



A guide for business

# Debt collection guideline: for collectors and creditors

July 2014



The Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) have produced this guideline. The ACCC and ASIC enforce Commonwealth consumer protection laws, including laws relevant to debt collection.

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#### **Important notice**

This guideline is designed to give you basic information; it does not cover the whole of the *Competition and Consumer Act 2010* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) or other relevant legislation and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible and there may be generalisations about the application of the above Acts, some of the provisions referred to have exceptions or important qualifications. In most cases, the particular circumstances of the conduct need to be taken into account when determining how these Acts apply to that conduct.

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## Part 1: Using this guideline



The Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) have produced this guideline. The ACCC and ASIC enforce Commonwealth consumer protection laws, including laws relevant to debt collection. For more information about the responsibilities of each agency, see appendix A.

The terms 'debt' and 'debtor' are used in this guideline to include alleged debts and alleged debtors respectively (see the glossary in appendix C for more information on terms and phrases).

### Who is this guideline for?

This guideline will help you to understand how the Commonwealth consumer protection laws apply to you if you are a:

- debt collector (including a debt collection agency, debt buy-out service, in-house collection department of a business or government agency, solicitor and other)
- creditor who uses external collection agencies to collect debts or sells or assigns debts to third parties.

This guideline applies to both creditors who are directly involved in debt collection and to specialist external agencies who provide debt collection services. When a creditor uses an agent for collection, the creditor (as principal) will generally be liable for their agent's conduct when that conduct comes within the agent's express, implied or ostensible authority.

A creditor may be responsible for their agent's collection activities even if the agent acts in a way that is contrary to an agreement or understanding between the creditor and agent about how the collection is to be undertaken.

A creditor may also remain liable for conduct regarding a debt despite having sold or assigned the debt. Liability will generally remain for misconduct occurring before the sale or assignment of the debt.

The ACCC and ASIC encourage creditors to use this guideline to ensure their in-house collection activities are compliant with the Commonwealth consumer protection laws and to incorporate this guideline into their contractual and compliance auditing arrangements with their agents and assignees.

This guideline will also serve as a point of reference for financial counsellors and debtors' advisers when negotiating with creditors or collectors about their practices.

## What this guideline covers

### Commonwealth consumer protection laws

This guideline explains the application of the following Commonwealth consumer protection laws, which are relevant to debt collection:

- The Australian Consumer Law (ACL), which is a schedule to the *Competition and Consumer Act 2010* (Cth) (CCA). The ACL is jointly enforced by the ACCC and state and territory consumer protection agencies
- Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), which is enforced by ASIC
- *National Consumer Credit Protection Act 2009* (Cth) (NCCP) which includes the National Credit Code (NCC) as Schedule 1 to the NCCP, which is enforced by ASIC.

Part 2 of this guideline provides practical guidance on what creditors and collectors should and should not do to minimise their risk of breaching the Commonwealth consumer protection laws that may apply when undertaking debt collection activities.

When seeking to recover a debt, part 3 of this guideline looks at the prohibitions and remedies against creditors or collectors who engage in:

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

Part 3 of this guideline also contains information about the penalties that apply for contraventions of the Commonwealth consumer protection laws.

### Other laws

This guideline also refers to other laws and regulations that are not enforced by the ACCC and ASIC, but which are relevant to debt collection. These laws include:

- Commonwealth privacy laws, which are enforced by the Office of the Australian Information Commissioner (OAIC)
- state and territory fair trading laws, which include conduct prohibitions mirroring those of the Commonwealth consumer protection laws and that are enforced by the state and territory consumer protection agencies
- the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act), which is enforced by the Australian Financial Security Authority (AFSA, formerly the Insolvency and Trustee Service Australia (ITSA)).

Various other laws, regulations and industry codes are also referred to in passing throughout this guideline. For a non-exhaustive list of other applicable laws, see appendix B. Also see the comments under *Relationship with court debt recovery processes* in this guide.

**Note:** this guideline does not provide guidance on the law on mortgages and other securities or guarantees.

## What this guideline does

This guideline:

- explains the ACCC's and ASIC's views on the laws that they regulate
- provides examples on how the law has been applied in particular cases and details of court outcomes
- gives guidance on what you should and should not do if you wish to minimise the risk of breaching the Commonwealth consumer protection laws
- notes other laws and regulations not regulated by the ACCC and ASIC that are relevant to debt collection.

This guideline does not have legal force. The ACCC and ASIC cannot make law in this field because that is the role of parliament. The ACCC and ASIC also cannot provide a definitive interpretation of the law because that is the role of the courts.<sup>1</sup>

ASIC and the ACCC will approach each potential compliance and enforcement matter on a case-by-case basis, taking into account all relevant circumstances, and by applying their respective enforcement and compliance policies. Compliance with this guide cannot provide a guarantee against enforcement action by ASIC or the ACCC. Businesses may also be subject to action by private parties. Businesses should consider seeking independent legal advice on these matters.

The ACCC and ASIC encourage businesses engaging in debt collection activity to follow this guideline and incorporate it into their staff training, both in terms of the text and the spirit of the document.

## Focus on individual debtors

This guideline is developed with particular reference to collecting debts from individual debtors. However, many of the laws and principles discussed in this guideline will also be relevant to the collection of corporate, business, and in particular, small business debts.

## Debtors' responsibilities

While this guideline focuses on the responsibilities of creditors and collectors, the ACCC and ASIC recognise that debtors have responsibilities too.

Debtors are legally responsible for paying the debts they legitimately owe. Where they owe the debt in question, debtors should:

- not attempt to avoid the obligation to satisfy debts they have incurred
- promptly contact creditors and debt collectors when they are experiencing financial difficulties and attempt to negotiate a variation in payments or other arrangement
- be candid about their financial position, including their other debts.

The ACCC and ASIC also recommend that debtors experiencing financial difficulties should seek the assistance of a financial counsellor, solicitor or other qualified adviser who may be able to help them with a debt negotiation.

The ACCC and ASIC have also produced guidance for debtors entitled *Dealing with debt: your rights and responsibilities*.

The Australian Energy Regulator (AER) has produced a consumer information factsheet, *Energy bills, hardship programs and disconnection—your rights*. This publication provides information on energy retailers' responsibility to help customers who are having difficulty paying their bills and to inform them of their options. For a copy of this publication go to [www.aer.gov.au/consumers/aer-resources](http://www.aer.gov.au/consumers/aer-resources).

We encourage creditors and collectors to refer debtors to these publications available at [www.accc.gov.au/publications](http://www.accc.gov.au/publications), [www.moneysmart.gov.au/tools-and-resources/publications](http://www.moneysmart.gov.au/tools-and-resources/publications) and [www.aer.gov.au/consumers/aer-resources](http://www.aer.gov.au/consumers/aer-resources) and to the services referred to above when appropriate.

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1 Although this guideline does not have legal force, it should be noted that:

- A creditor or collector may agree contractually to adhere to this guideline. This will be the case, for instance, if the terms and conditions for a particular product or service stipulate that the provider of the service will abide by the guideline itself, or by an industry code of conduct requiring compliance with the guideline. In these circumstances, provisions of the guideline may be legally enforceable by the debtor on the basis of the express incorporation of them into the creditor's contractual arrangements.
- External dispute resolution schemes may consider this guideline when making binding determinations on scheme members. See further under part 2, section 24, *The role of independent external dispute resolution schemes*.



## Relationship with court debt recovery processes

Broadly, debts may be recovered either through the courts, or by using creditor or collection agency personnel to negotiate repayments.

Debt recovery through the courts is largely regulated by state and territory law and the procedural rules of the courts. The recovery process may include the repossession of assets, securities or other legal enforcement of security interests.

This guide is mainly concerned with non-court debt recovery processes and informal collection activities before a court action is commenced or after a court judgment.

This guide does not limit any right you may have to:

- take legal action to collect a debt
- conduct legal repossession activities and other legal enforcement of legitimate security interests
- seek and obtain pre-judgment remedies, for example, orders to prevent the removal or transfer of property from the jurisdiction
- enforce judgment through a court process—including examination hearings, instalment orders, orders for the seizure and sale of property, garnishment or attachment orders
- undertake all necessary procedures (for example, for serving documents) associated with these actions.

However, you must not threaten action (legal or otherwise) that you are not legally permitted to take, do not have instructions or authority to take, or you have no intention to take. How legal action is threatened or taken can, in certain circumstances, amount to misleading or deceptive conduct, unconscionable conduct or harassment. You also must not misrepresent your legal entitlement to seize goods.

See part 2, sections 19–21 for more information about representations about the consequences of non-payment and the legal status of a debt and about legal action and procedures.

## A flexible, fair and realistic approach to collection

The need for collection activity will be greatly reduced when debtors act promptly and responsibly, and collectors are flexible, fair and realistic. Debtors may default on their debts because of circumstances beyond their control, such as unemployment, illness or family breakdown. While there are cases of fraud and deliberate evasion, most people are honest and want to meet their commitments if given a reasonable opportunity to do so.

The ACCC and ASIC encourage flexibility on the part of creditors and collectors. This includes recognising debtors who are vulnerable and experiencing financial hardship, and recognising that debtors may have a number of debts owing to different creditors.<sup>2</sup> A flexible approach involves making meaningful and sustainable payment arrangements that reasonably take into account a debtor's ongoing living expenses to enable them to live in basic comfort and prevent impoverishment or humiliation.

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<sup>2</sup> Note that when a debt relates to a contract regulated by the NCC, s. 72 provides borrowers with statutory rights to have a variation considered. Repayment negotiations more generally are discussed in part 2, section 14, *Repayment negotiations*.



## Part 2: Practical guidance



If you are involved in collection activity, either as a creditor, agent or assignee, this part of the guideline is addressed directly to you. The term ‘debtor’ includes an alleged debtor, and the term ‘debt’ includes an alleged debt. The term ‘debt collector’ includes creditors, independent collection agencies, collections departments within businesses, debt purchasers, assignees, agents, lawyers, government bodies engaged in trade or commerce, and other persons<sup>3</sup> collecting on behalf of others.

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<sup>3</sup> The CCA applies to corporations and individuals when they are acting as agents of a principal that is a corporation.

## 1. Making contact with a debtor

- (a) Under the privacy laws, you have obligations to protect the privacy of debtors.<sup>4</sup> When making direct contact, your first task must always be to ensure the person you are dealing with is the debtor. This must be done every time you make contact before you divulge any information about the debt, the process for its recovery or before providing any other confidential information.
- (b) If you consider it necessary to divulge your identity as a debt collector before being sure that you are dealing with the debtor (for example, if requested by the person you are dealing with), then you may do so if that would not have the effect of divulging that the debtor has a debt. Particular care should be taken when speaking to a person at a debtor's workplace.

### **Example: Calling from or on behalf of a bank**

If you are calling from or on behalf of a bank then it is unlikely that revealing the name of the bank would result in you divulging that the debtor has a debt. Banks commonly provide a range of services and the person you are dealing with will not be able to deduce that you are currently engaging in debt collection activities and that the debtor has a debt.

### **Example: Calling from or on behalf of an organisation with a descriptive name**

If you are calling from or on behalf of an organisation whose name is more revealing or descriptive in relation to debt collection practices (for example, 'Collections R Us') then revealing the name of the organisation is likely to divulge the existence of a debt.

- (c) The limits on disclosing information to third parties apply to the debtor's spouse, partner and/or family as much as they apply to other third parties.<sup>5</sup>
- (d) Having established the debtor's identity, you should then identify who you are, who you work for and explain the purpose of the contact. Failing to clearly identify who is calling and the purpose of the call will most likely confuse the debtor and may lead to the debtor avoiding subsequent calls.
- (e) If you elect to use emerging technology to attempt to or make contact with the debtor, you should carefully consider the particular channel and its potential audience. It may be acceptable to attempt contact via emerging technology provided:
  - you have a reasonable belief that contact will be with the debtor
  - you have a reasonable belief that the channel is not shared with other parties (for example, a shared work email address or joint social media account).
- (f) You should avoid contacting the debtor via a certain channel (whether it is an emerging technology or a more traditional channel of communication) if:
  - the debtor has specifically requested to be contacted through an alternate channel of communication, or
  - the debtor specifically requested that this particular channel not be used.
- (g) When you make initial contact, you should also provide the debtor with basic information about the debt, including the name of the creditor and any assignee of the debt, details of the account and the amount claimed. A debtor may request further information or documentation relating to the debt (see part 2, section 11, *Providing information and documents*).
- (h) If the debtor communicates with the collector through the collector's non-preferred channel of communication (for example, written correspondence), then the collector should not ignore this correspondence and should attempt to contact the debtor via the same channel. We also recommend that all written correspondence you send to debtors includes your contact details such as contact phone number, postal address and email address.

<sup>4</sup> For information on privacy issues, see part 2, section 8, *Privacy obligations to the debtor and third parties*.

<sup>5</sup> For authorised representatives, see part 2, section 9, *When a debtor is represented*.

- (i) Do not misrepresent your identity in any way—for example, do not falsely state or imply that you are or work for a solicitor or that you are a court, government official or independent complaints handling body.

#### **CASE STUDY**

A company implied to debtors that it was a firm which specialised in commencing legal proceedings for the recovery of debt, that it frequently commenced such proceedings, and that the particular matter had been referred to the company's lawyers for the purpose of commencing legal proceedings, when none of these implications were correct.

The court found that the company persistently engaged in misleading or deceptive conduct by making such implications.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164*

#### **CASE STUDY**

A company was found to have engaged in misleading and deceptive conduct, unconscionable conduct and coercion when attempting to obtain payment for mobile phone services. The company created a fake complaints handling organisation to deceive debtors into believing their disputes about liability were being assessed by an independent body when neither that body nor those activities existed. The company then contacted debtors under the false pretence of a fictitious debt collection agency to induce debtors to pay the alleged debts.

The court found this conduct to be unconscionable and that the company used undue coercion in its dealings with debtors. Several of the company's employees were also found to have been knowingly concerned and personally liable for the contravening conduct.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

- (j) On first contact if the debtor denies liability for the debt or raises an issue indicating a dispute about the debt, you should also take the steps referred to in part 2, section 13, *If liability is disputed*.
- (k) If a debtor advises that they cannot afford to repay the debt then you are entitled to make reasonable enquiries into their financial position to determine whether the debtor is able to make meaningful and sustainable repayments. If it is determined that they cannot make such repayments then you may suggest that the debtor considers seeking the advice of a financial counsellor. If the debtor demonstrates willingness and intention to do so then you should not contact them until after a reasonable time has passed, allowing them to obtain advice so that they may better understand their options.

## 2. Contact for a reasonable purpose only

- (a) Communications with the debtor must always be for a reasonable purpose, and should only occur to the extent necessary.<sup>6</sup>
- (b) It may be necessary and reasonable for you to contact a debtor to:
- provide information to the debtor about their account
  - make a demand for payment
  - offer to work with the debtor to reach a flexible repayment arrangement
  - accurately explain the consequences of non-payment, including any legal remedies available to the collector/creditor, and any service restrictions that may apply in the case of utilities (for example, disconnection of electricity or gas supply or restriction of water supply)
  - make arrangements for repayment of a debt
  - put a settlement proposal or alternative payment arrangement to the debtor
  - review existing arrangements after an agreed period
  - ascertain why earlier attempts to contact the debtor have not been responded to within a reasonable period, if this is the case
  - ascertain why an agreed repayment arrangement has not been complied with, if this is the case
  - investigate whether the debtor has changed their residential location without informing you, when there are grounds for believing this has occurred
  - sight, inspect or recover a security interest
  - or for other similar purposes.<sup>7</sup>

You may also contact a debtor at the debtor's request.

- (c) What constitutes a reasonable purpose may change according to the personal characteristics of an individual debtor. You should consider the information you have about each individual debtor in order to determine whether intended contact with that debtor will be for a reasonable purpose.

### **Example: Debtor's financial situation**

If you are aware that a debtor is unable to make meaningful and sustainable repayments towards a debt, then continuing to contact the debtor to demand payment will not be reasonable or appropriate. Where that is the case, you should only consider contacting the debtor if you know, or have good reason to think it is likely, that the debtor's financial situation has improved.

There are many reasons a debtor may be unable to make meaningful repayments towards a debt, including where they are:

- on a limited fixed income (whether on a temporary basis or for the foreseeable future, for example, with an aged pension)
- unemployed
- suffering significant, chronic or long-term illness or injury
- incarcerated.

<sup>6</sup> You should not pursue a person for a debt unless you have reasonable grounds for believing the person you contact is liable for the debt: see part 2, section 13, *If liability is disputed*.

<sup>7</sup> However, there are circumstances when further contact with a debtor may not, or may no longer, be appropriate: see part 2, sections 4, 13, 15 and 16, which provide information about *Hours of contact*, *If liability is disputed*, and *Contact when a payment arrangement is in place* and *Contact following bankruptcy or a Bankruptcy Act agreement* respectively.

- (d) There may be circumstances where contact is made for a reasonable purpose, or contact is made initially for a reasonable purpose, and yet other relevant considerations mean the contact becomes unreasonable or unacceptable.<sup>8</sup> Relevant considerations may include the debtor's mental illness or intellectual disability, or the debtor's incarceration.

**Example: Contact for reasonable purpose**

If you make contact with a debtor in order to convey a demand for payment it may be contact for a reasonable purpose. However, if the debtor disputes liability and requests proof of the alleged debt, and you continue to pursue that person without properly investigating the claims, then this will not be contact for a reasonable purpose.

**Example: Negotiating a repayment arrangement**

If contact is made with a debtor in order to negotiate a repayment arrangement where one does not exist, it may be necessary and reasonable contact; however, it may not be reasonable to contact the debtor where a payment arrangement exists and the debtor is meeting those repayments, unless you are proposing a genuine alternative arrangement to benefit the debtor.

It is not reasonable or acceptable to contact a debtor to:

- frighten or intimidate the debtor
- demoralise, tire out or exhaust the debtor
- embarrass the debtor in front of other people
- or for other similar purposes (see part 2, sections 17 and 18, *Conduct towards the debtor or their representatives* and *Conduct towards family members and other third parties*).<sup>9</sup>

**Example: Referral of complaints**

If, during communications with a debtor or other person, you attempt to dissuade them from making a complaint or refuse to refer them to a supervisor or complaints department (that is, on the basis of a dispute about the debt or your conduct in collecting the debt), then this will be unreasonable contact and may be unconscionable conduct.

<sup>8</sup> See also part 2, sections 13, 15 and 16, addressing *If liability is disputed*, *Contact when a repayment arrangement is in place* and *Contact following bankruptcy or a Bankruptcy Act agreement*, respectively.

<sup>9</sup> Note also that unreasonable communication with a debtor is specifically prohibited by s. 45(2)(p) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic). See part 2, sections 17 and 18 in regards to *Conduct towards the debtor or their representatives* and *Conduct towards family members and other third parties*.

### 3. What is 'contact'?

- (a) 'Contact' with the debtor or other person is interpreted widely. It includes, but is not limited to, the following:
- Communications by phone—including circumstances where the recipient (debtor or other person) elects to terminate the call, or where a voice message is left on a recording device, or where a message of any kind is delivered to the recipient (for example, text message).
  - Communications in writing—including all written correspondence (for example, letter, email, text message, fax, social media application or program, instant chat, phone application, or any other similar device).
  - Communications in person—including face-to-face contact, whether at the home of the debtor (or other person), workplace, or other location.

#### **Example: Contact**

'Contact' will be made if you phone a debtor and the debtor answers the call but shortly after terminates the call. If you phone again and leave a message on the debtor's voice mail, then you will have made two separate contacts with the debtor.

#### **Example: Multiple contacts**

If you phone a debtor and leave a message on the debtor's voice mail, and you also send the debtor an email, and a text message, then you will have made three separate contacts with the debtor.

- (b) 'Continuous contact' with the debtor or other person refers to a chain of contact (for example, an email chain) wherein a series of communications all form part of a single 'thread' of communication. Depending on the circumstances, such a thread may be treated as a single contact, provided:
- the consumer is voluntarily engaging in the exchange and has not expressed any dissatisfaction in relation to the continuing contact
  - the consumer has not been prompted by the collector for a response but instead has engaged in an interchange of communication whereby the parties take turns to initiate contact between the parties
  - the communication is within a 'reasonable proximity of time'
  - the communication is in relation to the same matter, and
  - the communication is likely to be anticipated by the debtor or other person.

#### **Example: Continuous contact**

If you email a debtor regarding an account (contact), and the debtor replies offering a payment arrangement, then the subsequent reply to the offer would not be considered a new contact if it occurs promptly and if the debtor would have anticipated a reply (same contact).

- (c) We consider a 'reasonable proximity of time' to be where no more than two business days pass between such communications and therefore may be part of the one contact.
- (d) A single continuous contact may also involve a series of instantaneous communications (that is, a closed chat forum between the debtor and collector, pop-up message or same-time service).
- (e) Contact should be distinguished from 'attempted contact', which as it implies, falls short of making contact with the debtor or other person, as described above.

**Example: Attempted contact**

If you phone a debtor (or other person) but the call is unanswered and you do not leave a message on voice mail, this is regarded as attempted contact with the debtor (or other person), and will not constitute a contact with either party.

- (f) Attempted contact should be distinguished from an 'unsuccessful contact'. Unsuccessful contact includes a phone call to a disconnected number or an email that bounces and is not delivered to any recipient.
- (g) The distinction between contact and attempted contact should not be construed by you as an opportunity to continually attempt to contact a debtor. Depending on the circumstances, continually attempting to contact a debtor (or other person) may amount to undue harassment (see part 2, section 5, *Frequency of contact* and Part 3, *Commonwealth consumer protection laws*).

**Example: Unnecessary and unduly frequent attempted contacts**

If you phone a debtor and the debtor answers the call but subsequently terminates the call (contact), and then you proceed to repeatedly phone the debtor throughout the same day despite the debtor not answering the calls (attempted contact), this may amount to unnecessary and unduly frequent attempted contacts and could constitute undue harassment.



## 4. Hours of contact

- (a) Contact with a debtor or a third party must be made at reasonable hours, taking into account their circumstances and reasonable wishes. The following can be assumed to be appropriate contact times, subject to the qualifications set out:

### Reasonable contact times

These times apply to both debtors and third parties<sup>10</sup> and are the local times in the debtor's state or territory.

<b>Contact by telephone</b>	Monday to Friday	7.30 am to 9 pm
	Weekends	9 am to 9 pm
	National public holidays	No contact recommended <sup>11</sup>
<b>Face-to-face contact<sup>12</sup></b>	Monday to Friday	9 am to 9 pm
	Weekends	9 am to 9 pm
	National public holidays	No contact recommended
<b>All workplace contact</b>	Debtor's normal working hours if known, or 9 am to 5 pm on weekdays	

- (b) We assume that contact will usually be by telephone. The above contact times for face-to-face contact, including contact at the debtor's workplace, need to be read in conjunction with part 2, section 7, *Face-to-face contact*.
- (c) There may be reasons why contact during the above times is unreasonable, or contact outside these times is reasonable. For instance, a debtor may ask that contact be made at other or more restricted times due to various reasons, for example, because the debtor:
- is a shift worker
  - is responsible for children, or caring for a family member, and contact at certain times is not convenient
  - does not wish to be contacted when other family members are present.
- (d) In these and other such cases, the reasonable wishes of the debtor should be respected, and contact limited to the times requested by the debtor.
- (e) However, a collector may alter the time of contact if, after reasonable efforts over a reasonable period of time to contact the debtor during normal hours or at the times requested by the debtor, the collector has not been able to do so.

<sup>10</sup> See definition of 'third party' in appendix C. Contact with a debtor's representative, such as financial counsellors and solicitors, would normally occur during ordinary business hours.

<sup>11</sup> It will generally be inappropriate to contact debtors on New Year's Day, Australia Day, Good Friday, Easter Sunday, Easter Monday, Anzac Day, Christmas Day and Boxing Day. Contact may also be prohibited on other days in particular jurisdictions. For instance, s. 43(1)(d)(i) of the *Fair Trading Act 1987* (SA) prohibits telephone calls or personal calls on any public holiday (state or national) to demand payment.

<sup>12</sup> Note that r. 87 of the National Consumer Credit Protection Regulations 2010 (Cth) (NCCP Regulations) provides that credit providers who are regulated by the NCCP can enter premises (for the purposes of repossession) on any day other than Sundays and public holidays between the hours of 8 am and 8 pm.

## 5. Frequency of contact

- (a) Debtors and third parties are entitled to be free from excessive communications from collectors.<sup>13</sup> Communications must always be for a reasonable purpose, and should only occur to the extent necessary: see part 2, section 2, *Contact for a reasonable purpose only*. The guidance on frequency of communications should be read subject to this general principle.
- (b) References to the number of contacts with debtors should be read as the number of contacts per account, rather than per individual debtor. It may be acceptable to have a higher overall level of contact with an individual debtor if this contact relates to more than one account. Where possible, however, collectors should seek to discuss multiple accounts with a debtor during the one contact to avoid unnecessary communications. Subject to your arrangements with original creditors, this includes where you collect debt on a contingent basis for multiple clients.
- (c) Unnecessary or unduly frequent contacts may amount to undue harassment of a debtor. We recommend that you do not contact a debtor more than three times per week, or 10 times per month at most (when contact is actually made, as distinct from attempted contact) and only when it is necessary to do so.<sup>14</sup> This recommendation does not apply to face-to-face contact which is specifically addressed below.
- (d) Unreasonably frequent attempted contact may also amount to undue harassment. This may occur, for example, where an automated dialler is used to make calls and a debtor's number is returned to the queue within a short space of time after each attempted contact. Collectors should ensure that attempted contacts are not excessive.

### Example: Unnecessary repeated contacts

If you contact a debtor or other person multiple times a day, without allowing an appropriate interval for the debtor to respond, then this is likely to involve unreasonable contact and may amount to undue harassment. Such contact may arise, for example, from the use of an automatic dialler system which leaves messages on recording devices and continues to call the recipient repeatedly until a response is received or identification is confirmed.

## Telephone and other contacts (including letters, emails, text or telephone messages, social media channels)

- (e) Unnecessary or unreasonable contact by letter, email, SMS, telephone messages (whether left on a voicemail service, an answering machine or with a third party), or by the use of social media channels or other technology must also be avoided.

### Example: Contact using social media

If you use social media such as Facebook to contact the debtor, then you must ensure such contact is not excessive and is always for a reasonable purpose; otherwise the contact may amount to undue harassment. You must also observe your privacy obligations when using such forums to make contact with the debtor.

- (f) It is important to cease your efforts to contact the debtor once you have reached the above recommended limits or if it is evident that further contact would not be for a reasonable purpose, unless the debtor invites the contact or there is some other legitimate reason for making further contact (for example, if you are in the process of negotiating an agreement with a willing debtor). It is also important to cease your efforts to contact the debtor using a particular medium when the debtor has requested that this medium not be used and has provided you with an alternative method of contact.

<sup>13</sup> In Victoria, s. 45(2)(m) of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* provides specific protection to debtors. Subsection (m) specifically prohibits a collector from contacting a debtor if the debtor has requested in writing that no further communication should be made.

<sup>14</sup> Note that s. 31(2) of the *Property Agents and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001 (Qld)* (which is specific to commercial agents) prohibits unsolicited communication with customer, including a debtor, more than twice a week.

- (g) Once you have made contact, leave a reasonable interval before next contacting the debtor. Give the debtor time to respond to your previous communications, and/or to organise payments if this has been agreed.

**Example: Repeated contact without interval**

If you have spoken to the debtor and it is understood that the debtor requires a few days to speak to third parties or consider options, then contacting the debtor on the following day may be considered unreasonable, even though it is within the recommended limits.

**Face-to-face contacts**

- (h) Further guidance is provided in part 2, section 7 on when face-to-face contact with the debtor is appropriate. You should only make face-to-face contact when such contact is necessary and reasonable. In such cases, we recommend that you do not make more than one face-to-face contact with a debtor per month (if contact with the debtor actually takes place).

**CASE STUDY**

The court ordered the defendant company to restrict its agents to a total of five personal visits (for the period of collection) unless a visit was specifically requested by the customer or a repayment agreement had been made and subsequently breached (in which case a further five visits could be made).

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

**Third parties**

- (i) We recommend that you do not contact a third party to obtain location information more often than once every six months. An exception is when permission to make further contact about the location of a debtor has been sought and given in advance by the third party. See part 2, section 8, *Privacy obligations to the debtor and third parties* and section 18, *Conduct towards family members and other third parties*.

**Example: Frequency of third party contact**

If you contact a third party in an attempt to speak with a debtor, and that other person tells you that the debtor does not live at that address and they do not know the location of the debtor, or have further details to provide, or simply do not wish to provide further details about the debtor, then you should not contact that third party again, unless you have reason to believe that after six months or more they may be in possession of relevant information about the debtor.

**Undue harassment**

- (j) Unduly frequent contact designed to wear down or exhaust a debtor, or likely to have this effect, constitutes 'undue harassment' or coercion and must be avoided. This is particularly likely if the collector makes a number of phone calls or other contacts in rapid succession. See part 3, *Commonwealth consumer protection laws*.

## 6. Location of contact

- (a) In most cases, the debtor's home will be the appropriate place to contact a debtor, with contact by letter or telephone generally being the most appropriate mode of contact.<sup>15</sup> However, if a debtor provides a telephone contact number (including mobile phone) as the means of contact, contact using that number will be appropriate whatever the debtor's location.
- (b) Sometimes, a debtor may not wish to be contacted at their home. If the debtor provides an alternative and reasonable location for contact and is able to be contacted at that location, the debtor should not be contacted at their home.
- (c) You should carefully consider whether contacting the debtor at work on a switch number or reception (contrasted with the debtor's direct work phone number) is appropriate and whether there are more suitable options available. Where contact is made at work, the debtor should be offered an opportunity to provide an alternate number to receive a call back at a more convenient time or nominate a preferred time for contact.
- (d) Contact must not involve a breach of your privacy obligations to the debtor. See part 2, section 8, *Privacy obligations to the debtor and third parties*.

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<sup>15</sup> However note that some statutory notices must be sent to a particular address.

## 7. Face-to-face contact

- (a) We recommend that personal or 'field' visits generally be considered as an option of last resort. Generally, face-to-face contact should only be made if reasonable attempts to contact a debtor by other less intrusive means such as phone calls, emails or letters have failed, and face-to-face contact is considered appropriate and necessary.
- (b) Where face-to-face contact is necessary we recommend that it is made at the debtor's home when possible during reasonable hours of contact, see part 2, section 4, *Hours of contact*. Making face-to-face contact with the debtor at work should be the last option.
- (c) Making a personal visit may be justified when a debtor refuses or fails to respond to other means of communication. Face-to-face contact may also be justified to verify the identity or location of a debtor when this is reasonably in doubt.
- (d) Written communications should only refer to the possibility of face-to-face contact where such contact is genuinely being contemplated as the most likely and appropriate next step. Where contact with a debtor has been established, face-to-face contact should not be threatened as part of a demand for payment.
- (e) **Note**—this guidance is not intended to limit otherwise legally permissible visits:
- to sight, inspect or recover security interests
  - for the serving of legal process
  - for the enforcement of court orders by officers appropriately authorised by the relevant court.

### Visiting the debtor's home

- (f) Visits to a person's home will often raise issues about the privacy of the debtor and/or third parties. This subsection should be read in conjunction with part 2, sections 8 and 18.
- (g) The following is recommended when visiting a debtor's home:
- Generally, do not visit the debtor's home uninvited when it is possible to ask permission to visit the debtor. If the debtor refuses the visit, you must not visit them.<sup>16</sup>
  - State clearly to the debtor the purpose of any visit before making the visit.
  - Negotiate a mutually convenient time for the visit. Unless the debtor agrees to or specifies another time, we recommend that visiting times be consistent with the reasonable contact times set out in part 2, section 4, *Hours of contact*.
  - Prior to any visit, allow the debtor time to either seek advice, support, or representation from a third party.
  - Do not visit the debtor's home if you know of special circumstances (for example, the debtor is seriously ill or mentally incapacitated) which would make face-to-face contact inappropriate. Leave the debtor's premises immediately if you become aware of such circumstances during the visit.

#### CASE STUDY

A company threatened to inform the debtor's husband about her indebtedness in circumstances where the debtor had already told the company that her husband did not know and that she did not want him to know.

The court found that the suggestion that there would be a marked car at the debtor's house with two Sheriff's officers, when combined with the observation that the collection officer knew that the debtor did not want her husband to know of the situation, was, in effect, a tactic by which the officer sought to intimidate the debtor and suborn her will. The conduct was held to be unduly harassing and coercive.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164*

<sup>16</sup> If you enter the debtor's premises when instructed not to do so, you risk breaching civil or criminal trespass laws. This is further discussed in Part 3.

- (h) You must leave the debtor's premises immediately if, at any time, you are asked to do so. As well as breaching the prohibition on undue harassment and coercion<sup>17</sup> refusing to leave someone's property on request is likely to constitute a breach of civil or criminal trespass laws. This applies to service or trades people claiming they are not permitted to leave a consumer's residence without receiving payment.
- (i) Whether before or after visiting a debtor, or at any other time, do not stay in the vicinity of the debtor's home for an extended period of time or engage in any other conduct that may suggest to the debtor or a third person that the debtor or a member of the debtor's household is under surveillance.

### Visiting the debtor's workplace

- (j) Visiting a debtor's workplace should only be undertaken as a last resort, unless the debtor:
- is the proprietor or a director of a business to which the debt relates
  - has specifically requested or agreed to the visit.
- (k) If a debtor has asked that you do not visit them at their workplace, and has provided an alternative and effective means of communication, do not visit them at their workplace.
- (l) Visiting a debtor at their workplace will always involve a risk of breaching the collector's privacy obligations to the debtor.<sup>18</sup> Collectors will generally be asked to explain who they are and why they are visiting, and it will generally be difficult to provide an explanation without giving confidential information to third parties.
- (m) Visiting a debtor at their workplace uninvited may also be seen as an attempt to put pressure on the debtor by embarrassing or threatening to embarrass them in front of work colleagues. If this is found to have occurred, such conduct is likely to constitute undue harassment or coercion of the debtor.
- (n) If you do visit a debtor's workplace:
- under no circumstances reveal to a third party, whether directly or indirectly, that the visit is in connection with a debt<sup>19</sup>
  - under no circumstances discuss the debt in front of co-workers<sup>20</sup>
  - leave immediately if, at any time, you are asked to do so by the debtor or another person.<sup>21</sup>
- (o) A visit to a debtor's workplace should be undertaken when you know the debtor will normally be at work. If you do not know the debtor's working hours, we recommend that you limit any visit to between 9 am and 5 pm on weekdays.
- (p) Whether before or after visiting a debtor, or at any other time, do not stay in the vicinity of the debtor's workplace for an extended period, or engage in any other conduct that may suggest to the debtor or a third person that the debtor is under surveillance.

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<sup>17</sup> In Victoria, the failure to leave a person's private residence when requested to do so is prohibited under s. 45(2)(d) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

<sup>18</sup> See part 2, section 8, *Privacy obligations to the debtor and third parties*.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> If you do not leave the debtor's workplace when asked to do so, you risk breaching tort and/or criminal trespass laws. Also, in Victoria, the failure to leave a person's workplace when requested to do so is prohibited under s. 45(2)(d) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

## 8. Privacy obligations to the debtor and third parties

The Office of the Australian Information Commissioner (OAIC) has responsibility for privacy regulation at the Commonwealth level.<sup>22</sup>

- (a) A debtor's personal information should always be treated with respect. The improper use of a debtor's personal information may cause that person serious difficulties.
- (b) There are legal obligations under the *Privacy Act 1988* (Cth) (the Privacy Act) designed to protect the privacy of a debtor's personal information.
- (c) A debtor's personal information may be regulated by the Privacy Act in a number of ways.

**Personal information** means information or an opinion, whether it is true or not, about an individual that can reasonably allow the individual to be identified.<sup>23</sup>

### Example: Personal information

Obtaining a debtor's contact details from their employer is collecting their personal information. Telling a debtor's neighbour the reason for trying to find the debtor will also disclose personal information about the debtor.

### Collecting and disclosing the debtor's personal information

- (d) Information handling by private sector organisations is regulated, in part, by the Australian Privacy Principles (the APPs).<sup>24</sup>
- (e) There are several key obligations around handling personal information:
  - Personal information (other than sensitive information which is discussed below) must not be collected about an individual unless the information is reasonably necessary for one or more of your organisation's functions or activities. Therefore, only collect information that is reasonably necessary to recover the debt. For example, do not write down extra information about the debtor from an identifying document just because it might be useful.
  - Sensitive information must not be collected about an individual unless the individual has consented and the information is reasonably necessary for one or more of your organisation's functions or activities. Some limited exceptions to this rule apply. Sensitive information includes information or an opinion about an individual's race or religious beliefs, criminal record, health information, or membership of a professional or trade association.
  - Personal information must be collected only by lawful and fair means and must be collected directly from the debtor, unless this is unreasonable or impracticable.<sup>25</sup>
  - When the debtor's information is collected, whether from a creditor or from the debtor, take reasonable steps to let the debtor know:
    - the identity of the organisation collecting the information and how to contact it
    - the fact that the organisation has collected information and the circumstances of that collection
    - the purposes for which the information is collected
    - the main consequences (if any) for the individual if all or part of the information is not provided
    - any law that requires the particular information to be collected
    - the organisations (or types of organisations) to which the organisation usually discloses information of that kind
    - whether the organisation is likely to disclose the information to overseas recipients

22 The OAIC can be contacted on 1300 363 992 or [www.oaic.gov.au](http://www.oaic.gov.au). See also under *Privacy laws* in appendix B.

23 See s. 6 of the Privacy Act for the definition of 'personal information'.

24 For more information on the APPs and how they are applied, see the APP guidelines at <http://www.oaic.gov.au/privacy/app-guidelines/>.

25 See APP 3. Advice on the operation of APP 3 can be found in the APP guidelines at [www.oaic.gov.au/privacy/app-guidelines/](http://www.oaic.gov.au/privacy/app-guidelines/).



- the fact that the debtor may access the information collected
  - how the individual can complain about a breach of the APPs.<sup>26</sup>
  - Do not use or disclose the information for a purpose other than that for which it was collected unless the debtor has consented to that use or disclosure or another exception applies.<sup>27</sup>
  - Do not use or disclose personal information for direct marketing, unless certain matters are satisfied.<sup>28</sup>
  - Before disclosing personal information about a debtor to an overseas recipient, the collector must take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the APPs in relation to that information.<sup>29</sup>
- (f) Caution should be exercised when leaving messages for the debtor that may be seen or accessed by third parties, for example:
- business cards or other documentation should not be left for the debtor in any open manner that would allow a third party to infer the nature of your interest in contacting the debtor
  - voicemail messages should be phrased so as to avoid a third party inferring the nature of your interest in contacting the debtor
  - at no stage should contact be made by a debtor's social media account that would compromise the debtor's privacy, for example, placing a message for the debtor in a way that would allow anyone other than the debtor to view it.

### What you should do with the debtor's personal information

- (g) Remember the following:
- take reasonable steps to ensure that the personal information being collected is accurate, complete and up-to-date. Before using or disclosing the personal information, having regard to the purpose of that use or disclosure, take reasonable steps to ensure the information is accurate, up-to-date, complete and relevant<sup>30</sup>
  - if personal information is kept for any time, ensure it is secure against misuse, interference or loss and from unauthorised access, modification or disclosure
  - if the information is no longer needed for any purpose for which the information may be used or disclosed, or required by law or a court to be retained, take reasonable steps to destroy it or permanently de-identify the record<sup>31</sup>
  - the debtor has a right to access and correct the personal information collected and certain procedures must be followed to facilitate that access or correction.<sup>32</sup>

### Rights of third parties

- (h) Collectors also have privacy obligations to third parties who they collect personal information from. Under APP 3, the personal information of third parties may only be collected if this is reasonably necessary for one or more functions or activities of the collector. Third parties must also be advised if their personal information is collected.

<sup>26</sup> Advice about what steps might be reasonable in certain circumstances can be found in the APP guidelines at [www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/](http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/).

<sup>27</sup> See APP 6. Advice on the operation of APP 6 can be found in the APP guidelines at [www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/](http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/).

<sup>28</sup> See APP 7. Advice on the operation of APP 7 can be found in the APP guidelines at [www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/](http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/).

<sup>29</sup> See APP 8. Advice on the operation of APP 8 can be found in the APP guidelines at [www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/](http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/).

<sup>30</sup> See APP 10. Advice on the operation of APP 10 can be found in the APP guidelines at [www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/](http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/).

<sup>31</sup> See APP 11. Advice on the operation of APP 11 can be found in the APP guidelines at [www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/](http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/).

<sup>32</sup> See APP 12 and APP 13. Advice on the operation of APP 12 and APP 13 can be found in the APP guidelines at [www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/](http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/).

## Obligations regarding consumer credit reports

- (i) Part IIIA of the Privacy Act also regulates the handling of personal information contained in consumer credit reports.<sup>33</sup> Credit providers should take care what information from a credit report is made available to you to recover a debt and ensure that defaults are only listed if the information is correct. For example, a credit provider should not disclose to an externally contracted debt collector a credit report or any information from a credit report apart from:
- details about the debt to be collected
  - information that is reasonably necessary in order to identify the individual. In certain circumstances, this may include the name and addresses of the debtor
  - any court judgments or bankruptcy orders against the debtor
  - personal insolvency information about the debtor.<sup>34</sup>

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<sup>33</sup> For general advice on credit reporting and the obligations around consumer credit reports, see <http://www.oaic.gov.au/privacy/privacy-act/credit-reporting>.

<sup>34</sup> See s. 21M of the Privacy Act.

## 9. When a debtor is represented

- (a) A debtor has a right to have an authorised representative (such as a financial counsellor, financial advisor, community worker, solicitor, guardian or carer) represent them or advocate on their behalf about a debt.
- (b) Except in the circumstances outlined in paragraph (d) and (e) of this section, you should not:
- contact a debtor directly after you know, or should know, that the debtor is represented
  - refuse to deal with an appointed or authorised representative, whether by direct refusal or by placing unnecessary obstacles in the way of the authorised representative, for example, by insisting on a particular style or form of authorisation when the written authority provided already includes the necessary information.

### **Example: Contacting a represented debtor**

If a debtor instructs you not to contact them, and provides you with contact details of a specified third party who has been authorised to act on their behalf, then you should not contact the debtor and future contact should be through the authorised representative.

- (c) In general, any form of authority consistent with the requirements of the Privacy Act should be regarded as acceptable. We recommend that:
- a verbal authorisation given by a debtor in circumstances where it is recorded (a file note of a conversation would suffice), is acceptable for the purpose of allowing a third party representative to represent them or advocate on their behalf about a debt
  - a written authorisation to be represented<sup>35</sup> include as many of the following details as is reasonably possible:
    - full name, date of birth and residential address of the debtor
    - the name of the creditor, account/contract identity details for which the authorisation is provided
    - full name, address and contact details (telephone or email) of the authorised third party, individual representative or agency
    - the basis of the authorisation provided—whether the authorisation is ongoing or whether strictly limited to a specific purpose or timeframe.
- (d) You are entitled to contact a debtor directly if:
- the debtor specifically requests direct communication with you
  - the representative does not consent to represent the debtor in relation to the debt
  - the representative advises you that they do not have instructions to represent the debtor in relation to the debt
  - the representative does not respond to your communications within a reasonable time (normally seven days) and you advise the representative in writing after the reasonable time has passed that if they do not respond within the next seven days, you will make direct contact with the debtor
  - you advised the debtor that you require a written authority which states that you are only to communicate through the debtor's representative, and the debtor or representative fails to provide you with that written authority within a reasonable time (normally seven days). Note that this does not apply where the debtor's representative is a solicitor. When an authorised representative does not agree to have written correspondence redirected to the representative, such correspondence should continue to be sent directly to the debtor.
- (e) You may also be entitled to contact a debtor directly where more than one of the following applies (except where the representative is a financial counsellor<sup>36</sup>, a qualified legal practitioner in the relevant state or territory, or a qualified accountant<sup>37</sup>):

<sup>35</sup> See Appendix D— Authority Form from Financial Counselling Australia for an example of a form of written authority developed by the Australian Bankers' Association and Financial Counselling Australia.

<sup>36</sup> See r. 20(5) of the NCCP Regulations.

<sup>37</sup> Certified by one of the three Australian peak bodies: the Institute of Chartered Accountants, Certified Practising Accountants Australia and the Institute of Public Accountants.

- the representative is acting in a manner or making decisions which increase or are likely to increase the debtor's liabilities
  - the representative may be charging the debtor a fee for services that can be readily accessed free of charge
  - the representative may be receiving payment from the debtor for the negotiation of a debt settlement
  - you reasonably believe that the representative is not informing the debtor of all available options, offers of settlement, offers of hardship assistance or other creditor proposals<sup>38</sup>
  - you reasonably believe that the representative is engaging in a deceptive or misleading manner in engagement with either or both the creditor or the debtor
  - you reasonably believe that the debtor has not been informed of the potential risks and consequences of a course of action the representative is pursuing
  - you reasonably believe that the representative is acting against the debtor's best interests.<sup>39</sup>
- (f) In the circumstances described in (e) above, upon contacting a debtor directly despite representation, you should explain to the debtor why you are making direct contact and provide the debtor with reasonable time to consider the information you provided and, if necessary, make alternative arrangements. Should the debtor confirm an intention to retain their authorised representative you should cease further direct contact with that debtor.
- (g) You should maintain records of all communications and attempted contacts with the debtor's representatives.
- (h) If the debt is assigned, contact details of the authorised representative should be provided to the assignee and the assignee should avoid contacting the debtor directly (subject to paragraph (d) and (e) above. Also see part 2, section 11, *Providing information and documents.*).

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<sup>38</sup> For example, because the representative's response appears to lack due consideration, or is aggressive or threatening.

<sup>39</sup> For example, based on the representative's previous conduct when representing this or other debtors.

## 10. Record keeping

- (a) You should ensure:
- you maintain accurate, complete and up-to-date records of all communications with debtors, including the time, date and nature of calls about the debt, records of any visits in person, and records of all correspondence sent
  - all payments made are accurately recorded (including details of date, amount and payment method)
  - you provide documents to which the debtor is entitled on the debtor's request.
- (b) Accurate record keeping by all parties is vital to promptly resolve disputes and to allow collectors and debtors to limit or avoid costly debt collection activity.

### **Example: Record of attempted and actual contacts**

If you maintain accurate records (for example, call logs or notes of contact and copies of all correspondence with the debtor), then it may be easier to identify any issues and to resolve disputes.

- (c) Accurate record keeping will also assist to determine whether a debt is statute-barred by making it easier for you to identify and calculate relevant dates to determine the limitation period. See part 2, section 20, *Representations about the legal status of debt—including statute-barred debt*.

### **Example: Record of payments**

If you accurately record all payments in relation to a debt then it will be much easier for you to accurately identify when the debtor's last payment was made.

- (d) Creditors should ensure:
- debt collectors are provided with accurate, up-to-date information about assigned or contracted debts<sup>40</sup>
  - retained information and documentation can be accessed and forwarded to collectors in a prompt and efficient manner
  - settled debts are not assigned or contracted out for collection.

## Recording debt settlements

- (e) You should ensure that:
- settlements reached in relation to the repayment of a debt are fully documented in relevant files and computer systems
  - before tranches of debts are assigned, sold or contracted out for collection, all reasonable steps are taken to ensure settled debts are not included.
- (f) Once a debt is settled, any credit reporting body report on the debtor should be updated appropriately.<sup>41</sup>

<sup>40</sup> Note, however, that there are limits on information mercantile agents are permitted to receive from credit providers under Part IIIA of the Privacy Act. More generally on privacy issues: see part 2, section 8, *Privacy obligations to the debtor and third parties*.

<sup>41</sup> More generally on credit reporting, see part 2, section 8, *Privacy obligations to the debtor and third parties*.

## 11. Providing information and documents

- (a) You should address requests for information or documentation as soon as possible.
- (b) In certain circumstances, failure to provide information may constitute misleading or deceptive conduct or unconscionable conduct. Copies of contracts and related documents should be provided without unreasonable delay if these are requested by a debtor. This can also assist if a debt has been incurred with a business operating under a trading name that is different to the creditor name supplied to the debtor. You can only charge for provision of documents if the contract that gave rise to the debt specifically allows for it.
- (c) If a debt relates to consumer credit regulated by the NCC, specific obligations are imposed on creditors to provide information and documents on request. These are set out in the following sections of the NCC:
- s. 36 (statement of amount owing and other matters)<sup>42</sup>
  - s. 38 (disputed accounts)<sup>43</sup>
  - s. 83 (statement of payout figure)<sup>44</sup>
  - s. 185 (copies of contracts and other documents).<sup>45</sup>
- These timeframes also provide a guide to what is reasonable for accounts that are not regulated by the NCCP.
- (d) In addition, subscribers to industry codes of conduct may be subject to information and document disclosure requirements.<sup>46</sup> Debtors also have a right to access personal information held about them under APP 12 (subject to certain limits).<sup>47</sup>
- (e) If a debtor requests information about an amount claimed as owing, or how that amount has been calculated, you should provide the debtor with an itemised statement of the account clearly specifying:
- the amount of the debt and how it is calculated
  - details of all payments made and all amounts (including principal, interest, fees and charges) owing and the relevant dates for these transactions.
- (f) Except for undisputed amounts, all collection activity should be suspended until the account information and/or documents requested have been provided to the debtor (see part 2, section 13, *If liability is disputed*).

### Responsibility for providing information and documents

- (g) Depending on arrangements between the original creditor and its agent or assignee who purchased the debt (assignee), such information may be provided either through the agent or assignee or directly by the original creditor.<sup>48</sup>

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42 Information to be provided to the debtor or loan guarantor if requested under s. 36(1) of the NCC:

- (a) the current balance of the debtor's account
- (b) any amounts credited or debited during a period specified in the request
- (c) any amounts currently overdue and when such amount became due
- (d) any amount currently payable and the date it became due.

43 If a particular liability is disputed in writing, the credit provider must explain in writing in reasonable detail how the liability arises: s. 38(1) of the NCC.

44 In response to a written request from a debtor or loan guarantor, a credit provider must provide a statement of the amount required to pay out a credit contract (other than a continuing credit contract facility) at a particular date. Details of items that make up this amount must also be provided if requested: s. 83 (1) of the NCC.

45 This section covers credit contracts, mortgages, guarantees, credit-related insurance contracts in the credit provider's possession, and notices previously given to the debtor, mortgagor or guarantor under the NCC.

46 For example, subscribers to the Code of Banking Practice (available at <http://www.bankers.asn.au/Industry-standards/ABAs-Code-of-Banking-Practice/Code-of-banking-practice>) must comply with code requirements relating to the provision of copies of documents (cl. 13) and statements of account (cl. 26).

47 More generally, see part 2, section 8, *Privacy obligations to the debtor and third parties*.

48 Note however the obligations under the Privacy Act. More generally on privacy issues, see part 2, section 8, *Privacy obligations to the debtor and third parties*.

## Agents

- (h) Original creditors should bear in mind that agents act on their behalf under express or implied authority. This means that the original creditor is ultimately liable for the agent's actions.
- (i) Original creditors and their agents need to have appropriate contractual and operational arrangements in place to facilitate the provision of information and documents. This includes prompt and efficient processes for agents relaying requests to the original creditors, and for the original creditors responding to those requests. When it is arranged for the original creditor to respond directly to the debtor, a discussion should take place between the original creditor and agent to ensure that collection activity is suspended until the account information or documents requested have been provided.

## Assignees

- (j) If you have purchased debt from the original creditor, you should ensure that you have all relevant information and documents relating to the debt, or are able to access this information or documents from the original creditor within reasonable timeframes or the prescribed time period under the NCC if the credit contract is regulated by the NCCP. You should ensure that the debtor is not disadvantaged by the assignment of the debt.
- (k) Original creditors and assignees should ensure that the terms of the assignment include adequate processes to ensure compliance with this guideline and the law.
- (l) The original creditor should notify the assignee if the debtor is represented or if there are repayment arrangements in place.
- (m) Where the original creditor sells or assigns the debt, the debtor must be informed of the sale. Note that some state-based property legislation prescribes that when a debt is assigned, the assignor must give express notice of the assignment to the debtor in writing.<sup>49</sup>
- (n) Clearly explaining why a party other than the original creditor is involved in the collection of a debt is important to avoid debtor confusion and to encourage a cooperative response. In addition to any other information required by state or Commonwealth laws, your first contact with the debtor should set out in plain English that you have purchased the debt from the original credit provider and set out the consequences of the purchase, including but not limited to relevant contact details, scheduled repayments and any other useful information that can assist the debtor's understanding of their obligations and options.

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<sup>49</sup> For example, see s. 134 of the *Property Law Act 1958* (Vic).



## 12. Consistent and appropriate correspondence

- (a) Your correspondence—including automatically generated letters—should be consistent with both your records and your verbal communications with the debtor, and vice versa.
- (b) Correspondence should reflect the repayment arrangements that you have made with the debtor.<sup>50</sup> Such correspondence must not make inaccurate representations, including misrepresentations about:
- the frequency of contact (for example stating that ‘numerous attempts have been made to contact you by telephone’ or ‘numerous previous letters have been sent’ if this is not the case)
  - liability or the amount owing (for example stating or implying that a debtor is liable for collection charges or fees, legal fees or charges that you are not legally entitled to claim)
  - demand payment for an amount that does not account for payments already made.
- (c) It is not appropriate to send reminders or other correspondence about the consequences of non-payment (including automatically generated letters) when:
- a temporary stay of action or enforcement has been granted
  - you have not provided the information you agreed to provide (whether or not liability for the debt has been disputed)
  - court or external dispute resolution proceedings regarding the debt have been commenced.<sup>51</sup>
- (d) You should avoid communications with the debtor that may distort the true purpose of the communication or communicate an unwarranted sense of urgency or cause unwarranted stress or anxiety.

### **Example: Unwarranted sense of urgency**

If you write a letter or other message to a debtor that does not identify the sender but states that the matter is urgent then you may lead a debtor to believe there may be some personal emergency that requires an immediate response.

<sup>50</sup> See part 2, section 14, *Repayment negotiations*, and section 15, *Contact when a payment arrangement is in place*.

<sup>51</sup> However, if judgment is subsequently obtained, further correspondence or other communication may be appropriate (for example, to outline alternatives to enforcement of the judgment debt through the courts). For a more general discussion of legal action and procedures, see part 2, section 21, *Legal action and procedures*.

### 13. If liability is disputed

- (a) Collection activity (including credit report listing) should be suspended if a person contacted about a debt claims that:
- they are not the alleged debtor
  - the debt was never incurred, or
  - the debt has been paid or otherwise settled
- and you have not already confirmed their identity and liability.
- (b) If collection activity is continued without properly investigating claims that a debt is not owed, including whether a debt is statute-barred, there is considerable risk of breaching the law.

#### Assignment

- (c) If you are considering assigning a debt, and the debt is in dispute, you should think carefully about providing additional information to the assignee.

#### Identity of debtor is disputed

- (d) A person must not be pursued for a debt unless there are reasonable grounds for asserting that the person is liable for the debt.

**Example: Take reasonable steps to ensure that the person contacted is the alleged debtor**

You should not send letters requesting payment or alleging a debt is owed to a person or group of persons who may only share a name or surname with the person who incurred the debt. Doing so can be stressful for a person who is not the alleged debtor and may be misleading or deceptive.

- (e) Reasonable steps should be taken to ensure that the person contacted or attempting to be contacted is the alleged debtor. If the identity of the debtor cannot be established with sufficient certainty (because they deny their identity and you do not have any other supporting evidence to the contrary) all contact with that person should cease. Failure to do so may risk breaching the Privacy Act. See part 2, section 8, *Privacy obligations to the debtor and third parties*.

#### Quantum of or liability for a debt is disputed

- (f) If the debtor's liability for the debt cannot be established when challenged, collection activity should cease. A letter to the debtor should be considered advising that collection activity has ceased and the circumstances (if any) in which collection activity may be resumed in the future.
- (g) It is misleading to state or imply that the debtor must prove they are not liable for the debt. In legal proceedings, proof of the debt lies with the person alleging the debt is owed to them.
- (h) If the parties are unable to resolve a dispute about liability for a debt or the amount owed, you may have an obligation to advise the debtor of internal or external dispute resolution processes available—see further under part 2, sections 22, *Resolving debtor complaints and disputes* and 24, *The role of independent external dispute resolution schemes*.
- (i) Subject to the next paragraph, further communication with a debtor, after the debtor has clearly denied liability and/or stated an intention to defend any legal proceedings brought against them, is not appropriate. In these circumstances, you have the option of starting legal proceedings if you choose to pursue the debt.
- (j) However, further communication in writing may be appropriate after a denial of liability:
- to clarify the basis of the creditor's or collector's claim and the consequences of legal action being taken
  - to advise the debtor of the creditor's or collector's intention to start legal proceedings, and the steps involved
  - to put a genuine proposal to the debtor for settlement of the debt.

Further communication is also appropriate when it is subsequently authorised or requested by the debtor.

- (k) Further communication with the debtor about any other debt, or any part of a debt that is not denied remains appropriate.
- (l) If a court judgment is obtained for a debt for which liability had been denied, you are entitled to start or resume communication with the debtor for that judgment debt (assuming the judgment has not been set aside).

## 14. Repayment negotiations

- (a) We encourage you to work with a debtor and to adopt a flexible and realistic approach to repayment arrangements, which includes:
- making reasonable allowances for a debtor's ongoing living expenses
  - considering if a debtor is on a fixed low income (for example a disability pension or other welfare payments) and there are no prospects of their income increasing in the future
  - recognising that debtors experiencing financial difficulties will often have a number of debts owing to different creditors, and
  - ensuring that payment arrangements are meaningful and sustainable.
- (b) In some circumstances, a prolonged period of negotiation about a debt may not be in the interests of the debtor. This may be the case, for instance, when a debtor's equity in their home or other security is reducing rapidly because they can no longer maintain minimum or meaningful loan repayments. It is appropriate for you to take this kind of circumstance into account when negotiating with a debtor.
- (c) Debtors experiencing financial hardship in relation to credit contracts regulated by the NCCP have the benefit of a formal process under the NCC.<sup>52</sup> In such cases, the credit provider must notify the debtor within the timeframes specified in the NCC whether the credit provider agrees to change the credit contract. You should not contact the debtor for the purpose of collection until such decision has been communicated. Financial hardship policies are also available to consumers for particular goods or services, such as energy and financial products or services.<sup>53</sup> There may also be other circumstances where consumers are entitled to apply for a particular repayment program due to financial hardship.
- (d) You should also be aware that the law may offer some protections to debtors receiving certain types of income, for example, where a debtor's income is derived only from a pension or a government benefit.<sup>54</sup>
- (e) In addition, some industry codes may oblige subscribers to help debtors overcome their financial difficulties and advise them of any rights they may have under the NCCP or other relevant legislation.<sup>55</sup>
- (f) You must not mislead the debtor in the context of repayment negotiations. For instance, you must not:
- advise a debtor that you do not, or are unable to, enter into repayment arrangements when this is not the case
  - mislead a debtor about their rights, for example, a right to seek a repayment variation
  - mislead a debtor about the consequences of non-payment (see part 2, section 19, *Representations about the consequences of non-payment*)
  - mislead a debtor about the legal status of a debt (see part 2, section 20, *Representations about the legal status of a debt—including statute-barred debt*).
- (g) It is also unacceptable to pressure a debtor to:
- pay in full or in unreasonably large instalments, or to increase payments when you are aware they are unable to do so
  - pay a large upfront amount and state that only afterwards will you consider payment arrangements
  - get further into debt to pay out an existing debt
  - show proof of unsuccessful alternative credit applications before a repayment plan will be negotiated

52 If a debtor considers that they are or will be unable to meet their obligations under a credit contract, the debtor may give the credit provider notice, orally or in writing, of their inability to meet these obligations: s. 72 of the NCC. If the credit provider does not agree to the variation proposed, the debtor can apply to your approved external dispute resolution scheme.

53 For example, the National Energy Retail Law (NERL) requires energy retailers to develop, maintain and implement a customer hardship policy for residential customers and the AER oversees this process. Energy retailers have an obligation to develop processes to identify consumers experiencing hardship and provide flexible payment options. The AER collects data to monitor retailers' compliance and performance in these areas. See AER publication *Energy bills, hardship programs and disconnection—your rights* at <http://www.aer.gov.au/consumers/aer-resources> and <http://www.aer.gov.au/consumers/my-energy-bill/problems-paying>.

54 For example, s. 60(1) of the *Social Security (Administration) Act 1999* (Cth) which provides that a social security payment is absolutely inalienable. Other protections include s. 12 of the *Judgment Debt Recovery Act 1984* (Vic), which states that an instalment order shall not without the consent of the judgment debtor be made if the income of the judgment debtor is derived solely for a pension or other government benefits.

55 Clause 28.2 of the Code of Banking Practice states in part: 'With your agreement and cooperation, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan'.

- borrow from family or friends to pay out a debt
  - access their superannuation early.
- (h) Under no circumstances should you provide debtors with financial advice.
- (i) Any repayment arrangement reached with a debtor should be fully and accurately documented.
- (j) A written copy of the agreed repayment arrangement should be provided to the debtor on request. If the debtor does not agree with the way the repayment arrangement has been recorded, they have an opportunity to clarify the arrangement with the debt collector or creditor.<sup>56</sup>

**Example: Confirm renegotiated repayment arrangements in writing**

At the end of a phone conversation with the debtor, where you have renegotiated a repayment arrangement, you may consider sending an email or letter to the debtor to confirm the terms of the agreed arrangement. This will minimise any ambiguities or misunderstandings, and will give the debtor the opportunity to contact you in case they disagree or are unclear about any aspect of the agreement or the way you have recorded it.

- (k) Once finalised, the debtor should be given a reasonable opportunity for the repayments to be made under the arrangements.

<sup>56</sup> If you are regulated under the NCCP, you may have an obligation to provide debtors with certain information and/or documents upon request, see for example, s. 185 of the NCC.

## 15. Contact when a payment arrangement is in place

- (a) Generally, while an arrangement is in place, the debtor or their representative should not be contacted unless:
- the debtor asks you to
  - you wish to propose a genuine alternative arrangement to benefit the debtor
  - the debtor does not comply with the terms of the repayment arrangement.
- (b) In addition, if you are required to provide or have committed to provide ongoing account statements to the debtor, you should continue to do so.

### **Example: Payment reminders**

You can ask the debtor whether they wish to receive payment reminders, perhaps via an email or SMS. However, if a debtor has not explicitly requested such contact you should avoid further contact unless it is for a proper purpose (for example, the debtor defaulted on a repayment).

- (c) You are entitled to contact a debtor to review an arrangement that was made subject to review. However, repayment reviews should not be excessively frequent. A minimum of three months is recommended between reviews unless the debtor fails to make an agreed repayment.

## 16. Contact following bankruptcy or a Bankruptcy Act agreement

The following information on bankruptcy has been written based on guidance from the Australian Financial Security Authority (AFSA), formerly known as the Insolvency and Trustee Service Australia.

AFSA is the Commonwealth body responsible for the administration and regulation of the personal insolvency system, trustee services and the administration of the Personal Property Securities Register (PPSR) and proceeds of crime.

- (a) Under the Bankruptcy Act an unsecured creditor<sup>57</sup> may lodge a proof of debt with the bankrupt's trustee. With limited exceptions set out in this Act, an unsecured creditor may not:
  - take or continue legal action or allow recovery action to continue against the bankrupt person
  - take any remedy against the person or property of the bankrupt.
- (b) A creditor or debt collector must also stop all informal collection activity against a bankrupt person for an unsecured debt.
- (c) Trying to persuade a bankrupt person that they should or must pay an unsecured debt covered by the bankruptcy will constitute misleading or deceptive conduct under the consumer protection laws.<sup>58</sup> Contacting a bankrupt person about such a debt may also amount to harassment of the debtor or unconscionable conduct.
- (d) Secured creditors<sup>59</sup> (including their agents) are entitled to take possession of secured assets and sell these if the bankrupt person is in default. Contacting a bankrupt debtor to sight, inspect or recover a security interest is permissible so long as the contact is consistent with the law.
- (e) In certain circumstances, a bankrupt person may also agree to pay a secured creditor to keep an asset. Ongoing communication with the bankrupt person in connection with such an arrangement is also permissible.
- (f) Apart from becoming bankrupt, in certain circumstances a debtor may enter into a Part IX debt agreement or Part X personal insolvency agreement under the Bankruptcy Act. These agreements involve a process by which a debtor makes a proposal to the creditors. If this proposal is formally accepted by the creditors, both debtor and creditors are bound by it and creditors cannot enforce remedies to recover their debts so long as the agreements are valid and are not declared void by a court or otherwise terminated. As with bankruptcy, secured creditors' rights are not affected by these agreements.<sup>60</sup>
- (g) Unsecured creditors (or their agents) should contact the trustee of a bankrupt estate, or the administrator of a Part IX or trustee of a Part X agreement for information about the possibility of recovering their debt.

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57 A creditor who does not hold a mortgage, bill of sale or other security over an asset that can be sold if the debt is not paid.

58 When a person is bankrupt, the debt may be recoverable from the bankrupt person's estate. In this case, the trustee of the bankrupt estate and not the bankrupt person should be contacted.

59 A creditor who holds a mortgage, bill of sale or other security over an asset that can be sold if the debt is not paid.

60 Further information is available on the AFSA website on [www.afsa.gov.au](http://www.afsa.gov.au) or 1300 364 785.

## 17. Conduct towards the debtor or their representatives

- (a) A debtor is entitled to respect and courtesy, and must not be subject to misleading, humiliating or intimidating conduct by a creditor, debt collector or any of their agents or representative. Such conduct is likely to breach the law.
- (b) You should never:
- use abusive, offensive, obscene or discriminatory language
  - make disrespectful or demeaning remarks about a debtor's character, situation in life, financial position, physical appearance, intelligence or other characteristics or circumstances
  - embarrass or shame a debtor—for example, by sending open correspondence to a shared post-box, posting messages for the debtor in a public online forum (for example, using social media sites), making the debtor's employer or co-workers aware that the debtor is being pursued for a debt, or creating an impression that the debtor is under surveillance<sup>61</sup>
  - adopt an aggressive, threatening or intimidating manner—for example, by shouting at or continually interrupting the debtor, or by refusing to listen to what the debtor has to say
  - use, or threaten to use, violence or physical force against a debtor, third party or against property<sup>62</sup>
  - mislead a debtor about the nature or extent of a debt, or the consequences of non-payment.<sup>63</sup>

### CASE STUDY

A company was found to have engaged in false and misleading conduct and unconscionable conduct, and to have used coercion to obtain payment for mobile services when it created a fictitious complaints handling body, a fictitious debt collection agency and made false statements about the consequences of non-payment to coerce debtors to pay the alleged debt.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

- (c) Inappropriate behaviour by a debtor does not justify unprofessional conduct by the collector.
- (d) Where possible, you should attempt to defuse such behaviour and refocus discussion on the outstanding debt and arrangements for its repayment. Where a debtor displays inappropriate behaviour, we recommend the matter be escalated to a senior staff member who is trained to manage such situations.
- (e) Debtor frustration or anger is more likely to be contained where viable and achievable repayment arrangements are proposed. In the event of violence or other extreme conduct, the appropriate response is to cease contact immediately and refer the matter to the police.

### CASE STUDY

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

*ACCC v Davis [2003] FCA 1227*

61 Such actions may also involve a breach of the collector's privacy obligations to the debtor: see part 2, section 8, *Privacy obligations to the debtor and third parties*.

62 Such threats or actions may constitute criminal conduct.

63 See further under part 2, sections 19, *Representations about the consequences of non-payment*, 20 *Representations about the legal status of debt, including statute-barred debt* and 21, *Legal action and procedures*.



## 18. Conduct towards family members and other third parties

- (a) You must not try to pressure a debtor by misleading, harassing, threatening or putting pressure on a debtor's spouse or partner, a member of a debtor's family (especially a child) or other third parties such as authorised representatives.
- (b) All communication with third parties, including members of a debtor's family, must be consistent with your privacy obligations to the debtor and the third party as set out in part 2, section 8, *Privacy obligations to the debtor and third parties*.

### CASE STUDY

A company threatened to call neighbours and friends of the debtor with the expectation that they would inform the debtor or the debtor's husband that the company had contacted them.

The court found that contacting the debtor's neighbour and asking him to pass a message to the debtor's husband, as opposed to the debtor, was a distinctly unsavoury tactic. It was found to amount to undue harassment and coercion. The court found that this conduct carried with it the implicit suggestion that such exposures might be expected in the future.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 116*

- (c) A debtor's family and third parties should be treated with courtesy and respect. In most circumstances, it is likely that the third party is unaware of the debt and may find the contact distressing (particularly in the case of family members).
- (d) You might breach Commonwealth consumer protection laws if, in communicating with a third party, you:
  - suggest or imply that the third party is liable for the debt when that person has no legal obligation to pay
  - suggest or imply that the third party should try and persuade the debtor to pay the debt, or that the third party should themselves pay the debt
  - put pressure on the debtor indirectly by involving the third party
  - embarrass or distress the debtor.
- (e) When it is appropriate to communicate with a third party, do so by telephone or other non-intrusive means wherever possible.<sup>64</sup>
- (f) Only visit a third party at their home or other location when no other means of making contact is available, for example, when you only have, or can only reasonably obtain, an address.
- (g) Attempting to get information about a debtor from a third party under false pretences, for example, by pretending to be an associate or friend of the debtor, constitutes misleading or deceptive conduct and is against the law.

### CASE STUDY

A company was eliciting confidential information about the debtor from the debtor's employer under false pretences by making a statement which was knowingly false, namely, that the call was for the purpose of processing a 'credit application'.

The court declared that the company had engaged in misleading or deceptive conduct and undue harassment and coercion.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164*

<sup>64</sup> On the hours and frequency of contact with third parties, see part 2, section 4, *Hours of contact* and section 5, *Frequency of contact*. If communication is made with a third party, the creditor or collector should avoid disclosing any information about the debtor including the existence of the debt: see part 2, section 8, *Privacy obligations to the debtor and third parties*.

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

### Communication with the debtor's child

- (i) Attempting to pressure a debtor by instigating unauthorised communication with the debtor's child, or by making threats about the debtor's child (for example, threatening to report the debtor to the family welfare authorities) will constitute undue harassment or coercion or unconscionable conduct within the meaning of the consumer protection laws.
- (j) Do not communicate with a debtor's child (under the age of 18) about a debt, unless:
- communication with that child is specifically authorised and initiated by the debtor; or the debtor, on their own initiative, asks the child to act as a translator
  - you reasonably believe the child is willing and able to act as a translator or other intermediary
  - you reasonably believe that the child has not been coerced in any way by the debtor or another party to act in this capacity.<sup>65</sup>
- (k) You must take particular care to ensure that your conduct and demeanour does not distress or embarrass the child. You should immediately cease communication involving the child if the child appears to become upset, or the child or a member of the child's family requests that the communication cease.

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<sup>65</sup> Note that in Victoria, any communication with a person under the age of 18 regarding a debt (if the person is not the debtor) is prohibited under s. 45(2)(n) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

## 19. Representations about the consequences of non-payment

- (a) This section should be read in conjunction with part 2, section 20, *Representations about the legal status of debt, including statute-barred debt* and section 21, *Legal action and procedures*.
- (b) You are entitled to accurately explain the consequences of non-payment of a debt, but must not misrepresent those consequences.<sup>66</sup> Misrepresentation may increase the risk of breaching laws against unconscionable conduct when the debtor is in a position of special disadvantage or vulnerability.<sup>67</sup>
- (c) You must not threaten legal action if the start of proceedings is not possible, not intended, or not under consideration, or you do not have instructions to start proceedings.

### CASE STUDY

A company represented to a debtor that it was commencing proceedings to bankrupt the debtor, which would involve his house being repossessed, when this was not true. The company also represented to a debtor that it would cause Sheriff's officers to attend the debtor's home to serve documents when this was not possible.

The court found that the operators were told to make references to legal proceedings and lawyers as a means of achieving debt recoveries.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164*

- (d) Conversely, you must not state or imply that action will not be taken when the start of proceedings is intended or under consideration.

### CASE STUDY

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

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

- (e) Do not state or imply to a debtor or their representative that:
  - immediate possession will be taken of a debtor's home or other property when the debt is not secured by that property, or you have not obtained judgment for the debt
  - you obtained judgment for the debt, if this is not the case
  - unsecured goods may be seized and sold without further legal action
  - unsecured basic household items can be seized if the debtor is made bankrupt<sup>68</sup>
  - additional fees or charges will be added to the debt if payment is not made, if such fees or charges are not permitted by law<sup>69</sup>
  - additional fees or charges will be added to the debt where there is no contractual right to add these
  - non-payment will have consequences relating to the person's employment or ability to earn an income
  - the debtor is obligated to make repayments from their social security entitlements if they are not obligated to do so.<sup>70</sup>

66 Apart from constituting misleading or deceptive conduct under the consumer protection laws, misrepresenting the consequences of non-payment of a debt may also be prohibited under the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

67 See part 3, *Commonwealth consumer protection laws*.

68 Section 116 of the *Bankruptcy Act 1966* (Cth) excludes these items from seizure by creditors.

69 For example, s. 347 of the *Property Agents and Motor Dealers Act 2000* (Qld) prohibits the recovery of a commercial agent's fees or charges (besides stamp duty and costs fixed by or payable under the rules of a court or a court order) in the absence of an agreement with the debtor allowing such recovery, and subject to the NCC.

70 Some state laws provide additional protection to debtors whose sole source of income is a social security benefit and the debtor has no other assets.

### CASE STUDY

A company was found to have engaged in unconscionable conduct by making false representations to debtors about the company's rights and remedies in the event that legal proceedings were commenced to recover the alleged debts.

The company falsely represented to debtors that a court would make certain orders that the debtor would be required to pay an additional charge of 20 per cent of the original debt as a remedy for failure to pay on time; and that all assets of value would be repossessed, including children's toys.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

### CASE STUDY

A company threatened to issue a warrant for the debtor's arrest and take action that would result in his taxi licence being revoked. The company also threatened to take action that would result in the debtor being unable to travel overseas (implying that his passport may be at risk).

The court found that the threats relating to the debtor's passport and taxi licence were 'calculated to intimidate' and amounted to undue harassment.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164*

- (f) Do not state or imply that:
- failure to pay a debt is a criminal matter when no fraud or other criminal offence is involved
  - a matter will be referred to the police when there is no intention or reasonable basis to make such a referral
  - criminal proceedings may be commenced by you or other private persons.<sup>71</sup>
- (g) Under the NERL, an energy retailer must not commence proceedings for debt recovery if the customer continues to adhere to the terms of an agreed payment arrangement or if the energy retailer has failed to comply with requirements in the NERL regarding payment plans and assistance to hardship customers or residential customers experiencing payment difficulties.

### Credit reporting

- (h) Do not state or imply that you intend to list a debt with a credit reporting service when:
- you do not have a genuine belief that the debtor is liable for the debt
  - you have no instructions to list the debt, and/or it is not your intention to do so
  - listing is not permitted by law or under a mandatory code
  - the debt has already been listed.
- (i) Equally, while it is appropriate to point out the possible consequences of a credit listing, you must not make misleading representations about those consequences.

#### Example: Misleading representations about adverse credit listings

You should not state to a debtor that once default is listed, the debtor will 'never be able to apply for a loan' or will 'be lucky to get a loan at a good rate again'.

- (j) Generally, it is not appropriate to make an adverse credit listing:
- when you are in the process of investigating a debtor's claim that a debt is not owed
  - if you are aware that the debtor has filed process with a tribunal or court, or lodged a complaint with an external dispute resolution scheme, disputing liability for the debt.
- (k) For more general information on credit reporting obligations, see part 2, section 8, *Privacy obligations to the debtor and third parties*.

<sup>71</sup> Such conduct will also breach s. 43(2)(a) of the *Fair Trading Act 1987* (SA).

## 20. Representations about the legal status of a debt—including statute-barred debt

- (a) This section should be read with part 2, section 19, *Representations about the consequences of non-payment* and section 21, *Legal action and procedures*.
- (b) You should not state or imply that legal action will or may be taken when a defence at law applies. Among other defences, a debtor will be able to claim a defence if:
- the debtor has been declared bankrupt<sup>72</sup> and the debt(s) is unsecured
  - the right to pursue the debt in court has expired due to the passing of time. This time limit varies from state to state, but is usually six years (three years in the Northern Territory) from the date the right of action accrued or the debt was last acknowledged by the debtor (for example, by making a payment).
- (c) Representing that legal action will or may be taken when a debt is statute-barred may be misleading or deceptive. Such representation may also be unconscionable when the debtor has not had the opportunity to obtain legal advice.

### CASE STUDY

An unemployed mother of a deaf, dependent child was contacted by a debt collector who questioned her about her personal and financial circumstances.

The collector implied that legal proceedings may be instituted if no payment was made on a debt of \$10 000 that, unknown to the debtor, was statute-barred. The court found the collector's conduct to be unconscionable and noted that the circumstances were sufficient to require the collector to establish that the transaction was fair, just and reasonable—which the collector did not do.

The court ordered that the debtor did not have to pay the debt and instead, that the creditor return the monies paid by the debtor.

*Collection House v Taylor [2004] VSC 49*

<sup>72</sup> Alternatively, the debtor has entered into a Part IX debt agreement or a Part X personal insolvency agreement under the Bankruptcy Act: see part 2, section 16, *Contact following bankruptcy*.

## 21. Legal action and procedures

- (a) This section should be read in conjunction with part 2, section 19, *Representations about the consequences of non-payment* and section 20, *Representations about the legal status of debt, including statute-barred debt*.
- (b) You have a right to pursue debts through the courts. However, in pursuing or threatening to pursue legal action you must comply with the consumer protection laws.
- (c) Do not make misrepresentations about the legal process. For instance, do not:
- misrepresent the nature or purpose of correspondence. Ensure the layout, wording and design of documents (for example, letters of demand) are not likely to create the impression in the mind of the debtor or their representative that they are court process or other court documents, or that they were sent from a solicitor's office, when this was not the case<sup>73</sup>
  - suggest that telephone calls are recorded 'for training purposes' (and, by implication, only for such purposes) when those calls may also be used as evidence
  - misrepresent that failure to pay a debt (where no fraud is involved) is a criminal or police matter, or is likely to be referred to the police<sup>74</sup>
  - misrepresent that you are a police officer, court official, or have some official capacity that you do not have to claim or enforce payment of a debt<sup>75</sup>
  - state or imply that unsecured basic household items can be seized if the debtor is made bankrupt<sup>76</sup>
  - state or imply that legal action has already been taken, or judgment entered, in relation to the debt when this is not the case.

### CASE STUDY

A company implied to a debtor that it had decided to and would commence legal proceedings against the debtor, when in fact the company had not, could not and would not do so. The company also represented to a debtor that it had been given strict instructions from a solicitor in relation to a debt when this was not the case.

The court found that the constant references to litigation were not an accident within this case. They were the intended outcome of the company's internal manual which promoted threatening litigation as a means to achieving recoveries. Further, the court found that the company was claiming to be a 'litigation company' when this was not true.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164*

- (d) In certain circumstances, the way legal action is threatened or employed can amount to unconscionable conduct or harassment. For instance, this may be the case if you start or escalate court action against a debtor when you have agreed not to, or when a payment arrangement is in place and is being complied with.

<sup>73</sup> See also s. 45(2)(g) *Australian Consumer Law and Fair Trading Act 2012* (Vic) and s. 43(2)(c) *Fair Trading Act 1987* (SA). These provisions relate specifically to misrepresentations regarding documents.

<sup>74</sup> See also s. 43(2)(a) *Fair Trading Act 1987* (SA) which specifically prohibits false representations that criminal or other proceedings will lie for non-payment of a debt.

<sup>75</sup> See also s. 45(2)(h) *Australian Consumer Law and Fair Trading Act 2012* (Vic) and s. 43(2)(b) *Fair Trading Act 1987* (SA).

<sup>76</sup> Section 116 of the Bankruptcy Act excludes these items from seizure by creditors.

- (e) When you know or can reasonably obtain the debtor's current address, we recommend that you issue debt recovery proceedings in the jurisdiction where the debtor lives.<sup>77</sup> In some circumstances, limiting a debtor's ability to contest court proceedings by starting those proceedings in an inconvenient jurisdiction may constitute, or be part of a course of conduct constituting unconscionable conduct.

#### **CASE STUDY**

A collector engaged in misleading or deceptive conduct by representing that the company was about to sell a debtor's residence to obtain payment, when the company had not started any legal proceedings at the time. The collector also made false claims that she would have the debtor arrested by the police or the fraud squad.

*ACCC v McCaskey [2000] FCR 1037*

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<sup>77</sup> Note that r. 36(3) of the NCCP Regulations provides that court proceedings must be brought in the jurisdiction in which the debtor resides.

## 22. Resolving debtor complaints and disputes

- (a) Complaints and disputes must not be ignored. You must have effective internal processes in place for logging, assessing, and where appropriate, taking timely action in response to them.

### CASE STUDY

A company created a fictitious complaints handling organisation to mislead debtors to believe their complaints and disputes were being considered by an independent body that did not exist. The court found the company to have engaged in misleading and deceptive conduct and to have acted unconscionably, as debtors were deceived into believing their complaints and disputes had been subject to a genuine review by a third party, when this was not the case, and were unduly coerced into paying alleged debts under false pretences.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

- (b) All staff members need to be adequately trained to identify complaints and disputes, and to ensure that established procedures are followed in dealing with them.<sup>78</sup> We encourage you to actively monitor staff who have direct contact with consumers to ensure that, where appropriate, matters are escalated to senior staff.
- (c) It is not acceptable to require that a complaint or dispute be in writing, and/or explicitly identified as such by the complainant/disputant, before it is considered or investigated.
- (d) Identifying and handling a dispute professionally, as soon as it originates, may save you time and money and may increase the likelihood of recovering the debt.
- (e) Entities regulated by the NCCP must hold an Australian Credit Licence, and entities providing financial services to retail clients who are required under the *Corporations Act 2001* (Cth) (Corporations Act) to have an Australian Financial Services Licence, must have an internal dispute resolution procedure that complies with standards and requirements made or approved by ASIC and must also be a member of an ASIC-approved external dispute resolution scheme.<sup>79</sup> ASIC requires that licensees' internal dispute resolution procedures satisfy the essential elements of Australian Standard AS ISO 10002-2006.
- (f) Under the NERL, energy retailers are required to develop, make and publish on their websites a set of procedures detailing how they will handle complaints and disputes. These procedures must be regularly reviewed and kept up to date and must be substantially consistent with the Australian Standard AS ISO 10002-2006. Energy retailers must also be a member of, or subject to, an energy ombudsman scheme for each state and territory where it sells or markets energy.<sup>80</sup>
- (g) Complaints/disputes handling standards may also be imposed as a condition of membership of an industry code or external dispute resolution scheme.
- (h) If you are not under a legal requirement to do so, we recommend that you have in place internal complaint/dispute handling processes that are, at least, consistent with the Australian Standard AS ISO 10002-2006 (or any Australian Standard that may subsequently replace it).

<sup>78</sup> Creditors and collectors also need to have appropriate contractual and operational arrangements in place to facilitate providing information and documents required to resolve disputes: see part 2, section 11, *Providing information and documents*.

<sup>79</sup> See s. 47(1)(i) of the NCCP. Further information about credit license obligations is available in ASIC's *Regulatory Guide 205: Credit licensing: General conduct information*, available at: [www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg205a.pdf/\\$file/rg205a.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg205a.pdf/$file/rg205a.pdf).

<sup>80</sup> For more information, see [www.aer.gov.au/consumers/making-a-complaint](http://www.aer.gov.au/consumers/making-a-complaint).



## 23. Compliance programs

- (a) A company is liable for the conduct of its employees and agents even if they inadvertently break the law. Compliance programs cover all relevant competition and consumer laws that apply in Australia and there are also compliance programs aimed at ensuring companies meet their corporate responsibilities.
- (b) Compliance programs can also be used to cover other areas of the law, such as privacy, discrimination, and other matters that may be relevant to debt collection activities. In addition to Commonwealth laws, a company must also consider the local state or territory laws in any jurisdiction within which it operates. In most cases where a company breaches these laws and has no compliance program, the court will order that an effective compliance program be implemented by the company.
- (c) A robust compliance program is a prudent risk management tool which assists managers and staff to understand their legal obligations and reduces the risk of breaching competition, consumer and other relevant laws.
- (d) You should establish and implement clear, appropriate, effective and fair policies and procedures for identifying and dealing with vulnerable debtors. A debtor may be vulnerable for a variety of reasons including experiencing mental health problems or mental capacity limitations.
- (e) Implementing a compliance program that guards against anti-competitive conduct or conduct in breach of the consumer protection laws or other relevant laws makes an open commitment to comply with those laws and can:
- improve business performance
  - boost market position by promoting good corporate citizenship
  - enhance your firm's reputation with customers and with staff
  - encourage innovation
  - encourage feedback and build customer loyalty through an open and effective complaint-handling procedure that can help identify illegal conduct within the business
  - in the event of a breach convince the court to reduce penalties or fines.
- (f) The nature of an appropriate compliance program will depend on the profile of the company. Each program should be tailored to a company's business activities and the particular risks it may face. For compliance programs to be effective there must be a strong commitment from senior managers to building and maintaining a culture of compliance.
- (g) Australian Standards can assist when setting up a compliance program, for example:
- compliance programs AS 3806-2006
  - handling customer complaints AS ISO 10002-2006.
- (h) The ACCC has developed compliance program templates that can be adapted for companies of any size or risk profile and also general guidance in relation to compliance programs. To obtain these templates and further guidance, please visit [www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program](http://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program).
- (i) Under the NERL, energy retailers are required to develop policies, systems and procedures to enable them to efficiently and effectively monitor their compliance with requirements under the NERL. The AER is responsible for monitoring, investigating and enforcing energy retailers' compliance with their obligations under the NERL in each state and territory where the NERL has commenced. The AER has published Compliance Reporting Procedures and Guidelines and a Statement of Approach which supports these functions and provides information to stakeholders on how the AER will approach its responsibilities in this area.

## Compliance programs and the law

- (j) The Federal Court has given considerable weight to the compliance culture of companies. One of the factors to be considered when setting penalties is:

Whether the company has a corporate culture conducive to compliance with [the CCA], as evidenced by educational programs and disciplinary or other corrective measures to an acknowledged contravention.

*[Justice French, Trade Practices Commission v CSR Ltd [1990] FCA 521 at [42]]*

- (k) The court does not consider the cost of such a program to be an excuse for not having an effective compliance program:

The cost of failing to comply should be set at a level which is significantly greater than the cost of ensuring compliance (via a compliance program).

*[Justice Emmett, ACCC v MNB Variety Imports Pty Ltd [1998] FCA 81]*

The court does not consider the mere existence of a program as a cause to reduce penalties: A well drafted set of policies and procedures will mean little if there is no follow-up in terms of training company officers (including directors) and, where appropriate, refresher training.

*[Justice French, ASIC v Chemeq Ltd [2006] FCA 936]*

The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it.

*[Justice Heerey, ACCC v Visy Ltd [2007] FCA 1617 at [319]]*

## 24. The role of independent external dispute resolution schemes

- (a) Many industries (including telecommunications companies, utility suppliers and financial services businesses) belong to an independent external dispute resolution (EDR) scheme.<sup>81</sup> Specialist collection and debt purchasing agencies, and other finance providers, may also decide to join a scheme. As already outlined in this guideline, belonging to an EDR scheme is a legal requirement for many creditors.
- (b) The ACCC and ASIC support the role played by EDR schemes in resolving consumer complaints and disputes when these are unable to be resolved through the creditor or debt collector's internal dispute resolution processes.
- (c) You should ensure that your systems and practices allow EDR in the debt collection area to work effectively, in particular:
- when applicable, you must advise debtors of an EDR scheme to which the debtor can take his or her unresolved dispute—ensuring this information is provided to debtors at the appropriate time is a requirement imposed on EDR scheme members, and may be stipulated under relevant laws or codes
  - collection activity relating to a dispute that has been referred to an EDR scheme must be suspended while the scheme considers the dispute—again, this is a requirement imposed on scheme members (including their agents)
  - a debt should not be sold, or passed to an external agent for collection, while a scheme is considering a dispute in relation to it
  - if a debt is inadvertently sold, the assignor/creditor should seek to retrieve the debt from the assignee, and seek to ensure that the assignee does not undertake collection activity or start legal proceedings until the scheme has resolved the dispute (and then only if liability is confirmed).
- (d) Note that you may remain subject to the jurisdiction of an EDR scheme for a debt matter even though the creditor has sold or assigned the debt in question. This is likely to be the case when the complaint relates to the period before the sale or assignment of the debt.
- (e) The ACCC and ASIC encourage EDR schemes to consider this guideline when determining how the consumer protection laws should be applied to particular debt collection-related matters.

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81 For a list of relevant dispute resolution schemes, refer to appendix A. Also see AER factsheet *What can I do if I have a complaint?* at: [www.aer.gov.au/consumers/aer-resources](http://www.aer.gov.au/consumers/aer-resources) and [www.aer.gov.au/consumers/making-a-complaint](http://www.aer.gov.au/consumers/making-a-complaint).

## Part 3: Commonwealth consumer protection laws



This part summarises key prohibitions and remedies under Commonwealth consumer protection laws applicable to debt collection activity. Relevant court decisions about the CCA and the ACL also apply to equivalent ASIC Act provisions.<sup>82</sup> See appendix B for other statutory and common law obligations and remedies.

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

#### Section 50 of the ACL

A person must not use physical force, undue harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.

#### Section 12DJ of the ASIC Act

A person contravenes this subsection if the person:

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

Section 50 of the ACL and s. 12DJ of the ASIC Act prohibit the use of:

- physical force
- undue harassment, and/or
- coercion

to support a demand for payment for goods or services/financial services. These provisions apply to the collector's conduct towards a debtor, their representative or towards a third party (for instance, a debtor's family member).

<sup>82</sup> *Cassidy v Saatchi & Saatchi Australia Pty Ltd* [2004] FCAFC 34.

The terms 'physical force', 'undue harassment' and 'coercion' are not defined in the law. They should be understood to have their ordinary meaning.

## Physical force

The use of any violence or physical force is prohibited under s. 50 of the ACL and s. 12DJ of the ASIC Act. The use of force may also be a criminal offence under state and territory criminal law.

### CASE STUDY

In *ACCC v Davis* and *ACCC v Capalaba*<sup>83</sup> the court ruled that agents representing a collection agency had contravened the law by physically holding a debtor to the ground while removing the debtor's vehicle from the debtor's premises. The fact that the collector had a contractual right to seize the vehicle under a mortgage over the vehicle did not permit the use of physical force to overcome the debtor's resistance to the seizure.

In *ACCC v Davis*, the court declared that the company engaged in undue harassment and coercion and made injunctions restraining the company from engaging in similar conduct in the future. The company was ordered to pay part of the ACCC's costs and the individuals involved in the conduct were ordered to attend a trade practices compliance seminar.

In *ACCC v Capalaba*, the court ordered an injunction restraining the company and the individuals involved in the conduct from engaging in undue harassment and coercion in the future. The court also ordered the company and those individuals to attend a trade practices compliance program and to pay the ACCC's costs.

## Undue harassment

Undue harassment means unnecessary or excessive contact or communication with a person, to the point where that person feels intimidated, tired or demoralised. Undue harassment may occur when repeated approaches are made or repeated pressure is applied to a debtor, going beyond what is acceptable or reasonable. While the harassment must be 'undue', there is no requirement that the conduct must involve the threat of an illegal act to contravene the law.<sup>84</sup> For further information on undue harassment, see part 2, section 5, *Frequency of contact*.

### CASE STUDY

The meaning of the term 'undue harassment' has been explained as follows<sup>85</sup>:

The word harassment means in the present context persistent disturbance or torment. In the case of a person employed to recover money owing to others ... it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made.

On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely convey the demand for recovery, the conduct will constitute undue harassment. ... Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter.

The reasonableness of the conduct will be relevant to whether the harassment constitutes undue harassment.

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

<sup>83</sup> *ACCC v Davis [2003] FCA 1227. ACCC v Capalaba Pty Ltd & Others [2003] FCA 1226.*

<sup>84</sup> *Campbell v Metway Leasing Ltd (1998) ATPR 41-630.*

<sup>85</sup> *ACCC v The Maritime Union of Australia [2001] FCA 1549 at [60].*

## Coercion

Judicial authority indicates that s. 50 of the ACL and s. 12DJ of the ASIC Act prohibit any 'coercion', not just 'undue coercion'.<sup>86</sup> Coercion involves actual or threatened force or pressure that restricts a debtor's choice or freedom to act.<sup>87</sup>

It is important to note that coercion may be exhibited in many forms, and is not limited to using or threatening physical force. A person may be considered to be coerced by another person either to do something or refrain from doing something. Unlike undue harassment, there is no requirement for the behaviour to be repetitive for it to amount to coercion.

### CASE STUDY

A company was found to have used coercion when it created a fictitious complaints handling body and a fictitious debt collection agency to obtain payment. The company coerced debtors into paying alleged debts by manipulating their ability to make informed decisions about liability for payment and/or their rights to commence legal proceedings to have liability decided by a court.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

## Trespass

### Entering private property to take possession of secured goods

The *Personal Property Securities Act 2009* (Cth) (PPSA) deals with security interests in personal property (both consumer and commercial). Where the NCC also applies, the PPSA and the NCC operate concurrently.<sup>88</sup>

A credit provider subject to the NCC or its agent must not enter onto private residential property to take possession of secured goods unless:

- the credit provider has a court order authorising the entry, or
- the occupier of the premises has given their express written consent to the entry.<sup>89</sup>

The occupier may withdraw their consent at any time. Once the occupier withdraws their consent, the credit provider or their agent must leave the premises immediately. It is a criminal offence to enter premises in contravention of these sections.

Where applicable, the specific requirements in the NCCP and NCCP Regulations need to be observed. For instance, the NCCP and NCCP Regulations set out the following requirements in relation to the occupier's consent:

- the credit provider or its agent has requested entry from the occupier by writing or by calling at the premises
- if the request is made personally, it may only be made between the hours of 8 am and 8 pm on any day other than a Sunday or public holiday
- the written consent must be in accordance with Form 13 (for credit contracts) or Form 19 (for leases) of the NCCP Regulations and signed by the occupier, and
- the consent is not presented to the occupier for signature with, or as part of, any other document.

<sup>86</sup> *ACCC v The Maritime Union of Australia [2001] FCA 1549* at [61]-[63].

<sup>87</sup> *Hodges v Webb [1920] 2 Ch 70* at 85-87.

<sup>88</sup> See s. 119 of the PPSA.

<sup>89</sup> See ss. 91(1), 91(2), s. 99 (for mortgaged goods) and s. 179N (for hired goods) of the NCC. Sections 99 and 179N require written consent of the debtor or lessee, having been informed in writing of the provisions of the relevant section. Under the PPSA, when seizing personal property to which a security interest applies, the credit provider may do so by any method permitted by law: s. 123.

## Trespass to land

A credit provider or its agent must not enter private land (both residential and commercial) to take possession of secured goods unless the credit provider or its agent has:

- a court order authorising entry, or
- the express consent of the occupier.

Otherwise, the credit provider or its agent is trespassing on the occupier's land.<sup>90</sup> The mere existence of a debt, or a right to give notice in relation to a debt, does not create a right to enter premises where the requisite consent has not been given.

An occupier who gives their express consent may withdraw their consent at any time.<sup>91</sup> Where the occupier has withdrawn their consent, the credit provider or its agent must leave the occupier's land immediately.

## Prohibition of misleading and deceptive conduct

### Section 18 of the ACL

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

### Section 12DA(1) of the ASIC Act

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

These provisions apply to conduct towards a person or persons in the course of activities which, by their nature, contain a trading or commercial element. Generally, most debt collection activities performed by a collector will be considered to be conduct in trade or commerce; however, the precise limits of whether conduct is in trade or commerce cannot be definitively stated and is a matter to be determined on a case-by-case basis.

### Engage in 'conduct'

Conduct includes doing or refusing to do any act and can refer to actions such as:

- silence (for example, not disclosing certain information)
- oral or written statements
- pictorial advertisements
- promotions
- quotations
- product labelling
- representations or impersonations made by a person.

<sup>90</sup> For example, see *Plenty v Dillon* [1991] HCA 5 and *TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82.

<sup>91</sup> For example, see *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605.

## CASE STUDY

A company was found to have engaged in misleading and deceptive conduct when it attempted to obtain payment for services.

The court found the company misled and deceived debtors to believe their complaints and disputes were being considered by an independent third party when this was not that case. The court also found the company misled and deceived debtors by demanding payment under the false pretences of a fictitious debt collection agency. The company also made misrepresentations as to the nature of the orders a court would make if proceedings were commenced to recover late payment.

The court also found the company acted unconscionably and ordered the company pay penalties of \$550 000 and its two directors \$55 000 and \$45 000. The court disqualified the directors from managing a corporation for a period of three years and two and a half years respectively. An employee who was involved in the conduct was also ordered to pay a penalty of \$3500.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

## ‘Misleading or deceptive or likely to mislead or deceive’

The ACL does not define the terms ‘misleading’ and ‘deceptive’. The court applies an objective test to assess whether conduct is misleading or deceptive and it considers the overall impression created by the conduct to determine whether it induces or is capable of inducing a person into error.

The conduct must be viewed in context and not in isolation. The most important factor in determining whether conduct may be misleading is the overall impression conveyed to a reasonable class of consumers who are likely to be affected by the conduct.

Intention is not an element of misleading or deceptive conduct, so a debt collector may breach this prohibition even though they do not mean to mislead anyone. It is enough that the representation is likely to mislead or deceive a reasonable member of the class of persons to whom the conduct is directed.

In some circumstances, a debt collector may need to disclose information to avoid creating a misleading impression.

## CASE STUDY

A collector was found to have breached the misleading and deceptive conduct provisions by representing to the debtor that:

- the agent was about to take immediate steps to sell a debtor’s residence to obtain payment of a debt owed when no legal proceedings to recover the debt had been started at the time
- the agent would arrange to have the debtor arrested by the police or the fraud squad if the debtor did not make immediate payment of the debt, when there was no reasonable basis on which the collector could have taken that action.

*ACCC v McCaskey [2000] FCA 1037*

For further examples of misleading or deceptive representations about the consequences of non-payment of debt, the legal status of a debt and legal action and procedures, refer part 2, sections 19 to 21.



## CASE STUDY

A number of representations made by a lawyer, who intended to collect small debts on behalf of video rental stores, were found to be misleading or deceptive. The representations included that:

- the customer would incur legal expenses and solicitor's costs, in addition to the debts that were already owed. However, in reality legal costs may not be recovered except in certain circumstances such as when a creditor is successful in legal proceedings and when the court makes orders for the payment of costs
- the law firm could obtain a judgment against the debtor without going to court, and could enforce any judgment itself, including a warrant, or an attachment of earnings order, when in reality, this can only be enforced by a court.

The court made orders restraining the lawyer from engaging in similar conduct in the future and ordered her to publish corrective notices in a number of national newspapers and industry publications. The court also ordered that the lawyer implement a trade practices compliance program and contribute \$30 000 to the ACCC's costs. The court's findings established prima facie evidence for later proceedings for damages or compensation orders.

*ACCC v Sampson [2011] FCA 1165*

## CASE STUDY

Collection staff were given a training manual, which suggested various scripts that may be used in collection. One of the scripts was as follows (at paragraph 24):

'Mr/Mrs/Ms. (**Surname**), the reason for my call to you today is a courtesy call due to the fact that I have received your physical file this morning from our solicitors. I have unfortunately been requested by our solicitors to put forward a final recommendation in reference to the outstanding amount of \$(**Balance**) and will need to finalise my recommendation by no later than (**Note down the exact time on paper to refer back to in later part of conversation**)... As I was looking through your file (**give time**) I have noticed here in your file is a Statement of Liquidated Claims which has been drawn and it is set for issuance at the local court in Sydney on (**Give exact date**) at (**Give exact time**). (**Pause**) Mr/Mrs/Ms. (**Debtors Surname**), Do you understand what a Statement of Liquidated claims is? (If the debtor answers YES, Ask the debtor to explain, so that you can confirm). (**If the debtor answers NO, Explain by saying... it is a series of document basically called summons**).'

(Emphasis in original.)

The manual encouraged collections officers to make the strong suggestion that lawyers had already been involved in the account with phrases such as:

- I have received strict instructions from my solicitor, to proceed with litigation...
- I don't even know where your matter is up to as our solicitors have you...
- I have just come out of a meeting with the solicitor with respect to three matters unfortunately one was yours...
- By tomorrow 3 pm this account will accumulate \$350.00 worth of legal fees...
- Your account has been brought from the solicitor's office and they are expecting a response from me as to proceed with litigation at 2.30 pm this afternoon...
- Just a reminder that our solicitors have given you one last chance to settle this account...

It was found that, while the company did have a legal section, it was not in any sense a common part of its business to refer debtors to this section. It was also found that referrals to the legal section were done on the recommendation of the section manager and not by individual collection officers. In no way were collections officers in a position to threaten to commence litigation. It was held that the manual encouraged collection staff to engage in misleading conduct (at paragraphs 25-31).

The court declared that the company had engaged in misleading or deceptive conduct and undue harassment and coercion. The court also ordered an injunction restraining the company from engaging in similar conduct in the future and ordered the company to pay ASIC's costs.

*ASIC v Accounts Control Management Services Pty Ltd [2012] FCA 1164*

For further information on misleading and deceptive conduct refer to the ACCC's publication, *Advertising and selling* and the ACL publication, *Avoiding unfair business practices: A guide for businesses and legal practitioners*.

## Prohibition of unconscionable conduct

Conduct may be unconscionable if it is particularly harsh or oppressive. It is behaviour that is substantially more than just hard commercial bargaining. The relationship or dealings between a creditor or collector and a debtor is one that could assume characteristics of unconscionable conduct. This is because the collector is often in a position of strength and can exert pressure or unfair tactics over a debtor.

The ACL prohibits unconscionable conduct and this prohibition is also reflected in similar provisions in the ASIC Act, so that businesses supplying financial products and services have the same rights and obligations as suppliers of other consumer products and services.

The ACL contains three provisions that relate to unconscionable conduct:

- s. 20 (prohibiting unconscionable conduct within the meaning of the unwritten law)
- s. 21 (prohibiting unconscionable conduct in connection with goods or services)
- s. 22 (factors the court will consider when deciding whether conduct is unconscionable).

The ASIC Act has mirror provisions relating to unconscionable conduct in relation to financial services:

- s. 12CA (prohibiting unconscionable conduct within the meaning of the unwritten law)
- s. 12CB (prohibiting unconscionable conduct in connection with financial services)
- s. 12CC (matters the court may have regard to when deciding whether conduct is unconscionable).

### Section 20 of the ACL and section 12CA of the ASIC Act (special disadvantage)

This type of unconscionable conduct occurs when one party knowingly exploits the special disadvantage of another. This is general unconscionable conduct according to historical judge-made law. Factors that may give rise to a special disadvantage include:

- ignorance of a debtor of important facts known to the staff or agent of the business
- illiteracy or lack of education of the debtor
- poverty or need of any kind of the debtor
- the debtor's age
- infirmity of body or mind of the debtor
- drunkenness of the debtor
- lack of explanation and assistance when necessary.<sup>92</sup>

You should consider whether any circumstances of special disadvantage or vulnerability apply to a debtor whom you contact. If it does, make sure you interact with the debtor in a way that does not take advantage of their special disadvantage. Otherwise, your conduct is likely to be regarded as unconscionable and in breach of the law under this provision.

When you know or suspect a debtor lacks knowledge of the law, the debt recovery process, or the implications of non-payment of a debt, you must not take advantage of their ignorance.

Depending on the circumstances, it may be appropriate to encourage the debtor with a special disadvantage to seek the assistance of a financial counsellor or other suitably qualified representative to act on their behalf.

#### CASE STUDY

A company was found to have acted unconscionably when it used unfair tactics to obtain payment, such as creating a fake complaints handling body and a fake debt collection agency to manipulate and pressure debtors into paying alleged debts.

The court also found the company acted unconscionably by using scare tactics and unfounded claims to deter debtors from non-payment, including that if proceedings were commenced the court would order the debtor to pay a certain amount of compensation to the creditor for failing to pay on time and that any assets belonging to the debtor would be repossessed.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

### Non-English speaking debtors

For someone who cannot speak English, appropriate interaction requires that the debtor can understand you. The assistance of an English-speaking family member or friend to translate should be sought, but only if the debtor proposes or agrees to this. Otherwise, the collector or creditor will need to engage a professional interpreter.<sup>93</sup>

<sup>92</sup> See *Blomley v Ryan (1956) 99 CLR 362*; *Commercial Bank of Australia v Amadio (1983) 151 CLR 447*.

<sup>93</sup> The Department of Immigration and Border Protection provides a 24-hour Translating and Interpreting Service (TIS National) accessible on 13 1450. User fees generally apply.

## Section 21 of the ACL (unconscionable conduct in connection with goods or services) and section 12CB of the ASIC Act (unconscionable conduct in connection with financial services)

'A person must not in trade or commerce, in connection with the supply or possible supply of goods or services to a person ... engage in conduct that is, in all the circumstances, unconscionable'.

Section 22 of the ACL and s. 12CC of the ASIC Act set out a long list of factors that courts may consider in determining whether a person has contravened s. 21 of the ACL and s. 12CB of the ASIC Act respectively, these include:

- the relative bargaining strength of the parties
- whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party
- whether the weaker party could understand the documentation used
- the use of undue influence, pressure or unfair tactics by the stronger party
- the price, or other circumstances, under which the weaker party would be able to buy or sell equivalent goods or services
- the requirements of applicable industry codes
- failure of the stronger party to disclose any intended conduct that might affect the interests of the weaker party
- the willingness of the stronger party to negotiate
- whether the stronger party has the right to unilaterally change contract terms.

These provisions apply widely to trade or commerce activities including debt collection activities.

Collectors risk breaching this prohibition particularly when they exert undue influence or pressure on, or unfair tactics against, a debtor who is at a special disadvantage or vulnerable.

### CASE STUDY

A commercial agent acted unconscionably in trying to recover a debt that, unknown to the debtor, was statute-barred. It was also noted that the factual circumstances were sufficient to require the collector to establish that the transaction was fair, just and reasonable.

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

After being contacted by an employee of the commercial agent and told that legal action may be taken if a satisfactory arrangement could not be reached, the debtor agreed to pay \$5000 to finalise the debt, of which \$4500 was immediately charged to her credit card. On appeal, the court upheld the original decision that the agent through its employee had acted unconscionably.

The court noted that:

*... the fact of someone from a firm of lawyers 'cold-calling' a woman of the respondent's socio-economic standing at home at 6.30 in the evening, and interrogating her as to her personal and financial circumstances while insinuating that in the absence of her agreement to pay legal proceedings may be instituted, is capable of constituting pressure of a very high order.<sup>94</sup>*

The court ordered that the debtor did not have to pay the \$5000 debt and instead, that the creditor return the monies paid by the debtor.

*Collection House v Taylor [2004] VSC 49*

<sup>94</sup> *Collection House v Taylor [2004] VSC 49* at [57].

## CASE STUDY

A creditor acted unconscionably by failing to stop efforts to repossess a car subject to a chattel mortgage when there was reasonable cause to understand that there would be a physical confrontation if they continued in their attempt.

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

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

## Enforcement and remedies for breaching Commonwealth consumer protection laws

### Infringement notices

ASIC or the ACCC may issue an infringement notice<sup>95</sup> where there are reasonable grounds to believe that there has been a contravention of the ASIC Act and the ACL, such as those dealing with false or misleading representations, harassment or coercion and unconscionable conduct. Infringement notices can also be issued for certain unfair practices and offences under the NCCP.

Under the ACL and the ASIC Act, the infringement notice penalties for the more common contraventions are \$10 200 for a corporation and \$2040 for an individual. The penalty for a publicly listed corporation under the CCA for the more common contraventions of the ACL is \$102 000.

### Penalties

A debt collector or creditor who is found to have breached the harassment and coercion provisions or false or misleading representations or unconscionable conduct provisions<sup>96</sup> is liable to penalties of up to:

- \$220 000 under the ACL or \$340 000 under the ASIC Act (in the case of individuals)
- \$1 100 000 under the ACL or \$1 700 000 under the ASIC Act (in the case of corporations).<sup>97</sup>

Certain defences may apply regarding these breaches.<sup>98</sup>

<sup>95</sup> Section 12GXA of the ASIC Act; s. 134A of the CCA.

<sup>96</sup> Sections 12DJ, 12DB and 12CB of the ASIC Act respectively; ss. 50, 29 and 21 of the ACL respectively.

<sup>97</sup> Section 12GBA of the ASIC Act and s. 224 of the ACL.

<sup>98</sup> Section 12GI(5), ASIC Act; s. 226(a) of the ACL.

## CASE STUDY

In April 2013, the Federal Court found that Excite Mobile Pty Ltd engaged in false and misleading and unconscionable conduct in its provision of mobile services to customers.

The court also found Excite Mobile acted unconscionably and used undue coercion when attempting to obtain payment for mobile services. Excite Mobile's directors were both found to have been directly knowingly concerned in Excite Mobile's contraventions.

A large number of consumers across all parts of Australia were affected by Excite Mobile's conduct, including consumers living in Indigenous communities on the Cape York Peninsula, remote areas in Queensland and Western Australia, and throughout the Northern Territory.

On 29 November 2013, the Federal Court ordered Excite Mobile pay penalties of \$555 000 and its two directors \$55 000 and \$45 000. The court disqualified the directors from managing a corporation for a period of three years and two and a half years respectively.

An employee who was involved in the conduct was also ordered to pay a penalty of \$3500.

*ACCC v Excite Mobile Pty Ltd [2013] FCA 350*

## Other civil orders

ASIC or the ACCC can apply to the court for civil orders against a debt collector or creditor, including:

- injunctions against future conduct<sup>99</sup>
- non-punitive orders (including corrective advertising)<sup>100</sup>
- compensation orders.

ASIC or the ACCC can also apply for other sanctions including adverse publicity orders.<sup>101</sup>

## Damages or injunction

Finally, a debtor or third party who suffers loss or damage as a result of a collector's breach of the unconscionable conduct<sup>102</sup>, misleading or deceptive conduct<sup>103</sup>, harassment and coercion<sup>104</sup>, or other provisions of the ASIC Act and the CCA, can recover the amount of their loss by an action for damages under these Acts.<sup>105</sup> A debtor or third party can also seek injunctive relief.<sup>106</sup>

99 Section 12GD, ASIC Act; s. 232 of the ACL.

100 Section 12GLA, ASIC Act; s. 246 of the ACL.

101 Section 12GLB, ASIC Act; s. 247 of the ACL.

102 Sections 12CA-CC, ASIC Act; ss. 20-22 of the ACL.

103 Section 12DA, ASIC Act; s. 18 of the ACL.

104 Section 12DJ of the ASIC Act; s. 50 of the ACL.

105 Section 12GF, ASIC Act; ss. 236, 237, 239(1) and s. 243 of the ACL.

106 Section 12GD, ASIC Act; s. 232 of the ACL.

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

## Australian Competition and Consumer Commission (ACCC)

The ACCC is responsible for administering and enforcing Commonwealth consumer protection laws contained in the ACL that are relevant to debt collection activities. The ACCC is responsible for dealing with misconduct associated with debt collection activity when the debt relates to goods and services other than a financial service or product. This includes:

- telephone or other utility services
- services of trades and professional people
- when a retailer does not require immediate payment for a product (but not when the customer enters into a finance arrangement as that will be ASIC's responsibility).

The ACCC's responsibilities also include debts arising from a deferred payment (for example, a customer who is billed monthly or given an extension of time to pay).

Without limitation, the ACCC's responsibilities cover any alleged:

- undue harassment
- coercion
- unconscionable conduct regarding the collection of the debt
- unfair contract terms in a standard form consumer contract for the supply of non-financial goods or services and the sale or grant of an interest in land, and
- any misleading or deceptive representations made about the actual good or service, which is subject to the debt or the debt relating to goods and non-financial services.

### ACCC contact details

For matters relating to the types of conduct described above, contact the ACCC:

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

ACCC Infocentre (business and consumer enquiries): 1300 302 502

ACCC general enquiry web form: [www.accc.gov.au/contact-us/contact-the-accc/general-enquiry-form](http://www.accc.gov.au/contact-us/contact-the-accc/general-enquiry-form)

ACCC complaint web form: [www.accc.gov.au/contact-us/contact-the-accc/consumer-complaint-form](http://www.accc.gov.au/contact-us/contact-the-accc/consumer-complaint-form)

Small business helpline: 1300 302 021

Callers who are deaf or have a hearing or speech impairment: [www.relayservice.com.au](http://www.relayservice.com.au), 13 3677 for TTY users or 1300 303 609 for Speak and Listen

Address for written complaints:

Australian Competition and Consumer Commission  
GPO Box 3131, Canberra ACT 2601

FAX: (02) 6243 1199

## Australian Securities and Investments Commission (ASIC)

ASIC is responsible for dealing with misconduct associated with debt collection activity when the debt relates to a financial product or service. This includes:

- credit card accounts
- home loans, personal loans and loans sourced through retailers for motor vehicles, household goods or other purposes
- fees for providing financial advice, insurance and other financial products and services.

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

If there is misleading or deceptive conduct relating to the actual good or service (such as the car or the appliance) and not the debt itself, this will be referred to the ACCC as it does not relate directly to a financial product or service.

### ASIC contact details

For matters relating to the types of debt given above, contact ASIC:

ASIC website: [www.asic.gov.au](http://www.asic.gov.au)

ASIC's Infoline: 1300 300 630

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

## Dispute resolution schemes

While the ACCC and ASIC have the power to regulate conduct as outlined throughout this guideline, there are certain functions that the ACCC and ASIC cannot perform. For example, the ACCC and ASIC are unable to make judgments in a case, as that is the role of the court.

The ACCC and ASIC do not mediate between parties or perform other dispute resolution activities to resolve private disputes.

However, there are a range of agencies that can provide assistance with dispute resolution in certain industries, for example, banking and insurance, energy and water, or telecommunications. A selection of these agencies is provided below:

- Financial Ombudsman Service: [www.fos.org.au](http://www.fos.org.au)
- Credit Ombudsman Service: [www.cosl.com.au](http://www.cosl.com.au)
- Energy and water ombudsman schemes—the contact details for the relevant ombudsman in each state and territory can be found at: [www.aer.gov.au/node/1292#Contacting\\_energy\\_ombudsman\\_schemes](http://www.aer.gov.au/node/1292#Contacting_energy_ombudsman_schemes)
- Telecommunications Industry Ombudsman: [www.tio.com.au](http://www.tio.com.au)

The Translating and Interpreting Service (TIS National) is an interpreting service provided by the Department of Immigration and Border Protection and can assist agencies and businesses that need to communicate with people who do not speak English.

For further information see: [www.tisnational.gov.au](http://www.tisnational.gov.au)

Immediate telephone interpreting can be undertaken by contacting 13 1450.



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

In some situations, a complaint may relate to a range of debts, including debts for financial services and debts for a good or non-financial service. The ACCC and ASIC coordinate their regulation and litigation activities when debt collection conduct involves overlapping jurisdiction and may delegate authority to each other as required.

Apart from the Commonwealth consumer protection laws outlined in part 3 of this guide, there are a range of other statutory and common law obligations and remedies that potentially affect collectors' and creditors' operations.<sup>107</sup> These include (but are not limited to) those listed below.

### State and territory fair trading laws

The ACL is applied as a law of the Commonwealth and each state and territory.<sup>108</sup> However, provisions of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) also prohibit certain conduct, including undue harassment and coercion.<sup>109</sup> The Victorian provisions also permit debtors to seek up to \$10 000 as compensation for humiliation and distress caused by debt collection conduct.<sup>110</sup>

### State and territory licensing of collectors

Most state and territory jurisdictions have occupational licensing requirements applying to a range of persons involved in debt collection activities.<sup>111</sup> These laws impose certain obligations on licensees, and set out grounds on which the relevant authority can refuse to grant or cancel a licence.

In Queensland, licensed commercial agents are subject to a mandatory industry code of conduct, the Commercial Agency Practice Code of Conduct.<sup>112</sup> In other jurisdictions conduct requirements may be imposed under the legislation itself.<sup>113</sup>

### National Consumer Credit Protection Act

Reforms to consumer credit law have resulted in a single national consumer credit regime governed by the NCCP which includes the NCC as Schedule 1. The NCC replaces previous state-based consumer credit codes and the Uniform Consumer Credit Code (UCCC). ASIC is responsible for administering the NCCP. The NCC applies to credit contracts entered into on or after 1 July 2010 where:

- the lender is in the business of providing credit
- a charge is made for providing the credit
- the debtor is a natural person or strata corporation
- the credit is provided for personal, domestic or household purposes, or to purchase, renovate or improve residential property for investment purposes, or to refinance credit previously provided for this purpose.

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<sup>107</sup> It should be noted that these laws apply to activities within their respective jurisdictions, even if the collector is physically located in another state, territory or country.

<sup>108</sup> *Fair Trading (Australian Consumer Law) Act 1992* (ACT), *Fair Trading Act 1987* (NSW), *Consumer Affairs and Fair Trading Act 1990* (NT), *Fair Trading Act 1989* (Qld), *Fair Trading Act 1987* (SA), *Australian Consumer Law (Tasmania) Act 2010* (Tas), *Australian Consumer Law and Fair Trading Act 2012* (Vic), *Fair Trading Act 2010* (WA).

<sup>109</sup> See s. 45(2), *Australian Consumer Law and Fair Trading Act 2012* (Vic).

<sup>110</sup> See s. 46, *Australian Consumer Law and Fair Trading Act 2012* (Vic).

<sup>111</sup> *Commercial Agents and Private Inquiry Agents Act 2004* (NSW), *Commercial and Private Agents Licensing Act 2002* (NT), *Property Agents and Motor Dealers Act 2000* (Qld), *Security and Investigation Industry Act 1995* (SA), *Security and Investigation Agents Act 2002* (Tas), *Debt Collectors Licensing Act 1964* (WA).

<sup>112</sup> *Property Agents and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001* (Qld).

<sup>113</sup> For example, s. 25 (Harassment), *Commercial Agents and Private Inquiry Agents Act 2004* (NSW).

The NCCP applies a licensing regime to those providing regulated credit or credit assistance and therefore require an Australian Credit Licence. Purchasers of regulated credit are providers for the purposes of that regime, but debt collectors acting on behalf of a credit licensee may have the benefit of an exemption.<sup>114</sup>

## National Energy Retail Law

The National Energy Retail Law (NERL) (and National Energy Retail Rules) commenced on 1 July 2012 in the Australian Capital Territory (ACT) and Tasmania (for electricity only). South Australia commenced the NERL on 1 February 2013 and New South Wales on 1 July 2013. These laws and rules provide a national customer protection framework for the retail sale of electricity and gas to residential and small business energy customers. In particular, it sets out requirements on energy retailers to assist customers who are facing financial hardship and looking for help to manage their bills. It includes obligations regarding when a customer can be disconnected and when debt collection proceedings can commence.

## State and territory unauthorised documents laws

Unauthorised documents acts in each state and territory make it an offence to design collection letters of demand in a way that makes them look like court documents.<sup>115</sup>

## State and territory limitation of actions laws

Each state and territory sets limitation periods on debt recovery actions.<sup>116</sup> These generally bar a remedy to the creditor if a defence pleading expiration of the limitation period is filed. In the case of simple contracts (which include the majority of debts referred for collection) the limitation period is normally six years (however, in the Northern Territory a three-year period applies.) In some jurisdictions, a payment or acknowledgment of the debt will re-start the limitation period even after the original period has expired. Limitation acts also regulate the enforcement of court judgments.

## Bankruptcy laws

Under the Bankruptcy Act regulated by the Australian Financial Security Authority, acceptance of a Part IX debt agreement or execution of a personal insolvency agreement prevents a creditor taking further action against a debtor in relation to their provable debts. A debtor is released from these debts after discharge from bankruptcy, or when all the obligations under the debt agreement are completed. A personal insolvency agreement may provide that the debtor is released from provable debts. Most unsecured debts will be provable.

## Privacy laws

Part IIIA of the Privacy Act governs the handling of credit reports and other credit-worthiness information about individuals by credit reporting agencies and credit providers. Some of the requirements include what information can be stored on a credit report, how long such information can be included, and to whom and under what circumstances access is allowed.

The APPs also regulate certain private sector entities in their dealings with personal information. These provisions of the Privacy Act, where applicable, regulate the collection, use and disclosure of personal information, and impose obligations on organisations to maintain accurate, complete and up-to-date records, and allow individuals access to, or correction of, information held about them.

The OAIC has published guidelines to assist with the interpretation and implementation of the APPs.

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<sup>114</sup> See NCCP Regulations r. 21.

<sup>115</sup> *City of Canberra Arms Act 1932* (ACT), *Unauthorised Documents Act 1922* (NSW), *Flag and Emblem Act 1985* (NT), *Emblems of Queensland Act 2005* (Qld), *Unauthorised Documents Act 1916* (SA), *Unauthorised Documents Act 1986* (Tas), *Unauthorized Documents Act 1958* (Vic), *Unauthorised Documents Act 1961* (WA).

<sup>116</sup> *Limitation Act 1985* (ACT), *Limitation Act 1969* (NSW), *Limitation Act 1981* (NT), *Limitation of Actions Act 1974* (Qld), *Limitation of Actions Act 1936* (SA), *Limitation Act 1974* (Tas), *Limitation of Actions Act 1958* (Vic), *Limitation Act 1935* (WA).

The Information Commissioner has registered and enforces the Privacy (Credit Reporting) Code 2014 (version 1.2). A breach of the Code is a breach of the Privacy Act.

## **Tort law**

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

## **Criminal law**

Creditors or debt collectors who engage in extreme conduct may be charged with criminal offences including assault and demanding with menace. A collector who refuses to leave a person's property may also be charged with trespass.

## **Other obligations**

Debt collectors, who are unsure of their obligations under any of the above-mentioned laws, mandatory codes and other arrangements, should obtain legal advice or seek more information from the relevant regulator. Creditors and debt collectors should be aware of the requirements of any voluntary industry code of conduct that applies and the rules of any relevant trade association or professional body.

## Appendix C: Glossary

**Agent:** for the purposes of this guideline, a person who has the express, implied or ostensible authority to undertake collection activity on behalf of a creditor in circumstances where a debt has not been sold or assigned.

**Assigned debt:** for the purposes of this guideline, any debt which has been sold, assigned, or factored by a creditor, or for which a creditor has in any other way subrogated their rights as a creditor.

**Assignee:** for the purposes of this guideline, a person undertaking collection activity after the sale, assignment or factoring of a debt, or the subrogation of rights by a creditor to this person.

**Authorised representative:** a person such as a financial counsellor, solicitor, financial advisor, carer, trustee or guardian who has been authorised by the debtor to act on behalf of the debtor.

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

**Debt collector:** a person collecting a debt in the course of a business. It includes creditors, independent collection agencies, collections departments within businesses, debt buy-out companies, assignees, agents, lawyers, government bodies engaged in trade or commerce, and other persons<sup>117</sup> collecting on behalf of others.

**Communicate:** unless otherwise specified, includes communication by telephone, mobile telephone, fax, email, letter, in writing via text message or online technology (such as social media channels), and in person.

**Complaint:** for the purposes of this guideline, this term is generally used for issues of collector or creditor conduct (as distinct from issues of debtor liability).

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

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

**Credit report:** any record or information, whether in a written, oral or other form, that:

- is being or has been prepared by a credit reporting agency
- has any bearing on an individual's:
  - eligibility to be provided with credit
  - history in relation to credit, or
  - capacity to repay credit
- is used, has been used or has the capacity to be used for the purpose of serving as a factor in establishing an individual's eligibility for credit.

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

**Debtor:** a natural person obligated or allegedly obligated to pay a debt.

**Dispute:** for the purposes of this guideline, this term is generally used in relation to issues of debtor liability (as distinct from issues of collector or creditor conduct: see 'Complaint').

**Judgment debt**<sup>118</sup>: means a debt confirmed by an order or judgment of a court.

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

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

<sup>117</sup> The CCA applies to corporations and individuals when they are acting as agents of a principal that is a corporation.

<sup>118</sup> These may go by different names in different states. For example, in Queensland, judgment debts are referred to as Money Orders.

**Statute-barred debt:** a debt for which the debtor is entitled to claim an absolute defence to legal proceedings to collect the debt due to the passage of time (as set out in the relevant statute of limitations).<sup>119</sup>

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

**Undue harassment:** refer to *Prohibition of the use of physical force, undue harassment and coercion* in part 3 .

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<sup>119</sup> See *State and territory limitation of actions laws* in appendix B.

# Appendix D: Authority Form from Financial Counselling Australia

## FINANCIAL COUNSELLOR AUTHORISATION FORM

### CUSTOMER DETAILS

#### Customer 1

Full name: .....

Address: .....

.....

Date of Birth: .....

#### Customer 2 (if applicable)

Full name: .....

Address: .....

.....

Date of Birth: .....

### ACCOUNT DETAILS

**Option 1 Information on individual accounts** (check box and complete table)

Account type	Account number	Financial Institution/Creditor/Service Provider

Please attach an additional sheet if more room for account details is required.

**OR Option 2 All accounts** (check box)

An account number is required to link all accounts (please enter here):

**OR Option 3 No account details** (exceptional circumstances – check box)

### AUTHORITY

#### I/we authorise

Counselling agency's name ("Authorised Agent"): .....

Counselling agency's address: .....

(Reference: Name of financial counsellor ..... )

#### or any other financial counsellor at the Authorised Agent to act as my/our agent to:

- Seek and exchange personal information (including information related to credit, financial affairs or sensitive information) about me and my accounts from the Financial Institution/Creditor/Service Provider;
- Negotiate with the Financial Institution/Creditor/Service Provider and enter into arrangements that are binding on me/us related to the account/s; and
- Act on my behalf until this authority is revoked.

#### I/we understand that:

- Standard account notification (including account statements and other prescribed notices) can still be sent to me/us by the Financial Institution/Creditor/Service Provider;
- If an agreement is made, my/our written consent may be required;
- The Financial Institution/Creditor/Service Provider will rely on the information provided;
- The Financial Institution/ Creditor/Service Provider will rely on the declaration and privacy consent previously provided by me/us to the Financial Institution;
- The Financial Institution/ Creditor/Service Provider will communicate with my/our appointed representative via telephone, letter, email or other forms of communication as agreed and which may be required;
- The Financial Institution/ Creditor/Service Provider will deal with my/our appointed representative until the authority is revoked.

Signed: **Customer 1** .....

Date: .....

Signed: **Customer 2 (if applicable)** .....

Date: .....

Signed: **Authorised Agent** .....

Date: .....

Financial Counsellor Registration number: .....

Financial Counsellor preferred contact number and email: .....

*In completing this form, you consent to the Financial Institution/Creditor/Service Provider collecting your personal information so that we, and they, can help with your financial difficulty or other issues. If the information is not complete or accurate this may affect the ability of the Financial Institution/Creditor/Service Provider to assist you in this regard.*

*The Privacy Policy of the Financial Institution/Creditor/Service Provider tells you what they do with the personal information that you have provided. It also tells you how to access and correct that information and how complaints can be made about a breach by them of the Australian Privacy Principles, Part IIIA of the Privacy Act or the Credit Reporting Privacy Code. Privacy Policies will be available on the websites of the Financial Institution/Creditor/Service Provider.*

Version 2 - June 2014

## FINANCIAL COUNSELLOR AUTHORISATION FORM | EXPLANATION

**The Financial Counsellor Authorisation Form** was developed by the Australian Bankers' Association and Financial Counselling Australia. The intent is to streamline interactions between banks operating in Australia and financial counsellors acting on behalf of bank customers. The use of the form has now been expanded to other industries, including some utilities, telcos and debt collectors.

### Purpose of the authority

The purpose of the Financial Counsellor Authorisation Form is to have an agreed acceptable authority a financial counsellor can send to a financial institution/creditor/service provider.

The authorisations include:

- Access to personal information of the customer; and
- Ability to enter into arrangements (including repayment arrangements, alteration of a contract, and settlement of disputes) on behalf of the customer.

It is important that all parties – the financial institution/creditor/service provider, the financial counselling agency (the authorised agent), and the customer(s) (the client(s)) are clear as to their rights and obligations.

### Using the authority

A client may give a financial counselling agency the authority to act on their behalf. In this instance, the financial institution/creditor/service provider will deal with the relevant financial counsellor, and will generally not contact their customer in relation to the matters subject to the authority. The financial institution/creditor/service supplier may continue to provide some written correspondence (e.g. account statements) to their customer directly and may require the consent of their customer, and any guarantors, to enter into any arrangements.

It is essential that the financial counselling agency/financial counsellor ensures the following three things:

1. All correspondence includes a registration number so the identity of the financial counsellor can be verified (by contacting the financial counselling agency if necessary);
2. If the financial counsellor ceases to assist the client, the counsellor will notify the financial institution/creditor/service provider; and
3. If the financial counsellor assisting the client changes, the counsellor or the financial counselling agency will notify the financial institution/creditor/service provider.

It is expected that a financial counsellor will explain the authority to their client. The authority may require additional information to be added to ensure that all parties are clear as to the instructions of the authority, including if there are any limitations to the authority. If there are limitations these should be specified in an attachment to the Financial Counsellor Authorisation Form.

It is also expected that a financial counsellor will inform their client that the information provided to the financial institution must be true and correct and the arrangements that may be entered into on their behalf by a financial counsellor are binding on them.

The authority will only relate to the accounts as detailed on the form. Groups of companies may permit the use of a single form for all related businesses. However, generally a separate form will need to be completed for different companies.

Wherever possible, the account numbers or other identifying information should be specified in the form. If an account number is not available, the counsellor should select option 3 (noting this will only be in exceptional circumstances, for example, an emergency event or natural disaster where information cannot be obtained). If option 3 is used, the financial counsellor will ensure all customer details are completed.

The authority may permit the financial counsellor to use unencrypted email to exchange information about the client's account(s).

Importantly, the authority will not permit the financial counsellor to transact on the client's account(s).

### Revoking the authority

An authority can be revoked at the discretion of the financial counsellor or the financial counselling agency.

A financial counsellor may revoke the authority for any reason, including because the matter has been resolved, the counsellor has decided to cease to act on behalf of the client, the client has not responded within a reasonable period of time, or the client puts in place another authority.

It is essential that the financial counsellor or the financial counselling agency ensures that the authority is revoked by notifying the financial institution/creditor/service provider in writing.

A financial institution/creditor/service provider can contact the customer if the financial counsellor is not contactable for a reasonable period of time. A reasonable period of time would be appropriate to the situation.

### Other information

A financial counsellor should contact their State or Territory financial counselling association or FCA if they require further information about the use and revocation of the authority.

It is noted:

- The Code of Banking Practice sets out the banking industry's commitments and obligations to customers on standards of practice, disclosure and principles of conduct for their banking services. For more information please see the ABA website<sup>1</sup>.
- The Telecommunications Consumer Protections Code is designed to ensure good service and fair outcomes for all telco customers.
- The Financial Counselling Code of Ethical Practice sets out the ethical values which guide financial counselling and provides guidance about appropriate behaviour in a number of ethical situations commonly experienced by financial counsellors<sup>2</sup>.

<sup>1</sup> <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice>

<sup>2</sup> <http://www.financialcounsellingaustralia.org.au/Corporate/Financial-Counselling/Policies>