

Debt collection compliance guide

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This guide has been prepared by the Australian Competition and Consumer Commission for businesses that collect debts.

It is divided into four sections:

Part A — Introduction

Part B — What are the essential elements for compliance systems

Part C — Establishing an effective compliance system

Part D — Maintaining a compliance system

The guide is designed to be used in conjunction with the Commission's guideline *Debt collection and the Trade Practices Act*. Organisations may also wish to refer to the Australian Standard on Compliance Programs (AS 3806–1998) for more information on compliance.

Part A. Introduction

Purpose of compliance guide

This guide gives practical advice for business on establishing mechanisms and systems that will promote compliance with s. 60 of the *Trade Practices Act 1974*.

Section 60 prohibits the use of physical force, undue harassment or coercion by a corporation (or its servants or agents) in connection with the supply of goods or services to consumers, or in connection with payment by consumers for goods or services.

This guide focuses on the obligations that the section imposes with respect to the collection of payment for goods or services — that is, on the collection of debts. It is based on the Australian Standard on Compliance Programs (AS 3806–1998).

In addition to the obligations imposed by s. 60, those involved in collecting debts have to comply with legal obligations imposed by other laws and regulations, including other provisions in the Trade Practices Act (especially ss 52 and 53), the Privacy Act, and any applicable State or Territory licensing legislation. Additionally, a member of an industry association might have to comply with a code of conduct or ethics promulgated by that association.

It is beyond the scope of the Compliance Guide to directly address procedures for compliance with all relevant laws. However, an effective compliance program should address all of an organisation's legal obligations. A system for compliance with s. 60 can also form the basis for compliance with other relevant industry laws and codes.

Why does my business need a compliance system?

A compliance system is an important tool for preventing contraventions of relevant legislation, including the Trade Practices Act. A compliance system should be an integral part of the risk-management operations for any business.

The risks of contravening s. 60 and other consumer protection provisions of the Act include:

- legal costs, including any legal costs of the applicant the business may be required to pay as a result of unsuccessful litigation;
- fines and penalties — for a breach of the consumer protection provisions, fines can be up to \$200 000 for a corporation and up to \$40 000 for an individual;
- refunds or compensation payments for affected consumers;
- staff (including managerial) costs associated with preparing for and defending litigation;
- loss of company reputation and, therefore, market share and profitability;
- loss of clientele; and
- damage to industry reputation.

An effective compliance system can significantly reduce the risks of contravention and the associated costs.

Ultimately a compliance system is a preventative mechanism. Initial costs in establishing a compliance system will be recouped in the long term by reducing the risk of contraventions and improved business efficiency.

Why is the ACCC interested in s. 60?

Feedback from various community organisations suggests that undue harassment and coercion are serious problems for consumers, particularly in relation to the collection of debts.

The likely characteristics of consumers subject to debt collection activity compound the problems associated with undue harassment and make it difficult to detect. The people most affected by undue harassment are also the people who are least likely to know how to go about complaining to the relevant authorities. They may be on low incomes, have limited formal education and low literacy, numeracy and budgetary skills. They are also unlikely to be aware of their rights in relation to the debt collection process.

The Commission has therefore been developing strategies to increase the effectiveness of s. 60 and provide assistance to businesses seeking to comply with the provision. This guide forms part of the education and assistance strategy.

Who should read this guide?

This guide will be of interest to any business that undertakes debt collection activity as either a substantial or significant part of their business. For example, it will be of most relevance to:

- independent debt collection agencies;
- internal debt collection branches of finance companies; and
- internal debt collection branches of retailers who provide credit to consumers.

The size of businesses engaging in debt collection differs widely, and compliance measures suitable for a large organisation may not be appropriate for a small business. The guide recognises this, and endeavours to provide compliance measures that can be adapted to suit a variety of different debt collection businesses.

What constitutes ‘undue harassment or coercion’?

As s. 60 has not been tested in court there is little guidance for businesses or consumers as to the kind of conduct that might breach the section. However, in consultation with stakeholders the Commission has developed a guideline for industry that details conduct that, in its view, might be at risk of contravening s. 60. Businesses should also refer to this guideline when developing their compliance program. The guideline is titled *Debt collection and the Trade Practices Act* and is available from all Commission offices.

Part B. What are the essential elements of compliance strategy?

The Australian Standard on Compliance Programs (AS 3806–1998) sets out the essential elements for an effective compliance strategy. For reference these are listed below.

Structural elements

- Commitment
- Compliance policy
- Management responsibility
- Resources
- Continuous improvement

Operational elements

- Identification of compliance issues
- Operating procedures for compliance
- Implementation
- Complaints handling system
- Record keeping
- Identification and rectification
- Systemic and recurring problems
- Reporting
- Management supervision

Maintenance elements

- Education and training
- Visibility and communication
- Monitoring and assessment
- Review
- Liaison
- Accountability

The following discussion explains how these elements can be implemented by a business involved in collecting debts. It also provides some practical examples to assist business.

Part C. Establishing an effective compliance system

Step 1. Establish commitment to compliance

For compliance with any obligation to be effective, all levels of the organisation must be **committed** to respecting the prohibition that the law(s) contains, whether the prohibition is found in the Trade Practices Act or other legislation.

The commitment to compliance and to an appropriate compliance system must be apparent in all levels within the debt collection organisation, starting with the board and the chief executive officer (in the case of a large firm) or the managing director (in the case of a smaller firm). Once this commitment is in place, ultimate responsibility for a breakdown in compliance will rest with upper management. Upper management must be willing to say that ‘the buck stops here’.

Examples

The commitment of upper management can be demonstrated by:

- making sure that compliance is a standing item for board or board committee meetings (in the case of a large organisation);
- appointing a compliance manager or a senior manager (in the case of a large organisation);
- appointing a manager or supervisor with responsibility for compliance (in the case of a smaller organisation);
- having appropriate compliance procedures in place;
- ensuring that these procedures are visible, maintained and well-resourced; and
- ensuring that these procedures are well publicised and understood by employees and agents.

Step 2. Allocate resources and authority for compliance

To ensure compliance with s. 60, as well as other relevant laws and regulations, the organisation must provide adequate compliance resources. It must also ensure that the individual (or unit) responsible for compliance has sufficient authority, recognition and support within the organisation to make compliance a priority and to make it stick.

This means that the organisation must decide to allocate personnel, time and money to the compliance effort. For example, it should charge a person (or unit) with responsibility for compliance activities. The person(s) so charged must have sufficient time and training to properly discharge the compliance functions. In addition, the organisation needs to allocate resources to train all staff (not just the compliance managers) about their responsibilities.

Example

Many large financial institutions have a dedicated compliance manager whose job it is to make sure that the organisation complies with relevant laws. In this context, responsibilities would include ensuring that systems are in place to follow the Commission guideline for ongoing training, and for monitoring and reporting on compliance issues. Smaller organisations should have someone whose duties include compliance.

Step 3. Assign responsibility for compliance

The necessity for compliance must permeate the consciousness of staff at all levels of the organisation. To this end **all** managers need to understand, promote and be responsible for compliance with s. 60 insofar as it applies to activities within their day-to-day responsibilities. Managers will therefore need to be responsible for:

- training staff under their immediate supervision about their responsibilities under s. 60; and
- ensuring that relevant compliance procedures are in place and maintained.

Step 4. Identify compliance issues and areas of risk

To ensure that compliance is not left to chance, relevant business units within the organisation should be assessed to identify relevant compliance issues. This will include identifying aspects of current operations and procedures that may be at risk of contravening relevant obligations. This identification process can be overseen by the person (or persons) responsible for compliance in the organisation.

Examples

For compliance with s. 60 of the Trade Practices Act, some issues to consider include these.

- Who will be responsible for contacting debtors?
- How are those staff members made aware of their responsibilities under s. 60?
- At what times, and with what frequency, do staff members telephone debtors?
- What procedures do staff follow if a request is made that contact not be made at a certain place or time?
- Do staff members visit debtors in their homes? In what circumstances?
- What procedures do staff members follow if a debtor requests that contact only be made through the debtor's representative?

Step 5. Develop operational and training procedures

This is likely to be the largest task involved in developing an effective compliance system. However, once appropriate procedures are in place, ongoing maintenance will require limited additional work.

To ensure that compliance becomes an integral part of normal operations the requirements of s. 60 (and other relevant laws) need to be integrated into the organisation's day-to-day operating procedures. A person who has detailed knowledge of the legislative requirements must be responsible for ensuring that these requirements are built in to the organisation's debt collection practices. The procedures to ensure compliance should be developed and implemented in consultation with staff and (where relevant) third parties, such as major clients.

In considering appropriate operational and training procedures it is important to recognise that different risk areas may require different compliance approaches.

Some risk issues can be best addressed through **training** staff on appropriate or inappropriate behaviour. Training must be aimed at relevant staff, must be ongoing, and must be tested for understanding.

Example

Many s. 60 issues can be traced back to the manner in which contacts with debtors are handled. Staff whose responsibilities include contact with debtors should be given appropriate training on the organisation's procedures for contacting debtors (in line with the Commission guideline). Training on communication and negotiation skills will also be of great assistance.

Some further examples of operational procedures relating to training are outlined below.

Examples

- Staff members require training about their legal compliance responsibilities. The person responsible for compliance should establish and update a register of those trained. Any questions asked during training and the answers given to those questions should also be recorded on the register. A training register is a mechanism allowing the organisation to be sure that:
 - it has trained all staff affected by the law; and

- those trained actually understood the training.
- Distributing a training review form to each staff member undergoing training would also help to improve staff understanding of the compliance message. Such a form allows the trainee to evaluate the training and record their views as to the clarity of the training. The trainer should then review all forms and the training program where appropriate.

In addition, the compliance manager would need to establish procedures that advise of any changes to the relevant law. Once the impact of the legal changes upon the organisation's operations have been assessed, the compliance manager must then ensure that all affected staff are re-trained or otherwise informed. The training register would need to be updated to reflect the re-training and again, questions asked and answered should be recorded.

Other risk issues may be better addressed by developing appropriate **procedural** systems.

Examples

The risk of misleading or deceptive communication can be limited by implementing a procedure for standard form letters and other communications to be checked by a person with trade practices expertise.

To ensure that contacts with debtors are made outside reasonable hours only in appropriate circumstances, an organisation could consider implementing a checklist to be completed before such contacts are made.

Any procedural manuals should be consistent with the Commission's guideline on *Debt collection and the Trade Practices Act*.

There are also a number of other issues that should be addressed when developing appropriate operational procedures.

Implementation and enforcement mechanisms

Once the compliance system has been established it should be consistently enforced with appropriate remedial measures. Establishing a system therefore requires the business to decide on the measures that will be implemented if an employee or an agent is in breach of compliance obligations. Effective sanctions or remedial measures can ensure that the compliance system retains credibility and effectiveness.

As discussed above, continuous training should also take place where appropriate.

Example

An agent of Debt Collectors Pty Ltd collects a debt by ringing the debtor at home at 11 p.m. every night for three weeks. Such conduct is likely to amount to undue harassment. Not only will it probably breach s. 60, it also breaches Debt Collector Pty Ltd's clear company policy not to telephone debtors after 9 p.m. at night.

An appropriate response to such a contravention might be, firstly, to explain the error and provide re-training. Secondly, the agent could be warned that repeat conduct could result in a reduction in commission or, if the behaviour continues, termination of the agency contract.

Record keeping

Accurate and up-to-date records of the organisation's compliance activities are needed to assist in the monitoring and review process. An organisation should therefore develop appropriate record keeping systems and procedures.

Records of complaints about an employee's or agent's behaviour should be kept by establishing and maintaining a complaints register. Keeping such a register allows the organisation to pinpoint compliance 'trouble spots' in its operating procedures.

As noted above, a training register is also an effective mechanism for keeping track of the organisation's compliance training program.

Additionally, businesses should maintain accurate records of contacts with debtors, including times and dates of all contacts.

Complaints handling systems

It is essential to have a visible and accessible complaint handling and monitoring system within the organisation which records complaints from staff, customers, competitors, financial counsellors, regulatory authorities, industry complaint handling committees and consumer organisations. Such a system can readily identify a compliance failure that might otherwise go undetected. An effective system which records and identifies complaints can act as an 'early warning' device regarding conduct which may ultimately be drawn to the attention of regulatory authorities and/or cause harm or damage to consumers. Instituting such a system is preferable to defending costly litigation. The Australian Standard on Complaints Handling (AS 4269-1995) sets down some criteria for effective complaints handling.

In the case of small firms a sophisticated consumer complaints system may not be necessary. Nevertheless, an appropriate person should be nominated to handle complaints and to keep a log of complaints and responses.

Identification and rectification

All compliance failures, once recorded, should be classified and analysed so that any problems can be identified and rectified as soon, and as effectively, as possible.

In particular, **systemic and recurring problems** are likely to carry significant risks for the organisation and can be more difficult to identify. Such problems can escalate over time and are more likely to attract the attention of regulatory authorities.

Example

Approaching the debtor's children in an attempt to enforce payment of a debt may amount to harassment, particularly where the collector makes threats or misrepresentations to the child about the consequences of the parent's non-payment. If an organisation's employees engage in this type of conduct on a regular basis, the organisation will be vulnerable to prosecution for breach of s. 60. The organisation should take immediate measures to make it clear that such conduct breaches its compliance policy, that there are sanctions for such conduct, and that repeat offenders will be dealt with expeditiously.

Operational procedures should have a mechanism for identifying and addressing systemic problems, as well as general compliance issues.

Example

Those responsible for compliance could regularly review complaints data and other compliance information to ensure that appropriate rectification action is taken, and that trends or issues are recognised and dealt with as they arise.

Keeping abreast of changes to the law

Legislation and its interpretation can change rapidly. Organisations therefore need to have systems which enable them to receive timely and accurate advice of relevant changes to laws and codes.

Example

Systems to advise on changes to the law could incorporate:

- making arrangements with legal advisers for regular updates;
- being on relevant regulators' mailing lists;
- becoming a member of industry associations (such as the Institute of Mercantile Agents or the Australian Collectors' Association);
- subscribing to relevant information services; and
- attending industry forums and seminars.

Reporting

Internal reporting arrangements need to be set in place to ensure that:

- the board and senior management are kept regularly informed of compliance activities;
- all actual or potential compliance failures are being reported and rectified in an appropriate way; and
- systemic and recurring problems of non-compliance are reported to those within the organisation with sufficient authority to correct them.

Example

A report on compliance issues and activities could become a regular item on board meeting agendas, and/or in an internal newsletter. In smaller businesses the managing director could be provided with a regular briefing.

Step 6. Document compliance policy and system

The Australian Standard suggests that an organisation should set out a compliance policy that clearly states the organisation's commitment. The policy should also set out exactly how that commitment is to be carried out.

The operational procedures to ensure compliance (as developed in step 5) should also be documented. This will form the compliance system (or compliance program) for the organisation.

The organisation should also establish appropriate requirements and procedures to ensure that its agents understand the company's commitment to compliance and the consequences of failing to meet relevant obligations.

Part D. Maintaining a compliance system

Once appropriate operational procedures have been developed and implemented, your compliance system will need regular maintenance to ensure that it does not become obsolete or ineffective. This section outlines the tasks that are needed to maintain an effective system.

Auditing

Compliance with the Commission guideline and with relevant laws should be regularly and randomly audited. Indicators of the level of compliance (and thus the effectiveness of the system) can be gauged through:

- the quantity of complaints received by the organisation;
- the quantity of complaints received by the Commission or financial counsellors; and
- the number of breaches of the guideline or law detected.

Any reports from regulatory or industry bodies of wrongdoing by the organisation's debt collectors should be investigated thoroughly and immediately, and rectified as soon as possible.

Continuous improvement

For a compliance system to remain effective it should be reviewed on an ongoing basis. Both the objectives of the system and the criteria against which its effectiveness is assessed should be re-examined at regular intervals.

Examples

In order to maintain an effective compliance system the organisation should:

- keep abreast of compliance best practices (both locally and overseas);
- foster a compliance culture within the organisation;
- employ people who have experience in and commitment to the continuous improvement of compliance;
- undertake specific training and retraining of staff;
- encourage innovation in compliance development, procedures and processes; and
- recognise exemplary compliance behaviour by teams, work units and individuals within the organisation.

Review

An independent review of the compliance system, particularly for a large company, by an appropriately qualified compliance expert every one or two years will help to ensure that the compliance system remains effective.

Liaison

There should be ongoing formal and informal liaison by the organisation and its compliance professionals with regulatory bodies (such as the Commission) as well as industry associations. This will help the organisation to be aware of current problem areas and effective compliance methods. Depending on the size of the business, it may be useful to hold regular meetings with:

- State, Territory and federal regulatory authorities;
- relevant industry associations; and
- consumer and community organisations.

Alternatively, it may be more appropriate to maintain informal regular contact with relevant organisations.

Relevant information, such as industry and regulatory newsletters and publications, should also be readily available to those responsible for the organisation's compliance efforts.

Accountability

The performance of the compliance program should be reported as specified in the compliance procedures. In the case of large organisations, performance should be reported to the board and chief executive officer. In the case of small organisations, a report to the managing director would be appropriate.

Compliance checklist

Commitment

- Is compliance a standing item at board meetings (in large organisations)? **Yes / No**
- Has the (large) organisation appointed a compliance manager or a senior manager with overall responsibility for compliance? **Yes / No**
- Has the (small) organisation appointed a manager or supervisor with responsibility for compliance? **Yes / No**
- Are procedures in place to check for legislative, Commission guideline and industry code requirements and new developments? **Yes / No**
- Are the compliance procedures well understood by relevant staff and distributors? **Yes / No**

Resources and authority

- Has the organisation committed adequate resources to compliance? **Yes / No**
- In large organisations is there an 'in-house' expert on the requirements of s. 60, the ACCC's guideline on *Debt collection and the Trade Practices Act*, and other relevant laws and codes of conduct? **Yes / No**
- In smaller organisations is there an 'in-house' expert, or does the organisation have access to quick and reliable external advice? **Yes / No**
- Is the organisation committed to ensuring that that person's regulatory knowledge is up to date? **Yes / No**
- Do those responsible for compliance have adequate authority to ensure compliance? **Yes / No**

Management responsibility

- Are all managers aware of the compliance responsibilities in their business unit? **Yes / No**
- Are all staff in the business unit aware of their compliance responsibilities? **Yes / No**

Identification of compliance issues

- Has the organisation conducted an audit of its entire operations to ensure that compliance issues and risk areas of operation have been identified and appropriate mechanisms put in place to ensure compliance? **Yes / No**
- Is the audit undertaken regularly? **Yes / No**

Operational procedures for compliance

- Has the organisation developed operational and training procedures to address all Trade Practices Act risks arising from their operations? **Yes / No**

System for enforcement and remedial action

- Has the organisation established appropriate procedures for enforcement and remedial action for non-compliance? **Yes / No**

Complaints handling system

Does the organisation have a visible and accessible complaints handling system to record complaints from a variety of sources?

Yes / No

Record keeping

Does the company keep registers in which to record complaints, compliance failures, and other compliance information?

Yes / No

Identification and rectification

Does the company have a system to identify and classify compliance failures so that all problems, including systemic and recurring problems, can be rectified?

Yes / No

Reporting

Are compliance problems reported to senior management?

Yes / No

Documentation of compliance policy and system

Has the organisation set out a clear policy to all staff and agents outlining its commitment to compliance and how compliance will be carried out?

Yes / No

Has the organisation documented its compliance system?

Yes / No

Has the compliance system been developed in consultation with staff and distributors?

Yes / No

Does the organisation have procedures in place to ensure compliance by agents?

Yes / No

Auditing

Does the organisation have regular spot audits for compliance with legal obligations and the Commission guideline?

Yes / No

Review

Does the organisation review its compliance system regularly?

Yes / No

Continuing improvement

Does the organisation have procedures in place to ensure continuous improvement in compliance?

Yes / No

Liaison

Does the organisation liaise regularly with relevant organisations, including regulators and consumer representatives?

Yes / No

Accountability

Is there regular reporting on compliance to the board/chief executive officer/managing director?

Yes / No