

**Joint Consumer Submission in  
response to**

**Draft Debt Collection Guideline: for  
collectors, creditors and debtors**

**April 2005**

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## Introduction

As consumer representatives across Australia, we thank the Australian Competition and Consumer Commission ('ACCC') and the Australian Securities and Investments Commission ('ASIC') for the opportunity to comment on the Draft *Debt Collection Guideline: for collectors, creditors and debts* released in February 2005.

This submission has been prepared by the Consumer Credit Legal Centre (NSW) Inc. ('CCLC (NSW)'), Centre for Credit and Consumer Law ('CCCL'), Consumer Credit Legal Service (Vic) Inc ('CCLS (VIC)'), and CARE Inc. Financial Counselling Service (ACT) ('CARE Inc.') after consultation with a number of consumer representatives around Australia, including financial counsellors, community workers, and community legal centre workers.

The following organisations made contributions to the submission or provided comment:

- Australian Financial Counselling and Credit Reform Association
- Brisbane Consumers Association
- Hobart Community Legal Service
- Financial Counsellors' Association of NSW
- Financial Counsellors' Association of Queensland
- Illawarra Legal Centre
- National Welfare Rights Network Inc.

A telephone link-up was held on 24 March 2005 with the following participants:

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- Carolyn Bond        Consumer Credit Legal Service (Vic) Inc.
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- Nicola Howell        Centre for Credit and Consumer Law (Qld)
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- Pip Martin            Legal Aid Commission NSW
- Pam Mutton          Anglicare
- Jan Pentland         Australian Financial Counselling and Credit  
Reform Association
- David Tennant        Care Inc. Financial Counselling Service (ACT)
- Catherine Uhr        Legal Aid Queensland
- Simone Watson      Centre for Credit and Consumer Law (Qld)
- Kai Wu                Legal Aid Commission NSW

## **The structure of this submission**

The submission is structured as follows. In Part 1, we provide some introductory comments that set the scene for our more detailed comments on the draft Guideline. In this part, we also look at the regulation of debt collection in other jurisdictions. In part 2, we comment on the general scope and language of the guideline, the important issue of enforcement and compliance, and the role of financial counsellors. Part 3 provides detailed comment on the text of the draft guideline.

We have not directly addressed each of the questions posed in the Discussion Paper. However, in general:

- Question 3 is answered in Part 3 (the role of the guidelines);
- Questions 2, 4, 5, and 6 are answered through our detailed comments on the text in Part 2; and
- Question 10 is addressed in Part 1, where we discuss the need for national legislation on debt collection

We recognise that some of the issues we raise are not directly within the scope of responsibilities for ASIC or the ACCC. However, we are of the view that this forum is one way of drawing the attention of the relevant policy makers to these broader issues. We will be distributing our submission widely in order to assist in further discussions and policy development on debt collection issues.

## **Summary of submissions**

We are pleased that the Guideline is being revised to reflect the changes that have occurred since the original *Debt Collection and the Trade Practices Act* guideline was released by the ACCC in 1999, including the transfer of consumer protection responsibilities in relation to financial services to ASIC, recent trends in debt levels and significant changes in the industry in recent years including rationalization and consolidation.

We are however concerned that the draft revised Guideline remains insufficient in a number of ways.

## **Compliance and Enforcement**

We submit that the Guideline must be intended to be linked with the exercise of enforcement responsibilities of the regulators, and it must be made clear that any contravention of the Guideline, while not definitive, will be a relevant matter to take into account in enforcement decisions.

Compliance must be specifically promoted, and in jurisdictions with licensing

regimes in place, compliance must be a condition of obtaining and maintaining a licence. In this submission we also discuss the need for government agencies and their contractors to abide by the Guideline.

## **Guideline could be significantly more robust on some issues**

Stronger statements are required in the Guideline in relation to systemic practices which are potentially in breach of the current law.

Within the context of this Guideline and the current law, there are some matters we submit that could be made considerably clearer. Many systemic practices of debt collectors are arguably misleading and deceptive, or amount to unconscionable conduct. For example, representing that a repayment arrangement cannot or will not be accepted when repayment arrangements are in fact agreed to as a matter of course when other tactics fail is clearly misleading. Other examples are given in the body of this submission. We hope that the ACCC and ASIC will take this opportunity to further clarify the limits of the current law.

## **The need for law reform and other measures**

However, we are strongly of the view that there are matters both covered by the Guideline and beyond its scope that must be addressed by national or uniform legislation. All debt collectors must be required to be registered or licensed, and there must be a range of negative and positive obligations on debt collectors to deal fairly with debtors and third parties.

We also discuss the need for additional mechanisms to ensure appropriate behaviour by debt collectors in the interim. We make the case for the development of a best practice guide or a Fair Debt Collection guide or similar, which would focus on the issues that cannot be adequately addressed through this process. The content of the guide would not be constrained by whether or not there is legislative support of the various obligations included in the guide.

# Part 1: Introductory Comments

## Recent Trends

Consumer borrowing has been increasing at historically unprecedented levels for a number of years. The level of Australian indebtedness is rising faster than ever before. Reserve Bank of Australia figures show that in January 2005 personal lending, including credit cards, reached \$ 116.0 billion.<sup>1</sup> Credit card debt alone reached \$29.28 billion (in January 2005), up from \$23.24 billion in January 2003.<sup>2</sup> Housing debt was \$503.7 billion (up from \$376.2 billion in January 2003).<sup>3</sup> Personal debts owed to banks alone by Australia households reached \$555.9 billion in January 2005, up from \$492.2 billion in less than one year since February 2004<sup>4</sup>.

The March 2004 Financial Stability Review published by the Reserve Bank of Australia<sup>5</sup> notes that the level of outstanding household credit rose at an annual rate of 15 per cent since 1996 and at an even faster rate of 22 per cent over the 12 months preceding January 2004. In fact, at the end of 2003, a number of indicators of household financial vulnerability, such as ratios of debt, house prices and interest payments to income and household gearing had reached record highs<sup>6</sup>.

Household debt represented over 140 per cent of disposable income in 2005 compared with 105 per cent in early 2001, taking Australia from having a relatively low debt-to-income ratio by international standards a decade ago to having a relatively high level of household debt when measured against income. The rise of household debt is one of the reasons the Reserve Bank cited for increasing interest rates in late 2003. Despite a general slowdown in household credit, the largest component of household debt, its growth remains considerably faster than growth in incomes<sup>7</sup>.

These figures, alarming as they are, do not include the many other debts arising from the provision of products and services where payment is deferred. Many of those facilities, for example telecommunications accounts, are increasingly operating as quasi credit accounts, with consumers often presenting at support services having accumulated debts they had no capacity to pay in the relevant account period. Frequently substantial fees and charges are also levied on those outstanding balances.

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<sup>1</sup> Reserve Bank of Australia Bulletin Statistics published at [www.rba.gov.au/Statistics/Bulletin](http://www.rba.gov.au/Statistics/Bulletin), Statistical Table D.2 Lending and Credit Aggregates.

<sup>2</sup> Reserve Bank of Australia Bulletin Statistics published at [www.rba.gov.au/Statistics/Bulletin](http://www.rba.gov.au/Statistics/Bulletin), Statistical Table C.1 Credit & Charge Card Statistics.

<sup>3</sup> Reserve Bank of Australia Bulletin Statistics published at [www.rba.gov.au/Statistics/Bulletin](http://www.rba.gov.au/Statistics/Bulletin), Statistical Table D.2 Lending and Credit Aggregates.

<sup>4</sup> Reserve Bank of Australia Bulletin Statistics published at [www.rba.gov.au/Statistics/Bulletin](http://www.rba.gov.au/Statistics/Bulletin), Statistical Table D.5 Banking Lending Classified by Sector.

<sup>5</sup> Financial Stability Review published at [www.rba.gov.au](http://www.rba.gov.au) on 25 March 2004.

<sup>6</sup> Financial Stability Review published at [www.rba.gov.au](http://www.rba.gov.au) on March 2005, p. 8.

<sup>7</sup> Financial Stability Review published at [www.rba.gov.au](http://www.rba.gov.au) on March 200, p. 11.

High levels of household debt, while not intrinsically bad, can leave families and individuals particularly exposed to financial hardship and loan default in the event of an economic downturn or a reduction in income or increase in expenses. Similarly, the trend towards revolving debt and interest-only debts has meant that households are exposed to larger amounts of debt for longer periods than has ever been the case historically. All this adds up to an increased likelihood that households will experience debt collection activity and a more urgent need to ensure that debt collection activity is fair and accountable.

There has also been a steady increase of creditors selling their debt. This is usually done after the creditor has attempted to collect the debt itself and after it has outsourced it to a collection agent without success. The creditor writes the debt off and then sells it to a debt collection company. The buying and selling of large tranches of debt is relatively recent and has coincided with changes in the industry that have resulted in emergence of several large, publicly listed debt collection companies. Listing has allowed the companies to raise the capital they needed to buy the debt. There have been several recent well-publicised transactions, including, for example, Credit Corp's reported purchase of debts with a face value of \$50 million from St George Bank in mid 2003<sup>8</sup>, Alliance Factoring's purchase of a large tranche of Telstra debt in 2003.

Debt collection has also been affected by consolidation of the industry in recent years. Two trends have converged to contribute to such consolidation. On the one hand, listing provided companies with capital to acquire debt and, on the other, there was more debt to buy. CreditCorp, for example, listed with a market capitalisation of \$13.8 million. Repcol raised \$14 from its Initial Public Offer and \$8 million from two series of convertible notes in the 12 months to November 2002. At the same time companies looked forward to an expansion of their market. The Managing Director of CreditCorp noted in his half yearly update for the half year ending in December 2001 that there was a trend to selling debts earlier in the cycle which, while increasing the cost of acquiring the ledgers, improves the collectibility levels. The Chairman of Collection House also noted how 'robust' the industry was in his half yearly report to shareholders in 2003.

The net result of increased outsourcing and larger debt collection companies is a more anonymous relationship between debtors and debt collectors and a greater reliance on automated systems which are inflexible, unresponsive to individual circumstances and susceptible to error.

At the same time we have seen a move away from the view that the need for debt collection is a sign of something awry, to a system where a certain level of debt collection is considered sustainable and the cost factored into the pricing of products. This approach is evident in the marketing of credit limit increases in relation to continuing credit, for example, where a track record of

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<sup>8</sup> Sydney Morning Herald, 31 July 2003.

meeting minimum payments is given far greater weight than traditional credit assessment which would see the entire debt able to be paid out within a reasonable period. This approach fails to take into account the financial hardship this can cause for individuals and households, and the consequent stresses on the wider community, particularly community services. Further, we submit that the assumptions on which this approach is based are flawed and could lead to an enormous growth in the need for debt collection in the event of an economic downturn.

## **Need for fair, legal and accountable debt collection**

Debt collection is an inevitable aspect of commerce. As a society increasingly reliant on credit, we have an urgent need to ensure that debt collection is fair, efficient, accurately targets debtors, and does not create undue financial hardship and stress leading to strain on community and government services. At the same time collection activity should be conducive to an equal distribution of available resources among creditors and should not compel or induce debtors to become further indebted, thereby increasing the debtors' potential hardship and shifting the problem to other creditors.

Previous reports produced by consumer organisations including *Selling Their Customers Out* by CCLS (Vic) and *A Report in relation to Debt Collection* by CCLC (NSW) have propounded many of the problems arising for consumers in the context of modern debt collection. Many of these problems persist and examples are contained in the detailed comments below. It is imperative that these problems are addressed as the spectres of increasing interest rates and a possible downturn in the economy loom large.

## **Not an attack on small business**

There is a general assumption that calls for more accountability in relation to debt collection are an indirect attack on small businesses who rely on debt collectors to pursue unpaid accounts. This assumption ignores two important matters:

1. Consumer organisations are not calling for an end to debt collection, or indeed an end to outsourced debt collection, only for appropriate checks and balances; and
2. Comparatively few complaints about debt collection relate to small business debt. Overwhelmingly complaints to legal advice services such as consumer credit legal services, and generally in the experience of contributing organisations, debt collection problems relate to credit card debts, telecommunications debts, and debts originating from other types of loans. It follows that the creditors concerned are predominantly large institutionalised companies.

## Regulation of debt collection in other jurisdictions

Before discussing the role and detailed content of the Guideline, we believe that it is worth commenting briefly on the different ways in which debt collection is regulated in other comparable countries.

A key difference between Australia and a number of comparable countries is that in other jurisdictions there is well-established legislative recognition of debt collection as a consumer and regulatory issue worthy of attention in its own right. In contrast, the approach in Australia is patchy and non-uniform in the States and Territories, with some jurisdictions providing regulation of debt collectors, and others not. In addition, in some jurisdictions that do have regulation, responsibility for administering the regulation is given to an agency that does not normally have a consumer protection focus (eg the Police Department). In these cases, there is a risk that non-compliance with debt collection regulations can be relegated to a secondary or tertiary priority.

At the national level, while s 60 of the *Trade Practices Act* (and the equivalent provision in the ASIC Act) does apply to debt collectors, as well as other businesses, there is no specific regulation of debt collection as an industry.

As a consequence, inconsistent standards apply across Australia, and there is little opportunity or forum for discussing other regulatory options for minimising unfair debt collection practices.

A brief summary of the regulatory regimes in other countries is provided below.

### *United States*

At the Federal level, the *Fair Debt Collection Practices Act*<sup>9</sup> was introduced to “eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”<sup>10</sup>

The *Fair Debt Collection Practices Act* does not impose licensing or registration requirements on debt collectors however, it does impose a range of conduct requirements on debt collectors that go beyond what might be covered by a general prohibition against undue harassment or misleading or deceptive conduct.

For example, the Act:

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<sup>9</sup> Title VIII – Debt collection practices, Consumer Credit Protection Act (15 U.S.C. 1601 et seq).

<sup>10</sup> Section 802(e).

- requires the collector to send a written notice about the debt within 5 days of the initial communication with a consumer. The notice must include the amount of the debt, the name of the creditor, and a statement that if the consumer notifies the collector in writing that the debt is disputed, the collector will obtain verification of the debt;<sup>11</sup>
- limits the way in which a debt collector can seek location information from a third party;<sup>12</sup>
- provides that, on written request, the collector must cease communicating with a consumer who refuses to pay a debt;<sup>13</sup>
- provides that a breach of the legislation can lead to civil liability to the consumer, in the amount of the actual damage suffered or additional damages not exceeding \$1,000.<sup>14</sup>
- Requires debt collectors to commence proceedings in the same jurisdiction in which the consumer signed the contract or in which the consumer resides at the commencement of the action<sup>15</sup>.

Responsibility for enforcing the Act lies with the Federal Trade Commission,<sup>16</sup> and the Act also obliges the Commission to report to Congress annually on its administration of the Act, assessment of compliance, and enforcement actions taken.<sup>17</sup>

In addition, many State governments have passed local Fair Debt Collection laws, detailing prohibited practices similar to those outlined in the Federal Act.<sup>18</sup>

### ***United Kingdom***

The United Kingdom does not have legislative instruments that specifically deal with the debt collection industry in its own right. However, under the *Consumer Credit Act 1974*, debt collectors are required to obtain a consumer credit licence.<sup>19</sup>

A licence will be granted where the Office of Fair Trading is satisfied that the applicant:

- is a fit person to be involved in the activities the licence covers; and
- the name under which the applicant wants to be licensed is not

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<sup>11</sup> Section 809.

<sup>12</sup> Section 804.

<sup>13</sup> Section 805(c).

<sup>14</sup> Section 813(a).

<sup>15</sup> Section 811(a).

<sup>16</sup> Section 814(a).

<sup>17</sup> Section 815.

<sup>18</sup> For example, the Fair Debt Collection Practices Act, California (Civil Code Section 1788 et seq.)

<sup>19</sup> See

<http://www.offt.gov.uk/Business/Legal+Powers/Consumer+Credit+Act/CCA+who+needs+a+licence.htm>

misleading or undesirable in any other way.<sup>20</sup>

“Fitness” is not defined in the legislation, but the OFT can issue general or sectoral guidance, and a failure to comply with such guidance will be relevant to assessing fitness. Fitness is an ongoing requirement for licence holders, and licenses can be revoked or suspended, or the OFT can make compulsory changes to a licence.

In July 2003, the OFT issued sectoral guidance for debt collectors.<sup>21</sup> This guidance lists examples of unfair business practices that could bring a debt collector’s fitness under question.

Examples of unfair (and thus prohibited) conduct:

- failing to provide debtors or creditors with information on the status of debts (eg not providing balance statements when reasonably requested);<sup>22</sup>
- ignoring or disregarding debtors’ legitimate wishes in respect of when and where to contact them;<sup>23</sup>
- falsely implying or stating that action can or will be taken when it legally cannot;<sup>24</sup>
- pursuing third parties for payment when they are not liable;<sup>25</sup>
- not ensuring that an adequate history of the debt is passed on as appropriate, resulting in repetitive and/or frequent contact by different parties;<sup>26</sup>
- pressuring debtors to pay in full, in unreasonably large instalments, or to increase payments when they are unable to do so;<sup>27</sup>
- ignoring and/or disregarding claims that debts have been settled or are disputed and continuing to make unjustified demands for payment;<sup>28</sup>
- not ceasing collection activity whilst investigating a reasonably queried or disputed debt.<sup>29</sup>

There is a level of similarity between the UK guidelines and the proposed ACCC/ASIC guidelines. However, while the content is in many areas similar, the key difference is that, in the UK, failure to comply with the guidelines has potentially a more serious impact, in that it can be grounds for suspending or revoking a licence. Further the comprehensive licensing of participants in the credit industry from credit providers and intermediaries through to debt collectors, provides a useful vehicle for imposing uniform obligations on in-

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<sup>20</sup> Section 25(1).

<sup>21</sup> Office of Fair Trading *Debt collection guidance: Response to consultation paper and final guidance on unfair business practices*, July 2003, OFT664.

<sup>22</sup> Clause 2.2(e).

<sup>23</sup> Clause 2.2(g).

<sup>24</sup> Clause 2.4(b).

<sup>25</sup> Clause 2.4(f).

<sup>26</sup> Clause 2.6(d).

<sup>27</sup> Clause 2.6(f).

<sup>28</sup> Clause 2.6(h).

<sup>29</sup> Clause 2.8(k).

house and outsourced collection activity.

## *Canada*

In Canada, debt collection is regulated at the level of the provinces and territories. All jurisdictions require debt collectors to be licensed or registered, and most jurisdictions also impose additional conduct requirements on debt collectors<sup>30</sup>.

For example, under the *Debt Collection Act* 1996 in British Columbia,<sup>31</sup> collection agents, collectors and bailiffs must have a valid and subsisting licence in order to act as a collection agent, collector or bailiff.<sup>32</sup> Licences can be refused, suspended or terminated if it is not in the public interest for the licensee or applicant to hold a licence because of the financial responsibility or record of past conduct of the applicant or licensee, or, if it is a corporation, the financial responsibility or record of past conduct of any of its officers or directors.<sup>33</sup>

Among other things, a failure to comply with the Debt Collection Act or the earlier Collection Agents Act may preclude a person from holding a licence.<sup>34</sup>

The Act prohibits unreasonable collection practices, including:

- making a charge, threat or promise that pertains to matters other than the collection of the debt;<sup>35</sup>
- communicating with a debtor, the debtor's family or the debtor's employer in a manner and in circumstances that, because of the nature or frequency of the communications, alarm, distress and humiliation are likely to result;<sup>36</sup>
- collecting or attempting to collect money from a person who is not liable for the debt;<sup>37</sup> and
- collecting or attempting to collect money that exceeds the amount of the debt owing.<sup>38</sup>

In addition, the Act enables the Director of Debt Collection to object in writing to a particular practice that is causing alarm, distress or humiliation, and the collector must then stop using that practice.<sup>39</sup>

Non-compliance with the provisions in the Act is a criminal offence,

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<sup>30</sup> See

[http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/h\\_ca01726e.html](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/h_ca01726e.html).

<sup>31</sup> [RSBC 1996] CHAPTER 92.

<sup>32</sup> Section 2(1).

<sup>33</sup> Section 5(1).

<sup>34</sup> Section 5(3)(f).

<sup>35</sup> Section 14(2)(a).

<sup>36</sup> Section 14(2)(c).

<sup>37</sup> Section 14(2)(f).

<sup>38</sup> Section 14(2)(g).

<sup>39</sup> Section 14(3).

punishable by fine,<sup>40</sup> however, the Act also provides a civil remedy. Where a court finds that a debtor has suffered loss, damage or inconvenience as a result of a contravention of the Act (or regulations), the debtor is entitled to judgment for the actual damages suffered, or \$100, whichever is the greater.<sup>41</sup>

Similarly, in Ontario, under the *Collection Agencies Act* 1990,<sup>42</sup> registration is required before a person carries on a business as a collection agent or acts as a collector.<sup>43</sup> Grounds for refusing registration include where the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;<sup>44</sup> and where the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.<sup>45</sup>

The *Collection Agencies Act* includes a list of prohibited practices, somewhat more limited in scope than those found in the British Columbia legislation.<sup>46</sup>

There have also been developments at the national level in Canada. In 2001, the Federal, provincial and territorial Ministers responsible for consumer protection agreed to “harmonize, across the country, the rules governing debt collection through collection agencies”<sup>47</sup>. In 2003, the Consumer Measures Committee of Industry Canada developed a ‘Harmonised list of prohibited collection practices’.<sup>48</sup> These are minimum standards, and will enable all jurisdictions to implement a common list of prohibited practices<sup>49</sup>.

The harmonised list includes the following:

- Except for the sole purpose of locating the debtor’s address or telephone number, no [collection agency] shall contact or attempt to contact any member of the debtor’s family or household, or any relative, neighbour, friend or acquaintance of the debtor unless (a) the person has guaranteed the debt, and is being contacted in respect of that guarantee; or (b) the debtor has requested the contact;<sup>50</sup>
- No [collection agency] shall directly or indirectly threaten or state an intention to proceed with any legal action: (a) for which the [collection agency] does not have the written authority of the creditor; or (b) for

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<sup>40</sup> Section 19.

<sup>41</sup> Section 20.

<sup>42</sup> R.S.O. 1990, Chapter C.14.

<sup>43</sup> Section 4(1).

<sup>44</sup> Section 6(1)(b).

<sup>45</sup> Section 6(1)(d).

<sup>46</sup> Section 22.

<sup>47</sup> See Communiqué, ‘Consumer Ministers Take Action to Improve Consumer Protection in the Evolving Marketplace’, 25 May 2001, at <http://www.ic.gc.ca/cmb/welcomeic.nsf/ffc979db07de58e6852564e400603639/85256a220056c2a485256a570067e78f!OpenDocument>.

<sup>48</sup> Available at [http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/hlpcp250403.pdf/\\$FILE/hlpcp250403.pdf](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/hlpcp250403.pdf/$FILE/hlpcp250403.pdf).

<sup>49</sup> See

<http://strategis.ic.gc.ca/epic/internet/incmc-cmc.nsf/en/fe00036e.html>.

<sup>50</sup> Clause 2(1).

- which there is no lawful authority;<sup>51</sup>
- No [collection agency] shall attempt to collect payment of a debt until the debtor has been notified by means of a private written communication ... of the name of the creditor ..., the balance owing on the account, and the identity and authority of the person making the demand;<sup>52</sup>
  - A [collection agency] may not initiate any verbal contact with a debtor until 5 days after this written communication has been sent to the debtor;<sup>53</sup>
  - No [collection agency] shall ... where the person has informed the [collection agency] that the person is not the debtor, continue to communicate with that person unless the [collection agency] first takes all reasonable precautions to ensure that the person is in fact the debtor.<sup>54</sup>

## *Summary*

Regulation in the jurisdictions discussed above generally includes licensing or registration, a detailed description of unacceptable conduct by debt collectors, positive obligations in relation to disclosing information, and real sanctions for non-compliance. In addition, in most cases, the list of prohibited practices is more extensive than that found in the Australian guidelines, providing greater protection for debtors and third parties in those countries. In Part 3 of this submission, we note some of the specific provisions in other jurisdictions by way of comparison.

In failing to provide the positive obligations, or real sanctions for non-compliance, Australia's reliance simply on non-enforceable guidelines means we are lagging behind comparable countries. Given the increasing role of consumer credit in Australia, and the increasing levels of household debt, this is a poor outcome for Australian consumers.

## **The need for legislation and an integrated regulatory approach**

While we support the need for this Guideline to be updated, we submit that there are matters both covered by the Guideline and beyond its scope that must be addressed by the legislature.

Despite the ostensible acceptance of the 1999 Guideline as “akin to law” by significant parts of the debt collection industry, consumer agencies continue to receive large numbers of complaints. The Legal Aid Commission of NSW, for

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<sup>51</sup> Clause 6.

<sup>52</sup> Clause 8(1).

<sup>53</sup> Clause 8(1).

<sup>54</sup> Clause 11(b).

example, reported to the Consumer Credit Legal Centre (NSW) Inc in its research project “Report into Debt Collection”<sup>55</sup> that debtor harassment was the most common complaint in relation to debt collection practices. This was also demonstrated by the results of the online as well as the phone-in survey<sup>56</sup>. This suggests that a Guideline is insufficient without proper regulation and adequate monitoring and compliance activity.

Most importantly, this is a view that is shared by industry. In a recent address by Mr Michael Watkins, Corporate Counsel of Collection House Limited, to the Financial Counsellors’ Association of Queensland Conference in 2005, he stated, “There is no doubt that *the* most significant issue in debt collection in Australia during the past 10 years has been the failure of our state and federal legislators to build a nationally consistent body of consumer law. This fundamental legislative failure has been to the detriment of consumers and debt collectors alike. It has produced confusion, uncertainty and significant financial cost.”

From the consumer perspective, it is imperative that debt collectors be regulated, with uniform obligations for all debt collectors, including in-house debt collectors. Legislation is needed to deal with a range of unfair debt collection practices that are currently not covered by the Guideline, or are not covered adequately by the Guideline.

As consumer advocates have regularly noted, section 60 and its equivalent in the *ASIC Act* do not cover the field of unfair practices in debt collection. Nor can they provide an effective vehicle for imposing positive obligations on debt collectors to deal fairly with debtors and third parties. While the guidelines can play an important role, particularly with adequate monitoring, compliance and enforcement activity, more is needed.

In our view, the limitations of the guideline are such that it is important to explore additional mechanisms to ensure appropriate behaviour by debt collectors. Our preference is for specific debt collection legislation, that would be national or uniform; would require registration or licensing; and would encompass a range of negative and positive obligations on debt collectors to deal fairly with debtors and third parties.

For example, legislation could encompass principles and obligations in relation to:

- acting fairly, honestly and efficiently when dealing with debtors and third parties;

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<sup>55</sup> “Report into Debt Collection”, Consumer Credit Legal Centre (NSW) Inc, Sydney. Available online: <http://www.cclcnsw.org.au>

<sup>56</sup> As part of the research for the “Report into Debt Collection”, the Consumer Credit Legal Centre (NSW) together with the Australian Consumers’ Association conducted a survey in relation to consumers’ experience with debt collection. The phone-in survey was conducted between 10 and 17 February 2004, with 70 telephone responses. The results of the survey are included in Chapter 10 Appendix A of the “Report into Debt Collection”.

- verification of alleged debts before collection activity starts;
- proper identification of complaints and disputes;
- not chasing debts that have been paid, settled or written off;
- ensuring the debtor is correctly identified;
- issuing proceedings in the consumers' jurisdiction;
- not attempting to collect debts that are statute-barred;
- allowing IDR and EDR processes to work;
- improving access to and coverage of EDR options;
- charging only reasonable enforcement and collection costs;
- dealing appropriately with requests for repayment arrangements;
- not imposing unfair pressure to apply for additional credit;
- appropriate use of the credit reporting system; and
- dealing appropriately with consumers in hardship.

While some of these issues are partially dealt with in the proposed guideline, we believe that they could be more fully dealt with in specific fair debt collection legislation.

For example, the requirement to provide proof of debt and what that proof should entail is a matter that should be clearly codified to ensure that adequate systems are in place to enable the flow of necessary information between creditors and collectors. A modified version of the US system outlined in the section above on overseas jurisdictions could be adopted as part of uniform or Federal debt collection legislation requiring certain basic information to be supplied on first contact with a debtor such as the amount off the debt, the identity of the debt collector, the identity of the creditor if different and the identity of the original creditor if the debt has been sold. Further information and a cessation of collection activity could then be required upon receiving notice that the debt is disputed. Such information could include for example:

- Original contract, invoice or application as applicable,
- Copies of the last account statement or relevant invoices.
- Copies of any relevant default notice or overdue notices or related correspondence,
- Itemisation of any additional costs, interest, default fees or other charges that have been added since the last statement,
- A copy of any relevant court order or judgment.

Another issue worthy of specific regulation is the restriction of unreasonable enforcement or collection charges.

#### **Case Study from CCLS (VIC)/ Credit Helpline**

Mr M had a charge card, and had missed payments due to unemployment. Correspondence from the charge card company suggested that it had agreed to his request for an extension, however he soon received a demand for payment within 7 days, and threatening referral to a debt collector if payment wasn't made within that time.

Six days later, Mr. M received a letter from a debt collector demanding payment of the debt owing to the charge card company – but the amount was 10% more than the demand made by the charge card company the week before. There was no mention by the charge card company or the debt collector of any enforcement charge.

Mr. M complained to the debt collector about the larger amount on a number of occasions, but the debt collector simply demanded full payment and offered no explanation.

Mr. M's lawyer eventually discovered that the charge card company had added 10% as enforcement costs just before passing the debt to the debt collector. The charge card company agreed to waive the costs following arguments that its actions had led Mr. M to believe that he had an extension of time.

However, this matter raises issues about how debt collection costs are charged, and illustrates the difficulties a consumer may face in identifying whether a dispute lies with the creditor or the debt collector.

#### **Case Study from CCLS (VIC)/ Credit Helpline**

October 2004 -- A single mother on the pension received a letter from a solicitor demanding \$23.90 for outstanding video hire, plus \$150 for the solicitor's costs. The document she received advising of date fixed for filing of a summons was designed to look like a Court document.

Enforcement is also a key issue. The complaints based system of compliance in relation to debtor harassment is ineffective for a number of practical reasons:

- Debtors are generally not aware that there are guidelines in relation to debt collection – even when seeking assistance from consumer agencies debtors rarely present to complain about harassment, they seek assistance because they can't pay the debt (or dispute the debt)
- Debtors are not clear on which government agency to complain to
- Complaint lodgement processes are often not user-friendly or accessible to people with low levels of literacy, and/or poor access to or understanding of the internet
- Complaints investigation is slow and often futile for lack of evidence
- Regulators are limited by their resources and are reluctant to take action unless there are clear systemic issues, leaving individuals without redress
- There are no incentives to complain - Lodging a complaint does not guarantee any relief from harassment and debtors often fear collection activity will be elevated in retaliation

The following case studies provided by the Financial Counsellors' Association

of Queensland put some of these issues into sharp relief:

**Case Study from Financial Counsellors' Association of Queensland**

A financial counsellor wanted to assist a debtor to complain about the tactics of a debt collector. This was July 2004. After checking the ACCC website they discovered they needed to complain to ASIC. They checked ASIC's website to be informed they need to complain to their local OFT. The QLD OFT was phoned. The operator knew nothing of S60 complaints and need to check with her supervisor. After a few minutes she said the complaint had to go through ASIC. On being informed that ASIC had said to contact OFT, she said that the debtor could then fill in the general complaint form but she did not sound confident. The wording of the OFT Form was not conducive to lodging a complaint about the activities of a debt collector breaching S60. By this stage the debtor was confused and did not want to proceed.

**Case Study from Financial Counsellors' Association of Queensland**

A debtor became ill and then unemployed. She was unable to pay her mobile phone contract and it was consequently disconnected. Three months later she was contacted by a debt collector demanding full payment. No documentation was produced and the figure demanded seemed excessive. Despite informing the collector she was unemployed and had no assets, she was told she would be served a summons and personal possessions would be taken. The collector phoned 3 times a day and used intimidating language. She saw a financial counsellor in Brisbane. A letter was sent to the debt collection agency telling them not to contact the debtor directly but to deal with the financial counselling agency. This was ignored and a complaint was written to the ACCC. Three weeks later a response from the ACCC was received stating they could take no action due to a lack of evidence.

In both the above cases the debtor was assisted by a financial counsellor. It can be presumed the situation would be even more difficult for a debtor attempting to complain without assistance.

We submit that the effectiveness of the complaints system would be greatly enhanced if:

- Collection activity was required to cease pending the investigation of a complaint or a repayment arrangement proposed by the debtor accepted
- The debt collector was subject to compensation and a minimum civil penalty or minimum damages award in the absence of demonstrable loss whenever a breach of s60 or the equivalent section of the ASIC act has been established
- Debtors were given the power to seek "cease and desist" orders (and compensation or civil penalty orders) from an appropriate local jurisdiction (for example, the CTTT in NSW) so that they are able to take individual action, in the absence of enforcement activity by the relevant regulator

- appropriate representative bodies were able to take action on behalf of a consumer or a group of consumers where individuals feel either disempowered or unable to take individual action.

These options could be implemented through specific debt collection legislation.

However, in the absence of a current commitment to specific debt collection legislation, we would also strongly support the development of a Fair Debt Collection guide or similar. This could be developed alongside the current ASIC/ACCC guidelines, but would focus primarily on matters that cannot be adequately addressed through that process. The content of the Guide would not be constrained by whether or not there is legislative support for the various obligations included in the Guide.

While a fair debt collection guide might not have legal force, there would be opportunities for its principles to be implemented through initiatives such as an industry code of practice. In addition, we would hope that, over time, the process of developing and implementing such a guide could raise standards in the industry, and the principles themselves could ultimately be codified in legislation.

We would be happy to work with ASIC, the ACCC and industry representatives to develop such a guide, and to identify opportunities for turning the guide's principles into practice.

## Part 2: General Comments on the draft Guideline

### The role of the Guideline

As made abundantly clear throughout the draft document, the Guideline does not have legal force. We would argue however that in jurisdictions that already license debt collectors (such as Queensland, NSW), consideration be given to making adherence to the Guideline a condition of maintaining the licence. Despite the general lack of legal force, the Guideline potentially plays a vital role in setting some parameters for conduct in a field where the relevant legislation is very general, cases have been few, and consumers are by definition relatively powerless. There are compelling commercial reasons for collectors to push the boundaries of legal behaviour: there is generally no interest on the part of collectors (in-house or external) to preserve or cultivate a relationship with the alleged debtor, and there may be considerable incentives to meet collection goals. It is in the interests of collectors and consumers alike that the extent of those legal boundaries are as clear as possible without necessarily limiting the general application of the relevant law.

To this end the Guideline as currently drafted is not proscriptive enough. The invocation “avoid” is used frequently in preference to the stronger phrase “do not”. In other places, lists of exceptions and rationales are put forward to suggest justification for departure from a general principle. For instance the admonition against communicating with a debtor’s children is followed by an outline of the circumstances in which this might be acceptable. The admonition about not leaving repeated messages for a debtor with a third party is followed by the suggestion that this is acceptable where the third party offers to act as a channel for communications with the debtor. We submit that these additional matters do little more than water down the effect of the general principle and should be deleted. Similarly, the bullet point list of reasons why a debtor might request contact at, or outside, specific times, appears to be unhelpful and risks being narrowly interpreted. The general principle that collectors should respect the reasonable wishes of debtors about preferred contact times and methods unless they have proven unworkable because the debtor is never available is preferable.

Finally, it must be made clear in Part 1 of the Guideline that although it is not law (unless compliance with the Guideline is mandated by subsequent legislation or regulation), contravention of the Guideline, while not definitive, will be a relevant matter to take into account in enforcement decisions.

The original guideline was an identification of the type of conduct that the ACCC considered might be at risk of contravening section 60 of the *Trade Practices Act* and other legislation. Indeed the Federal Court in *ACCC v McCaskey* referred to the 1999 Guideline as “helpful prudential guidelines for conduct which, if adhered to, should minimise the risk of contravening the

law.”<sup>57</sup>

We submit that the revised guideline should have the same intention, that is, it should be intended to identify the types of conduct that ASIC and the ACCC may consider to be in contravention of the relevant legislation that they administer. While the comments to the effect that “full compliance cannot provide a guarantee against enforcement action” are clearly necessary, compliance or otherwise with the guideline should be clearly stated as being relevant to the exercise of enforcement responsibilities by the regulators issuing the Guideline.

We appreciate that the Guideline is predominantly aimed at debt collectors and creditors. Greater effort is required in the future to ensure industry is aware of the Guideline, particularly given the ‘outsourcing’ of collection and subsequent failure to acknowledge or comply with the Guideline in the past. Regular education and communication with industry is required – a one off launch and presentation on the website etc is not sufficient to maintain adequate levels of awareness among an industry with reasonable staff turnover.

In addition, we submit that ASIC and the ACCC should also produce a similar know-your-rights document that would have the effect of empowering debtors or consumers with respect to debt collection – or work closely with fair trading and consumer agencies in the States to incorporate such information into their popular consumer materials. Such a document/s should spell out the rights of the debtor/consumer under specific circumstances (for example, see Queensland OFT’s Good Credit Guide). In answering Question 9 of the Discussion Paper, we submit that it may be more appropriate to include a list of consumer organisations that can offer advice to consumers with problems relating to debt or debt collection in this separate consumer-rights guide than in the present draft of the Guideline. Although the more enlightened creditors and debt collectors might refer consumers to community agencies that might assist them with their difficulties, that is far from universally the case.

## **The scope of the Guideline – Governments as Creditors**

An issue not addressed in the 1999 Guideline and similarly missing from the 2005 redraft is any reference to the role of governments as debt collectors. Governments raise and collect an enormous amount of money. They do so across a wide range of activities, from the standard levying of taxes and duties to the provision of services. The proper functioning of communities from local, to State and Territory, to the Commonwealth level, are reliant on the ability of governments to raise funds from the members of those communities.

In their various service delivery roles, governments come into contact with some of the most vulnerable and disadvantaged members of our community.

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<sup>57</sup> Australian Competition & Consumer Commission v McCaskey [2000] FCA 1037, at para 58 per French J.

For example at a State and Territory level, government agencies or authorities provide housing for people who cannot access private accommodation, either by renting or as purchasers. At a Commonwealth level, Centrelink is an enormous bureaucracy that provides a variety of services and supports.

In undertaking roles of revenue raiser and collector, governments should also be required to observe the standards of good practice imposed on any other person or entity engaged in debt collection. Regulatory frameworks do not however apply as predictably or consistently to governments and the Acts that the guideline seeks to support and illuminate are similarly affected by that inconsistency. The Guideline cannot and will not solve the confusion created by the various forms of Crown immunity that might apply. It should provide a principals base that is equally applicable to government debt collection activities.

There is a growing body of evidence that governments are not behaving properly in their debt collection activities. For example, the most recent annual report of the Commonwealth Ombudsman notes in the section devoted to Centrelink that “the largest category of complaints received ... about a single issue related to debt recovery”<sup>58</sup>. It then goes on to provide examples of conduct that do not meet the standards described in both the 1999 Guideline and the current draft. Similarly, the groups contributing to this submission have reported examples of poor conduct in the collection activities of State and Territory governments and authorities. That conduct ranges from refusal to provide any information substantiating debts, to ignoring the impacts of bankruptcy or limitations periods.

Governments are also more regularly utilising the services of large debt collection companies, and there is evidence that these private companies resort to intimidating and aggressive tactics that are blatantly unacceptable. Recently, the Herald Sun reported that the private debt collection company Dun & Bradstreet have threatened consumers that they would contact “employers to garnishee their wages, tax refund and bank accounts” if payments were not received within seven days<sup>59</sup>, at the same time refusing to take into account the current circumstances of the debtor or to negotiate repayment arrangements, but readily accepting credit card payments which only serves to perpetuate the debt cycle.

In addition, a briefing paper prepared by the National Welfare Rights Network<sup>60</sup> identifies a number of additional concerns, including inappropriate methods of contact by Dun & Bradstreet, for example, correspondence addressed “Dear Valued Welfare Recipient”, or letters that do not clearly identify its connection to Centrelink. There is also a concern that staff of the private company Dun & Bradstreet receive commission for amounts recovered which greatly increases the possibility of over-zealous debt collection

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<sup>58</sup> Commonwealth Ombudsman, Annual Report 2003-2004, Canberra p38.

<sup>59</sup> McManus, G. “Families harassed over debt,” *Herald Sun*, 19 March 2005.

<sup>60</sup> Thomas, G. “Dealing with Dun and Bradstreet about Debt Recover – one client’s experience”, the *National Welfare Rights Network*, 2005.

behaviour.

#### **Case Study from Welfare Rights Centre (NSW)**

Welfare Rights Centre (NSW) ('WRC') provides advice and representation on social security matters to people in NSW. They are often contacted by people who have a Centrelink debt which has been passed on to Dun and Bradstreet. The following case study which shows the difficulties that WRC had in negotiating with Dun and Bradstreet is an indicator of the systemic problems associated with debt collection of Centrelink debts; for those debtors attempting to resolve the same issues without representation by agencies such as WRC, the difficulties are further magnified.

A low-income earner Ms A was contacted by Dun and Bradstreet about an outstanding Centrelink debt of \$2,477. Dun and Bradstreet insisted that she make payments towards the debt, but she could not afford to make those payments as demanded. After unsuccessfully trying to negotiate with Dun and Bradstreet, Ms A contacted WRC.

WRC contacted Dun and Bradstreet to negotiate on their client's behalf, but were met with immense difficulties. The staff members refused to accept the offer made as well as other attempts to negotiate, threatening to "escalate the matter", when in practice, Dun and Bradstreet cannot do this as debtors that have not come to a repayment arrangement within 4 months will go back to Centrelink.

WRC questioned what processes were undertaken to establish whether Dun and Bradstreet's debt recovery practices placed a client in financial hardship, and whether the company had written to the client seeking a review of her income and expenditure, to make a realistic assessment of what she could afford to repay. WRC was told that no assessment of the client's capacity to repay the debt in the way suggested had taken place. Dun and Bradstreet also did not respond to WRC's questions about whether or not they were following proper assessment procedures as required by Centrelink, and about how judgments were made about a person's capacity to pay.

The matter was only resolved when WRC contacted the Centrelink Debt Recovery Customer Solutions Manager who negotiated with Dun and Bradstreet to accept Ms A's original offer.

The use of private companies by government agencies only increases the expectation that they should follow the rules that apply to debt collection more broadly. To not do so, may have the impact of further marginalising already disadvantaged consumers. It also potentially gives government unfair and unintended advantage over other creditors. Finally, it has the potential to undermine the credible operation of the Guideline and the law.

We note that the definition of 'collector' in the draft Guideline includes 'government and court officials'. However, we believe that a stronger

statement is needed that, as a minimum, government debt collection activities and policy documents should adopt and implement the Guideline. Similarly, contracts with external collectors acting on behalf of governments, should require compliance with the Guideline and contain sanctions for non-compliance up to and including the cancellation of those contracts.

## **Compliance and Enforcement**

The effectiveness of the Guideline in driving improved practice will largely depend on the commitment to ensure compliance and in the event of non-compliance, to take enforcement action. After the release of the 1999 Guideline the ACCC made clear its intention to monitor compliance and, as appropriate, to take enforcement action. That commitment resulted in the first court decisions on alleged breaches of section 60 of the Trade Practices Act.

Unfortunately however, messages about the importance of compliance dim as quickly as the attention of regulators is diverted elsewhere, or the focus of public statements switches to new priorities. As attractive as it might be, it is unrealistic to expect that the delivery of the Guideline itself will see an end to complaints about harassment and coercion made to consumer agencies. That said, the release of the revised document presents a unique opportunity to restate, in clear terms, the importance of complying with the law and the consequences for not doing so. It must also be made clear that there is capacity and commitment to prosecute in the event of non-compliance.

The case studies provided by the Financial Counselling Association of Queensland in the section entitled “The need for legislation and an integrated regulatory approach” above demonstrate some of the practical difficulties debtors face in enforcing their rights under the current law. A number of suggestions for reform are outlined in that section. Nevertheless, even within the context of the current law the Guideline could be more effectively promoted, the accessibility of complaints processes could be improved and steps taken to specifically empower financial counsellors and other interested community workers to assist debtors to complain. There could also be greater communication and coordination of complaints processes and enforcement activities between the relevant regulators to ensure that debtors are not lost at first base as a result of referral fatigue.

In addition to these measures, regulators should undertake proactive compliance audits, which not only involve auditing debt collectors’ policies and procedures to ensure they comply, but also incorporate eliciting feedback from debtors who have been contacted by the debt collection organisation. Such audits could be conducted at random and in response to a pattern of complaints.

In June 2003, the ACCC publicly launched a campaign to address the needs of vulnerable and disadvantaged consumers. The campaign is ongoing and links have been established with ASIC to facilitate referral of matters covered by

the ASIC Act. The experience of the groups involved in the preparation of this submission suggests that those who suffer the most from inappropriate and illegal debt collection activities are amongst the most vulnerable and disadvantaged members of our community. An opportunity exists therefore to launch the Guideline in a way that emphasises the importance of good debt collection practices *and* reinvigorates the commitment that both the ACCC and ASIC have made to issues confronting vulnerable and disadvantaged consumers. Presumably this should also assist in ensuring that the necessary resources and attention are available for proper compliance and enforcement programs.

We believe that there would also be value in ASIC and the ACCC regularly reporting on the implementation, and impact of the Guideline, and levels of compliance. This would increase transparency, and also increase the likelihood that the Guideline will continue to have a presence and relevance to industry after the initial flurry of activity surrounding the launch. As noted earlier, the Federal Trade Commission in the United States has such a reporting requirement in relation to its administration of the Fair Debt Collection Act.

## **Recognition for the Role of Financial Counsellors**

We submit that the Guideline should specifically recognise the important role played by financial counsellors in advocating for debtors, and specifically, in assisting debtors to reach workable repayment arrangements with creditors, including in many cases with multiple creditors. Financial counsellors provide information to consumers in financial difficulty. A thorough assessment of an individual or family's situation is followed by identifying what can be done to address the financial problems, and the possible advantages and disadvantages of those choices. Financial Counsellors are based in community agencies and are funded largely by State or the Federal Governments, though the sector generally is inadequately resourced.

Counsellors are required to act in the paramount interests of consumers, free of any conflict of interest and free of any commercial benefit. They provide a free, independent and confidential service.

While legal services experience some difficulties having their client's authority to act acknowledged and their correspondence returned (see our comments raised below in relation to Section 11: Contact where a debtor is represented), financial counsellors *regularly* report the following:

- Difficulties in having their client authorities recognised (including having to provide a different authority to each different branch of an organisation);
- Difficulties in reaching people with sufficient authority to settle matters by phone;

- Difficulties getting responses to written correspondence;
- Continuing contact with their clients by creditors/collectors despite their clear indication that they are representing the debtor.

These difficulties lead to frustration, inefficiencies and wasted resources. While we do not wish to limit the rights of other community workers and interested parties to represent debtors, we submit that the role of financial counsellors is so central that they should be given specific recognition in the Guideline.

Part of this proper recognition may flow on to how ASIC and the ACCC view representations about the role that financial counsellors play. There are an increasing number and variety of fee for service providers that describe their contractors or employees as financial counsellors or as offering financial counselling amongst their services. What is delivered is often anything but, not presenting options for consumers, but rather directing them to specific products or proposals, for which the consumer either directly or indirectly pays a fee. There are mechanisms for solving these mis-descriptions in the FSRA framework. So far there has been little enthusiasm evident for pursuing those options to prevent vulnerable consumers being misled and in the process further financially disadvantaged.

## **Part 3: Comments on the text of the draft Guideline**

Unless we have made specific comments, we agree with the text proposed in the draft Guideline.

Consistent with the section “Try avoiding debt collection completely”, the duty on collectors (and creditors) to ensure that a debt is owed before debt collection activity commences must be also be made explicit. While the majority of complaints about debt collection relate to the manner of collecting legitimate debts, an increasing number relate to debts for which the person contacted has no liability. While some mistakes will be inevitable and should be captured by effective dispute resolution processes, the attitude taken by some collectors that allegations can be made upon the flimsiest amount of information and the onus is entirely on the respondent to “prove their innocence” is totally unsatisfactory.

It is also important to point out some of the factors that lead to the necessity for debt collection in the first place, such as unexpected high bills (particularly on telecommunications accounts), aggressive marketing, and irresponsible lending. While some level of debt collection activity is undoubtedly inevitable, the availability of debt collection services should not be allowed to replace proper credit assessment and other measures to ensure that consumers are more likely to be able to meet their commitments as they fall due.

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

We make no comments in relation to this section.

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

In the experience of many consumer representatives, debt collectors contact debtors only when it is to their advantage. However, the reverse is not always as easy. The debtor, and often his or her representative, find it difficult to contact the debt collector in order to resolve any problems. The Guideline should require debt collectors to make themselves available for contact by the debtor and his or her representative.

In the case of a particular company, there is a designated department solely responsible for responding to written correspondence. When calling in to ask to speak to the person who wrote and signed the letter, the representative is told that the person does not take phone calls. Again, the representative is

only able to speak to a customer relations officer who usually will have no idea what has happened in the file. All of these delaying tactics need to be clearly addressed in the Guideline.

A related issue is that debtors who take the trouble to correspond with debt collectors in writing should receive a written response addressing any relevant issues raised by the debtor. All too often debtor correspondence is effectively ignored, while phone calls requesting the debtor to pay without regard to the content of the correspondence continue.

### ***Violence or physical intimidation***

We support the inclusion of the second paragraph which states that collectors should avoid the use of violence or physical force against a debtor, third party or against property. In the experience of contributing organizations, while physical violence is rare and extreme, it does occasionally occur, as the next case study shows.

#### **Case Study from CCLS (VIC)**

Our client's son, who lived separately to our client and her wheelchair-bound husband, took out loans with X and subsequently fell into arrears.

X repeatedly telephoned our client in an effort to make contact with her son. The calls became more frequent and aggressive over a period of a month or more. Our client instructed X not to contact her any more but the calls persisted.

Eventually, our client's son made an arrangement to meet Tom, a X recovery agent, at our client's home one evening.

At about 7:00pm, on leaving their house to attend an unrelated appointment, our client and her husband noticed their house being watched. After driving back to the house, they saw a male walking down the drive away from the house towards the street. Movement in the back yard had triggered the back security light. His car was parked across the drive, blocking access. Our client stopped next to his car, wound down her window, and asked 'What do you think you're doing?'

The man replied 'I can do what I like'.

Our client said, 'No, this is my house, you can't do what you like'.

He said 'My name's Tom, I spoke to you on the phone.'

Our client's husband then said 'You've got no right to go into our yard.'

Tom said to our client's husband, 'Get out of the fucking car.'

Our client said 'My husband can't walk; he can't get out of the car.'

Tom said 'I'll fucking pull him out.'

Our client then picked up her mobile phone and called 000 for the police.

Tom walked away and made a call on his mobile, walking around on the road while making the call. Our client asked Tom to move his car so our client could go into the drive and Tom did move the car just enough for our client to get up the drive.

Shortly after Tom's phone call, a large number of young people arrived in 10 cars together with 2 tow trucks. About 20 youths in all got out of the cars, late teens to early twenties. 3 or 4 girls were amongst them.

Our client could hear the youths talking amongst themselves about how they had people parked on various street corners to make sure that "he" couldn't leave with the car.

Our clients believed that the youths were talking about our client's son. One youth asked Tom what this person had done, and Tom said 'He's a big drug dealer.' Tom said to the youths, 'Hunt him down, run him off the road and bash him.' One of them asked, 'What's with these old people?' and Tom replied 'They're just trying to protect their son.'

When the cars turned up and the noise became very loud, our client called the police again and asked what was holding them up, and they arrived about five minutes after that. From the cars arriving to the police arriving would have been about 20 minutes.

Upon police attending from Keilor Downs station, Tom, the tow trucks, and the youths departed.

### **3. Your first contact with the debtor**

The Guideline should encourage debt collectors to make any initial contact with a debtor in writing. If a person is being telephoned simply to confirm their identity then substantial details about the debt should be subsequently forwarded in writing before any discussion about the substance of the matter commences. Where the debt collector is a different entity to the creditor, the professionalism of a letter is particularly important. For privacy and security reasons, alleged debtors should be entitled to investigate the identity and credentials of the debt collector to ensure that they are indeed who they claim to be and that they are authorised to collect the debt in question.

#### **United Kingdom**

Examples of unfair practice described in the Debt Collection Guidance include: contacting debtors without making clear who they are, who they work for, what their role is, and what the purpose of the contact is (para 2.2(c)); and failing to provide debtors with information on the status of debts (para 2.2(e)).

Further, this would limit the extent to which debtors could be unfairly pressured by ambush. We are aware of cases where debtors who were not liable for a debt have made a payment or commitment in the course of an initial phone call, which was then taken as an admission of liability. Even debtors who admit liability are often pressured into promising more than they can afford in the course of the initial phone call, immediately souring their relationship with the debt collector when they are unable to meet this commitment.

The fourth dot point provides that the debt collector should “give at least basic information about the alleged debt”. We submit that since it is an obligation of the debt collector to prove that the debtor owes the debt, it would only be consistent that as much information as possible is given at first contact. This is consistent with regulations in other jurisdictions (see below).

#### **United States**

Section 809 of the Fair Debt Collection Act provides that, within 5 days after the initial communication with a consumer, a debt collector must provide a written notice of the details of the debt, and give the consumer the opportunity to seek verification of the debt.

#### **Canada**

The Harmonised list of prohibited collection practices provides that no collection agency shall attempt to collect payment of a debt from a debtor until the debtor has been notified in writing of the creditor, balance on the account, and identity and authority of the collector (para 8(1)). Verbal contact with the debtor cannot be made until 5 days after this written material has been sent to the debtor (para 8(1)).

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

### **Case Study from CCLC (NSW) phone-in survey<sup>61</sup>**

In 2001 Mr B was contacted by a debt collector over a business loan. Mr B asked for statements to verify the amount owed but the debt collector never responded. In 2003 the debt collector commenced proceedings against him. He was not sure if he owed the debt and he had no idea how the debt was calculated.

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<sup>61</sup> See fn 7 above.

**Case Study from CCLS (VIC)**

A consumer received a letter from a debt collection about an old bank debt. The consumer did have a bank debt, but paid this to a different debt collector a year ago. He didn't know whether the letter was in relation to this paid debt. The consumer asked for proof of debt, but they said talk to the bank. The consumer called the bank, but they couldn't provide any information. He went back to the debt collector and asked for details, but the debt collector could only give a bank account number, however the bank said it didn't have any record of this. The consumer still did not think he owed any money, but debt collector threatened to sue him if he didn't pay. The bank agreed to provide documents, but this would take a week. The debt collector threatened to sue if the debt was not paid in "12 hours".

**Case study from CCLS (VIC)**

Consumers have been receiving letters from debt collectors demanding payment of a charge card debt. The consumers hadn't used the card for over 10 years and said it was paid out at that time. They asked the debt collector to provide information about the debt claimed. The debt collector couldn't provide any information, but threatened to sue if it wasn't paid.

**Case study from CCLS (VIC)**

The consumer received a letter from a debt collector claiming a telecommunications debt of \$76 from 5 years ago. She didn't believe she owed this, and asked for a copy of a bill, but this wasn't sent. The debt collector threatened listing of a credit report default if the amount wasn't paid.

**Case study from CCLS (VIC)**

A consumer had bank account that was closed 12 years ago, but he never obtained credit. A debt collector called claiming that they bought a debt from the bank and that he owed \$100. The consumer said he knew nothing of the debt and that if the debt collector couldn't provide any evidence of a debt, they should leave him alone. Neither the debt collector nor the bank had provided any information about the debt, but the debt collector threatened to issue legal proceedings and list default on his credit report.

This section of the draft Guideline suggests that the debt collector should give the debtor an itemised statement of account. We agree with this proposition but are concerned that this will be narrowly interpreted as being the only information which needs be supplied. We appreciate that it is not the role of the Guideline to create positive obligations or exhaustive lists of relevant information. However, we submit that this section should at the very least mention that other types of information may be relevant and applicable depending on the circumstances of the debtor. In situations where the debtor denies all knowledge of a debt because they have never dealt with the creditor concerned, for example, it may be misleading and deceptive or

unconscionable to pursue the debt without providing, a copy of an application form or other relevant information to connect the debtor to the account.

**Case Study from CCLC (NSW) phone-in survey**

A person had mistakenly paid a mobile phone bill that was not her own upon return from an overseas trip. When she tried to explain that she did not have a mobile phone, she was told that the fact that she had paid the first bill was an admission that she was liable. Neither the phone company nor a subsequent debt collector would entertain her story that she had neither applied for, possessed nor used the mobile phone in question at any time. No proof of debt was ever provided.

Eventually the Telecommunications Industry Ombudsman obtained a copy of the original application for the phone which clearly showed that a tampered copy of the respondent's drivers license containing a photo of someone else had been provided as proof of identity.

The second last paragraph of this section states, "Don't escalate your collection activity while the requested information is being supplied to the debtor." We submit that this does not go far enough. There should be a requirement that all debt collection activity be *suspended* pending provision of the information, or where some amount owing is conceded, an arrangement could be put in place regarding payment of the undisputed amount only. Debt collectors must also not take court action prior to supplying adequate information or particulars. In this context, collection activity should explicitly include any default listing on the debtor's credit report or threats in relation to default listing. Further, it is inappropriate for the debt collector to agree to provide information, but then explain that it may take time and the default will or may be listed in the interim period.

In this context, we note that where the debtor requests verification of the debt in the US, the debt collector must cease collection activity until the information is provided.<sup>62</sup> While this appears a sensible approach, there are concerns about its operation in practice. In particular, while the debtor has 30 days to seek verification, the collector is not obliged to cease collection activity until written notice requesting verification is received. This means that the right to seek verification can, in practice, be undermined by the collector's insistent demands for payment.<sup>63</sup> In addition, there is no obligation on the collector to provide written information on the fact that collection activity will cease if the debtor requests verification.<sup>64</sup>

In order to overcome the confusion that can be potentially caused to consumers, Griffith (2003) suggests that:

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<sup>62</sup> Section 809(b).

<sup>63</sup> Elwin Griffith (2003) - 'The search for more fairness in the Fair Debt Collection Practices Act' 37 *University of Richmond Law Review* 511, at 519.

<sup>64</sup> Griffith (2003) at 544.

**“The collector should be required to provide, in its initial communication, basic information about the debt and the accompanying validation notice. There should be a hiatus of twenty-one days before the collector can make any demands or threats”.**<sup>65</sup>

A similar approach should be adopted here.

Further, the 14-day time limit for the collector to provide information seems unnecessarily prescriptive. Indeed, in some cases, it will be shorter than the period permitted by legislation (eg the Consumer Credit Code allows 30 days for the provision of information that is more than 12 months old).

It is also possibly unnecessary. If collection activity must cease until the information is provided, then it is in the collector’s interest to get the requested information out as soon as possible. **More importantly the debtor should be given at least 14 days after the receipt of the information before collection activity recommences and at least 30 days (or one month) from the provision of the information before legal proceedings can be commenced.**

#### **Canada**

The harmonised list provides that the debt collector cannot make verbal contact with the debtor until at least 5 days after the written information has been sent to the debtor (para 8(1)).

Further, it is important to clarify the consequences of the debtor/creditor not being able/willing to provide the requested information. For this and the next Section on maintaining accurate records, no mention is made of what happens if the collector is unable to provide documents.

Consumers are always advised to be cautious, especially when it comes to financial matters. It is a strong consumer education message that a person is not to give money to others upon first contact or at least without checking out the facts. Consider the following consumer education messages:

- “Ask for the name of the person you are speaking to and who they represent.”
- “Ask for an explanation of anything you don’t understand.”
- “Read letters carefully if significant money, time or responsibilities are involved.”
- “Find out who you are dealing with. Independently verify any claims made by a sales person, investment adviser or advertisement.”
- “Don’t provide any financial or other personal information before you establish whether the company is legitimate.”
- “Don’t ever be afraid to ask questions. In fact, the more questions you

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<sup>65</sup> Griffith (2003) at 572.

- ask the better.”<sup>66</sup>
- “If in doubt, before handing over money, contact the trader and cross-check details by looking at the phone book, doing a business number search ... A reputable business will usually disclose detailed contact information on its website.”<sup>67</sup>

In a similar vein, industry cannot expect consumers to pay for any debt without information as well as verification. The Guideline should specify that where the collector is unable to comply with any request for basic information such as an itemised account, the collector should not continue to pursue the debt. More detailed information reasonably requested as proof of a disputed debt should be supplied, say, within one month. If this is not possible the collector should notify the alleged debtor in writing:

- Whether the requested information will be available and when,;
- Confirm that collection activity will not recommence until such information has been provided;
- Indicate that will advise the debtor if legal action is to be taken or the debt is to be referred back to the credit provider or passed to another debt collector.

We would also suggest that debt collectors be mindful of other sections of the Guideline in suggesting that legal action will be taken (see our comments in section 13. below). We submit that the circumstances in which it would be appropriate to take legal action when a reasonable request for information has not been complied with would be very narrow.

## 5. Maintain accurate records

### Case Study from CCLC phone-in survey

Ms Y was contacted by a debt collector over a credit card debt. The account balance did not seem to have decreased with all the payments Ms Y had made. She requested account statements to prove the amount of debt still owing but the debt collector did not supply anything. She refused to make further payments until she had received the requested statements. The debt collector suggested that she go bankrupt and became abusive on the phone.

A different debt collection company contacted Ms Y for the same debt. She eventually received her account statements, but these statements were only for the period before the account was outsourced for debt collection. The debt collector said she would look into it but the following week Ms Y was contacted again by a different employee who could find no record of the

<sup>66</sup> Office of Fair Trading, “Little Black Book of Scams”  
<http://www.fairtrading.nsw.gov.au/pdfs/corporate/publications/dft129.pdf>

<sup>67</sup> This last example was taken from “Consumer Rights – Scams” webpage at the ACCC website:  
[http://www.accc.gov.au/content/index.phtml/itemId/274365#h2\\_23](http://www.accc.gov.au/content/index.phtml/itemId/274365#h2_23)

previous conversation.

We submit that accurate record keeping is a very important best practice that must be followed by all debt collectors. However, we are of the opinion that the language used in this section in particular has the effect of watering-down the message significantly.

The first paragraph, for example, does not set the right tone for the rest of the section. It is not sufficient to say that accurate record keeping *can* be vital, it is in fact absolutely vital to ensuring that all demands for payment are accurate, that any payments or agreements made are properly accounted for, which in turn are essential to instilling consumer confidence.

Under the first dot point after the heading “Collectors” – it should specify that the collector should also accurately record the date and payment method of any payments made.

The paragraph beginning with “It is generally inappropriate to ...” and the dot points following is particularly lacking in vigour. “Reminders or correspondence about the consequences of non-payment” are more often than not nothing more than letters threatening various things including legal action. Where a temporary stay of action or enforcement has been granted, or further information promised to the alleged debtor, the debt collector should not make any demand for payment or otherwise attempt to threaten or cajole the debtor into settling the debt until the expiration of the period of the stay or the provision of the relevant information.

Similarly, in the case where liability for the debt has been disputed and the creditor/collector has not provided information that they agreed to provide, it is not sufficient to say “it is generally inappropriate to send reminders or other correspondence about the consequences of non-payment”. In these circumstances, as we stated above, the collector *must* no longer pursue the debt and further harass the consumer (see comments above in Section 4, Give clearly, Timely Information to Debtor).

#### **United Kingdom**

Unfair practices in the Debt Collection Guidance include “not ceasing collection activity whilst investigating a reasonably queried or disputed debt” (para 2.8k).

#### **United States**

Where a consumer requests validation of a debt, collection activity must cease until the information is provided (Fair Debt Collection Act s 809(b)).

In relation to the paragraph “Avoid misrepresentation about the amount of

debt ... or demanding payment for an amount that does not account for payments already made by the debtor”, we agree this is a useful point to make. However, we submit that there needs to be an overall statement in the introductory paragraphs to Part 2 of the Guidelines as well as at the beginning of this Section, stating the importance of only collecting the debts that are owed, and that there should be a positive duty on collectors to ensure that they are collecting the right debt. This would be consistent with the obligations in other jurisdictions. The role of creditors in providing accurate information to debt collectors when they outsource or sell debt should also be emphasised.

**Canada**

British Columbia Debt Collection Act: Prohibited conduct includes collecting, or attempting to collect money from a person who is not liable for the debt, and collecting or attempting to collect money that exceeds the amount of the debt owing.

Also, the harmonised list prohibits a collector from continuing to communicate with a person after the person has advised they are not the debtor, unless the collector ‘first takes all reasonable precautions to ensure that the person is in fact the debtor’ (para 11(b)).

## **6. Contact the debtor at reasonable hours**

The word “Only” should be inserted before the first sentence “Contact the debtor at reasonable hours...”.

We submit that the Guideline also needs to prohibit routine contact on weekends as the first contact regarding an overdue account. A major finance company now appears to routinely call on Sundays regarding any overdue payment regardless how small. Contact can often be made in business hours, particularly if people have a mobile number or do not work at that time (unless they have requested not to be called at such times). Contact on Saturdays, Sundays or public holidays should be avoided unless a reasonable number of attempts to contact debtors at other times have been exhausted, or the debtor has expressed a preference to be contacted at such times. Contact on weekends and public holidays should also be limited to between 1pm and 5pm.

**Canada**

The harmonised list prohibits contact on a Sunday, other than between 1pm and 5pm and on statutory holidays. However, on all other days, contact is permitted between 7am and 9pm (para 4).

A debt collector should only contact debtors by telephone after 8 a.m. We further submit there should be no contact at all after 8 p.m. (instead of 9 p.m. as stated in the Guideline). To permit contact up until 9 p.m. will inevitably

allow some debt collectors to make contact as late as possible, which is highly inappropriate for some debtors, especially the sick or the elderly.

We also submit that the examples given for when the debtor may request that contact be made at other times must be deleted. They might be taken to indicate that a person has to have one of those reasons or similar, when a person might simply have a general preference for contact at other times, as long as that person does provide alternative times for contact.

#### **United Kingdom**

Unfair practices include: contacting debtors at unreasonable times (para 2.2f), and ignoring or disregarding debtors' legitimate wishes in respect on when and where to contact them (para 2.2g).

## **7. Avoid unduly frequent contact with debtor**

#### **Case Study from CCLC (NSW) phone-in survey**

Mr K was contacted by a debt collector over a credit card debt. The debt collector sometimes called him more than three times in an hour, and at one time left 18 messages on his phone in a 3 hour period. The debt collector also told his co-worker about the debt and refused to believe that the co-worker was not Mr K.

We are pleased that the revised Guideline is much clearer about the number of calls that a debt collector could make to the debtor, and that it now also includes telephone, email and/or SMS messages.

#### **Case Study from CCLS (VIC) /Credit Helpline**

April 2004 – A caller to the Credit Helpline whose husband was very ill had arrears on a credit card. She claimed that the debt collector called her husband's mobile 6 times in half an hour.

#### **Case Study from CCLS (VIC)/Credit Helpline**

September 2004 – A caller complained that a debt collector was calling her up to 3 times per night.

#### **Case Study from CCLS (VIC)/Credit Helpline**

February 2005 -- A finance company was calling a consumer about the payment of a debt 9 times within one hour.

We query whether or not the first dot point should also include unanswered calls. In the experience of some of the contributing consumer organisations,

some debt collectors may not leave any messages, but may call incessantly and hang up when the phone is picked up as a means of harassing the debtor.

The first sentence under the heading of “Undue Harassment” should read “Unduly frequent contact likely to have the effect of wearing down or exhausting the debtor, or designed to have this effect ...”. The changed emphasis will more likely require the debt collector to have regard to the likely effect of their actions, rather than only looking at their intentions.

The section under the heading “Personal Visits” should emphasise that there must be no contact if the debtor refuses to agree to being visited. This is consistent with the first dot-point under subsection “Visiting the debtor’s home” on page 15.

## **8. Contact the debtor at an appropriate location**

Consistent with our submissions above in Section 7, Avoid unduly frequent contact with debtor, and the first dot-point under subsection “Visiting the debtor’s home” on page 15, we submit that the first sentence of this Section, “Generally, the debtor’s home will be the appropriate place to contact a debtor” must be qualified in the body of the text and not in a footnote. It should emphasise that there must be no contact if debtor refuses to agree to being visited.

### **United Kingdom**

Unfair practices include not making the purpose of any proposed visit clear (para 2.12a); visiting or threatening to visit debtors without prior agreement when the debt is deadlocked or disputed (para 2.12f); not giving adequate notice of the time and date of a visit (para 2.12g).

The first dot point after “Avoiding threatening or attempting to embarrass or shame a debtor” should not be in this section as sending open correspondence to a shared post box does not really come under “Contact the debtor at an appropriate location”. This and also the other dot points seem more appropriate in the “Treat the debtor with respect and courtesy” section.

## **9. Visiting the debtor’s home or workplace**

The guideline proposes that visiting times should be between 9 am to 9 pm. We submit that it would be highly inappropriate for any debt collector to visit a person’s home or workplace after 8 p.m., and thus the Guideline should be changed accordingly.

Consumer representatives are also concerned as to whether or not it is appropriate to contact a debtor at their workplace at all (unless specifically requested to do so), given that this could affect their reputation and unfairly

jeopardise their employment.

#### **United States**

A debt collector cannot contact the debtor at their place of employment if the debtor knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication (section 805(a)(3)).

#### **United Kingdom**

Unfair practices include: visiting debtors, unless requested, at inappropriate locations such as work or hospital (para 2.12h).

#### **Canada**

The Harmonised list provides that a collection agency cannot contact the debtor at work unless (a) the collector does not have the home address or phone number for the debtor, in which case verbal contact at the debtor's work, for the sole purpose of requesting the address or phone number, is permitted; or (b) the collector has unsuccessfully attempted to contact the debtor at home, in which case a single verbal attempt to contact the debtor at work is permitted. (para 3).

Where it requires the collector to leave the premises (home and workplace) immediately if requested to do so, a general statement about trespass laws should also be included.

## **10. Contacting family members and other third parties**

#### **Case Study from CCLS (VIC)/Credit Helpline**

August 2004 -- A caller complained that a debt collector acting on behalf of a bank disclosed details to a work colleague, and was hassling her 12-year-old daughter.

#### ***Family Members***

We submit that it is highly inappropriate for collectors to contact a family member to ask where the debtor lives. It is unlikely that such information will be given out by the family member, especially in light of the requirements limiting how much information the debtor could disclose to the family member about the debt, and the fact that the collector can only give his or her name and contact details. It should only be appropriate for a collector to contact a family member to leave a message for the debtor.

### **Case Study from CCLC phone-in survey**

A debt collector contacted Mr N over a bank loan debt. The debt collector had purchased the debt from a bank. Mr N was uncertain of the correct amount owed, and asked for a copy of the statements. No one had responded to his requests for 1-2 years.

The debt collector contacted Mr N again. He explained what had happened last time they contacted him but they did not care. The debt collector rang his children and told them that they would be taken to Court if their father doesn't pay the debt. Mr N was very angry about this and told the debt collector not to do it again or he would not pay anything and would stop negotiating with them.

After the initial few calls the debt collector's attitude improved and Mr N was able to make a payment arrangement to pay an agreed portion of the debt.

In regards to communication with the debtor's child under 18 years, we submit that this should be specifically prohibited. Under no circumstances is it appropriate to speak to a child about his or her parent's debt due to the impact this may have on the child's own sense of safety and security

The Guideline must be clear on this point, that even as a last resort, any contact with a minor would be regarded as being on the fringes of acceptable behaviour. It should also specify that even where the debtor asks the child to act as an interpreter, that communication with the child is only limited to this particular communication for which the child has been asked to act as an interpreter, and it does not equate to an ongoing authority for the collector to talk to the child every other instance.

### ***Third Parties***

We submit that the language of this subsection needs to be much stronger. Debt collectors should not only "avoid" coercing, or trying to get information under false pretences and the like, the guideline needs to reflect the language of the legislation prohibiting such conduct.

As a general rule, contact with third parties should not be ongoing. We argue that even at six-monthly intervals, repeated calls to a non-party could amount to harassment.

### **United States**

A debt collector can seek location information only once from a third party, unless more frequent contact is requested by the third party, or the collector reasonably believes that the earlier response of the third party was erroneous or incomplete, and that the person now has the correct or complete

information (section 804).<sup>68</sup> Collectors cannot contact third parties for purposes other than acquiring location information, without the prior consent of the third party (or an order of a relevant court) (section 805(b)).

### **Canada**

The harmonised guidelines state that “except for the sole purpose of locating the debtor’s address or telephone number, no [collection agency] shall contact or attempt to contact any member of the debtor’s family or household, or any relative, neighbour, friend or acquaintance of the debtor unless (a) the person has guaranteed the debt, and is being contacted in respect of that guarantee; or (b) the debtor has requested the contact (para 2(1)).

### **Case Study from CCLC (NSW) phone-in survey**

Mr Y has a terminal illness and receives a part-pension for financial support. He admits he owes a significant proportion of an alleged credit card debt but is unsure of the exact amount. He has very little income and no assets to meet the debt. A debt collector contacted his neighbours using the reverse white pages and questioned them about his whereabouts, whether he works and his movements to and from his home.

The question of disclosing the debt to third parties can be a vexed one when the debt collectors company or trading name clearly discloses the nature of their business. Many people will not accept or return calls from callers who do not clearly identify themselves.

Another related problem is where collectors, in an attempt to comply with privacy legislation (and perhaps to avoid inadvertent disclosure to third parties), insist on the recipient of a call giving all sorts of personal account information before proceeding with the call. The caller may be understandably reluctant to do this without a means of verifying to whom they are speaking also. After all, in this day of fairly regular fraud it is not wise to reveal your name, address date of birth, last transactions on your account etc to anyone who happens to ask. Some guidance on how to negotiate this minefield of legislation and competing concerns might be useful for collectors and consumers alike.

We assume that the first dot point on page 17 should read “Generally, contact the *third party* by telephone” rather than the *debtor*.

The last paragraph on page 17 contains a double negative. We assume that the first dot read should read “(Don’t) send letters about the debt addressed to people other than the debtor, or to the general household”.

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<sup>68</sup> Although Griffith (2003) raises concerns about the ease with which the exceptions can be called upon by collectors, particularly where the third party has the requested information, but chooses not to provide it at 548.

## **11. Contact where a debtor is represented**

It has been the experience of many consumer representatives that some debt collectors are particularly uncooperative, refusing to deal with a representative because written authority from the debtor has not been received, even though such authority has already been sent. It is a concern that some debt collectors use a myriad of delaying procedures, such as having a separate department handling faxes, scanning each page individually, then uploading to the computer system, before the fax will appear on their file. In our experience it has taken up to 3 days for a fax to be received by a particular debt collector, entirely defeating the instantaneous nature of a facsimile. During this time the debt collector refuses to talk to the representative at all, and continues to send letters threatening legal action, further adding to or prolonging the stresses experienced by the alleged debtor. Debt collectors must have strong workable processes in place, such as designated facsimile facilities that allow for the instantaneous transmission of a document, and information about the facsimile number and/or addresses where the authority can be sent must be provided to the debtor and/or the representative.

Consumer representatives also have experience dealing with some debt collectors who refuse to accept signed authorities from debtors. Some companies have their own pro forma authorities and will not accept any other type, even the form of authority under the Privacy Act.

We submit that the Privacy Act authority is the most appropriate and suitable form of authority that must be accepted by debt collectors in order to promote and improve efficiency.

Once a form of authority that complies with the Privacy Act requirements is received, it must be accepted. Collectors or creditors who refuse to deal with the representative after receipt of such an authority must be able to point to a clear defect in the authority.

In relation to the first dot point after about the collector's entitlement to contact a debtor directly after 14 days, it seems to be an odd time frame in which to require representatives to respond, especially given resource constraints in many community organisations. Fifteen business days or three weeks would perhaps be more workable and appropriate.

### **United Kingdom**

Unfair practices include 'refusing to deal with appointed or authorised third parties, such as Citizens Advice Bureaux, independent advice centres, or money advisers' (para 2.8c).

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

### **Case Study from CCLS (VIC)/Credit Helpline**

February 2005 -- A caller to the Credit Helpline had an arrangement to pay a debt, which was confirmed in writing. She was keeping to the payments, but she received calls each week from a debt collector hassling her about the debt.

### **Case Study from CCLS (VIC)/Credit Helping**

September 2004 – A consumer made an agreement with a debt collector to repay a bank debt. The payments were maintained, but the debt collector called demanding full payment of \$2,000, even suggesting to the consumer, who was a pensioner, that she borrow from friends or get a personal loan to pay debt.

In the first paragraph, delete “remember (among other considerations) that may have a number of debts owing to different creditors” – this is not necessary and is in any case irrelevant.

In the third last paragraph of this section, where it says “You are also entitled to contact a debtor to review an information arrangement which was made subject to review” – delete “which” and insert “if it”.

We submit that the Guideline should also prohibit collectors from accepting payment of a debt from a credit card, as more likely than not it would only send the debtor deeper into the spiral of debt.

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

The contributing organisations regard this section as the most important part of our submissions. We find the current drafting of this section to be misleadingly light-handed, and the passive language used is also inappropriate. As there is specific legislative prohibition of misleading and deceptive conduct, it is insufficient to confine the discussion to misrepresentations as to the consequences of non-payment. The Guideline must clearly identify the wide range of behaviour that would be prohibited as misleading and deceptive conduct.

In the experience of many contributing organisations, debt collectors engage in a number of practices that could fairly be viewed as misleading and deceptive conduct. The following examples must be included in the Guideline as a minimum.

***Do not imply immediate steps will be taken to sell a house or possessions if there is no intention to commence proceedings***

Where the debt collector has no intention to commence proceedings for the recovery of the debt, any statements or implications that immediate steps will be taken to sell a debtor's home or property would be misleading and deceptive unless the creditor has security over the relevant property. The same applies to situations where it is stated or implied that the debtor's home will be sold and the debt is so small as to exclude the forced sale of real estate as an enforcement option available to the creditor. Further, even with the larger debts, the debt collector should not imply that the debtor's house will be sold automatically as a consequence of legal proceedings when no security over the house has been taken.

**Case Study from CCLC (NSW) phone-in survey**

A debt collector contacted Ms D in relation to a credit card debt. The debt collector insisted on an immediate lump sum payment and later on a repayment arrangement she could not afford. The debt collector behaved in a threatening manner and told her "the sheriff will be on your doorstep the next day with a summons to take everything in the unit of value".

Based on the legal advice obtained she explained to the debt collector that the debt was statute barred. The debt collector called her solicitor and threatened to list her as a clearout on her credit report. Eventually the debt collector admitted verbally the debt was statute barred and stopped harassing her.

**Case Study from CCLC (NSW) phone-in survey**

Ms H owed about \$6,000 on a credit card. A debt collector contacted her and told her that a judgment has been obtained against her and that they had already contacted the ACT Sheriff's Office.

Ms H called the ACT Sheriff's Office and found out that there was no judgment made against her and the debt collector had never contacted the ACT Sheriff's Office. She also contacted the Magistrate and debt collector but no one can produce a copy of the judgment.

She could not sell her car to make a lump sum payment as she has a disabled child to take care of. She wanted to make a payment arrangement but this was refused by the debt collector.

**Case Study from CCLS/Credit Helpline**

A debt collector called a consumer in relation to a bank debt, threatened him with bankruptcy and said that he would lose job. The debt collector also said that they would send the sheriff who would come and take everything in house

(In Victoria, where this consumer lived, necessary household property is protected from the sheriff).

### **United Kingdom**

Unfair practices include: falsely implying or stating that action can be taken when it legally cannot (para 2.4b); falsely implying or stating that action has been taken when it has not (para 2.4d); falsely implying or stating that failure to pay a debt is a criminal offence or that criminal proceedings will be brought (para 2.4e).

### **Canada**

The harmonised list states that no collector shall directly or indirectly threaten or state an intention to proceed with any legal action: (a) for which the collection agency does not have the written authority of the creditor; or (b) for which there is no lawful authority (para 6).

### **United States**

Prohibited conduct includes: ‘the threat to take any action that cannot legally be taken or that is not intended to be taken’ (s 807(5)).

### ***Do not represent that you cannot or will not accept repayment arrangements when this is not in fact the case.***

In many cases that have come to the attention of contributors to this submission, debtors are initially told that repayment arrangements are unacceptable, only to find that a repayment arrangement is eventually accepted when attempts to extract the whole amount or a discounted lump sum have failed.

For many debtors a repayment arrangement is the only realistic option to meet their obligation. The most common reason for failure to pay a debt where liability is not in dispute is financial incapacity. In short, if the debtor could pay the debt, or a substantial part of it, they would have done so before it was referred to collections or outsourced. In a significant number of cases involving credit card debts, debtors who have failed to meet minimum payments of less than 5% of a debt are suddenly confronted with a demand for payment of the entire amount outstanding. In these circumstances insisting on full payment or a substantial lump sum is unrealistic and likely to cause considerable distress. At worst it can contribute to further indebtedness by driving people to borrow money (often on worse terms than the original loan or debt) to make the payment requested. This creates ongoing financial hardship for the debtor and difficulties for other creditors when the subsequent commitment cannot be met.

In the Survey conducted by CCLC (NSW) and Choice Money and Rights in February 2003, 48% of respondents who accepted they owed the debt claimed reported that the collector or creditor refused to believe that they were experiencing financial difficulty. Similarly 22% reported the collector/creditor insisted they pay the debt by credit card or other loan, 26% were asked to pay an initial lump sum before a repayment arrangement would be considered and 29% felt compelled to enter into a repayment arrangement they knew they could not afford.

While the decision whether to accept reasonable repayment arrangements is a commercial decision, not limited by current law except in specific circumstances (such as hardship variations under the UCCC), we submit that a representation by a collector that the collector (or its principal) cannot or do not accept repayment arrangements when this is patently untrue is misleading and deceptive.

#### **United Kingdom**

The list of unfair practices includes: pressurising debtors to pay in full, in unreasonably large instalments, or to increase payments when they are unable to do so (para 2.6f).

#### **United States**

The staff commentary on the Fair Debt Collection Act notes that, under the prohibition of false representations and deceptive means of collection, a collector 'may not falsely state or imply ... that he cannot accept partial payments when in fact he is authorised to accept them'.<sup>69</sup>

#### **Case Study from CCLC (NSW) phone-in survey**

A debt collector contacted Ms T over a personal loan debt. They told her to obtain a loan to pay the debt and refused to believe that she was in financial difficulty. They asked her if she had home and contents insurance and, when she replied in the affirmative, they suggested she must therefore have furniture she could sell. They refused to consider a repayment arrangement (which she ready and willing to enter into) and insisted that nothing but a lump sum payment would be satisfactory.

She contacted the original creditor and another company associated with the debt collector to complain about the debt collector's attitude. A payment arrangement was put in place as a result of her complaint.

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<sup>69</sup> Federal Trade Commission 'Staff Commentary on the Fair Debt Collection Practices Act', p 23, available at [www.ftc.gov/os/statutes/fcdpa/commentary.htm](http://www.ftc.gov/os/statutes/fcdpa/commentary.htm).

***Do not ask the debtor to provide information about his or her assets in a way which gives a misleading impression about the creditors rights***

While we would not want to unnecessarily limit the ability of debtors and creditors/collectors to exchange information in the course of negotiating a repayment arrangement or hardship variation, it is the experience of many contributing organisations that some debt collectors ask the debtor to provide them with a list of their assets, or income, assets and liabilities as a matter of course or in a manner which implies an obligation. We submit that to request this information in a way that either:

- implies that the creditor or collector has a right to this information; or
- implies that the creditor has a right to repossess or take possession of the debtor's assets when this is not the case

is potentially misleading and deceptive.

***Do not threaten to list a default on a person's credit report unless certain criteria are satisfied***

Another example of misleading and deceptive conduct relates to threats by debt collectors to make default listing on a person's credit report. We submit that the Guideline must specify that it would be misleading and deceptive to threaten to do so unless they are a member of a credit reporting agency, that they do intend to make the listing, and that no listing has already been made in relation to the same debt.

Further, threats to list a default on an alleged debtor's credit report when the debtor has disputed the debt and/or made a reasonable request for information should not be used as a trump card to settle the dispute in the creditor's favour.

***Do not use misleading terminology***

Creditors and debt collectors should also avoid the use of misleading terminology. A common example is the use of the phrase "written off". Many debtors assume this to mean that the debt will not be pursued and court action will not be taken (accepting that the debtor may be default listed unless otherwise agreed). This creates difficulties for both the creditor and the unprepared debtor when the debt is later pursued, often by a collector who has purchased the debt.

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

While it may be acceptable to ask an individual who has denied being the alleged debtor to provide a copy of their driver's licence, the practice of some debt collectors to stringently require extensive and specific proof of identity should be specifically prohibited.

#### **Case Study from CCLC**

Mr A (whose name was very common) was contacted by a debt collector about a mobile phone account from more than 6 years ago. Mr A denied that the debt was his as he had never owned a mobile phone, and had never lived at that address connected with the account. When he told this to the debt collector they simply said, "If you pay the account anyway we'll give you a discount".

He provided to the debt collector a copy of his driver's licence and a statutory declaration, but the debt collector further insisted that he provide a statutory declaration from his mother to prove that he lived with her at all relevant times and never owed a mobile phone, as well as a fraud report from the police, both of which he subsequently provided. In the meantime, they made a default listing on Mr A's credit report, and he was refused credit when he applied for a mortgage.

The debt collector still kept pursuing the debt and threatening legal action (despite it being a statute-barred debt), arguing that while he had provided proof of his identification, he had not yet satisfied them with proof of his address from *three separate documents* showing his address at the relevant time of the accounts, which, according to their own records, was a small 2-month window more than 6 years ago. In their own correspondence, they said that without this proof of address, which they claimed was required by the creditor, the creditor would not even begin to investigate the matter.

Mr A sought help from CCLC. Upon CCLC contacting the creditor, however, they immediately agreed that the mobile phone had been fraudulently connected, and agreed not to pursue the debt. They never made any mention of any requirement of three different documents to prove the relevant address at the time of the alleged debt. However, it was still a long time before the incorrect default listing was removed from Mr A's credit report.

#### **Case Study from CCLS (VIC)/Credit Helpline**

February 2005 - A caller was being hassled by a debt collector for payment of an accounts bill. However, she said it had nothing to do with her, but for a company she worked for, for a few hours a week. The company had gone into liquidation. Despite saying the debt didn't have anything to do with her, the debt collector continued to contact her.

#### **Case Study from CCLC (NSW)**

Mr. A was being chased by a debt collector for 2 years over a debt which he

knew he did not owe. It would appear Mr. A was the victim of identity fraud.

Mr. A sent the debt collector evidence that the debt was not his including a statutory declaration and proof of address to prove he was not living at some of the addresses the bank held and could not have made the transactions on the credit card. Despite this, the debt collector said the evidence was not enough and he had to pay the debt. It was only when CCLC started acting for Mr. A and contacted the original credit provider (a bank) that the matter was finally resolved with the bank admitting Mr. A does not owe the debt.

***Do not insist on immediate payment or offer to accept a discounted lump sum in settlement of a debt when the debtor indicates the debt is disputed***

We are aware that some debt collectors offer to settle debts by way of discounted lump sum payment with a consistent regularity that is unaffected by the debtors attitude or circumstances. Debtors report being offered a discounted lump sum in circumstances where they have denied liability for the debt, indicated they have already paid or settled the debt or suggested that the debt is statute barred. We submit that to insist on a lump sum payment when the debtor has disputed the debt could in some circumstances amount to misleading and deceptive or unconscionable conduct.

***Settled Debts***

It has become increasingly common for matters to be pursued after they have been settled that we submit “Conducting collection activity after a matter has been settled” warrants a separate section and needs further elaboration.

Most commonly this occurs where there is a breakdown in communication between the credit provider and the collector, but it also occurs as a result of poor systems within the credit provider or collector organisation. The “Selling Their Customers Out” report released by the Consumer Credit Legal Service (Vic) Inc a few years ago highlighted the practice of Collection House of reactivating settled matters. The Consumer Credit Legal Centre (NSW) Inc. has recently settled two matters with major banks that were subsequently the subject of inconsistent collection activity by debt collectors (a different collector in each case).

**Case Study from Hobart Community Legal Service**

A client who had old debt with AGC had entered into a repayment schedule and had been gradually repaying the debt. REPCOL then agreed to a final lump sum payment to pay off the debt in full and final settlement that was put in writing to the client. This amount was paid in full. Sometime later, REPCOL phoned to say that the person who had agreed to this on their behalf had no rights to do so and had been fired. REPCOL informed client that she

owed even more money and threatened client with legal proceedings.

While this sort of activity is partially addressed above by making sure there are decent mechanisms for dealing with the situation where the debtor says “wait a minute, I already settled that”, this type of mistake is so distressing for the debtor that we believe it is worth having a separate section encouraging credit providers and collectors to ensure they have effective systems in place to minimise the likelihood of this happening. We submit that these cases do have the potential to constitute harassment in their own right, particularly where the subsequent collection activity is very “enthusiastic”.

There are also other legislative concerns, in particular, pursuing a claim that has been paid or settled may constitute misleading and deceptive conduct as illustrated above in our discussion in Section 13.

In addition, a debt collector who continues to pursue a settled debt may be committing the criminal offence of obtaining money by false or misleading statements under section 178BB of the *Crimes Act 1900* (NSW). Relevantly, it is an offence to obtain money or any financial advantage by making a statement (whether or not in writing) which he or she knows to be a false or misleading and is made intentionally or with reckless disregard as to whether or not it is true or is false or misleading. We argue that to insist upon payment of a debt that has been settled is conduct that would constitute an offence under this Act.

In relation to proof of debt, we submit that it needs to be specifically regulated. Further, the role of creditors in this context must also be clarified.

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

The principle of this section is that people should not be worn down by repeated requests for money they claim they do not owe. At the same time, legitimate discussions aimed at resolving a dispute should not be discouraged and alleged debtors should be aware that a formal denial of a debt may have serious consequences such as the commencement of legal proceedings.

We submit that the first paragraph could be amended as follows:

“Do not continue to communicate with a debtor after:

- reasonable attempts to resolve a dispute have been exhausted, or
- the debtor has denied liability for the debt and asked communication to cease, or
- the debtor has stated an intention to defend any legal proceedings.”

A written notice should be sent to the debtor indicating that communication will cease unless the debtor requests otherwise and informing the debtor, if it is the case, that the creditor reserves the right to commence legal proceedings

in relation to the debt.

Where a liability for a debt has been denied it is inappropriate to list a default on the alleged debtor's credit report, or threaten to do so, as a method of securing payment.

The sentence "In these circumstances, you have the option of starting legal proceedings if you choose to pursue the debt" in the second paragraph should be deleted, it is implied in the subsequent paragraph.

We agree with the inclusion of the final paragraphs.

#### **United States**

If a consumer provides written notice that they refuse to pay a debt, and wish the collector to cease further communication, the collector shall not communicate further with respect to the debt, except: (a) to advise of the cessation of communication; (2) to notify the consumer that the collector or creditor may invoke specified remedies; (3) to notify the consumer of intention to invoke a specified remedy (section 805(c)).

#### **Canada**

No collection agency shall continue to communicate with a debtor where the debtor has notified the creditor and collection agency by registered mail that the debt is in dispute and that the debtor would like the creditor to take the matter to court. (para 12(c)).

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

Consumer representatives have seen a number of instances where the collector/creditor continues to pursue a debt even after receiving notification of the debtor's bankruptcy. As the following case studies illustrate, some creditors even sell the debt after notification by the Insolvency and Trustee Service Australia. At the very least, even if we were to assume no malice on the part of the creditor, these case studies demonstrate the failure of these companies' internal systems to deal with bankruptcy situations appropriately.

#### **Case Study from Australian Financial Counselling and Credit Reform Association**

Certegy Australia continued debt collection action after being notified of the debtor's bankruptcy. This company clearly does not or chooses not to understand bankruptcy. Employees give the debtor wrong information such as that the debt is secured and collection action can continue and have said that they 'don't recognise bankruptcy'. Complaints have been lodged with the ACCC.

**Case Study from Australian Financial Counselling and Credit Reform Association**

A client entered voluntary bankruptcy on 5 January 2005 and his creditors, including GE Money, were notified electronically by ITSA on 5 January 2005. On 14 February 2005, GE Money assigned its rights, title and interest in the debt to Repcol who subsequently wrote to my client requesting payment. He provided details of his bankruptcy and has had no further contact. This is an example of poor internal systems at GE where 40 days after being notified of their customer's bankruptcy, they have sold the debt.

**Case Study from CCLC (NSW) phone-in survey**

A debt collector contacted Mr G over a car loan debt. He was threatened with legal action even though the debt collector knew that he had been bankrupt for 4 months.

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

In our experience, it is not uncommon for debt collectors to pursue statute-barred debts and further insist upon payment, even offering for the debtor to pay a reduced amount. Not only is this misleading and deceptive (see our discussion above in Section 13), it would encourage the debtor to make a payment and hence effectively destroy any defence on limitation grounds they may have had.

**Case Study from CCLC (NSW) phone-in survey**

Mr A was contacted by a debt collector over a telecommunications debt for under \$500. He had not heard about the debt for the past 6 years. He explained to the debt collector that his phone had been stolen and he had reported this incident many years ago. The debt collector refused to listen, insisted on a lump sum payment and refused to make a reasonable repayment arrangement.

Mr A sought legal advice from a solicitor. He successfully argued that the debt was statute barred. The telecommunications company, however, is a major service provider and now refuses to deal with Mr A ever again.

Further, we submit that as soon as the debtor or his or her representative raises the issue of the statute barred nature of a debt, the collector must immediately stop debt collection activity or clarify why the defence does not apply, as any legal action commenced by the collector in these circumstances would only be met with this defence, and they would be more likely to be faced with court costs if they pursue the matter. It is actually in their interest not to pursue these debts where the defence is clearly available.

In the United States, the Federal Trade Commission advises consumers that the Fair Debt Collection Practices Act does not prohibit attempts to collect a statute-barred debt, but prohibits collectors from suing, or threatening to sue, the debtor.<sup>70</sup>

We are also regularly alarmed by the practice of some debt collectors in falsifying records in their payment ledgers or records, registering a payment within the last six years in order to revive statute-barred debts. It is arguable that any debt collector indulging in these practices would be committing a criminal offence of obtaining money by deception under section 178BA of the *Crimes Act* 1900 (NSW). The Guideline should specifically make reference to this.

#### **Case study from Credit Helpline (Vic)**

July 2004 -- A client's debt was contacted by a debt collector about a debt that was statute barred. The debt collector claimed that it wasn't statute barred as a recent payment had been made. A financial counsellor requested copy of a statement, but this wasn't provided. The financial counsellor also spoke to the original creditor, and was able to confirm that there had been no payment made as claimed by the debt collector.

In the last paragraph before the Case Study on page 22, we submit that the language needs to be much stronger again, especially since there is legislative backing (see our comments above in Section 13). Rather than "avoid" making misrepresentations, the Guideline must specify "Do not make misrepresentations ..."

#### **United Kingdom**

Unfair practices include: pursuing the debt if the debtor has heard nothing from the creditor during the relevant limitation period (para 2.14b); misleading debtors as to their rights and obligations, eg falsely stating or implying that the debt is still legally recoverable and relying on consumers not knowing the relevant legal provision (para 2.14b); continuing to press for payment after the debtor has stated they will not be paying a debt because it is statute-barred (para 2.14b).

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

#### **Case Study from CCLC (NSW) phone-in survey**

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<sup>70</sup> See FTC Consumer Alert: Time-Barred Debts, at <http://www.ftc.gov/bcp/online/pubs/alerts/timebaralrt.htm>.

A creditor contacted Ms H over a personal loan debt. While they were negotiating to settle the matter, the creditor issued a Statement of Liquidated Claim in response to her application for a s.66 hardship variation under the UCCC. The creditor informed her that “they did not bother with these types of variations”.

The Guideline should specify that no legal action should be commenced while the collector is providing documents to the debtor at their request.

The last paragraph of this Section should read “Do not unreasonably hinder a debtor’s ability to contest court proceedings”, rather than “Avoid unreasonably hindering...”

In relation to the collection of judgment debts, the Guideline must make clear that it has to be timely. It is not acceptable for a debt collector to seek an extension of time to enforce a judgment debt when no action has been taken to pursue the debt for many years and no satisfactory explanation can be given for the delay.

## **19. Dispute resolution schemes**

Internal complaint handling (IDR) is a vital component of effective dispute resolution. We submit that this section should cover complaint handling in addition to external dispute resolution schemes as these issues are inextricably linked.

Given the large scale of some debt collection operations (literally hundreds of thousands of accounts being simultaneously purchased and pursued in some cases), it is absolutely vital that effective complaint procedures are put in place not only to deal with complaints but to *recognise* them in the first place. Indeed many of the issues covered elsewhere in the draft Guideline require systems that are capable of identifying that a certain set of circumstances exist and to modify the usual path of collection activity accordingly.

Debtors and alleged debtors will raise complaints in a number of ways and it is only a small minority that will use the words “complaint” or “dispute”. More typically potential complaints will consist of factual statements such as “I have no recollection of this debt”, “I don’t believe I owe this money” or “that sounds way too high – I’m sure I don’t owe that much”, or “I already explained this to the phone company”. Likewise complaints may begin with questions such as “why are you ringing me again” or “why haven’t you sent me a copy of my statements”. Other clear signs of dissatisfaction will include expressions of frustration and anger. Collection staff need to be able to recognise a potential dispute and to be able to initiate appropriate procedures to ensure that complaints are not ignored. Further, systems must be adequate to ensure that complaints are followed through with appropriate action and that inconsistent collection activity does not occur in the interim period.

Collection staff should also be made aware that complaints may relate to actions, omission or representations made by the creditor if the creditor, or original creditor, is different to the entity pursuing the debt. For example, a customer may have disputed a phone bill, or the creditor's actions may have breached consumer protection legislation such as the Uniform Consumer Credit Code. Again it must be made clear that such complaints are valid, and appropriate procedures need to be set in place to deal with these issues consistent with the contractual arrangements between the creditor and the debt collector. Where such contractual arrangements are not conducive to referring back disputes to the original creditor, for instance, then they should be reviewed to ensure that creditors and debt collectors are able to comply with their obligations under this Guideline, the underlying legislative obligations and other relevant law.

The Guideline should clearly specify that debt collectors must have effective internal systems in place to identify the range of issues about which a consumer may raise a dispute, including the amount of the debt, if the debt has already been paid or settled, or if the person no longer owes the debt, or if the person is not the same person as that in the records. Where the consumer raises any of these issues, normal collection activity should be suspended and a duty arises for the debt collector to explain the IDR procedures and processes. Whether collection activity continues pending resolution of the complaint will depend in the nature of the complaint and may be in modified manner. This decision should be made as a distinct step in the complaints handling procedure in accordance with the circumstances of the case and taking into account the relevant sections of the draft Guideline.

In regards to external dispute resolution schemes, the key factor is accessibility. It is vitally important that debt collectors play a role in guiding debtors towards the correct body to determine any dispute. It is difficult enough for consumers to determine whether a scheme exists that covers their complaint/dispute when they are dealing with the original creditor. They cannot be expected to comprehend the implications of the involvement of the debt collector and the key differences between debts which are simply outsourced and those which have been assigned. We submit that the Guideline should suggest that internal complaints procedures include referring consumers to an appropriate dispute resolution scheme where such a scheme exists.

In addition, consistent with our comments above regarding disputes with the original creditor, we submit that there must be avenues in place for the aggrieved consumer to seek a remedy from the original creditor through their EDR scheme, for example, the BFSO if the creditor was a bank under the scheme.

The Code of Banking Practice also requires banks that have adopted the Code to comply with the current ACCC "Debt Collection and the Trade Practices Act" guideline dated June 1999<sup>71</sup>. It also obligates the bank to ensure that

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<sup>71</sup> Code of Banking Practice, Part D, section 29.

their representatives likewise comply with the guideline. A debtor wishing to complain about the conduct of a debt collector must be able to complain to the creditor and/or the creditor's EDR scheme, especially where it involves any breach of the Guideline and the law which underpins it by the debt collector.

We support the inclusion of the final sentence about ceasing collection activity pending consideration of the dispute by an external dispute resolution scheme.

## **Appendix D: Glossary**

Clarify what is meant by the terms "alleged debt" or "alleged debtor".

The definition of 'judgment debt' also seems a bit odd, as the terminology is different in different jurisdictions. In Queensland, for example, the terminology is "money order". At the minimum, the definition or the text should recognise that different terms may be used in different jurisdictions.