

Debt collection tested in the courts



Until last year section 60 of the Trade Practices Act remained untested in the courts, leaving the community unsure to what extent harassing or coercive conduct adopted by some debt collectors was against the law.

But in August 2000 the Perth Federal Court found that Cash Return Mercantile Pty Ltd, a debt collection agency, and its former agent, Ms Sharyn McCaskey, had breached the Act.

They had engaged in undue harassment, undue coercion and misleading conduct while collecting debts from consumers, the court found. They had made an excessive number of phone calls to debtors; they had adopted a threatening, aggressive and abusive manner; and they had

misled debtors and others about recovery procedures and the consequences of not paying the debts.

This case has clarified the ACCC's guidelines (see below) describing conduct that would be likely to contravene the laws.

However, the guidelines point out that if the debt collector contravenes s. 60, it doesn't mean the debtor can get away with not paying the debt. Consumers who are legally bound to pay or repay money must do so unless they have a valid defence.

Creditors can take reasonable steps to ensure their debt is repaid but they are not allowed to be unfair or intimidating.

The guidelines acknowledge that failure to repay a debt may

ACCC guidelines

Debt collectors are not supposed to pester or frighten a debtor, tell others about the debts, or threaten to take action they aren't legally entitled to take. This all comes under undue harassment, and it is against the law. This applies to anyone collecting debts, such as banks, finance companies, shops, hospitals, solicitors or debt collectors.

When they should call

People who owe debts should not be harassed or called at unreasonable hours. After 7.30 a.m. and before 9 p.m. is okay, unless the debtor has arranged something else or

unless the debt collector has been trying for a while to contact the debtor during the day.

Where they should call

Collectors should make their initial contacts, at least, outside of someone's work. If a collector needs to communicate with a debtor at work, they should do so discreetly and with care. A collector should only do

this if specifically asked, if an alternative hasn't been provided, or if the debt relates to a debtor's own business. If a collector does contact a debtor at work, they should not let others know about the debt.

How they should call

Collectors can visit in person but privacy and security should be respected. They should use less intrusive means if possible, especially initially, such as by phone, fax or mail.

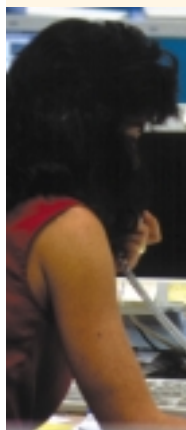
How often they should call

Collectors should only make calls that are absolutely necessary, up to about three (that you answer) a week, or 10 a month.

Who they should call

If a debtor has made arrangements to pay, a collector should not contact them. They should also not contact a debtor if liability has been denied in writing or that they intend to defend any legal proceedings.

If the debtor has a lawyer, financial counsellor or someone else representing them, a collector should contact them first.



not be deliberate. It could be because people have overcommitted themselves, or their financial circumstances have changed because of unemployment, ill health, divorce or separation.

Not paying a debt may also be because someone disputes its existence or the amount of debt.



Can they call family and friends?

If collectors don't know how to contact a debtor, they can contact family and friends to find out where the debtor is. However, those friends and family don't have to tell them the debtor's whereabouts and they are not liable for the debt. The collector should not discuss the debt with them or talk with the debtor's children without permission. They are not allowed to trick people into disclosing their whereabouts.

What they can't do

Collectors are not allowed to lie or mislead a debtor about:

- who they are and who they represent;
- the amount of money owed; and
- what will happen if the debt isn't paid.

They should also not use abusive, threatening or obscene language, and they must not use or threaten violence against either the debtor or their property.

Steps consumers can take

If a debtor is not disputing the debt, realistic repayment arrangements can be negotiated. Early and clear communication as soon as difficulties arise will help resolve any problems.

A debtor should also advise creditors of:

- current contact details; and
- any financial difficulties they may be having.

If a debtor wants a collector to stop a particular type of contact, they should write to them saying what conduct they don't like and what would be acceptable, for example, telephoning them at home instead of work. They should keep a copy of the letter.

They should keep accurate details about what has been said and done, in case they need to make a complaint.

Where to go for help

If a debtor needs help to manage what may seem to be an unmanageable situation, they should talk to:

- a free financial counselling service (usually listed under community advisory services in the Yellow Pages); or
- a free community legal centre.

Complaints can be made to:

- State and Territory fair trading agencies; or
- the ACCC.

The end result

If a creditor contravenes s. 60, it is a criminal offence and can lead to fines of up to \$200 000 for a corporation, or \$40 000 for an individual.

Civil remedies include injunctions, damages, other orders such as compliance programs and enforceable undertakings.

Even if a creditor uses an agent to collect debts, the creditor may still be liable for the agent's conduct if it contravenes the Act.