



Debt collection guideline: for collectors and creditors

OCTOBER 2005

Debt collection guideline:
for collectors and creditors

© Commonwealth of Australia 2005

ISBN 1 920702 83 0

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968* no part may be reproduced by any process without permission from the Australian Competition and Consumer Commission or the Australian Securities and Investments Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, PO Box 1199, Dickson ACT 2602; or to the Director, Public Relations, Australian Securities and Investments Commission at feedback@asic.gov.au.

Important notice

This guideline is designed to give you basic information; it does not cover the whole of the Trade Practices Act or the Australian Securities and Investments Commission Act and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible there may be generalisations about the application of the aforementioned 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.

Produced by the ACCC Publishing Unit 10/05.

Contents

Part 1: Using this guideline	1
Who is this guideline for?	1
What this guideline covers	2
Why has this guideline been developed?	3
What does this guideline do?	3
This guideline focuses on individual debtors	4
This guideline applies to creditors as well as collectors	4
Debtors' responsibilities	5
Relationship with court debt recovery processes	6
A flexible, fair and realistic approach to collection	7
Roles of ASIC and the ACCC	7
Part 2: Practical guidance	8
1. Contact for a reasonable purpose only	8
2. Making contact with the debtor	9
3. Hours of contact	10
4. Frequency of contact	11
Telephone contacts, letters and messages	12
Face-to-face contacts	12
Third parties	13
Undue harassment	13
5. Location of contact	14
6. Face-to-face contact	14
Visiting the debtor's home	15
Visiting the debtor's workplace	16

7.	Privacy obligations to the debtor and third parties	17
	Collecting and disclosing the debtor's personal information	17
	What you should do with the debtor's personal information	18
	Rights of third parties	18
	Obligations regarding consumer credit reports	19
8.	When a debtor is represented	19
9.	Record keeping	20
	Recording debt settlements	21
10.	Providing information and documents	21
	Responsibility for providing information and documents	22
11.	Consistent and appropriate correspondence	23
12.	If liability is disputed	24
	Formal denial of liability	24
13.	Repayment negotiations	25
14.	Contact when a payment arrangement is in place	27
15.	Contact following bankruptcy or a Bankruptcy Act agreement	27
16.	Conduct towards the debtor	29
17.	Debtors at a special disadvantage	30
	Non-English speaking debtors	31
18.	Conduct towards family members and other third parties	31
	Communication with the debtor's child	32
19.	Representations about the consequences of non-payment	33
	Credit reporting	35
20.	Representations about the legal status of a debt—including statute-barred debt	35
21.	Legal action and procedures	36
22.	Resolving debtor complaints and disputes	38
23.	The role of independent external dispute resolution schemes	39

Part 3: Commonwealth consumer protection laws **41**

Prohibition of the use of physical force, undue harassment and coercion	41
Physical force	42
Undue harassment	42
Coercion	43
Prohibition of misleading and deceptive conduct	43
Prohibition of unconscionable conduct	45
Enforcement and remedies for breaching the Trade Practices Act or the ASIC Act	48
Fines	48
Civil orders	48
Damages or injunction	48

Appendix A: ACCC and ASIC—debt collection roles and contact details	49
Australian Competition and Consumer Commission (ACCC)	49
Australian Securities and Investments Commission (ASIC)	50
Overlapping areas	51
Appendix B: Other statutory and common law obligations and remedies	52
State and territory fair trading laws	52
State and territory licensing of collectors	53
The Uniform Consumer Credit Code [UCCC]	53
State and territory unauthorised documents laws	53
State and territory limitation of actions laws	54
Bankruptcy laws	54
Privacy laws	54
Tort law	55
Criminal law	55
Other obligations	55
Appendix C: Glossary	56

Part 1: Using this guideline

This guideline has been produced by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC). The ACCC and ASIC enforce the Commonwealth consumer protection laws. For more information about the responsibilities of each agency, see appendix A.

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

Who is this guideline for?

This guideline will help:

- **collectors** (including collection agencies, debt buy-out services, in-house collection departments of businesses and government bodies, solicitors and others)
- **creditors** who use external collection agencies to collect debts or sell or assign debts to third parties

to understand how the Commonwealth consumer protection laws apply to them.

The guideline will also serve as a point of reference for **financial counsellors** and **debtors’ advisers** when negotiating with collectors about their practices. The ACCC and ASIC have developed a joint publication specifically for consumers called *Dealing with debt: your rights and responsibilities*.¹

¹ This publication is available on the ACCC and ASIC websites. A hard copy is also available free of charge by contacting either ASIC or the ACCC (contact details in appendix A).

What this guideline covers

This guideline explains how Commonwealth consumer protection laws relevant to collection apply. These laws include:

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

Part 2 of the guideline provides practical guidance on what collectors and creditors should and should not do to minimise the risk of breaching the laws administered by ASIC and the ACCC.

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

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

Penalties

Part 3 also contains information on penalties for breach of the Commonwealth consumer protection laws.

Other laws

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

- Commonwealth privacy laws—administered by the Office of the Privacy Commissioner
- state and territory fair trading laws—which include conduct prohibitions mirroring those of the Commonwealth consumer protection laws
- the Uniform Consumer Credit Code—uniform state and territory legislation administered by the state and territory fair trading and consumer affairs agencies
- the *Bankruptcy Act 1966*—administered by the Insolvency Trustee Service Australia.

Various other laws, regulations and industry codes are also referred to in passing throughout the guideline. For a non-exhaustive list of other applicable laws, see appendix B. Also see the comments under the heading, ‘Relationship with court debt recovery processes’ on p. 6.

Note: this guideline does not seek to deal with law on mortgages and other securities or guarantees.

Why has this guideline been developed?

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

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

- recent cases that interpret the law governing debt collection³
- changes to the structure and practices of the collection industry in recent years
- stakeholder feedback after consultation about the guideline.

What does this guideline do?

The guideline:

- explains ASIC’s and the ACCC’s view of the laws that we administer
- provides examples on how the law has been applied in particular cases
- gives guidance on what creditors and collectors should and should not do if they wish to **minimise** the risk of breaching the laws we administer
- notes other laws and regulations not administered by the ACCC and ASIC that are relevant to the debt collection context.

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

3 See references in part 3 of this guideline.

Note:

- This guideline does **not** have legal force. ASIC and the ACCC cannot make law in this field—that is the role of parliament. Nor can ASIC and the ACCC provide a definitive interpretation of the law—that is the role of the courts.⁴
- ASIC and the ACCC must approach each potential enforcement matter on a case-by-case basis, taking account of all relevant circumstances. Compliance with this guideline cannot provide a guarantee against enforcement action by ASIC or the ACCC.
- Businesses may also be subject to action by private parties.

The ACCC and ASIC encourage businesses engaging in 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.

This guideline focuses on individual debtors

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

This guideline applies to creditors as well as collectors

This guideline applies to creditors directly involved in debt collection as much as to specialist external agencies. 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.

4 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 creditor's contractual undertaking.
- Industry complaints handling schemes may consider this guideline when making binding determinations on scheme members. See further under part 2, section 23, 'The role of independent external dispute resolution schemes'.

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 laws we administer, and to incorporate this guideline into their contractual and compliance auditing arrangements with their agents and assignees.

Debtors' responsibilities

While this guideline focuses on the responsibilities of collectors, the ACCC and ASIC recognise that debtors have responsibilities too. Debtors are legally responsible for paying the debts they legitimately owe, and they should not deliberately try to avoid their obligations.

Whenever possible, debtors should take action before they get into difficulties. Debtors experiencing financial hardship should promptly contact their creditor, or the collector if the debt has already passed to a collection business, to negotiate a variation in payments or other arrangement. In seeking a variation, debtors should be candid about their financial position, including their other debts.

We also recommend that debtors in difficulties consider seeking the assistance of a community-based financial counsellor, solicitor or other qualified adviser who may be able to help them with a debt negotiation.

The ACCC and ASIC's *Dealing with debt: your rights and responsibilities* gives consumers detailed advice on dealing with debt matters. We encourage creditors and collectors to refer debtors to this publication and to the services referred to in the paragraph above when appropriate.

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 also include the repossession of securities or other legal enforcement of security interests.

This guideline is mainly concerned with non-court debt recovery processes and **informal** collection activities after a judgment. It does not claim to limit a creditor's right to:

- 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
- seek and obtain judgment for a debt
- 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, a collector must not threaten action (legal or otherwise) that they are not legally permitted to take, or do not have instructions or authority to take. How legal action is threatened or employed can, in certain circumstances, amount to unconscionable conduct or harassment. A collector also must not represent an entitlement to seize goods beyond that granted by law. See part 2, sections 19–21 of this guideline for more information.

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

A flexible, fair and realistic approach to collection

People often default on their debts as a result of circumstances beyond their control—such as unemployment, illness and 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.

On the other hand, most creditors want to minimise their exposure to debt collection and, to this end, most will be prepared to work flexibly with customers who get into difficulties. We encourage such flexibility on the part of creditors and their agents. This includes making reasonable allowance for a debtor's ongoing living expenses, and recognising that debtors experiencing financial hardship will often have a number of debts owing to different creditors.⁵

When debtors act promptly and responsibly, and collectors are flexible, fair and realistic, the need for collection activity will be greatly reduced.

Roles of ASIC and the ACCC

For more information on the respective roles of ASIC and the ACCC for debt collection see appendix A of this guideline.

⁵ Note that when a debt relates to a contract regulated by the Uniform Consumer Credit Code (administered by the states and territories), a debtor may have a statutory right to a variation when certain conditions are met. Repayment negotiations generally, including hardship variations under the UCCC, are discussed in part 2, section 13 of this guideline.

Part 2: Practical guidance

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

Who is this part addressed to?

This part of the guideline is addressed directly to all involved in collection activity, whether as creditors, agents or assignees [you]. Reference is also made to the specific responsibilities of creditors of contracted or assigned debts.

1. 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.⁶
- [b] It may be necessary and reasonable for you to contact a debtor to:
- give information about the debtor's account
 - convey a demand for payment
 - accurately explain the consequences of non-payment, including any legal remedies available to the collector/creditor, and any service restrictions that may apply in the case of utilities (for example, electricity)
 - 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

⁶ You should also not pursue a person for a debt unless you have reasonable grounds for believing the person you contact is liable for the debt: see section 12 of part 2 of this guideline.

- 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.⁷ You may also contact a debtor at the debtor's request.

[c] However, 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.⁸ See further under part 2, section 16 and part 2, section 17 of this guideline.

2. Making contact with the debtor

- [a] Under the privacy laws, collectors have obligations to protect the privacy of debtors.⁹ 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 other confidential information.
- [b] If you are considering divulging your identity as a 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 information such as that the debtor has 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.¹⁰
- [d] Having established the debtor's identity, you should then identify who you are and whom you work for, and explain the purpose of the contact.

7 However, there are circumstances when further contact with a debtor may not or may no longer be appropriate: see part 2, sections 4, 12 and 14–15 of this guideline.

8 Note also that 'unreasonable communication with a debtor' is specifically prohibited as undue harassment or coercion by s. 26(2)(i) of the *Fair Trading Act 1992 (ACT)* and s. 21(2)(h) of the *Fair Trading Act 1999 (Vic.)*.

9 Privacy related guidance in this section has been written with advice from the Office of the Privacy Commissioner (Federal). For information on privacy issues, see part 2, section 7 of this guideline.

10 For authorised representatives, see part 2, section 8 of this guideline.

- [e] When you make initial contact, you should also give at least basic information about the debt, including the name of the creditor and any assignee of the debt, and details of the account and the amount claimed. A debtor may request further information or documentation of the debt: see part 2, section 10 of this guideline.
- [f] 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 are a court or government official.
- [g] If on first contact 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 12 of this guideline.

3. Hours of contact

- [a] Only contact the debtor or a third party at reasonable hours, taking into account their circumstances and reasonable wishes. You can normally assume that the following are appropriate contact times, subject to the qualifications set out:

Reasonable contact times

These times apply to both debtors and third parties¹¹ and are the local times in the debtor's state or territory.

Contact by telephone	Monday to Friday	7.30 am–9.00 pm
	Weekends	9.00 am–9.00 pm
	National Public Holidays	No contact recommended ¹²
Face-to-face contact	Monday to Friday	9.00 am–9.00 pm
	Weekends	9.00 am–9.00 pm
	National Public Holidays	No contact recommended ¹³
All workplace contact	Debtor's normal working hours if known, or 9.00 am–5.00 pm on weekdays	

11 See definition of 'third party' in appendix C. Contact with debtors' representatives such as financial counsellors and solicitors would normally occur during ordinary business hours.

12 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 of the Fair Trading Act (SA) prohibits telephone calls or personal calls on any public holiday (state or national) to demand payment.

13 *ibid.*

- [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 the comments on face-to-face contact in part 2, section 6 of this guideline.
- [c] Also, there may be reasons why contact during the above times is unreasonable, or contact outside of these times is reasonable. For instance, a debtor may ask that contact be made at other or more restricted times. This may be for a range of reasons, for example (these examples are illustrative only):
- the debtor is a shift worker
 - the debtor is responsible for children and contact around meal times is not convenient
 - the debtor does not wish to be contacted when other family members are present.

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

- [d] 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.

4. Frequency of contact

- [a] Debtors and third parties are entitled to be free from excessive communications from collectors. Communications must always be for a reasonable purpose, and should only occur to the extent necessary: see part 2, section 1 of this guideline. The guidance on frequency of communications that follows (section 4) 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.

Telephone contacts, letters and messages

- [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) and only when it is necessary to do so.¹⁴

This contact includes:

- speaking to the debtor by telephone—including contacts when the debtor terminates the call
 - letters sent to the debtor.
- [d] Unnecessary or unreasonable contact by email, SMS or telephone messages (whether left on a voicemail service, on an answering machine or with a third party) must also be avoided.
- [e] Stop contacting efforts once you have reached the above limits **unless** the debtor asks for 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).
- [f] 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.

Face-to-face contacts

- [g] See our comments in part 2, section 6 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 fortnight (if contact with the debtor actually takes place).¹⁵

14 Note that s. 31(2) of the Property and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001 (Qld) prohibits unsolicited communication with a debtor more than twice a week.

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

Third parties

- [h] 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 has been sought and given in advance by the third party. Contact with third parties is discussed more generally in part 2, sections 7 and 18 of this guideline.

Undue harassment

- [i] 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. The specific prohibition against undue harassment is discussed further in part 3 of this guideline.

Undue harassment explained

Justice Hill of the Federal Court has explained the meaning of undue harassment as follows:

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

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

5. 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 appropriate mode of contact. However, if a debtor provides a telephone (including mobile phone) contact number as the means of contact, contact using that number will be appropriate whatever the debtor's location. Face-to-face contact is considered in the next section.
- [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 home.
- [c] Contact must not involve a breach of your privacy obligations to the debtor—see part 2, section 7 of this guideline.

6. Face-to-face contact

- [a] We recommend that collectors only make personal or 'field' visits if reasonable efforts to contact a debtor by other less intrusive means have been unsuccessful and face-to-face contact is **necessary**.
- [b] 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.
- [c] **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

- [d] 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, section 7. This subsection should also be read in conjunction with part 2, section 18 of this guideline.
- [e] We recommend the following 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.¹⁶
 - State clearly to the debtor the purpose of any visit before making the visit.
 - Negotiate a mutually convenient time for the visit. We recommend that visiting times be consistent with the reasonable contact times set out in part 2, section 3, unless the debtor agrees to another time.
 - Before the visit takes place, allow the debtor time to seek advice, support and/or the presence of a third party if they choose.
 - 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.
- [f] 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 coercion¹⁷ 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.
- [g] 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.

¹⁶ If you enter the debtor's premises when instructed not to do so, you risk breaching civil or criminal trespass laws.

¹⁷ In Victoria, the failure to leave a person's private residence when requested to do so is deemed to constitute undue harassment or coercion under s. 21(2)(k) of the *Fair Trading Act 1999* (Vic).

Visiting the debtor's workplace

- [h] 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
 - the debtor has specifically requested or agreed to the visit.
- [i] 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.
- [j] Visiting a debtor at their workplace will always involve a risk of breaching the collector's privacy obligations to the debtor.¹⁸ 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.
- [k] 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.
- [l] 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 debt¹⁹
 - under no circumstances discuss the debt in front of co-workers²⁰
 - leave immediately if, at any time, you are asked to do so by the debtor or another person.²¹
- [m] 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.
- [n] 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.

18 See part 2, section 7 of this guideline.

19 *ibid.*

20 *ibid.*

21 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 deemed to constitute undue harassment or coercion under s. 21(2)(k) of the *Fair Trading Act 1999* (Vic.).

7. Privacy obligations to the debtor and third parties

The following information on collectors' privacy obligations has been written with advice from the Office of the Privacy Commissioner (Federal), which has responsibility for privacy regulation at the Commonwealth level.²²

- [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. There are legal obligations under the *Privacy Act 1988 (Cwlth)* (the Privacy Act) designed to protect the privacy of a debtor's personal information.

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.²³

- [b] A debtor's personal information may be regulated by the Privacy Act in a number of ways. For example, 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 be **disclosing** personal information about the debtor.²⁴

Collecting and disclosing the debtor's personal information

- [c] Information handling by private sector organisations such as creditors and debt collectors is regulated, in part, by the National Privacy Principles (the NPPs).²⁵ There are several key obligations around information handling:
- collect information directly from the debtor whenever possible
 - only collect information that is 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
 - collect information by fair means

22 The Office of the Privacy Commissioner (Federal) can be contacted on 1300 363 992 or www.privacy.gov.au. See also under 'Privacy laws' in appendix B of this guideline.

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

24 For more information about these and other key concepts, see *Guidelines to the National Privacy Principles* (the NPP guidelines); available at www.privacy.gov.au/publications/nppgl_01.html.

25 For the NPPs, see www.privacy.gov.au/publications/npps01.html; and the NPP guidelines generally on how the NPPs are applied.

- when the debtor's information is collected, whether from a creditor or from the debtor, take reasonable steps to let the debtor know that it has been collected and what is going to be done with it²⁶
 - when making inquiries about a debtor from a neighbour or an employer, do not disclose information about the debtor, such as indicating that you are collecting a debt
 - for the same reason, be careful about what information is contained in messages left on answering machines.
- [d] Generally, personal information should only be used and disclosed for the purpose for which it was collected. There are some limited exceptions to this rule.²⁷

What you should do with the debtor's personal information

- [e] Remember the following:
- if the information is no longer needed for an allowable purpose, destroy it or permanently de-identify the record²⁸
 - if you keep the information for any time, make sure it is accurate, complete and up to date
 - if the information is kept for any time, ensure it is secure against loss or unauthorised handling
 - if the debtor wants to see their information they have a right to do so and to correct it if it is wrong.

Rights of third parties

- [f] Collectors also have privacy obligations to third parties whom they contact. Under National Privacy Principle 1, the personal information of third parties may only be collected (i.e. recorded) if this is **necessary** for one or more functions or activities of the collector. Third parties must also be advised if their personal information is collected.

26 Advice about what steps might be reasonable in certain circumstances can be found in the NPP guidelines at www.privacy.gov.au/publications/nppgl_01.html.

27 Advice about the operation of NPP 2 and its exceptions can be found in the NPP guidelines at www.privacy.gov.au/publications/nppgl_01.html.

28 See NPP 4.2. Allowable purposes are those permitted by NPP 2. Advice about destroying or de-identifying personal information that is no longer required is available in the NPP guidelines at: www.privacy.gov.au/publications/nppgl_01.html.

Obligations regarding consumer credit reports

- [g] Part IIIA of the Privacy Act also regulates the handling of personal information contained in consumer credit reports.²⁹ Credit providers should take care what information from a credit report is made available to a debt collector to recover a debt. 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
 - the name and addresses of the debtor
 - any court judgments or bankruptcy orders against the debtor.³⁰
- [h] While a debtor may have a default listed against them with a credit reporting agency, there are rules about who may make such a listing and when this can be done.³¹ For example, when a debtor's default has already been listed with a credit reporting agency, that default listing should only be updated to reflect who is currently owed the debt, rather than being separately listed again.

8. 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 the next paragraph, 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, e.g. by insisting on a particular style or form of authorisation when the written authority provided already includes the necessary information.³²

29 For general advice on credit reporting and the obligations around consumer credit reports, see www.privacy.gov.au/act/credit/index.html.

30 See s. 18N of the Privacy Act at: www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s18n.html. See also Privacy Act Fact Sheet 2, Mercantile agents (debt collection agents) at: www.privacy.gov.au/publications/crma.html.

31 See s. 18E of the Privacy Act at: www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s18e.html.

32 In general, any form of authority consistent with requirements of the *Privacy Act 1988 (Cwlth)* should be regarded as acceptable.

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

9. Record keeping

- [a] Accurate record keeping by all parties is vital to promptly resolve disputes and allow collectors and debtors to limit or avoid costly collection activity.
- [b] Collectors should ensure:
- they 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).
- [c] Creditors should ensure:
- collectors are provided with accurate, up-to-date information about assigned or contracted debts³³
 - 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.

³³ Note, however, that there are limits on information mercantile agents are permitted to receive from credit providers under Part IIIA, *Privacy Act 1988*. More generally on privacy issues: see part 2, section 7 of this guideline.

Recording debt settlements

- [d] Creditors and collectors have a responsibility to ensure that:
- settlements are fully documented in relevant files and computer systems
- and**
- before tranches of debts are assigned, sold or contracted out for collection, all reasonable steps are taken to ensure settled debts are not included.
- [e] Once a debt is settled, any credit reporting agency report on the debtor must be updated appropriately.³⁴

10. Providing information and documents

- [a] Requests by debtors for information and/or documentation about an account should not be ignored.
- [b] In certain circumstances, failure to provide information may constitute misleading and deceptive conduct or unconscionable conduct.
- [c] If a debt relates to a consumer loan or credit card facility regulated by the Uniform Consumer Credit Code³⁵, specific obligations are imposed on creditors to provide information and documents on request. These are set out in the following sections of the code:
- section 34 (Statement of amount owing and other matters)³⁶
 - section 36 (Disputed accounts)³⁷
 - section 76 (Statement of payout figure)³⁸
 - section 163 (Copies of contracts and other documents).³⁹

34 More generally on credit reporting, see part 2, section 7 of this guideline.

35 The UCCC is a scheme of uniform state and territory legislation administered by the state and territory fair trading/consumer affairs agencies. For more information about the code, go to the inter-governmental website: www.creditcode.gov.au. Materials in this guideline related to the UCCC have been prepared in conjunction with the chair of the UCCC management committee.

36 Information to be provided to the debtor or loan guarantor if requested under s. 34(1), UCCC:

- (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.

37 If a particular liability is disputed in writing, the credit provider must explain in writing in reasonable detail how the liability arises: s. 36(1), UCCC.

38 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 loan (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. 76(1), UCCC.

39 This section covers loan contracts, mortgages, guarantees, credit-related insurance contracts in the credit provider's possession, and notices previously given.

- [d] In addition, subscribers to industry codes of conduct may be subject to information and document disclosure requirements.⁴⁰ Debtors also have a right to access personal information held about them under National Privacy Principle 6 (subject to certain limits).⁴¹
- [e] If a debtor requests 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
 - details of all payments made and all amounts (including principal, interest, fees and charges) owing.
- [f] Creditors should also provide copies of contracts and related documents if these are requested.⁴²
- [g] Information and documents should be provided in a timely fashion. The Uniform Consumer Credit Code sets out timeframes to be complied with when the debt relates to a consumer loan or credit card facility.⁴³ These timeframes also provide a guide to what is reasonable for accounts that are not UCCC-regulated.
- [h] 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 12 of this guideline.

Responsibility for providing information and documents

- [i] Under the UCCC and more generally, creditors are responsible for ensuring that information and documents requested by debtors are provided to them. Depending on arrangements between the creditor and its agent or assignee, such information may be provided either through the agent or assignee or directly by the creditor.⁴⁴

40 For example, subscribers to the Code of Banking Practice (available at www.bankers.asn.au) must comply with code requirements relating to provision of copies of documents (cl. 11) and statements of account (cl. 24).

41 More generally, see part 2, section 7 of this guideline.

42 Providing a copy of the contract 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.

43 Under s. 34 (2) of the UCCC, a statement must be provided within 14 days if all information requested relates to a period 1 year or less before the request is given. Otherwise, a 30-day timeframe applies. Having provided a written statement, a credit provider is not required to provide a further statement if requested for a 3-month period: s. 34(4) of the UCCC. Similar timeframes apply to providing documents under s. 163 of the UCCC.

44 Note, however, that Part IIIA of the Privacy Act limits the information mercantile agents are permitted to receive from a credit provider. More generally on privacy issues, see part 2, section 7 of this guideline.

- [j] Creditors and collectors 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 creditors, and for creditors responding to those requests. When it is arranged for the creditor to respond directly to the debtor, there will have to be liaison between creditor and collector to ensure that collection activity is suspended until the account information or documents requested have been provided.

11. Consistent and appropriate correspondence

- [a] Your written correspondence—including automatically generated letters—should be consistent with both your records and your verbal communications with the debtor, and vice versa.
- [b] Letters and other correspondence should reflect the repayment arrangements that you have made with the debtor.⁴⁵ Such correspondence must not make inaccurate representations about:
- the frequency of contact (for example, state that ‘numerous attempts have been made to contact you by telephone’ or ‘numerous previous letters have been sent’ if this is not the case)
- or
- liability or the amount owing (for example, state or imply that a debtor is liable for collection charges or fees that you are not legally entitled to claim; or 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 proceedings regarding the debt have been commenced.⁴⁶

⁴⁵ See part 2, sections 13 and 14 regarding repayment negotiations.

⁴⁶ 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.

12. If liability is disputed

- [a] You must not pursue a person for a debt unless you have reasonable grounds for believing the person you contact is liable for the debt.⁴⁷
- [b] If a person you contact about a debt claims that:
- they are not the alleged debtor or
 - the debt has been paid or otherwise settled
- and you have not already confirmed their identity and liability, you should suspend further collection activity (including credit report listing) until the debtor's identity and ongoing liability have been confirmed.
- [c] If you continue with collection activity without properly investigating claims that a debt is not owed, you are at considerable risk of breaching one or more of the legal prohibitions of the Commonwealth laws if the debtor is not in fact liable for the debt.
- [d] 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.
- [e] If the creditor and/or collector are not able to establish the debtor's ongoing liability for the debt when challenged, collection activity should cease. The creditor should also consider providing a letter to the debtor advising that collection activity has ceased and the circumstances (if any) in which collection activity may be resumed in the future.
- [f] If the parties are unable to resolve a dispute about liability for a debt or the amount owed, a creditor or collector may have an obligation to advise the debtor of internal or external dispute resolution processes available—see further under part 2, sections 22 and 23 of this guideline.

Formal denial of liability

- [g] If a debtor verbally denies a debt and you require a written denial before you stop contact, tell the debtor of this requirement.

⁴⁷ For example, 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.

- [h] Subject to the next paragraph, further communication with a debtor, after the debtor has formally 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.
- [i] However, further communication **in writing** may be appropriate after a formal denial of liability:
- to state or reiterate the basis of the creditor's claim and the consequences of legal action being taken
 - to advise the debtor of the creditor's intention to start legal proceedings, and the steps involved
 - to put a genuine proposal for settlement of the matter.

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

- [j] Further communication about any other debt, or any part of a debt that is not denied, remains appropriate.
- [k] 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).

13. Repayment negotiations

- [a] We encourage creditors and collectors to work with debtors and to adopt a flexible and realistic approach to repayment arrangements. This includes:
- making reasonable allowance for a debtor's ongoing living expenses
 - recognising that debtors in difficulties will often have a number of debts owing to different creditors.
- [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 loan repayments. It is appropriate for creditors to take this kind of circumstance into account in their approach to negotiations with debtors.

- [c] Debtors experiencing financial hardship regarding their consumer loans or credit card facilities may apply to the creditor for a variation or change of their repayment arrangements on the grounds of hardship under the Uniform Consumer Credit Code (UCCC).⁴⁸
- [d] In addition, the Code of Banking Practice obliges subscribing banks to help debtors overcome their financial difficulties and advise them of any rights they may have under the UCCC.⁴⁹
- [e] 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 to seek a repayment variation when such a right exists.
- [f] It is also unacceptable to pressure a debtor:
- to pay in full, in unreasonably large instalments, or to increase payments when you are aware they are unable to do so
 - to get further into debt to pay out an existing debt
 - to show proof of unsuccessful alternative credit applications before a repayment plan will be negotiated.
- [g] Creditors and collectors must ensure that repayment arrangements are fully documented.
- [h] The collector or creditor (as relevant) should provide a written copy of an agreed payment arrangement to the debtor on request. You should also consider offering to provide a written copy, even when this is not specifically requested, in situations where an ongoing arrangement for periodic payments has been agreed to.⁵⁰
- [i] Once finalised, repayment arrangements should be given a chance to work—see the next section.

48 Under s. 66 of the UCCC a debtor unable reasonably to meet their obligations (because of illness, unemployment or other reasonable cause) can apply to their lender to extend the loan repayment period and reduce their periodic payments and/or to postpone payments for a period. The debtor must reasonably expect to be able to discharge their obligations under the proposed arrangements. If the lender does not agree to the variation proposed, the debtor can apply to a court or tribunal with jurisdiction to hear applications: s. 68 of the UCCC. This regime is subject to a maximum 'floating threshold' linked to the cost of housing: for more information, search under 'hardship threshold' at www.creditcode.gov.au.

49 Section 25.2 of the Code of Banking Practice states in part: 'With your agreement, 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'.

50 Note that when the debt relates to an account regulated by the UCCC, an agreement that defers or otherwise reduces the debtor's obligations for more than 90 days must be put in writing and given to the debtor: s. 65 of the UCCC.

14. Contact when a payment arrangement is in place

[a] Generally, while an arrangement is in place, do not contact the debtor unless:

- the debtor asks you to
- you wish to propose a **genuine** alternative or variant arrangement to benefit the debtor
- the debtor does not comply with the terms of the agreement.

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.

[b] You are entitled to contact a debtor to review an informal arrangement that was made subject to review. However, repayment reviews should not be excessively frequent—we recommend a **minimum** of three months between reviews unless a further default occurs sooner.

15. Contact following bankruptcy or a Bankruptcy Act agreement

The following information on bankruptcy has been written with advice from the Insolvency Trustee Service Australia, the Commonwealth body responsible for regulating bankruptcy and Bankruptcy Act agreements.⁵¹

[a] Under the Bankruptcy Act an unsecured creditor⁵² may lodge a proof of debt with the bankrupt's trustee. With limited exceptions set out in the Act, an unsecured creditor may not:

- take or continue legal action or allow recovery action to continue against the bankrupt person

or

- take any remedy against the person or property of the bankrupt.

51 ITSA can be contacted on 1300 364 785 or www.itsa.gov.au. ITSA has published *Information for creditors about bankruptcy (June 2004)* available from the ITSA site.

52 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.

- [b] A creditor or 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 and deceptive conduct under the consumer protection laws.⁵³ Contacting a bankrupt person about such a debt may also amount to harassment of the debtor and/or unconscionable conduct.
- [d] Secured creditors⁵⁴ (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 and/or recover a security interest is permissible as 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 as 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.⁵⁵
- [g] Unsecured creditors (or their agents) should contact the trustee of a bankrupt estate, or the administrator of a Part IX or Part X agreement for information about the possibility of recovering their debt.

53 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.

54 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.

55 Further information is available on the ITSA website on www.itsa.gov.au or 1300 364 785.

16. Conduct towards the debtor

- [a] A debtor is entitled to respect and courtesy, and must not be subject to misleading, humiliating or intimidating conduct. Such conduct is likely to breach the Commonwealth consumer protection laws, and may breach other laws as well.
- [b] Do not:
- use abusive, offensive, obscene or discriminatory language
 - make disrespectful or demeaning remarks about a debtor's character, situation in life, physical appearance, intelligence or other characteristics or circumstances
 - embarrass or shame a debtor—for example, by sending open correspondence to a shared post-box, making the debtor's employer or co-workers aware that the debtor is being pursued for a debt, or creating an impression that the debtor is under surveillance⁵⁶
 - 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
 - threaten to use, or use violence or physical force against a debtor, third party or against property⁵⁷
 - mislead a debtor about the nature or extent of a debt, or the consequences of non-payment.⁵⁸
- [c] Inappropriate behaviour by a debtor does not justify unprofessional conduct by the collector.
- [d] Where possible, the collector should attempt to diffuse such behaviour and refocus discussion on the outstanding debt and arrangements for its repayment. Debtor frustration and/or anger are 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.

56 Such actions may also involve a breach of the collector's privacy obligations to the debtor: see part 2, section 7 of this guideline.

57 Such threats or actions may also constitute criminal conduct.

58 See further under part 2, sections 19–21 of this guideline.

CASE STUDY

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

ACCC v Davis [2003] FCA 1227

17. Debtors at a special disadvantage

- [a] As with other people involved in trade and commerce, collectors must not engage in unconscionable conduct. Collectors are at risk of breaching this prohibition if they take advantage of the disability, weakness or vulnerability of a specially disadvantaged or vulnerable person.
- [b] Under the general law, 'special disadvantage' means that the consumer has a condition or is in a circumstance that seriously affects their ability to judge what is in their best interest. Factors that may give rise to a special disadvantage include:
- ignorance of important facts known to the staff or agent of the business
 - illiteracy or lack of education
 - poverty or need of any kind
 - the consumer's age
 - infirmity of body or mind
 - drunkenness
 - lack of explanation and assistance when necessary.⁵⁹
- [c] The statutory prohibition of unconscionable conduct, which builds on the general law concept, is considered further in this guideline.⁶⁰ It requires courts to consider all the circumstances of the case, including a number of specific factors such as whether undue influence has been exerted or unfair tactics have been adopted towards the consumer or a third party.

⁵⁹ See *Blomley v Ryan* (1956) 99 CLR 362, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

⁶⁰ See part 3, 'Prohibition of unconscionable conduct'.

- [d] 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 disadvantage. Otherwise, your conduct is likely to be regarded as unconscionable and in breach of the law.
- [e] 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 unfair advantage of their ignorance.
- [f] Depending on the circumstances, it may be appropriate to encourage the disadvantaged debtor to seek the assistance of a family member to support them, or a financial counsellor to act on their behalf.

Non-English speaking debtors

- [g] 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**.⁶¹ Otherwise, a professional interpreter will need to be engaged.⁶²

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 the debtor's spouse or partner, or a member of the debtor's family (especially a child) or other third parties.
- [b] All communication with third parties, including members of the debtor's family, must be consistent with the collector's privacy obligations to the debtor and the third party. See the discussion of privacy obligations to the debtor and third parties in part 2, section 7 of this guideline.

61 On the use of children (under 18 years) as translators, see the next section.

62 The Department of Immigration and Multicultural Affairs provides a 24-hour translating and interpreting service accessible on 131 450. User fees generally apply.

- [c] Communication with a third party can amount to a breach of the consumer protection laws if 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.
- [d] The standard for acceptable conduct towards third parties is, if anything, even higher than that applying to the debtor.
- [e] When it is appropriate to communicate with a third party, do so by telephone or other non-intrusive means wherever possible.⁶³ 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.
- [f] 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 and deceptive conduct and is against the law.
- [g] 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

- [h] 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) is likely to constitute undue harassment or coercion and/or unconscionable conduct within the meaning of the consumer protection laws, and is entirely unacceptable behaviour.

⁶³ On the hours and frequency of contact with third parties, see part 2, sections 3 and 4 of this guideline. 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 7 of this guideline.

- [i] A collector should never 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
 - the collector reasonably believes the child is willing and able to act as a translator or other intermediary
 - the collector reasonably believes that the child has not been coerced in any way by the debtor or another party.⁶⁴
- [j] The collector must take particular care to ensure their conduct and demeanour do not distress or embarrass the child. The collector 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.

19. Representations about the consequences of non-payment

- [a] This section should be read in conjunction with part 2, sections 20 and 21 of this guideline.
- [b] You are entitled to accurately explain the consequences of non-payment of a debt, but must not misrepresent those consequences.⁶⁵ Misrepresentation may increase the risk of breaching laws against unconscionable conduct when the debtor is in a position of special disadvantage or vulnerability.⁶⁶
- [c] You must not threaten legal action if the start of proceedings is not possible, or not under consideration, or you do not have instructions to start proceedings.
- [d] Conversely, you must not state or imply that action will not be taken when the start of proceedings is intended or under consideration.

64 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 deemed to constitute undue harassment or coercion under s. 21(2)(k) of the *Fair Trading Act 1999* (Vic).

65 Apart from constituting misleading and deceptive conduct under the consumer protection laws, misrepresenting the consequences of non-payment of a debt also constitutes undue harassment or coercion under s. 26(2)(b) *Fair Trading Act 1992* (ACT) and s21(2)(b) *Fair Trading Act 1999* (Vic).

66 See part 2, section 17 of this guideline.

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

A collection officer told a debtor by phone to accept a letter that was being delivered, and that no action would be taken. When the debtor contacted the collection officer through an authorised representative (a financial counsellor), they found that the collector had issued a Statement of Liquidated Claim and intended to proceed to judgment on the debt.

[e] Do not state or imply that:

- immediate possession will be taken of a debtor's home or other property when the debt is not secured by that property, or the creditor has not obtained judgment for the debt
- unsecured goods may be seized and sold without further legal action
- unsecured basic household items can be seized if the debtor is made bankrupt⁶⁷
- additional fees or charges will be added to the debt if payment is not made, if such fees or charges are not permitted by law⁶⁸
- additional fees or charges will be added to the debt where there is no contractual right to add these.

[f] Do not state or imply that:

- failure to pay a debt is a criminal matter when no fraud or other offence is involved
- a matter will be referred to the police when there is no intention to make such a referral
- criminal proceedings may be commenced by the creditor or agent or other private person themselves.⁶⁹

⁶⁷ Section 116 of the *Bankruptcy Act 1966* excludes these items from seizure by creditors.

⁶⁸ For example, s. 38 of the *Private Agents Act 1966* (Vic.) sets a statutory limit on the charges and costs that a commercial agent may charge, recover or receive from a debtor. Similarly, 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 Consumer Credit Code.

⁶⁹ Such conduct will also breach s. 43(2)(a), *Fair Trading Act 1987* (SA).

Credit reporting

- [g] 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 code⁷⁰
 - the debt has already been listed.
- [h] Equally, while it is appropriate to point out the possible consequences of a credit listing, you must not make misleading representations about those consequences.
- [i] 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 disputing liability for the debt.
- [j] For more general information on credit reporting obligations, see part 2, section 7 of this guideline.

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

- [a] This section should be read with part 2, section 19, and part 2, section 21 of this guideline.
- [b] Collectors 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 bankrupt⁷¹ 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 debt was last acknowledged by the debtor (for example, by making a payment).

⁷⁰ For example, provision 2.8 of the Credit Reporting Code of Conduct prohibits the listing of statute-barred debts.

⁷¹ 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 15 of this guideline.

- [c] Representing that legal action will or may be taken when a debt is statute-barred may be misleading and deceptive. Such representation may also be unconscionable when the debtor has not had the opportunity to obtain legal advice.
- [d] The Credit Reporting Code of Conduct prohibits the listing of statute-barred debts.⁷²

CASE STUDY

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

Collection House v Taylor [2004] VSC 49

21. Legal action and procedures

- [a] This section should be read in conjunction with part 2, sections 19 and 20 of this guideline.
- [b] Creditors and their agents 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 that they are court process or other court documents, or that they come from a solicitor's office, when this is not the case⁷³
 - 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

⁷² See Office of the Privacy Commissioner website at: www.privacy.gov.au/publications/.

⁷³ See also s. 26(2)(a),(c),(f)(g) *Fair Trading Act 1992* (ACT); s. 21(2)(a),(b),(c)(f) *Fair Trading Act 1999* (Vic.); and s. 43(2)(c) *Fair Trading Act 1987* (SA). These provisions relate specifically to misrepresentation regarding documents, court process etc.

- 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 police⁷⁴
 - 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 debt⁷⁵
 - state or imply that unsecured basic household items can be seized if the debtor is made bankrupt⁷⁶
 - state or imply that you have instructions to start legal proceedings when this is not intended, or you have received no such instructions
 - state or imply that legal action has already been taken, or judgment entered, when this is not case.
- [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.
- [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.⁷⁷ 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 breached misleading and deceptive conduct provisions by representing that they were about to sell a debtor's residence to obtain payment, when they had not started any legal proceedings at the time. They also breached these provisions by making baseless claims that they would have the debtor arrested by the police or the Fraud Squad.

ACCC v McCaskey [2000] FCR 1037.

74 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.

75 See also s. 26(2)(d) *Fair Trading Act 1992* (ACT); s. 21(2)(d) *Fair Trading Act 1999* (Vic.); and s. 43(2)(b) *Fair Trading Act 1987* (SA).

76 Section 116 of the *Bankruptcy Act 1966* excludes these items from seizure by creditors.

77 Applications under the UCCC (for example, for repossession of security interests related to regulated contracts) need to be brought in the jurisdiction where the debtor resided at the time the contract was entered into: see s. 6 of the UCCC. However, this requirement does not apply to debt recovery proceedings as such.

22. Resolving debtor complaints and disputes

- [a] Complaints and disputes must not be ignored. Creditors and collectors must have effective internal processes in place for logging, assessing, and where appropriate, taking timely action in response to them. Staff need to be trained to identify complaints and disputes, and to ensure that established procedures are followed in dealing with them.⁷⁸
- [b] 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.⁷⁹
- [c] Entities providing financial services to retail clients who are required under the *Corporations Act 2001* to have an Australian financial services licence (including banks, credit unions and building societies) must have an ASIC approved dispute resolution system, including internal dispute resolution [IDR] procedures.⁸⁰ ASIC requires that licensees' IDR procedures satisfy the essential elements of Australian Standard AS 4269:1995 and be appropriately documented.⁸¹ Complaints/disputes handling standards may also be imposed as a condition of membership of an industry code or external dispute resolution scheme.
- [d] Generally, we recommend that **all** creditors and collectors have in place internal complaint/dispute handling processes that are, at least, consistent with the Australian Standard AS 4269:1995 (or any Australian Standard that may subsequently replace it).

78 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 10 of this guideline.

79 However, if the complaint is escalated to an external dispute resolution scheme (see part 2, section 23 of this guideline) it will generally need to be put in writing.

80 Sections 912A(1)(g) and 912A(2)(a), *Corporations Act 2001*.

81 See ASIC policy statement 165, at 165.10. As part of the ASIC requirements, licensees must also have a system for informing complainants about the availability and accessibility of the relevant external dispute resolution scheme to which a licensee belongs. See part 2, section 23 of this guideline.

23. The role of independent external dispute resolution schemes

- [a] Many creditor organisations (including telecommunications companies, utility suppliers and financial services businesses) belong to an independent external dispute resolution [EDR] scheme.⁸² Specialist collection and debt buy-out agencies, and other finance providers, may also decide to join a scheme. Belonging to an EDR scheme is a legal requirement for some creditors.⁸³
- [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 collector's internal dispute resolution processes.
- [c] We urge creditors and collectors to ensure their systems and practices allow EDR in the debt collection area to work effectively. In particular:
- when applicable, creditors and collectors 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/or 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).

82 For a list of relevant ombudsman schemes, and for further information on EDR schemes, see the ACCC and ASIC publication entitled *Dealing with debt: your rights and responsibilities* (obtainable from either the ACCC or ASIC, contact details in appendix A of this guideline).

83 These include banks, building societies and credit unions providing financial services to retail clients who must belong to one or more ASIC approved EDR scheme as a requirement of their financial services licence: see ss. 912A(1)(g) and 912A(2)(b), *Corporations Act 2001*. ASIC policy statement PS 139 sets out ASIC requirements for scheme approval. A list of approved schemes can be obtained at [ww.asic.gov.au](http://www.asic.gov.au).

- [d] Note that a creditor 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 we administer should be applied to particular debt collection-related matters.

Part 3: Commonwealth consumer protection laws

This section summarises key prohibitions and remedies under Commonwealth consumer protection laws applicable to collection activity. Relevant court decisions about the Trade Practices Act provisions also apply to equivalent ASIC Act provisions.⁸⁴

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

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

Section 60 Trade Practices Act

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

Section 12DJ ASIC Act

A person contravenes this subsection if:

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

84 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* [2004] FCAFC 34.

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

- physical force
- undue harassment and/or
- coercion

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

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

Physical force

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

In *ACCC v Davis* and *ACCC v Capalaba*⁸⁵ the court found that, in pinning a debtor to the ground while the debtor's vehicle was removed from the debtor's premises, the respondent corporation through its agents breached s. 60 of the Trade Practices Act. The fact that the collector had a contractual right to seize the vehicle under a mortgage over the vehicle did not permit the use of physical force to overcome the debtor's resistance to the seizure.

Undue harassment

Undue harassment may occur when repeated approaches are made or repeated pressure is applied to a debtor, going beyond what is acceptable or reasonable. While the harassment must be 'undue', there is no requirement that the conduct must involve the threat of an illegal act.⁸⁶

⁸⁵ *ACCC v Davis* [2003] FCA 1227. *ACCC v Capalaba Pty Ltd & Others* [2003] FCA 1226.

⁸⁶ *Campbell v Metway Leasing Ltd* (1998) ATPR 41-630.

In *ACCC v Maritime Union of Australia*,⁸⁷ Justice Hill explained the meaning of the term **undue harassment** as follows:

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

Coercion

Judicial authority indicates that s. 60 of the Trade Practices Act and s. 12DJ of the ASIC Act prohibit any ‘coercion’, not just ‘undue coercion’.⁸⁸ The concept of **coercion** does not involve the element of repetition usually involved in the concept of **undue harassment**. Coercion is said to ‘carr[y] connotations of force or compulsion or threats of force or compulsion negating choice or freedom to act’.⁸⁹ Coercion may take many forms, and is not limited to using or threatening physical force.

Prohibition of misleading and deceptive conduct

Section 52(1) Trade Practices Act

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

⁸⁷ *ACCC v The Maritime Union of Australia* [2001] FCA 1549 at ¶ [60], Justice Hill.

⁸⁸ *ibid.* at ¶ [61]–[63].

⁸⁹ *ibid.* at ¶ [63].

Section 12DA(1) ASIC Act

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

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

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

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

In *ACCC v McCaskey*⁹⁰ the court accepted that a collector breached s. 52 of the Trade Practices Act by conduct towards debtors including representations that:

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

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

90 *ACCC v McCaskey* [2000] FCA 1037.

Prohibition of unconscionable conduct

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

Part IVA contains three provisions that prohibit unconscionable conduct:

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

Section 51AB Trade Practices Act (unconscionable conduct)

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

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

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

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

Part 2, Div. 2, subdiv. C, ASIC Act—unconscionable conduct (summary only)

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

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

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

In *Collection House v Taylor*⁹¹ it was found that a commercial agent had acted unconscionably in trying to recover a debt that, unknown to the debtor, was statute-barred. It was also noted that the factual circumstances were sufficient to require the collector to establish that the transaction was fair, just and reasonable.

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

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

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

In *ACCC v Esanda Finance Corporation Ltd*⁹² the court found that the creditor had

91 *Collection House v Taylor* [2004] VSC 49.

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 include 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 repossessing the vehicle without such an order, as well as the fact that Esanda's agents entered the debtor's residence by jumping a gate and opening a garage door from the inside.

See the ACCC's *Guide to unconscionable conduct* for more about this area of law. The principles discussed in this guide also generally apply to the ASIC Act. For a copy of this guide, visit www.accc.gov.au/publications or call the ACCC Infocentre on 1300 302 502.

Enforcement and remedies for breaching the Trade Practices Act or the ASIC Act

Fines

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

- \$220 000 (in the case of individuals)
- \$1 100 000 (in the case of corporations).⁹³

These penalties also apply when a collector is convicted of knowingly making false or misleading representations.⁹⁴ Certain defences may apply regarding these breaches.⁹⁵

Civil orders

ASIC or the ACCC can apply for civil orders against a collector, including:

- injunctions against future conduct⁹⁶
- non-punitive orders (including corrective advertising)⁹⁷

ASIC or the ACCC can also apply for criminal sanctions including adverse publicity orders.⁹⁸

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 conduct⁹⁹, misleading or deceptive conduct¹⁰⁰, harassment and coercion, or other provisions of the ASIC Act and Trade Practices Act, can recover the amount of their loss by an action for damages under these Acts.¹⁰¹ A debtor or third party can also seek injunctive relief.¹⁰²

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

94 Section 12 DB, ASIC Act; s. 75AZC Trade Practices Act.

95 Section 12GI, ASIC Act; s. 85 Trade Practices Act.

96 Section 12GD, ASIC Act; s. 80 of the Trade Practices Act.

97 Section 12GLA, ASIC Act; s. 86C of the Trade Practices Act.

98 Section 12 GLB, ASIC Act; s. 86D of the Trade Practices Act.

99 Sections 12CA–CC, ASIC Act; ss. 51AA–AC, Trade Practices Act.

100 Section 12DA, ASIC Act; s. 52, Trade Practices Act.

101 Section 12GF, ASIC Act; ss. 82 and 87(2)(d), Trade Practices Act.

102 Section 12GD, ASIC Act; s. 80, Trade Practices Act.

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

Australian Competition and Consumer Commission (ACCC)

The ACCC is responsible for dealing with misconduct associated with debt collection activity when the debt does not relate to providing a financial service. This includes debts:

- for providing telephone or other utility services
- for the 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 deferred payment (for example, a customer who is billed monthly or given an extension of time to pay).

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

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

ACCC contact details

For matters relating to the types of debt given above, contact the ACCC.

For all business and consumer inquiries:

ACCC Infocentre: 1300 302 502

ACCC website: www.accc.gov.au

National Office

PO Box 1199

DICKSON ACT 2602

Tel: (02) 6243 1111

Fax: (02) 6243 1199

Australian Securities and Investments Commission (ASIC)

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

- credit card accounts
- home loans, personal loans and loans sourced through retailers (for example, for motor vehicles, household goods and 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 the debt and any misrepresentations made about the debt. It extends to debts relating to a financial service which have been assigned or sold to a third party (for example, a debt buy-out company).

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

ASIC contact details

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

ASIC's Infoline: 1300 300 630 or
infoline@asic.gov.au

ASIC's consumer website: www.fido.gov.au.

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

Address for written complaints:

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

Overlapping areas

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

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

Appendix B: Other statutory and common law obligations and remedies

Apart from the Commonwealth consumer protection laws (See part 3 of this guide), there are a range of other statutory and common law obligations and remedies that potentially affect collectors' operations.¹⁰³ These include (but are not limited to) the following listed below.

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

State and territory fair trading laws

These laws¹⁰⁴, based on the *Trade Practices Act 1974*, contain similar misconduct prohibitions to those set out in the Commonwealth legislation. However, the harassment and coercion provisions of the *Fair Trading Act 1999* (Vic.) and *Fair Trading Act 1992* (ACT) also deem that certain specified conduct constitutes undue harassment and coercion.¹⁰⁵ Consumer Affairs Victoria has also published *Guidelines for debt collection* under the *Victorian Fair Trading Act (1999)*.¹⁰⁶ There may be other state and territory laws relating to consumer protection that are relevant to the collection context as well.

103 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.

104 *Fair Trading Act 1987* (ACT), *Fair Trading Act 1987* (NSW), *Consumer Affairs and Fair Trading Act 1990* (NT), *Fair Trading Act 1989* (Qld), *Fair Trading Act 1987* (SA), *Fair Trading Act 1990* (Tas.), *Fair Trading Act 1999* (Vic.), *Fair Trading Act 1987* (WA).

105 See s. 21(2), *Fair Trading Act* (Vic.) and s. 26(2), *Fair Trading Act* (ACT).

106 Available at www.consumer.vic.gov.au.

State and territory licensing of collectors

Most state and territory jurisdictions have occupational licensing requirements applying to a range of persons involved in collection.¹⁰⁷ 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 code of conduct, the Commercial Agency Practice Code of Conduct.¹⁰⁸ In other jurisdictions conduct requirements may be imposed under the legislation itself.¹⁰⁹

The Uniform Consumer Credit Code [UCCC]

Uniform state and territory legislation regulates consumer credit contracts and related transactions (including mortgages, guarantees, consumer leases and credit-related insurance). It imposes pre-contractual, contractual, and post-contractual form and disclosure obligations on credit providers, as well as some limitations on the contractual arrangements that may be entered into. It also regulates the termination and enforcement of contracts and related securities. Some important aspects of the UCCC in the context of debt collection include its provisions on: obtaining account information and documents¹¹⁰; varying repayments on grounds of hardship¹¹¹; and enforcement of credit contracts, mortgages and guarantees.¹¹²

State and territory unauthorised documents laws

Unauthorised documents acts in each state and territory¹¹³ make it an offence to design collection letters of demand in a way that makes them look like court documents.

107 *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 Agents Act 1995* (SA), *Security and Investigation Agents Act 2002* (Tas.), *Private Agents Act 1966* (Vic.), *Debt Collectors Licensing Act 1964* (WA).

108 *Property Agents and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001* (Qld).

109 For example, s. 25 (Harassment), *Commercial Agents and Private Inquiry Agents Act 2004* (NSW).

110 See part 2, section 10 of this guideline.

111 See part 2, section 13 of this guideline.

112 See Part 5 of the UCCC ('Ending and enforcing credit contracts, mortgages and guarantees').

113 *City of Canberra Arms Act 1932* (ACT), *Unauthorised Documents Act 1922* (NSW), *Flag and Emblem Act 1985* (NT), *Badge, Arms, Floral and other Emblems of Queensland Act 1959* (Qld), *Unauthorised Documents Act 1916* (SA), *Unauthorised Documents Act 1986* (Tas.), *Unauthorised Documents Act 1958* (Vic.), *Unauthorised Documents Act 1961* (WA).

State and territory limitation of actions laws

Each state and territory sets limitation periods on debt recovery actions.¹¹⁴

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. (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 1966*, administered by the Insolvency and Trustee Service Australia, on bankruptcy or acceptance of a Part IX debt agreement or a Part X personal insolvency agreement, a bankrupt/debtor is released from their financial obligations for provable debts. Most unsecured debts will be provable. Further action to recover provable debts directly from the bankrupt/debtor is not permitted—any further recovery must be through the scheme of administration under the Bankruptcy Act.

Privacy laws

Part IIIA of the *Privacy Act 1988 (Cwlth)* 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 National Privacy Principles 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 access by the individual concerned to the information held about them.

¹¹⁴ *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 Privacy Commissioner has issued a legally binding Credit Reporting Code of Conduct, and from time to time, the Privacy Commissioner also issues determinations that may affect the collection industry.

Tort law

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

Criminal law

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

Other obligations

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

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

Appendix C: 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.

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 persons¹¹⁵ collecting on behalf of others.

Communicate: unless otherwise specified, includes communication by telephone, mobile telephone, fax, email, letter 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: see ‘Dispute’ on p. 57).

¹¹⁵ The Trade Practices Act applies to corporations or individuals when they are acting as agents of a principal that is a corporation.

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 or
 - 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.¹¹⁶

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:¹¹⁷ 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.

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).¹¹⁸

¹¹⁶ Section 6(1), *Privacy Act 1988*.

¹¹⁷ These may go by different names in different states. For example, in Queensland, judgment debts are referred to as Money Orders.

¹¹⁸ See appendix B, 'Limitation of actions laws'.

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: please refer to the section entitled 'Prohibition of the use of physical force, undue harassment and coercion' in part 3 of this guideline.