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Report in relation to Debt Collection

By the
Consumer Credit Legal Centre (NSW) Inc

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Contents

Executive Summary

This report

This report was compiled by the Consumer Credit Legal Centre (NSW) Inc ("CCLC"), with funding from the Law and Justice Foundation of NSW. CCLC is a specialist community legal centre which provides legal advice and assistance to NSW consumers, particularly disadvantaged consumers, in relation to credit, debt and banking. The decision to undertake this report was made as a result of an increase in the number of calls to the CCLC in relation to problematic debt collection practices.

In preparing this report CCLC:

- Reviewed the law;
- Consulted credit providers, debt collectors (and one of their industry bodies), and other service providers assisting consumers (such as legal and financial counselling services);
- Reviewed CCLC's recent advice records and casework files; and
- Conducted a survey of debt collection experiences by consumers (jointly with the Australian Consumer Association/Choice Magazine) in February 2004.

This report focuses largely on the experiences of consumers in NSW and some of the recommendations are NSW specific. Nevertheless, there is considerable evidence (both in the limited interstate information contained in this report and the reported experience of consumer assistance services from other states) to suggest that the problems identified in this report and the general nature of the recommendations are relevant nationally.

The Principles underlying this report

This report begins by setting some principles underlying this report. They are that:

- Most debts are paid on time;
- There are many good reasons (and some not so good) why debt may not be paid on time;
- That lending money or extending credit is a commercial decision that is made on the basis of assessing and pricing risk;
- That there is a power imbalance between debt collectors (including credit providers collecting debt on their own behalf) and alleged debtors and a consequent need for consumer protection measures; and
- That debt collection should be legal, fair and timely.

Debt collection in Australia

The level of consumer debt in Australia has been growing at unprecedented rates. At the same time there have been changes in debt collection practices, including increased outsourcing of debt collection to specialised debt collection agencies, and considerable consolidation of the debt collection industry resulting in a number of large, listed companies operating across state borders.

Regulation of debt collection

Debt collectors are covered by a range of Commonwealth and State regulation, although with the exception of licensing regimes operating in some States, most of this law is applicable generally and not specific to debt collectors. This report summarises in considerable detail the Commonwealth legislation applicable to debt collection and the relevant laws of NSW.

Issues in debt collection from the consumer perspective

This report identifies a number of issues with debt collection for consumers (alleged debtors) as it currently operates, including:

- Proof of debt – debtors who deny liability for all or part of a debt have considerable difficult obtaining documents verifying the existence and/or amount of the debt, particularly if the agency seeking to recover the debt is a different agency to that to whom the debt was originally owed;
- Harassment – despite a number of laws and guidelines expressly prohibiting debtor harassment, it continues to be one of the most commonly reported problems relation to debt collection;
- Other collection practices – a range of other practices that are not expressly prohibited at law negatively impact on alleged debtors, sometimes to the point where they are unable to exercise their rights at law;
- Collecting old debt – the collection of debt which may be many years old creates particular difficulties for consumers and the legal limitations on the collection of such debt are being effectively avoided in some cases;
- Credit reporting – the credit reporting system is being effectively used by debt collectors to locate alleged debtors and leverage payment, regardless of the legitimacy of the debt collector's claim, and in other cases is resulting in disproportionate consumer detriment.

Recommendations

This report makes a number of recommendations aimed at addressing the issues outlined above:

Recommendation 1

Recommendation 4 of the National Competition Policy Review of the Commercial Agents and Private Inquiry Agents Act 1963 that the licensing of debt collectors in New South Wales should be retained should be adopted. Recommendation 5 that the Police Security Industry Registry should be the licensing body should not be adopted. Instead, the Office of Fair Trading should take responsibility for licensing and otherwise regulating the debt collection industry in NSW.

Recommendation 2

A debt collector must, at the time of initial contact with the alleged debtor, or within five days after the initial communication (unless the debt has been paid in the meantime), send the debtor a written notice containing

- *the amount of the debt*
- *the name of the creditor to whom the debt is owed, and the name of the original creditor if this is different*
- *a statement that unless the debtor, within 30 days after receiving the notice, disputes the validity of the debt, or any part of it, the debt will be assumed to be valid by the debt collector*
- *a statement that if the debtor notifies the debt collector in writing within the 30 day period that the debt, or any part of it, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the debtor and a copy of the verification or judgment will be mailed to the debtor by the debt collector.*

If the debtor notifies the debt collector in writing at any time that he or she disputes the debt, or part of it, the debt collector must cease collection of the debt or any disputed part of it, until the debt collector obtains verification of the debt or a copy of a judgment and sends a copy of the verification or judgment to the debtor.

If the consumer fails to dispute the debt or part of it within 30 days of receiving the notice from the debt collector the debt collector may commence collection activity.

It is not an admission of liability on the part of the debtor that he or she fails to dispute the validity of the debt.

Recommendation 3

The Fair Trading Act 1987(NSW) should be amended to include specific examples of what constitutes 'undue harassment or coercion'.

Recommendation 4

The ACCC Guideline should be updated, adopted by ASIC and reflected in any Code of Conduct subsequently developed by a State or Territory.

Recommendation 5

The provisions in the NSW draft Commercial Agents and Private Inquiry Agents Bill 2003 Act that empower the licensing authority to impose conditions on a debt collector's licence should be adopted. A consumer may make a complaint about harassment to the Office of Fair Trading, which would, in an appropriate case, impose a condition prohibiting specific (already unlawful) behaviour. If the condition is not complied with the Office of Fair Trading may cancel the licence.

Recommendation 6

The Fair Trading Act should be amended to give the Office of Fair Trading power, in an appropriate case, (for example, following a large number of complaints about harassment against a particular debt collector) to order that a debt collector must arrange an independent audit, at its own expense, of its collection activities. The audit should include contacting a random sample of alleged debtors that have been recently contacted by the debt collector.

Recommendation 7

The Fair Trading Act should be amended to confer jurisdiction on the Consumer, Trader and Tenancy Tribunal to hear claims of breaches of the consumer protection provisions of the Fair Trading Act, including harassment, brought by consumers, regardless of loss or damage. The remedies the CTTT should be able to provide should include:

- *a declaration that specified conduct is in breach of the relevant section of the FTA*
- *an order requiring the respondent to cease the offending conduct*
- *a civil penalty of a specified amount (to be deducted from the amount owed by the applicant)*
- *loss or damages caused by the breach (if any).*

Recommendation 8

Proceedings against debtors should be instituted in the jurisdiction in which the debtor lives.

Recommendation 9

The current uncertainty in the operation of the Limitation Act 1969 (NSW) should be clarified. It should be made clear that the effect of the Limitation Act is to extinguish a debt after six years during which there has been no payment made and no acknowledgement of the debt on the part of the debtor, and no court proceedings in relation to it, and that, once extinguished, the debt cannot be revived.

Recommendation 10

Section 64A of the Local Courts (Civil Claims) Act 1970 (NSW) should be amended so that it does not authorise a court to extend the time limit for enforcing a judgment debt.

Recommendation 11

Part 111A of the Privacy Act, the Credit Reporting Code of Conduct and/or the Commissioner's Determinations should be amended as necessary to achieve the following.

- *The listing agency should be obliged to notify an alleged debtor that a default or a 'serious credit infringement' has been listed on his or her credit report, within 14 days of listing. It should provide the debtor with information about how to dispute an inaccurate listing at the same time.*

- *The creditor should not be able to list a debt (and must remove an existing listing) when the alleged debtor has denied liability for the debt until liability is ascertained.*

- *The creditor should not be allowed to list a debt below a minimum amount ($500).*

- *The creditor should not be allowed to list a default later than one year after the issue of the default notice.*

1 This report

1.1 Background

This report has been written by the Consumer Credit Legal Centre (NSW) Inc (the CCLC). The CCLC is a community legal centre that specialises in credit and debt matters. Among other things it runs an advice line and acts for disadvantaged consumers. In the 12 months preceding the CCLC's decision to undertake the project almost one third of the callers to its advice line mentioned issues relating to debt collection or enforcement activity. At that time the level of indebtedness was rising, and it is continuing to rise. At the same time the debt collection industry was changing, as credit providers increasingly outsourced their debt collection activities and debt collection agencies increased in size and scope.

1.2 Consultation

In the course of writing this report the CCLC contacted financial counsellors, community legal centres and other agencies that act for consumers. It addressed a meeting of the Financial Counsellors Association of New South Wales about the project. It wrote to, faxed or emailed all community legal centres in New South Wales that are involved in debt collection, and some interstate agencies. It talked to officers of the Office of Fair Trading and the Legal Aid Commission of New South Wales. The CCLC also wrote to, and received responses to its enquiries from, the major banks, several telecommunication companies and other service providers that extend credit, including utilities. It also spoke to the President of the Australian Collectors Association, which represents debt collection companies, and individual debt collectors.

1.2.1 CCLC case and telephone advice files and surveys

This report identifies problems associated with debt collection. It includes a range of examples to illustrate these problems from the CCLC's case and telephone advice files. The CCLC and CHOICE, the monthly magazine published by the Australian Consumers' Association (ACA), conducted a survey of consumers in February 2004. This report also reflects the findings of that survey.

1.3 Acknowledgements

The CCLC wishes to thank the Law and Justice Foundation of NSW for their financial support for this project. Although resources were also contributed by CCLC, this project would not have been possible without the Law and Justice Foundation's support. The CCLC would like to thank the Australian Consumers Association ("ACA"), the staff at Choice Magazine and the staff of the new publication of the ACA, Choice Money and Rights. The surveys which form part of the data from which this report has been written were conducted in partnership with the ACA. The CCLC also wishes to particularly thank Pauline Kearney who conducted the consultation underlying this report; reviewed many of the CCLC's advice records, casework files and the survey results; and drafted

this report for the CCLC. We also appreciate those who took the time to participate in the consultations, or to review draft sections of the report.

1.4 Principles underlying this report

1.4.1 Most debts are paid on time

This report takes as its starting point that most debts are paid in accordance with the contractual arrangements made between the parties. Most credit card debts are paid, if not in full each month, at least according to the minimum payment arrangements that apply. Most personal loans are paid by the borrower to the lender month by month as required by the terms of the loan. Similarly, most utility debts are paid when they fall due. There is, however, a small proportion of debts that are not paid as they fall due and it is these debts, in particular the collection of these debts, that this report is concerned with.

1.4.2 Reasons why debts may not be paid

There are many reasons why a borrower may not pay a debt: social, cultural and individual. In recent years, there has been an explosion in the availability of credit with banks and other financial institutions making more frequent and attractive offers to their customers. Rampant consumerism puts significant pressure on everyone to have the biggest and the best holiday, car, television and other goods. Young people feel undressed without a mobile phone to keep in constant contact with their friends. At the same time, a significant proportion of the population lives in poverty and can barely make ends meet, or cannot do so, without recourse to credit, which they may or may not be able to repay. The debtor may have taken on a debt that was beyond his or her capacity to pay from the outset. He or she may lack the financial organisational skills necessary to ensure that debts are paid on time. Some are so lacking in financial sophistication that they may not understand that they owe the money, for example, the interest payment on an interest-free loan that has not been repaid by the due date. A critical life experience, for example, the death of a family member, or divorce or separation, may put everything else, including the payment of debts, in the shade. The borrower may suffer a temporary financial crisis, for example, when he or she loses a job. In some cases the borrower's financial situation has become such that he or she will never be able to pay the debt. A borrower may have been irresponsible with little concern about how or when, if ever, the debt might be paid and, in a small minority of cases, dishonesty may be involved.

1.4.3 Lending money

Money is a commodity like any other. Creditors lend it at a rate that, taking into account the costs of lending and including the costs of defaults, enable them to get an appropriate return on their capital. In deciding whether or not to lend it in a particular case, creditors assess the risks involved. The rate will reflect, among other things, the creditor's assessment of the risks.

1.4.4 Creditor/borrower relationship

The relationship between a creditor and a borrower is the same as the relationship between any other supplier and consumer. There is an imbalance of power that the law tries to remedy by means of consumer protection legislation. Thus the law prohibits certain behaviour, such as misleading and deceptive conduct, unconscionable behaviour and harassment. It also imposes obligations on creditors, for example, the production of information and documentation.

1.4.5 Debt collector/debtor relationship

The relationship between a debt collector, whether the debt collector is acting as the agent of the creditor or as the assignee of the debt, is different from that of creditor and lender. By the time a debt is in the hands of a debt collector the relationship between the creditor and borrower has broken down. The debtor is not just a consumer, but a consumer who, for whatever reason, has failed to comply with his or her side of the bargain. This puts the debtor in an even weaker position in relation to the debt collector than he or she was in relation to the creditor. Just as the law protects the borrower in his or her dealings with the creditor, so it should protect the debtor in relation to the debt collector. Furthermore it should recognise the particular vulnerability of the debtor who is unable to pay the debt.

1.4.6 Debt collection should be fair

In the CCLC's view the fundamental principle underlying the law and practice of debt collection is that it should be fair, that is, that it should be done in a way that is legitimate, honest and transparent. Debtors should be able to ascertain exactly what they are said to owe and what needs to be done to discharge the debt. They should be given a reasonable opportunity to pay the debt and, in the case of credit card debt, they should be given enough time to get their payments back on track before the card is cancelled and the debt outsourced or sold.

1.4.7 Debt collection should be timely

Closely linked to the principle that debt collection should be fair is the principle that debt collection should be timely. There are many reasons why a person might fall behind in paying a debt. Ideally the debtor will maintain contact with the creditor and keep the creditor informed of the reasons he or she has fallen behind in repayments and the prospects for recommencing repayments. It is not realistic, however, to expect that all debtors will do so. Some debtors will inadvertently lose contact with creditors, for example, by moving house without leaving a forwarding address, or going overseas leaving the debt behind them. Others may deliberately avoid contact with the creditor. On the other hand, it is reasonable to expect that the creditor will follow up the missed payments in a timely manner, keep the relevant records of the loan and its contacts with the debtor, and, if necessary, negotiate a payment schedule the debtor can comply with. The creditor has the resources to do this and has undoubtedly factored the cost of collecting bad debts into the cost of the product in the first place. It is also reasonable to expect that it will make any decision to outsource collection or to sell the debts in a

timely manner as well. It is not reasonable for a creditor to do nothing about a debt for year after year and then expose the debtor to the processes of collection.

1.5 Outline of this report

This report comprises of eight chapters. Chapter1 outlines the principles that underlie the report. Chapter 2 outlines some aspects of debt collection in Australia, including how the debt collection industry is changing. Chapter 3 contains an overview of the applicable law, State and Federal. Chapter 4 discusses the way debt collectors are licensed in NSW and makes a recommendation building on a recent review of the licensing legislation. Chapter 5 discusses proof of debt and recommends that the onus of proving a debt should be on the debt collector. Chapter 6 discusses one of the most common problems associated with debt collection from the point of view of the consumer, harassment, and makes several recommendations. Chapter 7 discusses credit reporting and makes a number of recommendations. There are two appendices: a report of the survey conducted by the CCLC and ACA/Choice and the questions used in the survey.

2 Aspects of debt collection in Australia

2.1 Debt in Australia

2.1.1 Level of debt

The level of Australian indebtedness is rising and is rising faster than ever before. Reserve Bank of Australia figures show that in February 2004 personal lending, including credit cards, reached $ 98.75 billion.[1] Credit card debt alone reached $25.94 billion (in January 2004), up from $17.4 billion in December 2001.[2] Housing debt was $448.4 billion (up from $286.3 billion in December 2001).[3] This brought consumer debt to a total of $ 547 billion in February 2004. The recently released Financial Stability Review March 2004 published by the Reserve Bank of Australia[4] notes that the level of outstanding household credit has risen at an annual rate of 15 per cent since 1996 and at an even faster rate of 22 per cent over the 12 months preceding January 2004. Household debt represented over 140 per cent of disposable income in 2003 compared with 105 per cent in early 2001, taking Australia from having a relatively low debt-to-income ratio by international standards a decade ago to having a relatively high level of household debt when measured against income. It appears that much of the increased personal spending has been financed by rapidly rising real estate values. The rise of household debt is one of the reasons the Reserve Bank cited for increasing interest rates in late 2003.

2.1.2 Problem debt

The kinds of debt that generate most calls to the CCLC include bank and other financial institution debts (personal loans and credit card debt) and telephone debts. Similarly, most respondents to the surveys CCLC conducted with ACA/Choice reported that they were being pursued for bank and other financial institution debt and telecommunications company debts. About one third of respondents to the online survey were being pursued for telecommunications debts and one quarter for outstanding consumer loans. Over one quarter of telephone respondents were being pursued for telecommunications debts and over one half for consumer loans, the majority of which were credit card accounts.

[1] Reserve Bank of Australia Bulletin Statistics published at www.rba.gov.au/ Statistics/Bulletin, Statistical Table D.2 Lending and Credit Aggregates.
[2] Reserve Bank of Australia Bulletin Statistics published at www.rba.gov.au/ Statistics/Bulletin, Statistical Table C.1 Credit & Charge Card Statistics.
[3] Reserve Bank of Australia Bulletin Statistics published at www.rba.gov.au/ Statistics/Bulletin, Statistical Table D.2 Lending and Credit Aggregates.
[4] Financial Stability Review published at www.rba.gov.au on 25 March 2004.

2.2 Overdue debt

2.2.1 Collecting debt

Debt that has become overdue may be collected by the creditor itself. The banks that responded to the CCLC's questions about their debt collecting practices collect their own unsecured debts at least for the first 120 days. Most creditors outsource collection to debt collectors who collect as an agent of the creditor after a specified time. They may or may not then sell the debt to a debt collector, possibly the same company that has been attempting to collect the debt on an agency basis. Some creditors, including some banks, telecommunications companies and utilities, do not currently sell debt at all. Some sell shortly after the debt has been returned from an agent; others sell years later.

2.2.2 Monitoring collection agents

The creditors that responded to the CCLC's questions about their debt collection practices review the operations of the companies to which they outsource debt collection. Most enter into a contract that requires the agent to comply with all applicable legal requirements. Most creditors reported that they audit the collection agent on a regular basis. Information provided by CCLC and respondents to the surveys show that, nevertheless, collectors do not always comply with the obligations the law imposes on them.

2.2.3 Buying and selling debt

Some creditors sell debt. This is usually done after the creditor has attempted to collect the debt itself and after it has outsourced it to a collection agent without success. The creditor writes the debt off and then sells it to a debt collection company. The buying and selling of large tranches of debt is relatively recent and has coincided with changes in the industry that have resulted in emergence of several large, publicly listed debt collection companies. Listing has allowed the companies to raise the capital they needed to buy the debt. There have been several recent well-publicised transactions, including, for example:

- Credit Corp's reported purchase of debts with a face value of $50 million from St George Bank in mid 2003[5]
- Alliance Factoring's purchase of a large tranche of Telstra debt in 2003.

2.3 Debt collection industry

2.3.1 Main players

The debt collection industry consists of a few large players and a large number of small players. In the last few years there has been considerable consolidation of the industry. Baycorp Advantage was formed by the merger of Baycorp Holdings and Data

[5] Sydney Morning Herald, 31 July 2003

Advantage. Collection House underwent a period of significant growth and acquisition.[6] RMG, initially formed from the merger of 16 smaller businesses in June 2000, added six more businesses during the following half year. Repcol, which listed in 2002, and expanded from its Perth base to the east coast by acquiring a Queensland based debt collection company in July 2002. CreditCorp also announced the acquisition of specialist collection businesses in the year after its listing.

2.3.2 Recent trends

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

2.3.3 Regulation

The debt collection industry is regulated under federal and State legislation.[7] Debt collectors, together with process servers, private detectives and others, are licensed under the Commercial Agents and Private Inquiry Agents Act 1963 (NSW), which is currently under review. They are subject to the consumer protection provisions of the Trade Practices Act 1974 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) and the Fair Trading Act 1987 (NSW). They are subject to the Privacy Act 1988 (Cth) and, to the extent that they use a credit listing service, they are subject to Part 111A of the Privacy Act. Depending on the nature of the debt, they may be subject to the Uniform Consumer Credit Code. There is no dedicated piece of legislation, however, that deals with debt collection.

2.3.4 Industry bodies

Debt collectors may belong to either or both of two industry bodies: the Institute of Mercantile Agents and the Australian Collectors Association. The Australian Collectors Association has a code of ethics which is binding on its members. Each member agrees, among other things, to

- conduct its business lawfully, comply with all relevant Legislation and Judicial decisions and trade fairly and responsibly
- not bring unreasonable pressure to bear on a consumer in default of payment and

[6] Half year report 1 July to 31 December 2002.
[7] See Chapter 3, p16.

- do everything reasonable to assist the debtor in the solution of any financial problems they may have.

3 Regulation of debt collection in Australia

3.1 Overview

This chapter outlines the legislation, Commonwealth and New South Wales, that regulates debt collection in New South Wales. At the Commonwealth level, the Trade Practices Act 1974 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) include consumer protection provisions, as does the Fair Trading Act 1987 (NSW) at the State level. The Uniform Consumer Credit Code regulates consumer credit contracts and the Limitation Act 1969 (NSW) limits creditors' rights to collect old debts. Finally, the Privacy Act 1988 (Cth) regulates the credit reporting system.

3.2 Commonwealth

3.2.1 Consumer Protection provisions of the TPA and the ASIC Act

Financial and other services distinguished

Two Commonwealth Acts protect consumers against unfair practices on the part of debt collectors. In general terms, the Australian Securities and Investments Commission Act 2001 (the ASIC Act), administered by the Australian Securities and Investments Commission (ASIC), protects consumers of financial services, which include services supplied by banks and other credit providers. The Trade Practices Act 1974 (the TPA), administered by the Australian Competition and Consumer Commission (ACCC), protects consumers of other services, for example, gas, electricity and other utility companies.

Misleading and deceptive conduct

Both the ASIC Act[8] and the TPA[9] prohibit a corporation from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive. What constitutes misleading and deceptive conduct on the part of a debt collector was considered in *McCaskey's Case*.[10] In granting consent orders to the ACCC, the court was satisfied that representations made by McCaskey amounted to misleading and deceptive conduct under s 52 of the Trade Practices Act. It made a declaration that the debt collector engaged in misleading and deceptive conduct by making the following representations.

- The debt collector was taking, or was about to take, immediate steps to sell the debtor's residence to obtain payment of the debt, when no steps could then be taken to sell the house as no legal proceedings to recover the debt had been started.
- The debt collector would arrange to have the debtor arrested by the police or the fraud squad if he did not make immediate payment of the alleged debt when there was no reasonable basis on which the debt collector could have taken

[8] S 12DA.
[9] S 52.
[10] *ACCC v McCaskey* [2000] FCA 1037.

> action to request or arrange for the police or the fraud squad to arrest the alleged debtor.

The court also granted injunctions restraining the debt collector from engaging in conduct that is misleading or deceptive, or likely to mislead or deceive a person, in connection with the collection of debts. The conduct included:

- saying an action will be taken that the collector has no reasonable basis for believing that he or she is legally permitted to take
- threatening criminal action if a debt is not paid or saying something that is likely to lead a debtor to believe that criminal action could be a consequence of non-payment if, at the time, the collector has not a reasonable basis for believing this and
- leading a debtor to believe that the collector's decision to report an alleged criminal offence will depend on whether or not a payment is made.

In remitting a case to the Victorian Civil and Administrative Tribunal, the Supreme Court of Victoria noted that the conduct of a person who may or may not have been employed by a debt collector and who collected payment in settlement of a statute barred debt may have been likely to mislead or deceive.[11]

Undue harassment

Both the ASIC Act[12] and the TPA[13] prohibit a corporation from using 'physical force, or undue harassment or coercion' in connection with, among other things, the payment of goods or services. In *McCaskey's Case*, the court granted consent orders (declarations and injunctive relief)[14] on the basis that the debt collector's telephone contacts with the alleged debtors constituted undue harassment and/or coercion. The telephone contacts were characterised as 'involving a threatening, aggressive, excessive or abusive manner' and a 'threatening, aggressive and overbearing manner and content', and as having been made with 'undue frequency'.[15] In considering what constitutes 'undue' harassment in the context of debt collection, the court said

> *"If legitimate demands are reasonably made, on more than one occasion, for the purpose of reminding the debtor of his or her obligation and drawing the debtor's attention to the likelihood of legal proceedings if payment is not made, then that conduct, if it be harassment, is not undue harassment. If, however, the frequency, nature or content of the approaches and communications associated with them is such that they are calculated to intimidate or demoralise, tire out or*

[11] *Collection House Limited v Leigh-Anne Taylor*, Supreme Court of Australia No 6657 of 2003, 3 March 2004 (Nettle J).
[12] S 12DJ.
[13] S 60.
[14] Para 54 –57.
[15] Para 22.

> *exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings, the harassment will be undue."*[16]

McCaskey's Case was applied in a more recent case. In *ACCC v Esanda*, the court made consent orders that 'repeated attendances' of the company's agents at the debtor's residence, including surveillance and approaching the debtor's wife at her workplace asserting that a vehicle was sold, hidden and/or stolen and demanding to know its whereabouts constituted undue harassment.[17]

Undue coercion

In *McCaskey's Case* the court also distinguished between coercion and undue coercion. It said:

> *'Where the demand includes content which does not serve legitimate purposes of reminding the debtor of the obligation and threatening legal proceedings for recovery but is calculated otherwise to intimidate or threaten the debtor, then the coercion may be undue. So if a threat is made of criminal proceedings, or of the immediate seizure and sale of house and property, a remedy not available in the absence of retention of title or some form of security, the coercion is likely to be seen as undue. . . Quite apart from content the manner or circumstances of a demand or communication, including the language used, the time and place at which it is made and the person to whom it is communicated, may go beyond the legitimate purposes of drawing attention to the existence of the obligation and the consequences for non-compliance. Again such a communication may amount to undue coercion. Obvious examples include the use of personally abusive or obscene language, conveying the demand to uninvolved family members, particularly children, or conveying the demand through a third party in order to embarrass the debtor when the debtor could reasonably have been the subject of a direct communication.'*[18]

3.2.2 ACCC Guideline[19]

Overview

In June 1999, the Australian Competition and Consumer Commission (ACCC) issued a guideline, which was developed in consultation with the relevant stakeholders for the benefit of both business and consumers. The guideline states that a corporation is entitled to take reasonable steps to pursue a debt that is owed to it or, if the corporation is a debt collector, to its client. A debtor is entitled to be treated fairly, with respect and courtesy, and should not be unduly harassed or coerced. It elucidates this general principle by providing direction on a number of matters. Although the guideline does

[16] Para 48.
[17] *Australian Competition and Consumer Commission v Esanda Finance Corporation Ltd* FAC 1225 (7 November 2003).
[18] Para 51.
[19] Consumer Affairs Victoria have recently published *Guidelines for Debt Collection*.

not have legal force, compliance with the guideline would be a factor the ACCC would take into account in deciding whether or not to prosecute.

Communicating with the debtor at, or away from, their workplace

A collector should not communicate with a debtor at any unusual time or place, or, without prior consent, at any time or place that the collector knows or should know, would be unreasonable or substantially inconvenient to the debtor. The guideline suggests that a convenient time for communication between collector and debtor is between 7.30 am and 9.00 pm local time for the debtor. Generally speaking, collectors should not communicate with a debtor at work, and certainly not in a way that is likely to inform third parties of the existence of a debt and discloses more than the name and contact details of the collector to third parties.

Personal visits

Where necessary a collector is entitled to communicate with the debtor by visiting in person. However, a collector should respect the debtor's own, and the household's privacy and security. Generally a collector should not use personal visits as the initial step in communicating with the debtor, and personal visits should not be used if other, less intrusive, means of communication are available and effective. A collector should not remain in the vicinity of the debtor's home or workplace for an extended length of time for the purpose of intimidating or embarrassing the debtor, or creating an impression that the debtor is under surveillance.

Frequency of communications

Collectors are entitled to make reasonable efforts to contact debtors. However, a collector should not make unsolicited communications with a debtor more frequently than is reasonable and necessary according to the circumstances. So, a collector should not:

- make more than three unsolicited (answered) telephone calls a week, or more than 10 a month, unless they can show a legitimate reason for doing so
- cause a telephone to ring, or engage any person in telephone conversation, repeatedly or continuously, if it is reasonably likely to unduly abuse, or harass the person at the called number or
- make unsolicited visits to a debtor more frequently than is reasonable and necessary, and no more frequently than once a week.

Allowing arrangements and other processes to work

A collector should generally not contact a debtor if an informal arrangement has been made for payment of the debt, and is being complied with, or if other legal processes or arrangements exist which make it inappropriate for the debtor to be contacted. For example, a debtor should not be contacted after he or she has (in writing) denied liability or stated an intention to defend any legal proceedings brought against him or her and has requested that no further communication be made, or if the collector

becomes aware that the debtor is bankrupt or has entered into a Part 1X or Part X arrangement under the Bankruptcy Act, unless the communication is in accordance with that Act.

Communicating with a debtor's representative

A debtor is entitled to have another party, for example, a solicitor or a financial counsellor, represent them and/or advocate on their behalf when communicating with the collector. The guideline lists the limited circumstances in which a collector may communicate directly with debtor once the collector knows, or should know, another person represents the debtor.

Communicating with third parties

Although collectors are entitled to contact third parties, including members of the debtor's family, they should only make unsolicited communications to third parties as are reasonable and necessary according to the circumstances. The guideline lists a number of things that collectors should not do.

Misleading or deceptive conduct

A collector must not engage in any conduct that is misleading or deceptive, or is likely to mislead or deceive. The guidelines lists examples of misleading and deceptive conduct, such as:

- making false or misleading representations about a collector's identity, or about the consequences of non-payment
- giving information about the consequences of legal action that is misleading or deceptive, or is likely to mislead or deceive
- using documents that could mislead the debtor into believing they are court documents
- making false or misleading representations about the amount, character or legal status of a debt
- threatening legal action if a debt is not paid or engaging in conduct that is likely to lead a debtor to believe that criminal action could be a consequence of non-payment, if the alleged conduct does not amount to a criminal offence and
- threatening action, legal or otherwise, that a collector is not legally permitted to take or does not have the instructions or authority to take, either at any time or at the time that the representation is made.

Coercion

A collector should not exercise unacceptable pressure on a debtor or third part in order to persuade the person to undertake a particular course of action. For example, a collector should not:

- lead a debtor to believe that the collector's decision to report an alleged criminal offence will depend on whether or not a payment is made or
- threaten to list a debtor on a blacklist or a bad debts database or otherwise threaten to take action which purports to affect a debtor's credit rating or ability to obtain credit, unless such listing is permitted under the credit reporting provisions of the Privacy Act.

Language, violence and physical force

A collector must not:

- use abusive, threatening, offensive, obscene, or discriminatory language to a debtor or a third party
- use, or threaten to use, violence or physical force to any person or
- use, or threaten to use, violence or physical force to property.

This conduct is criminal conduct under State and Territory law.

3.2.3 Privacy Act

Overview

The Privacy Act 1988 (Cth) is relevant to debt collection in two ways. Firstly, the National Privacy Principles (NPPs), which set out how private sector organisations should collect, use, keep secure and disclose personal information, apply to organisations with a turnover of $3 million or more. Secondly, the credit reporting system as it applies to consumers is regulated by Part 111A of the Privacy Act.

Credit reporting

Credit providers use a variety of means to assess the creditworthiness of their clients and would be clients. One of these is the credit reporting system. This is a system whereby members of an organisation have access to, and can report information about, individual consumers. The largest consumer credit reporting organisation in Australia is Baycorp Advantage Limited, which has a database of over 11 million individuals. Part 111A of the Privacy Act imposes, among other things, limits on the kind of information that a credit reporting organisation can hold, limits on who can obtain a consumer's credit information and limits on the purposes for which the information can be used.

Limits on the kind of information that can be held

What kind of information?

A credit information file held by a credit reporting agency must not contain information other than information 'reasonably necessary in order to identify the individual' or a record of

- credit applications
- current credit providers and
- default information.[20]

The information is:

- full name, including any known aliases; sex; and date of birth
- a maximum of three addresses consisting of a current or last known address and two immediately previous addresses
- name of current or last known employer and
- driver's licence number.[21]

Default information can be recorded only if the debtor is at least 60 days overdue in making a payment and the credit provider has taken steps to recover the whole or part of the amount outstanding.[22] It is enough that the credit provider has sent a written notice to the last known address of the debtor advising him or her of the overdue payment and requesting payment of the amount outstanding.[23] A debt cannot be listed if it is barred by the statute of limitations.[24]

How long can it be held?

The Privacy Act specifies the maximum time information can remain on a person's credit file. Information about credit applications, loan defaults, dishonoured cheques and court judgements made against the person remain on the file for a maximum of five years. Information about bankruptcy orders made against the person and a credit provider's opinion that an individual has committed a 'serious credit infringement'[25] remain for a maximum of seven years.

Limits on who can obtain a consumer's credit information

Generally speaking, a credit reporting agency may disclose personal information in an individual's credit information file only to credit providers and only for specified

[20] S 18E (1).
[21] Commissioner's Determination 1991 No 2.
[22] S 18E(1) (b) (vi).
[23] Credit reporting code of conduct, para 2.7.
[24] para 2.8
[25] A serious credit infringement is:
an act done by a person
(a) that involves fraudulently obtaining credit, or attempting fraudulently to obtain credit; or
(b) that involves fraudulently evading the person's obligations in relation to credit, or attempting fraudulently to evade those obligations; or
(c) that a reasonable person would consider indicates an intention, on the part of the first-mentioned person, no longer to comply with the first-mentioned person's obligations in relation to credit. (Privacy Act, s 6.)

purposes, including collecting payments that are overdue. In addition, a monitoring provision allows a credit reporting agency to disclose personal information in an individual's credit information file to any current credit provider where a default has been listed on the individual's file and at least 30 days have passed. There is no restriction on the disclosure of information in a credit report in which the only information is publicly available information.

Limits on purposes for which a credit provider may use a credit report

Having obtained an individual's credit report from a credit reporting agency, the credit provider may use the report, or personal information derived from it, for limited purposes only. These include collecting payments that are overdue and, if the credit provider believes on reasonable grounds that the individual has committed a serious credit infringement, in connection with that infringement.[26]

Disclosure by credit providers of credit worthiness information about an individual

A credit provider can disclose a report or personal information derived from a report to a wide variety of people in specified circumstances. These include a credit reporting agency, another credit provider, a guarantor, a mortgage insurer, a dispute resolution body, a State or Territory agency, a supplier of goods or services, a debt collector and others.

Rights of access and correction for individuals

A credit reporting agency must take reasonable steps to ensure that personal information contained in the file or report is accurate, up-to-date, complete and not misleading.[27] It must also ensure that individual consumers have access to their credit files and credit reports.[28] If an individual asks the agency to amend personal information in his or her file and the agency does not, the individual may ask the agency to include a statement of the amendment sought. The agency must, within 30 days after being requested to do so, include the statement in the file or report.[29]

[26] s 18L.
[27] S 18G (1).
[28] S 18H.
[29] s 18J (2).

3.3 New South Wales

3.3.1 Uniform Consumer Credit Code

Overview

The Uniform Consumer Credit Code (the Code) regulates consumer credit contracts in New South Wales.[30] All aspects of regulated contracts are affected by the Code, including enforcement. If a debt relates to the provision of consumer credit[31] the Code confers rights and imposes obligations on the consumer, the creditor and the debt collector.

Main provisions relating to debt collection

Code applies to debt collectors

The provisions of the Code apply equally to debt collectors as to credit providers. If a debt collector has purchased the debt from the credit provider, the Code applies to the purchaser.[32] If the debt collector is acting as an agent of the credit provider, the conduct of the debt collector acting within his or her actual or ostensible authority will be imputed to the credit provider and taken to be the conduct of the credit provider.[33]

Documentation

A debtor can ask for, and the credit provider must provide within a specified time limit, the following information and documentation:

- details of credits, debits and overdue moneys (within 30 days)[34]
- a payout figure (within seven days)[35] and
- copies of the credit contract, notices and credit related insurance contracts (if held) (within 30 days).[36]

The debt collector is required to provide the requested information and documentation whether it is acting the agent of the creditor or as principal, having bought the debt. If a debtor disputes the alleged debt, he or she may ask the debt collector (in writing, and within certain time limits) to give a written explanation, in reasonable detail, of how the

[30] The Uniform Credit Code applies in all States and Territories, except Western Australia, which has alternative consistent legislation.
[31] Credit 'is provided if under a contract—
(a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
(b) one person (the debtor) incurs a deferred debt to another (the credit provider): s 4(1).
[32] S 166.
[33] S 176(1).
[34] s 34.
[35] s 76.
[36] s 163.

debt arose. If so, the debt collector cannot, without leave of the Court, begin enforcement proceedings on the basis of a default arising from the disputed liability until at least 30 days have passed from the time the written explanation was given.[37]

Enforcement

Generally speaking, a debt collector cannot begin enforcement proceedings against a debtor in relation to a credit contract unless the debtor is in default under the contract and the debt collector has given the debtor a default notice allowing him or her at least 30 days to remedy the default and the default has not been remedied in that period. The default notice must specify the default and the action necessary to remedy it and state the circumstances in which a subsequent default of the same kind in the period of the notice will be enforced.[38]

Variation of the contract

A debtor may ask the debt collector to vary the contract on the grounds of his or her 'illness, unemployment or other reasonable cause' if he or she reasonably expects to be able to discharge his or her obligations under the contract if the terms were changed by:

- extending the terms of the contract and reducing the amount of each payment due accordingly
- postponing the dates on which payments are due or
- extending the period of the contract and postponing the dates on which payments are due.[39]

If the debt collector does not change the contract, the debtor may apply to a court to do so.[40]

A court may also, if satisfied on the application of the debtor that a contact was unjust, reopen the transaction that gave rise to the contract.[41] The court may, among other things, relieve the debtor from paying more than it considers to be reasonably payable or set aside, wholly or in part, or revise or alter, any agreement made.[42]

3.3.2 Fair trading legislation

Overview

Fair trading legislation in every State and Territory contains similar provisions to the consumer protection provisions of the Trade Practices Act and the ASIC Act. The State

[37] S 36.
[38] S 80.
[39] S 66.
[40] S 68.
[41] S 70.
[42] S 71.

and Territory legislation applies to individuals as well as to corporations.[43] Like the Commonwealth legislation the Fair Trading Act 1987 (NSW) prohibits

- misleading or deceptive conduct and
- harassment and coercion in connection with, among other things, payment for goods or services by a consumer.

Misleading or deceptive conduct

The Fair Trading Act provides that:

> *A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*[44]

On application by the Minister, the Director-General of the Office of Fair Trading, or anyone else, the Supreme Court may issue an injunction restraining a person from engaging in conduct that is misleading and deceptive.

Harassment and coercion

The Fair Trading Act also prohibits undue harassment and coercion, Section 55 provides that:

> *A person shall not use physical force or undue harassment or coercion in connection with . . . the payment for goods or services by a consumer.*

It is an offence to contravene the prohibition against harassment and coercion, the maximum penalty for which is $2 200 for a natural person and $110 000 for a corporation.[45] Civil penalties may also apply.[46] Unlike the ACT and Victorian Acts, the New South Wales Act does not specify conduct that constitutes undue harassment or coercion.[47] Nor has the New South Wales government published a guideline as to what might constitute undue coercion or harassment.[48]

[43] Fair Trading Act1992 (ACT); Consumer Affairs and Fair Trading Act (NT); Fair Trading Act 1989 (Qld); Fair Trading Act1987 (SA); Fair Trading Act1990 (Tas); Fair Trading Act 1999 (Vic); Fair Trading Act1987 (WA).
[44] S 42
[45] S 62.
[46] S 64.
[47] See Fair Trading Act1992 (ACT) s 26; Fair Trading Act 1999 (Vic) s 21.
[48] See section 3.2.2 on p18 for a discussion of the ACCC guideline.

3.3.3 The Statute of Limitations

Overview

Every jurisdiction has a statute of limitations, the effect of which is to limit a plaintiff's rights after the limitation period has expired. The nature of the limitation, and the statutory time limit for debt, vary from jurisdiction to jurisdiction.[49]

Limitation period is six years

In New South Wales, the Limitation Act 1969 (NSW) provides that the limitation period for causes of action based on contract, including debt, is six years, after which a cause of action 'is not maintainable'.[50] The six years begins to run from the time the debt was last acknowledged by the debtor, for example, by making a payment. The Limitation Act also provides that, on the expiration of the limitation period, in 'a cause of action to recover any debt damages or other money', the right and title of the plaintiff is extinguished.[51] However, section 68A provides that in proceedings to decide whether or not a right or title has been extinguished under the Act, the party relying on the benefit of the extinction of another party's right or title shall not have the benefit of that extinction unless he or she claims it.[52] This raises a practical anomaly. Although the debtor, assuming he or she knows the relevant law, has a complete defence in any proceedings the debt collector may bring, the debt collector may legitimately continue to pursue the debt (at least by reference to this part of this Act).

When is the debt extinguished?

In all jurisdictions, the statute of limitations gives a discretionary power to a court to extend the limitation period in some circumstances. In New South Wales, for example, the Limitation Act gives the court the power to extend the limitation period in a personal injuries case where relevant facts were not known to the plaintiff before the expiration of the limitation period.[53] The Act does not, however, explicitly give the court the power to extend the limitation period in a cause of action founded on contract or to recover debt, except in the case of fraud.[54] This is critical to the question of extinction. The High Court has held, in a personal injuries case where the court had power to extend the limitation period, that the plaintiff's right is not extinguished until the court has made a ruling as to whether or not the limitation period is to be extended.[55] It would seem that, on the other hand, that where the statute does not confer power on

[49] See Limitation Act 1985 (ACT); Limitation Act (NT); Limitation of Actions Act 1974 (Qld); Limitation of Actions Act1936 (SA); Limitation Act 1974 (Tas); Limitation of Actions Act 1958 (Vic); Limitation Act 1935 (WA).
[50] S14(1).
[51] S 63(1).
[52] See also *Ziras v State Rail Authority*, Supreme Court of New South Wales, 6 August 1991.
[53] Limitation Act 1969 (NSW) Part 3, Divisions 3 and 4.
[54] S 55
[55] *Commonwealth v Mewitt* 146 ALR 299 per Dawson J.

the court to extend the limitation period, the plaintiff's right or title is extinguished at the expiry of the limitation period. This would mean that a creditor would have no means to recover a debt as there is no longer a valid claim. Once a cause of action is extinguished, a subsequent acknowledgment of the debt will not revive it.[56]

3.3.4 Licensing of debt collectors

Overview

Debt collectors are licensed under the Commercial Agents and Private Inquiry Agents Act 1963 (NSW). This provides that only a person licensed under the Act may carry on the business or exercise any of the functions, of a commercial agent or sub-agent. These include collecting, or requesting or demanding payment of, debts. In 2002, the Ministry of Police conducted a National Competition Policy Review of the Act. The report, which was released in October 2003, canvassed various regulatory options, including deregulation, certification, a code of practice and a statutory licensing scheme. It found that the regulatory objectives of the Act[57] can only be achieved through maintaining a licensing regime, and that the benefits to the community of doing so far outweigh the costs.[58]

Main provisions

Applying for a licence

Section 10 provides that a person who is applying for, or renewing, a licence must lodge the application form and the prescribed fee (currently $55 for an agent and $15 for a sub-agent) with the clerk of the Local Court for the district in which the applicant proposes to collect debts. If the applicant has not held a commercial agent's licence in the past, or it is three months or more since the expiry of an earlier licence, the clerk of the court will send particulars of the application to the officer in charge of police at the nearest police station. The police officer will enquire whether there is any ground for objecting to the grant of a licence. The grounds for objection are listed in the legislation. The police officer will report in writing to the clerk of the court including, if applicable, a statement objecting to the granting of the application and the nature of the objection. If the clerk does not receive a report objecting to the application within a month after the application was received he or she must grant the application. If the clerk receives a statement objecting to the application he or she must set the application down for hearing by a court and notify the applicant (and, if the application is for a sub-agent's licence, the person for whom the applicant intends to work as a sub-agent) that the application will be objected to and the date of the hearing.

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[56] *Stage Club v Millers Hotels Pty Ltd* (1981) 150 CLR 535 at 565.

[57] The report identified the regulatory objectives of the act as the promotion of:

- public safety
- proper maintenance of appropriate standards by those engaged in investigative and commercial agency functions and
- the accountability of those engaged in providing these functions.

[58] Para 1.6.

Renewing, duration of, and cancelling a licence

If a person applies for the renewal of a current licence or applies for a licence within three months after the expiry of an earlier licence, the clerk must issue the licence (or renewal) and notify the officer in charge of police at the nearest police station that he or she has done so. A licence remains valid for 12 months. A local court magistrate may cancel a licence and disqualify, permanently or temporarily, the person from holding a licence. It may do so if it is satisfied that:

- the person improperly obtained the licence contrary to the provisions of the Act
- the person has been convicted of an offence against the Act or regulations or
- any of the grounds for objecting to the granting of a licence apply;
- and that cancellation of the licence and disqualification of the holder is warranted.

Harassment and misrepresentation

The Act creates an offence of misrepresentation[59] and an offence of harassment.[60]

Competition Policy Review recommendations

Applying for a licence

The report recommends that the licensing of debt collectors (and other commercial agents and private inquiry agents also licensed under the Act) should no longer be administered by the local courts. The licensing function should be integrated into the NSW Police Security Industry Registry.[61] There would be a single licence with five classes, including debt collection, corresponding to the work that a licensee is entitled to carry out. [62] It also recommends that the existing categories of agent and sub-agent be replaced by master and operative licences, a master licence authorising the licensee to conduct a business of providing persons to carry out the relevant commercial activity and an operative licence enabling the holder to be employed by a master licensee.[63]

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[59] s 20.
[60] S 39C
[61] Recommendation 5.
[62] Recommendation 15. the five classes of activity are:
- factual investigation
- surveillance investigation
- service of any writ, summons or legal process
- collection, request or demand for payment of an debt and
- location or repossession of goods (Recommendation 16).

[63] Recommendation 13.

Grounds for objection

The report recommends that an application for a licence may be refused on the grounds that:

- the applicant is not a fit and proper person to hold the class of licence sought and
- the grant of the licence would be contrary to the public interest.[64]

It also recommends that an application for a licence must not be granted unless the applicant has attained the approved competency standards or the approved level of accreditation.[65] In addition, the Commissioner of Police should have the discretion to refuse an application where the applicant has been convicted of one or more of a number of offences, including, for debt collectors, offences against s 60 of the Trade Practices Act (the anti-harassment provisions).[66]

[64] Recommendation 8.
[65] Recommendation 10.
[66] Recommendation 9. The other offences are:
- fraud, dishonesty or stealing (for which the maximum penalty is imprisonment for 3 months or more)
- robbery
- certain offences of violence
- offences involving firearms or weapons and
- an indictable prohibited drug or steroid offence.

4 Licensing of debt collectors

4.1 Introduction

Debt collectors are licensed under State legislation. In New South Wales, the relevant legislation is the Commercial Agents and Private Inquiry Agents Act 1963 (NSW). It provides that only a person licensed under the Act may carry on the business or exercise any of the functions of a commercial agent or sub-agent. These include collecting, or requesting or demanding payment of, debts. Currently, the licensing regime for commercial agents, including debt collectors, is administered by the local courts, using information supplied by the local police.[67]

4.2 Review of the law

In 2002, the Ministry for Police conducted a National Competition Policy Review of the Commercial Agents and Private Inquiry Agents Act. In its final report, the National Competition Policy Review (the NCP Review), which reviewed the relevant legislation, recommended (among other things):

- the licensing system should be retained[68] and
- the administration of the licensing function should be removed from the local courts and integrated into the NSW Police Security Industry Registry, a central registry, staffed by civilian members of the Police Service, which administers the licensing regime for the security industry. Recommendation 5.

4.2.1 A licensing system should be retained?

The NCP Review considered six alternatives to retaining the licensing system: deregulation, negative licensing, registration, certification, self regulation or co-regulation and codes of practice. It concluded that '[a]lthough the licensing regime restricts competition, it is the regulatory option which best achieves the objectives of the legislation.'

4.3 Who should administer the licensing system?

4.3.1 Arguments in favour of Police administration

The NCP Review considered whether the licensing regime currently administered under the Commercial Agents and Private Inquiry Agents Act 1963 should be administered by the Police Service, the Office of Fair Trading (the OFT), or both, and canvassed the arguments for and against the options. Unlike this report, the NCP Review was concerned not only with the licensing of debt collectors but also of process servers, repossession agents and private inquiry agents. The main arguments in favour of recommending that the Police Service should be responsible for licensing were that the

[67] See Chapter 3, Section 3.3.4, pp28-30.
[68] Recommendation 4.

Police already had a major role in conducting criminal record checks on applicants and licensees to ensure that they are fit and proper persons and that, as they already issue security industry licences, they already have the infrastructure for a centralised licensing authority in place. Finally, the OFT supported the recommendation because of the close relationship between the activities regulated by the legislation and those of the Police.[69]

4.3.2 Arguments in favour of OFT administration

The NCP Review Report listed the arguments made in submissions to the Review, including a submission made by the CCLC, in favour of transferring the administration of the licensing regime to the OFT, including:

- it has experience in administering other licensing regimes involving criminal checks through its Business Licensing Centre
- it can assess applicants on a wider range of criteria, including previous business practice and performance
- administering a business licensing regime is an inappropriate use of police resources and
- consumers are more likely to complain about debt collection issues to the OFT than the Police.

4.4 The CCLC's view

The CCLC acknowledges the view of the Australian Collectors Association that the recommendations of the Review do not take account of the changes in the debt collection industry in recent years, in particular the consolidation of the industry, the large scale buying and selling of debts and the use of offshore collection centres.[70] On the basis that debt collectors will continue to be licensed by the State, the CCLC is strongly of the view that the licensing of debt collectors should be administered by the OFT rather than the Police Service. It made a submission to that effect to the NCP Review and has made a subsequent submission following the release of the final report. In the recent submission, the CCLC noted the following points.

- Collectors wielding baseball bats are not part of the modern debt collection scene. Threats of violence (or actual violence) on the part of a debt collector would be an issue for the police whether or not the police were involved in the licensing of debt collectors. The behaviour that more commonly concerns debtors, for example, harassing phone calls, while unlawful, are not matters of immediate concern to the police.
- Other regulatory bodies already have jurisdiction in relation to debt collectors, including at State level the OFT and at federal level the ACCC and ASIC, which administer legislation prohibiting, among other things, undue harassment and coercion in relation to debt collection and misleading and deceptive conduct (as does the current Commercial Agents and Private inquiry Agents Act).

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[69] Report, page 53.

[70] Australian Collectors Association, A Submission in response to the Final Report in respect to National Competition Policy Review of the Commercial Agents and Private Inquiry Agents Act.

It stated its preferred position that the existing consumer protection jurisdiction relating to debtors should be consolidated by transferring responsibility for licensing to the OFT or the appropriate federal regulator (the ACCC or ASIC). In the CCLC's view transferring the licensing regime has the further advantage of linking licensing, which controls entry to the industry, with monitoring and enforcing compliance with the obligations imposed on the industry by consumer protection legislation.

Recommendation

Recommendation 4 of the National Competition Policy Review of the Commercial Agents and Private Inquiry Agents Act 1963 that the licensing of debt collectors in New South Wales should be retained should be adopted. Recommendation 5 that the Police Security Industry Registry should be the licensing body should not be adopted. Instead, the Office of Fair Trading should take responsibility for licensing and otherwise regulating the debt collection industry in NSW.

5 Proof of debt

5.1 Introduction

Failure of debt collectors to provide documentation of the debt for which they are pursuing an alleged debtor is a significant problem. It raises particular problems for consumers who, for whatever reason, believe they do not owe the debt, or not the whole amount of the debt, or who, while acknowledging the debt, want to clarify exactly what it is they are being asked to pay.

5.2 What the law says

The Uniform Consumer Credit Code (UCCC) provides that a debt collector must, on the request of the debtor, give the debtor specified information within a specified time limit. If the alleged debtor disputes the debt, the debt collector:

- must give the alleged debtor, on written request, a written explanation, in reasonable detail, of how the debt arose and
- must not, without leave of a court, take enforcement proceedings until at least 30 days have passed from the time the written explanation was given.[71]

The UCCC applies only to credit contracts. It does not therefore apply to contracts for goods and services, including telecommunications services.

5.3 What is happening

5.3.1 Overview

The CCLC and other agencies receive many complaints about debt collectors pursuing debts the alleged debtor does not believe he or she owes. In the surveys the CCLC conducted with CHOICE nearly half of the respondents believed they did not owe the debt. The reasons why an alleged debtor may dispute a debt include:

- belief that the debt has already been paid or has previously been written off by the original creditor
- the debt belongs to someone else, for example, a relative or someone else of the same name, or is a result of identity fraud.

There is often lack of documentation on both sides, especially when the debt is three, or four, or five years old, or older.

5.3.2 Debt has been paid, partially paid or 'written off'

The alleged debtor may have already paid, or part paid, the debt[72]. He or she may believe it has been written off, that is, that the creditor has no longer any interest in

[71] See Chapter 3, Section 3.3.1, Documentation at p24

collecting it, and that he or she has been released from the obligation to pay. The term 'written off', however, is used by many creditors to mean that the debt has been sold to a debt collector. This use of the term often causes confusion and misunderstanding.

CASE STUDY

B had a mobile phone contract with a telecommunications company, paying her bills until the phone was stolen. The bills skyrocketed and B told the company that the phone had been stolen and that she did not believe she owed the outstanding amounts. Some months later she rang the company to ask what was happening and was told the debt had been 'written off'. Six years later B received a letter telling her that the company had sold the debt to a debt collector, which subsequently sent her notice that she had to pay the debt or legal action would be taken. B consulted the CCLC who wrote to the company and to the collector pointing out that the debt had been written off and was statute barred. The company and the collector closed the matter. Nevertheless, the company stated that it would exercise its right to deny B a service until she had paid the amount owing to them.

A number of respondents to the telephone survey also stated that they accepted they had a debt, but were doubtful about whether the amount owed was correctly calculated. Many had difficulties getting copies of account statements. Another problem experienced was in obtaining an itemised account of interest and charges that had been added since the account was in default and regular account statements ceased to be issued.

One telephone survey respondents reported the following:

- A debt collector contacted Ms Y over a credit card debt. The account balance did not seemed to have decreased with all the payments Ms Y had made. She requested account statements to prove the amount of debt still owing but the debt collector did not supply anything. She refused to make further payments until she had received the requested statements. A different debt collection company contacted Ms Y for the same debt. She eventually received her account statements, but these statements were only for the period before the account was outsourced for debt collection. The debt collector said she would look into it, but the following week Ms Y was contacted again by a different employee who could find no record of the previous conversation.

[72] About one third of the respondents to the online survey who believed they did not owe the debt said they had already paid it.

5.3.3 Mistaken identity

There are a number of cases of collectors pursuing the wrong person in the CCLC's files.

- A person who was not a co-borrower with a debtor was being pursued as if were a co-borrower.
- A debtor who defaulted on an arrangement to pay was told by the debt collector that she must pay the debt in full as their enquiries had revealed that she owned a block of land. She did not, however, own the land.

CASE STUDY

A debt collector rang A stating A had an overdue phone bill with a telecommunications company. A denied the debt and asked the collector for details of the debt, including the phone number to which it related. The collector refused to give A the information, stating that A's phone would be cut off if the debt was not paid. Under duress, A gave the collector his credit card details. A then rang the telecommunications company, who acknowledged that another person with the same surname and first initial owed the debt.

About one fifth of the respondents to the online survey gave mistaken identity as the reason they believed they did not owe the debt.

- "[Debt collector] kept insisting I was someone else. When I rang [telecommunications company] to complain about their debt collector, they were not only unhelpful, but also rude and insulting."
- "The [government department] linked my name to another person with the same name but quite different personal details. Since my TFN and the real respondent's TFN was a matter of their internal record, there was no need for this process to proceed at all, yet it came to my attention with a summons to attend court."

A respondent to the telephone survey also was the victim of mistaken identity.

- Ms K has the same name as her deceased mother. She was being pursued for her mother's debt as they also have a similar date of birth and lived at the same address. The debt collector refused to listen and accused her of committing a fraud.

5.3.4 Victims of Fraud

Examples of the impact of fraud were identified in both surveys and have arisen in CCLC's casework.

A respondent to the telephone survey indicated that:

- She had mistakenly paid a mobile phone bill that was not her own upon return from an overseas trip. When she tried to explain that she did not have a mobile phone, she was told that the fact that she had paid the first bill was an admission that she was liable. Neither the phone company nor a subsequent debt collector would entertain her story that she had neither applied for, possessed nor used the mobile phone in question at any time. No proof of debt was ever provided. Eventually the Telecommunications Industry Ombudsman obtained a copy of the original application for the phone which clearly showed that a tampered copy of the respondent's drivers license containing a photo of someone else had been provided as proof of identity.

A respondent to the online survey wrote that:

- "I was a victim of "identity theft" some years ago, I have had to pay off close to $20K of debt that was not mine - the ability to get credit is WAY TOO EASY and the checks are in place to ensure that the person applying is in fact that person are not stringent enough."

A CCLC client also suffered at the hands of a fraudster:

- A debt collector sent demand letters to Mr. A over a credit card loan. Ms A had never had a credit card with the bank in question. The debt collector was very intimidating, insisted on a repayment arrangement despite Mr. A's denial of the debt, and refused to supply further documents to prove the debt. After many months of arguing with the debt collector and getting nowhere with the police (because the events leading to the alleged debt happened so long ago), Mr. A sought legal advice. The original creditor bank was contacted and provided copies of account statements that had been sent to addresses Mr. A had never lived at. The bank eventually conceded that it no longer held copies of the original loan application from 1993 and could therefore not prove who had applied for the credit card. Mr. A first heard about the alleged debt in January 2003.

5.3.5 Collector may not give debtor relevant documentation

A debtor may dispute the debt and ask for documentation. Generally speaking, the debt collector, whether acting as agent for the creditor or on its own account, will not have the relevant paperwork. When a debt is passed to a debt collector, it appears that, in many cases, the debt collector receives only basic information about the debt and does not receive a complete file. It is the CCLC's experience that when it makes a request for documents to a debt collector the debt collector must refer the request back to the creditor, even when the debt has been sold. If the debt is old the original lender may not easily be able to locate the paperwork, which may be buried in archives, mislabelled, or otherwise unable to be found. If neither party is able to establish its position to the satisfaction of the other there is potential for the dispute to escalate.

5.3.6 CCLC's advice files

There are a number of cases of a collector's failure to provide documentation on request in the CCLC's advice files.

- A collector had failed to send documents despite a request in writing each month for four months.
- A collector refused a request in writing to send the debtor a copy of a judgment debt.
- A consumer whose rented television and VCR were stolen was unable to obtain a copy of the insurance policy he had taken out at the time of renting the goods.
- A person whose mobile phone was stolen and who reported the theft immediately both to the police and the carrier, which acknowledged that the theft had been reported, could not get documentation of over $4 000 worth of calls allegedly made from the phone after it had been stolen.

CASE STUDY

C presented at a financial counsellor with a letter of demand, which included information C believed to be incorrect. The counsellor wrote to the debt collector asking for documentation under the Uniform Consumer Credit Code to be supplied within the statutory timeframe. Not having received a response the financial counsellor wrote again after one month and again after two months. Three months later it still had not received a response.

5.3.7 Other agencies

The Legal Aid Commission also reports that it often has problems obtaining documents from debt collectors. It says that it is often its experience that the collector will say that it has not obtained the documents from the original credit provider; even if it has the documents it can take a lot of time and a number of letters, which are often unanswered, before basic documentation is produced. This adds to the time pressures and cost of agencies assisting consumers. Lack of documentation may be the reason for a common complaint about debt collectors, that is, that they are difficult to make contact with, and fail to answer phone messages promptly, if at all.

5.3.8 Respondents to the surveys

A large proportion of respondents to the surveys reported that the creditor or debt collector had refused to supply documentation.[73] Respondents to the online survey wrote:

- "At the time of being contacted (just before Christmas) the debt collection agency was unable to provide any useful information about the debt being

[73] 34% of respondents to the online survey and 43% of those to the telephone survey.

recovered (i.e. who was claiming a debt against me, why and for how much). I would have thought this information should have been provided in a clearly documented format. No details were given of who was claiming. It was not clear whether or not my name had been given to credit rating agencies or tenant blacklists. No confirmation was sent confirming the issue was closed."

- "Have only now after 6 years received a letter claiming did not pay the full amount for a study fee back in 1998. Did not receive any supporting documentation to confirm this."

5.4 The CCLC's view

5.4.1 Onus should be on the collector to prove the debt

Once a debt passes to a debt collector, acting either as the agent of the creditor or as the principal, it often becomes very difficult for the alleged debtor to get information about the debt. If he or she does not accept that the debt is owed, or that the amount claimed is owed, or whatever, the onus should be on the debt collector to prove the debt. This is especially so when the debt is very old or has already been the subject of a dispute between the creditor and the debtor. It is vital in cases where the alleged debtor is not the debtor at all and therefore will never have had the relevant paperwork. In tendering for the agency, or for the purchase of the parcel of debt, the collector has had the opportunity to consider matters such as the nature, age and status of the debt and to factor them into the price it is willing to pay. Certainly the collector, who is in an ongoing and co-operative relationship with the creditor, is in a better position than the debtor, who may not be, to acquire the relevant information and documentation. For these reasons, in the event of a dispute, the onus should be on the collector to prove the debt.

5.4.2 Onus should be on the debt collector to verify the debt

The Uniform Consumer Credit Code (UCCC) specifies circumstances in which documentation of a debt must be sent to the debtor if the debt is regulated by the Code. The UCCC does not, however, apply to all consumer debt. In the United States, debt collection is regulated by a federal law. It contains a provision whereby the debt collector must validate the debt no later than five days after the initial communication with the alleged debtor and must cease collection activity if the alleged debtor disputes the debt or asks for details of the original creditor, until the debt is verified or the details obtained.[74] A similar provision should be included in the law applying to debt collectors.

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[74]. The debt collector must validate the debt by sending the debtor, either at the time of the initial communication with the debtor, or within five days after the initial communication, a written notice containing:

- the amount of the debt
- the name of the creditor
- a statement that the debt will be assumed to be valid, unless the consumer disputes the validity of it, or any part of it, within 30 days after receiving the notice
- a statement that, if the consumer notifies a dispute in writing within 30 days, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and post it to him or her and

Recommendation

A debt collector must, at the time of initial contact with the alleged debtor, or within five days after the initial communication (unless the debt has been paid in the meantime), send the debtor a written notice containing

- **the amount of the debt**
- **the name of the creditor to whom the debt is owed, and the name of the original creditor if this is different**
- **a statement that unless the debtor, within 30 days after receiving the notice, disputes the validity of the debt, or any part of it, the debt will be assumed to be valid by the debt collector**
- **a statement that if the debtor notifies the debt collector in writing within the 30 day period that the debt, or any part of it, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the debtor and a copy of the verification or judgment will be mailed to the debtor by the debt collector.**

If the debtor notifies the debt collector in writing at any time that he or she disputes the debt or part of it the debt collector must cease collection of the debt or any disputed part of it, until the debt collector obtains verification of the debt or a copy of a judgment and sends a copy of the verification or judgment to the debtor.

If the consumer fails to dispute the debt or part of it within 30 days of receiving the notice from the debt collector the debt collector may commence collection activity.

It is not an admission of liability on the part of the debtor that he or she fails to dispute the validity of the debt.

- a statement that, if the consumer requests it within the 30 days, the debt collector will provide the consumer with the name of the original creditor if different from the current creditor.

If the consumer notifies the debt collector within 30 days after receiving the notice that he or she disputes the debt or any part of it, or asks for the name and address of the original creditor, the debt collector must cease collection of the debt or any disputed part of it, until the debt collector obtains verification of the debt or a copy of the judgment, or name and address of the original creditor, and mail a copy of it to the consumer.

6 Harassment

6.1 Introduction

Harass is defined in the Macquarie Dictionary as 'to disturb persistently' or 'to torment'. Harassment can take many forms and what is harassment to one person may not be to another. Undue harassment in the course of collecting payment for goods and services is unlawful, and credit providers, debt collectors and consumers alike accept the need for limits on the nature and frequency of contact.

6.2 What the law says

The Trade Practices Act 1974 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) prohibit debt collectors who are corporations from using undue harassment or coercion in the course of collecting debts. The Fair Trading Act 1987 (NSW) imposes a similar prohibition on all debt collectors operating in New South Wales, whether incorporated or not. Although it does not have legal force, the ACCC Guideline provides clear direction on what constitutes undue harassment in the context of debt collection.[75] The Federal Court has applied the law and analysed the guideline in two cases involving debt collection.[76]

6.3 What is happening?

The CCLC's consultation shows that credit providers and debt collectors accept the ACCC's Guideline as appropriate. Nevertheless, the CCLC and other agencies receive many complaints about harassment. The Legal Aid Commission reported that harassment is perhaps the most common complaint. Respondents to both surveys reported a wide range of harassment and other unfair behaviour.[77] Complaints about harassment often coincide with attempts to collect very old debt. In broad terms there are four common kinds of harassment: excessive telephone calls, including calls made to a work phone number; telephone calls to friends and relatives; abusive and threatening telephone calls; and harassment by writing. Some examples of harassment by phone reported to the CCLC's advice line include:

- Although a debtor was making payments according to an agreement with a debt collector, the credit provider (a mobile phone company) was ringing his flatmates daily.
- 30+ year old man who was having difficulty making payments on a loan from a finance company was harassed by a debt collector ringing his parents constantly.
- Having found out a debtor's work phone number from caller ID when she returned one of his calls to home from work a collector then rang her three times in one day at work and threatened to serve a summons on her at work.

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[75] See Chapter 3, Section 3.2.2 pp18-21.

[76] See Chpater 3, Section 3.2.1 Undue Harassment at pp17-18

[77] About one quarter of respondents to the online survey and nearly one half of the respondents to the telephone survey.

A financial counsellor reports that three of their clients have received harassing phone calls at work.

- The debtor has told the collector not to phone her at work but the collector has continued to do so to the point that she has received a warning at work for excessive phone calls.
- The client is being harassed by telephone at work even though the financial counsellor has sent the collector an authority stating that all contact is to be made through the financial counselling agency.
- A creditor who is aware the debtor has become bankrupt continues to phone her at work to the point where she is in danger of losing her job.

Many phone calls are harassing because the collector uses abusive language and/or makes threats against the debtor. For example:

- A debtor who had a credit card debt of about $4 000 and was unaware of any judgment debt against him was threatened by a collector that, if he failed to pay the money by lunch time, the sheriff would come to the house, beat the door down and take everything in it.
- Having negotiated an agreement to pay a department store credit account debt of about $3 000 and having only $632 to pay, a debtor, who was unaware of a judgment debt against him, was threatened with 'a public examination of finances' by a collector that had recently bought the debt if he did not pay a discounted lump sum immediately.
- A collector threatened to take the debtor's house for a $3 300 credit card debt unless it was paid in full within 28 days.

Threats made to Legal Aid Commission clients include threats that the debtor will go to gaol, the debtor, or the debtor's family, won't be able to stay in Australia and the debtor will never be able to borrow money again.

CASE STUDY

E is a single woman living in a small bedsitter. She has an intellectual disability and works part-time. E borrowed money from a payday lender who took security for the loan over her furniture (an old lounge, a table and a black and white television). E became bankrupt but the debt, being secured, is not included. The creditor has telephoned E a number of times to tell her that it is sending the Sheriff to collect her furniture and to put it out in the street for collection. E does this and then has to bring it back at nightfall when it has not been collected.

Some examples of harassment in writing reported to the CCLC's advice line include:

- A collector sends a debtor 48 Hour Demand notices threatening legal action within 48 hours every few weeks. The collector does not institute legal proceedings.
- A debtor received demand notices stating that legal action will be commenced and judgment obtained which will involve further cost to the debtor. The notice does not state that the debtor is entitled to file a defence to the legal action.
- A collector sent a debtor a demand notice threatening bankruptcy proceedings that would result in the repossession of the debtor's home for a debt of less than $2 000.

6.4 The CCLC's view

6.4.1 Harassment is unlawful

Undue harassment of a debtor by a debt collector is unlawful. It is contrary to the Trade Practices Act, the Australian Securities and Investments Commission Act, the Fair Trading Act and the Commercial Agents and Private Inquiry Agents Act. It is also contrary to the espoused principles of many creditors and collectors. The banks and other creditors that responded to the CCLC's enquiries stated that they complied with the law and with the ACCC Guideline and insisted that collectors who collected on their behalf do also. Debtors are entitled to the same standard of polite, business-like commercial interaction as anyone else. It is difficult to see how harassing a debtor is going to improve his or her prospects of getting their financial prospects in order.

6.4.2 The law should list examples of conduct that constitutes harassment

The ACCC Guideline elucidates the general principle that a debtor is entitled to be treated fairly, with respect and courtesy, and should not be unduly harassed or coerced. It does not, however, have the force of law and, although widely adopted, does not apply to all debts. The fair trading legislation of two jurisdictions, Victoria and the Australian Capital Territory, list conduct that, without limiting the generality of the prohibition, constitutes undue harassment or coercion. They include:

- using documents resembling court documents or other official documents to mislead a debtor[78]
- misrepresenting to the debtor the consequences of not paying a debt or of debt recovery procedures[79] and
- unreasonable communication with a debtor[80]

[78] Fair Trading Act 1992 (ACT) s 26(2)(a); Fair Trading Act 1999 (Vic) s 21(2)(a).
[79] Fair Trading Act 1992 (ACT) s 26(2)(b); Fair Trading Act 1999 (Vic) s 21(2)(b).
[80] Fair Trading Act 1992 (ACT) s 26(2)(i); Fair Trading Act 1999 (Vic) s 21(2)(i).

In the CCLC's view, the Fair Trading Act 1987 should be amended to include specific examples of conduct that constitutes harassment.

Recommendation

The Fair Trading Act 1987(NSW) should be amended to include specific examples of what constitutes 'undue harassment or coercion'.

…

6.4.3 The ACCC Guideline should be updated

The ACCC Guideline was drafted in 1999. It has not kept up with technological developments and the changes in collection practices. It limits, for example, the number of 'answered' phone calls a debt collector can make to a debtor in a specified period of time, a limitation that does not take account of the almost universal use of message services. In the CCLC's view, the ACCC Guideline should be reviewed and updated to take account of technological change. It should then be adopted by ASIC and incorporated in any Code of Conduct developed by a State or Territory.

Recommendation

The ACCC Guideline should be updated, adopted by ASIC and reflected in any Code of Conduct subsequently developed by a State or Territory.

…

6.4.4 Prohibitions against harassment should linked to licensing

Currently a magistrate may cancel a licence, and disqualify a person from holding a licence, temporarily or permanently, if the magistrate is satisfied that the holder has been convicted of an offence against the Commercial Agents and Private Inquiry Agents Act. This would include the offence of harassment. In the CCLC's view, the power to cancel a licence should be in the hands of the Regulator and should not be dependent on a criminal conviction. The draft legislation attached to the National Competition Policy Review of the Commercial Agents and Private Inquiry Agents Act 1963 (NSW) includes provision for the licensing authority to impose conditions on a debt collector's licence. This would include a condition prohibiting specific conduct, including conduct that constituted harassment. In an appropriate case, for example, where a complaint of harassment had been investigated and found to be sustained, the licensing authority, which in the CCLC's view should be the Office of Fair Trading, should be able to impose such a condition. In the event of non-compliance it should be able to cancel the licence.

Recommendation

The provisions in the draft Commercial Agents and Private Inquiry Agents Bill 2003 Act that empower the licensing authority to impose conditions on a debt collector's licence should be adopted. A consumer may make a complaint about

harassment to the Office of Fair Trading, which would, in an appropriate case, impose a condition prohibiting specific (already unlawful) behaviour. If the condition is not complied with the Office of Fair Trading may cancel the licence.

…

6.4.5 OFT should have power to order audit of collection activities

The CCLC is concerned that there exists no adequate mechanism for dealing with evidence of systemic harassment on the part of a debt collector. In the CCLC's view the Office of Fair Trading should be able take action against a debt collector who has been the subject of a large number of complaints of harassment or other unlawful conduct. It should be able to order that the debt collector arrange an independent audit of its collection activities, including a random sample of alleged debtors recently contacted by the debt collector.

Recommendation

The Fair Trading Act should be amended to give the Office of Fair Trading power, in an appropriate case, (for example, following a large number of complaints about harassment against a particular debt collector) to order that a debt collector must arrange an independent audit, at its own expense, of its collection activities. The audit should include contacting a random sample of alleged debtors that have been recently contacted by the debt collector.

…

6.4.6 There should be adequate enforcement mechanisms

Despite the fact that harassment is unlawful it happens. In fact, harassment including abusive language and threatening behaviour, is one of the main complaints made by callers to the CCLC's advice line and to other agencies. It is the responsibility of the regulator, the ACCC, and ASIC, at the federal level, and the OFT at the State level, to take action to enforce the prohibition, and the ACCC has prosecuted two cases where the harassment was extreme.[81] However, there is little an individual consumer can do to enforce the law on his or her own behalf except make a complaint to the appropriate regulator. An individual may take action in the Consumer Trader and Tenancy Tribunal (CTTT), assuming he or she has a cause of action under the UCCC or the Consumer Claims Act, where there is quantifiable loss or damage, but often there is not. In any case, loss or damage caused by the harassment would be very difficult to prove. In the CCLC's view, suitable remedies against harassment should be available to ordinary consumers.

The Fair Trading Act should be amended to confer jurisdiction on the Consumer, Trader and Tenancy Tribunal to hear claims of breaches of the consumer protection provisions of the Fair Trading Act, including harassment, brought by

[81]. See Chapter 3, Section 3.2.1.

consumers, regardless of loss or damage. The remedies the CTTT should be able to provide should include

- **a declaration that specified conduct is in breach of the relevant section of the FTA**
- **an order requiring the respondent to cease the offending conduct**
- **a civil penalty of a specified amount (to be deducted from the amount owed by the applicant)**
- **loss or damages caused by the breach (if any).**

…

7 Other collection practices

7.1 Introduction

The CCLC has identified other collection practices that are, on the face of them at least, inappropriate. They include:

- misleading and deceptive conduct on the part of collectors;
- refusing to acknowledge, or seriously consider, requests for hardship variations under the UCCC
- failure to comply with agreements made earlier with a credit provider or a collector, or refusing to make agreements, for example, that the debtor should pay by instalments;
- failure to allow time for other process to work, for example, alternative dispute resolution processes;
- collectors refusing to deal with the debtor's representative and making themselves generally difficult to contact;
- pursuing debts in the face of evidence they have been settled, written off or otherwise no longer exist, or pursuing individuals in the face of evidence the individual is not the debtor; and
- initiating proceedings out of jurisdiction.

7.2 What the law says

Conduct that is misleading or deceptive, or likely to mislead or deceive, is prohibited by the Trade Practices Act 1974 (Cth), the Australian Securities and Investments Act 2001 (Cth) and the Fair Trading Act 1987 (NSW). In addition, the ACCC Guideline identifies misleading and deceptive conduct as contrary to its general principle that debtors should be treated fairly and should not be unduly harassed or coerced. Under the UCCC a debtor is entitled to ask credit provider or a debt collector to vary the contract on the grounds of hardship and to apply to the court to do so if the credit provider or debt collector does not. If an agreement is in place and being complied with, or other legal processes or arrangements exist that make it inappropriate to contact the debtor, the ACCC guideline says that a collector should not contact the debtor. The ACCC guideline also says that collectors should deal directly with a debtor once they know or should know they are represented by someone else only in limited circumstances.

7.3 What is happening?

7.3.1 Misleading and deceptive conduct

Many of the threats made as part of an harassing phone call also amount to misleading and deceptive conduct. In *McCaskey's Case*, for example, the court agreed that a wide range of behaviour on the part of the debt collector amounted to misleading and deceptive conduct, or was likely to mislead or deceive. This included:

- threats to take immediate steps to sell the debtor's house to obtain payment of the debt when no steps could be taken as legal proceedings had not been commenced and
- threats to have the debtor arrested if he did not pay the debt when there was no reasonable basis on which he could have asked the police to arrest the debtor.[82]

Examples of misleading and deceptive conduct reported to the CCLC include:

- the collector threatening the debtor that huge costs would be added to the debt if they sued him for the debt
- the collector threatening to take the debtor's home even when the debt is small and unsecured
- the collector threatening to take his (or her) spouse's assets
- the collector threatening the client would be arrested by the police if she fails to pay the amount outstanding on her telephone bill

About one quarter of the respondents to the online survey reported that the creditor or debt collector misled them. A respondent to the telephone survey said:

- Ms H owed about $6,000 on a credit card. A debt collector contacted her and told her that a judgment has been obtained against her and that they had already contacted the ACT Sheriff's Office. Ms H called the ACT Sheriff's Office and found out that there was no judgment made against her and the debt collector had never contacted the ACT Sheriff's Office. No copy of the alleged judgment was produced by the debt collector.

7.3.2 Refusing to comply with hardship variation requests

The UCCC provides that the debtor may ask the debt collector to vary the contract in specific circumstances.[83] There is no obligation on the part of the collector to do so but, if it does not, the debtor may apply to the court for the variation. The CCLC regularly receives calls to its advice line from debtors who have sought a variation of their credit contract on the grounds of hardship. Some examples are:

- An unemployed man repeatedly asked a debt collector to agree to accept reduced repayments while he was trying to find a job. The debt collector refused and demanded repayment in full. The debt collector then commenced court action in Victoria although the debt was incurred in New South Wales.
- A man who was seriously ill and needed an operation on his spine as a result of an injury repeatedly rang a credit provider to explain his circumstances and to ask that his payments be reduced for the six months he needed to recover. The credit provider refused to reduce the repayments and stated that the debtor's car would be repossessed if he fell behind in his repayments.

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82 . See Chapter 3, Section 3.2.1, Misleading and deceptive conduct at pp16-17

83 . See Chapter 3, Section 3.3.1, Variations at p25

7.3.3 Arrangements to pay

Instances of failure to comply with arrangements to pay, and other agreements, made by debtors with credit providers or debt collectors have been reported to CCLC and other agencies. Some examples are:

- A debtor made an agreement with a debt collector to pay by instalments. The creditor (a finance company), however, demanded immediate payment in full.
- The debtor made an arrangement to pay by instalments with the credit provider. Although she complied with the arrangement, the debtor was harassed by the collector who continued to claim she had missed payments even after she had sent copies of relevant receipts to the collector.
- A debtor negotiated an arrangement with a debt collector to pay a debt by instalments and then renegotiated it when she lost her job (promising to go back to the original amount when she got another job). She then received a letter from the debt collector offering her a discounted lump sum settlement and threatening to sue if she did not pay.
- A debtor entered an arrangement to pay with a bank that said that it would organise refinancing of her loans if she kept to the arrangement for three months. She did so but the bank issued a statement of liquidated claim for no apparent reason.
- A debtor entered into a repayment arrangement with a debt collector. The debtor kept to the arrangement for a year and then missed one payment. The debt collector sent him a notice stating that the whole amount was due and payable within seven days.

There are also a number of cases where a debt collector will not make an arrangement that the debtor repay the debt by instalments.

CASE STUDY

F is an elderly pensioner. She had a credit card with a low credit limit. Over time the bank made unsolicited increases to the credit limit until it reached $12 000. Eventually F's debt reached $7 000 and she could not meet the interest charges. In July 2003 the debt was sold to a debt collector who demanded F pay the amount outstanding in full and would not agree to a repayment arrangement. The collector also referred F to a finance broker who, for a fee of several thousand dollars, would arrange finance to pay the debt.

7.3.4 Failing to allow time for dispute resolution processes to work

Many creditors and some debt collectors have internal dispute resolution processes and some industries, for example, the banking and telecommunication industries, have external dispute resolution processes. The Banking and Financial Services Ombudsman (BFSO) has told its members debts should not be outsourced or sold while there is a

dispute in progress before the BFSO. The CCLC's files show that collection activity is sometimes commenced before dispute resolution processes have had a chance to work.

CASE STUDY

A debt collector contacted G, a 70 year old pensioner who speaks little English and does not read or write it, to collect a credit card debt. G said she had never applied for, or used, a credit card. The bank said she had applied for a card and used it, and was liable for the debt. The dispute was referred to the Banking Ombudsman. The bank then sold the debt to another debt collector while the matter was still with the Ombudsman. After the CCLC complained to the Ombudsman, the bank apologised and bought back the debt.

7.3.5 Refusing to deal with the debtor's agent

Although credit providers and debt collectors the CCLC talked to during this project agreed that they would always deal with the debtor's representative assuming they had received proper authorisation to do so, some agencies have complained that debt collectors continue to contact the debtor after the collector has been made aware that the representative is acting for the debtor. A financial counselling service, for example, has complained that its counsellors often have to deal with debt collectors and creditors that will not acknowledge the service's authority to act on behalf of the client. In some cases, the service reports, contact from the debt collector causes extreme distress. Even when the collector has agreed to deal with the agent, computer generated letters may continue to arrive at the debtor's address.

CASE STUDY

H has an outstanding telephone debt of $1 000. She entered into a Part 1X debt arrangement under the Bankruptcy Act. This was arranged by a financial counsellor or lawyer, who advised H's creditors that she, not H herself, was to be the point of contact. The creditor or debt collector continues to contact H despite being told that it is not appropriate to do so and to demand that H arranges payment of the outstanding telephone account.

A respondent to the telephone survey reported the following:

- A debt collector contacted Mr X over a telecommunications debt of under $500. He appointed a solicitor who asked that all communication be conducted through him. Still the debt collector had contacted Mr X seven times the last week and threatened to take him to court. Mr X is unsure if he owes debt and has asked for a copy of the statements. The debt collector refused to supply anything and kept on demanding payments. The debt is about 5 years old

7.3.6 Pursuing debts that have been settled

Debt collectors, whether acting as agents or as principals, rely heavily on the information they are given by the creditor. It may not always be accurate. Debt collectors themselves may make mistakes in identifying debtors. A caller to the CCLC's advice line believed she had paid a telecommunications company bill in full when she had disconnected the phone 2 years before. She had been contacted by a debt collector despite having heard nothing from the creditor in that time and having lived in the same house for nine years.

7.3.7 Computerised collection systems

As debt collection becomes increasingly computerised, there are increased opportunities for mistakes to be made. The CCLC's clients have complained that they continue to receive computer generated letters that do not take into account that they have appointed an agent to deal with the collector or have made an arrangement to pay the debt by instalments or that the collector has agreed to postpone collection activity. Furthermore, the letter may make assertions that are not true, for example that the debtor has not responded to 'numerous' telephone calls that have not in fact been made.

7.3.8 Instituting proceedings out of jurisdiction

It is common practice to institute court proceedings in the jurisdiction where the parties reside and the events giving rise to the dispute took place. However, the debt collector's head office and the debtor's residence may not be in the same place. In a number of cases reported to the CCLC court proceedings for the recovery of the debt have been issued in a State or Territory other than that in which the debtor lives. This makes it difficult, if not impossible, for the debtor to appear or even to file a defence and adds to the costs of the agency, if any, that is trying to assist the debtor.

CASE STUDY

A Sydney debt collector contacted Mrs V, who lived in Adelaide, about an alleged telecommunicatons debt. The claim was for approximately $1,100. Mrs V disputed the debt on a number of grounds including that she was induced to enter the phone contract by misleading and deceptive conduct, that she never received the accounts in question and that the claim was statute barred by virtue of the Limitations Act. The debt collector, knowing Mrs V lived in Adelaide and that she disputed liability for the debt, commenced proceedings against her in Sydney. Mrs V sought the advice of a solicitor in Adelaide, who confirmed that she had a valid defence but estimated that the legal costs associated with either defending the matter in NSW or having the proceedings transferred to Adelaide, would be greater than the amount of the alleged debt. Mrs V then paid the debt in full as the cheapest option available to her.

7.4 The CCLC's view

7.4.1 Collection activity should be fair

The relationship between and debtor and a debt collector is not equal. Given this, it is incumbent on the debt collector to observe the utmost fairness in its relationships with the debtor. Misleading and deceptive conduct is not only unfair but unlawful. Like harassment, it is contrary to the Trade Practices Act, the Australian Securities and Investments Act, the Fair Trading Act and the licensing legislation. To act in a way that reduces the chances of the debtor's being able to extricate himself or herself from the debt is unfair, and this includes failure to allow time for alternative arrangements to work, such as arrangements to pay by instalments and alternative dispute resolution processes. Refusing to deal with a debtor's agent is against the ACCC Guideline and accepted practice and pursuing debts that have been settled is clearly problematic for the alleged debtor and poor publicity for both the debt collector and the original creditor. Finally, initiating proceedings out of jurisdiction puts and impecunious debtor at such a disadvantage that it is difficult to see how he or she could possibly recover.

No recommendation made

The CCLC does not make a specific recommendation in relation to the unfair collection practices discussed above. The recommendation made in the previous chapter that would give power to the licensing authority to impose a condition on a debt collector's licence, and to cancel the licence for non-compliance with the condition, could be used to enforce the prohibitions against misleading and deceptive conduct. They could also be used against other unfair practices. Similarly, the recommendation that the Office of Fair Trading should be able to order that the debt collector must arrange an independent audit of its collection activities could be used in the event of widespread complaints about the unfair collection practices of a particular debt collector.

7.4.2 Proceedings against debtors should be instituted in the jurisdiction in which the debtor lives

Civil proceedings can be initiated in any State or Territory. While this gives welcome flexibility to national and multinational corporations, it is not appropriate for a debt collector to institute proceedings against a debtor in any jurisdiction other than that in which the debtor lives. The inequality of the financial and other resources of a debt collector and a debtor is such that it is grossly unfair to do otherwise. Many debt collection companies are national and, if not, are in a better position to brief legal counsel in another part of Australia than is a debtor who is, almost by definition, not able to fly from one part of Australia to another to defend court proceedings. Nor is the underfunded community legal centre possibly advising him or her able to do so.To institute proceedings against a consumer debtor in a jurisdiction other than that where the debtor lives should not be possible.

Recommendation

Proceedings against debtors should be instituted in the jurisdiction in which the debtor lives.

8 Collecting old debt

8.1 Introduction

Many of the problems faced by consumers arise in relation to old debt. This may be debt that the credit provider has attempted unsuccessfully to collect internally and then outsourced for collection on a commission basis, again unsuccessfully. It may have been outsourced again to a different collector, and then sold to someone else. In some cases it may have even been returned to the creditor after sale. Some of this is what is called statute barred debt, that is, debt in respect of which the Limitation Act imposes a bar by providing that a cause of action is not maintainable, and the debt is extinguished, after six years. The CCLC advice files show, and other agencies report, that debt collectors routinely attempt to collect this debt despite the fact that there has been widespread criticism of the practice by organisations representing creditors and consumers alike. There are two main problems associated with old debt:

- attempts are made to collect statute barred debts, that is, debts that have been extinguished by the Limitation Act and
- applications are made, and granted, for statutory time limits to be extended.

8.2 What the law says

8.2.1 Limitation Act

At the time of writing this report the law seems to be in a somewhat confused state. The Limitation Act 1969 (NSW) provides that six years is the limitation period for a debt. It affects debt collection in two ways.

- The Limitation Act provides that a cause of action is not maintainable after six years from the time the debt was last acknowledged by the debtor.[84] This does not preclude the creditor from attempting to collect the debt, or from instituting court proceedings against the debtor. It does not prevent the debtor from paying the debt if he or she wishes to do so. However, if the debtor claims the benefit of the statute in court proceedings to recover the debt, then the court must find in favour of the debtor. If he or she does not, whether deliberately or through lack or knowledge of the law, it would seem that the creditor retains the right to collect the debt.
- The Limitation Act provides that, after the limitations period has expired, the creditor's right and title to the money owed is 'extinguished'.[85] This would seem to preclude altogether any action on the part of the creditor to recover the money at all. The critical issue appears to be exactly when it is that the creditor's right is extinguished.[86]

84 S 14.
85 S 63.
86 See Chapter 3 , Section 3.3.3 at p27

The Act does not explicitly provide for the extension of the limitation period in relation to debt, except where there is fraud on the part of the debtor.[87]

8.2.2 Rationale for a statutory limitation on actions[88]

The Limitation Act represents a resolution of the competing policies of finality of litigation, which is secured by a limitation period, and of the need to do justice in the individual case. In a case decided in 1996,[89] Justice McHugh identified four broad rationales for the enactment of limitation periods:

- relevant evidence is likely to be lost
- it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed
- people should be able to arrange their affairs and use their resources on the basis that claims can no longer be made against them and
- the public interest requires that disputes be settled as quickly as possible.

8.3 What institutions say

Banks and other financial institutions

The CCLC's consultation with banks showed that there was not a consistent approach among banks to the timing of referral of debts to commission agents or the sale of debts. There was not, in fact, a consistent approach to various kinds of debts within each bank. One bank says it does not collect very old debts. Another says that, although it does not knowingly attempt to collect statute barred debts, it collects old debt if new information has come to hand. Another says it has sold only one bulk lot of aged arrears, some of which may have been inactive for several years. In a recent Bulletin, the Banking and Financial Services Ombudsman states that a financial services provider should not seek recovery of, or sell, a statute barred debt. It points out that although it is not unlawful to seek to recover a statute barred debt a collection activity will usually involve a misrepresentation that the debt is payable. In circumstances where there is a complete defence the representation may well amount to misleading and deceptive conduct. Misleading and deceptive conduct is a breach of the consumer protection provisions of the Trade Practices Act and the Australian Securities and Investments Commission Act. It is also a breach of the ACCC Guideline, which signatories of the Code of Banking Practice have agreed on their own behalf, and that of their representatives, to comply with.[90] Finally, the Credit Reporting Code of Conduct prevents a credit provider from listing a debt that is statute barred.[91]

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[87] See Limitation Act 1969 (NSW) s 55.

[88] This paragraph draws heavily from McGrath, Price and Davidson, Limitation of Actions Handbook New South Wales, para 0.25.

[89] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; 139 ALR 1 at ALR 8-9.

[90] Code of Banking Practice, clause 29.

[91] Clause 2.9.

Telecommunications companies

The Telecommunication Industry Ombudsman (TIO) has also addressed the issue of statute barred debt. In its Position Papers, Credit Management on its web site, the TIO states that where a provider is attempting to recover a debt outside the applicable limitation period and would not be able to sustain an action for recovery of the debt at law, the TIO will expect the provider to waive the debt. A recent change to its constitution gives the TIO jurisdiction to deal with disputes involving debts that have been sold by the telecommunications company to a debt collector. Nevertheless, at the time of writing this report, some very old telecommunication company debts are being collected.

Debt collectors

Recently, however, a large debt collection company, announced that it would no longer pursue collection of statute barred debts.[92] It did so despite its uncertainty about the 'wisdom, morality and ethics' of the situation where 'a person who can successfully evade their creditors for six years is shielded by the law, and a request for payment after this time risks being deemed contrary to fair and reasonable conduct'. It had earlier decided not to buy 'old debt' ledgers and its debt purchase and contingent collection documentation expressly exclude statute barred debt. Its clients and vendors are required to warrant that no debts in a portfolio are statute barred.

8.4 What is happening

Advice files

The CCLC's advice files for the period from January 2000 to the present show that the collection of very old debt, usually debt old enough to be statute barred, is a commonly reported problem. Furthermore, the collection of old debt is usually associated with other problems, for example, harassment and lack of documentation. In some cases the debt was as old as 8, 12, 15 or 20 years.

- Debtors who are unaware of their legal position have been encouraged to make a small payment towards the debt and then told that they have reactivated a debt that had been previously statute barred.[93]
- A woman paid a collection agency $50 on a six year old bank card debt under duress. She had been told orally by the bank that it had written the debt off.
- A woman whose car was repossessed and sold in 1992 was contacted for the first time since the repossession by a debt collector nine years later. She had made no payments since 1992 and, as she had borrowed money in 1999 without any difficulty, had assumed the debt had been forgotten. The collector said that the debt of $23 000 would be waived if she paid $5 000 before the following Monday.

[92] Collection House Ltd, Media Release, 4 March 2004.
[93] See also Legal Aid Commission.

- A man took out an unsecured personal loan to buy a car. After losing his job he stopped making payments. Six and a half years after his last payment ($400 out of his redundancy package) he was contacted by a debt collector. His offer to pay by instalments was rejected by the collector who said it would go to court unless he paid the full amount.

Collecting old telecom debts

The CCLC, the Legal Aid Commission of New South Wales and financial counsellors are aware of cases involving attempts to collect very old debts of a small telecommunication company. In general terms, the collector makes an *ex parte* application to the court, supported by a lengthy affidavit in which it is asserted that it is not the fault of the original creditor or the debt collector that the debt was not recovered sooner and that proceedings were not able to be issued in time. The collector also asserts that there is no denial of the debt. The court has given leave to file a statement of liquidated claim thereby effectively extending the limitation period.

Other evidence

Many of the examples in other Chapters of the this report involve old debts. While those examples will not be repeated here, the problems associated with those debts were usually exacerbated by the age of the debt claimed and the impression created by the failure on the part of the creditor to take any action in the intervening period (between the original default or dispute and the time of subsequent collection activity).

8.5 The CCLC's view

8.5.1 Collecting statute barred debts is not timely, efficient or fair

As has been shown there is a considerable body of opinion that suggests that a statute barred debt should not be collected. By definition, an attempt to collect a debt that is so old as to be statute barred is not timely. Nor is it efficient. The online survey identified that debts less then 12 months old at the time of collection activity were far more likely to be resolved than those debts that were older. One of the banks that responded to the CCLC's request for information about its debt collection practices wrote:

> *For unsecured debt we believe that it is very important to make contact very early with the customer as this generally improves the chances that the account can be brought back in order. The bank's experience is such that escalating arrears on credit cards become increasingly unmanageable for our customers within relatively short periods of time. This is neither to the customer's nor the Bank's advantage.*

Furthermore, collecting very old debt can be unfair to consumers in a number of ways. He or she is dependent on the debt collector, who may not be able to do so, to provide documentation the debtor needs to satisfy himself or herself of the legitimacy or accuracy of the claim. The debt collector is not in a position to resolve a possible dispute between the original creditor and the debtor and in any case it may be too late to

do so. In some cases, the original creditor may no longer exist. Time limits exist for good reason.[94] Certainly consumers are bound by shorter time limits if they want to make a complaint, or file a defence. While creditors and debt collectors are well aware of the Limitation Act and its implications for the collection of debt, the individual consumer may not be. Yet it is the consumer who, within the short time limit allowed for the filing of a defence, must raise it to get the benefit of it.

8.5.2 Extending time limits is neither timely nor fair

Making and application to extend the collection period beyond even the timeframe of the Limitation Act is certainly not in keeping with the principle of the timely collection of debts. Nor is it fair. It is certainly not fair to make no attempt to collect a debt during the statutory timeframe and then apply to a court to extend it.

8.5.3 Spirit, if not letter, of Limitation Act is being avoided

Attempting to collect statute barred debts avoids the spirit, if not the letter, of the Limitation Act and almost certainly amounts to misleading and deceptive conduct, or conduct likely to mislead or deceive in terms of the Trade Practices Act, the Australian Securities and Investments Commission Act and the Fair Trading Act. The practice of making *ex parte* applications to extend the limitation period under the Limitation Act makes a mockery of the Act. If a debt that is extinguished by the operation of the Limitation Act can then be extended on the basis of a statutory declaration of a debt collector that has not had an ongoing relationship with the debtor and may not be in possession of all the documentation, still less all the facts relating to the debt, then the Limitation Act offers little protection to the debtor. Even if, as a matter of statutory interpretation, it is held that the limitation period applying to a debt can be extended, doing so in the absence, and possibly without the knowledge of the debtor, is not a fair collection practice.

8.5.4 Time limits should be reasonable and should be enforced

The Limitation Act provides for a bar to the collection of debts after a specified period, six years in the case of debts. This is a generous time frame in which a creditor is free to take action to collect a debt. A statutory limitation period has been a feature of the law for many years. There is ample justification for it. The policy reasons for extending the limitation period that exist in cases of personal injury, where the plaintiff may be unaware of the existence of the injury until after the expiration of the period do not apply in the case of debt. In the absence of fraud on the part of the debtor, there is no justification for extending the period beyond the already generous six years. The current uncertainty in the law should be clarified. It should be made clear that the effect of the Limitation Act is to extinguish a debt after six years and that, once extinguished, the debt cannot be revived.

[94] See above Section 8.2.2 at p55.

Recommendation

The current uncertainty in the operation of the Limitation Act 1969 (NSW) should be clarified. It should be made clear that the effect of the Limitation Act is to extinguish a debt after six years during which there has been no payment made and no acknowledgement of the debt on the part of the debtor, and no court proceedings in relation to it, and that, once extinguished, the debt cannot be revived.

8.6 Judgment debts

8.6.1 What the law says

The Limitation Act extinguishes the right of a creditor or a debt collector who has bought a debt after six years. If action has already been taken and judgment entered against the debtor a different time limit applies. The time limit for a judgment debt is 12 years.[95] A judgment debt may be extended by the Local Court in NSW.[96]

8.6.2 What is happening

Judgement debts appear to be being extended almost as a matter of course with very little argument.

CASE STUDY

D bought a car under a loan agreement more than 20 years ago. He subsequently lost his job and, knowing he could no longer afford the loan or keep the car, he sold it back to the dealer for less than he had paid for it. In 1984, a debt collector obtained judgment against D for $2 507. D made some payments in 1990. The next contact was in 1994 when he was sent an examination summons. At that time D had a disability and was unemployed and no orders were made. In September 2000, D received notice that the court had extended the judgment (in March 1999) until May 2001. At the time the extension was granted it had been 16 years since the date of judgment and D had been on the electoral roll all of that time. The debt had blown out to $7 723, which D is now paying off at $30 per fortnight.

8.7 The CCLC's view

The lifespan of a judgment debt is 12 years and it can be extended. Judgement debts are extended routinely. Twelve years is a very long time to take some action to enforce a judgment debt. While there may be sound policy reasons for extending the time for enforcing a commercial debt, there is no justification for extending the time for enforcing

[95] Section 17 of the Limitation Act (NSW)
[96] Section 64A of the Local Court (Civil Claims) Act 1970 (NSW)

a consumer debt beyond 12 years from the date judgment was granted. The routine extension of judgment debts is inconsistent with the principle of fairness and does nothing to encourage the timely collection of debts.

Recommendation

Section 64A of the Local Courts (Civil Claims) Act 1970 (NSW) should be amended so that it does not authorise a court to extend the time limit for a judgment debt.

9 Credit reporting

9.1 Introduction

The credit reporting system is a system whereby credit providers report applications for credit made to them, and payment defaults on credit extended to a borrower by them, to a central body for the use of other credit providers. Creditors use the credit reporting system to assess the credit worthiness of potential borrowers. They also use it to assist them in collecting overdue payments. Debt collection companies who have purchased debt from a credit provider also use it to assist them in collecting overdue payments. The main credit reporting agency in Australia is operated by Baycorp Advantage Limited, a listed company that also has a significant receivables management business in Australia and New Zealand.[97] There are a number of problems associated with the credit reporting system that affect consumers in a significant way.

9.2 What the law says

The credit reporting system as it applies to consumers is regulated by Part 111A of the Privacy Act, which limits the kind of information that can be held by a credit reporting agency, how long it can be held, who can obtain it and the purposes for which it may be used.[98] A debt collecting agency that has purchased a debt (and is deemed to be the credit provider under the Act) may access information for the purpose of collecting overdue payments; a debt collecting agency acting as an agent of the debt collector may not.

9.3 What is happening

9.3.1 Overview

The fear of having a default listed on their credit reports, or actually having a default listed, is a significant problem for debtors. CCLC clients and clients of other agencies report difficulties associated with credit reporting. The surveys conducted by the CCLC and CHOICE also reveal problems. The problems include:

- being threatened with having a default listed, or actually having a default listed, as a collection tool, including as a means of locating the debtor
- being listed for a default, or 'a serious credit infringement' without their knowledge
- being listed for very old and/or very small debts and
- inability to remove an inaccurate or unfair listing.

[97] Dun and Bradstreet also maintain a credit reporting agency.
[98] See Chapter 3, Section 3.2.3, Privacy Act pp21-23

9.3.2 Listing as a collection tool

Threat of listing as leverage

The clients of the CCLC and other agencies fear having a default or other credit infringement listed on their credit report. A default listing seriously affects a person's ability to get credit for the duration of the listing (five years for a default listing or seven years for a listing for 'a serious credit infringement'). Consequently the threat of listing is a real threat. Using listing as a threat, or actually listing, gives the collector considerable leverage in its relationship with the debtor. About one half of the respondents to the surveys reported that the debt collector or creditor had threatened to report a default on the respondent's credit report and/or to ruin his or her credit rating.[99] In some cases, the default had been reported even before the respondent was contacted, or in relation to a debt that had already been paid. A respondent to the online survey wrote:

- "[The debt collector] promised an itemised bill would be sent to us before two weeks was up. [The debt collector] refused to allow a longer period to pay, we wanted the bill before paying; they said, "sure wait but we will be blackmarking your credit report for failing to pay". The debt was for an old mobile phone [bill of $79]."

Listing has also been used as leverage against CCLC clients.

- A CCLC client was being pursued for a very old debt, the last payment of which had been made more than six years before. The debt collector admitted the debt was statute barred but stated it would list it as 'a serious credit infringement' on the debtor's credit report and "if she wants it removed she will have to pay the debt".
- A caller had gone overseas, redirecting her mail to a PO box. A friend, with whom she was in email contact, was clearing the box. Her credit card statements did not reach the box and she was in arrears when the debt collector contacted her. The debt collector threatened to list unless she paid the full amount by the following Friday.

The fact that a debt has already been listed can also be an effective means of securing payment. A debtor may pay an alleged debt he or she does not believe is owed, or is at least unsure about, merely to have the default marked as paid. A number of respondents to the telephone survey had paid debts they believed they did not owe or were unsure of for this reason.

- Mr M contacted the liquidator of a telecommunications company about a default listing on his credit report. He explained that the phone was not in his name and that it was not his debt. The liquidator did not care and said that they had proof that it was his debt and told him to pay. He settled the matter by paying part of the debt in a lump sum payment and had the default marked as paid so he would be able to apply for a loan.

[99] 50% of online survey respondents and 54% telephone survey respondents.

- Mr C was default listed on his credit report for a $500 debt to a telecommunications company. Having no statement and very little details, Mr C was uncertain if he owed the debt or not. He paid the debt anyway to try to remove the default listing. He has still not succeeded in getting the listing removed.

Using listing as a location tool

When a debt collector buys a debt that is already listed as in default, the collector's name should be substituted for that of the original credit provider. However, the CCLC has been told that the default may be listed again. This means the five (or seven) year period of listing recommences. If the debt has not already been listed the debt collector may list as the new 'credit provider'. It may list immediately if the statutory requirements have been met[100], or it may list later. Once the collector is listed as the provider it may ask the agency for information about the debtor, including up to date location information. If the collector is unable to find the debtor it may list the debtor for a 'serious credit infringement' so that it will be automatically notified if the debtor applies for credit or his or her personal details are updated. The collector may list a default at first instance and later update the listing to a 'serious credit infringement'. In either case the collector is using the listing mechanism as a means of getting current location information.

- A caller to the CCLC's advice line got behind in payments on her credit card on which she owed $13 000. After an unsuccessful attempt to make an arrangement to pay by instalments the bank eventually listed her as in default. Some years later she was contacted by a debt collector and discovered that the debt had blown out to $25 000. The debt collector had listed her in respect of the same debt for which she had been listed some years earlier. Furthermore it listed her as a 'serious credit infringement' despite the fact that she had not moved house in the interim.
- A CCLC client checked her credit report to find she had been listed twice in relation to the same debt. She had been listed by the original credit provider (a bank) and, about two years later, by a debt collector who had bought the debt from the bank.

9.3.3 Being listed without being informed

A creditor may list a debtor for a default if the debtor is at least 60 days overdue in making a payment and the creditor has taken steps to recover the whole or part of the amount outstanding. When a debt collector buys a debt it may list a default assuming these preconditions have been met without further contact with the debtor although, as a matter of practice, some debt collectors inform the debtor that it may do so by letter to his or her last known address. This information will not, of course, reach the debtor if he or she has moved from that address. As a result, the debtor may not know that he or she has been listed at the time of listing and may not find out until he or she applies for

[100] See Chapter 3, Section3.2.3 at p22

credit or a loan, which may be some years later.[101] Respondents to the online survey wrote:

- "I was unable to pay my lease payments so I went to the car dealer and asked to trade my car and pay the difference. The dealer calculated the amount to pay out the lease but did not include the current month's payment. I acquired a loan to pay the amount. Four years later when I applied for a loan I was advised that a bad debt was listed for the months instalment and the loan [was] declined. . . . I was not aware that I had this slight until I applied for the loan. Credit agencies should be made to notify and justify these situations."
- "Only at a later time when I was denied credit did I discover that the default was still registered as being owed even though it had been paid."
- "I had referred the debt to the TIO and informed the debt collector and lawyers acting for them of this. I did not hear from them again until I recently obtained a copy of my credit report and found the debt listed as a default."

9.3.4 Inability to remove inaccurate listings

The law requires that information on a person's credit report is accurate.[102] However, if an individual disputes an entry on his or her credit report, it will not be removed as a matter of course, even temporarily while the dispute is being sorted out. All that the credit reporting agency is required to do is to include the individual's statement of the amendment sought and to notify people nominated by the individual of the amendment made, if any, or the statement of the amendment sought. The only recourse for the individual is to make a complaint to the Privacy Commissioner. It will take six OR MORE months for the complaint to be heard and in the meantime the individual is unable to access credit. Of the respondents to the online survey, 22% had a default listing for a debt they denied.

CCLC clients also report inaccurate listings and difficulties in negotiating the process for disputing an inaccurate listing:

- Mrs X was contacted by a bank for a credit card debt. She denied the debt as her signature had been forged. It took 4 years for the bank to start an investigation into the matter. A default listing was made on her credit report after she had clearly said that her signature had been forged.

[101] 52% of respondents to the online survey and 44% of respondents to the telephone survey did not know whether or not a default had been listed on their credit report in relation to the debt.

[102] However, of the respondents to the online survey:

- 26% reported that the listing was accurate
- 31% reported that it was not accurate but did not know how to dispute it
- 23% disputed the listing but failed to have it removed
- 17% succeeded in having the listing removed and
- 3% added an explanation.

9.3.5 Listing old debts

It is not permissible to default list a statute barred debt (that is, a debt to which the Limitation Act 1969 (NSW) applies).[103] In fact, the CCLC has been told that Baycorp's policy is that listings should be made within 12 months of the actual default. Nevertheless a number of CCLC clients have been listed for very old debts. A number of CCLC clients and clients of other agencies have been listed for alleged debts to a failed telecommunications company. The debts are for small amounts and are often statute barred.

Respondents to the telephone survey also reported being listed for very old debts.

- A debt collector contacted Mr M for debt incurred more than 10 years ago. The debt collector had purchased the debt from a bank. Mr M was threatened with default listing and was asked to pay a lump sum. Mr M consulted legal advice and found out from the solicitor that the debt was statute barred. Further more, the debt had already been written off by the bank.

9.3.6 Listing small debts

CCLC clients have also been listed for very small debts, including:

- a $33 telephone debt
- a $70 telephone debt and
- $112 finance company debt.

A caller to the CCLC's advice line was listed for a $125 telecom debt which, he said, he failed to pay because he had had to move house after a fire. As a result he is unable to get a home loan.

About one half of the debts reported to the online survey were for less than $500. Of the respondents who reported a debt of less than $100, 23% were aware of a default listing for the debt.[104] Of the respondents who reported a debt of $100 to $499, 37% were aware of a default listing.[105] Respondents to the telephone survey also reported being listed for very small amounts.

- A debt collector contacted Mr V over a telecommunications debt for under $100. He believed he owed some of the money claimed but not the entire debt. The debt collector agreed to remove the default listing on his credit report if he paid half of the debt in a lump sum payment. He paid the agreed amount but the debt collector did not remove the default listing.

[103] See Chapter 3, Section 3.2.3 at p22.
[104] 23% did not have a default listing and 55% did not know.
[105] 14% did not have a default listing and 49% did not know.

9.3.7 Listing as a 'serious credit infringement'

The CCLC has been told that creditors and/or debt collectors routinely list alleged debtors they cannot locate as a 'serious credit infringement'. It is not a 'serious credit infringement' to be unable to be located by a creditor or debt collector. Being unable to be located is not sufficient evidence that a debtor is fraudulently evading his or her obligations in relation to credit, or attempting to do so, or an indication of an intention no longer to comply with the his or her obligations in relation to credit:

- A CCLC client was listed as a 'serious credit infringement' on the day he was appearing in court to have a judgment set aside. The creditor was present in the same court as the debtor on that day.
- A CCLC client, a non English speaking newly arrived immigrant, got an interest free loan to buy a refrigerator and a television from a department store. He subsequently moved interstate. He rang the creditor to tell them that he had moved and to find out how he should make his repayments. He was told he could pay only in cash in the city in which he bought the goods (1 000 km from the city in which he lived). He was listed as a 'serious credit infringement' before he had received the information about how to pay.

In client correspondence with CCLC on this issue, the Office of the Federal Privacy Commissioner has reference to the Credit Reporting Code of Conduct and its Explanatory Memorandum in interpreting this provision of the Privacy Act. This approach focuses entirely on whether it was reasonable for the debt collector or credit provider to list the alleged debtor as a serious credit infringement at the time the listing was made. It does not take into account subsequent evidence that may be presented by the debtor of the steps he or she had taken to contact the credit provider. It also fails to take into account situations where, by no fault of their own, a person has simply not realised an account was outstanding, and upon becoming aware of the debt has taken immediate steps to settle it. In these circumstances, effective disqualification from mainstream credit for seven years can be a drastic consequence and does not appear to be what the relevant sections of the Privacy Act intended.

9.3.8 Potential conflict of interest

Baycorp Advantage is the main credit listing organisation in Australia. It also has a large receivables management business. This gives rise to a potential conflict of interest.

9.4 The CCLC's view

In the course of our advice and casework, and in talking to the consumers who contacted us during the phone-in survey, CCLC has come across a range of other problems associated with credit reporting, its regulation and practical operation that are beyond the scope of this report. While a number of specific recommendations are made below they do not represent a comprehensive solution to even the problems raised in this report. CCLC is of the view that a more comprehensive inquiry into credit reporting in Australia and its impact on consumers is urgently warranted.

9.4.1 Listing agency should inform debtor default has been listed

In the CCLC's view, when a creditor or debt collector lists a default or a 'serious credit infringement' on a debtor's credit report the listing agency should be obliged to notify the debtor in writing at his or her last known address. Threats to list are not always followed by actual listing and, unless he or she is notified that listing has in fact occurred, the alleged debtor is in limbo, not know whether or not the debt has been listed. In addition, notification of listing will enable a person who believes he or she should not have been listed, for example, because the debt had already been paid, to dispute the listing immediately and not three or four years later when rejected for a credit card or a home loan. The notification of listing should include information about what to do if the recipient wants to dispute the listing. The CCLC acknowledges that the debtor's last known address will not always be his or her current address. Nevertheless, this would enable debtors who receive the information to attempt to address any outstanding issues between the creditor and themselves or to negotiate an outcome. It would certainly reduce the incidence of unexpected and often unexplained default listings on people's credit reports.

Recommendation

The listing agency should be obliged to notify an alleged debtor that a default or a 'serious credit infringement' has been listed on his or her credit report, within 14 days of listing. It should provide the debtor with information about how to dispute an inaccurate listing at the same time.

…

9.4.2 Creditor should not list while alleged debtor disputes the debt

Inaccurate or disputed listings can cause serious consequences to the individual whose credit rating is affected by the listing and he or she is powerless to do anything about it. In the CCLC's view, a creditor or debt collector should not be able to list a debt when the alleged debtor has denied liability for the debt until liability is ascertained. If the disputed debt has already been listed as a default or a 'serious credit infringement' the creditor or debt collector should be obliged to remove the listing.

Recommendation

The creditor should not be able to list a debt (and must remove an existing listing) when the alleged debtor has denied liability for the debt until liability is ascertained

…

9.4.3 Old and small debts should not be listed

Although it is not permissible to default list a statute barred debt it is permissible to list a debt a few months, weeks or even days before it becomes statute barred. The effect of this is to extend the adverse consequences of the default nearly five (or seven in the case

of a listing for a 'serious credit infringement') years beyond the limitation period. This is inconsistent with the policy prohibiting the listing of statute barred debts and should not be allowed. In the CCLC's view the creditor should not be allowed to list a default later than one year after the issue of the default notice. Similarly, small debts should not be listed. The consequences of listing a debt for $100 or $200 or even $500 far outweighs the misdemeanour. Many small debts are telecommunications debts and appear to be related to problems with billings systems, billing errors and change of address problems. Small, possibly disputed debts are unlikely to be relevant to a risk assessment for future credit.

Recommendations

The creditor should not be allowed to list a default later than one year after the issue of the default notice.

The creditor should not be allowed to list a debt below a minimum amount ($500)

…

10 Appendix A – Survey Results

I am a 19 year old just starting my life and because bills were mistakenly being sent to the wrong address, I can now never get a loan, credit card, home loan etc. This is unfair, I never even knew I had an unpaid debt until I asked for a copy of my credit rating!

10.1 Introduction

10.1.1 The surveys

This chapter reports the findings of surveys conducted by the Consumer Credit Legal Centre (NSW) Inc) (CCLC) and CHOICE, the monthly magazine published by the Australian Consumers' Association (ACA). The surveys were done online to CHOICE and by telephone to the CCLC between 10 and 17 February 2004. The chapter includes comments made by respondents. Those made by respondents to the online survey are in italics; those to the telephone survey in boxes.

10.1.2 Participation

Consumers were invited to participate in the surveys in a CHOICE press release about an article about credit reporting mistakes in the January/February issue of CHOICE. CHOICE Online provided a link to the online survey in the online version of the article. In addition, between 200 and 300 flyers inviting participation were distributed in the inner Sydney area and contact details were included in an article published in some inner city newspapers. A total of 195 online responses, and 70 telephone responses were received. Of these, 139 online responses and 65 telephone responses related to collection within the last two years and it is these that this Appendix reports. It should be noted that respondents themselves chose to participate in one or other of the surveys. Nevertheless, they report experiences that are frequent enough to be indicative of general trends.

10.1.3 Preliminary issues

Nearly 90% of respondents to the online survey came from four states (New South Wales, Victoria, Queensland and Western Australia). More than 70% of respondents to the telephone survey, which was based in New South Wales and did not offer a 1800 free call number, came from that state.[106] In more than half the responses to both surveys, the respondent has been last pursued for the debt within the previous six months (55% online and 60% telephone). In nearly half the online responses (45%) the matter had been resolved between the respondent and the creditor or the debt collector; by contrast, nearly two thirds of the respondents to the telephone survey had not resolved the matter.

[106]. Of the interstate calls, eight were taken by operators in interstate services and the rest were made at the caller's own expense.

10.2 Nature of the debt

In both surveys, the respondents identified:

- the kind of debt being pursued
- the amount of the debt and
- the age of the debt at the time of collection activity.

Was overcharged constantly, had been reimbursed when I notified them, just to find out that I was overcharged again. I rang and wrote to them to cancel my internet and was still charged the following month. This was added to the account. I paid only what I had worked out that I owed. They insisted on the extras' to be paid. I refused.

More than half the debts in both surveys were either telecommunications company debts or financial institution debts (credit cards or personal loans) (58% online and 86% telephone). Other debts reported included:

- utility debts (gas, electricity and water)
- Government debts, (Centrelink overpayments, tax, fines and education fees) and
- medical or dental bills.

[I] didn't know [I] had an account with [telecommunications company] until I applied for a loan with the [bank] and the told me I had a credit default it took 2 months of letters calls to resolve. [Telecommunications company] and credit agency very rude when talking to them.

In the online survey, more than half the debts (51%) were under $500, and the overwhelming majority (89%) were less than $5 000. Telecommunications company debts made up a disproportional number of the debts of less than $500 (50% of the debts of less than $500 and only 34% of debts as a whole). Credit card and personal loan debts made up a disproportionate number of the debts over $500 (37% compared with 25% of debts as a whole). The telephone survey respondents reported larger debts: only 18% were less than $500 and 30% were over $5,000. There was also a significant difference between the online survey and the telephone survey as to the age of the debt at the time of collection activity. In the online survey, more that half (51%) the debts were less than 12 months old and a large majority (84%) were less than three years old. This compares with the telephone survey where about one third (37%) were less than 12 months old and less than two thirds (59%) were less than three years old and one fifth (20%) were 6 years or older.

Have only now after 6 years received a letter claiming did not pay the full amount for a study fee back in 1998. Did not receive any supporting documentation to confirm this.

10.3 Threats to list default on credit report

The respondents to both surveys were asked to state whether each of a list of 14 experiences with a debt collector or creditor had happened to them. In each survey approximately one half of the respondents reported that the debt collector or creditor had threatened to report a default on the respondent's credit report and/or to ruin his or her credit rating (50% online and 54% telephone). In some cases, the default had been reported even before the respondent was contacted or in relation to a debt that had already been paid.

[The debt collector] promised an itemised bill would be sent to us before two weeks was up. [The debt collector] refused to allow a longer period to pay, we wanted the bill before paying; they said "sure wait but we will be blackmarking your credit report for failing to pay". The debt was for an old mobile phone [bill of $79].

A debt collector contacted Mr M for a debt incurred more than 10 years ago. The debt collector had purchased the debt from a bank. Mr M was threatened with default listing and was asked to pay a lump sum. Mr M took legal advice and found out from the solicitor that the debt was statute barred. Furthermore, the bank had already written off the debt.

Mr N had a medical procedure costing under $500. He paid the amount requested and a made a claim on Medicare for the balance. Sometime later Mr N was informed that the referring doctor could not refer for that service and Medicare would not pay. He then arranged for his surgeon to provide a referral at his next appointment in 3 months time. He was told this was acceptable and had made a successful claim to Medicare.

Mr. N then received a letter from a firm of solicitors. The letter said Mr. N had not paid the medical bill and threatened to list a default on his credit report. Mr. N contacted the creditor who was horrified and said it was all a mistake and that they would ask the debt collector to write to Mr. N apologising and acknowledging the bill had already been paid and to remove any default listing.

Mr. N received a letter from the debt collector which simply acknowledged that he had paid the account, making it sound as if he had done so in response to their letter. There was no apology or mention of his credit report. It may have been just a threat but Mr. N was not sure.

10.4 Lack of documentation

In both surveys a large proportion of respondents (34% online and 43% telephone) reported that the debt collector or creditor had refused to supply statements, contracts or other documents to prove the debt.[107] About one half (48%) of the online respondents reporting refusal to supply documentation disputed the debt.

At the time of being contacted (just before Christmas) the debt collection agency was unable to provide any useful information about the debt being recovered (i.e. who was claiming a debt against me, why and for how much). I would have thought this information should have been provided in a clearly documented format. No details were given of who was claiming. It was not clear whether or not my name had been given to credit rating agencies or tenant blacklists. No confirmation was sent confirming the issue was closed.

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

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

10.5 Online survey: harassment and other unfair behaviour

In the online survey about one quarter of respondents reported they had suffered each of a wide range of harassment or other unfair behaviour. The debt collector or creditor:

- behaved in a threatening manner (29%)
- contacted the debtor more than three times per week (24%)
- misled the debtor in some way (24%)
- refused to give the debtor time to check records or to get legal advice (22%)

[107] The Survey response option simply stated that the creditor or debt collector had "refused to supply statements, contracts or other documents to prove the debt". Failure to select this option may have meant either that verification was supplied, or that the respondent had never asked for verification.

- threatened to garnishee (that is, to take by court order) money from the debtor's accounts or wages (22%).[108]

Between one fifth and one sixth of online respondents reported that the debt collector or creditor:

- asked the debtor to pay the debt using a credit card (19%)
- contacted the debtor at work when it had another contact number (18%)
- told the debtor's family, colleagues or other persons about the debt (14%)
- threatened to sell the debtor's car, possessions or property (13%).[109]

Other respondents (fewer than 10 per cent) reported that the debt collector or creditor:

- asked the debtor to do something unreasonable (9%)
- continued to contact the debtor after he or she had appointed an agent (such as a solicitor or financial counsellor (8%)
- threatened to sell a car, possessions or property belonging to the spouse or family members (6%).

In one case a debt collector entered the respondent's home by the backdoor and without permission while the occupants were asleep. In another the debt collector tried to break into the respondent's home.

> *I've had 6 different agencies contact me in the last 18 months for someone else's debt who has a very similar name (last time yesterday, prior to that last time was 11 months previously). Initially I received phone calls in the evening and on weekends, but the callers wouldn't give any details of what they wanted until I told them my birth date, which I wouldn't do - I didn't know who was calling me!, eventually found out debts were for unpaid [store] credit card, [store] card & another one. This went on for about 3 months, on and off. Finally left me alone. Then in Feb 2003 I received a summons for unpaid finance contract, sorted that out, and then received another summons for an unpaid fine for not voting in the Federal election in March 2003. All cases of mistaken identity. The latter 2 were fairly sorted out as the people I contacted were all reasonable, but the credit card people weren't. Yesterday, after thinking my name had been "cleared"! I received a letter from a debt collection agency based in Perth, with a request to contact them, but no details of what about. I have emailed them explaining that they have the wrong person, but have received no response as yet. The whole thing has been extremely stressful. Basically being put in the position of proving my "innocence" when the whole thing is nothing to do with me. Sorry for the waffle - I'm a bit angry about the whole thing. I'm also now rather concerned about my credit rating.*

[108] In the telephone survey, 11 respondent's indicated they had been threatened with a garnishee, 7 of whom also reported that there was no judgment debt.

[109] In the telephone survey, 22 respondents reported threats to sell their car, possessions or property, 18 of whom also reported that there was no judgment debt.

10.6 Telephone survey: harassment and other unfair behaviour

Generally speaking, respondents to the telephone survey, (the value of whose debts was significantly higher than those of the online respondents)[110], reported higher levels of harassment or other unfair behaviour, sometimes significantly higher, than did respondents to the online survey. For example:

- nearly half reported that the debt collector had behaved in a threatening manner (46% compared with 29%)
- about one third reported being threatened with the sale of their car, possessions or property (35% compared with 13%)
- about one quarter reported being asked to do something unreasonable (26% compared with 9%).

10.7 Does respondent acknowledge the debt?

Nearly half of the respondents to the online survey (47%) believed they did not owe the debt. Of the remainder, 37% acknowledged that they did, 10% that they owed some but not all of it and 6% did not know. The telephone survey results were similar, with 46% of respondents denying liability for the debt, and the remainder divided in slightly different proportions between those who acknowledged the debt, those who agreed they owed some but not all of it, and those who were not sure.

10.7.1 Respondents who believe they do not owe debt (or not all of it)[111]

Why respondents believe debt not owed

Nearly one third of the respondents to the online survey who believed they did not owe the debt (31%) said they had already paid it. The next two most common reasons were mistaken identity (17%) and that the goods were not satisfactory or had not been delivered (12%). Other reasons included:

- the creditor had previously agreed to accept a lesser amount
- it was someone else's debt[112]
- an error on behalf of the creditor
- alleged debtor had requested the telephone be disconnected two months before the debt was incurred

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[110] See Section 10.2 Nature of debt at p70

[111] This section discusses responses from the online survey only. The number of responses to the telephone survey was too small to allow for analysis of responses according to whether or not the respondent acknowledged the debt.

[112] This category may overlap to some extent with "mistaken identity", but also includes cases where a person is incorrectly alleged to be a guarantor or a co-debtor and cases where a person is being harassed in relation to a relative's debt.

- someone else called an ambulance that was not needed for the alleged debtor, an epileptic; and
- a fee for breach of contract of a mobile phone contract after the phone had been stolen.

The 'debt' had been paid using eftpos from my bank account. I had 'printed' the receipt to a pdf file (viewable with Acrobat reader) and e-mailed a copy of it to the debt collector.

Ms K has the same name as her deceased mother. They have similar dates of birth and lived at the same address. She was being pursued for her mother's debt. The debt collector refused to listen and accused her of committing a fraud.

Debtor's response to debt collection activity

Almost everyone (98%) who responded to the online survey that they believed, rightly or wrongly, they did not owe the debt explained this to the creditor and/or the debt collector. In nearly half the cases (47%), the creditor and/or the debt collector was difficult and obstructive. In 15% of cases they were unhelpful and in 13% abusive. In other cases the alleged debtor received no response at all to the explanation. Only in 10% of cases was the debt collector and/or creditor helpful.

I had proof of regular on-time payments which I had to fax to their head office to convince them that I had already paid the debt. I still received annoying phone calls days later, asking when I would commence making payments. I ended up complaining to them and eventually received a shallow apology from their public relations department. I have not since dealt with [finance company].

Nature of debt

A huge 40% of the disputed debts reported in the online survey were telecommunications company debts. Over 60% of disputed debts were less than $500. Nearly half (42%) were debts of between $100 and $499; of the remainder, about one fifth (19%) were less than $100 and about two fifths (39%) were over $500. About two thirds (66%) were dealing with a debt collector only; 18% were dealing with the creditor only and the rest (16%) with both. About one third of the respondents to the online survey (37%) who believed they did not owe the debt had resolved the matter. Of the remainder, 34% had not resolved it and 29% were unsure about resolution

Collection experience

The collection experience of respondents who believed they did not owe the debt was similar in a number of aspects to the experience of those who acknowledged they did, for example, being threatened with a default report or a ruined credit rating. There were

however, several significant differences. In nearly half the cases where the respondent believed he or she did not owe the debt (48%), the respondent also reported that the debt collector and/or creditor refused to supply statements, contracts or other documentation to prove the debt. This compares with 14% of respondents who believed they owed the debt.[113] On the other hand, fewer respondents who believed they did not owe the debt were contacted more than 3 times a week (18% compared with 31%) or were contacted at work when the debt collector and/or creditor had another contact number (11% compared with 27%).

[Debt Collector's] staff have been VERY rude and unhelpful. They do not listen to what I am saying and even when I tell them the debt has been paid over 4 years ago, they ignore me and keep calling at least once every three weeks. They have even spoken to my children about the debt!!!!

. . .

They phoned the home phone number morning and night every day. Sometimes as late as 8:30pm. My girlfriend had to deal with that and she even gave them my mobile number but they continued to call at home when I wasn't there.

Resolution

More than one third of the respondents who believed they did not owe the debt (38%) were still in the process of resolving the debt. In more than one third of the cases the problem appears to have been resolved in the respondent's favour:

- the respondent denied the debt and the problem has gone away (14%);
- the respondent provided proof which was accepted (13%);
- the respondent argued for some time and his or her side was eventually accepted (9%);
- the debt collector and/or creditor accepted the respondent's story (3%).

Of the remainder, 11% paid the money and 2% paid part of it. Enforcement action was successful against 2%. In 22% of cases a default had been listed on the respondent's credit report; 56% of respondents did not know whether or not a default had been listed.

You must prove beyond any doubt that it is in their error and provide documentation that they refuse to give you.

[113] Given that many debt collectors do not seem to be in possession of the relevant information, this result is more likely to be due to the fact that those who acknowledged the debt were less likely to ask for documentary verification of the debt, than that they were given the information when they admitted the debt.

10.7.2 Respondents who acknowledge they owe the debt[114]

Nature of the debt

About one quarter (24%) of the debts owed by respondents who acknowledged it reported in the online survey were telecommunications company debts and about one quarter (26%) were credit card debts. Debts to financial institutions (credit cards and personal loans) made up about 40% of the total. Nearly one half (49%) of the debts were over $1 000; about one quarter (28%) were between $100 and $499; 14% were less than $100; and 10% between $500 and $999. More than half of the respondents (56%) were dealing with the debt collector; one third (32%) with the creditor and the remainder with both. More that half (58%) had resolved the matter at the time of the survey.

Collection experience

The most frequently reported experiences with debt collectors or creditors collecting the debt reported in the online survey were:

- threats to list a default or ruin the debtor's credit rating (53%)
- behaving in a threatening manner(35%)
- contacting the debtor more than three times a week (31%)
- contacting the debtor at work when the collector had another contact number (27%) and
- misleading the debtor in some way (22%).

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

Negotiating payment

Respondents' experiences

Respondents who acknowledged they owed some or all of the debt were asked to identify their experiences during negotiations for payment of the debt from a list of possible experiences. More than a half of the respondents (55%) reported that the debt collector and/or creditor insisted on immediate lump sum payment and refused to make

[114] This section discusses responses from the online survey only. The number of responses to the telephone survey was too small to allow for analysis of responses according to whether or not the respondent acknowledged the debt.

a repayment arrangement. Nearly half (48%) reported that the debt collector and/or creditor refused to believe that the respondent was experiencing financial difficulty. Respondents also reported that the debt collector and/or creditor:

- insisted on a repayment arrangement the debtor knew he or she could not afford (29%)
- insisted on an initial lump sum payment before a repayment arrangement would be accepted (26%)
- insisted that the respondent pay more than he or she owed (25%)
- refused to honour an agreement the respondent had made previously (22%).

Some respondents reported that the debt collector and/or creditor insisted that the respondent pay the debt by credit card (11%)[115] or take out a loan to pay the debt (11%).

I had 1 month to go on my mobile plan, but had left the country. My SIM card was lost, hence blocked immediately so calls could not have been made on the phone. I called the phone company to check the expiration date of my contract as I was in South Korea and was assured that everything was finished. 7 months later I was notified through a long chain of friends that my old house had been receiving phone calls from [telecommunications company]. I believe that there could not have been more than 1 month more of my mobile monthly access fee, hence $30. The total amount the debt collector was chasing was more than $800 which included a cancellation fee and a fee for the debt recovery company. After pursuing the matter, the debt recovery office said that if I made a bulk payment of $240, it would be settled, however, this amount could not be itemised, hence I have no idea what it was for at all. The debt recovery office said that [telecommunications company] had the documentation and to contact them for it, and [telecommunications company] said that the debt recovery office had it. Hence, I paid the $240 and still have no idea what it was for. Meanwhile, all of this was being done by International phone calls from South Korea.

Resolution

More that half the respondents to the online survey (58%) who acknowledged the debt had resolved the matter. Of the remainder, 14% had not resolved it and 28% were unsure about resolution. This was in stark contrast to those who did not believe they owed the debt where only 37% had resolved the matter.

Outcome of negotiations

Nearly three quarters of the respondents to the online survey (73%) who acknowledged the debt had made a payment within the previous 12 months. Nearly half the respondents (43%) paid the debt in full. About one quarter (26%) made a repayment arrangement. Small numbers:

[115] In the telephone survey 11 respondents reported that the creditor/debt collector insisted that they pay their debt by credit card. Of these, 5 were credit card debts in the first place.

- made a lump sum arrangement of less than the claimed amount to settle the debt (6%)
- made a repayment arrangement they could not afford and are being contacted again (6%)
- have not paid and have not heard from the debt collector and/or creditor again (6%)
- have been taken to court (6%)
- are going bankrupt (6%)
- have had goods or property seized or sold to pay the debt (5%)
- had their accounts garnisheed (2%).

The debt collector demanded a lump sum payment despite a payment arrangement being agreed to earlier, and me continuing to abide by the agreement.

. . .

Our dealings with the credit collection agency were straight forward enough: we paid the debt and ended it. But in my opinion the medical clinic had referred the debt to [debt collector] without actually asking us for the money and then, when the debt had been paid to [debt collector], the clinic asked my husband to pay the same amount since they had no record of receiving payment from the debt collector. The debt collector claims that the problems are all with the clinic. Although payment was made to the debt collector in December last, we have not yet received a receipt for tax claim purposes. It seems very easy for someone to refer a debt to a collector without actually trying to get the payment themselves.

10.8 Consequences of the debt collection experience

10.8.1 Possible consequences

Respondents to the online survey and the telephone survey were asked whether:

- there was a court judgment against them
- they were notified the matter was going to court or
- there was a default listing on their credit report related to the alleged debt.

10.8.2 Court judgment

Of the respondents to the online survey 8% reported there was a judgment against them. Only two (of a total of 10) reported that they had been notified that the matter was going to court; six said they had not been notified; and two could not remember. By comparison, 16% of respondents to the telephone survey reported a judgment against

them.[116] 60% of online respondents and 77% of telephone respondents said there was not a judgment. 33% of online respondents and 7% of telephone respondents did not know.

A court order is on my Credit Ref which wasn't known about until I asked for a copy of my reference.

10.8.3 Default listing

In both the online and telephone surveys about half the respondents reported that they did not know whether or not there was a default listing on their credit report related to the alleged debt (52% online and 44% telephone). Of the remaining respondents to the online survey, 30% reported that there was and 18% that there was not. The corresponding figures for the telephone survey are 46% and 11% respectively.

My account to [telecommunications company] for $121.50 was paid on 31/12/03. I was given a default listing 20/1/04 and the default was listed as paid on 29/1/04. This has caused my personal loan application to be rejected. I was not aware that I had been listed and had trouble finding out who had listed me and why. After many phone calls and time wasted I have been led to believe the error by [telecommunicatons company] will be removed within 72 hours. They had no legal right to list me for an account that had been paid weeks earlier and the debt collector informed me that [telecommunications company] had received the payment from them before the 12th. There was no apology and I believe in the very least I am entitled to that.

Mr M contacted the liquidator of a telecommunications company about a default listing on his credit report. He explained that the phone was not in his name and that it was not his debt. The liquidator did not care and said that they had proof that it was his debt and told him to pay. He settled the matter by paying part of the debt in a lump sum payment and had the default marked as paid so he would be able to apply for a loan.

Mr C was default listed on his credit report for a $500 debt to a telecommunications company. Having no statement and very little details, Mr C was uncertain if he owed the debt or not. He paid the debt anyway to try to remove the default listing. He has still not succeeded in getting the listing removed.

[116]. This may reflect the fact that the debts reported to the telephone survey were larger than those reported to the online survey (See Section 10.2 Nature of Debt at p70).

Appendix B – Survey Questions

Have you had an experience with debt collection?

CHOICE Online, in association with the NSW Consumer Credit Legal Centre (CCLC) would appreciate it if you could take a few minutes to complete the following survey on your experiences with debt collectors.

Your response is anonymous but will provide us with valuable information for our research into this important consumer issue. The results of this online survey will be reported in the first edition of our new magazine CHOICE Money and Rights in April.

Tell us about your most recent experience .....

1. When were you last pursued for debt (i.e. contacted by credit provider/debt collector)?

- In the last 6 months
- 7 - 12 months ago
- 1 - 2 years ago
- 3 years ago or more

2. Has the matter been resolved between you and the creditor/debt collector?

- Yes
- No
- Unsure

3. What sort of debt was/is being pursued?

- Consumer loan - credit card
- Consumer loan - personal loan
- Consumer loan - home mortgage
- Consumer loan - other
- Business/investment loan
- Telecommunication company debt
- Utility debt (electricity, gas, water)
- Other (please specify)

4. How large was/is the debt being pursued?

- Less than $50
- $50 - $99
- $100 - $499
- $500 - $999
- $1,000 - $4,999
- $5,000 - $9,999

- ❑ $10,000 - $19,999
- ❑ $20,000 - $49,999
- ❑ $50,000 or more

5. How old was the alleged debt at the time of being pursued?

- ❑ Less than 12 months
- ❑ 1 - 3 years
- ❑ 4 - 6 years
- ❑ 7 - 9 years
- ❑ Don't know

6. Who made contact with you regarding payment of this debt?

- ❑ The creditor (person/company to whom you allegedly owe the money) [Goto question 8]
- ❑ A debt collector
- ❑ Both the creditor and a debt collector

7. In this matter, what best describes the relationship between the creditor and the debt collector?

- ❑ The debt collector is collecting the debt for the creditor (as an agent)
- ❑ The debt collector had bought the debt from the creditor
- ❑ I don't know anything about the relationship between the creditor and the debt collector

8. Did the debt collector/creditor do any of the following (you may choose more than one option)?

- ❑ Refuse to give you time to check your records/get legal advice
- ❑ Refuse to supply statements, contract or other documents to prove the debt
- ❑ Contact you more than three times per week
- ❑ Contact you at work when he/she had another contact number
- ❑ Tell your family, colleagues or other person(s) about your debt
- ❑ Threaten to list a default on your credit report/ruin your credit rating
- ❑ Ask you to pay your debt using a credit card
- ❑ Continue to contact you after you had appointed an agent (such as a solicitor or financial counsellor)
- ❑ Threaten to sell your car, possessions or property
- ❑ Threaten to sell a car, possessions or property belonging to your spouse or family members
- ❑ Threaten to garnishee (take by court order) money from your accounts or wages
- ❑ Ask you to do anything unreasonable
- ❑ Mislead you in anyway
- ❑ Behave in a threatening manner
- ❑ Other (please specify)

9. Do you believe that you owe the debt?

- ❑ Yes [Goto question 14]
- ❑ Some but not all of it [Goto question 14]
- ❑ No
- ❑ Don't know [Goto question 17]

10. Why do you believe that you do not owe the debt?

- ❑ Not my debt (mistaken identity)
- ❑ Not my debt (being chased because of relative, friend or associate)
- ❑ Goods or services not delivered or unsatisfactory
- ❑ Already paid
- ❑ Creditor had previously said debt would not be pursued
- ❑ Creditor had previously agreed to accept lesser amount
- ❑ I have not had any contact about this debt, nor made any payments in over six years
- ❑ Other (please specify)

11. Did you explain this to the creditor/debt collector?

- ❑ Yes
- ❑ No [Goto question 13]
- ❑ Can't remember [Goto question 13]

12. What was the creditor's/debt collector's response?

- ❑ Reasonable and responsive
- ❑ Unhelpful
- ❑ Difficult and obstructive (e.g. that's your problem, you prove it, we'll list it on your credit report if you don't pay, or make a payment and we'll call it quits)
- ❑ Abusive (as for difficult, but also rude and insulting)
- ❑ Other (please specify)

13. How did you resolve the issue?

- ❑ It is still in the process of being resolved [Goto question 17]
- ❑ I paid the money [Goto question 17]
- ❑ I paid part of the money [Goto question 17]
- ❑ The debt collector/creditor accepted my story [Goto question 17]
- ❑ I provided proof of my side of the story and this was accepted by the debt collector/creditor [Goto question 17]
- ❑ I argued for some time (by phone, fax, email, letter etc) and my side of the story was eventually accepted [Goto question 17]
- ❑ I denied the debt and the problem seems to have gone away [Goto question 17]
- ❑ The debt collector/creditor took enforcement action and I successfully defended the matter in a Court or Tribunal [Goto question 17]

- ❑ The debt collector/creditor took enforcement action and I lost money or property as a result. [Goto question 17]
- ❑ Other (please specify) [Goto question 17]

14. When did you last make a payment?

- ❑ Less than 12 months
- ❑ 1 - 3 years
- ❑ 4 - 6 years
- ❑ 7 - 9 years
- ❑ 10 years or more
- ❑ I have not made a payment

15. Did the debt collector/creditor do any of the following during negotiations for payment of the debt (you may choose more than one option)?

- ❑ Insist you pay more than you believe you owe (i.e. refuse to listen to your reason why the amount is wrong or you have a partial defence to your debt)
- ❑ Insist on an immediate lump sum payment (refuse to make a repayment arrangement)
- ❑ Insist you pay your debt by credit card
- ❑ Insist you take out a loan to pay the debt
- ❑ Refuse to honour an agreement you had previously made (with the creditor, the debt collector or another debt collector)
- ❑ Refuse to believe you were experiencing financial difficulty
- ❑ Insist on a repayment arrangement you knew you could not afford
- ❑ Insist on an initial lump sum payment before a repayment arrangement would be accepted
- ❑ Other (please specify)

16. What happened or is happening in relation to the debt? (you may choose more than one option)

- ❑ It is still in the process of being resolved
- ❑ I paid in full
- ❑ I made a lump sum payment (less than the total amount claimed) and there is final settlement of the debt
- ❑ I made a repayment arrangement
- ❑ I made a repayment arrangement I could not afford and the creditor/ debt collector is contacting me again
- ❑ I have not paid and I have not heard from the creditor/ debt collector in the last 6 months
- ❑ The creditor/ debt collector agreed to waive the debt
- ❑ My goods or property have been seized or sold to pay the debt
- ❑ I was taken or am being taken to court
- ❑ My wages/bank accounts were garnisheed
- ❑ I have received an Examination Summons
- ❑ I made an instalment arrangement with the court

- I am going/went bankrupt
- Other (please specify)

17. Do you know whether there is a court judgement against you in relation to this debt?

- Yes
- No [Goto question 19]
- Don't know [Goto question 19]

18. Were you notified that the matter was going to court?

- Yes
- No
- Can't remember

19. Was or is there a default listing on your credit report related to this alleged debt?

- Yes
- No [Goto question 21]
- Don't know (click on the link at the end of this report to check your credit report) [Goto question 21]

20. If there was a default listing, which of the following best describes your situation?

- The default was correctly listed on my credit report
- The listing was incorrect but I did not know how to dispute it
- There was a listing but I successfully had it removed
- I disputed the listing but wasn't successful in having it removed

21. Which state do you live in?

- ACT
- NSW
- NT
- QLD
- SA
- TAS
- VIC
- WA

22. Is there any thing you would like to add about your experience?