



**Australian Competition and Consumer Commission**

**and**

**Australian Securities and Investments Commission**

**Draft**

**Debt collection guideline:  
for collectors,  
creditors and debtors**

**February 2005**

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## Part 1: Using this guideline

This guideline will help:

- **collectors** (including collection agencies, debt buy-out services, collections departments of businesses, solicitors and others) understand how Commonwealth consumer protection laws apply to them.
- **creditors** using external collection agencies to collect debts, draft contracts and investigate complaints against agents or contractors. When a creditor uses an agent for collection, the creditor (as principal) may be liable if their agent's conduct breaches the Trade Practices Act or the ASIC Act. Also, many creditors have significant reputations to protect, which could be adversely affected by association with agents' misconduct
- **debtors**<sup>1</sup> and their advisers, as a point of reference when negotiating with collectors about their practices.

This guideline has been produced by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), who enforce Commonwealth consumer protection laws (for more information, see appendix A). It explains how Commonwealth consumer protection laws relevant to collection apply. These laws include:

- Part IVA and Part V of the *Trade Practices Act 1974*
- Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

Part 3 of this guideline looks at the prohibitions and remedies against debt collectors who engage in:

- the use of physical force, undue harassment or coercion
- misleading or deceptive conduct
- unconscionable conduct.

This guideline does not discuss other laws and obligations that can also apply to collection activity. For a non-exhaustive list see appendix B.

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<sup>1</sup> In this guideline, the terms debt and debtor include alleged debts and alleged debtors respectively. Please see the glossary in appendix D for more definitions.

## Why has this guideline been developed?

This guideline replaces the ACCC's *Debt Collection and the Trade Practices Act* published in June 1999. Since then, ASIC has become responsible for consumer protection in financial services.<sup>2</sup> ASIC and the ACCC now share responsibility at the Commonwealth level for protecting people who are debtors or alleged debtors from unacceptable collection conduct.

This guideline reflects the joint responsibilities of the ACCC and ASIC for collection activity. It also takes account of:

- recent cases that interpret the law governing debt collection<sup>3</sup>
- changes to the structure and practices of the collection industry in recent years
- stakeholder feedback following consultation about the guideline.

## This guideline focuses on individual debtors

The guideline has been developed with particular reference to collecting debts from individual debtors. However many of the laws and principles discussed will also be relevant to the collection of corporate or business debts.

## Relationship with court debt recovery processes

Broadly, debts may be recovered either through the courts, or 'extra-judicially'—in other words, through a collector. Debt recovery through the courts is largely regulated by state and territory law and the procedural rules of the courts. If a security interest is involved, the recovery process may also involve the repossession of securities or other legal enforcement of security interests.

This guideline is mainly concerned with extra-judicial debt recovery processes and informal collection activities following a judgment. It does not limit a creditor's right to:

- conduct legal repossession activities and other legal enforcement of legitimate security interests
- seek and obtain pre-judgment remedies, e.g. orders to prevent the removal or transfer of property from the jurisdiction
- seek and obtain judgment for a debt

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<sup>2</sup> ASIC's role is set out in the *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, and other legislation. See also appendix A of this guideline.

<sup>3</sup> See references in part 3 of this guideline.

- enforce judgment through a court process—including examination hearings, instalment orders, orders for the seizure and sale of property, garnishment or attachment orders, and/or
- undertake all necessary procedures (e.g. for serving documents) associated with these actions.

However a collector must not threaten action (legal or otherwise) that they're not legally permitted to take, or don't have instructions or authority to take. How legal action is threatened or employed can, in certain circumstances, amount to unconscionable conduct or harassment. A collector also must not represent an entitlement to seize goods beyond that granted by law. See section 18 in part 2 of this guideline for more information.

Read this guideline keeping in mind the rights given, and obligations imposed by the courts under debt recovery and other laws.

## **This guideline is not law**

This guideline does not have legal force. ASIC and the ACCC cannot:

- make law—this is the role of parliament and the common law
- provide a definitive interpretation of the law—this is the role of the courts.

Rather, it explains ASIC and the ACCC's view of the law, provides examples on how the law has been applied in particular cases, and gives guidance on what collection businesses and practitioners should and should not do if they wish to *minimise* the risk of breaching the laws we administer. We encourage you to follow it.<sup>4</sup>

ASIC and the ACCC must approach each potential enforcement matter on a case-by-case basis, taking account of all relevant circumstances. Compliance with this guideline is only one factor to be considered, and even full compliance cannot provide a guarantee against enforcement action by ASIC or the ACCC.

Compliance with this guideline will also not necessarily protect business from action taken by private parties alleging a breach of the law.

The ACCC and ASIC hope that businesses engaging in collection activity will implement this guideline, both in terms of the text and the spirit of the document.

## **Try avoiding debt collection completely**

While this guideline focuses on the responsibilities of collectors, debtors have responsibilities too.

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<sup>4</sup> For information on penalties for breach of the Commonwealth consumer protection laws see part 3 of this guideline.

Debtors are legally responsible for paying the debts they legitimately owe, and they should not deliberately try to avoid their obligations. Debtors experiencing financial hardship should also contact the collector without delay to negotiate a variation of their repayments or other arrangements.

Making these arrangements will often be possible, particularly if the debtor acts before their situation becomes unmanageable. A community-based financial counsellor or other qualified professional may be able to assist the debtor with a debt negotiation. More generally, we recommend that debtors experiencing financial hardship consider seeking assistance from a financial counselling service to help them manage their affairs.

We also encourage collectors to adopt a flexible and realistic approach to repayment arrangements and variations, remembering (among other considerations) that a debtor experiencing financial hardship may have a number of debts owing to different creditors.

Where debtors act promptly, and collectors take a realistic approach to the debtor's situation, the need for collection activity will be greatly reduced.

## **Roles of ASIC and the ACCC**

For more information on the roles of ASIC and the ACCC with regard to debt collection see appendix A of this guideline.

## Part 2: Practical guidance

Collectors—follow the practical guidance given below to minimise the risk of breaching the Commonwealth consumer protection laws described in part 3.

Creditors not directly involved in debt collection—while most sections in this part of the guideline are aimed at collectors, some sections also apply to you.

In this guideline, the term ‘debtor’ includes an alleged debtor, and the term ‘debt’ includes an alleged debt.

### 1. Contact with the debtor should be for a reasonable purpose

Communications with the debtor should always be for a reasonable purpose.

Depending on circumstances, it may be reasonable for you to contact a debtor to:

- give information about the debtor’s account
- convey a demand for payment
- accurately explain the consequences of non-payment, including any legal remedies available
- make arrangements for repayment of a debt
- put a settlement proposal or alternative payment arrangement to the debtor
- ask why an agreed repayment arrangement has not been complied with, if this is the case
- review existing arrangements after an agreed period of time

or for other similar purposes.<sup>5</sup> You may also contact a debtor at the debtor’s request.

However, it is not reasonable or acceptable to contact a debtor to:

- frighten or intimidate them
- make the debtor feel ‘under siege’
- tire out or exhaust the debtor

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<sup>5</sup> There are circumstances where further contact with a debtor may not or may no longer be appropriate: see sections 7, 12, 15, 16 and 17 of part 2 of this guideline.



- embarrass the debtor in front of other people

or for other similar purposes.

## **2. Treat the debtor with respect and courtesy**

A debtor is entitled to respect and courtesy.

Avoid:

- using abusive, offensive, obscene, or discriminatory language
- using an aggressive, threatening or intimidating manner
- threatening to use violence or physical force against a debtor, third party or against property.

Also, do not:

- make false or misleading representations
- continually and abruptly interrupt the debtor
- refuse to listen to what the debtor has to say
- shout
- make disrespectful or demeaning remarks about a person's character, situation in life, physical appearance, intelligence or other characteristics or circumstances
- engage in other undue harassment or coercion, including the threat or use of physical force.

Consider any illness, ignorance, inexperience, impaired abilities, difficulty with English, cultural background, age, lack of assistance, financial need or other circumstances that may affect a debtor's ability to protect their own interests and put them at a 'special disadvantage'.

Avoid exerting undue influence on, or adopting unfair tactics towards, a disadvantaged or vulnerable debtor or third party.

Avoid exploiting a debtor's lack of knowledge of the law, the debt recovery process, or the implications of non-payment of a debt.

*Case study*

A company was found to have breached the prohibitions against harassment and coercion when its agents pinned a man to the ground during a vehicle seizure, even though the company had a contractual right to seize a debtor's vehicle. The court found this to be the case notwithstanding the fact that the man threatened the agents with assault.

*ACCC v Davis* [2003] FCA 1227

### 3. Your first contact with the debtor

On first contact with a debtor<sup>6</sup>:

- identify who you are and who you work for—avoid misrepresentations about your identity, e.g. don't falsely state or imply that you are or work for a solicitor, or are a court or government official
- explain what your role is
- explain the purpose of the contact
- give at least basic information about the alleged debt, including the name of the creditor and any assignee of the debt, details of the account and the amount claimed.

### 4. Give clear, timely information to the debtor

If the debtor makes a reasonable request for information about the debt amount or other matters relating to the debt, ensure you provide the information within a reasonable time (usually 14 days). In certain circumstances, failure to provide information may constitute misleading or deceptive conduct.

In the case of assigned debt, this will depend on the creditor being able to provide you with accurate and efficient debt history records and data. Obtaining this data is also important where you're acting on behalf of a third party creditor. See section 5 below.

Generally, you should give the debtor an itemised statement of account setting out clearly, with no unnecessary jargon:

- the amount of the alleged debt and how it is calculated

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<sup>6</sup> Only disclose the information mentioned if you are certain you are in contact with the debtor and not a third party or relative—please refer to section 10 of part 2 of this guideline.

- details of all payments made and all amounts (including principal, interest, fees and charges) owing.

Don't escalate your collection activity while the requested information is being supplied to the debtor.

Don't ignore or dismiss a debtor's reasonable request for information about a debt.<sup>7</sup>

## 5. Maintain accurate records

Accurate record keeping by all parties—collectors, creditors and debtors—can be vital to promptly resolving disputes and can mean avoiding collection activity completely.

### Collectors:

- Maintain full and accurate records of all communications with debtors, including the time, date and nature of calls about the alleged debt, records of any visits in person, and records of all correspondence sent. Any payments made towards a debt should also be accurately recorded.
- Make sure your written correspondence (like automatically generated letters) to debtors is consistent with your verbal communications and vice versa. For instance, avoid sending automatically generated letters that state 'numerous attempts have been made to contact you' when no such attempts have been made, or sending letters to a debtor directly when the debtor has appointed a representative.

It's generally inappropriate to send reminders or other correspondence about the consequences of non-payment when:

- a temporary stay of action or enforcement has been granted
- liability for the debt has been disputed and the creditor/collector has not provided information that they agreed to provide.

Ensure that any automatically generated letters are consistent with any payment arrangements that you or the creditor have made with the debtor.

Avoid misrepresentations about the amount of a debt, e.g. stating or implying that a debtor is liable for collection charges or fees that you are not legally entitled to claim, or demanding payment for an amount that does not account for payments already made by the debtor.

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<sup>7</sup> If a debt is disputed in court, such information and documentation will need to be produced in any case. Also, some industry codes require companies to produce any such information or documentation upon a debtor or alleged debtor's request.

**Creditors:**

- Ensure useful and accurate information about an alleged debt is available to both collectors and debtors. You have a responsibility to assist the collection process by ensuring that accurate and full information is provided to, or readily obtainable by, the collector. Creditors must also ensure that assigned or contracted debts have not already been settled.

The *Uniform Consumer Credit Code* (UCCC), administered by the states and territories, contains specific provisions about providing information and documents to debtors whose credit contacts are regulated under the UCCC regime.<sup>8</sup>

## 6. Contact the debtor at reasonable hours

Contact the debtor at reasonable hours, taking into account the debtor's circumstances and reasonable wishes.

You can normally assume that a reasonable time and way to contact a debtor is by telephone after 8 am and before 9 pm local time.<sup>9</sup> However, a debtor may ask that contact be made at other times for a range of reasons. For instance:

- the debtor is a shift worker and asleep during normal working hours
- the debtor is responsible for children and contact around meal times is not convenient
- the debtor does not wish to be contacted when other family members are present.

In these and other such cases, the reasonable wishes of the debtor should be respected, and contact limited to the times requested by the debtor.

However, a collector may alter the time of contact if, having made reasonable efforts over a reasonable period of time to contact the debtor during normal hours or at the times requested by the debtor, the collector has not been able to do so.

## 7. Avoid unduly frequent contact with debtor

Debtors are entitled to be free from excessive and unnecessary communications from collectors.

The amount of contact should be reasonable in all the circumstances. Generally, you should not contact a debtor more than three times per week, or 10 times per month.

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<sup>8</sup> Sections 34(1) and 163(1), UCCC. See appendix B of this guideline for further information.

<sup>9</sup> The timing of personal visits and contact with third parties is considered separately in sections 9 and 10 of this guide respectively.

This includes:

- telephone calls to a debtor—including contacts where the debtor terminates the call
- telephone, email and/or SMS messages.

Stop your contacting efforts once you've reached the above limits *unless* the debtor asks for the contact, or there is some other legitimate reason for making a further contact.<sup>10</sup>

Once you've made contact, leave a reasonable interval before next contacting the debtor. In determining what a 'reasonable interval' between communications is, take into account the need to give the debtor a reasonable opportunity to respond to your previous communications.

### **Undue harassment**

Unduly frequent contact designed to wear down or exhaust a debtor, or likely to have this effect, may constitute 'undue harassment' or coercion and should be avoided.

This is particularly likely to be the case where the collector makes a number of phone calls or other contacts in rapid succession.

#### *Undue harassment explained*

Justice Hill of the Federal Court has explained the meaning of undue harassment to be 'frequent unwelcome approaches requesting payment of a debt ... calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely convey the demand for recovery'.

*ACCC v The Maritime Union of Australia* [2001] FCA 1549

### **Personal visits**

A collector should only make personal visits if reasonable efforts to contact a debtor by other means have been unsuccessful; and collectors should not make more than one personal visit<sup>11</sup> to a debtor per month.<sup>12</sup>

<sup>10</sup> Note that s. 31(2) of the *Property and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001* (Qld) prohibits unsolicited communication with a debtor more than twice a week. Note also that s. 43 of the Fair Trading Act (SA), prohibits personal calls or telephone calls on a public holiday for the purpose of demanding payment.

<sup>11</sup> For a more detailed discussion on personal visits, see sections 8 and 9 of Part 2 of this guideline.

<sup>12</sup> In *ACCC v Esanda Finance Corporation Ltd* [2003] FCA 1225, Justice Lee ordered Esanda to restrict its agents to a total of five personal visits [for the period of collection] unless a visit was specifically requested by the customer or a repayment agreement had been made and subsequently breached (in which case a further five visits may be made).

## 8. Contact the debtor at an appropriate location

Generally, the debtor's home will be the appropriate place to contact a debtor.<sup>13</sup> But sometimes, a debtor may not wish to be contacted at home. If the debtor asks to be contacted at an alternative and reasonable location, contact the debtor at that location.

Generally, don't contact a debtor at a location:

- where the debtor has said they don't want to be contacted, e.g. debtors often tell collectors they don't wish to be contacted at their workplace
- that the debtor would be likely to view as unusual or substantially inconvenient, e.g. contact at a restaurant, club or place of entertainment, or
- where it is likely that others, such as the debtor's friends or work colleagues, will become aware of the debt, collector's identity and/or collection activity.

However, contact at the above locations may be acceptable if the debtor fails to provide you with an alternative, effective location for communication, after you've asked for one.

In this situation, be discrete and handle the contact sensitively and with extreme care. Take all reasonable steps to ensure that other people are not given information, either directly or indirectly, about the debtor's financial affairs. Generally only disclose your name and contact details. Give the details of your company only if specifically requested.

Avoid threatening or attempting to embarrass or shame a debtor, such as:

- sending open correspondence to a shared post box
- making the debtor's employer or co-workers aware that the debtor is being pursued for a debt
- creating an impression that the debtor is under surveillance.

## 9. Visiting the debtor's home or workplace

(Also see the previous section)

Avoid:

- visiting the debtor in person at inappropriate locations, at unreasonable intervals or unreasonable times, e.g. when other less intrusive forms of contact, like the telephone, are available and effective (an exception is when the debtor asks for a personal visit)

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<sup>13</sup> Our assumption is that contact would normally be by telephone. The circumstances in which it may be appropriate to visit a person at their home are discussed in section 9 of this guideline.

- creating an impression that the debtor is under surveillance
- using or threatening to use violence or physical force against a debtor, third party or against property

### **Visiting the debtor's home**

Respect the debtor's and the household's privacy and security and observe the following specific safeguards:

- generally, don't visit the debtor's home uninvited when it is possible to ask permission to visit the debtor—if the debtor refuses to agree to being visited, don't visit them
- state clearly to the debtor the purpose of any visit before making the visit
- negotiate a mutually convenient time for the visit. Unless the debtor asks for another time, the proposed visiting times should be between 9 am and 9 pm local time
- the timing of any visit should allow the debtor time to seek advice, support and/or the presence of a third party, if they choose
- don't visit the debtor's home if you know of certain circumstances, (e.g. the debtor is seriously ill or mentally incapacitated) that would make personal contact inappropriate—leave the debtor's premises immediately if you become aware of such circumstances during the visit
- leave the debtor's premises immediately if, at any time, you are asked to do so.

Whether before or after visiting a debtor, or at any other time, don't stay in the vicinity of the debtor's home for an extended period of time, or engage in any other conduct that may suggest to the debtor or a third person that the debtor, or a member of the debtor's household, is under surveillance.

### **Visiting the debtor's workplace**

Generally, don't visit a debtor's workplace. However, visiting a debtor's workplace may be appropriate in very limited circumstances such as when:

- the debtor is the proprietor or a director of a business to which the debt relates
- the debtor has specifically requested the visit, or
- you've exhausted all other available means of making contact with the debtor.

If visiting a debtor at their workplace, be discrete and handle the contact sensitively and with extreme care. Take all reasonable steps to ensure that the debtor's employer and co-workers are not given information, either directly or indirectly, about the debtor's financial affairs.

Also:

- avoid communications that are likely to inform third parties of the existence of a debt
- only visit a debtor at their workplace during normal business hours (9 am to 5 pm) or at a time requested by the debtor
- don't try to visit the debtor at their workplace if you're aware of circumstances (e.g. that the debtor is seriously ill or mentally incapacitated) that would make personal contact inappropriate—leave the debtor's workplace immediately if you become aware of such circumstances during the course of a visit
- leave the debtor's workplace immediately if, at any time, you are asked to do so.

Whether before or after visiting a debtor, or at any other time, don't stay in the vicinity of the debtor's workplace for an extended period of time, or engage in any other conduct that may suggest to the debtor or a third person that the debtor is under surveillance.

## 10. Contacting family members and other third parties

When communicating with family members or third parties, be discrete and handle the contact sensitively and with extreme care. Don't assume that they are aware of information about the debt situation, or that the debtor wants such persons to be informed. But if a family member or friend has been authorised by the debtor to act as the debtor's representative, see the next section, *Contact where a debtor is represented*.

### Family members

Generally, only make unsolicited contact with a third party such as a spouse, family member, friend or flatmate of the debtor to:

- ask where the debtor lives, *and/or*
- leave a message for the debtor.

Generally, only give third parties your name and contact details. Give the details of your company only if specifically requested.

The nature, content and frequency of your communication with the third party should be consistent with one or other (or both) of the above reasons.

A collector should never communicate with a debtor's children (under the age of 18) about a debt, unless:

- communication with that child is specifically authorised and initiated by the debtor *or*
- the debtor, on their own initiative, asks the child to act as a translator.



Avoid trying to coerce a debtor by harassing, threatening or putting pressure on members of the debtor's family (especially the debtor's children) or other third parties.

### **Third parties**

Follow the safeguards below for third party contacts.

- Generally, contact the debtor by telephone or other electronic means. Only visit a third party at their home or other location when no other means of making contact is available, e.g. where you only have or can only reasonably obtain an address.
- Limit questions about where the debtor lives, to once every six months. Exceptions are where the third party has agreed to, or requested, further contact.
- When you know or should know that a third party does not live with the debtor, don't leave repeated messages for the debtor. An exception is where the third party offers to act as a channel for communications with the debtor.
- Don't contact the third party by telephone or in person on public holidays, before 9 am or after 8 pm local time on weekdays, or before 9 am or after 5 pm local time on weekends, unless the third party authorised or asked you to do so.

Avoid trying to get information about a debtor from a third party under false pretences, for example by pretending to be an associate or friend of the debtor.

A third party is not obliged to give you information, nor agree to leave a message for a debtor, or otherwise help you. If a third party indicates they don't want to help you—however unreasonable that refusal may seem to you—stop contacting the third party.

Avoid communication with a third party to:

- suggest or imply that the third party should pay the debt, or is liable for the debt when that person has no legal obligation to pay that debt
- suggest or imply that the third party should try and persuade the debtor to pay the debt
- put pressure on the debtor indirectly by involving a partner, family member and/or other person the debtor is or may be emotionally attached to, *or*
- embarrass the debtor.

Such conduct may constitute undue harassment or coercion of the debtor and/or the third party. The standard for acceptable conduct to third parties is, if anything, even higher than that applying to the debtor.

Avoid methods of contact that may alert a third party to the existence of a debt. Don't:

- send letters about the debt addressed to the debtor only. For example, don't send debt letters addressed 'To the householder'. Such letters may disclose the existence of a debt to third parties and they also run the risk of being ignored as junk mail.

- leave answering machine or voice mail messages which imply the existence of a debt if these may be accessed or heard by third parties.

## 11. Contact where a debtor is represented

A debtor has a right to have another party (e.g. a financial counsellor, community worker or solicitor) represent them or advocate on their behalf about a debt.

Generally, you should not:

- refuse to deal with an appointed or authorised representative, whether by direct refusal or by placing unnecessary obstacles in the way of the authorised representative, e.g. by insisting on a particular style or form of authorisation where the written authority provided already includes the necessary information, *or*
- contact a debtor directly after you know, or should know, that the debtor is represented.

However, you're entitled to contact a debtor directly if:

- the representative does not respond to your communications within a reasonable time (normally, 14 days)
- the debtor's representative advises that they don't have instructions from the debtor about the debt
- the representative does not consent to act
- the debtor specifically requests direct communication with you, or
- the representative is not a solicitor and you advise that written authority stating that you are to communicate through the debtor's representative is required, and the debtor or their representative does not provide that authority.

## 12. Contact when an informal payment arrangement is in place

Try to adopt a flexible and realistic approach to repayment arrangements and variations, remembering (among other considerations) that a debtor experiencing financial hardship may have a number of debts owing to different creditors.

Once negotiated, an informal arrangement to repay a debt should be put in writing and a copy provided to the debtor. Then give these informal arrangements a chance to work.

Generally, while an arrangement is in place and is being complied with, don't contact the debtor unless:

- the debtor asks you to, or

- you wish to propose a genuine alternative or variant arrangement to benefit the debtor.

However, you should continue to send the debtor regular account statements.

You're also entitled to contact a debtor to review an informal arrangement which was made subject to review. However repayment reviews should not be excessively frequent—as a guide, there should be a minimum of three months between reviews.

Avoid pressuring a debtor to pay in full, in unreasonably large instalments, or to increase payments in a payment plan when they are unable to do so.

For example, avoid pressuring debtors to get further into debt in order to pay out the debt being pursued or requiring debtors to show proof of unsuccessful alternative credit applications before negotiating a payment plan.

### **13. Do not misrepresent the consequences of non-payment**

Misrepresenting the consequences of non-payment of a debt is an offence.

This may also increase the risk of breaching laws against unconscionable conduct when the debtor is in a position of disadvantage or vulnerability.<sup>14</sup>

Implications that serious action will be taken if payment is not made, when this is not intended or legally possible, breach the consumer protection prohibitions in Commonwealth law.

Avoid stating or implying that:

- immediate steps will be taken to sell a debtor's home when no legal proceedings to recover the debt have been started
- unsecured goods may be seized and sold without further legal action being taken
- unsecured items such as household furniture or basic appliances can be seized if a debt is not paid<sup>15</sup>, or
- further fees or charges will be added to the debt if payments are not made.

Avoid falsely implying or stating that:

- failure to pay a debt is a criminal offence

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<sup>14</sup> See the explanation of prohibitions against unconscionable conduct in part 3 of this guideline, as well as section 2 of part 2 of this guideline, which discusses the concept of 'special disadvantage' which is relevant to unconscionable conduct.

<sup>15</sup> Section 116 of the *Bankruptcy Act 1966* and state and territory legislation relating to the recovery of judgment debts excludes these items from seizure by creditors.

- criminal proceedings will be brought or that a matter will be referred to the police when you don't intend to make such a referral.

Do not make false representations about your intention to list a debt on a credit reporting service or the consequences of such a listing.

For example, avoid stating or implying that a debt will be listed and the debtor's credit rating damaged when you don't have instructions to, or don't intend to, list the debt or you don't have a reasonable belief that the debtor or alleged debtor is liable for the debt.

The debtor may be unsure about the validity of a debt, especially if the debt relates to a transaction occurring many years ago. It is particularly important to provide adequate information about the debt in these circumstances (see section 4 of this part for further information).

## **14. Is the person you're pursuing liable for the debt?**

You should not pursue a person for a debt unless you have reasonable grounds for believing the person is liable for the debt.

If a person you contact about an alleged debt claims that:

- they are not the alleged debtor, or
- the alleged debt has been paid or otherwise settled

you should suspend further collection activity until the debtor's identity and ongoing liability have been confirmed.

If you continue with collection activity without properly investigating claims that a debt is not owed, you are at considerable risk of breaching one or more of the legal prohibitions of the Commonwealth laws if the alleged debtor is not in fact liable for the debt.

It is acceptable to ask an individual who denies being the alleged debtor to show evidence of their identity (such as a driver's licence).

It is not reasonable to demand that the individual prove that they are not liable for the alleged debt. Rather, you, the collector, should be able to prove that the debt is owed by the alleged debtor.

Creditors holding account and other information have a responsibility to help with the resolution of claims that a debt is not owed, by ensuring that accurate and full information is provided to, or readily obtainable by, the collector.<sup>16</sup>

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<sup>16</sup> Debts covered under the *Uniform Consumer Credit Code* impose obligations on credit providers to provide information in the case of disputed liability (section 36): see appendix B of this guideline.

## **15. Contact following a formal denial of liability**

Generally, don't continue to communicate with a debtor after the debtor has denied liability and/or stated an intention to defend any legal proceedings brought against them.

If a debtor verbally denies an alleged debt and you require a written denial before you stop contact, tell the debtor of this requirement. In these circumstances, you have the option of starting legal proceedings if you choose to pursue the debt.

However, in the above circumstances, further communication may be appropriate:

- to advise the debtor in writing of the steps you intend to take towards legal proceedings
- to put a genuine proposal in writing for settlement of the matter
- about any debt, or part of a debt, that is not denied, or
- where further communication is subsequently authorised or requested by the debtor.

If a court judgment is obtained for a debt for which liability had been denied, you're entitled to start or resume communication with the debtor for that judgment debt (assuming the judgment has not been set aside).

## **16. Contact with debtor following bankruptcy or a Bankruptcy Act arrangement**

When you've been put on notice that a debtor:

- has become a bankrupt, or
- has entered into a Part IX or Part X agreement under the Bankruptcy Act

stop all communication with the bankrupt that is not authorised under that Act.

Any such communication which is not specifically permitted by the Bankruptcy Act or requested by the bankrupt or their representative could be viewed as harassing the bankrupt.

Avoid misrepresenting that a debt is payable despite the bankruptcy. Remember that, unless you are a secured creditor, a debt is not payable following bankruptcy (except in very limited circumstances).

## **17. Do not make misrepresentations about the legal status of a debt—including statute-barred debt**

Don't collect a debt that has already been settled.

Creditors have a responsibility to help the collection process by ensuring that you're provided with or have ready access to accurate and full information. Creditors must also ensure that assigned or contracted debts have not already been settled.

Collectors should not state or imply that a debt is payable when a *legal defence* applies. Debtors will be able to claim a legal defence if:

- they have been declared bankrupt, or
- if the right to pursue the debt in court has expired due to the passage of time. This time limit varies from state to state, but is usually six years from the date the debt was last acknowledged by the debtor (e.g. by making a payment).

Avoid making misrepresentations that a statute-barred debt is payable, as they may be considered:

- misleading and/or deceptive when the statutory time limit has passed, or
- unconscionable when the debtor has not had the opportunity to obtain independent advice (even if the debtor has not expressly claimed the defence).

#### *Case study*

An unemployed mother of a deaf dependent child was cold-called by a collector who questioned her about her personal and financial circumstances. The collector implied that legal proceedings may be instituted if no payment was made on a debt of \$10,000 that, unknown to the debtor, was statute-barred. The court found the collector's conduct to be unconscionable and noted that the circumstances were sufficient to require the collector to establish that the transaction was fair, just and reasonable—which the collector did not do.

*Collection House v Taylor* [2004] VSC 49 Supreme Court of Victoria

## **18. Legal action and procedures**

You do have a right to pursue debts through the courts, but how you pursue or threaten to pursue legal action must also comply with the Commonwealth consumer protection laws discussed in part 3 of this guide.

Falsely stating or implying that legal action has been or will be taken when this is not the case may breach these laws. How legal action is threatened or employed can, in certain circumstances, amount to unconscionable conduct or harassment.

Do not make misrepresentations about the nature of correspondence, e.g. when the layout or design of a document gives the impression that it is a court process or other court document, or that it comes from a solicitor's office, when this is not the case.

Do not threaten criminal proceedings or police action in the absence of evidence that an offence has been committed. Avoid stating or implying that unsecured items such as household furniture or basic appliances can be seized if a debt is not paid.<sup>17</sup>

Do not make misrepresentations about your instructions, e.g. avoid suggesting you have instructions to start legal proceedings when you've received no instructions.

#### *Case studies*

A company sent a debtor a letter implying that they would not or could not lawfully repossess a car without a court order, but then proceeded to repossess the car without this order. The court found this to be a contributing factor towards a finding of unconscionable conduct.

*ACCC v Esanda Finance Corporation Ltd* [2003] FCA 1225

A collector breached misleading and deceptive conduct provisions by representing that they were about to sell a debtor's residence to obtain payment, when they had not started any legal proceedings at the time. They also breached these provisions by making baseless claims that they would have the debtor arrested by the police or the Fraud Squad.

*ACCC v McCaskey* [2000] FCR 1037.

Don't start or escalate court action against a debtor when you have agreed not to, or when a payment arrangement is in place and is being complied with. The way you start court proceedings may be taken into consideration when a decision is made about whether you have acted unconscionably.

Avoid unreasonably hindering a debtor's ability to contest court proceedings, for example by issuing proceedings in a jurisdiction outside of the debtor's residence.

## **19. Dispute resolution schemes**

When there is a dispute about the validity or amount of a debt, the debtor may wish to contact an independent dispute resolution or complaint handling scheme to complain about the conduct of a firm which is a member of the scheme. Generally, these schemes are provided at no cost to the debtor.

The schemes may not be able to hear all types of complaints in an industry, and may not apply if the alleged debt has been sold to a collection company *and* the dispute does not involve the original supplier of the goods or services. See appendix C for some relevant dispute resolution schemes.

You should stop collection activity while a debt is under consideration by a dispute resolution scheme.

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<sup>17</sup> Section 116 of the *Bankruptcy Act 1966* and state and territory legislation relating to the recovery of judgment debts excludes these items from seizure by creditors.

## Part 3: Commonwealth consumer protection laws

This section summarises key prohibitions and remedies under Commonwealth consumer protection laws applicable to collection activity. Relevant court decisions about the Trade Practices Act provisions also apply to equivalent ASIC Act provisions.<sup>18</sup>

See appendix B for other statutory and common law obligations and remedies.

### Prohibition of the use of physical force, undue harassment and coercion

#### *Section 60 Trade Practices Act*

A corporation shall not use physical force, undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

#### *Section 12DJ ASIC Act*

A person contravenes this subsection if:

- (a) the person uses physical force or undue harassment or coercion; and
- (b) the person uses such force, harassment or coercion in connection with the supply or possible supply of financial services to a consumer or the payment for financial services by a consumer.

Under s. 60 Trade Practices Act, and s. 12DJ ASIC Act, the use of:

- physical force
- undue harassment and/or
- coercion

to support a demand for payment for goods or services (including financial services) is deemed unacceptable and is prohibited. These provisions are not limited to conduct directed at a debtor. They also apply to the collector's conduct towards a third party (for instance, a family member).

The terms 'physical force', 'harassment' and 'coercion' are not defined in the law. They should be understood in the way they are ordinarily used and defined (see below).

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<sup>18</sup> *Cassidy v Saatchi & Saatchi Australia Pty Ltd* [2004] FCAFC 34



### Physical force

There is no concept of ‘undue’ physical force under s. 60 of the Trade Practices Act, and s. 12DJ of the ASIC Act. Any use of any violence or physical force is prohibited. The use of force may also be a criminal offence under state and territory criminal law.

In *ACCC v Davis*<sup>19</sup> the court found that, in pinning a debtor to the ground while the debtor's vehicle was removed from the debtor's premises, the respondent corporation through its agents breached s. 60 of the Trade Practices Act. The fact that the collector had a contractual right to seize the vehicle under a mortgage over the vehicle did not permit the use of physical force to overcome the debtor's resistance to the seizure.

### Undue harassment

Undue harassment may occur when repeated approaches are made or repeated pressure is applied to a debtor, going beyond what is acceptable or reasonable. While the harassment must be ‘undue’, there is no requirement that the conduct must involve the threat of an illegal act.<sup>20</sup>

In *ACCC v Maritime Union of Australia*,<sup>21</sup> Justice Hill explained the meaning of the term *undue harassment* as follows:

The word harassment means in the present context persistent disturbance or torment. In the case of a person employed to recover money owing to others ... it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made. On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely convey the demand for recovery, the conduct will constitute undue harassment. ... Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter. The reasonableness of the conduct will be relevant to whether what is harassment constitutes undue harassment.

In *ACCC v Esanda Finance Corporation Ltd*<sup>22</sup> the court found that Esanda had acted unconscionably by failing to stop efforts to repossess a car subject to a chattel mortgage when it had reasonable cause to understand that a physical confrontation would occur if they continued in their attempt. This matter is related to *ACCC v Davis*, in that Davis was an agent of Esanda.

Other factors considered in the court's declaration of unconscionability include Esanda sending the debtor a notice implying that they would not or could not lawfully repossess the car without a court order, and then repossessing the vehicle without such an order, as well as the fact that Esanda's agents entered the debtor's residence by jumping a gate and opening a garage door from the inside.

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<sup>19</sup> *ACCC v Davis* [2003] FCA 1227.

<sup>20</sup> *Campbell v Metway Leasing Ltd* (1998) ATPR 41-630.

<sup>21</sup> *ACCC v The Maritime Union of Australia* [2001] FCA 1549 at para [60] per Hill J.

<sup>22</sup> *ACCC v Esanda Finance Corporation Ltd* [2003] FCA 1225.

## Coercion

Judicial authority indicates that s. 60 of the Trade Practices Act and s. 12DJ ASIC Act prohibit any ‘coercion’, not just ‘undue coercion’.<sup>23</sup> The concept of *coercion* does not involve the element of repetition usually involved in the concept of *undue harassment*. *Coercion* is said to ‘carr[y] connotations of force or compulsion or threats of force or compulsion negating choice or freedom to act’.<sup>24</sup> Coercion may take many forms, and is not limited to using or threatening physical force.

## Prohibition of misleading and deceptive conduct

### *Section 52(1) Trade Practices Act*

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

### *Section 12DA(1) ASIC Act*

A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

These provisions apply widely to trade or commerce activities, of which collectors’ activities are but one aspect.

The above sections prohibit a collector from making any statement or engaging in any other conduct (e.g. impersonating someone, or using a false letterhead or document) that is misleading or deceptive or is likely to mislead or deceive. The terms ‘misleading’ and ‘deceptive’ are not defined in the law and should be understood in the way they are ordinarily used and defined.

Collectors may breach this prohibition even though they don’t intend to mislead—it is enough that the misrepresentation is likely to have this effect on the type or class of person to whom the conduct is directed. In some circumstances, a collector may need to positively disclose information to avoid creating a misleading impression.

In *ACCC v McCaskey*<sup>25</sup> the court accepted that a collector breached s. 52 of the Trade Practices Act by conduct towards debtors including representations that:

- the agent was about to take immediate steps to sell a debtor’s residence to obtain payment of a debt owed when no legal proceedings to recover the debt had been started at the time

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<sup>23</sup> *ACCC v The Maritime Union of Australia* [2001] FCA 1549 at para [61] – [63].

<sup>24</sup> *ibid* at para [63].

<sup>25</sup> *ACCC v McCaskey* [2000] FCA 1037.

- the agent would arrange to have the debtor arrested by the police or the fraud squad if the debtor did not make immediate payment of the alleged debt, when there was no reasonable basis on which the collector could have taken that action.

The ACCC's publication *Advertising and Selling* (December 2004), discusses misleading and deceptive conduct (as well as other issues) in more detail. The principles discussed there also generally apply to the prohibition against misleading or deceptive conduct in the ASIC Act. For a copy of this booklet, visit [www.accc.gov.au/publications](http://www.accc.gov.au/publications) or call the ACCC InfoCentre on 1300 302 502.

## **Prohibition of unconscionable conduct**

### ***Trade Practices Act, Part IVA—unconscionable conduct (summary only)***

Part IVA contains three provisions that prohibit unconscionable conduct:

- (a) section 51AA (unconscionable conduct within the meaning of the unwritten law of the states and territories)
- (b) section 51AB (unconscionable conduct)
- (c) section 51AC (unconscionable conduct in business transactions).

### ***Section 51AB Trade Practices Act (unconscionable conduct)***

This section prohibits a corporation 'in trade or commerce, in connection with the supply or possible supply of goods or services to a person', from engaging in 'conduct that is, in all the circumstances, unconscionable': s. 51AB(1).

Without limiting the matters to which a court can have regard in determining whether s. 51AB(1) has been contravened, the court can consider:

- (a) the relative strengths of the bargaining positions of the corporation and the consumer
- (b) whether as a result of the conduct the consumer was required to comply with conditions that were not reasonably necessary to protect the corporation's legitimate interests
- (c) whether the consumer was able to understand documents relating to the supply or possible supply of the goods or services
- (d) whether undue influence or pressure was exerted on, or unfair tactics were used against, the consumer or a person acting on behalf of the consumer
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods from another trader.

Section 51AB is limited to unconscionable conduct in connection with the supply or possible supply of goods or services of a kind 'ordinarily acquired for personal, domestic or household use or consumption' (s. 51AB(5)).

***Part 2 Div 2 Subdivision C ASIC Act—unconscionable Conduct (summary only)***

This subdivision is based on, and is substantially similar to, Part IVA of the Trade Practices Act but is limited to the supply or possible supply of ‘financial services’. Unlike Part IVA of the Trade Practices Act, the subdivision applies to unconscionable conduct of ‘persons’ generally and is not limited to the conduct of ‘corporations’.

These provisions apply widely to trade or commerce activities, of which the collecting activities are but one aspect.

Collectors risk breaching this prohibition, in particular when they exert undue influence or pressure on, or unfair tactics against, a debtor who is specially disadvantaged or vulnerable.

In *Collection House v Taylor*<sup>26</sup> it was accepted that a commercial agent had acted unconscionably in trying to recover a debt that, unknown to the debtor, was statute-barred. It was also noted that the factual circumstances were sufficient to require the collector to establish that the transaction was fair, just and reasonable.

The debtor was an unemployed mother with a deaf dependent child, who had originally defaulted on repayments for a car loan. The car was repossessed and sold. The residual debt was purchased by the commercial agent a number of years later, by which time accumulated interest had increased the amount owing to more than \$10 000.

After being contacted by an employee of the commercial agent and told that legal action may be taken if a satisfactory arrangement could not be reached, the debtor agreed to pay \$5 000 to finalise the debt, of which \$4 500 was immediately charged to her credit card. The court upheld the original decision that the agent through its employee had acted unconscionably. The court noted that:

... 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 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.

See the ACCC’s *Guide to Unconscionable Conduct* for more about this area of law. The principles discussed in this guide also generally apply to the ASIC Act. For a copy of this guide, visit [www.accc.gov.au/publications](http://www.accc.gov.au/publications) or call the ACCC InfoCentre on 1300 302 502.

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<sup>26</sup> *Collection House v Taylor* [2004] VSC 49.

## **Enforcement and remedies for breaching the Trade Practices Act and ASIC Act**

### **Fines**

A collector who breaches the harassment and coercion provisions is guilty of an offence punishable on conviction by a fine of up to:

- \$220 000 (in the case of individuals), or
- \$1 100 000 (in the case of corporations).<sup>27</sup>

These penalties also apply when a collector is convicted of knowingly making false or misleading representations.<sup>28</sup> Certain defences may apply in relation to these breaches.<sup>29</sup>

### **Civil orders**

In addition, apart from criminal sanctions, ASIC or the ACCC can apply for civil orders against a collector, including:

- injunctions against future conduct<sup>30</sup>
- non-punitive orders,<sup>31</sup> and
- punitive orders requiring adverse publicity.<sup>32</sup>

### **Damages or injunction**

Finally, a debtor or third party who suffers loss or damage as a result of a collector's breach of the unconscionable conduct<sup>33</sup>, misleading or deceptive conduct<sup>34</sup>, harassment and coercion, or other provisions of the ASIC Act and Trade Practices Act, can recover

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<sup>27</sup> Section 12GB(1) of the ASIC Act and ss. 6(6) and 75AZN of the Trade Practices Act. Penalties are denominated in 'penalty units' in the legislation (10 000 in the case of corporations and 2000 in the case of individuals), with 1 penalty unit being equal to \$110 at the time of publication. The value of penalty units can change over time.

<sup>28</sup> Section 12 DB, ASIC Act; s. 75AZC Trade Practices Act

<sup>29</sup> Section 12GI, ASIC Act; s. 85 Trade Practices Act.

<sup>30</sup> Section 12GD, ASIC Act; s. 80 of the Trade Practices Act.

<sup>31</sup> Section 12GLA, ASIC Act; s. 86C of the Trade Practices Act.

<sup>32</sup> Section 12 GLB, ASIC Act; s. 86D of the Trade Practices Act.

<sup>33</sup> Sections 12CA–CC, ASIC Act; ss. 51AA-AC, Trade Practices Act.

<sup>34</sup> Section 12DA, ASIC Act; s. 52, Trade Practices Act.

the amount of their loss by an action for damages under these Acts.<sup>35</sup> A debtor or third party can also seek injunctive relief.<sup>36</sup>

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<sup>35</sup> Section 12GF, ASIC Act; ss. 82 and 87(2)(d), Trade Practices Act.

<sup>36</sup> Section 12GD, ASIC Act; s. 80, Trade Practices Act.

## **Appendix A: ACCC and ASIC—debt collection roles and contact details**

### **Australian Competition and Consumer Commission (ACCC)**

The ACCC is responsible for dealing with misconduct associated with debt collection activity when the debt does not relate to the provision of a financial service.

This includes debts:

- for the provision of telephone or other utility services
- for the services of trades and professional people

where a retailer does not require immediate payment for a product (but not where the customer enters into a finance arrangement as that will be ASIC's responsibility).

The ACCC's responsibility also includes:

In relation to such matters, the ACCC's responsibility includes debts that arise because payment has been deferred (for example, a customer being billed monthly or given an extension of time to pay).

The ACCC's responsibilities cover any alleged undue harassment, coercion or unconscionable conduct in connection with the collection of the debt and any misrepresentations made about the debt. It extends to debts relating to goods and non-financial services which have been assigned or sold to a third party (for example, a debt buy-out company).

The ACCC is also responsible for any misleading or deceptive conduct relating to the actual good or service.

### **ACCC contact details**

For all business and consumer inquiries:

National Office

PO Box 1199

ACCC Infocentre: 1300 302 502

DICKSON ACT 2602

ACCC website: [www.accc.gov.au](http://www.accc.gov.au)

Tel: (02) 6243 1111

Fax: (02) 6243 1199

## **Australian Securities and Investments Commission (ASIC)**

ASIC is responsible for dealing with misconduct associated with debt collection activity when the debt relates to the provision of a financial service. This includes debts relating to:

- credit card accounts
- loans (such as home loans and personal loans)
- finance provided by a finance company, for example for the purchase of a car or household goods (including finance companies related to the retailer)
- fees for the provision of financial advice.

ASIC's responsibility covers any alleged undue harassment, coercion or unconscionable conduct in connection with the collection of the debt and any misrepresentations made about the debt. It extends to debts relating to the provision of a financial service which have been assigned or sold to a third party (for example, a debt buy-out company).

If there is misleading or deceptive conduct relating to the actual good or service (such as the car or the appliance) and not the debt, this will be referred to the ACCC.

### **ASIC contact details**

ASIC's Infoline: 1300 300 630 or  
[infoline@asic.gov.au](mailto:infoline@asic.gov.au)

ASIC's consumer website:  
[www.fido.asic.gov.au](http://www.fido.asic.gov.au).

Go to *How to complain* to make a complaint on line.

Address for written complaints:  
ASIC Complaints  
Australian Securities and Investments  
Commission  
PO Box 9149  
TRARALGON VIC 3844  
FAX: (03) 5177 3749

### **Overlapping areas**

In some situations, a complaint may relate to a range of debts, including both debts for financial services and debts for a good or non-financial services. The ACCC and ASIC have agreed to coordinate any action when debt collection conduct involves such overlapping jurisdiction.

For more information about the respective responsibilities of ASIC and the ACCC over debt collection, see the joint brochure *Complaints about debt collection activity — the responsibilities of Commonwealth agencies*. For a copy, contact either the ACCC or ASIC using the phone numbers provided above, or visit the ACCC or ASIC website.



## Appendix B: Other statutory and common law obligations and remedies

Apart from the Commonwealth consumer protection laws (See part 3 of this guide), there are a range of other statutory and common law obligations and remedies that potentially impact collectors' operations. These include (but are not limited to) the following listed below.

Because this guide does not have legal force, read it subject to the rights and obligations imposed by the following and any other applicable laws and/or mandatory codes to the extent of any inconsistency.

### State and territory fair trading laws

These laws,<sup>37</sup> based on the *Trade Practices Act 1974*, contain similar misconduct prohibitions to those set out in the Commonwealth legislation. However, the harassment and coercion provisions of the *Fair Trading Act 1999 (Vic)* and *Fair Trading Act 1992 (ACT)* also deem that certain specified conduct constitutes undue harassment and coercion.<sup>38</sup> In addition, Consumer Affairs Victoria has published *Guidelines for debt collection* under the Victorian *Fair Trading Act (1999)*.<sup>39</sup>

### State and territory licensing of collectors

Most state and territory jurisdictions have occupational licensing requirements applying to a range of persons involved in collection. These laws impose certain obligations on licensees, and set out grounds on which the relevant authority can refuse to grant or cancel a licence. In Queensland, licensed commercial agents are also subject to a mandatory code of conduct, the Commercial Agency Practice Code of Conduct.<sup>40</sup> New South Wales has also enacted laws about the licensing of collectors.<sup>41</sup>

### The Uniform Consumer Credit Code [UCCC]

This legislative scheme imposes an obligation on creditors and their agents to provide account information<sup>42</sup> and documentation<sup>43</sup> in relation to regulated credit arrangements

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<sup>37</sup> *Fair Trading Act 1987 (ACT)*, *Fair Trading Act 1987 (NSW)*, *Fair Trading Act 1989 (Qld)*, *Fair Trading Act 1987 (SA)*, *Fair Trading Act 1990 (Tas)*, *Fair Trading Act 1999 (Vic)*, *Fair Trading Act 1987 (WA)*, *Consumer Affairs and Fair Trading Act 1990 (NT)*.

<sup>38</sup> See s. 21(2), *Fair Trading Act (Vic)* and s. 26(2), *Fair Trading Act (ACT)*

<sup>39</sup> Available at [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au).

<sup>40</sup> *Property Agents and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001 (Qld)*.

<sup>41</sup> *Commercial Agents and Private Inquiry Agents Act 2004 (NSW)*.

<sup>42</sup> Under s. 34(1) of the UCCC the credit provider must provide a statement of all or any of the following in respect of a regulated account—the current balance, any amounts credited or debited during a period specified in the request, any amounts currently overdue and when each such amount

on request. Debtors whose loan contracts are subject to the UCCC regime are also given other protections relevant in the situation where the debtor is experiencing financial hardship.<sup>44</sup>

Many contracts under which a debt arises are also governed by the state and territory consumer credit laws.

### **State and territory unauthorised documents laws**

Unauthorised documents Acts in each state and territory make it an offence to design collection letters of demand in a way that makes them look like court documents.

### **Bankruptcy laws**

Under the *Bankruptcy Act 1966*, administered by the Insolvency and Trustee Service Australia, on making a sequestration order or accepting a debtor's petition, a bankrupt person is released from their financial obligations for debts provable in their bankruptcy (with some very limited exceptions). Most of a debtor's unsecured debts will be provable. Further action to recover provable debts directly from the bankrupt person is not permitted—any further recovery must be through the scheme of administration for the bankrupt's estate.

In addition, the Bankruptcy Act provides for arrangements short of bankruptcy under Part IX and Part X of the *Act*. Once a Part IX or Part X arrangement is in place, a debtor is no longer free to pursue recovery in the usual manner.

### **Privacy laws**

Part IIIA of the *Privacy Act 1988* regulates how credit reporting agencies and credit providers handle information about a person's creditworthiness. It limits the content, use and disclosure of credit reports. Among other things, it limits the information mercantile agents are permitted to access. The Privacy Commissioner has also issued a legally binding Credit Reporting Code of Conduct. From time to time, the Privacy Commissioner also issues determinations that may impact on the collection industry.

### **Tort law**

Collectors who engage in extreme conduct may expose themselves to civil action in tort by a debtor. Depending on the circumstances, action for trespass, assault, wilful infliction of mental injury, nervous shock and defamation (among others) may apply.

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became due, any amount currently payable and the date it became due. Time limits apply to this requirement (s. 34(2)).

<sup>43</sup> Under s. 163(1) of the UCCC the credit provider must provide a debtor, mortgagor or guarantor with a copy of a regulated credit contract, mortgage or guarantee within a specified period. Time limits apply to this requirement (s. 163(2)).

<sup>44</sup> See, for example, s. 66 (changes on grounds of hardship), UCCC.

### **Criminal law**

Collectors who engage in extreme conduct may be charged with criminal offences including assault, demanding with menaces etc. A collector who refuses to leave a person's property may also be charged with trespass.

### **Other obligations**

Collectors who are unsure of their obligations under any of the above-mentioned laws, mandatory codes and other arrangements should seek more information from the relevant regulator and/or obtain legal advice.

You should also be aware of the requirements of any voluntary code of conduct or similar instrument to which you subscribe and of the relevant rules of any trade association or professional body to which you belong.

## Appendix C: Independent dispute resolution schemes and Ombudsman

### **Banking and Financial Services Ombudsman**

GPO Box 3  
Melbourne VIC 3001  
Tel: 1300 780 808  
Fax: 03 9613 7345

Email: [Enquiries@bfso.org.au](mailto:Enquiries@bfso.org.au)

Web: [www.bfso.org.au](http://www.bfso.org.au)

Collins Street West  
Melbourne VIC 8007  
Tel: 1800 062 058  
Fax: 1800 630 614  
Email: [tio@tio.com.au](mailto:tio@tio.com.au)

Web: [www.tio.com.au](http://www.tio.com.au)

### **Credit Union Dispute Resolution Centre**

The Credit Union Dispute Manager  
GPO Box 3  
Melbourne VIC 3001  
Tel: 1300 780 808  
Fax: 03 9620 4446

Email: [info@cudrc.com.au](mailto:info@ cudrc.com.au)

Web: [www.cudrc.com.au](http://www.cudrc.com.au)

### **Energy and Water Ombudsman – NSW**

PO Box K1343  
Haymarket NSW 1240  
Tel: 1800 246 545  
Fax: 1800 812 291  
Email: [omb@ewon.com.au](mailto:omb@ewon.com.au)  
Web: [www.ewon.com.au](http://www.ewon.com.au)

### **Financial Cooperatives Dispute Resolution Scheme**

PO Box 372  
Clayfield, QLD, 4011  
Tel: 1300 139 220 (local call rates)  
Fax: 1300 139 221

Email: [ombudsman@fcds.org.au](mailto:ombudsman@fcds.org.au)

Web: [www.fcds.org.au](http://www.fcds.org.au)

### **Energy and Water Ombudsman – Victoria**

GPO Box 469D  
Melbourne VIC 3001  
Tel: 1800 500 509  
Fax: 1800 500 549  
Email: [ewovinfo@ewov.com.au](mailto:ewovinfo@ewov.com.au)  
Web: [www.ewov.com.au](http://www.ewov.com.au)

### **Telecommunications Industry Ombudsman Ltd**

PO Box 276

### **Energy Industry Ombudsman – South Australia**

GPO Box 2947  
Adelaide SA 5001  
Tel: 1800 665 565

DRAFT Appendix C: Independent dispute resolution schemes and Ombudsman

Fax: 1800 665 165

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**Electricity Ombudsman – Tasmania**

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[www.justice.tas.gov.au/electricity\\_ombudsman/home.html](http://www.justice.tas.gov.au/electricity_ombudsman/home.html)

## Appendix D: Glossary

**Agent:** includes any person engaged in collection activity on behalf of a creditor, including the collection of an outsourced debt.

**Assigned debt:** for the purposes of this guideline, means any debt which has been sold, assigned, or factored by a creditor.

**Assignee:** for the purposes of this guideline, means the person undertaking collection activity following the sale, assignment or factoring of a debt.

**Bankrupt:** a person who has been declared bankrupt under the provisions of the *Bankruptcy Act 1966* and has not been discharged from the bankruptcy.

**Collector:** a person collecting a debt in the course of a business. It includes creditors, independent collection agencies, assignees, agents, lawyers, government and court officials, and other persons<sup>45</sup> collecting on behalf of others.

**Communicate:** unless otherwise specified, includes communication by telephone, mobile telephone, fax, email, letter and in person.

**Credit report:** any record or information, whether in a written, oral or other form, that is being or has been prepared by a credit reporting agency; and has any bearing on an individual's:

- eligibility to be provided with credit; or
- history in relation to credit; or
- capacity to repay credit; and
- is used, has been used or has the capacity to be used for the purpose of serving as a factor in establishing an individual's eligibility for credit.<sup>46</sup>

**Credit listing:** for the purposes of this guideline, means the listing of an unpaid debt on a person's credit report.

**Creditor:** a person to whom a debt is incurred. In this guideline, the term continues to apply to the person to whom the debt is incurred despite the sale, assignment, factoring or outsourcing of the debt.

**Debt:** an amount of money owed. For the purposes of this guideline, it includes an alleged debt

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<sup>45</sup> The Trade Practices Act applies to corporations or individuals when they are acting as agents of a principal that is a corporation.

<sup>46</sup> Section 6(1), *Privacy Act 1988*.

**Debtor:** a natural person obligated or allegedly obligated to pay a debt. It includes a co-borrower or guarantor of the debtor.

**Judgment debt:** means a debt confirmed by a judge's order.

**Reasonableness:** is assessed according to an objective standard, taking into account all relevant circumstances.

**Third party:** any person other than the debtor, but does not include a debtor's legal representative, trustee, or other authorised representative, or a guarantor or co-borrower. Nor does it include a related entity of the collector.

**Security interest:** an interest in or a power over goods (whether arising by or under an instrument or transaction or arising on the execution of a warrant issued under the relevant state or territory legislation) which secures payment of a debt.

**Statute-barred debt:** a debt in respect of which the debtor is entitled to claim an absolute defence to legal proceedings to collect the debt due to the passage of time (as set out in the relevant statute of limitations).<sup>47</sup>

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<sup>47</sup> The statute of limitations varies among the jurisdictions, but is usually set at six years following the debtor's last acknowledgement (e.g. a partial repayment) of the debt.