



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 61

ACCC / ASIC debt collection guideline:

For collectors, creditors and debtors (First draft)

February 2005

Australian Competition and Consumer Commission



Australian Securities and Investments Commission



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ACCC/ASIC debt collection guideline

Discussion paper

February 2005

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Introduction

The Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) have announced a joint project to revise the ACCC's publication *Debt collection and the Trade Practices Act*, released in 1999¹.

A draft of the revised publication *ACCC and ASIC Debt Collection Guideline* (the guideline) accompanies this discussion paper. We seek your feedback on the guideline by **5 pm EST Thursday 31 March 2005**.

Proposed timeline for the consultative process

14 February 2005	Circulate draft guideline to stakeholders [Period of 6 weeks to receive written submissions]
31 March 2005	Period for written submissions close [ACCC/ASIC consider written submissions]
May 2005	ACCC/ASIC launch of guideline.

Why revise the guideline?

The ACCC and ASIC are committed to providing guidance to business on how they can comply with the laws the ACCC and ASIC administer and to improving consumers' understanding of their rights and obligations.

Debt collection and the Trade Practice Act 1999 is an example of such guidance. The 1999 guideline is in need of revision for a number of reasons.

¹ The 1999 guideline is available at: <http://www.accc.gov.au/content/index.phtml/itemId/303690>

Since its publication:

- responsibility for consumer protection in relation to financial services was transferred to ASIC (in 2002). This includes responsibility for undue harassment and coercion, unconscionable conduct and misleading and deceptive conduct in relation to financial services
- a number of relevant cases have been decided—when the 1999 guideline was produced, s. 60 of the Trade Practices Act had not been tested in court
- industry practices in relation to debt collection have undergone significant change and development
- problems relating to debt collection have emerged as a trend in the ACCC's campaign to protect disadvantaged and vulnerable consumers. ASIC also receives significant numbers of complaints on debt collection.

What is the effect of the guideline?

Once finalised, the guideline will reflect the ACCC's and ASIC's view of how relevant provisions of the Trade Practices Act and the ASIC Act apply to debt collection conduct.

The guideline does not have legal force. ASIC and the ACCC cannot make law—this is the role of the parliament and the common law. Nor can ASIC and the ACCC 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.

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

Also, compliance with the guideline will not necessarily protect businesses from litigation initiated by private parties over alleged contraventions of the above-mentioned prohibitions.

How is the guideline different?

The current draft differs from the 1999 guideline in a number of important ways.

Firstly, the draft reflects the role ASIC now plays jointly with the ACCC in the administration of debt collection at the Federal level. An appendix has been included summarising the responsibilities of the two agencies.

Secondly, as well as the substantive guidance on conduct, the 1999 guideline included a separate guide to establishing an effective debt collection compliance program.² This has not been retained in the current draft. However, the ACCC and/or ASIC may decide to further consider the provision of advice on compliance programs or strategies.

Thirdly, consistent with recent cases, the guideline takes a somewhat broader approach to the legal protections under the federal legislation. In particular, it gives greater weight to the prohibition on unconscionable conduct in the debt collection context. You will also note that the key prohibitions under the Trade Practices Act and the ASIC Act are now set out in a separate part of the guideline (part 3) together with a brief commentary on each based on recent cases. Part 3 also includes an updated section on enforcement and remedies.

The guideline also includes new sections (some of which draw on material in the 1999 guideline). Additional topics covered relate to:

- purpose of communication [between collectors and debtors]
- manner of communication
- providing adequate information about the collector and the debt
- maintaining accurate records
- location of contact
- investigating when liability is disputed.

² Pp. 23–46 of the 1999 guideline.

We have also added or expanded sections to address the following issues:

- threats regarding credit listing where there is no intention to list or malicious listing
- sale of debt (debt factoring)
- the undesirability of sending letters marked 'To the Householder'
- representations regarding statute barred debts
- the effect of bankruptcy on the part of the consumer
- issuing proceedings outside the jurisdiction in which a debt was incurred.

In addition, the draft amends the approach taken on some specific issues in the 1999 guideline including in relation to:

- the hours within which contact with debtors or third parties is appropriate, and
- the frequency of face-to-face contact.

A number of changes have also been made to the order of the topics covered, as well as to the format and wording of particular sections. These are designed to make the guideline as simple and easy to use as possible.

Consultation Questions

Q.1 Is the guideline well organised and easy to follow? If not, please indicate how it can be improved.

Q. 2 Do you have any comments on the definitions and other terminology used in the guideline, including terms set out in the glossary (appendix D)? Are any definitions unclear or ambiguous? Please suggest any proposed amendments.

Q.3 Do you have any comments on *Part 1: Using this guideline*?

Q.4 Is the guidance set out in *Part 2: Practical guidance* appropriate, clear and consistent? Are there areas where a higher standard should be recommended? Alternatively, are there any aspects of the guidance that are unclear or

excessively burdensome from a compliance perspective? Please explain your response, and suggest alternative approaches where appropriate.³

Q.5 Are there additional matters or aspects of the collection process that you consider should be covered in part 2 of the guideline? (Please provide reasons)

Q.6 Alternatively, are there matters you consider should be deleted from part 2 or dealt with differently? (Please provide reasons)

Q.7 Do you have any comments on our outline of the Commonwealth consumer protection legislation in part 3 of the guideline?

Q.8 Are the descriptions of other statutory and common law obligations set out in appendix B clear? Are there other laws or obligations that we should note in this appendix?

Q.9 Do community organisations that can offer advice to consumers with problems relating to debt or debt collection wish to have their contact details included in the guideline?

Q.10 Are there any additional issues you wish to raise, or other aspects of the guideline you wish to comment on?

Your response

How

Please respond by answering the consultation questions above. (You need not answer all questions unless you wish to do so.)

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

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

Each submission should include:

- the submitter's name and address (and a contact point if the submission is lodged on behalf of an organisation)

³ You may wish to refer to what you consider general or widespread industry practice to be in this context.

- names of any additional contributors to the submission who may wish to be acknowledged
- contact telephone numbers in case ASIC or the ACCC need to clarify any points, obtain additional information, or advise if the submission appears incomplete (e.g. pages missing); and
- fax and email addresses where available.

Confidentiality

Please note that we will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential. We will not treat an automatic email confidentiality notice as a specific request to treat a submission as confidential.

To whom

Mail responses to:

Attention: Nick O’Kane

Australian Competition and Consumer Commission

GPO Box 520J

Melbourne Victoria 3001

Email responses to:

DebtCollectionGuideline@acc.gov.au

Fax responses to:

(03) 9663 3699

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

Please ensure your response reaches us by **31 March 2005**.