

20 June 2014

Michael McGarvie  
CEO Legal Services Board  
Legal Services Commissioner  
Level 10, 330 Collins St Melbourne VIC 3000

**Sent by Email** – [admin@lsb.vic.gov.au](mailto:admin@lsb.vic.gov.au)

Dear Mr McGarvie

## **Consultation on Victorian Solicitors' Conduct Rules**

We write in relation to the Legal Service Board's (**LSB**) current consultation on the Victorian Solicitors' Conduct Rules, which mirror the Australian Solicitors' Conduct Rules.<sup>1</sup>

### **1. About Consumer Action**

Consumer Action Legal Centre (**CALC**) is an independent, not-for-profit, campaign-focused casework and policy organisation. CALC 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.

### **2. Our relevant experience**

Our centre regularly assists debtors who are being pursued by lawyers or law firms acting on behalf of debt collectors or creditors seeking repayment of a debt. Our concern is that existing professional conduct rules do not adequately protect vulnerable debtors being pursued in such circumstances. The Victoria Legal Services Commissioner Debt Collection Round Table held in 2009 highlighted the serious problems associated with lawyers undertaking debt collection.<sup>1</sup>

Modern technology allows for the mass generation of legal letters of demand on a scale which is inconceivable to most lawyers. As discussed below, enforcement action was

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<sup>1</sup> Consumer Action sent a similar letter in response to the Law Council of Australia's (LCA) 2013 consultation with Legal Assistance Services Peak Bodies on the Australian Solicitors' Conduct Rules and Commentary

recently taken by the ACCC against lawyer Pippa Sampson. In that instance, the Federal Court heard that Pippa Sampson's firm was sending 20,000 letters and notices each month, or 240,000 letters over a 12 month period. Mass debt collection performed by solicitors on this scale has the potential to cause widespread detriment to consumers and broad reputational damage to the legal profession unless it is conducted with absolute probity.

It is our view that industry-specific rules, including professional conduct rules that apply to lawyers, should be designed to enhance standards required by general laws, bringing them from generic standards to higher standards. We are concerned that the existing professional conduct rules (both the Victorian *Professional Conduct and Practice Rules 2005* (the **Victorian Rules**) and the proposed Victorian Solicitors' Conduct Rules (the **VSCR**)) provide for standards that are in some respects lesser than that provided by the general law, particularly the Australian Consumer Law (**ACL**).<sup>ii</sup>

We have four main areas of concern:

- (i) the relationship between lawyers and debt collectors,
- (ii) solicitors claiming enforcement costs,
- (iii) misleading conduct in lawyer communications with third persons, and
- (iv) communication with another solicitor's client.

These are addressed below.

### **3. Relationship between lawyers and debt collectors**

Rule 29 of the Victorian Rules deals with the relationship between debt collectors and lawyers. It states:

#### 29. Debt Collection or Mercantile Agencies

29.1 A practitioner must not allow the practitioner's business name or stationery to be used by a debt collection, or mercantile agent in a manner that is likely to mislead the public

29.2 A practitioner who receives, from a debt collection or mercantile agent, instructions to act for a client creditor, must ensure that -

29.2.1 the practitioner's relationship to the agent is fully disclosed to the client;

29.2.2 the information required to be disclosed to the client by any relevant legislation and these rules is communicated to the client;

29.2.3 the practitioner maintains direct control and supervision of-

(i) any proceedings and

(ii) any correspondence or communication with the client and with the client's debtor to which correspondence or communication the practitioner is or purports to be a party on behalf of the client.

Consumer complaints to CALC demonstrate evidence of letters on law firm letterhead that appear to have been prepared by a mercantile agent, sometimes with a lack of any legal supervision. For example, it is not uncommon for our clients to receive correspondence that is printed on a legal practitioner's or law firm's letterhead containing the telephone number or email address of a debt collection agency. In our view, this practice may indicate a breach of rule 29.2.3(ii), a view that is also taken by the Victorian Legal Services Commissioner.<sup>iii</sup>

The recent disciplinary proceeding taken by the Victorian Legal Services Commissioner against Victoria Nomikos, being the first disciplinary proceeding to deal with rule 29, is a case in point.<sup>iv</sup> After the Tribunal ordered the legal practitioner pay \$25,000, the Commissioner stated that "handing over a letterhead template and allowing a debt collection agency to write a payment demand on it without vetting every letter fell short of what is expected of a lawyer".<sup>v</sup>

In our view, given the capacity of mass debt collection lawyers to cause widespread detriment to consumers and damage to the reputation of the profession, the VSCR should deal expressly with what constitutes a permissible relationship between a lawyer and mercantile agent. The VSCR should also deal with and the level of care and conduct a lawyer must demonstrate with respect to a file where literally thousands of matters are being handled simultaneously. This could be addressed by adopting a rule similar to Victorian Rule 29 into the VSCR.

#### **4. Claims for costs**

In addition, in our view, VSCR could provide guidance about the practice of demanding or requesting additional costs or charges from consumer debtors. In our experience, lawyers or law firms that act on behalf of debt collectors or mercantile agents regularly seek payment of additional costs on top of the initial debt. In some instances, letters of demand refer to trading terms which allow the creditor to recover costs relating to collecting a debt, however it is not clear that the lawyer or law firm had considered such terms closely and the extent that they actually allow recovery of costs.

It is not uncommon for letters of demand to include "debt collection commission" equating to a significant proportion of the total small debt (e.g., \$250 commission on a \$450 debt) as well as "legal costs" which can also be significant. These costs can add up to more than double the amount of a small debt. In our view, terms of contracts which allow for recovery of collection costs must be fair and reasonable. If such terms are imbalanced, or not reasonably necessary to protect the interests of the creditor (for example, by permitting recovery of costs exceeding the real costs associated with collecting the debt), they may be unfair terms and thus void under the Australian Consumer Law.<sup>vi</sup> While the Victorian Legal Services Commissioner's fact sheet on debt collection suggests that overcharging may constitute professional misconduct, and that lawyers' costs should be fair and reasonable, it is our view that these principles could be

more clearly articulated in professional rules, thereby bringing about an enhanced standard of conduct.

We ask that the LSB consider adopting a rule similar to rule 29 of the Victorian Rules, and consider extending it to consider the question of costs in these circumstances.

## **5. Misleading conduct in lawyer communications with third persons**

Rule 28 of the Victorian Rules and rule 34 of the VSCR regulate communications with other persons, such as consumer debtors. Rule 28 of the Victorian Rules states:

### 28. Communications

A practitioner must not, in any communication with another person on behalf of a client:

28.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or

28.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client;

Rule 34 of the VSRC states:

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;

34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

These rules can be contrasted with section 18 of the ACL, which prohibits, in trade or commerce, misleading and deceptive conduct, as well as conduct likely to mislead and deceive. The definition of "trade or commerce" in section 2 of the ACL includes "any business or professional activity"—in our view, the ACL thus applies to the activities of lawyers.<sup>vii</sup>

ACL Section 18 covers a very wide range of conduct. It can include lying, making false or inaccurate claims, leading to the wrong conclusion, or inaccurate claims. Case law suggests that the overall impression is what matters, and the court will consider whether the conduct is likely to lead a significant number of people to whom it is directed into error, or has the tendency to deceive such persons. In contrast, the professional rules

above create a very high threshold. For example, rule 28 of the Victorian Rules and VSCR 34.1.1 appears to allow a lawyer or law firm to engage in conduct which is likely to mislead a debtor but falls short of being grossly excessive.

The Federal Court decision of *Australian Competition & Consumer Commission v Sampson*<sup>viii</sup> demonstrates the breadth of the ACL. The conduct of Sampson (partner in law firm Goddard Elliot) was initially investigated after a complaint was made to ACCC by Central Australian Aboriginal Legal Service. The agreed facts were that Sampson and Goddard Elliot acted as a mercantile agent on behalf of a number of video stores. Goddard Elliot sent numerous letters and notices to debtors of video stores since at least April 2002, including approximately 20,000 letters and notices each month in the 12 months preceding the ACCC action. The Federal Court declared that Sampson acted in breach of section 52 of the *Trade Practices Act 1974* (the predecessor to section 18 of the ACL), including by sending letters marked 'urgent notice' which represented that:

- the lawyer's video rental client was necessarily entitled to recover lawyer's costs of a certain amount;
- if legal action was taken then this would necessarily result in additional costs associated with legal proceedings, even though the video retail client would have no entitlement to recover legal costs if they were unsuccessful, and even if successful, costs would not necessarily be ordered in a proceeding issued for the recovery of a small debt

There were other examples of misleading conduct including representing that Goddard Elliot could itself enforce a judgment by a warrant, garnishee order and/or attachment of earnings, when of course it could not do so without instructions from the client, and then an enforcement order from a court; and issuing a document 'notice of intention to commence legal proceedings' which was similar in format to a court document, but in fact was not a court document.

While this conduct was in breach of section 18 of the ACL, it is not clear that it would necessarily 'grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client'. This may mean that legal services regulators would not necessarily investigate such conduct, despite it being in breach of consumer laws.

As noted above, it is our view that professional rules should seek to enhance general standards. In this case, we think that the professional rules should at least require an equivalent standard as general consumer laws. We ask that the LSB consider amending the relevant rules to ensure that they include a general prohibition on misleading or deceptive conduct, or conduct likely to mislead or deceive.

## **6. Communication with another solicitor's client**

Rule 33 of the VSCR prevents a solicitor from dealing directly with the client of another solicitor, save for limited circumstances, as follows:

33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:

33.1.1 the other practitioner has previously consented;

33.1.2 the solicitor believes on reasonable grounds that:

- (i) the circumstances are so urgent as to require the solicitor to do so; and
- (ii) the dealing would not be unfair to the opponent's client;

33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or

33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.

This rule is problematic for CLCs and their clients in civil disputes against legally represented providers of financial, insurance or investment services, local councils, utilities, or debt collection agencies.

In many cases liability is not in issue, and the legal assistance the consumer needs is negotiating about hardship and capacity to pay. The 'no contact rule' is problematic for three reasons;

- (i) As noted above, correspondence on the lawyer's letterhead may contain the telephone number or email address of a debt collection agency. It is apparent that the law firm is a clearing house for the debt collector, and it would be fruitless (if possible) to contact the law firm, which is unlikely to hold specific instructions.
- (ii) The service provider may be subject regulations and statutes which require them to attempt alternative or internal dispute resolution. Our clients are entitled to the benefit of those processes, and CLCs need to be able to communicate directly with the company/provider in order to access and progress their submissions. Contact with the debt collection solicitor often frustrates or precludes this.
- (iii) Thirdly, it is crucial that we avoid our clients incurring unnecessary costs, particularly since CLCs assist low income and disadvantaged clients. We have found that any contact with the debt collection solicitor adds significantly to the debt.

For example: A CLC acts for a person who is having mortgage difficulties. The bank has retained a solicitor to recover the debt/arrears. The CLC ideally needs to contact the financial hardship team at the bank to negotiate repayment. Contacting the debt collection solicitor will simply add to the debt and will be ineffective since that solicitor is not receiving instructions from the financial hardship team but from a different section of the bank.

The exceptions to in rules 33.1.1-33.1.4 do not sufficiently address the situations outlined above. Consumer Action recommends changes to the VSCR to accommodate these circumstances,

## 7. Contact

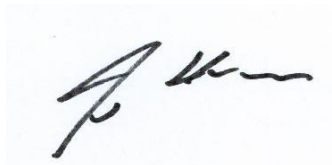
Please contact us on 03 9670 5088 or at [gerard@consumeraction.org.au](mailto:gerard@consumeraction.org.au) or [gregor@consumeraction.org.au](mailto:gregor@consumeraction.org.au) if you would like to discuss these matters further.

Yours sincerely

### CONSUMER ACTION LAW CENTRE



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CEO



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<sup>i</sup> Victorian Legal Services Commissioner, Summary of the 2009 Debt Collection Round Table convened by the Legal Services Commissioner of Victoria, available at: [http://lsc.vic.gov.au/documents/LSC\\_DebtCollectionSummary.pdf](http://lsc.vic.gov.au/documents/LSC_DebtCollectionSummary.pdf)

<sup>ii</sup> Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

<sup>iii</sup> Victorian Legal Services Commissioner, Fact Sheet—Issues in Complaints about Debt Collection, available at: [http://www.lsc.vic.gov.au/documents/Debt\\_collection\\_fact\\_sheet\(Oct\\_12\).pdf](http://www.lsc.vic.gov.au/documents/Debt_collection_fact_sheet(Oct_12).pdf)

<sup>iv</sup> Legal Services Commissioner v Nomikos (Legal Practice) [2014] VCAT 251 (12 March 2014).

<sup>v</sup> Legal Services Commissioner, Media Release: Large fine, reprimand for debt collection lawyer's conduct, 13 March 2014, available at: [http://www.lsc.vic.gov.au/documents/2014-03-13\\_MR\\_Large\\_fine\\_reprimand\\_for\\_debt\\_collection\\_lawyers\\_conduct.pdf](http://www.lsc.vic.gov.au/documents/2014-03-13_MR_Large_fine_reprimand_for_debt_collection_lawyers_conduct.pdf)

<sup>vi</sup> Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

<sup>vii</sup> Queensland Legal Services Commissioner, Regulatory Guide 2—The Application of the Australian Consumer Law to lawyers, available at:

[http://www.lsc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0009/137808/Regulatory-Guide-2-ACL.pdf](http://www.lsc.qld.gov.au/__data/assets/pdf_file/0009/137808/Regulatory-Guide-2-ACL.pdf)

<sup>viii</sup> [2011] FCA 1165