



Debt collection and the Trade Practices Act

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Important notice

Please note that this guideline is a summary designed to give you the basic information you need. It does not cover the whole of the Trade Practices Act and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the Act to that conduct.

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Contents

Introduction	1
Debt collection activities and consumer responsibilities	1
Is this guideline law?.....	3
Guideline subject to legislation and mandatory codes	4
Scope of the guideline	5
Penalties	5
Principals and agents	5
Conduct principles.....	6
Communicating with the debtor away from their workplace	7
Communicating with the debtor at the debtor's workplace	8
Personal visits	9
Frequency of communications	11
Allowing arrangements and other processes to work	12
Communicating with a debtor's representative	13
Communicating with third parties.....	15
Misleading or deceptive conduct.....	17
Coercion.....	18
Language, violence and physical force	19
Systems for complying with s. 60.....	20
Definitions	21

Debt collection compliance guide

Contents

Part A — Introduction	25
Purpose of compliance guide.....	25
Why does my business need a compliance system?	26
Why is the ACCC interested in s. 60?.....	27
Who should read this guide?.....	27
What constitutes ‘undue harassment or coercion’?	28
 Part B — What are the essential elements of compliance strategy?.....	29
 Part C — Establishing an effective compliance system.....	31
Step 1. Establish commitment to compliance.....	31
Step 2. Allocate resources and authority for compliance	32
Step 3. Assign responsibility for compliance	32
Step 4. Identify compliance issues and areas of risk	33
Step 5. Develop operational and training procedures	33
Step 6. Document compliance policy and system.....	39
 Part D — Maintaining a compliance system	40
Auditing.....	40
Continuous improvement	40
Review	41
Liaison.....	41
Accountability	42
 Compliance checklist.....	43
 ACCC addresses.....	47

Introduction

Section 60 of the Trade Practices Act provides that:

a corporation shall not use physical force, undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

The scope of s. 60 of the *Trade Practices Act 1974* has not been tested in court, and thus there is little direct guidance for business or consumers. The Commission has developed this guideline, in consultation with relevant stakeholders, for the benefit of both business and consumers. It hopes the guideline will help clarify community expectations of businesses when collecting debts.

The Commission considers that the conduct described in the guideline would, in most circumstances, be at risk of contravening the relevant laws. It should be noted, however, that a contravention of s. 60 does not act as a defence to any obligation to pay a debt.

Section 60 applies to more than just debt collection. Section 60 applies to both the **supply** of goods or services and the **collection of payment** for goods or services. This guideline specifically deals with debt collection issues, but many of the principles could also apply to businesses engaged in the supply of goods or services.

The guideline is not intended to limit the interpretation of s. 60 as it applies to the supply of goods or services.

Debt collection activities and consumer responsibilities

Debt collection is a legitimate and necessary business activity. Consumers who are legally bound to pay or repay money are expected to meet that obligation unless they have a valid defence.

Creditors and their agents are entitled to take **reasonable** steps to contact a debtor and make arrangements that will enable the debt to be repaid. However, s. 60 places broad limits on

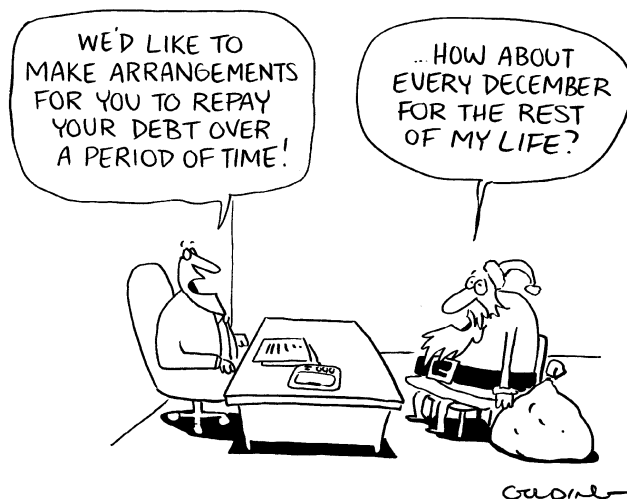
the conduct of collectors in order to protect consumers from unfair or intimidating behaviour.

A consumer's failure to meet obligations under a debt may arise from a variety of circumstances. In some cases a consumer may deliberately try to avoid repaying a debt. In others a failure is not deliberate, but arises from over-commitment and/or major changes in financial circumstances resulting from, for example, unemployment, business failure, ill health, divorce or separation. Or default may arise because a consumer disputes the validity, existence or amount of the debt.



Often, where liability is not disputed, repayment arrangements can be made which enable a consumer to repay the debt over a period of time. The Commission strongly encourages collectors to negotiate **realistic** repayment arrangements with a debtor and, in doing so, to remember that debtors may have debts with a number of different creditors. Realistic repayment arrangements stand the best chance of being maintained. If there is a process of bona fide negotiation it may reduce the risk of contravening s. 60.

Consumers also have important responsibilities in relation to their debts. They should advise creditors of current contact details, and contact them when financial difficulties occur. Early communication between debtors and creditors — as soon as financial difficulties arise — will help to resolve the matter more quickly and reduce the risk that arrears become unmanageable.



The Commission encourages consumers and creditors/collectors to use financial counsellors and other professionals who may be able to assist the debtor to manage their financial situation.

Is this guideline law?

This guideline does not have legal force. The Commission cannot make law; this is the role of the Parliament and the common law. Nor can the Commission provide a definitive interpretation of the law; this is the role of the courts.

However, as an enforcement agency the Commission considers it useful to identify the type of conduct it considers may be at risk of contravening s. 60 of the Trade Practices Act (and/or other legislation). To decide whether the legislation has been breached the Commission approaches each matter on a case-by-case basis, taking into account all relevant

circumstances. Compliance with the guideline is only one factor to be considered. This means that **full compliance with the guideline can help minimise the risk of breaching the law, but cannot provide businesses with a guarantee against litigation.**

Private persons can also institute proceedings for a contravention of s. 60. Compliance with the guideline will not necessarily protect businesses from litigation initiated by private parties.

The Commission hopes that businesses engaging in collection activity will implement the guideline, both in terms of the text and the **spirit** of the document.

Guideline subject to legislation and mandatory codes

As this guideline does not have legal force, compliance with it is subject to relevant legislative provisions or mandatory codes of conduct. This includes:

- regulations or legislation governing service of process and statutory notices;
- legal repossession activities and other legal enforcement of security interests;
- court ordered instalment arrangements;
- obligations under the Privacy Act;
- obligations under the Bankruptcy Act;
- obligations under industry licensing regulations; and
- any conduct specifically authorised by a court.

Although the guideline has been drafted, as far as possible, to minimise the chance of inconsistency with other legislation, it is the responsibility of individual businesses to ensure that they comply with all applicable laws.

Scope of the guideline

These guidelines have been developed considering only the collection of debts from individual consumers. The scope of s. 60 is wider than just debt collection from consumers. For example, many of the principles discussed here **may** also be appropriate when collecting business debts.

It is important to remember that s. 60 is not limited to debt collection situations. It applies to many other situations where 'undue harassment or coercion' are used in supply of goods or services to consumers, or the payment for goods or services by a consumer.

Penalties

Contravention of s. 60 is a criminal offence and can lead to the imposition of fines of up to \$200 000 for a corporation, or \$40 000 for an individual. Civil remedies for a contravention can include injunctions, damages, other orders, and enforceable undertakings.



Principals and agents

Where a creditor uses an agent for collection purposes, the creditor (as principal) may be liable for any conduct of the agent that contravenes the Trade Practices Act.

Conduct principles

A corporation is entitled to take reasonable steps to pursue a debt that is owed to it or its client if the corporation is a debt collector. A debtor is entitled to be treated fairly, with respect and courtesy, and should not be unduly harassed or coerced.



This guideline provides direction on:

- communicating with the debtor at, or away from, their workplace;
- personal visits;
- frequency of communications;
- allowing arrangements and other processes to work;
- communicating with a debtor's representative;
- communicating with third parties;
- misleading or deceptive conduct;
- coercion;
- language, violence, and physical force; and
- documentation and information.

Communicating with the debtor away from their workplace

Principle

A collector has a right to communicate with a debtor to facilitate collection. However, all communications should be made for reasonable purposes, and debtors should not be unduly harassed, or subject to communications at unreasonable hours.

Example ...

- A collector should not communicate with a debtor at any unusual time or place, or at any time or place that the collector knows or should know, would be unreasonable or substantially inconvenient to the debtor unless the debtor has given prior consent directly to the collector.

A collector can assume that the convenient time for communicating with a debtor is after 7.30 a.m. and before 9 p.m. local time at the debtor's location, **unless** the collector is informed otherwise.

A collector should not communicate, or attempt to communicate, with a debtor before 7.30 a.m. or after 9 p.m. **unless:**

- the debtor authorises communication at other hours; or
- the collector has made reasonable efforts, over a reasonable period of time, to contact the debtor after 7.30 a.m. and before 9 p.m., and the collector has made reasonable attempts to contact the debtor using other, less intrusive, methods of communication.



Note: Section 43 of the Fair Trading Act (SA) prohibits personal calls or telephone calls on a public holiday for the purpose of demanding payment.

- A collector should not communicate with a debtor at any time or place where the debtor has requested that no communication be made, or using any mechanism that the debtor has requested not be used, unless:
 - the debtor has not provided an alternate and effective contact mechanism; or
 - the debtor does not respond through the agreed contact mechanism within a reasonable time.

Communicating with the debtor at the debtor's workplace

Principle

Collectors should attempt to communicate with debtors outside of work where appropriate and possible, particularly for the initial contacts. Collectors should ensure that where communications or visits need to be made to a debtor's workplace, those contacts are handled discretely and with care. Debtors should be able to request that no communications be made at the workplace, provided that an alternative and effective contact mechanism is available.

Example ...

- A collector should not communicate with a debtor at the workplace, or visit the debtor at the workplace **unless**:
 - the debtor has specifically requested or authorised communications to be made at the workplace; or
 - the debtor has not provided an alternate and effective contact mechanism; or
 - the debtor is the proprietor or a director of a corporate proprietor of a business to which the debt relates.
- A collector should not communicate with, or attempt to communicate with, a debtor at the workplace in a manner that:
 - is likely to inform third parties of the existence of a debt; or

- discloses more than the name and contact details (including company name only if specifically requested by the third party) of the collector to third parties.



Personal visits

Principle

Where necessary a collector is entitled to communicate with the debtor by visiting in person. However, a collector should respect the debtor's own, and the household's privacy and security. Generally a collector should not use personal visits as the initial step in communicating with the debtor, and personal visits should not be used if other, less intrusive, means of communication are available and effective.

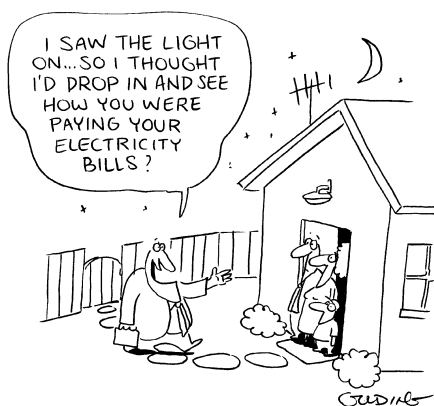
Example ...

- A collector should not visit a debtor in connection with the collection of any debt at any unusual time or place, or any time or place known or which should be known to be substantially inconvenient to the debtor, without the prior consent of the debtor given directly to the collector.

A collector can assume that the convenient time for making a personal visit to a debtor away from the workplace is after 7.30 a.m. and before 9 p.m. local time at the debtor's location, **unless** the collector is informed otherwise.

A collector can assume that the convenient time for making a personal visit to a debtor at the workplace is during normal business hours (9 a.m. to 5 p.m.), **unless** the collector is informed otherwise.

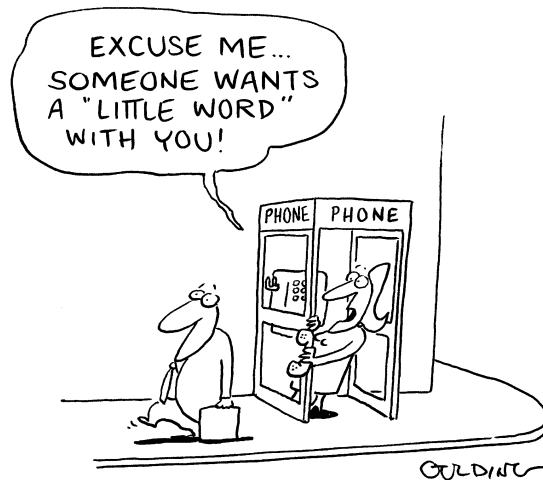
- A collector should not visit a debtor at the workplace if the debtor has so requested, and has provided an alternative and effective contact mechanism.
- A collector should immediately leave private property or the debtor's workplace if requested to do so by the debtor or another person.
- A collector should not remain in the vicinity of the debtor's location for an extended length of time for the purpose of:
 - intimidating or embarrassing a debtor; or
 - creating an impression that the debtor is under surveillance.



Frequency of communications

Principle

Collectors are entitled to make reasonable efforts to contact debtors; however, debtors are entitled to be free from unnecessary communications. A collector should not make unsolicited communications with the debtor more frequently than is reasonable and necessary according to the circumstances. Whether frequency of communication is considered to be reasonable will be assessed in light of the purpose of the communications.



Example ...

- A collector should not make more than three unsolicited (answered) telephone calls per week to a debtor, or more than 10 unsolicited telephone calls per calendar month to a debtor (including telephone calls where the debtor terminates the call), unless they can show a legitimate reason for doing so.

Note: In Queensland the Consumer Code of Conduct for Commercial Agents restricts contact with debtors to a maximum of two per week.

- A collector should not, in relation to a consumer debt, cause a telephone to ring, or engage any person in telephone conversation, repeatedly or continuously if it is reasonably likely to unduly abuse, or harass the person at the called number.
- A collector should not make unsolicited visits to a debtor more frequently than is reasonable and necessary, and no more frequently than once per week.

Allowing arrangements and other processes to work

Principle

A collector should generally not contact a debtor if an informal arrangement has been made for payment of the debt, and is being complied with, or if other legal processes or arrangements exist which make it inappropriate for the debtor to be contacted.



Example ...

- A collector should not communicate with a debtor whilst an arrangement to pay is in place and being complied with, unless the communication is made:
 - at the request of the debtor;
 - to confirm the details of the arrangement and to advise the debtor of the consequences of not complying with the arrangement;

- to provide a statement of the debtor's account;
- to advise the debtor of any legal remedies the collector intends to pursue whilst the arrangement is in place;
- to make a legitimate offer of an alternative arrangement of benefit to the debtor; or
- to review the arrangement (not more frequently than every three months).
- A collector should not communicate with a debtor after the debtor has (in writing) denied liability or stated an intention to defend any legal proceedings brought against them and has requested that no further communication be made, except for:
 - written communication that advises the debtor of the steps the collector intends to take with respect to legal proceedings;
 - written communication that is genuinely designed to facilitate settlement of the matter;
 - communication with respect to any part of a debt that is not denied;
 - communication where a judgment for that debt has been obtained against the debtor, and has not been set aside; or
 - further communication that is authorised by the debtor.
- A collector should not communicate with a debtor or third party for payment of the debt or to assert a right for payment once the collector becomes aware that the debtor is bankrupt or has entered into a Part IX or Part X agreement under the Bankruptcy Act, **unless** the communication is in accordance with that Act.

Communicating with a debtor's representative

Principle

A debtor is entitled to have another party represent them and/or advocate on their behalf when communicating with the collector. In turn, representatives must act reasonably, and the collector should be entitled to contact the debtor directly in appropriate circumstances.

Example ...

- A collector should not communicate directly with a debtor once the collector knows, or should know, that another person (e.g. solicitor, financial counsellor) represents the debtor in the matter, unless:
 - the debtor's representative does not respond to communications from the collector within a reasonable time (normally 14 working days);
 - the debtor's representative advises that he or she does not have instructions from the debtor in respect of this matter;
 - the representative does not consent to act;
 - where the representative is not a solicitor, the collector advises that written authority for the collector to communicate through the debtor's representative is required, and the debtor does not provide that authority; or
 - the debtor specifically requests communication from the collector.

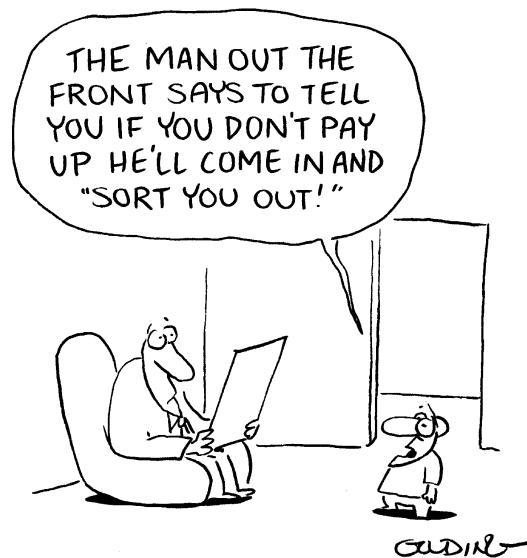


Communicating with third parties

Principle

Collectors are entitled to contact third parties in order to facilitate communication with the debtor. However, third parties are not liable for the debt, and are under no obligation to provide information to the collector. They are entitled to similar (if not greater) protection from undue harassment. A collector should only make unsolicited communications to third parties as are reasonable and necessary according to the circumstances.

A collector should not assume that any member of the debtor's family or household is aware of, or privy to, information about the debt situation, or that the debtor wants such persons to be informed.



Example ...

- A collector should communicate with a third party only in relation to a debt to seek location information or to leave a message for the debtor.
- A collector should not communicate with or visit a third party between the hours of 9 p.m. and 7.30 a.m. **unless** the communication or visit is authorised by the third party.

- A collector should not repeatedly communicate with a third party to leave a message for the debtor if the collector knows or should know that the third party does not live or work with the debtor, **unless**:
 - the third party has agreed to further contact; or
 - the third party has requested the contact.
- A collector should not communicate with a third party to seek location information about the debtor on more than one occasion within a six month period, **unless**:
 - the third party has agreed to further contact; or
 - the third party has requested the contact.
- A collector should not make misleading or deceptive statements to a third party in order to obtain the debtor's location or other information about the debtor from that third party.
- A collector should not disclose (or threaten to disclose) information about the debt (including the existence of the debt) to a third party, unless disclosure is permitted by the Privacy Act.
- A collector should not communicate with the debtor's child or children (under the age of 18) about the debt, **unless**:
 - communication with that child is specifically authorised by the debtor; or
 - the debtor asks the child to act as a translator.

Misleading or deceptive conduct

Principle

A collector must not engage in any other conduct that is misleading or deceptive or is likely to mislead or deceive.



Example ...

- A collector must not make a false or misleading representation about the nature of a collector's identity.
- A collector must not make a false or misleading representation about the consequences of non-payment. However, a collector is entitled to accurately explain the consequences of non-payment.
- A collector must not give information about the consequences of legal action that is misleading or deceptive or likely to mislead or deceive. However, a collector is entitled to accurately explain the consequences of legal action.
- A collector must not use documents that could mislead the debtor into believing they are court documents.
- A collector must not make false or misleading representations about the amount, character, or legal status of a debt.

- A collector must not threaten criminal action if a debt is not paid or engage in conduct that is likely to lead a debtor to believe that criminal action could be a consequence of non-payment, if the alleged conduct does not amount to a criminal offence.
- A collector must not threaten action (legal or otherwise) that a collector is not legally permitted to take or does not have the instructions or authority to take, either at any time or at the time that the representation is made.

Coercion

Principle

A collector should not exercise unacceptable or illegitimate pressure on a debtor or third party in order to persuade the recipient of the conduct to undertake a particular course of action.



Example ...

- A collector should not lead a debtor to believe that the collector's decision to report an alleged criminal offence will depend on whether or not a payment is made.
- A collector should not threaten to list a debtor on a blacklist or bad debts database or otherwise threaten to take action which purports to affect a debtor's credit rating or ability to obtain credit, **unless** such listing is permitted under the credit reporting provisions of the Privacy Act.

Language, violence and physical force

A collector should not use abusive, threatening, offensive, obscene, or discriminatory language to a debtor or a third party.

A collector must not use, or threaten to use, violence or physical force to any person.

A collector must not use, or threaten to use, violence or physical force to property.

Note: Such conduct is criminal under State and Territory criminal law.

Systems for complying with s. 60

Effective compliance systems reduce the risk of court action by either the Commission or a private litigant. An important part of an effective compliance system is the training given to staff and agents. This guideline should form part of any training and compliance system introduced by collectors.

A compliance guide for debt collectors has been developed, and designed to be used in conjunction with this guideline.



Definitions

Collector means a person collecting a debt in the course of a business. It includes creditors, independent debt collection agencies, lawyers, government and court officials, and persons collecting on behalf of others where either the collector, or if the collector is an agent, its principal, is a corporation.

Communicate, unless otherwise specified, includes communication by telephone, mobile telephone, fax, email, letter, and telegram.

Debtor means a natural person (or small company debtor) obligated or allegedly obligated to pay a debt. It includes a co-borrower or guarantor of the debtor.

Reasonableness is assessed according to an objective standard, taking into account all relevant circumstances.

Third party means any person other than the debtor, but does not include a debtor's legal representative, trustee, or other authorised representative, or a guarantor or co-borrower. Nor does it include a related entity of the collector.



Debt collection compliance guide

June 1999

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.

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.

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.

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.

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

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