'.

Implications of the decision

The decision in *Collection House v Taylor* shows that attempts to collect statute-barred debts carry an increased risk of being considered unreasonable or unlawful.

The decision also makes it clear that when the limitation period expires, the rights and obligations of both the creditor (and its agents) and the debtor are materially altered.

Specifically, the decision supports the following propositions:

- The fact that a debtor makes a payment for a statute-barred debt may be sufficient in itself to suggest that the transaction was not fair, just or reasonable.
- Where that is the case, the evidentiary burden lies on the creditor/debt collector to prove that the payment was in fact fair, just and reasonable.

© Australian Securities & Investments Commission, September 2005

Response by Collection House

Collection House responded to the court's decision by making a public announcement that it had:

- decided in 2002 that it would no longer buy 'old debt' ledgers;
- taken steps in January 2003 to ensure that it did not purchase statute-barred debts (this included obtaining a warranty from clients and vendors that purchased debt portfolios did not contain statute-barred debts, and returning any debts subsequently found to be statute-barred to those clients or vendors); and
- brought forward a decision to end collection activity on any statute-barred debts remaining on its ledgers that pre-dated that policy.[19]

[19] Collection House Limited Media Release/ Company Announcement (4 March 2004)

© Australian Securities & Investments Commission, September 2005

Section 4: Industry approaches

ASIC's survey

In January 2005, ASIC wrote to a range of mercantile agents, debt collectors and industry peak bodies, asking about standard policies and practices for collecting statute-barred debts.

The survey was prompted by a number of factors, including:

- an awareness within ASIC that collection of statute-barred debts was an area of ongoing concern (based on complaints made to ASIC and information from other sources);[20]
- differences in the approaches taken to collecting statute-barred debts; and
- the decision in *Collection House v Taylor*, which was an important step in providing debt collectors with a better understanding of when conduct will breach the law.

The survey asked agencies to *advise:*

> *Whether or not your firm collects statute-barred debt.*
>
> *If so, whether there are any special practices or procedures that you adopt in relation to collecting statute-barred debt. If there are, please provide a short summary and if the procedures are documented in more detail in guidelines, directives or training material for staff, please provide copies of the relevant parts of those documents.*
>
> *Whether your firm's policy or practice on the purchase or collection of statute-barred debt has changed since the decision in* Collection House v Taylor. *If so, please advise the nature of the change.*

The responses confirmed that there is considerable divergence in the industry about their understanding of and approach to statute-barred debts.

Of the 17 individual agencies contacted, only 6 said that they did collect statute-barred debts, with 4 of those suggesting that they did so only rarely.[21]

---

[20] See, for example, *Report in relation to Debt Collection* by the Consumer Credit Legal Centre (NSW) Inc (April 2004), available at www.cclcnsw.org.au.

[21] It is important to note that some debt collectors act as agent on behalf of the creditor, others only collect debts that they purchased from a third party and thus own the right to collect the debt in their own name, and some undertake a combination of both. Approaches to statute-barred debts did not appear to be influenced by the capacity in which debts were collected.

© Australian Securities & Investments Commission, September 2005

In addition, the responses to the survey revealed that:

- *Collection House v Taylor* appears to have had minimal impact on the practices of the debt collection industry, despite its impact on their day to day activities;
- there is widespread failure to adopt processes to identify whether or not debts are statute-barred;
- there is widespread misunderstanding of the laws relating to limitation regimes; and
- those agencies that collect statute-barred debts are not doing enough to ensure that their conduct meets the standards set by the law.

Identifying the status of debts

Of the agencies that collect statute-barred debts, half did not have any policy for identifying debts that were or might be statute-barred.[22]

The only policy that directly acknowledged the importance of the characteristics of the debt stated that:

> *The age of the debt, admissions of liability and payment records are clearly visible on each of our files. Discussions regarding recognising the age and status of debts are usually conducted in training and coaching sessions with the collectors' team leaders.*

Such a policy should be considered a fundamental part of any compliance program. In the absence of a clear policy ensuring that statute-barred debts are properly identified, agencies risk engaging in conduct that will be considered inappropriate or unlawful.

A number of responses to ASIC's survey by agencies that do not collect statute-barred debts did no more than state that the agency:

> *does not collect statute-barred debts.*

Because the questions set out in the survey did not require a more detailed answer, it cannot be inferred that these agencies do not have policies for identifying the status of a debt. However, agencies that do not collect statute-barred debts especially need to make sure they can identify these debts, as failure to do so will involve a very high risk of engaging in conduct that will be considered inappropriate or unlawful.

A debt's status can be effectively identified in a number of ways. For example, one of the respondents to the survey advised that it had:

> *made a strategic decision to limit its activities to contingency debt only. Specifically this means that [the agency] does not acquire debt ledgers but collects overdue debt that is*

[22] For details of the policies provided by the other respondents, see 'Agencies that collect statute-barred debts' later in this section.

© Australian Securities & Investments Commission, September 2005

> *generally between 60-360 days past due on a commission only basis.*

Based on this policy, if a debt is not collected after it is beyond 360 days past due, it is returned to the creditor. Even allowing for some margin on this timeframe, it is clear that this agency will cease collecting debts well before any relevant limitation period expires.

Another agency advised that:

> *our firm is not involved in the practice of purchasing debt. Similarly our firm will not act on behalf of other agents who are unable to provide supporting documentation for any referred account which may relate to Statute-Barred Debt.*

This more pro-active strategy places the onus on the creditor or referring party to provide evidence that the debt is not statute-barred, and ensures that collection activity is not undertaken in the absence of that evidence.

Understanding the law

The survey responses showed widespread confusion about the law, reflected in the observation by one agency that:

> *In general terms the terminology for Statute-Barred Debts appears to be subject to some conjecture especially in the minds of those involved in either the administration or collection of aged debts.*

Another agency referred to 'old debt' as being:

> *debts not including court judgments that are older than 5 to 7 years,*

and noted that it:

> *was on the understanding that there was a law saying people could not attempt recovery after 7 years.*

Any attempt at compliance based on no more than an anecdotal familiarity with the law will have little or no chance of being effective.

Even those agencies that gave more careful consideration to these issues, however, did not always get it right. One of the respondents provided a detailed written policy/guideline for employees that appeared to reflect a real confusion about one of the most important elements of limitation regimes—the calculation of limitation periods.

Specifically, the policy contained three inconsistent explanations about when a debt should be considered statute-barred, as well as the following incorrect explanation about the effect of subsequent payments:

> *[If] you determine the debt is statute-barred under the original cause of action but the debtor has come to an instalment arrangement (which they breached) a new cause of action arises*

© Australian Securities & Investments Commission, September 2005

> *from that breach (when the payment was missed) ... A whole new six years commences from when the payment was missed but you must be careful to take action for the breach of that agreement and not for the original cause of action.*

While this explanation is correct to the extent that a six-year limitation period will start from the date that the instalment arrangement payment was missed, it is incorrect in asserting that the arrangement would be the foundation of any legal action, rather than the original debt itself. In some jurisdictions, time would also not start to run again if the original limitation period had already expired.

A failure to understand how the law operates may well result in debts that are statute-barred being treated as though they are not. Such a failure will result in collection of debts that either should not be collected at all, or that should be treated differently. In such circumstances, there is an increased risk of inappropriate, unreasonable or unlawful conduct.

Agencies that avoid statute-barred debts

The responses to the survey indicated a widely-held view within the industry that collecting statute-barred debts is problematic. One agency specifically referred to these issues as a key factor in its decision not to collect old debts:

> *The variance in laws regarding statute-barred debt has led to our adopting of a policy that we do not undertake any litigation or collection activity on statute-barred debts.*

Some agencies take additional steps when presented with statute-barred debts for collection. One of the respondents to the survey advised that, in the context of contingent debt collection:

> *Our firm's policy is to advise the client [the creditor] immediately should a statute-barred debt(s) be received. A letter is written to the client confirming – No collection will take place as the debt(s) is statute-barred and information regarding the debt(s) will not be entered into our system in addition, all information is returned to the client.*

Another provided a similar policy that applied where a staff member identified a debt as being statute-barred, which incorporated some additional steps:

> *The manager will review the file and contact our client [the creditor] to advise that our policy is not to pursue statute-barred debts and that the file will be closed and returned to the client.*
>
> *Prior to closing the file a letter is to be sent to the debtor advising that we no longer act in the matter and that future*

© Australian Securities & Investments Commission, September 2005

> *communication regarding the debt should be through the creditor.*
>
> *Close the file with notes advising that the debt is statute-barred and that no further action is being taken.*

The situation is different where an agency is involved in debt purchase rather than contingent collection. It is generally the case that debts are not sold individually, but as part of a book, ledger or tranche of debts.

ASIC is aware that a number of debt purchase agencies enter into assignment agreements that contain a recourse clause for debts that are subsequently identified as statute-barred. Such an agreement allows the agency that purchased the debt to sell it back if it is found to be statute-barred—essentially a form of guarantee or warranty. Recourse clauses may also operate for other matters (e.g. where a debt has been sold despite having already been settled).

As noted above, however, the efficacy of this type of strategy is closely tied to the ability of the agency and its staff to identify statute-barred debts.

Agencies that collect statute-barred debts

Given industry's view of the problems associated with statute-barred debts, it might be expected that agencies collecting these debts would take particular care in doing so. The results of the survey, however, suggest that this is not necessarily the case.

Policies in place

Of the six agencies that collect statute-barred debts, only one provided a written policy that appeared to demonstrate a sound understanding of the effect and operation of limitation regimes and the restrictions imposed on collecting those debts.[23]

Broadly speaking, this agency's approach to statute-barred debts was summarised in its response:

> *Our historical practice has been to cease full active recovery on Statute-barred debt, within the [agency's] guidelines…, however to retain these accounts as 'open' within our system and to accept incoming payments on those accounts. Where it is determined that legal action is not maintainable, we do not pursue the debtor for repayment. In these cases we do not threaten legal action or misrepresent the situation.*[24]

[23] However, the policy did not seem to take into account the effect of the NSW legislation in extinguishing liability: see 'Expiration of the limitation period' in Section 2 of this report.

[24] This agency also advised that it only rarely collects statute-barred debts, and that it includes a recourse clause in most of its assignment agreements.

© Australian Securities & Investments Commission, September 2005

More specifically, the key features of this agency's policy were:

- extensive training of recovery personnel both upfront (two week induction process) and ongoing;
- accurate information about calculating limitation periods and the effect of expiration of limitation periods; and
- limited contact with a debtor after a debt has been identified as statute-barred, which if unsuccessful will result in cessation of all collection activity. (These accounts are only re-activated if the debtor contacts the agency and offers to make payment, at which point 'they should be informed that the account is statute-barred and asked to confirm their reason for the payment').

No/inadequate policies

In contrast, other agencies either had no policies or practices for collecting statute-barred debts, [25] or provided policies that did not appear likely to ensure fair and legally compliant collection practices.

For example, one respondent that provided only very limited guidelines advised that its collectors:

> *are aware that we cannot litigate on a statute-barred debt. Notwithstanding this, collectors are also aware that the customer has every right to pay the debt should he/she want to fulfil their moral and social responsibility. Collectors are encouraged to ask for the debt to be paid in full while fully understanding that legal action is not an option.*

Merely stopping short of threatening legal action should not be considered sufficient compliance with the law.

Context of the debt

There is nothing in this policy encouraging the collector to pay any attention to other details of the debt or the circumstances of the debtor. In this context, it is worth recalling the observation of Nettle J in *Collection House v Taylor* that:

> *the fact that any impoverished debtor is willing to pay $5,000 in settlement of a 10 year old statute-barred finance company debt of $11,000 is probably sufficient without more to raise in the mind of a reasonable person the possibility that the debtor does not know of the limitation period and might not have agreed to pay it if they had known. In any event, the facts would be sufficient to cast upon the beneficiary of the*

[25] Three of the six agencies that said they collect statute-barred debts did not have relevant policies.

© Australian Securities & Investments Commission, September 2005

> *transaction the burden of establishing that the transaction was fair, just and reasonable.*

Informing the debtor

Silence about the fact that a debt is statute-barred will not always be unconscionable or unreasonable, but it does create a real compliance risk. *Collection House v Taylor* is an example of conduct that was unconscionable because it involved the deliberate exploitation of a debtor's ignorance about the status of the debt and the effect of the expiration of the limitation period.

On the other hand, an example of conduct that would be extremely difficult to fault is a policy of informing a debtor that the debt is statute-barred and asking for an explanation for an offer of payment. All other collection activity is likely to fall somewhere between these two extremes, and the risk of engaging in conduct that will be considered unlawful will be vary according to which end of the spectrum such activity approaches.

Pursuing the debt

Another respondent provided written policies that appear to reflect an even more open approach to collecting statute-barred debts, based on the premise that 'if an account is statute-barred, it does not mean that the debt is no longer owing'.

From this starting point, staff are advised that:

> *It is legal and reasonable to contact a Statute-barred Debtor and ask for payment, as with any other account.* (Elsewhere it is suggested that: *If you encounter a statute-barred account it should be worked like any other*.)
>
> *If the Debtor indicates that they know the debt is statute-barred, we should inform the debtor that this situation does not extinguish the debt, and they still owe the money.*
>
> *If the debtor instructs us not to call them about the debt we should only then cease making phone contact.*
>
> *We should not threaten any action which we know we cannot take.*

While this policy does set out some important restrictions, it too fails to acknowledge the prima facie unfairness identified by Nettle J in *Collection House v Taylor*.

© Australian Securities & Investments Commission, September 2005

False, misleading or deceptive conduct

In addition, the instruction to 'inform the debtor that this situation does not extinguish the debt' creates the very real potential for false, misleading or deceptive conduct:

- Firstly, if the New South Wales legislation applies, then the statement will be false as the debt will in fact have been extinguished.
- Secondly, such a statement could at the very least be confusing, and might easily mislead a debtor into believing that there is no practical or relevant effect of a debt becoming statute-barred.

The collector's role

Staff of this agency are also advised that:

> *As an employee of [agency] you cannot act both for us and for the debtor, this means that you cannot give the debtor advice on the status of the account in relation to the statute of limitations.*

This final instruction appears misconceived, as providing information to a consumer about a debt for which that consumer is allegedly liable does not in any way constitute a conflict with or compromise of an employee's obligations to his or her employer.

Responding to *Collection House v Taylor*

None of the responses to the survey showed any change of practice or approach as a result of the decision in *Collection House v Taylor*. While some respondents did indicate they were aware of the decision, one respondent suggested that:

> *None of the practices which were the apparent basis for the decision, applied to this company.*

As this response was received by an agency that collects statute-barred debts (albeit rarely), this assessment is difficult to understand.

What is perhaps more surprising, however, is that while some of the policies provided in response to the survey referred to conduct that might be potentially misleading or deceptive, no particular consideration was given to conduct that might be considered unconscionable.

It is difficult to account for this omission given the detailed discussion of these issues in *Collection House v Taylor*, and that the case ultimately turned on the issue of unconscionable (rather than misleading or deceptive) conduct.

© Australian Securities & Investments Commission, September 2005

Other responses to limitation regimes

A number of respondents to ASIC's survey took the opportunity to make observations or suggestions about the existence, nature and operation of limitation regimes more generally.

The theme of many of those observations is captured in the following statement from one of the respondents:

> *We contend that because a debtor cannot be located within a set period of time should not be the fundamental reason for a debt to be extinguished.*
>
> …
>
> *[T]o reward consumers with the statute barring of debts in an environment where the creditors are denied reasonable access to locate "missing debtors" is frankly unfair and inappropriate.*

While it is perhaps not surprising that some within the debt collection industry would query the 'wisdom, morality and ethics'[26] of limitation regimes, it is important to remember the public policy rationales for those regimes that have long been recognised by both courts and legislators.

Given the various rationales for the enactment of limitation regimes,[27] it has been suggested that:

> [*a*] *limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.*[28]

Viewed from this perspective, it becomes clear that limitation regimes involve balancing competing interests. While not necessarily guaranteeing the optimal outcome in every single case, this balance is nevertheless aimed at achieving the outcome that best serves the public interest.

[26] Collection House Limited Media release/Company Announcement (4 March 2004)

[27] See Section 2 of this report.

[28] *Brisbane South Regional Health Authority v Taylor*, McHugh J at 553

© Australian Securities & Investments Commission, September 2005

Section 5: Compliance issues

The responses to ASIC's survey suggest that most debt collectors need to be more committed to ensuring that their conduct on debts that are or may be statute-barred is not unconscionable, misleading or deceptive and does not constitute harassment.

Of most concern, ASIC considers that there was very little evidence of acceptable or consistent procedures and practices in the following areas.

Identifying statute-barred debts

Responses both from agencies that do and do not collect statute-barred debts consistently failed to show any process for identifying whether or not debts were statute-barred. The ability to identify what debts are statute-barred and when other debts will become statute-barred is equally important for all agencies, as failure to identify those debts significantly increases the risk of conduct that will be considered unlawful.

The problems in this area arose both from an insufficient regard to the characteristics of the debt itself and misunderstandings or lack of awareness about the various limitation regimes that apply.

Few agencies referred to procedures for obtaining from the original creditor enough information to accurately assess the status of the debt.

Understanding which regime applies

There was little evidence that agencies could adequately differentiate between the different limitation regimes that might apply to a debt, and even less of how those differences might affect the approach taken to collecting a debt.

With debt collection increasingly being undertaken at a national rather than a local level, it is important not only that these differences are properly understood and responded to, but also that appropriate processes are implemented to correctly identify which state or territory's legislation applies to each debt. A compliance program that ignores these differences risks allowing collection activity that is unlawful.

Deciding not to collect statute-barred debts

While agencies could advise whether or not they collected statute-barred debts, the responses suggested that many that had chosen not to collect these debts had not incorporated this decision into a written policy.

There is a real possibility that relevant staff will be unaware of policy decisions that are not documented, particularly where those policies are not included in initial and/or ongoing training.

© Australian Securities & Investments Commission, September 2005

Fair and reasonable communication with debtors

Some policies that agencies provided recognised the importance of avoiding statements that might be misleading or deceptive, particularly about available enforcement options.

Far less attention was paid, however, to more positive obligations or responsibilities when dealing with debtors. For example, the decision in *Collection House v Taylor* suggests that it may be unconscionable to take advantage of a debtor's lack of awareness that a debt is statute-barred.

Accordingly, policies designed to prevent unconscionable conduct might cover issues such as:

- providing information to a debtor about the debt, either because the debtor requests that information, is clearly looking for that information, or because the circumstances mean that it would be unreasonable to withhold that information; and
- ensuring that a debtor who is unaware that a debt is statute-barred is not unfairly induced to make a payment or provide a written acknowledgement of the debt, either to settle the debt or to re-start the clock.

The responses to ASIC's survey suggested that most agencies paid very little if any attention to these issues.

In any event, as has already been noted, the responses to the survey showed widespread failure by agencies to properly understand or give adequate regard to the law. As a result, even in those areas where policies have been developed and implemented, agencies are likely to be engaging in conduct that is unconscionable, misleading or deceptive or that constitutes undue harassment.

Further work

The nature and extent of the deficiencies identified by ASIC's survey indicate that this area deserves further regulatory attention. This report aims not merely to highlight the problems that currently exist, but also to allow for those involved in debt collection to improve their practices where necessary.

ASIC will continue its work on this issue by issuing a joint *Debt Collection Guideline for Collectors and Creditors* with the ACCC, responding to complaints as they are made, taking enforcement action where appropriate, and by undertaking a future review to monitor and assess changes in industry practices.

© Australian Securities & Investments Commission, September 2005