

---

# Forum

## Undue harassment or coercion — an ACCC research project

The Commission is presently conducting a research project on s. 60 of the Trade Practices Act. Section 60 prohibits the use of physical force or undue harassment or coercion in connection with the supply, or possible supply, of goods or services or payment for goods or services.

The provision has never been tested by litigation. The lack of litigation may suggest that there is general compliance with it. However, the Commission has received correspondence and feedback from community organisations concerned about the extent of debt harassment and alleged non-compliance with s. 60 in the marketplace. Anecdotal evidence suggests that harassment and coercion continues to be a serious problem for consumers, particularly in relation to debt collection.

It is considered that the consumers most likely to be the targets of undue harassment are also the consumers least likely to complain, particularly to official or government agencies. These consumers are more likely to be on low incomes, have limited formal education, low literacy and numeracy skills and/or be otherwise disadvantaged. They are also generally not likely to be aware of their rights or of the process of debt recovery.

### ACCC project

The Commission is taking a two-pronged approach, involving market review and enforcement action. The project aims to develop strategies for increasing both the effectiveness of, and the level of compliance with, the provision. The Commission also

hopes to clarify the scope of s. 60 through a test case or cases.

Depending on the nature and detail of the information the Commission receives during the course of the project, further outcomes may include the development of an industry guideline or code detailing conduct that is acceptable or unacceptable, and the establishment of dispute resolution schemes that can deal effectively with s. 60.

### Possible test cases

The Commission is interested in identifying matters that may be used to test the scope of s. 60 in the courts and welcomes appropriate referrals from organisations which deal with complaints from the public.

### ACCC's interpretation of s. 60

The Commission has formulated the following interpretation of the terms used in s. 60, to be used to assess whether particular conduct contravenes the Trade Practices Act.

#### *Physical force*

Physical force includes any assault, battery or deprivation of liberty of a person and any threats of physical force to a person or property.

#### *Undue harassment*

**Harassment** is conduct that causes distress, agitation, anxiety, or worry to the recipient, interferes with the recipient's peace and quiet, and/or amounts to pestering or plaguing with repeated requests or demands.

It includes:

- telephone communications or visits between 9 p.m. and 8 a.m. (unless the

trader has been advised by the recipient that calls within this period, or a part of this period, are acceptable and convenient);

- repeated communications during 'reasonable' hours;
- telephone communications or visits at a person's workplace, if the trader has been asked not to contact the person at work;
- communications at particular times or places that the person has advised are not acceptable or convenient;
- use or threat of violence to person or property (which, of course, could also amount to physical force);
- misrepresentation about the consequences of non-payment or of the debt recovery process;
- misrepresentation of the amount, character or legal status of a debt;
- disclosure of information, or threat of disclosure, to third parties who do not have a clear and legitimate interest in the information (e.g. employer, neighbour, welfare agencies, government agencies);
- threatening to publish, post or cause to be published, or posting, any list of consumers commonly known as a 'default list' for the purpose of forcing, or attempting to force, collection of an account;
- contacting the consumer when asked to deal through an adviser (solicitor, financial counsellor, etc.);
- contacting a consumer after being advised by the consumer that he or she wishes the trader to cease communication;
- use of abusive, threatening, offensive or obscene language;
- misrepresentation that documents are court documents or official documents; and
- misrepresentation that the trader is a solicitor, or is employed by a solicitor, is an

independent debt collector, or is a bailiff or police officer.

**Undue** harassment is harassing conduct that is either persistent or, if a one-off occurrence, is excessive, improper, inappropriate or unnecessary.

In assessing whether specific conduct amounts to undue harassment, the particular circumstances of the recipient of the conduct will also be relevant. If the target of the harassment is disadvantaged such that the conduct has a greater impact on them than it would have on someone not suffering those disadvantages, the harassment may amount to undue harassment. Characteristics that may be relevant include age, state of health, lack of English skills, illiteracy and lack of business experience.

#### *Coercion*

**Coercion** means a negation of choice which can be created by either physical means (e.g. threats of violence) or non-physical means (e.g. threats to reputation or peace of mind). Coercion occurs when unacceptable or illegitimate pressure is brought to bear on one party by another, such pressure being a factor in persuading the victim to undertake a particular course of action.

#### *Application to third parties*

Section 60 applies to conduct applied directly to a consumer. It also applies when conduct is directed at any other person (e.g. a friend or relative of the consumer) as long as the conduct is engaged in in respect of the supply or possible supply to, or payment by, the consumer.

#### **Referrals to the ACCC**

Organisations that wish to refer s. 60 matters to the Commission are asked to provide as much information as possible about alleged conduct, including:

- an explanation of the context in which it occurred (e.g. if harassment related to a default, the reason for the default, the

- extent of the default, and any arrangements for repayment);
- details of the trader/creditor/debt collector;
- as far as possible, exact statements made by the trader, creditor or debt collector;
- as far as possible, exact statements made by the consumer, or any other party;
- as far as possible, times and dates and frequency of communications;
- copies of all written documentation relevant to the allegations;
- as far as possible, names of all participants in, or witnesses to, the alleged conduct;
- details of actions taken by the consumer, or someone acting on their behalf, in response to the conduct; and
- specific details of the consequences suffered, and an explanation as to how the harassment contributed to the consequences.

Before referring matters to the Commission, organisations are asked to discuss referrals with Nicola Howell on (02) 6243 1065.

Organisations are also asked not to unduly raise the expectations of consumers. As in any other matter, the Commission cannot guarantee that it will take action on a consumer's behalf.

It is important that cases be referred to the Commission as early as possible, to avoid possible difficulties with evidence gathering or problems with time limits.

### Request for comments

The Commission is also seeking wider comments and information from interested parties, on issues such as:

- the extent of compliance with the prohibitions of undue harassment, physical force and coercion;

- whether the provision is effective, and if not, why not;
- what is acceptable and/or unacceptable behaviour in terms of undue harassment and coercion;
- whether there are any strategies that could be implemented to increase the effectiveness of the provision;
- whether there is awareness of the provision and related rights and obligations by:
  - consumers
  - industry
  - 'help' professionals;
- what avenues, if any, are pursued by consumers when faced with apparent contraventions;
- whether there are any impediments to taking legal or other corrective action and, if so, what strategies could be imposed to overcome such impediments; and
- any other comments on the effectiveness or otherwise of the provision.

The Commission requests that responses include information to support comments. It hopes to receive comments and submissions by the end of August 1998. They will be treated as public documents unless a request for confidentiality is made.

Please send to:

Nicola Howell  
Australian Competition and Consumer  
Commission  
PO Box 1199  
Dickson ACT 2602  
Phone: (02) 6243 1065  
Fax: (02) 6243 1078  
E-mail: [nicola.howell@accc.gov.au](mailto:nicola.howell@accc.gov.au)