The Pursuit of the Impossible

Consumer Experience With External Collection of Retail Energy Debts

A case study report by the
Consumer Action Law Centre

June 2012

consumer action law centre

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Executive Summary

This report provides a snapshot of consumers' experience of debt collection practices in the Victorian retail energy sector. At a time of rising energy prices and increasing affordability problems for many consumers,[1] this report demonstrates the impact of some debt collection practices for consumers and their access to energy.

Governments and the community generally agree that energy is an essential service, necessary for the health and wellbeing of all citizens. Despite this recognition, especially as the price of energy increases, some consumers are unable to pay energy bills by the due date. Increasingly, consumers are incurring debts to energy retailers that run up to hundreds or thousands of dollars. Subsequent actions by energy retailers, including steps to disconnect, pursue debt collection and commence legal action, can mean that some households risk losing access to an energy supply. Losing access to energy, or the threat of such, is likely to have health and well being implications for consumers (Urbis 2010). This has been recognised in the new National Energy Retail Law which states that disconnection due to an inability to pay energy bills should be a last resort option.[2]

Energy debts referred to debt collection

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 also operates MoneyHelp, a not-for-profit financial counselling service to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

The ongoing demand for help from these services has prompted documentation, through case studies, of some of the debt collection practices of energy retailers. These case studies shed light on whether existing consumer protections, which are designed to ensure consumers maintain access to an essential service are sufficient, and whether they are being adequately enforced.

[1] Retail electricity prices have increased 40 per cent in the last three years and further sustained increases are likely for the rest of this decade (Australian Government 2011)
[2] National Energy Retail Law (South Australia) Act 2011 (SA), Schedule 1, Nat.ional Energy Retail Law, section 47.

Independent data confirms increased energy hardship and debt collection activity

Independent data demonstrates that energy costs are increasing and that debt levels, at least for a sub-set of consumers experiencing difficulty, is growing.

The Australian Bureau of Statistics (**ABS**) confirms that between 2007 and 2011, residential electricity prices increased by 35 per cent in real terms (ABS 2011). The Australian Energy Market Commission (**AEMC**) has forecast that electricity prices will continue to rise by 19% in real terms between 2009–2010 and 2012–2013 (AEMC 2011).

The Essential Services Commission (**ESC**) reports that the average debt on exit from a hardship program has increased from $518 to $815 across the years in 2008-09 in 2009-10, and the average debt on entry is actually less than the average debt on exit (ESC 2010). Mandated hardship policies are meant to assist consumers experiencing financial difficulty manage debts to energy companies. These results suggest therefore that there is scope for improvement in energy hardship policies and their implementation and/or that there is a group of consumers who do not have the capacity to pay for energy at present prices, even where hardship initiatives are applied. Given forecast price rises, this group can be expected to grow. The ESC also reports a very low proportion of customers participate in hardship programs (0.45 per cent).

The Energy and Water Ombudsman of Victoria's (**EWOV**) 2010/2011 annual report also states that hardship and debt collection complaints are rising (EWOV 2011a). From its overall case intake during 2010-11 of 54,289 complaints, over 8,000 complaints raised credit issues and 2,396 related to debt collection.

In 2011, EWOV also identified a systemic issue relating to debt collection from complaints made by consumers (EWOV 2011b). EWOV reported that a group of customers who changed retailers approximately two years ago recently received debt collection activity from their previous retailer with little or no interim contact. EWOV reports that it appeared the energy retailer followed a different arrears cycle for final billing that provided the affected customers little opportunity to address the arrears. However, the energy retailer advised EWOV that it had not changed its final bill collection process although it believed the collection agency may have updated its system which discovered existing debts. Debt collectors generally have six years to recover a debt.

Case studies

Through case studies sourced from Consumer Action's legal advice service and our MoneyHelp financial counselling service between October and December 2011, this report illustrates the experience of six (6) consumers who have been subject to recent debt collection practices of energy retailers

The case studies tell the experiences of:

- a 25 year old single parent threatened with repossession of her motor vehicle over an energy debt of $2,180, when it would not be able to be seized through court recovery processes;
- a 30 year old single mother whose small energy debt of $350 was referred to an outsourced debt collector without an affordable payment plan being offered by her energy retailer;
- a 75 year old aged pensioner whose "smoothed payment plan" resulted in debts of over $500 being referred to an external debt collector who sought additional costs;
- a 49 year old disability support pensioner who experienced severe distress from numerous missed calls and messages left on her mobile phone from a debt collector;
- a 69 year old aged pensioner who cancelled a door-to-door sales agreement within the cooling off period, but was then pursued for debt that she did not owe; and
- a 41 year old African refugee who incurred an energy debt that she could not afford, and was not referred to the energy retailer's hardship program.

Themes

The case studies identify a number of concerning practices by energy retail businesses and their debt collection agencies. Some represent poor practice and potential breaches of consumer laws. However, other practices are allowed within the current regulatory framework while still having harmful impacts on vulnerable and disadvantaged consumers.

While the number of case studies in this report is limited, debt collection practices, particularly those undertaken by large entities, are usually systematised which suggests that other consumers will have been subject to similar practices. In some circumstances, poor debt collection practices can represent the practices of an errant staff member rather than forming a general approach. Where this is so, it may still impact a number of consumers and can indicate weaknesses in training and compliance monitoring.

The case studies in this report demonstrate the following practices:

1. Leaving numerous telephone messages or missed calls on debtors' phones;
2. Seeking full payment of a debt, without considering whether the debtor has means to pay;
3. Pursuing debt from debtors where they are aware debtors' income is protected;
4. Misrepresenting the consequences of not paying a debt;
5. Referring debts to collectors without considering a debtor's capacity to pay or whether the debtor should be assisted through a hardship policy;
6. Seeking payment of costs in addition to the debt being recovered;
7. Seeking recovery of debt that is disputed or not owed; and
8. Referring to debts to external collectors quickly where the alleged debtor is no longer a customer of the retailer;
9. Debtors being able to transfer retailers despite having a significant debt with their current retailer, resulting in debt management being treated differently.

Recommendations

Based on these findings, the report makes the following recommendations:

1. That both general consumer and energy-specific regulators increase monitoring and enforcement activity relating to misconduct in the collection of energy debt;

2. That the National Energy Retail Law and the National Energy Retail Rules clarify that energy debts should not be referred to an outsourced debt collector until a retailer has offered the debtor a payment plan and participation in that retailer's hardship policy;

3. That the Australian Securities and Investment Commission **(ASIC)** and Australian Consumer and Competition Commission **(ACCC)** guideline on debt be amended to clarify what is meant by 'contact for a reasonable purpose'. For example, it appears that some debt collectors leave numerous 'missed calls' on debtors' mobile phones causing distress. It is unclear whether a missed call is a contact for the purpose of the guideline.

4. That energy retailers not refer debts to an external debt collector where they are aware that the debtor's sole source of income is social security;

5. That energy retailers be prohibited from imposing contractual terms that allow recovery of debt collection costs in energy contracts;

6. That the prohibition against certain debt collection practices in the *Australian Consumer Law and Fair Trading Act 2012* (Vic) be adopted nationally;

7. That energy ombudsman schemes be empowered to award compensation to energy consumers who have been subject to unfair debt collection practices;

8. That all debt collectors (or collectors of energy debts) be licensed, and for licensing to impose the conditions imposed on debt purchasers under the *National Consumer Credit Protection Act 2010* (Cth);

9. That the Federal Government set the threshold for which small debts can be listed on credit reports at at least $500; and

10. That governments, energy retailers and the community sector recommit to the "shared responsibility" model for dealing with energy hardship and take practical steps to define and implement this model.

Chapter overview

Chapter 1 outlines the existing consumer protections in relation to the collection of energy debts, including an overview of energy specific protections as well as general consumer protections.

Chapter 2 provides a brief insight into the way energy retailers pursue an energy debt or otherwise assign a debt to an external collector or debt-purchaser.

Chapter 3 details the case studies, which present the experience of several consumers as they encounter debt collection. The case studies also seek to paint a broader picture of the consumers' circumstances, including financial situation.

Chapter 4 summarises the main findings from the report, particularly drawing out consumer problems arising in the case studies.

The **Conclusion** provides a brief summary as well as makes the full recommendations.

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The views expressed in this document do not necessarily reflect the views of the Consumer Advocacy Panel or the Australian Energy Market Commission.

The case studies cited herein do not claim to be representative or of a statistically significant number. They are, however, the lived experience of six consumers who have approached Consumer Action for assistance, and represent a range of vulnerable and disadvantaged consumers across different geographic areas and retailers. Analysis of debt collection calls received by Consumer Action also suggests that the issues raised in the case studies are broadly representative where the same or similar issues are experienced by other callers.

1. Existing consumer protections in relation to collection of energy debts

Since the 1990s, there has been significant restructure of retail energy markets in Australia. In all states and territories, consumers deal with privatised or corporatised energy retailers which are currently licensed by state government regulators. In many states, retail energy is also contestable, meaning that consumers can choose to have their energy provided by a number of different retailers. It was planned that rather than being licensed in each state, energy retailers will be authorised by the Australian Energy Regulator (**AER**) (except in Western Australia and Northern Territory) from 1 July 2012 pursuant to the new National Energy Customer Framework (**NECF**). However, the NECF will only apply from that date in Tasmania and the Australian Capital Territory. Other jurisdictions (except Queensland which has yet to consider the matter) have stated that they remain committed to applying the NECF as soon as practical (SCER 2012).[3]

The creation of a competitive market for energy retailing has fundamentally changed the consumer-provider relationship. While energy is an essential service fundamental to individual and family wellbeing, energy providers operate as commercial entities. As such, they seek to recover debts from their customers in a commercial manner. Given this, governments have established consumer protections to temper the commercial recovery of debts and support consumers experiencing financial hardship maintain their connection with an essential service.

In particular, consumer protection regulations specifically recognise that a consumer should not be disconnected from supply for incapacity to pay alone.[4] This provision is a substantial recognition of the essential nature of energy services. However, as the case studies in this report suggest, there is a gap between the principle recognised in the law and its implementation and, therefore, consumer experience on the ground.

[3] NSW has indicated that it will defer applying the NECF until 2014 (Hartcher 2012), while Victoria has indicated that it has deferred applying the NECF 'to ensure there is no reduction in key protections for Victorian consumers' (O'Brien 2012).

[4] e.g. National Energy Retail Law (South Australia) Act 2011 (SA), Schedule 1, National Energy Retail Law, section 47, states that disconnection due to an inability to pay energy bills should be a last resort option.

1.1 Victorian energy regulation

Energy regulation across the national energy market (**NEM**) is in the process of becoming harmonised across participating jurisdictions.[5] However, in Victoria, energy retail provision is still regulated by the *Energy Industry Act 2000* (Vic) and the *Gas Industry Act 2001* (Vic). This legislation, together with the Energy Retail Code which is overseen by the ESC, provides a framework for how consumers who are experiencing financial hardship or are facing disconnection are to be treated by energy retailers. The regulations do not specifically deal with the way in which energy retailers recover debts from consumers, but rather place limitations on energy retailers' conduct.

The Energy Retail Code encourages consumers who are experiencing payment difficulties to contact their energy retailer. If a retailer is aware that a consumer is experiencing such difficulties or is facing disconnection, then it should tell the consumer about its hardship policy.

While participating in a retailer's hardship program or other instalment plans, a consumer's electricity and/or gas service (as the case may be) cannot be disconnected, and they should not be part of the usual cycle for debt collection and legal action. The law also provides that disconnection is a last resort for energy retailers—there are certain things a retailer must do before it can disconnect someone who is experiencing financial difficulty. There are also situations where the retailer cannot disconnect a consumer's supply, such as:

- if the consumer owes less than the amount set by the ESC;
- if the consumer has complained to EWOV, or another external dispute resolution body, about something directly related to the amount they owe and the complaint remains unresolved;
- if the consumer has formally applied for a Utility Relief Grant and a decision on this has not been made;
- if the only charge owing is for something other than the supply or sale of energy (e.g. for an appliance bought through the energy retailer);
- if the person is actively participating in the retailer's hardship program;
- for electricity—if the person's supply address is registered as having a life support machine;

[5] Participating jurisdictions in the NEM include Queensland, NSW, ACT, Victoria, South Australia and Tasmania.

- for gas—if the person's supply address is registered as a medical exemption supply address;
- after 2pm on a weekday;
- on a Friday, on a weekend, on a public holiday or on the day before a public holiday—unless the person asks for disconnection.

Retailers cannot commence legal proceedings for recovery of a debt while someone is making payments under an agreed payment arrangement (clause 11.4 of the Energy Retail Code). Further, a retailer cannot start legal proceedings for recovery of a debt unless and until it has assessed a consumer's capacity to pay, made available evidence about that assessment, offered the consumer an instalment plan, and provided information about concessions, utility relief grants and the availability of an independent financial counsellor (clause 11.2 of the Energy Retail Code). Retailers must also comply with guidelines on debt collection issued by the ACCC and ASIC (see section 1.3 below).

In some instances, consumers with an energy debt attempt to switch energy providers. As demonstrated in the case studies in this report, it is often the debts to previous retailers that are referred to outsourced debt collectors. If a consumer does switch from an energy provider, some of the protections in the Energy Retail Code will not apply (e.g., the protection from disconnection). Also, there is perhaps less incentive for retailers to treat the customer fairly, as there is no longer a business relationship between them and the consumer.

Electricity retailers do, however, have the ability to object to a customer transfer where a consumer has an outstanding debt of more than $200 (clause 5 of the Customer Transfer Code). Gas retailers can also object where a debt is greater than $100 and has been due and payable for greater than 40 business days (Gas Retail Market Procedures). If exercised by a retailer, such an objection can ensure that energy debt is dealt with through the framework provided for by the Energy Retail Code (and, in particular, the financial hardship policy of the relevant retailer), rather than risk being outsourced to a third party debt collector. This has not been replicated in the National Energy Retail Law.

1.2 New national energy regulation (National Energy Retail Law 2011)

In 2011, the National Energy Retail Law (**NERL**) was enacted by the South Australian parliament as lead legislator for the national energy laws. The NERL was due to come into force in each participating jurisdiction from 1 July 2012 to

replace jurisdictional retail energy regulations (including the Victorian energy regulations outlined above). However, as discussed above, this has been deferred for NSW, VIC and QLD. Other jurisdictions may follow.

As with the current Victorian laws, the NERL will only regulate debt collection minimally, providing limitations on the circumstances in which retailers can commence proceedings for the recovery of a debt, not the manner in which they must behave or the consequences for poor debt collection activity or misconduct.

Primarily, under section 51 of the NERL, retailers are obliged to ensure that debt collection activity does not commence where:

- the customer adheres to the terms of a payment plan or other agreed payment arrangement; or
- the retailer has failed to comply with the requirements of its customer hardship policy in relation to that customer.

The National Energy Retail Rules, made under the NERL to regulate the terms and conditions of energy consumer contracts, also require retailers to inform consumers of their hardship policy, establish a payment plan that has regard to a consumer's capacity to pay, and accept payment by Centrepay (Centrelink's direct debit facility) should this be requested by a consumer. The Rules also require the AER to determine hardship indicators. In April 2010, the AER released an issues paper outlining its proposed hardship indicators but did not propose that retailers report on debt collection activity.

1.3 Australian Consumer Law

The Australian Consumer Law (**ACL**) came into effect on 1 January 2011, harmonising the consumer protection provisions of the *Trade Practices Act 1974* (Cth) and much state fair trading legislation. The ACL is a schedule to the *Competition and Consumer Act 2010* (Cth) and has been enacted to apply as a law of each state and territory.

This ACL does not specifically deal with debt collection, but does include a prohibition against harassment and coercion (section 50) as well as a prohibition on misleading and deceptive conduct, or conduct that is likely to mislead or deceive (section 18). Both these provisions have been found to apply in a debt collection context. These provisions are replicated in the

Australia Securities and Investments Commission Act 2001(Cth) in relation to financial services (sections 12DA and 21DJ).

Undue harassment means unnecessary or excessive contact or communication with a person, to the point where that person feels intimidated, tired or demoralised. Coercion involves force (actual or threatened) that restricts another person's choice or freedom to act. Unlike harassment, there is no requirement for behaviour to be repetitive in order to amount to coercion.[6]

The prohibition against misleading and deceptive conduct applies widely across the economy. Examples of misleading and deceptive conduct in relation to debt collection include impersonating someone or using a false letterhead or document. Collectors may breach this prohibition even though they do not intend to mislead—it is enough that the misrepresentation is likely to have this effect on the type or class of person to whom the conduct is directed. In some circumstances, a collector may need to positively disclose information to avoid creating a misleading impression (see section 1.6 below).

The ACL is enforced by the ACCC as well as state fair trading agencies, while ASIC is responsible for dealing with consumer protection relating to financial services. As such, all of these agencies have a role to play in relation to debt collection practices.

The ACCC and ASIC have jointly published the guideline *Debt collection: your rights and responsibilities* which provides guidance to businesses and debt collectors about how they must act when recovering debts and to ensure they are not in breach of the prohibition against harassment and coercion.

Fundamentally, the guideline states that "communications with the debtor must always be for a reasonable purpose, and should only occur to the extent necessary". The guideline also provides guidance on when consumers can be contacted:

- a maximum of 3 phone calls or letters per week (or 10 per month);
- phone contact only between the hours of 7:30 am–9:00 pm on weekdays and 9:00 am–9:00 pm on weekends;
- face-to-face contact only between the hours of 9:00 am–9:00 pm on weekdays and weekends;
- no contact on national public holidays.

[6] *ACCC v Maritime Union of Australia* [2001] FCA 1549

The guideline describes a range of unacceptable behaviour by debt collectors, including:

- Extreme conduct—force, trespass, intimidation;
- Unreasonable conduct—harassment, verbal abuse, overbearing manner;
- False or misleading statements and/or conduct;
- Embarrassing or intimidating debtors through other people;
- Misleading or deceptive conduct; and
- Other unfair or unconscionable conduct.

1.4 State fair trading laws

State and territory offices of fair trading also have a role in regulating the activities of creditors/collectors under state fair trading acts in addition to the ACL. In all jurisdictions except Victoria and the Australian Capital Territory, debt collectors must be licensed. Licensing obligations vary considerably between jurisdictions and require collection agents to engage in a range of compliance and education activities. Objectives of licensing legislation include seeking to ensure that:

- debt collectors are of the good character required to perform the functions of debt collectors (licensing application);
- the standards of the industry are high by ensuring collectors know legislative and other requirements (education and training);
- creditors are protected from defalcation (trust accounts); and
- consumers are protected from certain practice (prohibited conduct provisions) (Consumer Affairs 2011).

The regulators that administer and enforce this regulation also vary from police to fair trading agencies, or a combination of both, depending on the State or Territory in question.

Victoria recently reformed its regulatory framework for debt collectors by abolishing its licensing scheme, and replacing it with a negative licensing system that sees any person who is convicted of engaging in coercion, physical violence or undue harassment under *Australian Consumer Law* or *Fair Trading Act 2012* (or a range of other legislation) automatically prohibited from acting as a debt collector. It also specifically prohibits a number of debt collection practices, including:

- entering or threatening to enter a private residence without lawful authority;
- refusing to leave a private residence or workplace when asked to do so;
- using a document that looks like an official document but is not;
- impersonating a government employee or agent;
- attempting or threatening to possess any property without lawful authority;
- disclosing or threatening to disclose debt information, without the debtor's consent, to any person who does not have a legitimate interest in the information;
- contacting a person by a method that the person has asked not to be used, unless there is no other method available;
- contacting a person about a debt after the person advises in writing that no further communication should be made about that debt, unless the contact is in relation to legal action or the threat of legal action; and
- communicating with a person in a manner that is unreasonable in its frequency, nature or content (section 45, *Australian Consumer Law and Fair Trading Act 2012*).

The regulator, CAV, can seek fines for breach of the prohibited debt collection practices and consumers can seek compensation of up to $10,000 for humiliation or distress as a result of a course of conduct in contravention of the prohibited debt collection activities (section 46, *Australian Consumer Law and Fair Trading Act 2012*). When introducing these provisions, the Minister stated:

> Allowing access to emotional distress damages for poor debt collection practices is not novel. Such damages have been commonplace in the United States for many years. Similarly, the United Kingdom has recognised damages for anxiety including distress arising from harassment by creditors and debt collectors... Such damages help to ensure that the costs of consumer detriment, so far as money can do it, are borne by those people who, through the use of unfair debt collection practices, cause the detriment (Robinson 2010).

Compensation pursuant to these provisions can be ordered after application to VCAT. While energy ombudsman such as EWOV can award compensation for humiliation or distress, this is generally only considered if a customer requests compensation and then as part of the overall resolution sought.

1.5 National credit legislation

In 2011, the *National Consumer Credit Protection Act 2010* (Cth) came into effect. This law provides for a licensing framework for credit providers. Under the law, any agency that collects or purchases a financial services debt must also be licensed under that law, or be registered as a 'credit representative' of a licensee.

The licenses impose a number of conditions on purchases of financial services debt who then may seek to collect that debt. These include membership of an independent external dispute resolution, minimum training requirements as well as a number of conduct provisions including a requirement to act honestly, efficiently and fairly. This framework does not apply to utilities or other non-financial services. Thus, for example, other than for debt collectors that collect financial services debt, there is no requirement on debt collectors to be members of an independent external dispute resolution service.

In an options paper looking at the harmonisation of debt collection regulation released in October 2011, CAV considered whether these conditions should be applied to debt collectors other than those collecting financial services debt, such as energy debt (CAV 2011). The outcomes of this consultation have not yet been published.

1.6 Low-income consumers—concept of 'judgment-proof debtor'

Social security legislation as well as legislation regulating the legal debt recovery process protects the income of certain low income debtors. These protections have led to the use of the term "judgment-proof debtor", which describes people who have no assets and low incomes from social security payments alone. They are “judgment proof” in the sense that there is little point in a creditor pursuing legal action against them, as there is no real likelihood that the debtor can pay—they need all their income just to pay food, rent and utilities.

In Victoria, people in this category have legislative protection from having judgment debts being enforced against them. Section 12 of the *Judgment Debt Recovery Act 1984* (Vic) provides that instalment orders shall not be made without the consent of the judgment debtor if the income of the judgment debtor is derived solely from a pension benefit allowance or other regular payment pursuant to social security legislation. Court rules also prohibit creditors

obtaining garnishee orders in relation to social security income.[7] Further, section 60(1) of the *Social Security Administration Act 1991* (Cth) provides that:

> A social security payment is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise.

In relation to assets, court rules provide that any property that cannot be seized from a bankrupt must not be seized or taken from a debtor under any process issued for the enforcement of a judgment for the recovery of a debt.[8] The *Bankruptcy Act 1966* (Cth) and regulations provides that general household property (e.g. household furniture, whitegoods, electronic equipment), tools of trade, and motor vehicles used as a means of transport (up to a value of around $7,000) cannot be obtained by creditors.[9]

While these provisions do not explicitly prevent a creditor from seeking to recover a debt from a relevant debtor, the practical outcome is that where the debtor's sole income is a social security benefit and there are no unprotected assets of value against which the judgment can be enforced, debt collection activity will be a hollow exercise from a creditor's point of view.

These protections work in tandem with the prohibited debt collection provisions of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) referred to above. These provisions state that a debt collector cannot continue to make contact with a debtor after it has received a written request for contact to stop—unless it is to issue legal proceedings or threatening to issue legal proceedings. This recognises that, if a creditor or debt collector wants to collect on a debt, they should use court processes rather than continually badger and wear down consumers through regular contact. The court process is far more appropriate as those who have no means to pay will be protected, and those that might have a defence can put that forward to an independent arbiter.

Importantly, creditors or debt collectors should be careful in these circumstances to ensure that they do not mislead the debtor into believing they must make a payment from a social security benefit. Should a creditor or debt

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[7] See, eg, order 72.01, *Magistrates' Court General Civil Procedure Rules 2010* (Vic).
[8] *Supreme Court Act 1986* (Vic), section 42. Order 68 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic) provides that the rules, practice and procedure of Supreme Court will apply to the Sheriff in exercising warrants to seize property issued out of the Magistrates' Court.
[9] *Bankruptcy Act 1966* (Cth), section 116(2)(b), (c) and (ca); *Bankruptcy Regulations*, r 6.03 ff.

collector suggest to, or direct, a social security recipient to make a payment without also pointing out that there is no obligation to do so while their sole source of income is a social security benefit (and the debtor has no other assets), such conduct might be regarded as misleading or unconscionable and not in compliance with ASIC/ACCC Guidelines.

1.7 Enforcement and role of regulators

The above laws and guidelines provide a robust framework for the collection of debts relating to energy. However, laws and guidelines of themselves are insufficient. Compliance and enforcement action by regulators can encourage improved practice among energy retailers and debt collectors.

Regulators have generally a wide range of powers to enforce regulatory frameworks, including gaining information, obtaining compensation for consumers and seeking court sanctions against non-compliant traders. Currently, compliance and regulation is the responsibility of the ESC, but the AER will assume responsibility with the implementation of the new national energy retail laws. CAV and the ACCC share responsibility for debt collection compliance and enforcement as it pertains to the ACL. CAV also have responsibility for compliance and enforcement for the debt collection provisions referred to in part 1.4 above.

This report is not aware of any recent court-related enforcement action having been undertaken by relevant regulators relating to energy debts. However, in its 2010/11 compliance report, the ESC did report on one debt collection matter relating to Simply Energy:

> The Commission received a complaint in June 2010 from a customer about a bill he received from a collection agency for a Gas Congestion Charge that he allegedly owed Simply Energy. In December 2007 the Commission found the charge was unjustified and Simply Energy's collection efforts at that time breached the Retail Code. The retailer advised that its debt collectors no longer sought payment from 574 customers.
>
> This time, the Commission again required Simply Energy to investigate and take the necessary corrective action to stop its collection agents. The retailer advised the problem was caused by an administrative error and failure to process a computer file. As a result, debt collectors again sought payment from 77 of its past customers. Simply Energy advised it reversed this debt collection

process, cancelled the alleged debts and contacted the individuals where possible to apologise and explain (ESC 2012).

In financial services, ASIC has commenced proceedings against one of Australia's largest debt collection groups in relation to their recovery practices. ASIC alleges that Accounts Control Management Services Pty Ltd and ACM Group Limited engaged in misleading or deceptive conduct and undue harassment or coercion while carrying on a debt collection business (ASIC 2011). This matter is still before the courts.

Enforcement activity, such as that taken by ASIC, can promote compliance among the sector generally. The case studies outlined in this report suggest there is an opportunity for increased enforcement to improve collection practices in the energy industry. Such action could focus on clear breaches of consumer or energy laws, such as misrepresenting the consequences of not paying a debt.

2. Debt collection by energy retailers

2.1 Collection by a retailer

Original creditors across all business sectors generally engage in activities to recover outstanding debts as part of their in-house credit management functions, before referring to external debt collection agencies.

Energy retailers tackle the issue of debt collection in a variety of ways. For current customers, debt collection and disconnection tend to be strongly linked. As noted above, the regulatory framework is quite prescriptive regarding the circumstances in which disconnection can occur. This tends to impact therefore, on the early stages of debt collection, and energy retailers generally proceed with reminder notices, disconnection warnings and ultimately disconnection, before a debt is referred to an external collection agency. In relation to debts owed by consumers who are not current customers, these tend to get referred to external debt collectors more readily.

Another important factor in the approach energy retailers take to pursuing a debt is whether or not a consumer is participating in a payment plan or hardship arrangement. As discussed in chapter 1, hardship policies are designed to provide affordable payment arrangements and additional support, and are to have regard for a consumer's capacity to pay.

Despite such obligations, as demonstrated by first, second, fourth, fifth and sixth case studies in this report, some consumer debts appear to be referred to debt collection without being offered an affordable payment plan. This is particularly the case where a consumer is no longer a customer of a retailer because they have switched to a new provider.

Industry data also raises questions about the effectiveness of hardship provisions. The ESC reports that in 2010 -11, only 24,122 consumers or 0.45 per cent of consumers participated in a retailers' hardship policy (ESC 2011). This amount fell by 3,803 down from 0.55 per cent from the previous year. This very low proportion of total customers raises questions about the visibility and effectiveness of retailers' hardship policies in reaching all those customers experiencing financial hardship.

Case studies one, two and four also outline situations where a payment plan is established, but insufficient regard is given to the consumer's capacity to pay, resulting in the arrangement failing.

All case studies demonstrate problems with capacity to pay. Industry data reflects similar problems. For example, the Essential Services Commission reports that the average debt for a customer exiting a financial hardship program is actually higher than when a customer enters the program (in 2010-11, average debt on exit was $732 compared to average debt on entry of $630) (ESC 2011). These figures have reversed from 2008-09, when the average debt on exit of a hardship program was less than the average debt on entry. While averages might not tell the full story, and it may be that some debts are increasing because consumers' capacity is less than the cost of their ongoing consumption, it certainly raises questions about whether hardship policies and payment arrangements are helping consumers manage and reduce their debt.

2.2 Use of debt collection agencies

The case studies in this report as well as industry data, suggest that energy retailers are commonly outsourcing debts to collectors. It appears that energy debts are generally referred to outsourced collectors on a contingent fee for service basis.

Consumer Affairs Victoria has reported that contingent fee services account for around 68 per cent of the out-sourced debt collection industry (CAV 2011) It also notes that creditors typically assign nonperforming accounts for debt collection after they have been deemed non-collectible, usually 90 to 180 days overdue.

The Australian Collectors and Debt Buyers Association (**ACDBA**), which claims to represent 70 per cent of the debt collection and purchasing industry, reports that at 30 June 2011, 973,905 files were under collection relating to utilities (ACDBA 2011). It is not clear the number of energy debts within this, or whether this includes telecommunication debts. However, the number is significant and growing from prior years. When extrapolated across the industry and to other sectors, the ACDBA estimates that Australian Collections sector was actioning in excess of $13.6 billion in debt represented by 5.47 million files.

The practices of some debt collection agencies continue to be a feature in complaints to agencies such as Consumer Action. Complaints relate not only to

utilities, but also to other services like credit, financial services and telecommunications. While some debt collection agencies have taken positive steps to improve practices, common complaints include:

- unreasonably persistent telephone calls from debt collectors;
- unreasonable or potentially misleading threats of the consequences of non-payment (e.g. seizing goods beyond lawful entitlement);
- continued contact of debtors who are "judgment proof";
- contacting third parties, such as neighbours, family or employers; and
- insufficient proof of a debt, or seeking payment from wrong debtor.

2.3 Assignment of debt

Some creditors also sell debts to debt purchasers, who then collect the debt as if it was their own. In this model, the creditor no longer has direct association with the money owned by the debtor, and the risk associated with non-collection is transferred to the collection agent. Generally, portfolios or tranches of debt as sold at deep discount from the total value of the accounts.

CAV (2011) states that the majority of purchased debts originate from credit card markets. This report does not suggest that this practice is widespread in relation to energy debts, but notes that it has occurred in other utility sectors such as telecommunications.

3. The case studies: consumer experience of energy debt collection

This chapter provides the case studies that form the basis of this report. The case studies are all sourced from consumers that have contacted Consumer Action's legal advice service or MoneyHelp financial counselling service for assistance. The case studies are based on instructions provided by consumers to Consumer Action lawyers or financial counsellors.

Consumer Action provides one-off telephone legal advice to around 3,000 Victorians per year, and provides ongoing legal advice and assistance to a proportion of those consumers. MoneyHelp, which provides telephone financial counselling services to Victorians experiencing financial difficulty, reaches over 6,000 consumers per annum and many more through its information website. The case studies presented here are generally reflective of the issues raised in the many calls relating to debt collection received by Consumer Action during 2010/2011 financial year.

The names of all consumers have been changed to protect their identity. However, the names of energy retailers have been included where documentary evidence about their involvement was obtained.

Case study 1: **Karina and TRU Energy**

Karina is a 25 year old single parent of two children living in a Victorian regional town. Karina's primary source of income is government income support through the single parenting allowance. Her annual income is less than $26,000 per year.

Karina held an electricity account with energy retailer **TRU Energy** and over three billing periods accrued a debt of $2,180. The three bills averaged around $700 per quarter, and appeared to be increasing.

Karina lives in a two bedroom flat with all electric appliances. She felt that the bills were high and several times queried with TRU Energy why this was and why they were increasing. Karina says that TRU Energy were unhelpful in their advice on how to address the high bills. However, as Karina was experiencing payment difficulties, they offered her a payment plan of $100 per week. Unfortunately, Karina could not afford such large weekly payments on a sustainable basis.

Karina again contacted TRU Energy, and a representative suggested a hardship program might be suitable. The representative said they would send out the appropriate forms including for a utility relief grant. Karina says she never received these forms and despite contacting TRU Energy again, was not provided assistance through a hardship program.

Disappointed with TRU Energy, Karina decided to switch energy providers to Neighbourhood Energy. After switching provider, Karina says her bills reduced significantly to approximately $300 per quarter, despite not making any substantial changes to her usage.

At the time of switching, Karina was in contact with TRU Energy. Karina says that TRU Energy were still unable to offer her a reasonable payment arrangement for her debt, and that they subsequently outsourced collection to an external debt collection agency.

The collection agency commenced contact with Karina through regular, weekly letters, demanding payment of the $2,180. Karina telephoned the collection agency to explain she couldn't pay the amount of $150 per week they were asking as it was not affordable. As Karina was unable to negotiate a payment arrangement she could afford, she left it. The letters from the collection agency continued for approximately 8 months, until she received a phone call from

them pursuing payment with, she reports, threats of repossession of her motor vehicle. Access to Karina's vehicle is necessary as she needs it to drive her two young children to school. The vehicle is old and worth approximately $2,000.

Very upset by this threat, Karina eventually sought advice from MoneyHelp. Karina discovered that she was considered 'judgment proof' and that the collection agency were not able to access her Centrelink payments, and that they must offer a payment arrangement that she could afford. Karina proposed a payment arrangement of $20 per fortnight and advised them that she was judgment proof. Karina says the collection agency were adamant that they couldn't accept payments lower than $100 per week, and that they were within their rights to demand a higher amount. The collection agency ultimately accepted a payment arrangement of $20 per fortnight.

Karina has been making fortnightly payments of $20 for a few months now—without missing a payment—and has reduced her amount owing by approximately $200.

Problems raised by case study:

1. The energy retailer did not adequately investigate Karina's claims of a high bill.

2. The energy retailer did not offer Karina a payment arrangement that was affordable to her, nor did it initially refer her to their financial hardship program, despite her obvious payment difficulties.

3. The debt collector required payments from Karina with no allowance to make payments in affordable amounts.

4. The debt collector threatened repossession of Karina's vehicle, when it would not be able to do so pursuant to enforcement of judgment processes (due to the vehicle's low value).

Case study 2: **Helen and Lumo Energy**

Helen is 30 year-old single parent, with a young family living in rural Victoria. She was working part time, around 30 hours a week, receiving an income of $50,000 per annum. Unfortunately, Helen lost her job in early 2011, meaning her income reduced significantly to around $27,000 per annum.

Helen had purchased her electricity from energy retailer **Victoria Electricity (now Lumo Energy).** After she lost her job, Helen had difficulty paying some of her bills including her mortgage, council rates, credit card and electricity bill.

Due to her financial difficulty, Helen was unable to pay a quarterly electricity bill of approximately $350. She contacted her energy retailer to seek an extension for payment as she wasn't able to pay within the normal payment cycle. Helen was offered time to pay, but was not offered a payment plan or access to a hardship program.

Despite being offered time to pay, Helen was unable to pay all of the bill and then received the next quarter's bill. In around June 2011, she switched providers to TRU energy. Since switching providers, Helen has not had ongoing payment difficulties.

However, Helen did have an unpaid debt to Lumo Energy. The energy retailer then outsourced Helen's debt to an external debt collector**.**

From October 2011, Helen says the collection agency telephoned her up to 6 times a day to seek payment for the debt. At this time, however, Helen had obtained some work and was not able to easily answer the phone while at work and some calls went unanswered. On one occasion when Helen was able to answer her phone at work, she found it difficult to understand the caller. Helen was convinced the call was coming from outside Australia.

Highly distressed about the calls she was receiving, Helen contacted MoneyHelp who advised her about her complaint options. Helen was also referred to a face-to-face financial counsellor to assist negotiate with the debt collector, and other creditors, as Helen felt unable to do this herself.

Helen offered the collection agency payment of $20 a fortnight, which her financial counsellor deemed affordable. Helen says the agency initially refused this arrangement as they wanted the full payment to be made over a shorter period of time. In the end, however, the collection agency accepted Helen's payment proposal, and Helen established a BPAY payment which

automatically deducted the correct amount.

Helen has since paid her debt in full and all contact with the collection agency has ceased.

Problems raised by case study:

1. The energy retailer did not offer Helen a payment arrangement that was affordable to her.
2. The energy retailer did not refer Helen to its financial hardship program, despite her notifying them of her payment difficulties.
3. The debt collector appears to have telephoned Helen (including through missed calls left on her phone) in excess of the amount of times allowed pursuant to the ACCC/ASIC debt collection guideline.
4. The debt collector required payments from Helen with no allowance to make payments in affordable amounts.

Case study 3: Gladys and Simply Energy

Gladys is a 75 year old aged pensioner living in Melbourne's west. Her total income, including additional supplements and benefits, is less than $26,000 per year.

Gladys purchased both her electricity and gas from Simply Energy. Given Gladys was a concession card-holder, she was entitled to claim the winter energy concession. In 2009, she contacted Simply Energy and arranged a "Smoothed Payment Plan". This was later called a Fixed Instalment Plan. A Smoothed Payment Plan involves a consumer making equal monthly payments based on the energy provider's estimate of total energy usage for a period of 12 months. At the end of the 12 months, the monthly payment is recalculated based on prior and future estimated usage.

In mid-2009, Gladys agreed to pay $120 for gas and $80 for electricity per month for a twelve month period. During this time, Gladys lived in a small house with her daughter and a friend, and their overall consumption was relatively low. Gladys would regularly contact Simply Energy to check whether her payments were covering her usage. On a number of occasions, she was advised that it was.

In March 2010, Gladys again contacted Simply Energy to ensure her payments were correct. At that time, she agreed to vary her payments to cover higher costs and agreed to a 12 month schedule of payments whereby she would pay $100 per month for electricity and $145 per month for gas.

In late 2010, Gladys moved house with her daughter. Prior to moving, Gladys provided Simply Energy with notice about the move. At this time, she was advised by a representative of Simply Energy that she had been provided the wrong information by other Simply Energy staff and that she owed an amount of $500 on top of her regular, monthly payments. Gladys was surprised that her account was in debt following assurances by Simply Energy that her payments were sufficient. Despite this, she settled the account.

Following this error, in April 2011, Gladys decided to switch provider to Energy Australia. Subsequent to this, in October 2011, she received three letters from a lawyer acting on behalf of a debt collection agency in relation to debt to Simple Energy. The letters requested she immediately repay outstanding debts of $224.20, $557.25 and $253.58 plus "our costs" of $71.50, $115.50 and $88

respectively. This amounted to a total of $1,310.03.

Concerned that she was not liable for these amounts and upset about threats in the letters relating to "further recovery action", Gladys sought advice from Consumer Action's telephone legal advice service. Gladys was advised to write to the lawyers requesting they provide proof of the basis for the debt, that she indicate that she was "judgment proof", and state that she is not required to pay the lawyer's costs unless a contract provided for that.

On 26 October, Gladys wrote to the lawyers disputing their demands and rejecting liability for the debt. She advised them she lived on an aged pension, that she rented accommodation and she had no assets. In early November, the lawyers sent her another letter of demand. Gladys subsequently re-sent her letter via registered mail, and contact with the lawyers subsequently ceased. Gladys has not received any assurance in writing that the debt is not owed.

Since moving to Energy Australia, and into a house which is as twice as big as her previous house, Gladys continues to pay instalments of $240 per month. After 9 months, she says that she is $500 in credit with Energy Australia.

Problems raised by case study:

1. A smoothed payment plan did not assist the consumer maintain connection.
2. The debt collector sought payment of costs in addition to the debt, without disclosing the basis on which these were claimed.
3. The debt collector sought full payment of a debt despite the retailer knowing that the consumer was a pensioner

Case study 4: **Sarah and an energy retailer***

Sarah is a 49 year old disability support pensioner. Her total income, including supplements, is less than $26,000 per year. Sarah's health is not good—she suffers from epilepsy (which she generally manages) and other conditions, and requires regular visits from a district nurse.

Sarah purchased both electricity and gas from an energy retailer*. Due to her low income, she experienced ongoing payment difficulties.

Over a period of two to three years, Sarah incurred a gas debt of $114 and electricity debt of $480. Sarah contacted the retailer and tried to establish a payment arrangement to overcome her payment difficulties. Sarah indicated to the retailer that she was only able to contribute $10 per fortnight. Sarah isn't sure whether she spoke with a hardship department, but the retailer representative refused her offer.

Some time later, Sarah's debt was outsourced to an external debt collector who commenced debt collection activity. This activity included persistent phone calls at various times of the day. Sarah received phone calls on the weekend, and due to her feeling of being harassed, did not answer her calls. Nevertheless, Sarah received up to fifteen messages on her phone—in some instances missed calls from unidentified numbers, and in other cases messages were left.

The collection agency also sent Sarah a number of letters threatening legal action over a period of around 12 months. Sarah was distressed by these letters and phone calls and contacted the Consumer Action telephone legal advice service for advice.

Sarah was assisted to send a letter to the debt collector and the retailer advising those companies of her financial status, particularly that her sole source of income was the disability support pension, and asking them to cease contact. This letter referred to the protections provided by the *Fair Trading Act 1999* (Vic). Sarah was also advised to make a complaint to the Energy and Water Ombudsman Victoria, noting that compensation for distress might be available to her.

Sarah reports that the level of contact by the debt collector caused her a high level of distress, and has contributed to deterioration of her epilepsy.

Problems raised by case study:

1. The energy retailer did not accept Sarah's offer of a payment plan based on capacity to pay, despite her advising them of payment difficulties.

2. The debt collector repeatedly contacted Sarah on the phone, leaving multiple missed calls and messages.

3. The debt collector threatened legal action over a long period of time, but did not appear to follow through with this threat.

4. At no stage did the debt collector advise Sarah that she would not have to make payments from a social security payment should it succeed in legal action against her.

* The energy retailer is not named pursuant to a settlement agreement.

Case study 5: Mischa and Lumo Energy

Mischa is 69 years old, lives alone, and receives the aged pension. With supplements and other pensions, she lives on an income less than $26,000 per year.

Mischa has always received her electricity and gas from the same energy retailer. In mid-2010, she was visited by a door-to-door salesperson representing **Lumo Energy**. The sales representative said that Mischa would be better off with this company. Mischa asked what were the consequences if she changed her mind, and was told it would just be a $20 fee. Mischa then agreed to sign the agreement.

Within a few days, Mischa regretted the purchase and sent the contract back to Lumo Energy with "CANCELLED" written across it. Despite this, Lumo Energy continued to charge Mischa for her energy and she received bills from them.

Mischa contacted Lumo Energy to tell them that she had cancelled the contract and that they shouldn't be billing her. She also contacted her initial immediately to confirm that they were supplying her electricity and gas as her retailer.

Lumo Energy continued to send Mischa further bills and invoices, which she believed were not payable. By this time Mischa was already receiving bills from her initial retailer for her usage which she paid. In December 2010, she paid one Lumo invoice by cheque in the amount of $247.90 under duress. However, she subsequently received further bills and invoices.

Some time later Lumo Energy referred a debt to an external debt collection agency, which subsequently began contact to recover $188.95 from Mischa. Over a period of a few months, the agency:

- telephoned Mischa numerous times;
- sent a letter threatening legal action if the debt remained unpaid;
- sent a field officer to Mischa's residence (less than 10 days after sending a letter threatening legal action).

Mischa contacted the Consumer Action telephone legal advice service about the letters threatening legal action, as the prospect of such action distressed her. Consumer Action assisted Mischa send a letter to Lumo Energy confirming that no money is owing, requesting that Lumo Energy refund her amounts paid,

and confirming that it has not listed a default on Mischa's credit file. Mischa's correspondence also asked Lumo Energy to inform the debt collection agency to no longer contact her.

Mischa informs us that she continues to receive contact from collection agency despite this correspondence, and that she will be making a complaint to the Energy and Water Ombudsman Victoria.

Problems raised by case study:

1. The energy retailer sent invoices for energy usage despite Mischa's cancellation of a contract within the cooling off period.
2. The debt collector sent letters demanding full payment with no suggestion of making payments in affordable amounts.
3. At no stage did the energy retailer suggest that a payment arrangement would be appropriate, before referring to a debt collector.
4. The debt collector sent a field officer to Mischa's residence uninvited, despite Mischa previously informing Lumo Energy that the debt was not owed.
5. The debt collector has continued to contact Mischa despite requests that it cease.

Case study 6: Tazi and TRU Energy

Tazi is a 41 year old mother with school aged children. She is of African background, having arrived in Australia as a refugee some years ago. Tazi's primary source of income is government income support due to a disability which prevents her from working. Her annual income is less than $26,000 per year.

Tazi had a gas account with energy retailer **TRU Energy.** In early 2011, she received a bill higher than usual of $259.97. Tazi contacted her retailer and explained her situation—in particular, she informed the TRU Energy of her income and expenditure, and that she was unable to pay the bill in full.

Tazi was at no stage offered to participate in a hardship program, or instalment arrangement to pay the outstanding amount. Tazi did not hear anything further from TRU Energy, so understood that she did not have to pay the bill.

The debt was later outsourced to a debt collection agency. Tazi was contacted by the agency by letter to instruct her that she must pay the outstanding amount, in full.

Tazi contacted MoneyHelp for assistance, and was referred to a face-to-face financial counsellor. Tazi says that she has now been able to establish a payment arrangement with the collection agency. If payments continue, she is not contacted by the collection agency.

Problems raised by case study:

1. The energy retailer did not offer Tazi a payment arrangement or refer her to their financial hardship policy, despite informing them of her situation.

2. The debt collector initially required Tazi to make payment in full, despite Tazi's income being protected.

4. Themes—analysis of case studies

Below is a summary of themes that appear in the case studies that raise particular problems for consumers who have experienced debt collection activity in relation to energy debt. Many of the examples represent poor industry behaviour and potential breaches of consumer laws, however some practices are allowed within the current framework while still having harmful impacts for vulnerable and disadvantaged consumers.

1. Debt collectors or creditors leaving numerous telephone messages or missed calls on debtors' phones

   Most debt collection activity considered in the context of this report appear to occur within the "reasonable contact times" outlined in the ASIC/ACCC guideline on debt collection. However, the frequency of contact by some debt collectors caused distress for debtors.

   The ASIC/ACCC guideline on debt collection recommends that collectors do not contact a debtor more than three times per week, or 10 times per month at most and *only when it is necessary to do so.* The guideline also states that unnecessary or unreasonable contact by SMS or telephone messages (whether left on a voicemail service, answering machine or with third party) must also be avoided.

   Some debt collectors appear to be interpreting 'contact' as not including missed calls or messages on mobile phones and we agree this issue is not conclusively dealt with in the Guidelines. Sarah's case study (number 4) suggests that the debt collector left up to fifteen messages on her phone within a short period of time. Given the significant stress reported by consumers who receive missed calls or messages from debt collectors, the guideline should be clearer on this point.

2. Debt collectors or creditors seeking full payment of a debt

   The framework for payment of energy is one that preferences small, regular repayments as a means of assisting those experiencing financial difficulty to remain connected to an essential service. For example, retail energy rules provide that where a consumer is identified as having difficulty paying a bill, then the retailer must provide the option of paying under a payment plan. Additional protections are also supposed to be available pursuant to mandated financial hardship policies.

The ASIC/ACCC guideline on debt collection also encourages creditors and collectors to adopt a flexible and realistic approach to repayment arrangements, including making reasonable allowances for ongoing living expenses. The guideline also states that it is unacceptable to pressure a debtor to pay in full or in unreasonably large instalments.

In nearly all case studies, external debt collectors initially made contact seeking payment of the full amount owing. Some letters from debt collectors stated "if payment is not received within 72 hours of this letter, further recovery action may be instituted against you for the recovery of the outstanding debt". The practice of seeking payment for full payment of a debt is not only unreasonable given the circumstances of most debtors, but also creates distress and anguish.

3. Debt collectors or creditors pursuing debt from debtors where they are aware debtors' income is protected

   As outlined in part 1.6 of this report, consumers whose sole source of income is social security and do not own any seizable assets are known as "judgment proof". This means that a creditor will be unlikely to be able to enforce a judgment against the debtor if they were successful in obtaining one through a court.

   In a number of the case studies outlined in this report, debt collectors sought payment from debtors who were "judgment proof". While of itself this is not against the law, it may be misleading or unconscionable if a creditor suggests that payment towards an aged debt must be made from a social security payment that is protected. In at least one case study (that of Gladys), it appears that the energy retailer referred a debt to an external debt collector even though it knew she was an aged pensioner as she provided her pension number when making repayments to access a concession rate.

   There are significant opportunities to improve practices in this area. Firstly, regulatory guidelines could clarify that it is not reasonable for a creditor or debt collector to regularly contact debtors who are 'judgment proof'. Secondly, given retailers are usually aware which customers receive Centrelink payments through the claiming of a concession, they should consider whether such customers are 'judgment proof' and whether it is appropriate to refer debts from such customers to external debt collectors.

4. Debt collectors or creditors misrepresenting the consequences of not paying a debt

   Creditors or debt collectors that misrepresent the consequences of not paying a debt risk breaching the ACL.

   Some of the case studies suggested that debt collectors misrepresent the consequence of not paying a debt as a means of encouraging payment. For example, Karina's case study (number 1) suggests that the debt collector threatened repossession of her vehicle if she did not pay the debt. This is despite the vehicle being below the threshold value at which it can be recovered through bankruptcy or court enforcement procedures.

   In other cases, debt collectors indicated that non-payment 'may not only incur additional costs and expense but affect your ability to obtain credit in the future'. It is not clear whether these debt collectors actually have the ability to list defaults on credit reports or on what basis they are seeking additional costs.

5. Energy retailers referring debts to collectors without considering a debtor's capacity to pay or whether the debtor should be assisted through a hardship policy

   National energy rules require energy retailers to offer payment plans that have regard to the consumer's capacity to pay any arrears owing and the consumer's expected energy consumption needs over the following 12 month period. The national energy retail law also prohibits the recovery of a debt where:

   - the consumer adheres to the terms of a payment plan or other agreed payment arrangement; or
   - the retailer has failed to comply with the requirements of its customer hardship policy in relation to that consumer.

   In nearly all case studies outlined in this report it appears referral was made to a debt collector without an appropriate assessment of capacity to pay or the offering of a payment plan. In the case of Karina (case study 1), the retailer offered a payment plan that Karina was unable to sustain.

6. Debt collectors seeking payment of costs in addition to the debt being recovered

In at least one case study (Gladys), the debt collector (a law firm) sought payment of its costs in addition to the debt owed to the energy retailer. The letters in question do not evince a basis upon which these costs are claimed. Where there is no contractual obligation to pay costs relating to debt recovery, these costs may not be payable and to seek payment might amount to misleading conduct.[10] The model terms and conditions for standard energy retail costs (Schedule 1 to the National Energy Retail Rules) does not provide a retailer with the right to seek debt recovery costs.

Even where there is a contractual entitlement to seek debt recovery costs, the letters from debt collectors fail to mention this. This is confusing for many recipients who are unaware the amount is claimed pursuant to a contract. To express an amount under a contract as 'legal costs' or 'our costs' means it is likely that a debtor will not consider checking the terms of their contract and ascertaining whether the costs are reasonable and lawfully claimed. It may also mislead consumers to believe that the 'costs' are payable pursuant to a separate legal obligation.

Such an approach may also mean that a debtor will think that they are unable to challenge the amount of costs (for example, by raising the issue in a complaint before an industry ombudsman) based on a belief that it is the debt collector/lawyer—not the energy retailer creditor client—who is claiming the costs. Such costs also appear to increase the amount owed which is unhelpful where a consumer is already in financial difficulty.

7. Debt collectors or creditors seeking recovery of debt which is disputed

The ASIC/ACCC guideline on debt collection states that creditors and debt collectors must not pursue a debt unless they have reasonable grounds for believing the person is liable for the debtor. A creditor or debt collector should also investigate claims that a debt is not owed.

[10] Noting that this collector was a law firm, legal ethics guidelines are also relevant. The Law Institute of Victoria's Letters of Demand Guidelines states: *A letter of demand should therefore not threaten the institution of legal proceedings if legal costs are not paid within a particular time.* See: <http://www.liv.asn.au/PDF/Practising/Ethics/2007GuideLettersDemand.aspx>

Mischa's case study (number 5) suggests that the energy retailer referred a debt to an outsourced collector despite her claims that the debt was not owed as she had cancelled within a contract within the cooling-off period.

8. Energy retailers commonly refer to debts to external collectors quickly where the alleged debtor is no longer a customer of the retailer

   In most of the case studies, the energy retailer referred the debt to a collector at the time or not long after the consumer changed or switched provider. This practice appears to deprive consumers of their rights pursuant to energy rules that provide for payment plans and access to hardship policies under national energy regulation.

   The National Energy Retail Law defines customer as a person to whom energy is sold for premises by a retailer or who proposes to purchase energy for premises from a retailer. This does not appear to exclude past customers. Further, the model contract for standard energy retail contracts states 'rights and obligations accrued before the end of this contract continue despite the end of the contract, including any obligations to pay amounts to us'. This means that rights such as access to payment plans and hardship policies should survive, even where a retailer refers a debt to an external collector.

   The practice of referring debts at the point a customer switches retailer also seems to reflect a less than active management of accounts and debts during the period where the debtor is the customer of the retailer.

9. Debtors being able to transfer retailers despite having a significant debt with their current retailer

   Energy market procedures provide the right for energy retailers to object to a transfer of a customer who has a debt to them. For example, the Victorian Electricity Transfer Code of Conduct provides energy retailers to object to a transfer where the customer has a debt of $200 or more. In relation to gas, the Gas Retail Market Procedures (regulated by the Australian Energy Market Operator) allow gas retailers to object to a transfer where the customer has a debt that is $100 or greater and has been due and payable for 40 days.

   While intended to protect the position of the energy retailer, these provisions can also operate to protect indebted consumers. If transfers are blocked in these circumstances, it is far more likely that a consumer will be

afforded a payment plan or access to a hardship policy, rather than have their debt referred to an external collector. These provisions may, however, impact on a consumer's ability to shop around and choose a more competitive retail offer.

5. Conclusion and recommendations

This report has provided case studies of six consumers who have been pursued by an external debt collection agency in relation to an energy debt. While there is a robust retail energy regulatory framework that aims to ensure consumers maintain access to an essential service, increasing numbers of energy debts appear to be referred to external collectors.

The case studies cited herein do not claim to be representative or of a statistically significant number. They are, however, the lived experience of six consumers who have approached Consumer Action for assistance, and represent a range of vulnerable and disadvantaged consumers across different geographic areas and retailers. Analysis of debt collection calls received by Consumer Action also suggests that the issues raised in the case studies are broadly representative where the same or similar issues are experienced by other callers.

The case studies outlined in this report demonstrate a range of consumer problems that occur when energy retailers refer debts to external collectors. On an interpersonal level, this can include distress, anguish and even exacerbation of health problems. Some debt collection practices can also result in consumers making payment under duress, redirecting social security income away from current consumption.

The nature of the competitive energy market—where consumers are able to switch between energy retailers—also causes problems. Many of the case studies outlined in this report demonstrate that where a consumer with a debt switches provider, their account is quickly referred to an external debt collector. This can effectively deprive a consumer from accessing various protections under energy consumer laws, such as access to payment plans and hardship policies.

This report makes several recommendations directed at Governments, industry and consumer agencies.

1. **That both general consumer and energy-specific regulators increase enforcement activity relating to misconduct in the collection of energy debt**

   Enforcement action can encourage improved practice among energy retailers and debt collectors. Such action could focus on clear breaches of consumer or energy laws, such as misrepresenting the consequences of not paying a debt.

2. **That the National Energy Retail Law and National Energy Retail Rules clarify that energy debts should not be referred to an outsourced debt collector until a retailer has offered the debtor a payment plan and participation in that retailer's hardship policy**

   The National Energy Retail Law and Rules already establishes a framework for repayment of energy bills that encourages payment plans and regular payments. This should apply equally to both current and former customers by specifically prohibiting outsourcing to external collectors before a consumer has been offered a payment plan or access to a hardship policy.

3. **That the ASIC/ACCC guideline on debt collection be amended to clarify what is meant by 'contact for a reasonable purpose'**

   The ASIC/ACCC guideline is now outdated and needs to be updated to take account of current debt collection practices. For example, it appears that some debt collectors leave numerous 'missed calls' on debtors' mobile phones causing distress. It is unclear whether a missed call is a contact for the purpose of the guideline. The guideline should also clarify that it is not reasonable for a creditor or debt collector to regularly contact debtors who are 'judgment proof'.

4. **That energy retailers not refer debts to an external collector where they are aware that the debtor's sole source of income is social security**

   Energy retailers are usually aware which of their customers have social security for income, as the consumer will have provided the retailer details of their concession entitlement. Many such consumers will be "judgment proof" and thus it will be a hollow exercise to use legal enforcement

measures to enforce the debt. Retailers should commit to supporting these customers "in house".

5. **That energy retailers be prohibited from imposing contractual terms that allow recovery of debt collection costs in energy contracts**

   The imposition of costs relating to debt collection further penalises consumers who have accrued energy debt. In Victoria, the government has banned late payment fees on energy accounts as this unduly impacts consumers experiencing payment difficulties. The imposition of debt recovery costs can have a similar impact of exacerbating payment difficulties.

6. **That the prohibited debt collection practices in the *Australian Consumer Law and Fair Trading Act 2012* (Vic) be adopted nationally**

   The prohibited debt collection provisions in Victorian legislation provide specific detail to what constitutes unlawful debt collection practices. These provisions set a best practice standard and should be adopted nationally.

7. **That energy ombudsman schemes be empowered to award compensation to energy consumers who have been subject to unfair debt collection practices**

   The debt collection provisions in Victoria legislation provide consumers with the opportunity to seek compensation for humiliation and distress where a creditor or debt collector has engaged in a course of conduct that contravenes the prohibited debt collection provisions. Energy ombudsman should have the power to award such compensation, being the predominant forum for complaints about energy.

8. **That all debt collectors be licensed, and for licensing to impose the conditions imposed on debt purchasers under the *National Consumer Credit Protection Act 2010 (Cth)***

   Licensing allows for the imposition of clear conduct standards on debt collectors. Licensing can also require debt collectors be members of external dispute resolution schemes, so that consumers have access to free and independent dispute resolution.

9. **That the Federal Government set the threshold for which small debts can be listed on credit reports at at least $500**

   In the Australian Law Reform Commission report, *For Your Information: Australian Privacy Law and Practice*, it recommended that new credit reporting regulation should provide that credit reporting agencies are not permitted to list overdue payments of less than a prescribed amount. An amount of $500 would ensure that small energy debts could not be listed on credit reports, limiting a consumer's access to credit.

10. **That governments, energy retailers and the community sector recommit to the "shared responsibility" model for dealing with energy hardship and take practical steps to define and implement this model**

    In spite of the development of a regulatory framework which prioritises consumers maintaining access to energy, energy hardship continues to grow. All stakeholders need to work cooperatively to address this growing and complex problem.

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