Consumer Affairs Victoria

# Debt Collection Harmonisation Regulation

## Options Paper

Consumer Affairs Victoria, October 2011

DEPARTMENT OF JUSTICE

State Government Victoria

Consumer Affairs Victoria
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## Contents

# 1. Executive Summary

## 1.1 Purpose

The purpose of this paper is to discuss the regulatory framework for debt collection and to present for comment several options for its harmonisation. The paper is written in the context of the Ministerial Council on Consumer Affairs' (MCCA)[1] objectives that aim to:

- develop an understanding of the new model for credit regulation and what it means for debt collection regulation, by December 2011
- develop consistent regulation for debt collection having regard to new models for credit and the National Occupational Licensing System, by December 2012.

As part of these objectives, reduced consumer detriment and resolution of jurisdictional inconsistencies within the current legislative framework will also be considered. [2]

## 1.2 Background

In 2008, the Council of Australian Governments (COAG) agreed to pursue wide-ranging regulatory reform in order to increase Australia's productivity and provide the environment for a seamless national economy. COAG found that Australia's productivity was hampered by regulatory duplication and inconsistency, which compromised economic competitiveness and required reform.

In particular, fair trading and consumer credit laws were targeted to ensure a harmonised regulatory framework with seamless laws and enhanced consumer protection provisions.

Late in 2009, it was agreed that regulation of debt collection would be placed on MCCA's forward agenda, with the aim of minimising the regulatory overlap between the regulation and licensing of debt collectors and the regulation of debt collection currently administered by the states and territories, and the new national consumer credit regime. It was agreed that Victoria would lead this project and release a paper discussing these issues on behalf of MCCA.

## 1.3 Industry landscape

The debt collection industry has changed significantly over the past ten years. The impact of technology on debt collection practices, industry consolidation, regulatory developments and increased government usage of debt collection services have moved the debt collection environment towards professionalism and specialisation in service delivery.[3]

The debt collection industry can be distinguished by two types of collection servicing; 'in-house' debt collection and 'out-sourced' debt collection.[4] In-house collection is collection of debts by the original creditor, that is, 'in-house', while out-sourced collection

[1] Soon to be named COAG Legislative and Governance Forum on Consumer Affairs (CAF).

[2] Court enforcement of a debt through state and territory civil procedures is out of scope for this national harmonisation project.

[3] Some businesses specialise in call centre collections, others in field calls, repossessions, skip tracing and other related debt collection functions. These would include phone calls to clients, site visits, repossession of goods and holding of client funds.

[4] It has been reported that consumer debt in Australia – mortgages, credit cards and personal loans for example – now exceeds more than the Australian economy earns in a year. That is $1.2 trillion or approximately $56 thousand for every Australian man, woman or child. See Barnes, Terry (2010) 'Consumption at all costs', in The Age, 13 January.

involves a third party, such as an agent or debt buyer.

The two main areas of out-sourced collection are the credit and financial service industry (74 per cent) and utilities industry (13 per cent, which includes telecommunications companies).[5]

Third-party debt collectors collect debts across a range of industries and on behalf of a range of creditors including credit providers, utility companies and local government. This is called contingent debt collection. Contingent debt collectors are typically paid either a flat fee for pursuing overdue accounts, or a commission based on the amount of money recovered.

A debt collector may also purchase a debt outright. Debt buyers purchase the debt at a discount, making a profit if the amount recovered exceeds the purchase price of the debt and the cost of collection. Debt purchasing is increasing within the industry.[6]

The out-sourcing industry is increasingly dominated by a small number of large companies. These include Dun & Bradstreet, Collection House and Credit Corp Group Limited. In addition to these larger companies, the industry has a large number of small collection agencies, many of whom are sole traders. Technology has facilitated delivery of services across multiple jurisdictions without the need for a physical presence in each jurisdiction. However, ambiguity exists as to whether a licence is required for each jurisdiction.

The process of debt collection has evolved due to corporatisation and increased professionalism in the industry. Debt collection itself is generally no different whether the collector owns the debt or is acting as a third party, however, two distinct 'specialisations' have emerged within the industry. They are debt collection-debt purchasing functions (characterised by high volume telephone based activity), which incorporates the bulk of the industry, and field call-repossession and process service functions (characterised by low volume activity in the 'field').[7]

A wide range of entities not required to be licensed also participate in the industry. Participants not required to have a specific debt collection licence include banks, other finance companies, legal practitioners, accountants and businesses that collect their own debts in-house.

The industry is represented by a range of industry associations that promote professional and ethical conduct, however, membership is voluntary.

### 1.4 Inter-jurisdictional inconsistency

The regulatory framework for debt collection in Australia is complex, inconsistent and occurs on a number of levels. This is a consequence of shifts in the objectives of regulation over time (such as the general re-orientation from anti-fraud provisions and the protection of creditors to consumer protection provisions) and the subsequent differences between state and territory regulation, as well as the range of instruments currently used for regulation. This has created a 'patchwork' of debt collection regulation.

The 'patchwork' can be separated into three groups that overlap depending on the industry of debt collection activity. They are:

- general regulation, which applies to all debt collectors and includes state, territory and Commonwealth fair trading legislation and licensing legislation

[5] That market generates approximately $1.6 billion of revenue. See IBIS (2010) Debt Collection at a Glance, Melbourne: IBIS, p 11.

[6] Ibid p 12. Importantly, once the debt is sold to the debt buyer consumers may lose some protections (such as those under codes of conduct or membership to dispute resolution schemes) imposed by specific legislation such as telecommunications regulation, unless the debt buyer has independently agreed to conform to the obligations (and joined an industry body for example).

[7] ACDBA (2011) *Australian Collections Industry* Snapshot, April, p 3.

such as the Australian Consumer Law (ACL)

- credit industry specific regulation, which includes the *National Consumer Credit Protection Act 2009* (the 'National Credit Act'), other relevant state, territory and Commonwealth legislation, such as privacy or credit reporting legislation ( which is out of scope for this project), and specific codes of conduct
- other regulation, which includes the ACCC-ASIC Guidelines for Debt Collection[8] and regulation associated with telecommunications, energy and water suppliers.[9]

Legislative inconsistencies and overlap lead to a range of problems and associated costs for both consumers and industry. For example, collectors collecting debts interstate are required to adhere to different licensing arrangements, some more prescriptive than others. Collectors are also required to adhere to a range of different regulations depending on the requirements of the industry where the debt has arisen, which can make it more difficult to comply.

## 1.5 Consumer protection within the current regulatory framework

Over the last two decades, a large volume of qualitative data has built up that reflects a potential for a lack of compliance with consumer protection laws by the debt collection industry.[10] While compliance has definitely improved over this time, misconduct by some debt collectors, most notably third party debt collectors, has continued. Instances of harassment and coercion, and misleading and deceptive conduct, as well as the lack of effective dispute resolution mechanisms have continually been raised anecdotally by consumers and bodies representing consumers.

There is also national quantitative data that supports the anecdotal evidence, and highlights that there are a range of exacerbating factors that contribute to debt disputes, such as misinformation and educational issues. This research also highlighted that a large proportion of debt collectors engaged in practices that, according to consumers, did not comply with the ACCC-ASIC Guidelines for Debt Collectors. See Appendix 2 for further detail.

When analysing this research, however, it is important to recognise the emotional nature of debt complaints that may exasperate the collection process and contribute to complaints, as well as the level of complaints relative to the large amount of debt collection that occurs throughout Australia.[11]

Indeed, education for consumers and collectors early on in the debt collection process, which outlines their debt responsibilities, the avenues for help that are available to them and the sensitivities involved, may help reduce the number of consumers who find themselves

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[8] Industry has made clear that due to the range of inconsistencies with the current regulatory framework and the collection of inter-jurisdictional debt, the ACCC-ASIC Guidelines are frequently used as the core instrument guiding their behaviour. See for example, ACDBA (2009) *Submission to the National Consumer Credit Protection Bill 2009*, May, NSW: ACDBA.

[9] This includes a range of Codes of Conduct and dispute resolution requirements.

[10] See for example:

- Australian Law Reform Commission (1987) *Debt Recovery and Insolvency*, Report No. 36, Canberra: Australian Government Publishing Service
- ACCC (1999) *Undue Harassment and Coercion in Debt Collection*, May: Canberra: ACCC
- Consumer Credit Legal Centre (CCLC) (NSW) (2004) *Report in Relation to Debt Collection*, April, NSW: CCLC
- ACCC-ASIC, *Debt Collection Practices in Australia, Summary of Stakeholder Consultation*, ACCC, Commonwealth of Australia, May 2009
- Latitude Insights (2010) Debt *Collection Regulation Harmonisation Research: Final Report*, Melbourne: Latitude Insights, contained in Appendix 2.

[11] For example, industry statistics suggest that despite a high volume of contacts (over 60 million p.a.), reported complaints (considered to be any matter relating to professional conduct) against the industry amount to one debtor complaint per 9000 accounts under management, representing less than 0.0001 per cent of total contacts p.a.. See Australian Collectors Association (ACA) (2008) *Submission to Consumer Affairs Legislation Modernisation Consultation: Private Agents Act 1966*, November, Newcastle: ACA, p 8.

pursued by a debt collector late in the collection process.

## 1.6 The suitability of the national credit model

One objective of this paper is to develop an understanding of the new model for credit and what it means for debt collection regulation. The main reforms under the National Credit Act are that debt buyers must hold an Australian Credit Licence and have the same requirements imposed upon them as 'credit providers'.[12] These are:

- minimum training requirements with adequate financial and human resources to meet their obligations
- enhanced standards of conduct including a requirement to act honestly, efficiently and fairly, and to properly train and supervise people who act on their behalf
- mandatory membership of an external dispute resolution (EDR) scheme.

ASIC has the power to take prompt action Australia-wide to cancel or suspend a licence or ban people from engaging in credit activities.

The National Credit Act applies to persons who undertake 'credit activities', which includes both in-house and out-sourced debt collection, but only in the context of debts arising out of consumer credit.

Research has shown that there is a lack of understanding amongst consumers about their responsibilities with credit and repaying debt.[13] Indeed, the very nature of credit, including credit education and financial literacy (and the processing of that information), is a complex environment for vulnerable and disadvantaged consumers.[14] Because of these complexities it has been subject to specific regulation.

In the context of consumer credit, the National Credit Act would provide a solid legislative platform for any new regulation of debt collection. In particular, its focus on minimum training requirements, enhanced standards of conduct and mandatory membership of an EDR scheme would help alleviate many of the consumer problems highlighted by the recent research.

However, the National Credit Act does not regulate debt collection outside consumer credit contracts, and the increased EDR and training requirements may duplicate existing industry practice (for example, with respect to utility debts) as well as impact upon the efficient collection of debts.[15]

Currently, regulations made under the National Credit Act exempt certain persons engaging in debt collection activities (such as those already licensed or authorised under specific state debt collector legislation) from the requirement to hold a licence, but does not apply to debt collectors collecting assigned debts. This exemption means that these debt collectors are not subject to their state or territory licensing obligations as well as those under the credit framework.

## 1.7 The role of the National Occupational Licensing System

Another objective of this paper is to include consideration of the National Occupational Licensing System (NOLS)[16] in the development

[12] See Appendix 3 for more detail.

[13] Schetzer, L (2007) *Drowning in Debt: The experiences of people who seek assistance from financial counsellors,* December, Melbourne: Department of Justice, pp 38-42; AND Pleasence et al (2007) *A Helping Hand: The Impact of Debt Advice on People's Lives*, March, United Kingdom: Legal Services Research Centre and Department for Constitutional Affairs.

[14] Consumer Affairs Victoria (2004) *Discussion Paper: What do we mean by 'vulnerable' and 'disadvantaged' consumers?* Melbourne: CAV, p 14.

[15] The Latitude Insights research report stated that approximately 40 per cent of the 1200 respondents interviewed throughout Australia reported having a debt relating to consumer credit. Therefore, this would potentially leave over 60 per cent of the industry to other regulation.

[16] The NOLS timeframe of delivery (July 2012 for Phase 1 of the scheme and July 2013 for Phase 2) is not consistent with the timeframes for this project (to be completed in December 2012), and

of the harmonisation of debt collection project.[17] NOLS is being developed to remove licensing inconsistencies across state and territory borders and to provide for a more mobile workforce.

Under NOLS, licence holders will be able to perform work in any state or territory with a single national licence. NOLS aims to provide a framework that reduces red tape and improves business efficiency and the competitiveness and productivity of the national economy. For example, harmonisation of the debt collection licence under NOLS could reduce the regulatory burden on the industry by minimising legislative inconsistencies and reducing inter-jurisdictional anomalies.

Further, national licensing will provide greater security for consumers because qualification requirements, if they are deemed suitable, could become streamlined. There may also be increased productivity because debt collectors would be able to work across Australian jurisdictions under one consistent licensing system.

However, there are a number of difficulties with NOLS eligibility criteria, and there may be limited benefit if debt collection were included in the scheme. For example, occupations that are currently included in NOLS are those that contain many classes or sub-classes of licence in each jurisdiction, such as builders, property agents and electricians. The large number of these classes and sub-classes compound restrictions on mobility and competition, and consequently has a considerable impact on the Australian economy. Licensing of debt collectors does not exhibit these kinds of problems.

NOLS eligibility criteria also strictly involve licensing, which offers no variation to other regulatory tools, which may be more suitable in the context of debt collection regulation. Further, a suitable licensing framework has already been established under the National Credit Act that could readily be applied to debt collectors, and debt buyers who also engage in debt collection for fee or reward will already be covered by these credit licensing requirements.

Harmonisation of the debt collection licence will reduce burden within the industry and provide some legislative clarity for its participants by eliminating overlap, but for the reasons outlined above it is not clear whether the benefits would be of the scale of the occupations that are already included in NOLS.

## 1.8 Options for harmonisation

For the purposes of the debt collection regulation harmonisation project, it is necessary to present several options for consultation. Respondents are asked to comment on and justify which option(s) they prefer. Part 4 of this paper details and discusses on the options.

### 1.8.1 Licensing options

**Status quo**

The status quo would see the existing licensing regulation of debt collectors continue without change.

**Remove the exemption**

This option would remove the exemption for third-party collectors from the National Credit Act and would apply the requirements of that Act (such as mandatory EDR, training requirements and enhanced standards of conduct) to third-party collectors who collect debts, though only in the context of consumer credit. Collection of debts not covered by the National Credit Act would still require those debt collectors to hold separate licences, which would duplicate regulation.

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its work program is already taken up with other occupations. However, once work on the harmonisation of debt collection regulation is completed, it could become part of NOLS after that date.

[17] MCCA (2009) Ministerial Council on Consumer Affairs: *A New Approach to Consumer* Policy, Strategy 2010-2012, p 11.

**Use the NOLS model**

NOLS would be extended to include debt collectors under this option. Licensees would be able to undertake their business in any state or territory that is participating in NOLS. This option will provide an established framework that aims to reduce red tape and promote a seamless economy.

**Mandatory exclusion requirements**

As in Victoria, mandatory exclusionary requirements would allow anybody to operate as a debt collector unless they are excluded from the industry by particular criteria and not permitted to practise. This could occur where conduct provisions are breached. Mandatory exclusion requirements are a more targeted, less restrictive and less costly form of regulation compared to positive licensing for example.

**Licensing via the national credit act or a specific national licensing act**

This option would use state legislation to apply the National Credit Act to all debt collectors, or alternatively impose consistent positive licensing on debt collectors as part of a specific licensing act. This act could impose similar conditions to the National Credit Act, and would provide the opportunity to develop a specific Act exclusively for debt collectors.

### 1.8.2 Conduct options

**Status quo**

Under this option, the existing regulatory framework for the conduct of debt collectors would continue notwithstanding any harmonised licensing framework. Collection agents would continue to be subject to the range of consumer protection provisions found in the Australian Consumer Law, the ASIC Act and the ACCC-ASIC Guidelines for Debt Collectors.

**Non-prescribed industry code of conduct**

A voluntary industry code of conduct is a 'light-touch' form of regulation that sets out specific standards of conduct on how an industry will deal with its customers. Collectors would voluntarily agree to uphold these standards by signing up to the code. However, given the availability of voluntary membership to industry bodies (and the standards they impose on their members) a voluntary code may not increase standards for the industry.

**Prescribed industry code of conduct**

This option would impose a mandatory code of conduct for collectors. The main benefit of a code is that it outlines specific prohibitions or conduct that must be followed. Industry uses the ACCC-ASIC Debt Collection Guidelines as their core instrument for guidance on conduct. These guidelines outline particular prohibitions in accordance with relevant legislation, and would provide a suitable model for a code of conduct. The main disadvantage of this option is that mandatory codes of practice can be highly prescriptive, limiting debt collector discretion with respect to the most appropriate course of action in the circumstances when collecting a debt.

**Legislative provisions**

This option would see legislative provisions that regulate conduct introduced either into exclusive debt collection legislation or as a new part inserted into existing state and territory debt collector legislation. Legislative provisions contained in an Act would have a similar effect to a code, and contain similar content, though codes do not generally have monetary penalties attached for non-compliance.

### 1.8.3 Trust accounting options

**Status quo**

Under this option, debt collectors would be required to maintain trust accounts, as they already do in most states and territories. This would ensure that money recovered for clients is kept separate from money paid to the business for its services.

**Require disclosure of trust account details**

Under this option, while a debt collector would not be required to operate a trust account, they would be required to disclose to clients whether they operate a trust account, and, if they do not have a trust account, to explain the potential consequences of this. This option would lower compliance costs for collection agents, giving them discretion as to whether or not they maintain a trust account.

**Abolish trust account requirements**

This option would see the removal of trust account requirements. Instead, it would be left to each purchaser of collection agency service to satisfy themselves that appropriate prudential arrangements have been put in place to protect against default. The main advantage of abolishing a requirement that collection agencies have a trust account is that it would reduce compliance costs such as bank fees and audit costs for collection agents and compliance costs for governments. A risk is that under this option, many small business purchasers of collection agency services may only do so infrequently, and therefore, may not be aware of the risks where a collector does not have a trust account.

### 1.8.4 Complaint handling options

**Status quo**

This option would see the existing arrangement for complaint handling maintained in spite of any harmonised legislative framework, for example in relation to licensing or conduct. There is no current requirement for all debt collectors to have internal or external dispute resolution processes unless they are credit providers or telecommunications, energy or water suppliers. Debt collectors that belong to an industry association may have dispute resolution processes as part of their contractual arrangements.

**Mandatory membership of an external dispute resolution scheme**

This option would require all debt collectors who are not members of an EDR scheme to join one that provides a dispute resolution process for people with problems with their financial service provider, such as the Financial Ombudsman Service, for example. The EDR process would provide an independent complaint handling process, though it may be exploited by consumers.

**Mandatory internal dispute resolution**

Mandatory Internal Dispute Resolution (IDR), at least in accordance with the Australian Standard for Complaint Handling, would provide an efficient internal process for handling complaints made against the debt collector. However, it would not be an independent process and may be viewed as biased towards the collector.

**Regulator-administered dispute resolution**

Conciliation is already provided by state and territory fair trading offices as part of their respective fair trading legislation. Depending on how enforcement of the new debt collection regulatory framework is to be decided (for example, whether through a state or federal regulator), this option would see a regulator be the primary channel for complaints and the resolution of those complaints.

### 1.8.5 Administration options

**Status quo**

This option would retain the existing administrative framework for the regulation of debt collection, with each jurisdiction individually responsible at the state and territory level (varying from state to state between the police and offices of fair trading), and ACCC and ASIC being responsible at the Commonwealth level.

**Transfer administration to a regulator exclusive to debt collection**

Depending on the type of legislative framework (in relation to licensing or conduct for example), this option would see responsibility for debt collection transferred to a regulator exclusively established for debt collection. This would provide specialist administration, but would take time and resources to be established.

**Modernise and harmonise state and territory administration**

The current responsibility amongst states and territories varies between the police and offices of fair trading. This option would make each state and territory's fair trading office the sole regulator of debt collection in that jurisdiction and ensure states and territories collaborated on compliance and enforcement issues. The main advantages of this option are that the states and territories may continue administration and modernisation will provide the opportunity for appropriate reforms and collaboration. The main disadvantage of this option is that different jurisdictions may apply varying degrees of enforcement, which may subsequently reduce competition.

### 1.8.6 Information standards options

**Status quo**

The *Privacy Act 1988* (Cwth) (Part IIIA and the Credit Reporting Code of Conduct), relevant state and territory privacy legislation, and numerous conduct provisions that prohibit misleading and deceptive conduct regulate debt collectors and their handling of credit reporting and information sharing matters. This option would see that regulation remain unchanged.

**Prescribe statutory forms**

This option would prescribe information standards (such as forms or minimum requirements) that collectors would have to adhere to, in relation to minimum information disclosure when collecting debts. This would also apply in relation to debts that have been assigned or sold to a third party and where confusion exists as to the identity of the debtor and the particulars of the debt. Provisions could be inserted into the chosen regulatory framework as part of their existing state legislation or new industry-specific legislation, if preferred.

**Mandatory disclosure upon request**

This option would implement the requirement that any person who is not the original creditor must provide certain information about a debt within five days of commencing collection efforts. A consumer would be able to request further details of the debt within 30 days of collection efforts commencing. The required information includes the name and address of the original creditor and verification of the debt itself.

### 1.8.7 Educational requirements options

**Status quo**

This option would see the existing irregular education requirements continue without change. States and territories would continue to vary regarding the qualifications required to carry on business as a debt collector, and industry would continue to impose internal education requirements for collectors who choose to be members of an industry association.

**Modernise and harmonise statutory training standards**

New South Wales South Australia and Tasmania impose statutory education requirements on debt collectors[18],. Queensland retains a power to prescribe qualifications but has not done so to date. This option would see the requirements modernised and harmonised throughout Australia.

**Introduce training standards that are set by industry**

Introducing training standards across the industry, and having those standards set by industry (but, for example, approved by the regulator) will have similar benefits to Option 2. The standards would form part of the chosen licensing framework and be approved by the regulator; they could be tailored by industry to suit particular specialisations. For example, call centre staff would receive training relevant to their duties, which may differ from the training received by a repossession agent. However, there is no direct evidence of a lack of training causing a problem.

**Abolish all mandatory training requirements**

It is often argued by industry that current training requirements are inconsistent and irrelevant to current industry practice, not cost-

[18] In NSW the Certificate III in Financial Services (Mercantile Agencies) in & TAS - three units from the Diploma in Financial Services (Credit Management & Mercantile Agencies).

effective, difficult to access and lack flexibility. As a result industry peak bodies have implemented their own training requirements for their members. This option would abolish all mandated training requirements leaving it up to the market to decide whether they undergo training independently or through membership to a peak body.

### 1.9 How to make a submission

There is no specified format for a submission. Submissions may range from a letter addressing one issue to a systematic analysis of the impact of the reform of regulation of debt collection. Submissions will be accepted in electronic or printed form.

Submissions will be regarded as public documents and will be posted on CAV's website unless a submission is marked 'CONFIDENTIAL'. Notwithstanding any such marking, documents held by government may be the subject of a request for access under the *Freedom of Information Act 1982*. Documents are assessed under the Act and not all information is automatically made available.

The suggested topics in this paper are presented as a guide only. Respondents should not feel the need to address all topics or be restricted to only the issues raised under each topic. Respondents are encouraged to provide data, case studies or other evidence to support the arguments they submit.

Please indicate in what capacity you are making a submission. If your submission is lodged on behalf of a representative group, you are asked to provide a summary of the people and/or organisations that you represent.

Submissions close at 5pm on Friday 9 December 2011 and can be sent to:

Debt Collection Consultation
Consumer Affairs Victoria

Policy and Legislation Branch
GPO Box 123
MELBOURNE 3001

or by email to:
**debt.collection@justice.vic.gov.au**

# 2. Background – the industry landscape

An assessment of the current state of the regulatory framework is assisted by first examining the current market context of the regulation and major changes and growth in the market that has occurred.

There are two main groups of consumers of collection agency services: creditors, who purchase services from collection agencies, and debtors, who deal with the collection agents who are recovering debts.

The data presented in this section can be attributed to IBIS (2010) *Debt Collection at a Glance*, Melbourne: IBIS, unless otherwise indicated.

## 2.1 What is debt collection?

All businesses must, at some stage, undertake debt collection. Whether that business collects debts in-house or out-sources the collection, having rules that allow cheap and effective recovery of debt is vital to ensure that businesses feel confident in advancing credit, goods and services to consumers.

For the purposes of this paper, 'debt collection' is defined as any attempt to enforce an obligation or alleged obligation to pay money arising out of a transaction in which the subject matter of the transaction is predominantly for personal, domestic, or household purposes.

It is important to recognise that debt collection agents are not the only debt collectors. A 'debt collector' can be:

- the original creditor, for example, a bank or trader/business (an in-house or 'original creditor')
- an agent acting on the behalf of a creditor who receives a fee or percentage of the total amount collected ('third-party collector')
- a person who purchases debt from the original creditor at a discount to its face value (a 'debt buyer').

There are two main business models adopted by the out-sourced debt collection industry. They are the collection of debt on behalf of the original creditor (contingent collection) and the outright purchase of debt ledgers or portfolios by collection agencies (including specialised debt buyers). The growing use of credit by households up to 2008 supported both the volume of contingency collection and the value of debt ledgers available for purchase. Agencies may receive a fee based on the number of accounts managed. More commonly collection agencies are paid a commission, calculated as a percentage of recovered money.

### 2.1.1 Contingent collection

Contingent fee services are the traditional services provided in the out-sourced debt collection industry (accounting for 68 per cent of the market). Creditors typically assign non-performing accounts for debt collection after they have been deemed non-collectible, usually 90 to 180 days overdue.

The commission rate for contingent fee services is generally based on the degree of difficulty of the collection. Importantly, the earlier the debt is assigned, the higher the probability of recovering the debt and, therefore, the lower the cost to collect and the commission rate.

### 2.1.2 Debt purchasing

While contingent fee servicing remains the most widely used method of recovering non-performing accounts, debt purchasing has

increasingly become a more beneficial alternative (accounting for 22 per cent of the market).

The majority of purchased portfolios originate from the credit card and retail markets. Such portfolios are typically purchased at a deep discount from the total value of the accounts. In this model the creditor no longer has any association with the money owed by the debtor, and the risk associated with non-collection is transferred to the collection agent.

### 2.1.3 Service delivery

The collection industry has developed into two distinct specialisations. They are:

- collectors, that perform contingent collecting or debt purchasing functions, with no face to face debtor contact; and
- field agents or process servers that perform field call, repossession and process service functions, with no face to face debtor contact.

The business functions of contingent debt collectors and debt purchasers are the same, with the only difference relating to the ownership of the debt.[19] A generic model of the debt collection process can be found at *Appendix 4*.

Field agents and process servers act on behalf of original creditors or third parties such as collection agencies. The purpose of field calls varies and includes physically attending an address to speak directly with a debtor, usually to interview the debtor to establish their capacity to pay, to service a court process or repossess a specific asset for which the original creditor holds a security interest. Field agents may also be required to 'skip-trace', which requires the agent to locate the debtor if they are not at their last known address.[20]

## 2.2 The industry at a glance

In the past, the industry has had a poor public image and been accused of using unethical practices to recover debts. This has led to some reluctance on the part of creditors who are concerned to protect their relationship with customers to engage the services of third party collectors.

However, the professionalisation of the industry, the existence of a number of industry bodies that promote ethical collection practices, continuing educational requirements, industry accreditation and other compliance measures has raised the minimum standards of the industry.

### 2.2.1 Industry structure

It is estimated that there is more than $6 billion of purchased debt under collection, with 120 million accounts under management, and increased competition for the debt portfolios of large firms operating in industries such as banking and telecommunications driving up the price of debt ledgers.

Around 61 per cent of debt collection accounts are consumer accounts, while 32 per cent are commercial accounts.

The out-sourcing debt collection industry remains highly fragmented, despite some consolidation occurring within the industry. The industry has a range of operators of varying size offering collection, repossession, process servicing and investigative services. According to IBIS, the largest four industry participants in terms of revenue account for around 24 per cent of the total market – they are Collection House Limited, Credit Corp Group Limited, Dunn & Bradstreet Holdings and Trans Tasman Holdings.

Industry consolidation is expected to increase as larger firms within the industry acquire smaller firms that found it difficult to maintain

[19] ACDBA (2011) Australian Collections Industry Snapshot April, p 8.

[20] In some jurisdictions (e.g. NSW), industry licensing provides that field agents who hold commercial agent or sub-agent licences can undertake related enquiries to ascertain the whereabouts of debtors. However, in other jurisdictions, another licence (e.g. private investigator/enquiry agent) may be required. ACDBA (2011) op cit, p 15.

recovery rates and profit margins over last three years. Greater use of information technology and increasing compliance costs will also likely drive further industry consolidation.

### 2.2.2 Industry bodies

Creditors, collectors, investigators, process servers and repossession agents involved in debt recovery activities are represented through a range of industry associations that promote professional and ethical conduct. However, membership is voluntary. These bodies include:

- Australian Collectors and Debt Buyers Association (ACDBA)[21]
- Institute of Mercantile Agents Limited (IMA)[22]
- Australian Institute of Credit Management (AICM).

ACDBA, which recently became independent of the IMA, currently has seven members including major firms such as Baycorp, Dun & Bradstreet and Collection House. These firms comprise more than 60 per cent of the debt collection and debt purchasing markets.[23]

**Figure 1: Location of Debt Collection Businesses**

| State | No. of Businesses |
|---|---|
| Victoria | 582 |
| New South Wales | 919 |
| Queensland | 387 |
| Western Australia | 197 |
| South Australia | 142 |
| Australian Capital Territory | 46 |
| Tasmania | 31 |
| Northern Territory | 16 |
| Total | 2320 |

### 2.2.3 Major markets

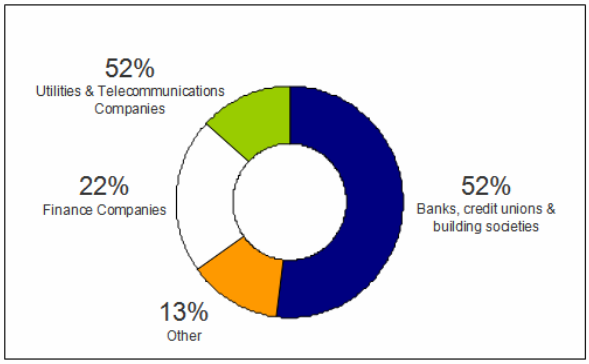
Third-party debt collectors are used by an increasing number of credit card companies, banks and companies that are owed money with clients failing to meet repayments.

There have been increased opportunities for debt collectors from the health and medical sector, and this sector is expected to continue to offer good opportunities for collection agencies over the next few years.

Federal government bodies, such as the Australian Taxation Office have also increasingly outsourced their debt collection activities. Collection of traffic, toll road and court fines are also often outsourced by governments.

The chart below demonstrates the total revenue segmentation of the industry.

**Figure 2: Major Market Segmentation (2010) – Total Market $1.6 billion**




*Source: IBISWORLD*

[21] ACDBA's membership is estimated to represent approximately 70% of the Australian debt collection and debt purchasing industry, generally represents the views of the debt collection and debt purchasing industry. See ACDBA (2011) op cit, p 20.

[22] IMA generally represents the position of the field service industry.

[23] Australian Collectors Association (ACA) (2008) *Submission to Consumer Affairs Legislation Modernisation Consultation: Private Agents Act 1966*, November, Newcastle: ACA, p 7.

**Figure 3: Total Value of Debts Under Collection by ACBDA Members By Type Of Debt**

| | Snapshot at 30 June 2009 | | Snapshot at 30 June 2010 | | Trend comparing 2010 with 2009 | |
|---|---|---|---|---|---|---|
| Type of debt | Debt Value $ | No of Files | Debt Value $ | No of Files | Change of Debt $ Value % | Change No of Files % |
| Finance | 4,933,308,019 | 1,216,583 | 5,542,690,549 | 1,281,454 | 12.4 | 5.3 |
| Utilities | 301,040,919 | 495,244 | 247,220,977 | 384,269 | -17.9 | -22.4 |
| Government | 572,769,981 | 290,620 | 2,266,431,510 | 724,416 | 295.7 | 149.3 |
| Commercial | 244,433,315 | 130,349 | 275,393,485 | 133,906 | 12.7 | 2.7 |
| Other | 719,491,505 | 884,748 | 1,067,872,257 | 1,170.003 | 48.4 | 32.2 |
| Not Broken Down | 12,895,398 | 2,961 | 28,016,386 | 4,670 | 117.3 | 57.7 |
| Total | 6,783,939,137 | 3,020,505 | 9,427,625,144 | 3,698,718 | 39.0 | 22.5 |

*Source: ACBDA (2011) Australian Collections Industry Snapshot, April 2011, p19*

# 3. The regulatory framework – key problems

Two significant problems currently exist in relation to the current regulatory framework, they are:

- legislative inconsistency across jurisdictions
- the ineffectiveness of the consumer protection elements of the current regulatory framework.

## 3.1 The licensing framework

Inconsistency within the existing debt collection regulatory framework is reflected in the range of state, territory and Commonwealth regulation that exists and the differing evolutionary path that each has followed.

The framework represents a 'patchwork' approach to the regulation of debt collection, which leads to a range of associated regulatory costs.[24]

[24] The regulatory costs of the current framework vary across jurisdictions and depend on the stringency of the licensing regulation. Costs increase if the debt collector collects debts across a range of states and territories because, despite the ambiguity, they may need to be licensed in that state or territory they are collecting the debt. For example, when a debt collector in Victoria was required to be licensed, they were imposed approximately $6000 of regulatory costs per year to be able to collect debts in Victoria (See Price Waterhouse Coopers (2010) Standard Cost Model Assessment for Changes to the Travel Agents Act 1986, Introduction Agents Act 1997 and the Private Agents Act 1966, April, Melbourne: PWC). If that Victorian debt collector wanted to collect a debt in New South Wales they would then be imposed that jurisdiction's licensing costs, such as a more stringent licensing application (having to get it processed via the police for example, which may increase 'time costs' due to processing delays). ACDBA has argued that licence processing delays can take up to 72 days with loss of income and overhead costs of up to $100K (See Australian Collectors Association (ACA) (2008) Submission to CAPI Act Review, June, Newcastle: ACA, p 16.) and education requirements. More costs would be imposed on that debt collector for collection in any other Australian jurisdiction, depending on the stringency of the regulatory requirements of that jurisdiction.

**Background to licensing acts**

The objectives and requirements of debt collection regulation have historically not differed greatly from jurisdiction to jurisdiction, though there is some variation in how they have evolved. For example, licensing regulation existed primarily to protect creditors against problems of fraudulent debt collectors or their defalcation. This is reflected in prescriptive licensing and trust account provisions and the initial police administration of that regulation, which has continued in some jurisdictions (New South Wales and Tasmania).

Gradually the regulation re-orientated itself towards consumer protection and raising the standards of the industry. This is highlighted by conduct and training provisions, and office of fair trading administration of that regulation occurring in most jurisdictions.

The legislation was introduced in a time where the industry lacked professionalisation and specialisation. Therefore, debt collectors were regulated to protect their clients (creditors) and were traditionally grouped together with 'investigation agents' or 'commercial agents'. For example, the *Private Agents Act 1966* (Vic) before it was repealed was introduced to ensure that:[25]

- "commercial agents are of such character, and that their practices are such as would make them suitable to perform the functions of a commercial agent
- "that they have lodged or will be capable of lodging, a fidelity bond of a

[25] *Hansard* (Assembly), 5 October 1966, pp. 785-786.

> stated amount as a measure of protection against loss of clients' money."

The Minister's Second Reading Speech suggests that the Act was introduced to protect creditors. It states that the objectives of the legislation with respect to debt collectors were "to regulate the activities of debt collectors by applying to them a licensing system of control similar to that now in force with respect to process servers and inquiry agents, with special provisions relating to the keeping of a separate trust account and the lodgement with the court of a fidelity bond from an insurance company."[26] This approach is similar in other jurisdictions.

Although some jurisdictions have more recently enacted legislation compared to Victoria, and have sporadically included training requirements or general conduct provision for consumer protection, the same fundamental objectives and requirements contained in the Victorian Act are still evident. This is reflected in part in the titles of the legislation, which all reflect the grouping of debt collectors with other 'agents', and with that, the main objective of protecting the agent's principal (such as the creditor through the use of trust accounts) rather than the debtor.[27]

**Overview of state and territory debt collection licensing**

Today, all Australian jurisdictions licence debt collectors with the exception of the Australian Capital Territory (ACT) and, since 1 July 2011, Victoria.[28] Licensing requirements differ considerably between jurisdictions and require collection agents to engage in a range of compliance and education activities. Appendix 1 contains a comparative table that highlights the jurisdictional inconsistencies and overlap within the debt collection regulatory framework.

The current 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).

The regulators that administer and enforce this regulation also vary from police to fair trading agencies, or a combination of both, which further increases regulatory inconsistency.

The ACT, like New Zealand, does not require licensing for debt collectors, relying instead on provisions against harassment and coercion contained in the Australian Consumer Law. No legislation exists to exclude debt collectors who have been found guilty of using undue harassment, coercion or physical force from continuing in the industry. Likewise, no provisions exist to protect creditors in the event that a collection agent defaults, and collection agents are not required to have a trust account.

Variations also exist throughout jurisdictions with regard to the definitions of a 'debt collector'; process of application, such as who determines them, the grounds, what

[26] *Ibid*, p. 784.

[27] For example, South Australia (*Security & Investigations Agents Act 1995*), Tasmania (with the *Security & Investigations Agents Act 2002*) and New South Wales (*Commercial Agents & Private Agents Act 2004*), though all Acts reflect similar approaches.

[28] 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 Fair Trading Act 1999 (or a range of other legislation) automatically prohibited from acting as a debt collector. It also retained its fair debt collection practices provisions applying them directly to the conduct of debt collectors.

qualifications are required; and distinctions between master and operator licences. For this reason the interaction between state and territory licensing requirements is difficult to interpret. For example, a person 'carrying on the business of debt collection' in NSW is required to be licensed. However, if that debt collector is pursuing a debt interstate, ambiguity exists whether they are required to be licensed interstate.[29]

Furthermore, ACDBA has suggested that the framework for regulation in most jurisdictions does not recognise the distinct specialisations involved in collecting debts, such as debt collecting over the phone compared with field calls, and that licensing requirements that apply generally (rather than separately) to both of these areas can be unnecessarily burdensome.[30]

**Protections within licensing acts**

With the exception of Victoria and the ACT, all licensing systems require collection agents to establish trust accounts, and also impose varying degrees of record-keeping and audit requirements on the holders of those accounts.[31]

Most jurisdictions' licensing legislation (with the exceptions of Western Australia and South Australia) also prohibit collection agents engaging in harassing behaviour (over and above similar provisions in the ACL[32]). Unlike Victoria's recently repealed licensing legislation, direct penalties can attach to breaches of these provisions in other jurisdictions. Such measures enable the regulator to directly regulate debt collection practices, with high penalties for non-compliance.

For example, section 25 of New South Wales' *Commercial Agents and Private Inquiry Agents Act 2004* prohibits third party collectors from leaving notices, vehicles or other objects outside a debtor's premises indicating that the licensee is visiting the premises, communicating at times that are unreasonable in their frequency or time, and disclosing to the person's employer that the person is a debtor.

Western Australia and the Northern Territory require collection agents to pay sureties to compensate creditors in the event of default. On the other hand, Tasmania, New South Wales, South Australia and Queensland do not require such sureties.

Many creditors, being commercial operations, would be in a position to make assessments about credit risks given most transactions entered into are commercial arrangements, and may be one-off jobs for creditors of failing companies.

It is possible that trust accounts are not needed and that "protection of creditors from low quality debt collectors does not appear to be warranted and affords little public benefit".[33]

Queensland requires collection agents to engage in, and refrain from, certain types of behaviour under a mandatory code of conduct. New South Wales' regulations also prescribe a range of behaviours to be followed, including providing the debt collector's name and licence number, and providing evidence of the debt on demand.

**Licensing training requirements**

New South Wales (Certificate III in Financial Services (Mercantile Agencies)), South Australia and Tasmania (both requiring three units from the Diploma in Financial Services (Credit Management and Mercantile Agencies)) impose education requirements on

[29] This is highlighted in Institute of Mercantile Agents (2007) 'Collectors Under the Gaze of Interstate Regulators', AGENT, June/July, Volume 40, Issue 3, Newcastle: IMA, pp 6-7.

[30] ACDBA (2011) op cit, p 8.

[31] The purpose of a trust account is for the protection of creditors (and the defalcation of the debt collector).

[32] The ACL largely replicates the harassment and coercion provisions that were contained in section 60 of the *Trade Practices Act 1974* (Cth). It also contains general prohibitions on misleading or deceptive conduct, as well as the capacity for banning and disqualification orders.

[33] See Consumer Affairs Victoria (2008) *Modernising Victoria's Consumer Policy Framework: Collection Agents and Debt Collection, October*, Melbourne: CAV, p 20; and, Freehills Regulatory Group (1999) *National Competition Policy Review of Private Agents Legislation*, p. 39.

commercial agents. Queensland retains a power to prescribe qualifications but has not done so to date.

ACDBA has argued [34] that the prescribed training is inflexible to market changes and ignores the broad legislative environment in which collectors work, including consideration of the ACCC-ASIC Debt Collection Guidelines and the Privacy Act. These are key compliance areas for the debt collection industry. In addition, the qualifications can only be obtained through a Registered Training Organisation, which is a substantial cost imposition.

Consequently, industry associations run intensive internal training programs to ensure their employees understand the legislative environment in which they work and the agency's specific approach to debtor management and compliance. These standards are often requirements of membership to industry associations, which include annual refresher courses.

### 3.1.1 Exemptions

Each state and territory exempts a large sector of the debt collection industry, such as banks, other finance companies, legal practitioners and accountants. Additionally, firms that collect debts in-house are not required to be licensed.

The following are examples of who may be exempted in Australia. These are based on the *Commercial and Private Inquiry Agents Act 2004* (NSW), though each jurisdiction is quite similar:

- any state police officer
- any police officer of the Australian Federal Police
- any member of the Australian Defence Force
- any officer or employee of the Commonwealth or of any other State or Territory
- any officer or employee of a public authority of the Commonwealth or of any other State or Territory
- any legal practitioner or legal practitioner's clerk
- any registered company auditor within the meaning of the *Corporations Act 2001* (Commonwealth)
- any insurance company registered under the *Insurance Act 1973* (Commonwealth), any person carrying on the business of an insurance loss adjuster on behalf of an insurance company so registered and any employee of any such insurance company or of any person carrying on any such business
- any officer or employee of an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Commonwealth).

Some of these exemptions may create weaknesses in the consumer protection provisions those particular Acts provide.

## 3.2 The credit model

The National Credit Act has introduced a comprehensive national licensing system for persons who undertake 'credit activities'. This framework applies to debt collectors, but only in the context of debts arising out of consumer credit.

This regulatory framework ensures that any party that collects debts on behalf of a credit licensee must be either a licensee or authorised in writing by the licensee as a 'credit representative', with the intent of making the holder of the credit licence ultimately responsible for the conduct of the credit representative. In addition, any person who is an assignee of the debts of another credit provider (for example, purchasing the debts of the original credit provider) would be required to obtain a licence.

[34] See the Australian Collectors Association (2008) *Submission to CAPI Act Review*, op cit, p 13.

Debt collectors who fall within scope of the National Credit Act must hold an Australian Credit Licence and have the same requirements imposed upon them that apply to credit providers. Generally, the main reforms relating to debt collection are:[35]

- minimum training requirements with adequate financial and human resources to meet their obligations.
- enhanced standards of conduct including a requirement to act honestly, efficiently and fairly, and to properly train and supervise people who act on their behalf.
- mandatory membership of an EDR scheme[36]
- The power for ASIC to take action promptly to cancel or suspend a licence or ban people from engaging in credit activities Australia-wide.

These requirements will provide consumers and industry valuable tools to adhere to their responsibilities throughout the debt collection process.

However, the National Credit Act's Regulations currently exempt certain persons engaging in debt collection activities (such as those already licensed or authorised under specific state legislation regulating debt collectors) from the requirement to hold a licence. This exemption does not apply to debt collectors collecting assigned debts (for example, where they have purchased the debts from the lender) who still have to be licensed. The rationale here is that those collecting assigned debts become a credit provider because they have been assigned the rights of the debt. Therefore, in the interests of consumers they are transferred the same responsibilities as would a credit provider under the Act.

The exemption means that debt collectors that simply collect debts on behalf of a credit provider are not subject to state or territory licensing obligations as well as those under the credit framework.

### 3.2.1 ACCC-ASIC debt collection guidelines

In 2005, ACCC and ASIC jointly published *Debt Collection Guidelines: for Collectors and Creditors* (the Guidelines)[37], replacing earlier Guidelines published in 1999.

The Guidelines are intended to assist persons or corporations engaged in debt collection to understand their legal obligations when collecting debts. The Guidelines outline conduct that ACCC and ASIC consider best practice for collectors and provides some examples of what may be considered misleading or deceptive, or unconscionable conduct, or action that may constitute undue harassment and coercion.[38]

Earlier guidelines have been described by French J (as he was then) as "helpful prudential guidelines for conduct which, if adhered to, should minimise the risk of contravening the law."[39] However, as French J stated, ultimately the "publication is not a statement of the law. It can only be a guide."[40] The Guidelines do not, in themselves, have any legal force.

Only the courts can provide definitive interpretations of what constitutes undue harassment or coercion. As such, the Guidelines cannot be said to function as a substitute for the kind of statutory guidance

[35] A table containing all the requirements can be found at Appendix 3.

[36] Consumers will have access to a three-tiered dispute resolution process for credit issues. They will have access to the credit provider's and credit service provider's internal dispute resolution process as a first point of dispute resolution, then the EDR scheme.

[37] ACDBA and IMAL have indicated that the Guidelines are the main instrument that allows them to guide their practices in a consistent manner.

[38] ACCC-ASIC (2005) *Debt Collection Guidelines: For Collectors And Creditors*, October, ACCC/ASIC: Melbourne and CAV (2004) *Victorian Guidelines for debt collection*, CAV: Melbourne.

[39] ACCC v McCaskey [2000] FCA 1037, [58].

[40] ACCC v McCaskey [2000] FCA 1037, [51].

provided by laws such as the ACL and Victoria's *Fair Trading Act 1999*. Furthermore, the Guidelines are secondary to any rights and responsibilities created by any other relevant laws, or by mandatory codes of conduct, which are discussed below.

By complying with the Guidelines, businesses may minimise the risk of breaking the law. However, should a business choose not to comply with the Guidelines, enforcement may be difficult because regulators are left to rely on the high level concepts embodied in the ACL such as 'undue harassment', 'coercion' and 'misleading or deceptive conduct'. As discussed below, reliance on high level concepts can make it difficult to take effective compliance action.

### 3.2.2 Other industry arrangements

**Other legislation**

In addition to the general state and territory licensing regulation and the requirements of the ACL, there is a range of other State and Commonwealth legislation that may need to be adhered to, as well as a range of industry codes that may apply depending on the industry of collection. [41]

This is in addition to legislation governing the service of process and statutory notices, legal repossession activities and enforcement of securities interests, obligations under industry licensing schemes and any orders made by a court, all of which are out of scope for this particular project.

**Codes of conduct**

The regulatory framework covers a range of different industries that involve debt collection activities, such as telecommunications, energy (electricity and gas) and water. These industries have codes of conduct that include complaints procedures, debt management and debt collection practices. Industry members (such as utility providers) are required to comply with these codes, in addition to the general legislative requirements discussed earlier in this paper. They are also responsible for third party debt collectors collecting debts on their behalf.

Similar to the credit model, utility companies (telecommunication companies, energy and water suppliers) must belong to independent EDR schemes as part of their requirements, such as the:

Telecommunications Industry Ombudsman

Electricity and Water Ombudsman (Vic)

Electricity and Water Ombudsman (NSW)

Essential Services Consumer Council (ACT)

Energy Ombudsman (TAS)

Energy Ombudsman (WA)

Energy Industry Ombudsman (SA)

State Ombudsman (NT)

Energy Consumer Protection Office (QLD)

Nationally, the Australian Energy Regulator monitors, investigates and enforces compliance with the national energy framework [comprising the National Electricity Law (Electricity Law) and National Electricity Rules (Electricity Rules), the National Gas Law (Gas Law) and National Gas Rules (Gas Rules)] and associated regulations.

These laws do not in themselves encompass debt collection requirements, though different codes may be enforced at state and territory level. In Victoria for example, the Energy and Water Ombudsman Victoria can investigate debt collection issues, even though an energy or water company may have outsourced the debt to a debt collection agency. The complaint must relate to the agency's action on an outstanding energy or water bill.

[41] Such as the *Privacy Act 1988*, *Australian Securities and Investments Commissions Act 2001*, *Bankruptcy Act 1966*, *Financial Services Reform Act 2001*, the *National Consumer Credit Protection Act 2009* and the *Corporations Act 2001*. State-based legislation dealing with unauthorised documents, information privacy and the recovery of judgment debts may also apply.

The Essential Services Commission regulates the Victorian retail energy industry and protects consumers by ensuring that all energy providers adhere to legislated codes, regulations and guidelines. The Energy Retail Code (2009)[42] states, for example, that an energy retailer:

Must comply with guidelines on debt collection issued by the Australian Competition and Consumer Commission concerning section 60 of the *Trade Practices Act 1974* (Cwth). (This section relates to the prohibition of physical force, harassment and coercion, and is now section 50 of the *Competition and Consumer Act 2010*]

Similarly, at a national level, the Telecommunications Industry Ombudsman can ensure that a telecommunications company (such as an internet service provider or phone company) acts in accordance with its debt collection policy, and in accordance with any payment plan it may have negotiated with a customer. For example, the Telecommunications Consumer Protections Code (2007) states that a supplier must ensure that:

- its compliance arrangements with debt collection agencies require that the collection methods employed are not harsh and unconscionable at law, constitute undue harassment or are otherwise unlawful disreputable or offensive inconsistent with the standards approved by any relevant industry body
- its debt collection agents comply with accepted professional and ethical standards for collection of debts and have compliance systems which accord with principles of the current Australian Standard on Compliance Programs
- have complaint handling processes which generally accord with the current Australian Standard on Complaint Handling.

With regard to third-party action, the Telecommunications Code states that a supplier must take all reasonable steps to:

- ensure that debts sold or assigned to third parties or listed with a credit reporting agency do not include any unresolved service or billing issues involving disputed account balance amounts
- resolve any billing or service issues that arise after an amount has been sold or assigned to a third party.

**Industry associations**

Debt collectors that are members of an industry association are required to incorporate aspects of the legislation and guidelines into their business contracts as a condition of the particular association's membership.

For example, members of ACDBA have service agreements in place that specify conduct and account management standards for members. These are in addition to statutory requirements. ACDBA members' service agreements typically contain the following obligations:

- performance standards, including quality management systems duties, obligations and warranties compliance with relevant legislation – including the ACL and Fair Trading Acts (FTAs), National Credit Act, Privacy Act and the ACCC-ASIC Guidelines
- dispute resolution procedures
- reporting obligations
- auditing requirements.

The agreed contractual obligations can increase standards of debt collection for members and may contain more stringent

[42] The National Energy Retail Code has replaced the respective state energy codes, though the requirements are similar.

standards than those imposed by any existing legislation.

## 3.3 Consumer protection elements of the current regulatory framework

Like licensing regulation, the consumer protection elements of the current regulatory framework involve a range of instruments. These range from generic provisions contained in the ACL and some licensing legislation prohibiting undue harassment and coercion, and misleading or deceptive conduct, to specific guidelines and codes of conduct.

This paper will focus on four specific issues faced by consumers when dealing with debt collection. They are:

- physical force, undue harassment or coercion
- misleading or deceptive conduct
- a lack of consumer and industry education
- inaccurate, incomplete or misinformation.

Importantly, it needs to be recognised that while the potential for misconduct is high and the consequences severe (both emotionally and financially), in the context of the frequency of debt collection contacts the proportion of misconduct per year is believed to be low.[43]

### 3.3.1 Physical force, undue harassment and coercion

Section 50 of the Australian Consumer Law provides that:

A person must not use physical force, or undue harassment or coercion, in connection with:

(a) the supply or possible supply of goods or services; or

(b) the payment for goods or services; or

(c) the sale or grant, or the possible sale or grant, of an interest in land; or

(d) the payment for an interest in land.

Penalties of up to $1.1 million for corporations and $220,000 for individuals can apply if a contravention occurs.[44]

Allegations of harassment and coercion represent a significant proportion of the complaints throughout Australia regarding debt collection practices. This has been highlighted anecdotally over the last ten or so years by ACCC and ASIC (1999 and 2009), the Consumer Credit Legal Centre (2004), Consumer Affairs Victoria (CAV)(2008), and Latitude Insights (2010).[45]

Harassing or coercive conduct is also the most serious issue affecting consumers (debtors) in their experiences with debt collectors. Debtors often find themselves in a position where they cannot pay or they are disputing the debt, which according to the consumer is where harassment or coercion is more likely to occur. In addition, complaints about harassment often coincide with attempts to collect old debts.[46]

CAV has highlighted that the use of physical force, undue harassment or coercion by

[43] Statistics obtained from the industry suggest that despite a high volume of contacts (over 60 million per year), reported complaints (considered to be any matter relating to professional conduct) against the industry amount to one debtor complaint per 9,000 accounts under management, representing less than 0.0001 per cent per total contacts per year. See Australian Collectors Association (November 2008) op cit, p 8.

[44] In addition, it is important to note that section 50 does not apply to the collection of all debts in trade or commerce. A connection to either a supply or possible supply of goods, services or an interest in land, or the payment for goods, services or an interest in land is required. It is not clear that section 50 would, for example, extend to a demand for liquidated damages caused by non-compliance with a condition of a contract.

[45] See Australian Competition and Consumer Commission (1999) Undue harassment and coercion in debt collection, May: Canberra: ACCC; Consumer Credit Legal Centre (CCLC) (NSW) (2004) Report in Relation to Debt Collection, April, NSW: CCLC; Consumer Affairs Victoria (2008) Modernising op cit; ACC-ASIC (2009) *Debt Collection Practices, op cit*; Latitude Insights (2010) op cit.

[46] Consumer Credit Legal Centre (2004) *op cit*.

collection agencies in the process of collecting debts or repossessing goods can have significant consequences such as causing major emotional or physical distress for debtors.[47]

ACCC[48] and ASIC have received numerous complaints about debt collectors and debt purchasers making phone calls that:

- were excessive in number
- mocked or belittled the debtor
- were aggressive (e.g. threatening to send someone to the debtor's house to take their goods)
- sought to dissuade debtors from making complaints (e.g. refusing to refer the debtor to a supervisor if there is a dispute about the debt).

In addition to these complaints, there has been a small amount of instances where enforcement action has been taken against the debt collector.[49]

### 3.3.2 Misleading and deceptive conduct & false and misleading representations

*ACCC v McCaskey*[50] provides an example of what defines misleading or deceptive conduct in the context of debt collection. The court agreed that a wide range of behaviour on the part of the debt collector amounted to misleading or deceptive conduct, or was likely to mislead or deceive. This included:

- threats to take immediate steps to sell the debtor's house to obtain payment of the debt when no steps could be taken as legal proceedings had not been commenced; and
- threats to have the debtor arrested if he did not pay the debt when there was no reasonable basis on which the debt collector could have asked the police to arrest the debtor.

Allegations of false representations about the consequences of non-payment of a debt have been noted by ACCC and ASIC.[51] The misrepresentations included claims that:

- the failure to pay a debt involves an element of criminality;
- an ability to seize unsecured household items exists;
- legal action has been taken or judgement has been entered when this is not the case; and
- legal action will be pursued for statute-barred debts.

Consumer agencies also reported instances where letters to debtors were framed to look like legal documents, giving the impression that legal proceedings were about to commence when this was not the case.[52] While state-based unauthorised documents legislation may prohibit the use of some types

[47] Consumer Affairs Victoria (2008) *Modernising* op cit, p 21.

[48] ACCC(2009) Debt Collection Practices ibid.

[49] ACMS (in May 2011 ASIC commenced proceedings in the Federal Court in response to alleged misleading or deceptive/undue harassment and coercion practices); EC Credit Control (in December 2010 ASIC reviewed EC Credit practices in response to receiving complaints regarding misleading and deceptive conduct. EC Credit agreed to amended procedures and implemented an Internal Dispute Resolution system); Axess Debt Management (in June 2010 ASIC raised concerns regarding the collection of statute-barred debts. In response, Axess amended its policies and refunded payments to affected debtors); GE Money (in May 2008, GE Money entered an EU with ASIC following complaints of; excessive or inappropriate contact, contact at unreasonable hours and an inflexible approach to repayment arrangements); and Alliance Factoring (in 2003 ACCC accepted an enforceable undertaking with Alliance concerning the misleading and deceptive conduct and undue harassment and coercion in relation to purchased Telstra debts). The Department of Commerce (WA), formerly the Department of Consumer and Employment Protection (DOCEP), action was against a Western Australian debt collector for undue harassment. It was the first successful action since DOCEP took over the debt collection portfolio in 2005. It should be noted the action was brought against a sole trader, new to the industry, under the harassment provisions of the Fair Trading Act, not Western Australia's debt collection legislation.

[50] ACCC v McCaskey [2000] FCA 1037. .

[51] ACCC (2009) Debt Collection Practices op cit, p 14.

[52] Consumer Credit Legal Centre (2004) *op cit* p 14.

of these documents, in practice the penalties are low and the legislation drafted in an ambiguous manner. Such matters could also be pursued on the basis that it is misleading or deceptive conduct.[53] However, this does not give access to criminal sanctions, with only civil remedies such as damages and injunctions being available. Making a false or misleading representation that a person is acting in an official capacity to collect a debt when they are not should attract criminal sanction.

With respect to existing sections prohibiting false or misleading representations such as section 29 of the ACL, it is important to note that in *ACCC v McCaskey*, an attempt was made to prosecute the defendant and seek declaratory relief on the basis she contravened section 53(g) of the *Trade Practices Act 1974* (now section 29(1)(m) of the ACL). Section 53(g) prohibited false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. It was alleged that by threatening to have a customer arrested because he stopped a cheque, and threatening to take immediate steps to take possession of another consumer's home when this was not possible, these were false or misleading representations within the meaning of section 53(g). The right in question was the right to assert payment. Two approaches were raised: first, that the right was asserted by the supplier against the purchaser and second, although the representations were not made to the clients of the debt collectors (creditors), the representations were made to third parties (alleged debtors). However, French J found that each of these approaches to be a 'doubtful construction' and refused the application for declaratory relief.[54]

Hence, section 29 of the ACL, concerned as it is with false or misleading representations in connection with the *supply* of goods and services (rather than the payment for goods or services), probably does not apply to debt collection activities against consumers.

To overcome the problems experienced in *ACCC v McCaskey*, Victoria's fair debt collection practices legislation specifically prohibits a wide range of false or misleading representations in connection with debt collection, including false or misleading representations in connection with the nature of a debt, the extent of a debt, the method of recovering a debt and the consequences of not paying a debt.[55]

### 3.3.3 Debt education

**Industry**

Industry has indicated that current mandatory educational requirements vary across jurisdictions and are, at times, irrelevant, not cost effective, difficult to access, and may contribute to a high turnover of staff as a result of these failings.[56] As a result, those debt collectors that are part of a peak body such as ACDBA have implemented their own training requirements. However, consumer agencies observed a lack of basic understanding of consumer protection laws by junior officers (such as call centre staff) in the collection industry, even when particular organisations had well documented compliance frameworks.[57] Furthermore:

- third party authorisations (where debtors are assisted by a third party, such as a financial counsellor) are being ignored by some collectors, and there is an inconsistent approach to the acceptance of third party

[53] See, for example, Corporation of the City of Adelaide v Adelaide City Fines Pty Ltd [2009] FCA 132.

[54] ACCC v McCaskey [2000] FCA 1037 [36], [39].

[55] See Part 5B Fair Trading Act 1999 (Vic). Appendix 5 contains some detail on this.

[56] Australian Collectors Association (November 2008) op cit p 12-13

[57] ACCC(2009) Debt Collection Practices op cit p17

authorisations by collectors, whereby some will accept verbal authorisations while others will not[58]

- consumers are concerned that creditors do not understand financial hardship, and that different work areas within collection firms often adopt inconsistent approaches to debtor welfare.

Industry has stressed that the risk to the reputation of firms from reports of unlawful activity and the subsequent loss of business are strong incentives to implement and communicate effective compliance strategies and educational strategies.[59]

**Consumers**

There is also a lack of understanding amongst consumers about their responsibilities with credit, repaying debt and dealing with debt collectors.[60] Indeed, the very nature of credit, including credit education and financial literacy (and the processing of that information), is a complex environment for consumers, particularly vulnerable and disadvantaged consumers.[61] Because of these complexities it should be regulated differently and incorporate different requirements for those debt collectors who engage in credit activities.

This is also highlighted by research undertaken in Victoria and the United Kingdom. For example, in research undertaken by Latitude Insights on behalf of CAV, debtors were asked what they would do differently to avoid being contacted by a debt collector in the future. Latitude reported that only one in five debtors would approach the situation differently if given the opportunity to do so.[62]

In 2007, research commissioned by CAV revealed that many people who experienced debt related problems were unaware that financial counselling services existed, and when they were assisted, they credited their financial counsellor with being able to educate them on their options, rights and responsibilities and ultimately with achieving a positive outcome.[63] Similarly, in the UK it was revealed that debt advice provided by financial counsellors led to better outcomes for vulnerable groups when dealing with debt collectors.[64]

### 3.3.4 Inaccurate, incomplete or misinformation

A number of problems exist within the debt collection industry with regard to the information provided to debtors by debt collectors and shared between debt collectors themselves. For example, the ACCC-ASIC report[65] reported difficulties experienced, particularly once debts are sold, with regards to:

- disputes about the debt, which arise when a number of traders are involved and where debts have been on-sold to multiple collection agencies. Consumer groups have argued that this is because of miscommunication between organisations when debts are subsequently sold;
- the contact by an entity other than the original creditor, which can be

[58] In Victoria, debt collectors must not contact a consumer by a method the consumer has asked not to be used, unless there is no other method available (s.93M of the Fair Trading Act 1999 (Vic)). See also Appendix 5.

[59] ACCC (2009) Ibid, p 18.

[60] Schetzer op cit, pp 38-42. Pleasence op cit.

[61] This has been explained by CAV, as follows "[essentially, consumer vulnerability – susceptibility to detriment in consumption – arises from the interaction of market and product characteristics and personal attributes and circumstances causing poor access to information and/or ineffective use of information by the consumer or deterring complaint and the pursuit of redress. A consumer in this situation faces a high risk of detriment." Consumer Affairs Victoria (2004) *Discussion Paper: What do we mean by 'vulnerable' and 'disadvantaged' consumers?* Melbourne: CAV, p 14.

[62] See Appendix 2 for more detail.

[63] Schetzer, *op cit* pp 38-42.

[64] Pleasence op cit.

[65] ACCC(2009) *Debt Collection Practices op cit*, pp 9-12.

confusing for the debtor. Debtors have reported that they have been unable to identify whether they were dealing with the creditor, an agent or a debt purchaser, which indicate a lack of notification or understanding of the appointment of a third party collector as agent and a lack of notification of the sale of the debt; and

- incorrect default listings, which can occur when an individual is incorrectly identified and subsequently refuses to pay the debt, or the full debt has been paid out with the original creditor without the knowledge of the debt purchaser, or a debt is incorrectly listed as a serious credit infringement rather than simply as a default.

These misinformation issues seem to arise out of the selling and assignment of old debts, and can create unintended consequences for consumers and debt collectors alike. In particular, they can create confusion and barriers to the efficient collection of debts not otherwise the subject of disputes, and can be exacerbated when a creditor or debt collector is not contactable or refuses to provide supporting documentation or information about the debt when asked.

Industry has suggested that difficulty can arise in the resolution of these disputes because contractually debt buyers are only responsible for conduct post the assignment from the creditor.[66] Both legal and practical difficulties also arise in the transfer of information from the creditor to the assignee or debt purchaser.[67] In particular, these difficulties involve compliance with the Privacy Act, protection of commercially sensitive information and document retention obligations under a range of legislation including the Credit Code made under the National Credit Act and the Anti-Money Laundering and Counter Terrorism Financing Act.[68]

**Quantification of consumer issues**

A national online survey was conducted on 1200 consumers who had been contacted within the previous two years by a company, organisation or debt collection agency in relation to an outstanding debt. [69]

Consumers in the ACT and NT were combined with respondents from NSW and SA respectively. This was due to the smaller population in these two jurisdictions, when compared with other states, and a lack of sufficient online panellists in either of these jurisdictions to obtain a large enough sample size to allow independent analysis of individual states/territories.

Unless otherwise indicated percentage data presented is based on a national population sample size of 500,000 and assumes that this is representative of the Australian population.

**Key outcomes of quantitative research**

The outcomes of the quantitative research support much of the qualitative data presented in this paper.[70] Some of the key outcomes of this research include:

- problems such as disputes with the debt collector or allegations of misconduct increased depending on the amount of debts the consumer had and whether they disputed the debt(s)

[66] ACDBA (2011) op cit, p 20.

[67] ACDBA have suggested that up to 75 per cent of contact details provided to their members are incorrect, resulting in significant costs in locating the actual debtor. On average approximately 35% of debtors are never located. Ibid, p 21.

[68] Ibid.

[69] For more detail and the demographics of the survey see Latitude Insights (2010) Op Cit.

[70] It should be noted that the data presented in this paper that relates to consumer detriment is drawn from consumers' perspectives and as a result may be overstated. However, it cannot be ignored, and given the potential for misconduct in such a marketplace is high, effective mitigation against misconduct is crucial.

in question.[71] For example, respondents who had more than three outstanding debts in the last two years were more likely to report experiencing inappropriate contact (44.1 per cent). Once respondents had more than three outstanding debts they were significantly more likely to report non-compliance – responding in the affirmative to nine of the fifteen scenarios presented in the survey including harassment, coercion or misleading or deceptive conduct.

- according to debtors, debt collectors (both original creditors and third-party collectors) engage in a range of activities that do not comply with the ACCC-ASIC Guidelines. For example, nearly one third (29.2 per cent) of all respondents reported being threatened that they could lose their home or car if they did not repay the debt. Just over 30 per cent reported that they were not given adequate time to ensure the debt was correct and 29.2 per cent reported being told they could lose their house or other items if they failed to repay the debt.
- most debtors (58 per cent) made tangible arrangements to repay the debt when requested by the debt collector. However, almost one third (28 per cent) ignored the problem, refused to pay the debt, promised to pay the debt, or did nothing. Only seven per cent percent sought third party intervention such as legal advice or lodged a complaint with authorities. More importantly, research indicated that one in five respondents would not handle their situation differently in future. When asked why they did not seek advice or assistance, almost 40 per cent of debtors were embarrassed or ashamed or did not go anywhere for help. These statistics suggest a lack of understanding or recognition of their debt responsibilities and the collection process, as well as their rights. In addition, high instances of misconduct should also be reflected in whether or not a debtor seeks assistance from an authority, though this wasn't the case in this research.
- the majority of debt collectors reportedly no longer contacted respondents who claimed to have resolved the debt (83.4 per cent). However, a small proportion (16.6 per cent) reported that they continued to be contacted by the debt collector, which should not occur. In addition, approximately one third of respondents indicated that they did not receive information when requested to enable resolution of the dispute or confirm the debt.
- according to the research, approximately 60 per cent of debts related to credit (30 per cent), telecommunications (16 per cent) and utilities (electricity, water or gas (15 per cent)). This statistic is significant because these industries are already subject to extensive regulation and contain membership to external dispute resolution schemes as well as codes of conduct.

over 50 per cent of respondents to the survey had two or more outstanding debts and 90 per

[71] More statistics reflected this, for example, respondents with only one debt were more likely to have resolved the situation (80.3%) as were those who agreed with the debt (79.5%) compared to those with three or more debts (64.7%) or respondents who disagreed with the debt (65.0%). Similarly, respondents who agreed with their debt were much more likely to report encountering a debt collector with a helpful attitude (75 per cent) compared to those who disputed the debt (21.0 per cent).

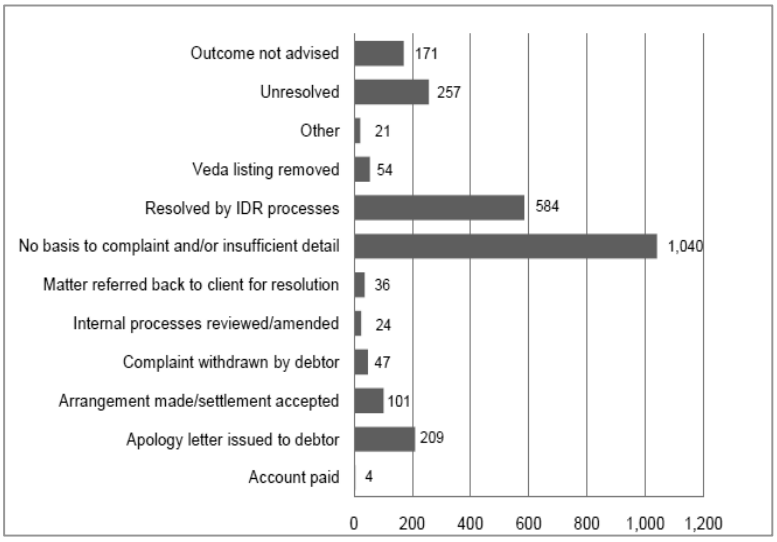
cent of respondents' debts were $10,000 or under. Approximately, two thirds of respondents were involved in the debt recovery process for more than two months and almost 25 per cent were involved for over twelve months.

The table and chart below outline how ACDBA handled 2548 complaints in the 12 months to 30 June 2010.

**Figure 4: How ACDBA Handled Complaints Received in the 12 Months to 30 June 2010**

| Method of Handling Incident | Number for the 12 Months to 30 June 2010 |
|---|---|
| Internal Dispute Resolution | 2130 |
| External Dispute Resolution | 352 |
| Regulators | 66 |
| Total | 2548 |

**Figure 5: How ACDBA Handled Complaints Received in the 12 Months to 30 June 2010**




*Source: ACDBA (2011) Australian Collections Industry, April, p 23*

# 4. Options for harmonising debt collection

This section discusses several options in response to the issues raised by this discussion paper. These issues include:

- Whether the National Credit Act is a suitable model for the harmonisation of debt collection regulation?
- Whether the National Occupational Licensing System (NOLS) has a role in the regulation of debt collection.
- Whether a licensing system should be retained, and if so, what form that system should take?
- How should practitioners' conduct be regulated?
- Which authority should be responsible for monitoring and enforcing the new harmonised debt collection regulation?

Respondents are asked to provide feedback and to provide a rationale, including data where available, in support of the option(s) they prefer on each issue.[72]

## 4.1 Licensing options

### Option 1: Status quo

The status quo would see the existing licensing regulation of debt collectors continue without amendment. States and territories would continue to process licence applications and objections, and to cancel licences when required. The advantages of this option include:

- rogue debt collectors would continue to be prevented from entering the industry, as a licence would continue to be required
- the onus would remain on the debt collector to prove they are a suitable person to hold a licence, although this would depend on the assessment criteria applied
- no costs would be imposed on industry or government resulting from the introduction of a new system
- debt collectors who use harassment and coercion may be excluded.

However, maintaining the status quo has several disadvantages, many of which have been discussed in this paper. Disadvantages may include:

- debt collectors operating in more than one jurisdiction would face higher costs due to licensing and regulatory inconsistencies
- the licensing procedure puts the onus on the applicant to demonstrate that they are a suitable person to hold a licence, thereby imposing a barrier to entry
- licensing processes would not apply other consumer protection law
- inconsistency across debt collection legislation would continue.

[72] Please refer to the 'How to Make a Submission' part of this section for submission details. It is important to note that each option is not mutually exclusive. Thought needs to be given to the compatibility of one preferred option with the next.

### Option 2: Remove exemption from national credit act

**Advantages**

Simply removing the exemption of third party collectors from the National Credit Act would apply the National Credit Act to third-party collectors collecting debts to which the National Credit Act applies. In the context of consumer credit, it would provide consumers a further level of protection through better dispute resolution mechanisms and a national credit licensing system with enhanced enforcement powers administered by ASIC as a single national regulator. In particular, moving to the National Credit Act would provide:

- a comprehensive licensing regime for debt collectors who engage in 'credit activities'
- improved sanctions and enhanced enforcement powers for ASIC
- expanded consumer protection through training and conduct requirements and mandatory membership to an EDR.[73]

Complaint handling is an important element of good business practice because it can resolve individual matters when they arise, and assist with early identification of compliance problems.[74] Indeed, one intention of the mandatory EDR scheme is to provide for the efficient and equitable resolution of a debt dispute before enforcement action is taken. This is achieved through investigating in a neutral setting, and in a non-adversarial fashion, alternative terms and conditions that may provide a mutually beneficial solution to the problem.

The national credit model provides a ready-made framework for those debt collectors that fall within its scope. In particular, the reported non-compliance of industry with the ACCC-ASIC Guidelines highlighted by the Latitude Research would benefit from more rigorous conduct provisions. Similarly, the lack of understanding of debtors' situation, particularly in the area of credit, may be improved by the minimum training requirements (with adequate financial and human resources to meet those obligations) provided by the National Credit Act. Further the credit model provides scope for greater education strategies that may be developed for consumers, such as inserting more content into the 'Credit Guide'.[75]

There is also legislative scope to attach conditions onto a debt collector's credit licence which they must comply with. These conditions could depend on the type of collecting the licensee specialises in, such as whether they are a Repossession/Field Agents or office-based collectors.

However, whether debt collectors of industries outside of consumer credit should fall within the new credit regime by virtue of being debt collectors or be regulated separately via new regulation depends on the range of regulation that already exists in those industries outside of credit. This is discussed below.

It is important to recognise that up to 75 per cent of the debt collection market relates to the credit market. Therefore, despite the National Credit Act's limited application, it may be reasonable to assume that many debt collectors would (if they have not already done so) be required to get a credit licence if the exemption were removed.[76]

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[73] Memberships to an EDR scheme require debts not to be outsourced or sold while there is a dispute in progress.

[74] Industry responses to complaint handling have indicated that the expeditious resolution of complaints and working with debtors to help solve their financial difficulties is in the best interest of both parties and is considered to be best practice. See ACCC-ASIC (2009) Debt Collection Practices op cit, pp 13-14.

[75] The provision of this credit guide currently notifies the debtor of the identity of the person collecting the debt and key information about the collector's membership of external dispute resolution and compensation arrangements. See Part 3-6, Division 2, subsection 160(3) of the Credit Act.

[76] Debt collectors collect a range of debts from a range of industries. IBIS reported that the major market segmentation of $1.6 billion (Revenue) can be divided as follows; 52 per cent (banks, credit unions and building societies), 22 per cent (finance

**Disadvantages**

It would not be straightforward to broaden the scope of the credit model to other industries. For example, while there is a deliberate application to debt collectors, the definition of 'credit activities' only relates to consumer credit and excludes other areas where debt collectors may also be involved, such as the payment of telephone and other bills. Further, the focus of the regulation in the National Credit Act is on credit providers, rather than their agents. This is reflected in the decision to make credit providers liable in the event of non-compliance by the provider's agents.

There is also potential for some overlap because several industries where debts are collected apart from credit (such as those from the energy or telecommunications industries)[77] already have requirements similar to those under the National Credit Act.[78] For example, the telecommunications and energy industries commonly have codes of conduct such as the Telecommunications Consumer Protection Code and the Energy Retail Code, both of which contain elements of consumer protection. Industry members are often required, as a condition of holding a licence, to comply with these codes, in addition to the general legislative requirements of the ACL or state and territory regulation.

In addition, participants in some industries such as telecommunication companies, and energy and water suppliers, must also belong to independent EDR schemes, such as the Telecommunication Industry Ombudsman), and the Energy and Water Ombudsman of Victoria which would be subsequent to IDR an original creditor may have.

Therefore, parties to a debt have already gone through dispute resolution processes and applying the enhanced requirements of the National Credit Act on top of the regulation the energy or telecommunications industries already imposes may create unnecessary duplication. Duplicating EDR requirements may only serve to increase costs on industry and prolong the consumer's inability to pay the debt.

If it was decided that the National Credit Act should apply to all debt collectors undertaking credit activities (including original creditors, third-party agents and debt buyers), and if it is considered that a range of similar regulation already exists for utility providers (in the form of mandatory EDR and codes of conduct), then debt collectors that exclusively collect or buy debts from creditors who are not engaged in credit activities would remain outside of the proposed regulation. Currently they are regulated via the existing state and territory licensing legislation.

If this option was preferred, it would be necessary to determine whether a licensing system is necessary for these third party collectors (given the objectives of harmonisation and reduction of duplication) and if so, what form it should take. It may require debt collectors that fall outside of the National Credit Act to also be licensed, which may be unnecessarily duplicative.

### Option 3: The National Occupational Licensing System (NOLS) model[79]

In its Strategic Priority for 2010-2012, MCCA asked for consideration to be given to NOLS in

companies), 13 per cent (utilities) and 13 per cent (other). See IBIS (2010) Op Cit p 13. Therefore, only debt buyers of industries exclusively outside of credit and utilities (13 per cent) would not receive the requirements those areas of regulation would impose, such as mandatory EDR or standards of conduct. Similarly, ACDBA reported approximately 62% of accounts under their management related to credit and utilities. See ACDBA (2011) op cit, p 19.

[77] According to IBIS, approximately 13% of debts relate to utilities (including telecommunications). See IBIS (2010) op cIt p 13.

[78] However, these requirements do not go as far as the National Credit Act requirements, which include broad reaching risk management and training requirements and different enforcement tools.

[79] It should be noted that timelines for NOLS (July 2012 for Phase 1 and July 2013 for Phase 2) are not consistent with the timelines for this project, nor does NOLS currently include 'debt collection' as an occupation in either phase.

the development of the harmonisation of debt collection project.[80] NOLS is being developed to remove licensing inconsistencies across state and territory borders and provide for a more mobile workforce.

**Advantages**

Under NOLS, licence holders will be able to perform work in any state or territory that is taking part in NOLS with a single national licence. NOLS will provide an established framework that aims to reduce red tape, improve business efficiency and the competitiveness and productivity of the national economy.

For example, the harmonisation of the debt collection licence under NOLS will reduce burden within the industry by minimising inconsistencies and reducing inter-jurisdictional anomalies, as well as providing some legislative clarity for its participants by eliminating overlap.

Further, national licensing will provide greater security for consumers because qualification requirements would become streamlined. There would also be added benefits in terms of the economies of scale through increased productivity by enabling debt collectors to work across Australian jurisdictions under one consistent licensing system.

**Disadvantages**

There are a number of difficulties with the NOLS eligibility criteria. For example, the occupations that are currently included in NOLS are those that contain many classes or sub-classes of licence in each jurisdiction, such as builders, property agents and electricians. The large number of these classes and sub-classes compound restrictions on mobility and competition, and consequently has a considerable effect on the Australian economy. Licensing of debt collectors does not exhibit these kinds of problems.

The NOLS eligibility criteria also strictly involves positive licensing (including registration or accreditation) [81], and offers no variation to other regulatory tools that may be more suitable in the context of debt collection regulation.

Further, a suitable licensing framework has already been established under the National Credit Act that could readily be applied to debt collectors, and debt buyers who also engage in debt collection for fee or reward will already be covered by these credit licensing requirements.

Finally, the NOLS timeframe of delivery (2012-13) is not consistent with the timeframes for this project (2012), and its work program is already taken up with other occupations.[82]

### Option 4: Mandatory exclusion requirements (negative licensing)

With regard to improved consumer protection as a result of licensing, there is an incentive for the debt collector to keep their licence and behave in accordance with the regulation. Aside from being prohibited from practising in the industry and losing a licence due to a particular offence, positive licensing may not offer any enhanced consumer protection (over conduct provisions contained in other regulation for example). Indeed, this incentive can be achieved without positive licensing.

Mandatory exclusion requirements provide the regulatory tools to deal directly with those who behave illegally or in an incompetent, exploitative or predatory manner, and if necessary, prohibit them from practicing. It leaves the vast majority of ethical and competent members of the industry to self

[80] Ministerial Council on Consumer Affairs: A New Approach to Consumer Policy, Strategy 2010-2012, p 11.

[81] The Occupational Licensing National Law Act 2010 states that the Regulations can provide for "the different types of licenses, registration and accreditation" (s. 161(1)(c)).

[82] If debt collectors were to be included in the NOLS, this, mostly likely, would be well after the commencement date (as soon as possible after 1 July 2013) for the second wave of NOLS occupations. A Debt Collectors Advisory Committee would have to develop policy for NOLS Debt Collector Regulations and these would need to be drafted. This would all take time and likely could not be achieved until well after July 2013.

regulate, but provides an additional level of public protection with respect to debt collectors at minimal cost to the community.

When compared to a positive licensing system, this option could:

- broadly apply to all specialisations (phone based collectors and field agents for example) of debt collection, without the need for conditions, and potentially other industries (such as trades and lawyers)
- enable poor quality operators to be excluded from the collection industry without the need to impose costly licensing on responsible businesses
- impose very low barriers to entry on collection agents, lowering costs for purchasers of collection services
- automatically exclude any person who is found to have used coercion, undue harassment or physical force (or other deemed offences) when collecting debts without the need to take separate action
- be considerably broader in its scope than the existing positive licensing system, which is limited to the holders of the licence (for example, if a legal practitioner, who is exempted from the current licensing regime, is found guilty of undue harassment, they would be excluded from being a collection agent in addition to any sanctions imposed under the Australian Consumer Law and each State's *Legal Profession Act 2004*)
- like a positive licensing system, give the regulator a wide range of enforcement options (such as enforceable undertakings and adverse publicity orders) if a person becomes prohibited and seeks permission to continue practising, although the enforcement options available would depend on what is put into the legislation.

On the other hand, when compared to a positive licensing system, this option also has a number of disadvantages, including:

- a negative event is required before a person is excluded from the industry (although this is the same under positive licensing where a person with a history of negative conduct can be excluded from the industry before receiving the licence)
- it may be difficult for licensees (and the Regulator) to determine who is participating in the industry. This could make measures such as mandatory audits of trust accounts (if trust accounts are to be required of participants in the industry) more difficult to administer
- there would be no (or limited) fee revenue, meaning that funding for compliance activities may need to come from the wider community in the form of general taxation.

An example of mandatory exclusion requirements was introduced in Victoria on 1 July 2011, and will bring about savings for the Victorian industry of over $2 million per year.[83] This is without jeopardising the consumer protection elements of the Victorian debt collection regulatory framework. Victoria retained these elements through the insertion of 'debt collection practices' provisions into the *Fair Trading Act 1999* (Vic), which are similar to Victoria's previous harassment and coercion provisions before the implementation of the ACL.

[83] See Appendix 5 for details of these provisions. See also Price Waterhouse Coopers (2010) Standard Cost Model Assessment for Changes to the Travel Agents Act 1986, Introduction Agents Act 1997 and the Private Agents Act 1966, April, Melbourne: PWC.

### Option 5: Deemed licensing via the national credit act or a separate national licensing act

As discussed, all Australian jurisdictions, with the exception of the Australian Capital Territory and Victoria, maintain some form of licensing of collection agents. However, internationally, several other jurisdictions including New Zealand and many American states such as California do not operate a licensing scheme for collection agents.

Should jurisdictions want to retain some form of licensing, an alternative mechanism to mandatory exclusion requirements may be for each state and territory to deem that the holder of a licence under the National Credit Act is entitled to practise in that state or territory as a third-party collector. Alternatively, a separate licensing Act could be established containing similar provisions and imposes similar requirements to the National Credit Act.

To enable states and territories to participate in enforcement, the National Credit Act could then be amended to provide that if a debt buyer was found guilty of certain offences against the ACL (for example, the prohibition on physical force, undue harassment and coercion) or any debt collection practices legislation, their licence would have imposed on it a condition prohibiting the collection of any debt for fee or reward, or the purchase of any debt for the purpose of collection. Similar provisions could be developed as part of a separate licensing Act.

This option would have several advantages, including that:

- it could extend coverage of the National Credit Act licensing system to debt buyers who do not buy debts covered by the National Credit Act
- alternatively, it could provide the opportunity to develop a new national licensing Act specific to debt collection (including service delivery specialisation)
- states and territories would be able to respond to local matters as they arose in a manner similar to the ACL, with enforcement action by one jurisdiction automatically having an effect nationwide
- it would provide the opportunity to allow all debt collectors to hold one national licence, reducing the regulatory burden on debt collectors
- it would provide the ability to exclude someone based on particular characteristics (such as a criminal record), but could include 'good permission' provisions that provides the applicant to argue their case
- it could allow for a centralised, nationwide register of debt collectors to be established
- it would lead to third-party collectors being members of EDR schemes.

However, compared with other options, deemed licensing may cost more in terms of higher prices for business, reduced competition, and poorer consumer choice which may outweigh what the scheme attempts to resolve in terms of protecting consumers and addressing market failures.[84]

The disadvantages of this option may include:

- a larger regulatory burden would be imposed than under a negative licensing system
- if the National Credit Act's coverage were extended, ASIC's resources would be impacted upon
- a specific Act may be viewed as overly prescriptive or inflexible

[84] Kleiner is the most recent comprehensive study on this matter although the issues of anticompetitive occupational licensing have been the subject of consideration by Nobel laureates such as Friedman, Stigler and Akerlof and were a core element to NCP reform in the late 1990s. See Kleiner, Morris (2006) *Licensing Occupations: Ensuring Quality or Restricting* Competition? Michigan: Upjohn Institute for Employment Research.

- consumers may not necessarily be better off given the existence of fair trading and other instruments of regulation (such as FTAs, the ACL, the ACCC-ASIC Guidelines, codes of conduct or industry service agreements), which are designed to specifically protect consumers.

## 4.2 Conduct options

The use of physical force, undue harassment or coercion in the process of collecting debts or repossessing goods can have significant consequences such as causing major emotional or physical distress for debtors. Despite industry improvements in the area and the relative low frequency of misconduct, the research presented in the body of this paper and in Appendix 2 highlights that there is a very high potential for misconduct to occur within the industry. Therefore, a continued role for government is likely to exist to prevent such distress from occurring.

Currently, a range of instruments regulate conduct including the general conduct provisions contained in the National Credit Act (though aside from the general requirement to act honestly and fairly, the National Credit Act does not contain specific conduct prohibitions for debt collectors[85]), the ACL (which prohibits any person from using physical force, undue harassment and coercion in connection to the payment of goods and services, and also bans misleading or deceptive conduct), industry codes (such as those found within the debt collection industry itself and in the utility or telecommunications industries) and particular conduct provisions that are contained sporadically in state and territory licensing legislation.

There are also specific debt collection guidelines published by ACCC and ASIC, which industry use as their central instrument for guiding their behaviour in accordance with the range of legislation that exists. The Guidelines are useful in that respect because the range of regulation that does exist does not offer industry participants clarity on their rights and responsibilities. This has been identified both by industry and the consumer research discussed in this paper.[86] Clear and consistent conduct laws may assist both consumers and industry in recognising their responsibilities in the debt collection process, and would similarly assist regulators in recognising breaches of the regulation.

This may be achieved through a range of regulatory tools such as a Memorandum of Understanding (MoU)[87], self-regulatory tools (such as industry provided standards or codes or mandatory membership to a peak body)[88], a prescribed code of conduct (mandatory or voluntary), or through prescriptive conduct provisions contained in legislation or guidelines. These regulatory tools would also need to be consistent with any existing regulation around conduct.

### Option 1: Status quo

Under this option, the existing regulatory framework for the conduct of debt collectors would continue in spite of any harmonised licensing framework discussed earlier. Collection agents would continue to be subject to the range of consumer protection provisions found in the relevant State and Territory Fair Trading Acts, the ASIC Act, the ACL and the ACCC-ASIC Guidelines.

[85] Section 47(1) of the National Credit Act contains a list of obligations for licensees. There are provisions on harassment and misleading conduct (sections 154 and 155), although these relate specifically to entering credit contracts.

[86] Institute of Mercantile Agents (2008) *op cit*

[87] An MoU is, in practice, unenforceable and may not be appropriate to an industry with a high potential for misconduct, particularly against vulnerable or disadvantaged consumers. Therefore, this method will not be discussed further.

[88] Industry standards (such as conforming with ACCC-ASIC Guidelines or mandatory IDR) already exist in the form of contractual standards imposed by peak bodies such as ACDBA or IMA, although membership of these bodies is voluntary.

This option would not impose any compliance costs and would also allow the continuance of any contractual arrangements between principals and their agents. However, the main disadvantages of this option are that:

- because collection agents are not obliged to follow the Guidelines, but rather the legislation the guidelines cover, some detriment to debtors could eventuate from collection agents using practices that differ from those clearly recommended in the Guidelines
- cross-jurisdictional inconsistencies due to the range of instruments regarding conduct would remain potentially causing further detriment to debtors and the imposition of costs on industry
- The current situation may also create uncertainty for interstate debtors, community legal centres and other bodies as to what a collection agent must do with respect to debt collection and repossession practices, because the guidelines do not necessarily act as a strong deterrent nor do they offer a clear legal force.

### Option 2: Non-prescribed industry codes of conduct

Non-prescribed codes of conduct may be either voluntary or mandatory and administered (and largely enforced) by the debt collection industry. They may contain specific conduct prohibitions, trader responsibilities, requirements on training or concern other matters the industry considers appropriate. However, they generally do not provide monetary penalties for non-compliance (as legislation would for example).

A voluntary non-prescribed code of conduct could set out specific standards of conduct for how the debt collection industry would deal with its customers. Collectors would voluntarily agree to uphold these standards by signing up to the code. There could be sanctions for businesses that breach the code, which may include:

- having to pay a fine or other penalty;
- being expelled from the industry association; or
- having to advertise that they have breached the code and explain what they are going to do to resolve a complaint.

Most voluntary codes of conduct will allow consumers to make a complaint when they are dissatisfied with a product or service. There will usually be a procedure in the code for complaints to first be considered by the business and then the industry association. If after this the consumer is still not satisfied, then they may have their complaint reviewed by an independent body from outside the industry.

A voluntary code would provide a flexible and light touch approach towards regulating debt collector conduct, with benefits of minimal barriers to entry and low cost imposition. However, it is arguable whether a voluntary code would increase standards in the debt collection industry given the availability of voluntary membership to industry bodies (and their imposed standards).

In addition, a voluntary code would be less likely to act as a deterrent towards deliberately non-compliant collectors, because there would be no incentive for a ‘rogue’ collector to sign up to it, although this point could be applied to most regulatory tools.

### Option 3: Mandatory prescribed code

This option would see provision made for debt collection practices to be prescribed either in a set of Regulations, in a manner similar to Queensland’s *Property Agents and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001*, or in primary legislation.

Like non-prescribed codes of conduct, prescribed codes may be voluntary or mandatory, and contain specific information on conduct or trader responsibilities. However, their key differences are that they are codified under an Act, which allows for penalties to be attached for non-compliance, and their content is prescribed by the regulator. A prescribed mandatory industry code of conduct is binding on all industry participants.

A prescribed code of conduct could provide the Regulator with power to take initial independent action when a breach has occurred, rather than the industry. Industry participants can also take their own private action for a breach of a prescribed industry code.

A mandatory code, perhaps consistent with existing industry standards, may ensure those collectors not part of an industry body would receive the benefit of clear standards. However, this may eliminate the incentive of genuine collectors choosing to become a member of an industry body.

Where there is a breach of a prescribed industry code, remedies that may be available include:

- declarations that particular conduct is in breach of the Code
- injunctions to stop the prohibited conduct continuing, or to require some action to be taken
- damages
- rescission, setting aside or variation of contracts
- community service orders
- corrective advertising.

The main benefit of a Code is that it outlines specific prohibitions on conduct that must be followed. The ACC-ASIC Guidelines reiterate the impropriety of the behaviour contained in all relevant legislation (including the ACL), as well as other more generic conduct. These guidelines may provide a suitable model.

The Guidelines are also used by industry as the core instrument for guidance on regulatory behaviour and are often part of the contractual arrangements between industry members and their clients. Depending on how the Code is implemented and the level of detail of the code of practice, this option would also:

- allow strong consumer protections to exist with respect to collection agent behaviour
- allow debtors, collection agents and other parties to be well informed about the their rights and obligations with respect to debt collection activities and behaviour
- allow non-compliant behaviour by collection agents to be directly penalised
- provide a clear depiction of industry legislative responsibility.

Currently, the guidelines are arguably limited to providing the regulator's views "on what creditors and collectors should and should not do if they wish to minimise the risk of breaching the laws…"[89] They do not, in themselves, have any legal force on the question of what may amount to harassment or coercion.

However, as codified law and combined with the ACL the guidelines (used as a prescribed code) could provide the regulator with specific examples of what would constitute prohibited behaviour. Therefore, if the code was breached its specificity would provide strong grounds for enforcement and impose monetary penalties where appropriate.

The main disadvantage of this option is that mandatory codes of practice can be highly prescriptive, limiting collection agents'

[89] ACCC & ASIC (2005) *Debt Collection Guidelins, op cit* p 3.

discretion with respect to the most appropriate course of action in the circumstances when collecting a debt. In addition, codes of conduct may not be considered stringent enough compared with specific legislation, and may have limited enforceability.

### Option 4: Legislative provisions

This option would see legislative provisions that regulate conduct introduced either into an exclusive debt collection Act or as a new Part inserted into existing state and territory debt collector legislation.

Legislative provisions contained in an Act would have a similar effect to a prescribed code, and contain similar content. However, Codes do not generally have monetary penalties attached for non-compliance, nor do they tend to be overly specific.

The provisions contained in the ACL contain prohibitions against harassment and coercion, or misleading and deceptive conduct. However, these provisions seem quite broad in their interpretation and lack transparency around what *would* constitute harassment or coercion, or misleading or deceptive conduct. These kinds of provisions could be complimented by a more specific approach in the context of debt collection.

This specificity can be found in Victoria's FTA (see Appendix 5), which apply directly to debt collectors. Like the Guidelines Victoria's FTA goes further than the ACL and contains clear guidance on what conduct is prohibited. Aside from providing clarity and guidance around a debt collector's responsibilities, specific provisions also reduce the potential of some debt collectors to abuse any latitude.[90] The main advantages of this option are that:

- it provides the opportunity to develop new harmonised legislation specific to the conduct of debt collectors
- new consistent provisions would provide clarity on prohibited behaviour, ensuring greater consumer protection
- it would reduce inter-jurisdictional legislative inconsistencies in relation to conduct.

The main disadvantages of this option are that:

- complaints against the industry may increase due to the specificity, thereby increasing cost on industry and government in the resolution of those complaints
- specific statutory provisions may be considered too complex and/or overly prescriptive
- more prescriptive legislation may be exploited by consumers and could subsequently disrupt the efficient collection of debts.

## 4.3 Trust accounting options

### Option 1: Status quo

Under this option, debt collectors would be required to continue to maintain trust accounts, as they do in most states and territories. The objective of legislating trust accounting requirements ensures that debt collectors act with financial integrity, protects clients' from further financial loss if a defalcation occurs and facilitates the detection of wrongful use of trust money.

Trust accounting requirements ensure that money recovered for clients is not intermingled with the money paid to the business for its services.

This option would ensure existing separation of client funds and those of the collector's business would continue. This allows the regulator to monitor compliance more effectively, such as annual auditing

[90] Industry has suggested in numerous submissions that that specific guidance is preferred. In particular, they have supported the use of the ACCC/ASIC Guidelines. See for example Institute of Mercantile Agents (2008) op cit ; Australian Collectors Association (November 2008) op cit.

requirements, than a voluntary scheme. Trust accounting requirements ensure the money is held in a protected environment and reduce the risk that creditors lose money in the event that a collection agent became insolvent.

This option could involve the modernisation of provisions relating to trust accounts to reflect modern business arrangements, such as mandatory auditing of accounts and computerised accounting systems.

When compared to the other options, this option may impose higher compliance costs on collectors, with bank fees and audit fees both likely to be incurred. Compliance costs may also be imposed on the regulator with a need to audit collectors' trust accounts to verify their correctness.

### Option 2: Require disclosure of trust account or professional indemnity insurance details

Under this option, while a debt collector would not be required by statute to operate a trust account or obtain professional indemnity insurance, they would be required to disclose whether they operate a trust account to their clients or if they had professional indemnity insurance. If they had neither of these they would be required to explain the potential consequences of this.

This option would lower compliance costs for collection agents, giving them the discretion as to whether or not they hold trust accounts or have professional indemnity insurance, which would protect against any negligence of the collector. It would also ensure that purchasers of collection agency services are fully informed about the consequences of a collection agent not having such protections. It is expected that this would lead to significant pressure in the marketplace for debt collectors to have trust accounts or professional indemnity insurance, without the need to formally regulate them.

However, removing a requirement to have a trust account would mean that collection agents could mix money recovered from debtors with their main business account, which creates two main risks. The first risk is that, in the event of a defalcation by a collection agent, the monies received on behalf of a creditor may be used to pay secured creditors of the collection agent. The second risk is that debt collectors could use money recovered to finance their own activities, rather than repaying principals.

### Option 3: Abolish trust account requirements

This option would see the removal of trust account requirements. Instead, it would be left to each purchaser of collection agency service to satisfy themselves that appropriate prudential arrangements have been put in place to protect against default.

The main purpose of a trust account is for the protection of creditors (in the event that the debt collector defalcates). However, most creditors, being commercial operations, should be in a position to make assessments about credit risks and level of detriment suffered in the event of defalcation. Furthermore, most transactions entered into are commercial arrangements and may be described as one-off jobs for trade creditors of foundering companies.[91] This may suggest that there is not a need to continue regulation to protect against third-party collectors and the risks associated with money held in trust.

Because purchasers of debt collection services are typically businesses rather than ordinary consumers, debt collectors have the incentive of ensuring their services are credible and reliable. Indeed, the consequences of business losses could potentially be substantial if trust account requirements were abolished, and the cost to remedy such losses may be high. However, business failure remains a possibility

[91] Victoria has argued that the "protection of creditors from low quality debt collectors does not appear to be warranted and affords little public benefit." See CAV (2008) Modernising op cit p 20 and Freehills Regulatory Group (1999) National Competition Policy Review of Private Agents Legislation, p. 39.

in a range of other industries where funds are handled, and are often managed through strict contractual arrangements, such as motor car dealers, finance brokers and second-hand dealers.

Collectors practice in a competitive market where they must not only protect their own interests through quality service provision, but also their clients' interests. It is expected that third-party collectors would typically have service agreements in place with their clients that specify conduct and account management standards. Such service agreements often go beyond existing regulatory requirements.

Business to business contractual arrangements aim to ensure high service delivery standards agreed between members and their clients. The agreed obligations are often broader in scope and more thorough than the current specific debt collection legislation. Arguably, the licensing arrangements are not achieving this, rather, industry standards are.

The main advantage of abolishing a requirement for collection agencies to hold trust accounts is that it would reduce compliance costs such as bank fees and audits, as well as reduce the regulatory burden placed on collection agencies and compliance costs for governments. It would also be consistent with the requirements imposed on most other industries.

On the other hand, in addition to the disadvantages described in option 2, another risk is that under this option, many small business purchasers of collection agency services may only do so infrequently, and therefore may not be aware of the risks if a collector does not have a trust account.

## 4.4 Complaint handling options

Industry sectors recognise the value of providing access to dispute resolution processes.[92] Complaint handling is an important element of good business practice because it can resolve individual matters when they arise and assist with early identification of compliance problems.

Debt collectors that are members of an industry association may include dispute resolution requirements as part of their contractual arrangements. However, this isn't a prerequisite across the industry and may have its limitations given it is an internal process.

If the exemption from the National Credit Act is removed, it may impose obligations regarding membership of external dispute resolution (EDR) to some industry participants not currently required (such as those outside of credit for example) to provide access to EDR. However, as discussed, those laws will not be applicable to all debt collectors.

### Option 1: Status quo

This option would see the existing arrangement for complaint handling maintained in spite of any harmonised legislative framework (in relation to licensing or conduct for example). There is no current requirement for debt collectors to have internal or external dispute resolution processes unless they engage in credit activities under the National Credit Act or are telecommunication, energy or water suppliers.

Debt collectors that belong to an industry association may have internal dispute resolution processes as part of their contractual arrangements. However, membership to these associations is voluntary.

The main advantage of this option is that there would be no imposition of cost as a result of change to the industry. However, the main disadvantage of this option is that there could be a lack of independent dispute resolution for consumers.

[92] ACCC-ASIC (2009) *Debt Collection Practices in Australia, op.cit.*

### Option 2: Mandatory membership of EDR scheme[93]

This option would require all debt collectors, which are not already members of an EDR scheme, to become members of an EDR Scheme (such as the Financial Ombudsman Service (FOS)), which provides dispute resolution process for those with problems with their financial service provider.

This option may require the membership of the FOS to extend to the inclusion of debt collectors. It would also require the dispute to go through the collector's internal dispute resolution process, where available, before it reaches the independent EDR scheme. The main advantages of this option are that:

- consumers would have an independent process to have their complaints (a prerequisite may be if they are firstly unsuccessful with the internal process of the debt collector) assessed
- an independent EDR scheme allows the dispute to be viewed objectively (and the consumer to be satisfied that it has been viewed objectively)
- parties may resolve disputes more expeditiously, which may enhance the effectiveness of the collection of debts
- an EDR body may identify breakdowns in the collection agent's internal process and motivate improvements

The main disadvantages of this option are that:

- the membership to an EDR scheme would impose costs such as a membership fee, as well as time costs in getting disputes resolved
- the EDR scheme may be exploited by consumers and used to hold up legitimate collection processes
- the EDR process may slow down the inevitable collection process and result in consumer being in a worse financial position (unless interest is frozen and the consumer complaint is upheld).[94]

This option would not eliminate the regulator (whether state or federal) as a channel for complaints by debtors. However, the escalation of complaints to the regulator may be minimised by the widespread adoption of EDR by debt collectors.

An alternative of this option could be mandatory membership to an industry association (rather than an independent body) that has a regulator approved dispute resolution process and that is accountable to the regulator. However, mandatory membership to one of these associations may impose an unnecessary barrier to entry to those entering the market, and although it would potentially increase competition between peak bodies and perhaps raise standards further, the same result could arguably be achieved through a mandatory code of conduct or prescribed provisions.

### Option 3: Mandatory internal dispute resolution

This option would mandate Internal Dispute Resolution (IDR) procedures, at least in accordance with the Australian Standard for Complaint Handling. This would provide an efficient internal process for handling complaints made against the debt collector.

The advantages of this option may include:

- consumers will have an immediate complaint handling process
- IDR would impose less of a cost compared with option 2
- may increase service delivery
- allow for the monitoring of complaints

[93] This option would not apply to collectors who already have EDR requirements under the National Credit Act.

[94] ACDBA (2011) op cit, p 24.

- However, the disadvantages of this may include:
- the complaint handling process will not be independent
- the process is ultimately at the discretion of the collector, unless prescribed/approved.

There may be scope in this option to have the mandatory IDR process made accountable to the relevant regulator.

### Option 4: Regulator administered dispute resolution

Conciliation is generally provided by state and territory fair trading offices as part of their respective fair trading legislation. Depending on how enforcement of the new debt collection regulatory framework was to be decided, this option would see state and territory regulators be the primary channel for complaints and the resolution of those complaints.

This option would have similar advantages to option 2. The other main advantages of this option are that:

- the presence of the regulator as the primary complaints channel may reduce complaints through the improvement of the collection agent's own internal processes
- the regulator may monitor the industry more effectively and identify any systemic issues as they arise.

The main disadvantages of this option are that:

- cost would be imposed on government (although may be recovered through a licensing or registration fee)
- the regulator may be exploited and used to hold up legitimate collection processes.

There would be scope with this option to ensure consumers have gone through an IDR (or other) process with the collector as a prerequisite for regulator intervention.

## 4.5 Administration options

Importantly, any regulatory framework is only as good as the enforcement that compliments it. State and territory Fair Trading Offices, and in some cases the police, administer the regulation (for enforcement and licensing for example) under their respective Fair Trading Acts and other state legislation, such as licensing Acts. Therefore, if a national scheme is introduced it must be decided how it will be administered, and subsequently enforced.

### Option 1: Status quo

This option would retain the existing administrative framework for the regulation of debt collection, with each jurisdiction individually responsible at the state and territory level (varying from state to state between the Police and Offices of Fair Trading), and ACCC and ASIC being responsible at the Commonwealth level.

The main advantages of this option are that:

- there would be no change or costs imposed on industry or government
- regulators could continue enforcement.

The main disadvantages of this option are that:

- the fragmented approach to administration would remain in spite of a harmonised legislative framework
- administrative inconsistencies would continue for the industry
- cross-jurisdictional difficulties (such as enforcement) may continue.

### Option 2: Transfer administration to a dedicated debt collection regulator

Currently, the ASIC is responsible for ensuring creditors and collectors engaging in recovering outstanding debts arising from the provision of financial services (or credit activities) are compliant with the ASIC Act, and ACCC is responsible for ensuring compliant collection activity for debts arising from the supply of

non-financial products and services under the ACL. The states and territories are then individually responsible for licensing and particular fair trading matters under their separate debt collection licensing Acts and FTAs.

Depending on the type of legislative framework chosen (in relation to licensing or conduct for example), this option would see responsibility for debt collection transferred to a regulator, established exclusively for debt collection.

The main advantages of this option are that:

- transferring responsibility for licensing to an exclusive regulator may enable specialised staff to handle the compliance processes (such as enforcement or licensing) and oversee trust accounts (if they are made mandatory)
- an exclusive regulator would make it clear about who to deal with for all interstate debt collection matters for both consumers and businesses.

The main disadvantages of this option are that:

- non-central (in rural areas for example) enforcement by a centrally based agency may be difficult
- states and territories may lose some legislative power
- an exclusive regulator would need time to be established, and to acquire knowledge and data that currently exists at state level
- disruption may impose some cost on industry as a result of the transfer.

### Option 3: Modernise and harmonise state and territory administration

The current responsibility amongst states and territories varies between the police and Offices of Fair Trading. This option would make state and territory Fair Trading Offices the sole regulators of debt collection in that jurisdiction, and ensure states and territories work together on compliance and enforcement issues. The main advantages of this option are that:

- the states and territories may continue administration
- modernisation will provide the opportunity for appropriate reforms and collaboration
- less regulator and industry disruption will occur compared with a full transfer of responsibility
- The main disadvantages of this option are that:
- different jurisdictions may apply varying degrees of compliance and enforcement, which may subsequently reduce competition
- increased costs may be imposed as a result of the harmonization.

This option would allow the continued function of ASIC and ACCC in their roles as Commonwealth administrators of fair trading rules.

## 4.6 Information standards

As this paper has discussed, misinformation issues seem to arise out of the collection, selling and assignment of old debts, and can create unintended consequences for consumers and debt collectors alike. In particular, they can create confusion and barriers to the efficient collection of debts not otherwise the subject of disputes.

### Option 1: Status quo

The *Privacy Act 1988* (Cth) (Part IIIA and the Credit Reporting Code of Conduct), relevant state and territory privacy legislation, and numerous conduct provisions that prohibit misleading and deceptive conduct regulate debt collectors and their handling of credit reporting and information sharing matters. This

option would see that regulation remain unchanged.

Collectors that are members of industry associations have internal processes that ensure the provision of information when requested by debtors, or will provide all relevant information as part of the initial contact.

The main advantage of this option is that there would be no change or costs imposed on the industry. However, the main disadvantages of this option are that:

- debtor confusion and disputes arising out of misinformation and credit reporting issues may remain
- the status quo may continue to exacerbate barriers to the efficient collection of debts.

### Option 2: Standardised and prescribed information provision

This option would prescribe information standards (such as forms or minimum requirements) that would require disclosure about debts that have been assigned or sold to a third party. It would focus on targeted areas of confusion, such as standards relating to the identity of the debtor and the particulars of the debt. Provisions could be inserted into the chosen regulatory framework (as part of either existing state and territory legislation or new industry specific legislation if preferred).

Depending on the information required to be disclosed, this option may involve amendment to relevant credit reporting legislation such as the Privacy Act, which is out of scope for this project. Nonetheless, the main advantages of this option are that:

- may eliminate the misinformation issues discussed in this paper
- consumers would be clear on what information they can expect
- industry would have a clear and approved form that is ready to use, which may provide greater clarity for industry and less margin for error
- The main disadvantages of this option are that:
- prescribed forms reduce flexibility for industry to develop their own forms, which many collectors have already
- prescribed forms would increase the regulatory burden on the industry, which may outweigh any disclosure benefit.

### Option 3: Mandatory disclosure upon request

This option would implement the requirement that any person who is not the original creditor must provide certain information about a debt within five days of commencing collection efforts.

A consumer would be able to request further details of the debt within 30 days of collection efforts commencing. The required information includes the name and address of the original creditor and verification of the debt itself.

Similar protections also exist under section 38 of the National Credit Code made under the National Credit Act, as well as the Fair Debt Collection Practices Act in the United States and the Commercial Agents and Inquiry Agents Regulation 2006 (NSW). With respect to debts covered by the National Credit Code, a credit provider must provide a written notice explaining in reasonable detail how the liability for the debt arises. Enforcement proceedings cannot occur until at least 30 days have passed from the date of the notice. However, no requirements exist for many debts not covered by the National Credit Code.

The main advantage of this option would be that consumers would be able to source upon request information regarding their debt, which may reduce complaints involving misinformation issues.

However, one disadvantage may be that consumers could use this right to delay the collection process until the information is received, although this may be safeguarded against. Further, from an industry perspective, the costs involved in transferring huge amounts of data from the original credit provider to the debt purchaser cannot be justified particularly when liability is rarely disputed.[95]

## 4.7 Educational requirements options

ACCC and ASIC identified organisational culture as a key determinant for the process of debt collection, and the conduct of the industry more generally.[96] Education, if relevant and accessible, can enhance the 'compliance culture' (and the compliance framework in general) by ensuring the activities of debt collectors comply with consumer protection laws and that those involved in the function of debt collection understand the sensitivities involved.

Industry has supported this point but has questioned the inflexibility and relevance of the existing training standards.

### Option 1: Status quo

This option would see the existing sporadic education requirements continue without amendment. States and territories would continue to vary with regards to what qualifications are required to carry on the business of a debt collector, and industry (at least collectors that are members of an industry association) would continue to impose internal education requirements. The main advantages of this option are that:

- there would be no change or costs imposed on the industry or government caused by changing to a new educational system
- there would be no increased barriers of entry into the market
- The main disadvantages of this option are:
- cross-jurisdictional educational inconsistencies will remain
- debt collectors engaging in business interstate may continue to remain at a competitive disadvantage
- the 'compliance culture' of the industry may continue to be affected
- consumers may receive lower standards of debt collection in those jurisdictions that do not require qualifications
- current issues expressed by industry regarding the failings of education requirements would go unreformed

### Option 2: Modernise and harmonise statutory training standards

New South Wales, South Australia and Tasmania impose statutory education requirements on debt collectors.[97] Queensland retains a power to prescribe qualifications but has not done so to date.

This option would see these requirements modernised and harmonised throughout Australia. The main advantages of this option are that:

- it would provide the opportunity to develop education requirements that are updated and consistent across Australia
- debt collectors would have consistent educative responsibilities and be on

[95] ACDBA (2011) op cit, p 21.

[96] ACCC (2009) *Debt Collection Practices, op cit,* pp 17-18.

[97] In NSW the Certificate III in Financial Services (Mercantile Agencies) in & TAS - three units from the Diploma in Financial Services (Credit Management & Mercantile Agencies).

competitively level playing field when practicing interstate

- the ‘compliance culture’ of debt collectors may increase
- service provision to consumers may be enhanced, which may reduce complaints
- However, the main disadvantages of this option are that:
- training may be considered an indirect means of promoting compliance compared with other mechanisms such as access to damages
- up to date and relevant statutory education requirements may be considered difficult and costly to maintain
- it is uncertain whether complaints against the industry will be reduced through mandatory education requirements
- statutory education requirements may not be flexible and may not be applicable to all collector specialisations
- there would be an imposition of costs on those debt collectors currently not required to have qualifications
- some industry participants already consider existing education requirements as expensive and difficult to access, and contributing to higher turnover within the industry
- mandatory education standards would increase barriers of entry into the industry.

### Option 3: Introduce industry determined training standards

Introducing training standards across the industry and having those standards set by industry (but approved by the regulator for example) will have similar benefits to Option 2.

The standards, which would form part of the chosen licensing framework and be approved by the regulator, could be tailored by industry to suit particular specialisations within the organisation. For example, call centre staff would receive training relevant to their duties, which may differ to the training received by a repossession agent.

In addition to the advantages of Option 2, the main advantage with of option is that it would be flexible and able to be updated easily by industry, thereby maintaining industry relevance. The main disadvantage would be those discussed in Option 2.

### Option 4: No mandatory training

This option would eliminate all mandatory training requirements and leave training an area for market resolution. Industry associations impose training requirements on their members. However, membership to such an association is voluntary, although there is an obvious business incentive to join. The advantages of this option would include:

- no costs or barriers to entry into the marketplace
- regulatory focus would shift to other areas of compliance.

However, the main disadvantage of this option would include that debt collectors may become less aware of their obligations, and this may potentially increase instances of misconduct.

# Appendix 1: Comparative table

| Jurisdiction | Regulation | Definition | Requirements | Regulator/Administration |
|---|---|---|---|---|
| Commonwealth | Privacy Act 1988, Australian Securities and Investments Commissions Act 2001, Bankruptcy Act 1966, Financial Services Reform Act 2001, the National Consumer Credit Protection Act 2009, Corporations Act 2001 and the Competition and Consumer Act 2010 (otherwise known as the Australian Consumer Law (ACL)).<br>There are also a range of industry Codes including the national Telecommunications Consumer Protection Code and the National Energy Retail Code. | Not applicable | These Acts regulate the handling of a debtor's information, the conduct of particular financial service creditors, bankruptcy procedures, conduct and disclosure for financial service providers and licensing and conduct of those engaged in 'credit activities' and those outside (ACL) respectively.<br>These Codes ensure that energy providers comply with the ACL and ACCC-ASIC Debt Collection Guidelines and that telecommunication providers are not unlawful and adhere to Australian Standards in 'compliance programs' and 'dispute resolution'. | The regulators of these Acts are the Privacy Commissioner and the Australian Securities and Investments Commission.<br>There are a range of agencies that assist in the regulation of the utilities industry, they include the Telecommunications Industry Ombudsman, Electricity and Water Ombudsman (Vic), Electricity and Water Ombudsman (NSW), Essential Services Consumer Council (ACT), Energy Ombudsman (TAS), Energy Ombudsman (WA), Energy Industry Ombudsman (SA), State Ombudsman (NT) and Energy Consumer Protection Office (QLD). |
| Australian Capital Territory | The ACT does not licence debt collectors, though it regulates their conduct via the ACL | Not applicable | The ACL prohibits debt collectors from engaging in misconduct (such as misleading and deceptive misconduct or harassment and coercion). Regulation has the capacity for "ban and cease trading" orders for those collectors that breach the law. | Office of Consumer and Business Affairs and the Australian Securities and Investments Commission (ASIC). |
| New South Wales | Commercial Agents & Private | Any individual or | Act regulates Operators Licensees | Commercial Agents and Private |

| Jurisdiction | Regulation | Definition | Requirements | Regulator/Administration |
|---|---|---|---|---|
| | Inquiry Agents Act 2004 and Commercial Agents & Private Inquiry Agents Regulation 2006 | business engaged in debt 'collection activities' in NSW. | (employees) and Master Licensees (businesses)<br>Prohibits particular unreasonable contact and communication, visiting or leaving notices at the premises.<br>Prescribes particular behaviour including the collector's name and licence number, and providing evidence of the debt on demand.<br>Licenses refused if persons convicted of prescribed offences in the last 10 years or found guilty with no conviction in the last 5 years.<br>Education qualifications required (Cert III in Financial Services (Mercantile Agencies), higher for Master Licenses. | Inquiry Agents Security Licensing and Enforcement Directorate within the NSW Police Force's State Crime Command. |
| Northern Territory | Commercial & Private Agents Licensing Act and Commercial & Private Agents Licensing Regulations | A commercial/sub-agent is licensed to (on behalf of others) collect, request or demand payment of debts; serve legal processes and repossess goods; obtain evidence for legal proceedings; and search for missing persons. | Application in the form approved by the Commissioner, accompanied by the prescribed fee and bond/security.<br>Licensee must be of 'good character' with no criminal history, and must convince the Commissioner of financial resources to carry on business<br>Must have evidence of fidelity fund (trust account) | Commissioner of Consumer Affairs |
| Queensland | Property Agents & Motor Dealers Act 2000 and Property Agents & | A commercial agent licence | No experience or minimum educational requirements. | Office of Fair Trading |

| Jurisdiction | Regulation | Definition | Requirements | Regulator/Administration |
|---|---|---|---|---|
| | Motor Dealers Regulation 2001 | authorises the holder (on behalf of their client) to find or repossess for any person any goods or chattels; collect or request payment of debts; and serve any writ, claim, application or other process. | Retains a power to prescribe education requirements but has not done so to date.<br>Act prohibits particular conduct like misrepresentation of a debt, unlawful entry and licence misuse.<br>Regulations provide for book keeping requirements and trust account claims.<br>Regulation prescribes a mandatory Code of Conduct that provides for honesty, fairness and skill when collecting a debt, as well as communication requirements and to act in the client's best interest. It also prohibits harassing or misleading conduct among other areas. | |
| South Australia | Security & Investigations Agents Act 1995 and Security & Investigations Agents Regulations 1996 | | Licenses refused if persons convicted of particular offences, including breaches of Police Act, Listening Devices Act and Telecommunications Act.<br>Education qualifications required such as 3 units of the Diploma of Financial Services (Credit Management & Mercantile Agencies), with statement of attainment or certificate of equivalency through a Registered Training Provider. | Office of Consumer and Business Affairs |
| South Australia | Security & Investigations Agents Act 1995 and Security & Investigations Agents Regulations 1996 | | Licenses refused if persons convicted of particular offences, including breaches of Police Act, Listening Devices Act and Telecommunications Act.<br>Education qualifications required such as 3 units of the Diploma of Financial Services (Credit Management & Mercantile Agencies), | Office of Consumer and Business Affairs |

| Jurisdiction | Regulation | Definition | Requirements | Regulator/Administration |
|---|---|---|---|---|
| | | | with statement of attainment or certificate of equivalency through a Registered Training Provider. | |
| Tasmania | Security & Investigations Agents Act 2002 and Security & Investigations Agents Regulations 2002 | | Application to Commissioner and competency standards for education, practical skills and experience as determined by the Commissioner.<br>Education qualifications required such as 3 units of the Diploma of Financial Services (Credit Management & Mercantile Agencies), with statement of attainment or certificate of equivalency through a Registered Training Provider. | Commissioner for Consumer Affairs and Fair Trading |
| Victoria | Fair Trading Act 1999 (section 162AA) | | Introduces a negative licensing scheme, prohibiting any person from engaging in debt collection if they breach particular laws, conduct provisions of the Act.<br>Prohibits specific conduct relating to harassment & coercion, misleading or deceptive conduct, & prohibiting communication if collector is told in writing to cease conduct. | Consumer Affairs Victoria (Department of Justice) |
| Western Australia | Security & Investigations Agents Act 2002 and Security & Investigations Agents Regulations 2005 | | Application must provide identification, residential & business address details, and testimonials from 3 people of ‘good repute’.<br>Require sureties to be paid into a trust account. | Department of Consumer and Employment Protection |

# Appendix 2: Latitude research

The data and information presented in this appendix is drawn from Latitude Insights (2010) *Debt Collection Regulation Harmonisation Research: Final Report*, Melbourne: Latitude.

**Kinds of debt**

Nearly half of all respondents (49.4 per cent) had only one outstanding debt in the last two years with the majority (85.3 per cent) recording three or fewer outstanding debts. A small minority (9.6 per cent) had incurred five or more outstanding debts over the past two years.

Respondents aged under 44 years of age were more likely to have three or more outstanding debts in the past two years (31 per cent) compared to older debtors aged 55 years or more (16.8 per cent).

Respondents who had one outstanding debt were more likely to agree with the debt (44.6 per cent) compared to respondents who had three or more outstanding debts (31.5 per cent).

In the survey respondents were asked to identify the type of purchase to which the debt was related. The following table outlines the purchase categories respondents were contacted about for their outstanding debt.

| Type Of Purchase | Number of Responses | Percentage of Total |
|---|---|---|
| Credit card | 296 | 24.6 |
| Telecommunications (including mobile phones) | 194 | 16.1 |
| Utilities (electricity, gas, water or rates) | 179 | 14.9 |
| Personal loan | 65 | 5.4 |
| A fine | 64 | 5.3 |
| General services (e.g. ticketing/booking, airlines, repairs) | 52 | 4.3 |
| Motor vehicle | 50 | 4.2 |
| Mortgage repayments | 41 | 3.4 |

| | | |
|---|---|---|
| Accommodation – Rent | 16 | 1.3 |
| Other (please specify) | 139 | 11.6 |
| Total | 1200 | 100.0 |

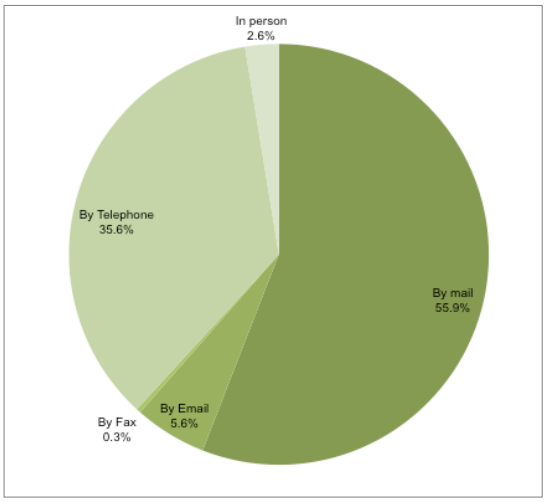
**The debtor experience**

The survey indicated that original creditors were more likely to initially contact respondents via telephone (40.1 per cent) compared with third party debt collectors (32.1 per cent) who preferred mail as their first method of contact.

When respondents were asked if the original creditor or third party debt collector introduced himself or herself in a manner that was clear about why they were contacting the debtor, 78 per cent of respondents stated 'yes' and 22 per cent recorded 'no'. Original creditors were significantly more likely to be considered clear (84.7 per cent) about why they were contacting the debtor compared to third party debt collectors (72.5 per cent).

Respondents who agreed with the debt also reported that the original creditor and / or third party debt collector was clear in why they were making contact (84.8 per cent) compared to respondents who disputed the debt (64.2 per cent).

*Chart 3: Method of Initial Contact for Debt*



**Transfer of information**

In the survey respondents were also asked if the original creditor and/or third party collector provided them with sufficient information and detail about the debt so that they understood why they were being contacted. The clear majority, 81.5 per cent of respondents reported that they were provided with sufficient information while 18.5 per cent reported that they were not. Original creditors (88.1 per cent) were more likely to have been reported to provide the debtor with sufficient information compared to a third party debt collector (76.4 per cent). Importantly respondents who agreed with their debt reported a 92.0 per cent satisfaction with the information provided, whereas respondents who disagreed with the debt reported a much lower level of satisfaction (62.2 per cent).

The table below shows the number and percentage of respondents who requested further information and whether or not they received that information.

| | *No of respondents Requested Further Information* | *Percentage of total sample* | *No of respondents provided additional information* | *Percentage of total sample* |
|---|---|---|---|---|
| Yes | 591 | 49.3% | 416 | 70.4% |
| No | 609 | 50.8% | 175 | 29.6% |
| Total | 1200 | 100.0% | 591 | 100.0% |

Just under half (49.3 per cent) of all respondents requested further information about the debt with only 70.4 per cent of those receiving the additional information.

Nearly one third (29.6 per cent) of respondents who requested additional information reported that they did not receive it. Original creditors were reportedly much more likely to provide further information (79.5 per cent) compared with third party debt collectors (63.1 per cent). Respondents who did not agree with the debt were less likely to report receiving additional information (55.4 per cent) compared with respondents who agreed with the debt (87 per cent). The following table outlines the reasons respondents gave for not receiving requested information.

| *Reason for reporting not having received information requested for debt collector* | *No of respondents* | *Percentage of total sample* |
|---|---|---|
| Asked for written confirmation/proof but never received it | 38 | 21.7% |
| Confidential/Privacy laws/couldn't provide information to me | 20 | 11.4% |
| Amount in dispute/disagree on value | 17 | 9.7% |
| Still waiting to hear / no response/follow up | 12 | 6.9% |
| Debt collector - did not want to talk/listen, just wanted money | 10 | 5.7% |
| Debts taken over by others | 10 | 5.7% |
| Language barrier / Call Centre / Couldn't understand | 9 | 5.1% |
| Debt collector – unclear/uninformed | 6 | 3.4% |
| Spoke to many people but no-one had information | 5 | 2.9% |
| Threatened/bullied with court action | 5 | 2.9% |
| Debt collector - rude/abusive | 4 | 2.3% |
| Too slow | 3 | 1.7% |
| It wasn't my debt | 2 | 1.1% |
| Don't know/unsure | 25 | 14.3% |
| Other | 9 | 5.1% |
| Total | 175 | 100.0% |

Nearly half of all respondents (49.2 per cent) who reported not receiving the additional information explained the failure to receive the information as the original creditor and/or third party debt collector simply not providing the information to them. In some cases they were still waiting to receive it at the time of the survey. The vast majority of explanations (68.6 per cent) provided by

respondents do not provide sufficient explanation as to why the original creditors and/or third party collector reportedly failed to provide the respondent with the requested information.

**Debtor response to the debt**

This section outlines respondents' reactions to the debt, including why they were unable to repay the debt and whether the situation was resolved. The following table outlines the reasons why respondents did not pay their debt.

| Reason for not paying debt | No. of responses | Percentage of responses |
|---|---|---|
| Unexpected changes to financial situation | 298 | 24.8 |
| Forgot to pay the debt | 277 | 23.1 |
| Debt in dispute | 195 | 16.3 |
| Misjudgement of being able to pay debt | 178 | 14.8 |
| Change in income | 172 | 14.3 |
| Unemployment | 152 | 12.7 |
| Change in employment conditions | 129 | 10.8 |
| Sickness (respondent or a family member) | 113 | 9.4 |
| Other | 154 | 12.8 |
| Total | 1200 | 100.0 |

Nearly one quarter of all respondents (24.8%) reported that they were unable to repay the debt due to an unexpected change in their financial situation and just under another quarter (23.1%) reported that they had forgotten to repay the debt.

Respondents who agreed with the debt were more likely to indicate that the reason they were unable to repay the debt was due to an unexpected change in their financial situation (30.2%) that prevented them paying the debt on time. Just under one third (29.5%) of these respondents reported having forgotten to repay the debt and 17.1 percent reported misjudged their ability to repay the

debt. The remainder was reportedly due to unemployment (14.5%), sickness (10.1%), change in income (16.6%) and employment conditions (11.9%).

In contrast, respondents who did not agree with the debt not surprisingly attributed it primarily to the debt being in dispute (41.2%). Other reasons reported for not paying back the debt amongst these respondents included unexpected changes to financial situation (14.6%), forgot to repay the debt (11.0%), misjudgement of ability to repay the debt (10.5%), change in income (10.0%) and change in employment conditions (8.7%). Interestingly, only 41.2% of these respondents reported that the debt was not paid as it was in dispute whereas the remainder of respondents gave other reasons for not paying back the debt even though they disagreed with the debt. This suggests that the remaining 58.8% would have paid back the debt even though they disagreed with it, but reasons such as forgetting to pay the debt or change in financial circumstances prevented them from doing so.

The table below indicates that the majority of respondents (65.3 per cent) agreed with the details of the debt and believed they were responsible for paying back the outstanding debt. However, just over one third (34.7 per cent) of respondents did not believe they were responsible for the debt or that the details were incorrect. Amongst these respondents, 17.1 per cent believed that the details of the debt were incorrect and 17.6 per cent agreed that the details of the debt were correct but due to other related circumstances they should not have to repay the debt.

| *Response* | *No. of responses* | *Per cent* |
|---|---|---|
| I agreed with the details of the debt | 784 | 65.3 |
| I agreed with the details of the debt but believed I was not responsible | 211 | 17.6 |
| The details of the debt were incorrect | 205 | 17.1 |
| Total | 1200 | 100 |

When respondents were asked via an open-ended question[98] why they disagreed with the debt, 42.4 per cent indicated that the amount charged was not what they had agreed to or that they had paid part or most of the debt.

[98] Note: there appears to be a disconnect between the question asked of respondents and the answers given. This is due to the question having an open-ended response category.

Close to a third (30.1 per cent) indicated that they disagreed with the debt because the details of the debt were incorrect and 9.4 per cent reported they had never received the goods or they were faulty (5.8 per cent).

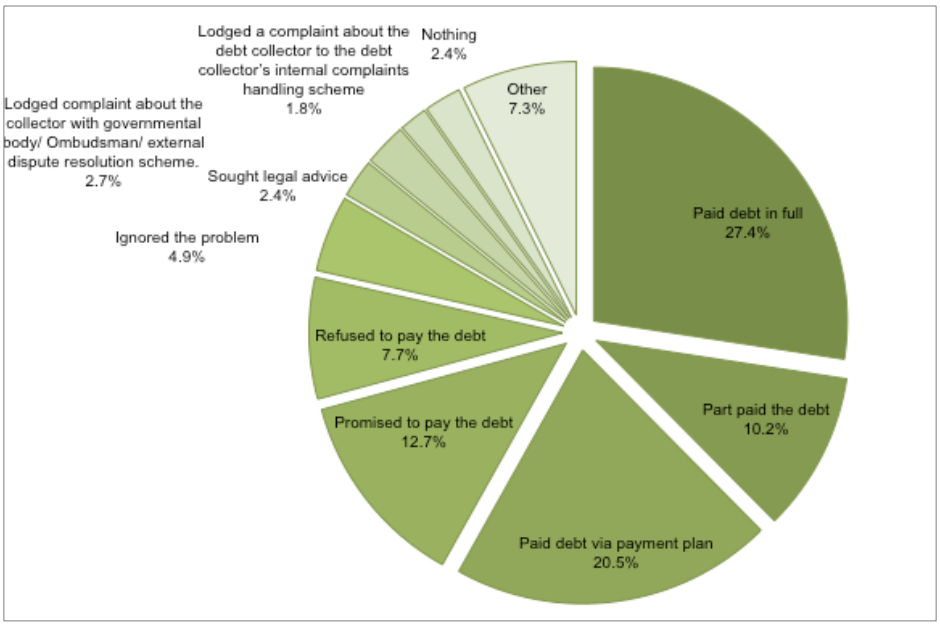
Chart 4 over illustrates that over half of all respondents (58.1 per cent) reported making tangible arrangements to repay the debt when requested for payment by the original creditor and/or third party collector. Twenty eight percent ignored the problem, refused to pay the debt, promised to pay the debt or did nothing and seven percent sought third party intervention such as legal advice or lodged a complaint with authorities.

Respondents who were contacted by the original creditor were more likely to report paying the debt on request (37.2 per cent), as well as respondents who agreed with the debt (39.2 per cent). In contrast respondents who were contacted by a third party debt collector was less likely to report paying back the debt (26.9 per cent), as well as respondents who did not agree with the debt (18.2 per cent).

The majority of respondents agreed to repay the debt because it was their debt and it was the right thing to do (44.9 per cent). A small proportion claimed that the reason they paid back the debt was because they were threatened, summoned to court or were being hassled by the collector (6.3 per cent) and the remaining respondents arranged a payment plan (10.5 per cent).

The majority of respondents who reportedly refused to repay the debt claimed it was a result of the debt being in dispute or unresolved (17.3 per cent) or because of their financial situation such as bankruptcy, illness or simply not having the money (8.7 per cent).

Chart 4: Respondent Response to Request for Repayment of Debt



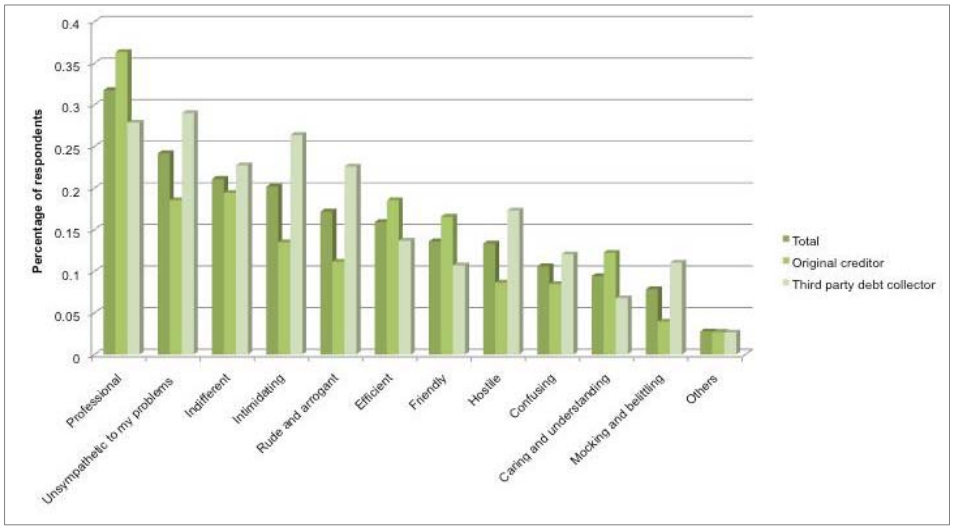
For the majority of respondents this action resolved the situation (74.4 per cent). Respondents who were dealing with original creditors were more likely to have resolved the situation (81.3 per cent) compared to those dealing with third party collectors (68.9 per cent). Furthermore, respondents with only one debt were more likely to have resolved the situation (80.3 per cent) as were those who agreed with the debt (79.5 per cent) compared to those with three or more debts (64.7 per cent) or respondents who disagreed with the debt (65.0 per cent).

**Behaviour of debt collector according to the debtor**

Chart 5 outlines the manner respondents were approached about the debt and compares original creditors to third party debt collectors. Respondents were given a list of possible responses and could indicate as many responses as were applicable.

The majority of respondents reported encountering a negative manner when approached by the debt collector about the debt (61.8 per cent). However, respondents who were approached by the original creditor were less likely to report encountering a negative attitude (50.0 per cent), whereas respondents dealing with third party collectors were more likely to report encountering a negative attitude (70.5 per cent) by the debt collector than a positive manner.

*Chart 5: The Manner In Which Respondents Were Approached By Debt Collector*




Similarly, respondents who agreed with their debt were much more likely to report encountering a debt collector with a helpful attitude (75 per cent) compared to those who disputed the debt (21.0 per cent).

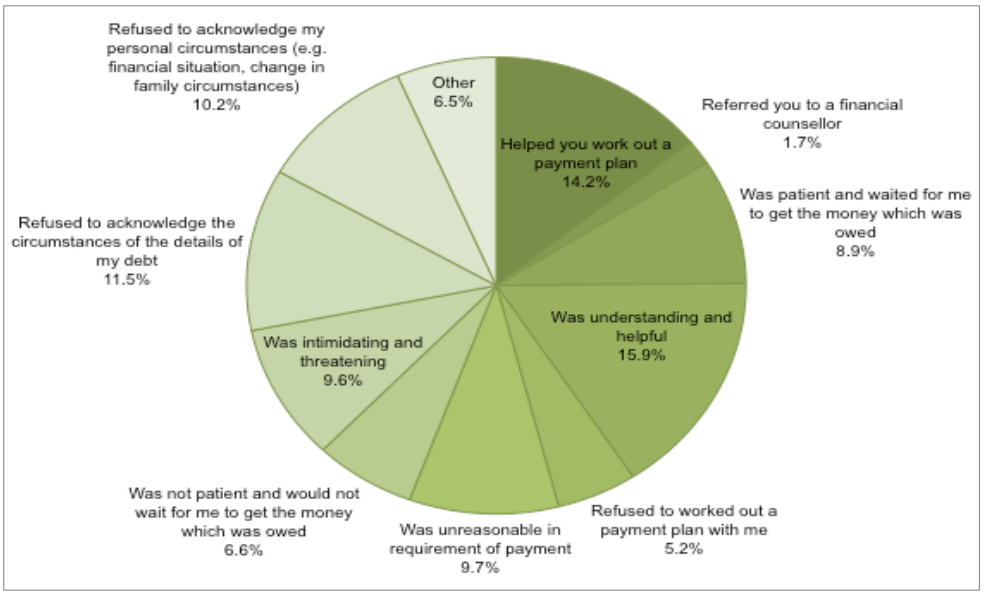
Chart 6 below demonstrates that just over half of all respondents (52.8 per cent) reported that the original creditor and/or third party collector was unhelpful and failed to provide assistance to help them repay the debt. Only 40.7per cent per cent of original creditors and/or third party collectors were reportedly understanding and flexible in working out a solution to assist the respondent in repaying back the debt.

Once again respondents were more likely to report encountering positive interactions from the debt collector if they were the original creditor (58.5 per cent) compared to a third party collector (37.0 per cent). Equally, respondents who agreed with the debt were also more likely to report experiencing constructive dealings with the debt collector (57.2 per cent) compared to respondents who disagreed with the debt in question (23.5 per cent).

Referral to a financial counsellor was more likely to occur in Victoria (4.8 per cent) than in other states and territories throughout Australia (1.9 per cent). Respondents who did not speak English as their primary language were also much more likely to report being referred to a financial counsellor (8.9 per cent) by the debt collector compared to respondents who spoke English as their primary language (2.4 per cent).

The majority of respondents reported that when the original creditor or third party collector made contact to seek payment for the debt, 74.4 per cent of debts were either paid or payment plans negotiated and that subsequently the debt was resolved.

*Chart 6: Behaviour Of The Debt Collector When Dealing With The Respondent*



**In relation to the debt**

The majority of debt collectors reportedly no longer contacted respondents who claimed to have resolved the debt (83.4 per cent). However, a small proportion (16.6 per cent or n=148) continued to report being contacted by the debt collector.

Respondents who had reported having resolved the debt were then asked if they continued to be contacted by the debt collector. The table below outlines their response.

| *State /Territory* | *Percentage who reported continued contact* |
|---|---|
| New South Wales & Australian Capital Territory | 25.3 |
| Victoria | 17.4 |
| South Australia & Northern Territory | 15.7 |
| Queensland | 13.6 |
| Tasmania | 12.7 |
| Western Australia | 10.4 |
| All-Australia | 16.6 |

Of these 148 respondents, those living in NSW or the ACT were significantly more likely to be contacted by the debt collector after the debt was resolved. Furthermore, respondents who spoke English as a second language (34.1 per cent) were also more likely to report receiving continued contact, compared with respondents who spoke English as a first language (15.4 per cent).

There was a strong indication from respondents that the debt collectors' action to recover the debt was unfair and unreasonable if the respondent disagreed with the debt (68.9 per cent) or was contacted by a third party collector (51.6 per cent). Whereas, respondents were more likely to believe that the debt collectors' actions to recover the debt was fair and reasonable if they were the original creditor (67.3 per cent) or the respondent agreed with the debt (71.0 per cent).

**Seeking assistance**

Just over one third of respondents reported seeking advice about the debt (34.5 per cent) with the remaining 65.5 per cent reported receiving no advice or assistance. Respondents who agreed with the debt were less likely to report that they sought advice (30.6 per cent) compared to respondents who disagreed with the debt (41.9 per cent). Respondents who spoke English as a second language were also more likely to report seeking advice (51.8 per cent), as were those with six or more debts (44.9 per cent).

Forty percent of respondents who reported sought assistance were likely to go to a friend, family member or work colleague. Only 16.8 per cent reported seeking advice from a financial advisor or counsellor and 13.3 per cent from a consumer protection agency or lawyer.

Advice sought from consumer protection agencies was most likely to come from respondents who were dealing with third party debt collectors (13.6 per cent) compared to those dealing with the original creditor (7.5 per cent). Furthermore, respondents who disagreed with the debt were also more likely to seek advice from consumer protection agencies (16.2 per cent) compared to those respondents that agreed with the debt (6.3 per cent). Males (15.2 per cent) were also more likely than females (7.0 per cent) to report seeking advice from consumer protection agencies.

Respondents were also asked to report why they did not seek advice about their situation. The table below reports the findings.

| *Reason respondents did not seek advice (N= 786)* | *Agreed with Debt %t* | *Disagreed with Debt %* | *Total %* |
|---|---|---|---|
| I was embarrassed and ashamed | 19.3 | 12.6 | 17.2 |
| I didn't want anyone to find out I was in financial trouble | 20.8 | 9.1 | 17.2 |
| I was scared I would end up in worse trouble | 6.4 | 6.5 | 6.5 |
| I felt there was no hope and nothing could get me out of this situation | 14.3 | 15.5 | 14.8 |
| It was no-one else's business | 33.5 | 25.1 | 30.9 |
| I didn't know where to go for help | 17.3 | 20.6 | 18.3 |

| | | | |
|---|---|---|---|
| I didn't care | 11.4 | 15.5 | 12.7 |
| Others | 20.2 | 22.7 | 20.9 |

The table outlines the different reasons why respondents reported not seeking advice depending on whether they agreed or disagreed with the debt. Respondents who agreed with the debt were more likely to report not seeking advice because they were embarrassed and ashamed (19.3 per cent), didn't want anyone to find out (20.8 per cent) and believed it was no-one else's business (33.5 per cent). In contrast, respondents who disputed the debt did not know where to go for help (20.6 per cent), felt there was nothing they could do to get out of the situation (15.5 per cent) and also believed it was no-one else's business (25.1 per cent).

Females were more likely to report being embarrassed and ashamed (19.6 per cent) and did not want anyone to find out about the debt (20.7 per cent) and therefore did not seek advice. Whereas males were more likely to report that they believed it was no-one else's business (30.9 per cent) and they did not care (12.7 per cent).

Respondents with three debts or more were also more unlikely to report seeking advice and reported this being due to feelings of no hope (22.2 per cent), not knowing where to go (31.9 per cent), being ashamed and embarrassed (23.6 per cent) and not wanting anyone to know they were in financial trouble (22.2 per cent).

**Industry non-compliance**

Currently two specific types of debt collectors operate throughout Australia to collect outstanding debts. They are either original or third party debt collectors (including debt buyers). The following table represents the type of debt collectors and the number and percentage of respondents they contacted.

| Type of debt collector | No of responses | Percentage of total sample |
|---|---|---|
| Original creditor | 556 | 46.3 |
| Original creditor initially and then passed on to a third party | 246 | 20.5 |

| | | |
|---|---|---|
| A debt collection agency / third party | 361 | 30.1 |
| Other / Unsure | 37 | 3.1 |
| Total | 1200 | 100.0 |

The following table outlines instances of non-compliance with the ACCC-ASIC Guidelines and consumer protection laws by debt collectors. 1200 respondents were presented with a list of statements and asked to answer 'yes', 'no' or 'unsure' to each. The proportion answering 'yes' for each statement is shown in the table below.

| | Original Creditor % | Third party debt collector % | Total % |
|---|---|---|---|
| They told me that I would incur additional costs because I did not pay back the debt | 75.5 | 74.7 | 74.7** |
| They threatened to put my name on a default list that would affect my credit rating | 41.8 | 64.5 | 54.2± |
| They didn't give me time to make sure the debt was correct | 25.3 | 34.6 | 30.6 |
| They told me I could lose my house, car or other items if I did not pay the debt | 24.5 | 32.6 | 29.2 |
| I was contacted before 9 am or after 9 pm at night on the weekend | 20.9 | 28.0 | 25.0 |
| They sent me a letter that I thought was from a lawyer and later found out it was not | 16.8 | 28.2 | 22.9 |
| They refused to supply contracts, statements or other records to prove the debt | 15.4 | 26.1 | 21.9 |
| They embarrassed me in front of my family, friends or work colleagues | 17.0 | 20.5 | 19.0 |
| I was contacted on a public holiday | 14.3 | 21.4 | 18.2 |

| | | | |
|---|---|---|---|
| They told me I could go to jail if I did not pay the debt | 13.7 | 20.5 | 17.6 |
| They listed or threatened to list my debt even though it was under $100 | 14.8 | 19.9 | 17.6 |
| They told me I could be arrested by the police if I did not pay back the debt | 12.4 | 21.0 | 17.1 |
| They contacted my friends, family and work colleagues about the debt | 14.6 | 18.9 | 17.1 |
| They told me they were going to take my partners/ spouses assets if I did not pay back the debt | 8.8 | 15.6 | 12.8 |
| They told me that the Sheriff's office had made a judgement against me when I later found out was not the case | 8.2 | 13.5 | 11.0 |

*Table Notes:*

***The implications of this statistic may be skewed depending on whether the debt collector was justified in charging additional costs, or whether they were misleading.*

*±The implications of this statistic may be skewed depending on whether the debt collector was justified in default listing the debtor, or whether they were misleading.*

The table highlights that a range of non-compliant activity occurs within the debt collection industry. For example, nearly one third (29.2 per cent) of all respondents reported being told they could lose their home or car if they did not repay the debt. Just over thirty per cent reported that they were not given adequate time to ensure the debt was correct and 29.2 per cent reported being told they could lose their house or other items if they failed to repay the debt.

Inappropriate contact was reported by at least 25.0 per cent of the respondents and 17.6 percent reported being told the police could arrest them and they could go to jail. Two in ten respondents reported being sent a letter that was claimed to be from a lawyer or were told the Sheriffs office had made a judgement against them that later turned out to be false. Nearly 22 per cent of respondents reported being refused the supply of contracts statements or other records to prove the debt. Just over one in ten respondents reported being told their partner or spouses assets would be taken if they did not repay the debt.

For 17.6 per cent of respondents the debts were reportedly either listed or threatened to be listed, even though it was under $100.

In the fifteen scenarios presented to respondents, fourteen were reportedly more likely to occur if a third party debt collector was pursuing the respondent for the debt. The only scenario where this was not the case was for the incurrence of additional chargers.

Respondents aged under 34 were more likely to report experiencing inappropriate contact (35.7 per cent) and have their friends or family contacted about the debt (19.8 per cent). They were also more likely to be threatened with having the debt listed even though it was under $100.

Respondents who had more than three outstanding debts in the last two years were more likely to report experiencing inappropriate contact (44.1 per cent) and be sent a letter from a lawyer that was later discovered to be false (25.0 per cent). Further, once respondents had more than three outstanding debts they were significantly more likely to report incurring nine of the 15 scenarios presented above.

# Appendix 3: Credit act requirements

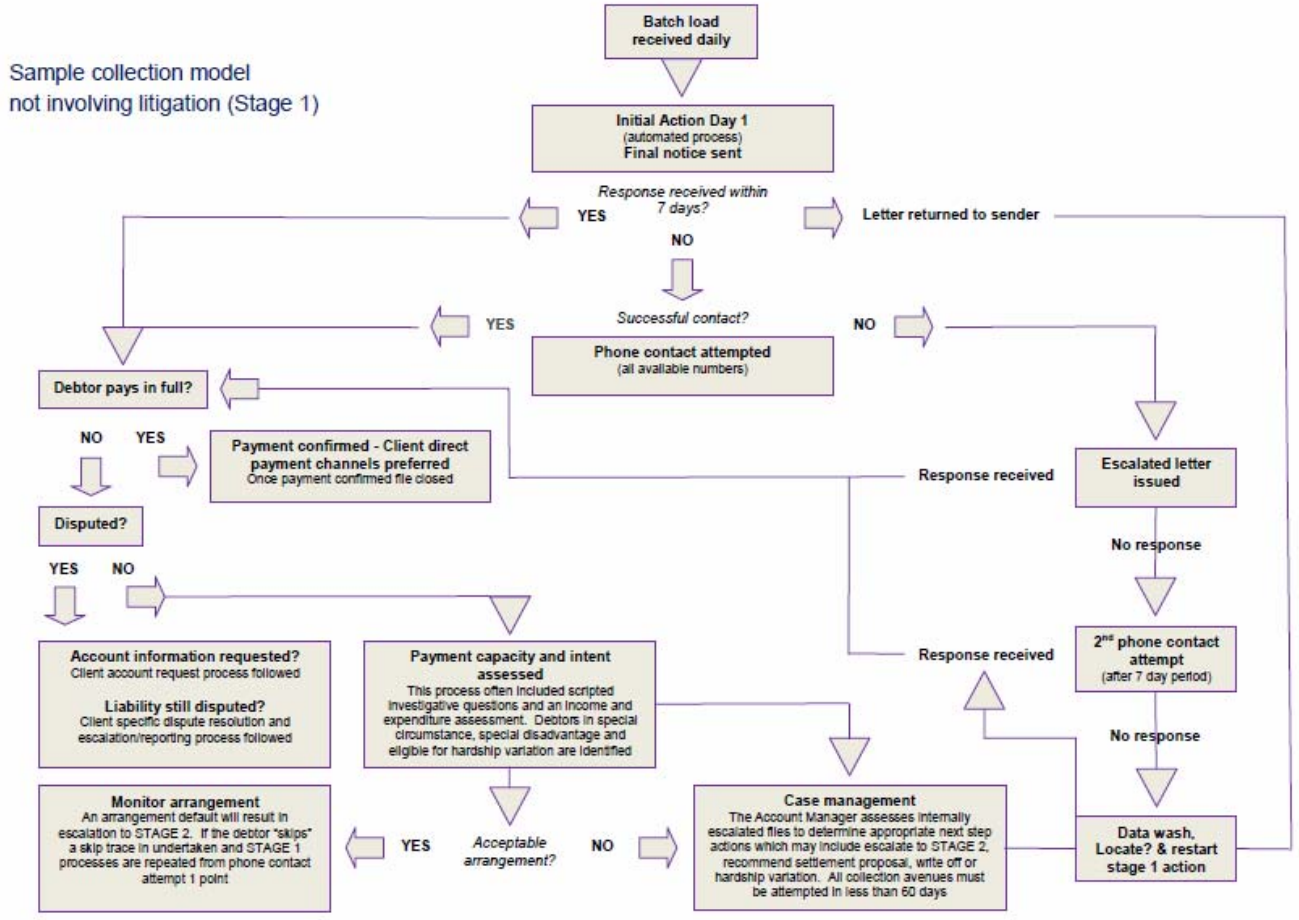
| *Obligation* | *Description / section* |
|---|---|
| ***Your broad compliance obligations*** | |
| Engaging in credit activities efficiently, honestly, fairly | You must do all things necessary to ensure that the credit activities authorised by your licence are engaged in efficiently, honestly and fairly (s47(1)(a)) |
| Complying with the conditions on your licence | You must comply with the conditions on your licence (s47(1)(c)) |
| Complying with relevant laws | You must comply with the credit legislation (s47(1)(d))<br>You must comply with any other obligations that are prescribed by the regulations (s47(1)(m)) |
| ***Your internal systems*** | |
| Risk management systems | You must comply with the credit legislation (s47(1)(d))<br>You must comply with any other obligations that are prescribed by the regulations (s47(1)(m)) |
| Conflicts of interest | You must have in place adequate arrangements to ensure that your clients are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by you or your representatives (s47(1)(b)) |

| ***Obligation*** | ***Description / section*** |
|---|---|
| Dispute resolution | You must have an internal dispute resolution procedure that:<br>▪ complies with standards and requirements made or approved by ASIC in accordance with the regulations (s47(1)(h)(i)); and<br>▪ covers disputes in relation to credit activities engaged in by you or your representatives (s47(1)(h)(ii))<br><br>You must be a member of an approved external dispute resolution scheme (s47(1)(i)) |
| ***Your people*** | |
| Ensuring your representatives comply | You must take reasonable steps to ensure that your representatives comply with the credit legislation (s47(1)(e)) |
| Training and individual competence | You must ensure that your representatives are adequately trained, and are competent, to engage in the credit activities authorised by your licence (s47(1)(g)) |
| Organisational competence | You must maintain the competence to engage in the credit activities authorised by your licence (s47(f)) |
| ***Your resources*** | |
| Adequate resources | Unless you are a body regulated by APRA, you must have available adequate resources (including financial, technological and human resources) to engage in the credit activities authorised by your licence and to carry out supervisory arrangements (s47(1)(l)(i)) |
| Compensation arrangements | You must have compensation arrangements in accordance with s48 (s47(1)(j)) |

| *Obligation* | *Description / section* |
|---|---|
| Ensuring compliance with the general conduct obligations | You must have adequate arrangements and systems to ensure compliance with your obligations under s47(1), and a written plan that documents those arrangements and systems (s47(1)(k)) |

*Source: ASIC (June 2010), Regulatory Guide 205, Credit Licensing: General Conduct Obligations, Melbourne, pp 5-6.*

# Appendix 4: Generic collection model




Source: ACDBA (2011) *Australian Collections Industry*, April p22.

# Appendix 5: Victorian mandatory exclusion licensing provisions

Victoria introduced dedicated fair debt collection practices provisions into the Fair Trading Act, based on conduct that was deemed to contravene the prohibition on physical force, undue harassment and coercion.

The provisions consider a wide range of conduct to be a 'prohibited debt collection practice'. Among the practices prohibited by this legislation are:

- using physical force, undue harassment or coercion
- entering or threatening to enter a private residence without lawful authority; using any threat, deception or misrepresentation to obtain consent to enter a private residence; and refusing to leave a private residence or workplace when asked to do so
- exposing or threatening to expose a person or a member of that person's family to ridicule or intimidation
- 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 to which they are not entitled. For example, when collecting a debt, a debt collector must not say they are going to seize a home or other property that they cannot legally take
- disclosing or threatening to disclose debt information, without the debtor's consent, to any person without a legitimate interest in the information
- making a false or misleading representation regarding the nature or extent of a debt, the method of collecting a debt or the consequences of not paying a debt
- contacting a person by a method that they have asked not to be used, unless there is no other means available. For example, a debt collector must not contact a debtor at their workplace when they have asked to be contacted only at home, or directly when they have asked that all communications be handled by their lawyer or financial counsellor
- contacting a person about a debt after they have advised in writing that no further communication should be made about that debt. This applies unless the contact is through an action issued by a court or the Victorian Civil and Administrative Tribunal (VCAT), or there is a threat to take the debtor to court or VCAT that the creditor intends to take
- communicating with a person under 18 about a debt, if the person is not the debtor
- demanding payment of a debt from someone without having a reasonable belief that they are the debtor and are liable for the debt. For example, demanding payment from every 'J Smith' who resides in a suburb in an attempt to collect a debt owed by John Smith
- communicating with a person in a manner that is unreasonable in its frequency, nature or content.

In addition, where a person is found guilty of an offence, they will be prohibited from acting as a third-party collector for fee or reward, and

from purchasing consumer debts for the purposes of collection in Victoria.

Penalties of up to $143,340 also apply for corporations and $28,668 for individuals.

# Appendix 6: Shortened forms

| | |
|---|---|
| Australian Collectors And Debt Buyers Association | ACDBA |
| Australian Collectors Association | ACA |
| Australian Competition And Consumer Commission | ACCC |
| Australian Consumer Law | ACL |
| Australian Institute Of Credit Management | AICM |
| Australian Investigators Association | AIA |
| Australian Mercantile Agents Association | AMAA |
| Australian Securities And Investments Commission | ASIC |
| Consumer Affairs Victoria | CAV |
| Consumer Credit Legal Centre | CCLC |
| Council of Australian Governments | COAG |
| Credit Ombudsman Service | COS |
| External Dispute Resolution | EDR |
| Fair Trading Acts | FTAs |
| Financial Ombudsman Service | FOS |
| Institute of Mercantile Agents | IMA |
| Internal Dispute Resolution | IDR |
| Licensing Authority for Commercial Agents in NSW | CAPI |
| Memorandum of Association | MoU |
| Ministerial Council on Consumer Affairs | MCCA |
| National Occupational Licensing System | NOLS |

# Appendix 7: References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