



Consumer Credit
Legal Centre NSW

December 2013

Submission in relation to the ACCC/ASIC Debt Collection
Guideline for collectors and creditors
by the
Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc (“CCLC”) is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 20,000 calls for advice or assistance during the 2012/2013 financial year.

A significant part of CCLC’s work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Thank you for the opportunity to comment on the ACCC/ASIC Debt Collection Guideline. The Consumer Credit Legal Centre (CCLC) supports the regular revision and updating of the Debt Collection Guideline. It is important that the Guideline is updated on a regular basis to account for changes to the law, recent decisions and ongoing improvement in practices and industry standards.

Overall comments

The Guideline has proved to be pivotal in improving the practices of the debt collection industry. It has been very pleasing to see practices continually improve across the main debt collectors in Australia. Subject to the comments below CCLC strongly supports the proposed changes to the Guideline.

CCLC notes that the Guideline is not law, and only represents guidance. In our view, consideration should be given to the Guideline being made into law. The debt collection industry is very large and pervasive, and unfortunately not all debtors subject to debt collection activity have access to EDR. CCLC has ongoing problems with a number of smaller debt collectors who continually breach the Guideline with no consequences. Some of the breaches are very serious, including threatening the consumer that s/he will be reported to the Police. We contend that legislation is required to ensure that all consumers have adequate consumer protection when dealing with debt collectors.

The following comments refer to specific sections of **Part 2 of the Guideline: 'Practical guidance.'**

I. Making contact with the debtor

Paragraph (e).

The drafting for (e) is not very clear.

Emerging technologies, and in particular, social media have been proven to be very open modes of communication. Privacy settings are very difficult to navigate and the privacy settings can be changed unilaterally. In addition, it is very easy to impersonate another person online. CCLC submits that it is too easy for a debt collector to cause a debtor serious public humiliation and breach of their privacy by:

1. Sending debt collection demands to the wrong person; or
2. Sending debt collection demands that are effectively accessible by the public.

For this reason, the Guideline must state that:

1. Social media is often not private and there are real dangers of breaching the Privacy Act if debt collection demands are public;
2. Social media is diverse and includes people who impersonate other people. The debt collector needs to ensure that:
 - a) the debtor must be identified using a full range of information to ensure that contact is being made with the appropriate person; and
 - b) if the social media settings are mostly private it may not be possible to identify the debtor; and

3. Email is open to interception and viewing by anyone. This may be an acceptable risk for a consumer that distributes his or her personal email address, however work email is definitely open to be read by the management of an organisation. Many organisations track employee emails to manage risk. Accordingly, a debt collection email to an employee is not private and in addition, may lead to the employee/debtor losing their job. This is a serious detriment and it is important that the debtor consent to the use of communication through their work email.

CCLC currently has a case where a debtor has been sent a message via their Facebook account from a debt collector. In this case the message breaches several sections of the existing Debt Collection Guideline as the debtor entered into bankruptcy in relation to the unsecured debt being collected. The message also threatens a default listing of 5 or 7 years at Veda Advantage. The threat of default is also misleading as it appears the debt collector is threatening a clear-out listing on a debt the subject of a bankruptcy.

Our client was extremely upset by the threatening message received via Facebook. Our client is concerned that the message is not private. Our client feels humiliated.

The case studies provided are a useful addition to the guideline.

2. Contact for a reasonable purpose only

Paragraph c)

CCLC strongly supports this paragraph. It is harassment to continue to contact a debtor when they simply cannot pay.

We endorse the comments made by Consumer Action Law Centre regarding debts that have been on-sold after a consumer has requested no more contact due to inability to pay. Section C should be amended to note that initial contact may be unreasonable if the debtor has already made clear that they are unable to make payments towards the debt and their situation is unlikely to have changed.

Paragraph d)

The examples given are excellent.

3. What is 'contact'?

Paragraph d)

In our view, it is not possible for a debt collector to join a chat forum without breaching the debtor's privacy. An even larger risk is that the debtor may get confused about who is contacting them. This example should be deleted.

The remainder of the section is supported. It clarifies a number of issues and is very useful.

4. Hours of contact

This section is supported.

Paragraph c)

An extra dot point should be added to cover religion. In some religions the Sabbath is on a Saturday.

5. Frequency of contact

CCLC contends that three contacts from a debt collector in a week tires out debtors and wears them down. The amount of contact should be limited to twice a week only with maximum monthly contacts of eight.

CCLC also contends that face-to-face contact is so intimidating that it should be limited to once every 6 months. CCLC has received calls from consumers that have been alarmed and frightened by a knock on the door from a burly debt collector. Face-to-face contact should only be available when all other contact attempts have failed over the period of at least a month.

Other than the issues identified above the rest of section 5 is supported.

6. Location of contact

CCLC supports this section but notes that the section fails to cover telephone contact to a debtor at work. This is a major complaint by debtors who call CCLC.

CCLC has received a number of calls from debtors in the following situation:

1. The debtor is being contacted 3 times a week at work;
2. The debtor's supervisor is extremely annoyed by the contact;
3. The whole office knows the debtor is being pursued by a debt collector because it is open plan or a work site where the debtor is "paged";
4. The debtor is at risk of losing his or her job; and
5. The debtor feels embarrassed and humiliated.

Most offices are open plan and conversations are not private. The Guideline needs to specifically warn about contacting the debtor at work.

Some years ago, an employee of CCLC received debt collection calls a number of times over a few weeks. The calls disrupted the office and everyone knew it was debt collection because it was obvious. The employee was embarrassed and vital resources were taken up on answering calls when the debt collector could have called the debtor at home.

There needs to be a presumption that calls to a debtor's work should only occur after contact at home is not possible. The debtor should always be offered an opportunity to give an alternate number for the debt collector to call back at a more convenient time.

7. Face-to-face contact

Supported

8. Privacy obligations of the debtor and third parties

Supported

9. When a debtor is represented

CCLC is very concerned about the effect of c) 2nd bullet point (page 27 of the Draft Guideline). The following information has already been sent on this point in a separate submission to Agata Evans on 29 November 2013.

In preparing a response to the draft Guidelines, we have discovered a serious problem with one of the proposed changes. I refer to section 9 c) of the Draft Guideline. In particular, the second dot point.

That part sets minimum requirements for an authority to be used in dealing with debt collectors. CCLC was not consulted at all on this proposed change. This is a problem, because I am assuming that industry is now aware of this proposed change and this will make it difficult to “put the genie back in the bottle”.

CCLC has a strong preference that this section, c) bullet point 2) should be deleted entirely. Setting minimum requirements is problematic because there are always very reasonable exceptions to why information cannot be provided. This section sets up a situation where an authority would be rejected simply because certain information is not available. This will leave debtors exposed to further harassment.

It is my understanding that the vast majority of authorities in use by financial counsellors and consumer advocate solicitors in Australia would not meet the minimum requirements set out in the draft guideline. The financial counsellor authorisation form recently negotiated by FCA does not meet at least one requirement and exceptions have been negotiated on other requirements.

To explain some of the problems with the requirements:

- Full name, DOB and residential address

The CCLC authority only includes name and DOB. Residential address is a major problem in the case of homelessness and domestic violence situations. There are also other examples where the debtor cannot and/or should not provide their address.

- The name of the creditor, account/contract identity details

The CCLC authority provides the name of the creditor only and is meant to cover all debts with the creditor. I also need to add that debtors are more likely to have less information about a debt when they are dealing with a debt collector. The first contact is often a phone call and the debtor is often not provided (or does not have a pen handy) to write down the details of the debt claimed. Many debtors call CCLC knowing only that they are being harassed and the name of the debt collector. In that case the authority would be for the debtor to find out what debt the debt collector is claiming and the details.

- Full name, address and contact details of rep

Agree. This point should clarify that the representative is often the agency, CLC etc, rather than a specific person.

- The basis of the authorisation provided

I believe this would be satisfied on the basis that most authorities just say they are acting and that's it until advised otherwise. It is unclear whether this usual practice meets the requirement specified above.

- The verified signature of the debtor and the date

What is a verified signature? If you are saying that the signature must have a witness (being the representative) that is completely unworkable. In the case of telephone services like CCLC, many authorities are obtained from distant clients by mail and e-mail. Some of these clients are house-bound and even getting a signature witnessed by another person (rather than the service) would create an unfair and unnecessary hurdle. It is not an affidavit, it's just an authority to act!

As outlined above, we have significant problems with this section and would urgently like to discuss this further. We have also brought this up as an issue with other consumer advocates.

10. Record keeping

This section is supported and is clearly drafted.

11. Providing information and documents

Paragraph d)

The consumer is also entitled to copies of any assessment or preliminary assessment under the *NCCP Act*. We contend that the assessment also includes providing documents relied on in making the assessment.

CCLC has experienced a number of creditors demanding money for the provision of documents. One debt collector demanded \$50 per page, and an NCCP regulated creditor demanded \$7 per page.

We would seek some guidance or requirement in the Guide whether a debt collector can charge for the information and if so that the cost should be reasonable with some examples provided.

Additionally we endorse the comments made by the Consumer Action Law Centre regarding debt collectors attempting to collect debts but refusing to provide evidence to debtors demonstrating that the debt is owed. We endorse all of Consumer Action's recommendations in this section.

12. Consistent and appropriate correspondence

Supported

13. If liability is disputed

Paragraph i)

It should be noted in the first bullet point that the reiteration of the basis of the creditor's claim cannot be made repeatedly. It is reasonable to reiterate the basis of the claim once after the consumer formally denies liability, but it is harassment to do so more than once.

A large problem with ACMS in the past was that no matter what CCLC said or did in raising a dispute, ACMS just kept sending the debtor demand letters. This is harassment. Other debt collectors also do this.

In our experience, often the first contact a debtor has with a debt collector asking for their birthdate. Some guidance as to appropriate first contact in verifying a person's identity

would be useful for debtors and for debt collectors. Often debtors will refuse to provide the information believing that the call is a scam.

14. Repayment negotiations

Paragraph a)

This paragraph is strongly supported by CCLC. A major problem for debtors is that they are often pressured into repayment arrangements they cannot afford. This is a poor outcome for the debtor and the debt collector as the debtor defaults very quickly.

Paragraph g)

A very common problem in debt collection is pressuring debtors to make large up-front payments. Debtors are often told they need to get a loan and/or borrow from family or friends. This is still a common practice and unfortunately, the release of the Guideline does not seem to have slowed this practice.

Of further concern is that a number of debt collectors are closely involved with lenders or are also credit providers themselves. A major concern is that debtors may be:

- credit assisted into a loan by the debt collector;
- referred to a fringe lender; or
- referred to the debt collector's own loan company.

For example, Credit Corp is the largest debt collector in Australia. Credit Corp also operates as a credit provider under 3 different trading names:

1. Clean Cash: payday loans/small amount credit contracts;
2. Money Start: medium amount credit contracts/fringe lenders (very disturbingly similar name to ASIC's Money Smart); and
3. Car Start: car loans.

A real concern for CCLC is that Credit Corp will arrange or encourage debtors to obtain loans to pay their debts to Credit Corp from a Credit Corp loan company. This would be highly inappropriate.

An extra bullet point should be included under 14 (g) that states:

- Get a loan from a particular credit provider or the debt collector's own credit provider business to pay out a debt

Paragraph h)

CCLC has encountered some problems where a debtor believed they had negotiated a full and final settlement of the debt over the phone. Then when they paid the agreed amount, the debt collector claimed it was just a part payment.

The debtor should be able to request a copy of the agreed arrangement in writing before the agreed payment is made to ensure the parties are in agreement.

15. Contact when a payment arrangement is in place

Supported

16. Contact following bankruptcy or a Bankruptcy Act agreement

This section is supported.

The only issue is that debt collectors often threaten to (or actually do) list a default on a debtor's credit report when they know the debtor is bankrupt. This is inconsistent with the Privacy Act and is harassment. This issue should be covered in this section to clarify that point.

17. Conduct towards the debtor or their representatives

Supported

18. Conduct towards family members and other third parties

Supported

19. Representations about the consequences of non-payment

Supported

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

Supported

21. Legal action and procedures

Supported

22. Resolving debtor complaints and disputes

Supported

23. Compliance programs

Supported

24. The role of independent external dispute resolution schemes

Supported

The following comments refer to specific pages of the **Dealing with Debt Brochure** for consumers.

CCLC supports the publishing of a brochure for consumers on Dealing with Debt. Overall, the brochure is comprehensive and very clear. CCLC only has a few comments:

1. Page 6 Dealing with your debts

A common problem with debt collectors is that they won't agree to a repayment arrangement. In that situation, it is a good idea for the debtor to start making the repayments that they can afford while they continue to negotiate with the debt collector. The benefit here is that at least they are paying. In the alternative, the debt keeps getting bigger and bigger while they negotiate with the debt collector about a repayment arrangement. Although this issue is covered on page 12 it should be stated early on in the brochure.

2. Page 10 sample letter

The sample letter is out of date due to the change of the hardship provisions under the NCC. There is no requirement for the offered arrangement to be one of the three old options. In addition, as there is no restriction on the types of arrangements that can be made, the suggestions below are just common examples.

The letter should be changed to:

I request that:

1. Make repayments of \$_____ until the debt is repaid
2. Make repayments of \$_____ until ? and then make repayments of \$_____ until the debt is repaid

The paragraph on requesting and postponing should be deleted (again because the NCC has been changed). In addition, an outline of income and expenses is not necessary as the debt collector will send out a form to be completed. The last 3 paragraphs should be kept.

3. Disputing a debt on page 13

It should be made clear that a debt collector failing to agree to a hardship variation in relation to a loan under the NCCP can be challenged by going to EDR.

4. Are you being taken to court? On page 16

It is very poor advice to get a consumer to ask for a postponement of enforcement if they receive a summons or statement of claim. CCLC would never give this advice. CCLC would always advise the debtor to lodge in EDR. This acts as a postponement of enforcement. The proposed letter may not work.

CCLC strongly suggests this section is changed to recommend lodging in EDR before the summons/SOC time for response ends. Similarly, if the lender/debt collector is threatening repossession of goods then EDR is the best way to go.

This section is unclear and needs rewriting because two concepts are being confused – court action and repossession.

The sample letter should be deleted.

If the debtor is still threatened with repossession after lodging in EDR then they should urgently get legal advice.

5. Stature barred debts page 19

“confirmed the debt” in the 2nd paragraph should specify in writing.

There should also be a tip which states:

If it is over 6 years since you made a payment on the debt (and the debt collector/creditor has not obtained a judgment in Court) then do not make a payment on a debt until you get advice.

6. Harassment

CCLC suggests a sample page in the brochure for a diary so the debtor can record when they are contacted.

7. To find out more

AFCCRA is now Financial Counselling Australia

ITSA is now AFSA

Concluding Remarks

Thank you again for the opportunity to comment on the Debt Collection Guideline. If you have any questions or concerns regarding this submission please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216.



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