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New ACCC/ASIC Debt Collection Guideline

Introduction to this Bulletin

In this Bulletin we discuss the new Debt Collection Guideline for Collectors and Creditors, released by the Australian Competition & Consumer Commission ('ACCC') and the Australian Securities & Investments Commission ('ASIC') this month.

The 2005 Debt Collection Guideline is an important document designed to give useful information and provide practical guidance to creditors and debt collectors.

The Guideline is not legally enforceable but we support its publication and encourage members to be familiar with its content including the principles of fair debt collection practice expressed in it.

Although it will not necessarily determine the outcome in any particular case, we will take the Guideline into account when considering disputes about debt collection matters and will certainly take into account the various consumer protection laws and decided cases referred to in it.

A link to the Guideline is available on both the ASIC and the ACCC websites. This Bulletin is not a re-statement of the Guideline, instead we highlight those areas of debt collection practice that have recently been considered by us and which are referred to in the Guideline.

Purpose of the Debt Collection Guideline

The ACCC and ASIC have responsibility for enforcing Commonwealth consumer protection laws, including those relevant to debt collection.

Those laws include prohibitions against misleading or deceptive conduct and unconscionable conduct generally, and a direct prohibition against physical force, undue harassment or coercion in the collection of a debt.

In particular, section 12DJ of the *Australian Securities and Investments Commission Act* 2001 (Cth) ('ASIC Act') says:

(1) A person contravenes this subsection if:

(a) the person uses physical force or undue harassment or coercion; and

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

(2) Strict liability applies to paragraph (1)(b).

A breach of this section would amount to an offence[1] and might also give rise to a civil action for loss.

The purpose of the 2005 Debt Collection Guideline is to:

- explain how the Commonwealth laws apply;
- provide practical guidance on minimising the risk of breaching those laws; and
- outline the prohibitions and remedies against creditors and collectors who breach the laws.

The Guideline also discusses other laws that are relevant to debt collection practice including the 2001 amendments to the *Privacy Act* 1988 (Cth), state and territory fair trading laws and the Uniform Consumer Credit Code.

The Guideline encourages debtors to act promptly and responsibly, and collectors to be flexible, fair and realistic.

The Guideline in the Context of the Code of Banking Practice

A number of members of the BFSO scheme have subscribed to the Code of Banking Practice ('CBP'). The CBP currently contains a promise, in clause 29, to comply with the 1999 guideline published by the ACCC, 'Debt Collection and the Trade Practices Act' ('the 1999 guideline').

The 1999 guideline is less detailed than the 2005 Debt Collection Guideline, which states that it is to replace the 1999 guideline. We would expect that in due course, the CBP will be amended to refer to the 2005 Debt Collection Guideline. In the meantime we regard clause 29 of the CBP as operational and effective to make it a contractual obligation for subscribers to the CBP to continue to comply with the 1999 guideline. Members should also consider complying with the 2005 Debt Collection Guideline to the extent that Guideline imposes a higher standard.

BFSO Jurisdiction and Approach

If a person has suffered financial or non-financial loss as a result of the conduct of a financial services provider or its agents in the collection of a debt or an alleged debt, we

[1] See section 12GB ASIC Act

may be able to consider the dispute and award compensation in appropriate circumstances.

In determining whether a person is entitled to compensation for loss suffered we have regard to the law, good industry practice, any applicable industry codes or guidelines and fairness in all the circumstances.

Financial loss might include increased legal or collection costs sought to be recovered against the person. Non-financial loss might include distress or inconvenience.

Factors to be taken into account in assessing a claim for non-financial loss may include:

1. The extent of actual physical inconvenience, including the length of time it persisted and its degree;

2. The extent to which the disputant used his/her time to rectify the situation; and

3. The extent to which the disputant's expectation of enjoyment and peace of mind was interfered with for reasons beyond the disputant's control and as a result of the act or omission.

We do not award compensation as a punitive measure. If the debt is owed it is likely that the debt itself will have to be repaid unless the financial services provider, as a commercial decision, decides to offer a waiver or reduction of the debt as a way of settling the dispute about its conduct or the conduct of its agent.

We expect disputants generally:

1. To be moderately robust in the way in which they deal with an unexpected problem;

2. To take responsibility for ensuring that their financial affairs are in order in the ordinary course;

3. To bear the ordinary and normal degree of inconvenience associated with correcting an unexpected problem; and

4. To take reasonable steps to minimise the inconvenience suffered.

In the context of activity by a financial services provider or its agent to collect a debt that is owing, this means that we expect disputants to make themselves reasonably available to discuss repayment of a debt, and if they are unable to repay it when due, to reasonably communicate with the creditor about a repayment plan including any necessary variation on the grounds of financial hardship.

On the other hand we also expect members of the BFSO scheme and their agents to take every reasonable step to ensure that they do not engage in misleading or deceptive conduct, unconscionable conduct, or conduct involving physical force, undue harassment or coercion. If such conduct has taken place we expect them to recognise

that it has, take steps to ensure that it is not repeated and resolve the dispute appropriately.

We appreciate that debt collection activity can involve difficult situations which can challenge debtors and collectors alike. We encourage BFSO members to use the suggestions in the 2005 Debt Collection Guideline to minimise inappropriate conduct.

Our Bulletin 46, June 2005, provides more information about dealing with customers in financial difficulty including the obligations on subscribers to the CBP, contained in clause 25.2, to try to help customers overcome any financial difficulties they may have with a credit facility provided to them.

Particular guidelines

In the following pages we make some preliminary comments regarding a selection of the matters covered by the 2005 Debt Collection Guideline.

Contact with the Debtor

Sections 1 to 6 of Part 2 in particular set out some practical guidance in relation to contact with a debtor [2] and cover matters such as:

- The purpose of the contact;
- Making contact;
- Hours of contact;
- Frequency of contact;
- Location of contact; and
- Face-to face contact.

Contact – should be reasonable and necessary

The general principle is that communication with a debtor should be for a reasonable purpose and should only occur to the extent necessary. Demands should be legitimate and reasonably made. It is not reasonable or acceptable to contact a debtor to frighten, intimidate or embarrass them. Contact should not be used to demoralise, tire out or exhaust the person.

Hours of contact must be reasonable and the frequency should be no more than is necessary.[3] The Guideline suggests the following as reasonable contact times:

Telephone contact:

- Between 7.30am and 9.00pm, Monday to Friday
- Between 9.00am and 9.00pm on weekends
- No contact on national public holidays or where prohibited on other public holidays by State fair trading laws

[2] A reference to a debtor includes an alleged debtor.
[3] See Part 2, sections 3, 4 & 6.

Face to face contact (excluding at the debtor's place of work) only between 9.00am and 9.00pm on weekdays and weekends, with no contact on national public holidays, or where otherwise prohibited. Any contact at the debtor's place of work should only be during the debtor's normal working hours, if known, or between 9.00am and 5.00pm on weekdays.

We recommend that both debtors and collectors keep accurate records of contact, not only for the purpose of establishing the times of contact but also for ensuring that there are records of any discussion including any agreement reached.

Undue harassment should be avoided

Undue harassment is explained in the quote on page 13 of the Guideline from a Federal Court decision, *ACCC v The Maritime Union of Australia* [2001] FCA 1549. In that case, Justice Hill said that:

> The word harassment means in the present context persistent disturbance or torment. In the case of a person employed to recover money to others…it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt….[W]here 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.

We appreciate that contact about an unpaid debt will often be unwelcome and that it can be difficult for a collector to discuss payment without some embarrassment being caused to the debtor. What comes out of the decision of Justice Hill, in our view, is that legitimate contact will become illegitimate if its purpose and the manner of it go well beyond reasonably conveying the demand and discussing repayment and into what might be described as bullying or seeking to humiliate the debtor.

Avoid breaching privacy obligations

Another important principle which is referred to in various parts of the 2005 Debt Collection Guideline is that contact with the debtor or with third parties must not breach obligations owed to the debtor under the Privacy Act.

As a first step, a creditor or collector must ensure that they are speaking with the debtor before any information about the debt is disclosed, or even that the contact is in relation to debt recovery. They should state their name and the identity of the company they are calling from, but not in such a way as to indicate that the call is about a debt. Visits to the debtor's home require care to be taken, and visits to a debtor's work should only be considered as a last resort.[4]

[4] Part 2, section 6. See also sections 7 and 18.

When a debtor is represented

The 2005 Debt Collection Guideline states that a debtor has a right to appoint an authorised representative to represent them or advocate on their behalf. An authorised representative may be, for example a financial counsellor, financial advisor, community worker, guardian/administrator or carer. When a debtor is represented a collector/creditor should not contact the debtor directly or refuse to deal with an authorised representative. [5]

No unnecessary obstacles

This is an area of debt collection that generates frequent complaints to us from representatives such as financial counsellors and advisers. The common complaints are that:

- There is inconsistency across financial services providers, even across different business units, as to what form of authorisation will be accepted;
- Despite written authorisation being provided, direct contact may still be made with the debtor; and
- Other, unnecessary, obstacles are placed in the way of contact with the authorised representative.

We agree with the view expressed in the Guideline [6] that in general, any form of authority consistent with requirements of the Privacy Act 1988 should be regarded as acceptable and that creditors or collectors should not insist on a particular style or form of authorisation when the written authority provided already includes the necessary information.

We understand that the requirements of the Privacy Act have prompted pro forma authorities to be prepared within financial services providers. What is important, however, is the content rather than the style and it is our observation that insistence on particular forms has placed unnecessary obstacles in the way of authorised representatives.

Direct contact with a debtor who has appointed a representative should be avoided. We agree, however, with the views expressed in the Guideline[7] as to when direct contact may occur:

- If the representative does not respond to communications within a reasonable time (normally 14 days);
- The representative advises that they do not have instructions from the debtor about the debt; [8]

[5] See Part 2, section 8.
[6] Part 2, section 8 (b).
[7] Part 2, section 8(c).

- The representative does not consent to act;
- The debtor specifically requests direct communication; or
- Written authority is required but is not provided.

We make the observation that care should be taken by the creditor or collector to record the appointment and contact details of an authorised representative in all relevant places, to ensure that automatically generated correspondence is not sent to the debtor direct or system generated calls made from call centres.

Disputed Debts

The 2005 Debt Collection Guideline says that a creditor must not pursue a person for a debt unless the creditor has reasonable grounds for believing the person contacted is liable for the debt. [9]

We occasionally consider disputes from people who say that the financial services provider is seeking to recover a debt which they do not owe and that there has been a case of mistaken identity. Our view is that pursuing a person for a debt when it is clear, or ought to be clear, that they are not the debtor would be undue harassment and may also be misleading or deceptive conduct.

We agree with the view expressed in the Guideline that it is reasonable to expect that, if a person claims that they are not the alleged debtor or that the debt has been paid or otherwise settled and the creditor has not already confirmed their identity and liability, debt collection activity will be suspended until these matters have been confirmed.

We also agree that it would be misleading to state or imply that the debtor must prove they are not liable for the debt. This is because in legal proceedings, proof of the debt lies with the person alleging that the debt is owed to them.

If the parties are unable to resolve a dispute about liability for the debt or the amount owed, the creditor should then advise the debtor about their ability to lodge a dispute with the BFSO. If a dispute comes to this office and the creditor is able to provide information which suggests it is more probable than not that the alleged debtor owes the debt, we will ask the alleged debtor to provide information to establish that they do not owe the debt.

Providing Information about the Debt

Debtors have rights to obtain information about the debt under the Uniform Consumer Credit Code[10] and the Code of Banking Practice, and members of the scheme should ensure that their staff and agents are aware of those rights. In addition to those rights, the 2005 Debt Collection Guideline says that as a general principle, if a debtor requests

[8] Although an exception would be where the representative is appointed under an Administration order and can make decisions for the debtor.
[9] Part 2, section 12.
[10] Section 34 statement of amount owing.

information about an amount claimed as owing, or how that amount has been calculated, the creditor should normally provide the debtor with an itemised statement of the account clearly specifying:

- The amount of the debt and how it is calculated; and

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

It is our view that an itemised statement of the amount owing should be provided at no cost to the debtor where the creditor is seeking to recover a debt, the debt is disputed and the alleged debtor asks for such a statement. The information would be required by the BFSO in any event if the debtor lodges a dispute with this office. Providing the information at an early stage may mean that the debt is acknowledged or otherwise resolved.

Except for undisputed amounts, all collection activity should be suspended until the account information or documents requested have been provided to the debtor.

Disputed Debts and the Role of the BFSO

In the 2005 Debt Collection Guideline, ASIC and the ACCC encourage creditors and debt collectors who are members of an external dispute resolution scheme ("EDR scheme"), such as BFSO, to allow the dispute resolution process in the context of debt collection to work effectively. [11]

In particular it says:

- Collection activity should cease when a debtor disputes a debt and the creditor is investigating that dispute. A credit listing should not be made in relation to a disputed debt;

- When applicable, creditors and debt collectors must advise debtors of an EDR scheme to which the debtor can take his or her unresolved dispute, ensuring that this information is provided at the appropriate time;

- Once a dispute about a debt has been referred to an EDR scheme, collection activity should cease while the dispute is considered;

- A debt should not be sold, or passed on to an external agent for collection while the EDR scheme is considering a dispute; and

- If the debt is inadvertently sold, the assignor/creditor should seek to retrieve the debt from the assignee and/or seek to ensure that the assignee does not undertake collection activity or start legal proceedings until the EDR scheme has resolved the dispute (and only if liability is confirmed.)

[11] Part 2, section 23.

BFSO endorses these comments and would expect members to act in accordance with these principles.

Credit Reporting

Credit reporting requirements are dealt with under the *Privacy Act* 1988 and the Credit Reporting Code of Conduct. Some of the common issues arising with credit reporting were dealt with in BFSO Bulletin 34. The legal obligations in relation to personal information which are contained in the Privacy Act also arise in the context of debt collection. BFSO's approach to those obligations was set out in detail in Bulletin 28.

The 2005 Debt Collection Guideline also deals with aspects of credit reporting and issues around personal information and privacy.[12] We agree that misleading or deceptive conduct should be avoided in relation to:

- A creditor's intention to list a debt;
- A creditor's right to list a debt, particularly where the right of recovery is statute-barred;[13] or
- The consequences of listing.

A listing should not be made when the creditor is in the process of investigating a debtor's claim that a debt is not owed, or if the debtor has filed process with a court or tribunal, or lodged a dispute with the BFSO, disputing liability for the debt.

Contact with a Debtor following Bankruptcy

Unsecured debts

Under the 2005 Debt Collection Guideline, the creditor or a debt collector must stop all informal collection activity against a bankrupt for an unsecured debt. Legal proceedings can only be continued with the leave of the court.

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 and contacting the debtor may also amount to harassment. Contact should be made with the bankrupt's trustee.

Where the debtor has entered into a Part IX or Part X arrangement and the arrangement has been accepted by creditors, then creditors are bound by the arrangement, provided it is valid and not declared void or otherwise terminated. Creditors should therefore also cease debt collection activity where the debtor has entered into such an arrangement.

As all contact with a debtor who has become bankrupt or entered into an arrangement under the Bankruptcy Act must cease, it is not appropriate for financial services providers who are members of the BFSO Scheme to assign the debt. A member who

[12] Part 2, section 7(g) and (h), section19 (g) – (j)
[13] It would also be misleading to seek to recover such as debt. See Collection House v Taylor [2004] VSC 49, referred to at p36 of the Guideline.

does so may still be liable for claims for non-financial loss as it is reasonably foreseeable that contact with the debtor will take place when it should have stopped.

Members of the Scheme should therefore have processes in place to ensure that bankrupt debts are not included in debts sold to third parties. The failure to have such processes in place may be regarded as a systemic issue.

Secured debts

The 2005 Debt Collection Guideline does not prohibit secured creditors from taking possession of, and selling, secured assets if the bankrupt person is in default. Contacting a bankrupt debtor to sight, inspect and/or recover a security is permissible as long as the contact is consistent with the law.

Record Keeping

Accurate record keeping is essential in resolving disputes. The 2005 Debt Collection Guideline requires creditors and debt collectors to maintain accurate, complete and up to date records of all communications with debtors, including the time, date and nature of calls about the debt. All payments must also be accurately recorded. In addition it is said that, where an arrangement is made in relation to a debt, that arrangement should be confirmed in writing and a copy kept on the file. We regard this as good industry practice.

Related BFSO Bulletins

Bulletin 46	Dealing with Customers in Financial Difficulty
Bulletin 38	Fairness in Debt Recovery
Bulletin 34	Collection Issues – Sale of Debts and Credit Reporting
Bulletin 28	Privacy issues

As is always the case, we welcome feedback on this Bulletin.

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