13 December 2013

By email

Mrs Agata Evans
Small Business Partnership & Education
Australian Competition & Consumer Commission
Level 24, 400 George Street, Brisbane, Queensland 4000

Dear Ms Evans

Review of the ACCC / ASIC Debt Collection Guideline

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the review of the ACCC / ASIC Debt Collection Guideline for Collectors and Creditors.

The revised draft Guideline is a significant improvement on the existing version, especially the recognition of the need for additional protections for low-income debtors. We have made suggestions for improvements to specific sections below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. 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.

What this guideline does (Part 1, page 7)

The section 'what this guideline does' could also note that creditors could require compliance with the guideline when they assign debts to another party, or enter into a contractual relationship for a third party to collect debts on their behalf.

Contact for reasonable purpose only (Part 2, section 2)

We welcome paragraph c) of section 2 and the attached example which states that it is not reasonable to contact a debtor who has no ability to make payments towards a debt.

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We assist some debtors to request collectors make no further contact on the basis that the debtor is unable to make payments towards the debt and has no income or assets that could be seized through legal proceedings. These debtors can find that their debt is then on-sold to other collectors who begin to make contact and the debtor has to repeat the process of requesting contact is ceased. This can happen many times over.

We recommend paragraph c) in section 2 be amended to also note that initial contact may be unreasonable if the debtor has already made clear that they are unable to make payments towards the debt and their situation is unlikely to have changed. This accords with the protection provided by section 45(2)(m) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) which prohibits a debt collector from contacting a debtor if the debtor has requested in writing that no further communication be made.

Section 10 (record keeping) and section 11 (provision of information) should also be amended to require collectors to properly record receipt of these kinds of debtor requests, and pass those records on to other collectors who subsequently buy the debt.

Attempted contact (Part 2, section 3)

We welcome the inclusion of guidance on attempted contact at paragraphs e) - g) of section 2. It is our experience that multiple attempted contacts can create just as much distress as actual contact.[1]

Hours of contact (Part 2, Section 4)

We welcome the more limited 'reasonable contact hours'.

Frequency of Contact (Part 2, Section 5)

The guidelines on what is a reasonable frequency of contact in paragraph c) of section 5 are a useful benchmark. However we find that some collectors misunderstand the meaning of this section and believe that (for example) three contacts per week are reasonable in all circumstances. The Guidelines are quite clear that the three per week / ten per month limit are to be read subject to the overriding principle that contact should only be made when it is reasonable to do so, but given the misunderstanding around this point it may be useful to reiterate it through other channels.

We recommend that when ACCC and ASIC engage with collectors on the Guideline they stress the key principle that contact may only be made for a reasonable purpose, and if there is no reasonable purpose then no contact should be made at all.

[1] See for example case study four in our report *The Pursuit of the Impossible: Consumer Experience with External Collection of Retail Energy Debts*, June 2012, http://consumeraction.org.au/the-pursuit-of-the-impossible-consumer-experience-with-external-collection-of-retail-energy-debts/

We also recommend that the discussion in section 5 on frequency of contact should also give guidance as to what is a reasonable frequency of attempted contact.

Privacy obligations (Part 2, Section 8)

Currently section 8 discusses current obligations under the *Privacy Act* (including mentioning the National Privacy Principles which are about to be replaced) before mentioning that the new Privacy regime will begin operating in March 2014. As the Guidelines are unlikely to be in place for very long before the new regime begins, we suggest removing references to the current law and simply mentioning content related to the new regime.

When a debtor is represented (Part 2, Section 9)

We strongly agree with the concerns raised by Consumer Credit Legal Centre NSW (CCLC) regarding Part 2, Section 9, paragraph c) which sets out requirements for an authority for a debtor's representative. These requirements seem to require far more detail than needed for compliance with the *Privacy Act 1988* and as such create an unnecessary barrier for consumers to access representation.

As recommended by CCLC, section c) should be removed from the revised guideline. Alternatively, ACCC and ASIC should meet with stakeholders representing credit providers, financial counsellors and community legal centres to develop a more realistic guideline.

Otherwise, we reiterate our support for the guidance on collector's obligations when a debtor is represented. Unfortunately many debtors still say that collectors continue to contact them even after they have given notice that a representative has been appointed.

Record keeping (Part 2, Section 10)

We welcome the guidance that collectors maintain accurate, complete and up to date records of contact with debtors. We recommend that the guidance also specifically require that these records of contact be provided to the debtor upon request.

Providing information and documents (Part 2, Section 11)

<u>Requirement to provide information</u>
At present, sections 10 and 11 together require that proof of the debt should be provided to debtors on request. However we think this should go further and should be put more bluntly.

Our legal practice reports recurring problems with collectors attempting to collect debts but refusing to provide evidence to debtors demonstrating that the debt is owed. When evidence is requested, collectors may respond by:

- stating that they do not have the documents and referring the debtor back to the original creditor (at which point the original creditor may then respond that the file has been closed and documents are no longer available);
- providing some documents but not enough to prove the existence of the debt; or
- simply claiming that 'we have reviewed the evidence and we are satisfied the debt is owed'.

This problem exists across all debt collectors and can happen with relatively recent debts as well as old ones.

Case study

Consumer Action began assisting the client in October 2011 with a dispute she had with a debt collector. The collector was attempting to collect three separate debts and the client instructed that the collector had been aggressive, intimidating and had contacted her with unreasonable frequency which caused her distress. Our client also instructed that the collector had contacted her family, neighbours and workplace even though it had her address and home phone number. By the time the client approached Consumer Action, a complaint had been lodged with the relevant external dispute resolution scheme.

The collector claimed that one of the debts, originally $500, had by October 2011 increased to over $2000. Our client was of the view that she did not owe that debt, or if she did, that it may now be statute barred. The collector disagreed on both points but had failed to provide documentary evidence.

In October 2011, the client requested that the collector provide the original contracts, an itemised breakdown of amounts outstanding and statements of payments for the accounts as evidence that the debt was owed and not statute barred. The collector failed to provide those documents and indeed had had still not provided them when the parties settled the dispute (waiving all three debts) in April 2012. During that time the collector had never given any reason for withholding those documents. It is notable that the collector managed to avoid providing these documents—which are clearly critical to determining whether our client was liable to pay the debt—even though the dispute resolution scheme had the power to require parties provide relevant information.

Dr Eve Bodsworth reported similar experience in *Like Juggling 27 Chainsaws: Understanding the experience of default judgement debtors in Victoria* found that

> in some instances there was a significant delay between the debt being incurred and contact from debt collectors (often not the original party) which created confusion and mistrust. Often these third party agents or debt purchasers were unable or unwilling to provide information to the debtor... Interviewees indicated that debt purchasers often did not have records regarding the origin of the debt—and several respondents were told by the original creditors that 'It's out of our hands' when contacting them for information.[2]

[2] At page 42-43.

As far as we are concerned it is unreasonable and indeed dishonest for a collector to attempt collection of a debt if they are not in possession of evidence that proves the debt exists or that the alleged debtor is the responsible party. Nor is it reasonable for a debtor to have to source documents which prove they are not liable for a debt when the collector has failed to establish their liability in the first place.

We recommend that the Guideline should clearly state at the beginning of section 11 that:

- if a debtor has reasonably requested proof that they owe an alleged debt, the collector should cease all contact (and enforcement action) until the information has been provided to the debtor;

- if the collector does not already possess proof of the debt, they must advise the debtor that the debt will not be pursued until the evidence is provided by the collector. Details about the debtor's right to make a complaint through internal and external processes should be provided at this point;

- there should be no buck-passing between collectors and the original creditor over who should provide the requested information. The party seeking to collect the debt is responsible for proving that it is entitled to collect; and

- it is misleading for a collector to initiate legal action if they do not possess documentary evidence that proves the debt exists and the alleged debtor is liable.

Agents and Assignees

We welcome the discussion of the different responsibilities of agents and assignees, particularly that assignees need to clearly explain to debtors why they are involved in collecting the debt. This is a source of confusion for clients.

Frequency of contact (Part 2, section 15)

Paragraph a) states the general principle that debtors and third parties should be free from excessive contact from collectors. The footnote attached to this point notes that paragraph 45(2)(m) of the *Australian Consumer Law and Fair Trading Act* prohibits a collector from continuing contact if the debtor requests in writing that contact cease.

We recommend that the content of the footnote should be included in the main text to make this point more forcefully. While the legislation cited only applies to Victoria, the principle behind 45(2)(m) is reasonable and should set a best practice standard across Australia. For completeness, the reference to paragraph 45(2)(m) should also note that a collector can continue to contact a debtor after receiving the written request if the contact is to inform the debtor of a legitimate threat to begin court proceedings.

Representations regarding statute-barred debt (Part 2, Section 20)

We have handled cases where collectors have enticed debtors to make small payments on very old debts which are almost at the point of being statute barred. This is used as a calculated technique to restart the six year window for collection in situations where the debtor is unaware that the debt will soon become statute barred. In our view it is likely to be misleading and unconscionable. A collector has six years in which to collect a debt since the date of last payment or acknowledgement of liability. A professional collector should not need to wait until this window is nearly closed before beginning collection.

We recommend section 20 be amended to include that collectors should seek to recover any amount of a debt which is nearing the end of the six year collection period without disclosing that the debt is uncollectable six years after the last acknowledgement of the debt.

Legal action and proceedings (Part 2, Section 21)

Paragraph c) of section 21 states that collectors should not represent that calls are recorded for 'training purposes' when they may also be used to collect evidence which may be later used against the debtor.

This paragraph should be expanded to require that collectors who record all calls to either:

- disclose that the recordings may be used as evidence; or
- advise debtors that they can elect to not have the call recorded.

Other broad comments

Victorian compensation provisions for debt collector harassment

We suggest the Guideline should mention that section 46 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) permits debtors to seek up to $10,000 of compensation for humiliation and distress caused by debt collection conduct. While this only applies in Victoria, it will raise awareness of this provision for collectors and debtors in Victoria.

Regulator engagement with collectors and creditors

It is our experience that particular parts of the Guideline are routinely ignored or misunderstood by creditors, for example:

- avoiding contact with debtors when they have made known that they have authorised a representative;
- failing to provide evidence that a debt is owed on request; and
- unreasonable frequency of contact.

It is also our experience that collection firms that are new to the market are more likely to misunderstand their obligations under the law, as described in the Guidelines.

We recommend that when ACCC and ASIC engage with collectors, they are proactive in discussing the guideline with new entrants and focus on reiterating points which collectors repeatedly fail to meet.

Dealing with Debt publication

We recommend the following changes to Dealing with Debt:

- Page 15 contains a 'Quick Tip' box including the following paragraph:

  > If legal proceedings have started but judgement has not been entered, and you have not taken any action beyond lodging a defence (or lodging a defence and counterclaim), you can still take your dispute to an external dispute resolution scheme.

  This is important information but it is worded in an overly legalistic way which will be hard for non-lawyers to understand. We suggest rephrasing to:

  > You may be able to take a complaint to an external dispute resolution scheme even if a creditor has started to take action against you in court. If the creditor has begun court action, contact the external dispute resolution service immediately for advice on whether they can hear your complaint.

- The 'Your legal rights and protections' section on page 20 should note that Victorian debtors are protected by the prohibited debt collection practices provisions at section 45 of the *Australian Consumer Law and Fair Trading Act 2012*, and can claim up to $10,000 damages for humiliation and distress under section 46.

- The section on page 28 'Getting a copy of your credit report' should clearly say that debtors can access a copy of their credit report for no charge. This is increasingly important as both Veda and Dun and Bradstreet fail to properly explain on their websites that they are obliged to provide free reports and 'credit repair' companies are using the promise of a free report to attract customers.

We understand that outdated information in Dealing with Debt will be corrected after revisions to the Guideline are complete. The following are points which reviewers should note when updating Dealing with Debt:

- References to AFCCRA should be updated to refer to Financial Counselling Australia;

- References to financial counselling should note the national financial counselling hotline: 1800 007 007.

- The contact times on page 8 will need to be updated if they are amended as proposed by the guideline;

- the sample letter requesting a hardship variation on page 10-11 needs to be updated to take account of the following changes to hardship provisions of the National Credit Code:

- debtors may no longer need to identify that their financial hardship is caused by either 'illness, unemployment or other reasonable cause'. For contracts entered since 1 March 2013, section 72 only requires that the debtor consider that they 'will be unable to meet his or her obligations';
- debtors may no longer need to specify one of the three types of variation listed on page 10. Section 72 no longer limits variations to those three types.
- the paragraph beginning 'I/We assume you will stay all enforcement action while you consider this application...' should be updated to reflect that in most cases a credit provider cannot continue enforcement action until they have properly responded to a hardship notice: s 89A.

- We have made comments above regarding obligations on collectors and creditors to provide proof of debt before continuing contact or enforcement action. If changes are made to those sections of the guideline, the paragraphs on page 10 under 'Disputing a Debt' will also need updating.

- The box 'Embarrassing or intimidating you through other people' should be updated to include references to social media.

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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