14 December 2011

**By email: debt.collection@justice.vic.gov.au**

Debt Collection Consultation
Consumer Affairs Victoria
Policy and Legislation Branch
GPO Box 123
Melbourne Vic 3001

Dear Sir or Madam

**Debt Collection Harmonisation Regulation Options Paper**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Debt Collection Harmonisation Regulation options paper (**the options paper**).

We are very supportive of the intent of harmonising debt collection regulation. However, we urge COAG to ensure that the process of harmonisation should not erode consumer protections that already exist in different jurisdictions. It is our view that harmonisation should raise all jurisdictions to best practice rather than to the lowest common denominator.

In brief, this submission argues that more stringent regulation of the debt collection industry is warranted. We have recommended that:

- all third party debt collectors be required to hold a debt collection license. Firms which already hold a credit license would automatically be licensed as a debt collector. However, other firms would need to be licensed under a separate act with similar licensing standards as apply to granting of credit licences;
- development of the harmonised scheme be informed by a comprehensive analysis of consumer protection provisions currently available under state regulation, and the final scheme include all consumer protections currently available in all jurisdictions;
- debt collector conduct be regulated by detailed statutory provisions, including sanctions for misconduct that are available to be imposed on the motion of either regulators or consumers;
- it be a requirement of granting a debt collection license that the licensee is a member of an external dispute resolution scheme, and that licensees have at least basic internal dispute resolution processes in place; and
- debt collectors be required to provide prescribed items of basic information at the beginning of the debt collection process, and to provide further available evidence about the debt within 30 days if requested.

Our comments are detailed more fully below.

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**About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

**The justification for stricter regulation of the debt collection industry**

As the options paper notes, a considerable number of reports have been written in the past documenting poor conduct by the debt collection industry. However, the options paper goes on to state that compliance by the industry has 'definitely improved' and cites statistics provided by the industry that only around one complaint from a debtor is received for every 9000 accounts under management.[1]

We do not agree that level of complaints are a good indicator of consumer detriment or trader misconduct. Further, it is our experience from the complaints to our service that the debt collection industry continues to cause a disproportionate amount of harm for consumers. As we will discuss below, it is an industry that is distinguished by poor conduct and stricter regulation not only warranted but required.

As noted above, the debt collection industry has claimed in the past that very few complaints are made against it, and by implication there is a low level of misconduct. However, the number of formal complaints made against a trader or industry is not always a good proxy for consumer dissatisfaction or detriment, particularly where consumers are disadvantaged or vulnerable. In 2006, Consumer Affairs Victoria reported that approximately 4 per cent of revealed consumer detriment is reported to it and smaller percentages are reported to other agencies, such as ombudsman.[2] There are many reasons for this, but the chief cause is that people are unaware of their rights and protections under the law. Even if they are aware of their rights, they do not know where to go for help or that free or affordable help even exists.

This is confirmed by the research conducted by Latitude Insights cited in the options paper[3] which found that large numbers of people who disagreed with the debts they were contacted about did not seek help. These proportions are even larger in people with three or more debts.

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[1] Page 8.
[2] Consumer Affairs Victoria, *Consumer detriment in Victoria: a survey of its nature, costs and implications*, October 2006, available at: http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/cav_report_consumer_detriment_10.pdf.
[3] See Appendix 2

Respondents to Latitude's survey who disputed the debt in question reported that they did not seek help because they:

- didn't know where to go for help (20.6%, or 31.9% of people with three or more debts);
- felt hopeless and that nothing could help them (15.5%, 22.2% of those with three or more debts);
- were embarrassed or ashamed (12.6%, or 23.6% of those with three or more debts);
- didn't want others to know they were in financial trouble (9.1%, or 22.2% of those with three or more debts); or
- were scared of ending up in more trouble (6.5%).[4]

Consumer Action's advice lines receive calls on a wide range of consumer topics, and a significant number of calls from consumers complaining about debt collection practices. Between January and November 2011, over 5% of the calls we received where the client named a particular trader, they named one of six major debt collection firms.

We don't suggest that all these matters involved unfair practices. However, based on a large sample of calls we examined in 2008, about one third of calls involving debt collection include an allegation of a practice which breaches the law or the ASIC/ACCC Debt Collection Guidelines. Notably, from time to time, we see that particular debt collectors may have significantly more, or significantly less, allegations of misconduct than others. This suggests that many of the practices are a result of poor practices within a particular business rather than simply a result of debt collection per se.

While most callers to our service will only receive advice, some matters are taken on as legal cases (meaning clients receive more intensive support over a longer time) after being assessed through a case intake process. It is illustrative that of the matters considered for legal practice intake in the six months to November this year (usually due to a potential systemic issue or detriment to a vulnerable consumer) 21% involved debt collection issues.

Running legal files enables us to examine the circumstances of the case in more detail, and we regularly see proof of debt collector misconduct. Some of this misconduct indicates recurring patterns of particular types of misconduct, suggesting the existence of systemic industry problems. Key conduct issues identified in our casework include:

- debt collectors ignoring communications from financial counsellors or lawyers (in some cases continuing to contact the client directly);
- repeated telephone calls in excess of what is allowed by the guidelines;
- misleading or deceptive conduct—for example threatening to take legal action or seize property when the collector doesn't have the right to do so; and
- contacting the debtor's workplace or contacting family or neighbours when the debtor has requested an alternative form of contact.

The Latitude research also found that many different types of misconduct were widespread. This includes serious conduct such as debt collectors telling consumers that they could go to jail if they do not pay the debt (reported by 20.5 per cent of respondents), or that they could be arrested by the police (21 per cent of responses).

[4] Pages 65-66.

Respondents also reported that communication received from debt collectors was misrepresented as being from a lawyer (28.2 per cent), and that misrepresentations were made that the creditor had a court judgement (13.5 per cent). Just over 20 per cent reported the debt collector had embarrassed them in front of family, friends or colleagues.[5]

While we believe that improved legislation and Guidelines has had a positive impact on some debt collection practices, the increase in debt collection activity means that poor systemic practices can have an impact on more consumers. The experience of Consumer Action and other community organisations indicates ongoing systemic problems in the debt collection industry.

This view is the basis for our position throughout the rest of this submission that the debt collection industry is characterised by unlawful and unfair conduct and that self regulation or 'light touch' regulation is an inappropriate approach. More stringent regulation is justified and indeed required.

**Licensing**

We support the intent of harmonising debt collection licensing requirements. We believe the licensing model should be designed based on the following two principles:

- All businesses that act as a third party debt collector should be required to hold a license;
- Standards of conduct for licensees and enforcement processes under a harmonised scheme should be equivalent to the highest regulatory standards under the current regime.

Our preferred model is similar to that proposed by option five in the discussion paper.[6] Under this model, firms that hold a credit license under the *National Consumer Credit Protection Act 2009* (**'the Credit Act'**) would automatically be licensed to work as a debt collector.

However, this model would also extend licensing requirements to other debt collectors by establishing a separate licensing act imposing similar requirements as the Credit Act. Firms that do not hold a credit license but wish to operate as a debt collector would need to hold a license under this separate act. This would apply to both debt collectors that act as an agent, and those that purchase debt ledgers and then collect on their own behalf.

As the options paper notes,[7] this model has a number of advantages. Most importantly, it will end licensing inconsistencies and close loopholes by ensuring that all third party debt collectors across Australia will be required to hold the same license.

By replicating the licensing standards of the Credit Act, our preferred model will also ensure that all third party debt collectors are members of an approved external dispute resolution (**EDR**) scheme. This is an important consumer protection. As well as providing consumers with a free

[5] See options paper pp 67-68.
[6] See page 38.
[7] Page 38.

and accessible dispute resolution process, it provides incentives for businesses to settle disputes internally.

In addition to the requirements under the Credit Act, the harmonised licensing requirements should not exclude general consumer protection law (for example the Australian Consumer Law) and should include consumer protection measures currently available under state regulation. For example, harmonised licensing provisions should adopt the prohibition of particular debt collection practices and remedies for humiliation or distress caused by prohibited practices under sections 94M and 93N of the Victorian *Fair Trading Act 1999*. We recommend that the harmonisation process be informed by a comprehensive analysis of consumer protection provisions currently available under state regulation.

The option of 'negative licensing' (which does not require debt collectors to be licensed, but could bar them from practice under some circumstances) is in our view unsatisfactory for this industry. A model which effectively allows anybody to practice and self regulate is simply not suitable for this industry—where the incentive for non-compliance can be significant, and can give one business an unfair advantage (at least in the short term). The ability to prohibit a trader from practicing if they engage in misconduct is on its own an inadequate protection. As discussed above, consumers may be unlikely to complain about misconduct for a number of reasons, meaning that it may go undetected. Even if one consumer complains, regulators may be reluctant to bar a trader from collecting debts unless they can establish a pattern of conduct—meaning multiple consumers would need to make complaints of similar misconduct before action was taken.

**Conduct**

Our preferred model of regulating conduct is through uniform statutory conduct requirements. These requirements need to be detailed enough to provide clarity for industry, consumers and regulators on what amounts to misconduct. Conduct provisions also need to include sanctions which are proportionate and available to be imposed on the motion of either regulators or consumers.

This position is informed by the history of misconduct in this industry and the nature of debt collection itself, which creates incentives for collectors to use harassment, intimidation and misleading conduct to prompt repayment. Given this backdrop, clear and detailed requirements are needed to send messages about what conduct will not be tolerated. Sanctions are also necessary to counter incentives to engage in misconduct and ensure that businesses cannot receive a competitive advantage by using illegal or unfair tactics.

As we have argued above, detailed and prescriptive conduct regulation is warranted for third party debt collectors. Options which rely on the industry to self regulate (such as voluntary codes of conduct, or conduct requirements that cannot impose sanctions) are inappropriate and will be ineffective. A voluntary code will not have any impact on the worst offenders (who will simply choose to not be bound by the code)[8] and any firms who do agree to be bound will not be subject to sanctions if they breach the code.

[8] As noted in the options paper, p 40.

If COAG does not favour the inclusion of detailed conduct requirements in legislation, an alternative may be to set out broad requirements in statute which are supported by detailed requirements in a mandatory industry code of conduct. In this model, compliance with the code would be a licensing requirement.

If this model were adopted, it will be important to ensure that responsibilities for code administration, review and enforcement lie with an independent body. As with our preferred option, failure to comply with the code must lead to effective sanctions.

The options paper argues that one disadvantage of a mandatory code could be to reduce incentives for debt collectors to join an industry body, adopt a voluntary code and thereby attempt to distinguish their business as one which subscribes to best practice.[9]

We disagree. In our view, a code (or statutory conduct requirements) will provide detail on good debt collection practice and ideally raise the industry standard to the requirements of the code, but will not prevent industry associations from setting a higher standard for their own members.

The options paper also raises concerns that a mandatory code could limit the discretion of collection agents in determining the most appropriate method for collecting a debt.[10] We strongly disagree that this is a genuine risk. The purpose of conduct requirements in either a code or legislation will be to set acceptable industry standards and forbid conduct which is illegal or unreasonable. There is no reason why a code should need to limit a collector's discretion to use legal, reasonable and responsible methods. A code will only limit the discretion of collectors to use methods which should not be being used.

**Complaint handling**

We strongly recommend that all debt collectors be required to become members of an EDR scheme as a condition of licensing. All debt collectors should also be required to have at least basic internal dispute resolution (**IDR**) processes in place. In addition to the justification described above for effective EDR processes, an EDR scheme can ensure a speedy and informal process when consumers contest their liability for a debt. While some providers who use third party debt collectors are members of EDR, some aren't—particularly smaller agencies.

In noting our view that debt collectors should be members of EDR schemes, we also draw attention to a gap that exists for consumers in the telecommunications sector. The Telecommunications Industry Ombudsman (**TIO**) cannot deal with complaints that are more than two years old. Some debt collectors collect telecommunications debt after two years, but before the statutory limitation period ends (generally six years). Consumers that are subject to such collection are unable to make a complaint to the TIO should they dispute liability for a debt.

Further, as the options paper notes, a weakness of IDR is that it is not an independent process. However, we are of the view that membership of an effective EDR scheme (which requires the trader to pay for the resolution service) will create an incentive to put in place effective IDR processes. It will still be necessary, however, to impose at least basic requirements including an

[9] Page 41.
[10] Pages 41-2.

obligation to make consumers aware of their rights to IDR and EDR, and that complaints to IDR receive a decision within a stated time limit. As suggested in the options paper, standards for IDR could be based on the Australian Standard for Complaints Handling.

IDR processes within a debt collection business present some challenges which exist less in other sectors. In almost all cases the firm's aim is to receive payment of the debt, and our experience suggests that it can be difficult for the firm to clearly separate this aim from that of resolving a dispute. For example, it is not unusual for complaints about inappropriate telephone calls or letters to receive a response which asks for a repayment plan. It is therefore likely that additional IDR standards will be required.

**Information standards**

We recommend that debt collectors be required to provide prescribed items of basic information at the beginning of the debt collection process, and to provide further available evidence about the debt within 30 days if requested.

As above, this additional prescription is clearly warranted. In Consumer Action's casework experience, it is not uncommon for debt collectors to fail to provide information about disputed debts when requested by consumers. This experience is supported by findings of Latitude Insights that in 37 per cent of cases involving a third party debt collector where the consumer requested further information, that information was never provided.[11] In 69 per cent of cases where the requested information was not provided, no sufficient explanation was given.[12]

It is extremely important to consumers that this information is made available, as it enables them to check whether the debt is in fact owed by them, whether pursuit of the debt is statute barred or whether they are otherwise immune, for example because of bankruptcy.

At minimum, we recommend debt collectors be required to provide the following information when they first make contact with the alleged debtor:

a) particulars of the debt;
b) particulars of the alleged debtor;
c) the identity of the debt collector;
d) information on standards of conduct applicable to the collector; and
e) rights and obligations of the consumer and where to call for advice or to make a complaint.

All of this information could be presented on a single sheet of paper and, despite the concerns noted in the options paper,[13] will not create an undue burden for debt collectors. All items on the list above are basic pieces of information which should be readily available to the debt collector. The final three points will be standard text that can be created once and reproduced on all information sheets. Points d) and e) could be prescribed text provided in legislation.

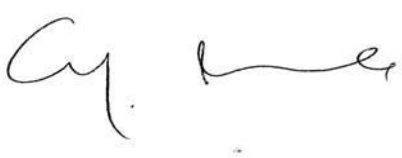
[11] Options paper, p 57.
[12] Options paper, p 58-59.
[13] Page 49.

In addition to making this basic information available, we recommend that debt collectors be obliged to provide additional available information within 30 days if requested by the alleged debtor. In our view, the most basic standards of professional conduct would require debt collectors to have documents on file that establish the particulars of the debt and identify the debtor. There is no reason why these documents should not be made available to the alleged debtor on request. It is a matter of procedural fairness that consumers in this situation be permitted to assess relevant evidence and, if they choose, to dispute the debt.

We do not share the concern of the options paper that there is any substantial risk that this requirement will be abused by consumers as a delaying tactic. The debt collector should have the relevant information available, and can choose to provide the information very early in the 30 day period if it chooses. To the extent that this causes any delay in the process, it is greatly outweighed by the right of consumers to assess the details of the claim made against them.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
**CONSUMER ACTION LAW CENTRE**



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