

## **DEBT RECOVERY IN NSW**

**Organisation:** Australian Securities and Investments Commission  
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**ASIC**

Australian Securities & Investments Commission

GPO Box 9827 in your Capital City

19 May 2014

Bryan Doyle  
Committee Chair  
Parliament of New South Wales  
Legislative Assembly Committee on Legal Affairs

By email only: [legalaffairs@parliament.nsw.gov.au](mailto:legalaffairs@parliament.nsw.gov.au)

Dear Mr Doyle

**ASIC Submission on the Inquiry into Debt Recovery in New South Wales**

We refer to your letter dated 11 April 2014 regarding the "*Inquiry into Debt Recovery in NSW*" being conducted by the Legislative Assembly Committee on Legal Affairs.

Thank you for the opportunity to make a submission to the Inquiry.

We wish to address the relevant jurisdiction and provisions administered by the Australian Securities and Investments Commission (ASIC), our role and intended outcomes, and refer you to guidance we have provided, jointly with the Australian Competition and Consumer Commission (ACCC), to the debt collection industry to assist collectors, creditors and debtors.

***ASIC's jurisdiction***

ASIC's jurisdiction in respect of debt collection arises primarily from:

- the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which applies to conduct that is related to the provision of financial services. These largely mirror relevant provisions of the Australian Consumer Law (ACL), which is administered by the States and Territories and, at the Commonwealth level, by the ACCC.
- the *National Consumer Credit Protection Act 2009* (Cth) (National Credit Act), which imposes a licensing regime on credit providers, credit assistance providers, and purchasers of debts that arise from regulated credit contracts.

### ***Conduct regulation***

Relevantly to the regulation of debt collection activities, the ASIC Act and ACL prohibit:

- the use of physical force, undue harassment or coercion (ASIC Act s12DJ; ACL s50)
- misleading and deceptive conduct (ASIC Act s12DA; ACL s18); and
- unconscionable conduct (ASIC Act s12CB; ACL s21).

The ASIC Act applies to collection activities in respect of debts that relate to the provision of a financial service (including a credit facility). For example, this includes debts on credit card accounts, personal or home loans, finance provided by a finance company for items such as a car or household goods, and fees for providing financial advice, insurance, and other financial products and services.

The ACCC's jurisdiction under the ACL covers the balance of collection activities, being those that do not relate to financial services.

In 2005, ASIC and ACCC published joint guidance to assist creditors and collectors to understand their legal obligations and comply with the law. ASIC has published that guidance as ASIC Regulatory Guide 96: *Debt collection guideline for collectors and creditors* (the Guide)<sup>1</sup>.

The Guide has been well received by both industry and consumer representatives, and adopted by reference in various industry codes of practice<sup>2</sup>. ASIC and the ACCC are finalising a review of the Guide, which will update the existing guidance to reflect recent changes in the law and other relevant developments.

### ***Credit Licensing***

The National Credit Act applies a licensing regime to those providing regulated credit or credit assistance. Purchasers of regulated credit are providers for the purposes of that regime, and so are required to hold an Australian Credit Licence. Those who collect regulated debts on behalf of a Licensee have the benefit of an exemption<sup>3</sup>, however as agent of the Licensee they will be required to meet relevant standards of conduct.

The NCCP regime is generally not directed to collections activity, but does include provisions dealing with financial hardship, payment default and enforcement. Licensees are also required to do all things necessary to ensure that credit activities are engaged in efficiently, honestly and fairly<sup>4</sup>.

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<sup>1</sup> [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ACCC-ASIC\\_Deht\\_Collection\\_Guideline.pdf/\\$file/ACCC-ASIC\\_Deht\\_Collection\\_Guideline.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ACCC-ASIC_Deht_Collection_Guideline.pdf/$file/ACCC-ASIC_Deht_Collection_Guideline.pdf)

<sup>2</sup> See for example clause 32 of the Code of Banking Practice, 2013.

<sup>3</sup> Reg 21, *National Consumer Credit Protection Regulations* 2010 (Cth)

<sup>4</sup> s47 National Credit Act

### ***Regulatory Action***

ASIC has been and continues to be active in ensuring compliance with the law. The following illustrate the types of action we have taken in the past in response to conduct that we have identified as poor or potentially unlawful.

#### ACM Group Limited

In 2011 ASIC commenced proceedings in the Federal Court of Australia against one of Australia's largest debt collection groups in relation to their recovery practices. It was alleged the ACM Group Limited had engaged in misleading or deceptive conduct and undue harassment or coercion while carrying on a debt collection business.

In 2012 the Court found the conduct to be 'widespread' and 'systemic'. It found the ACM debt collector training manual made it very plain that debtors should be threatened with litigation. It also found that the tone of one of ACM's supervisors was rude, condescending and vicious.

The Court declared that ACM had engaged in misleading and deceptive conduct and undue harassment and coercion in relation to eight debtors, in breach of the ASIC Act. The Court also ordered that ACM be restrained from engaging in misleading and deceptive conduct and undue harassment and coercion in the future and that these orders operate permanently.<sup>5</sup>

#### GE Money

In 2008 ASIC took action over the debt collection practices of the GE Money consumer credit businesses. ASIC accepted an Enforcement Undertaking (EU) from GE Money to address concerns arising from consumer complaints about harassment, including excessive or inappropriate contact with customers, contact at unreasonable hours and an inflexible approach to repayment arrangements.

The EU required GE Money to engage an independent expert to review and assess its debt collection processes to ensure that it complies with the Guide and make recommendations to correct any deficiencies, provide ASIC with an Action Plan to implement any recommendations, pay compensation to affected customers in accordance with guidelines prepared by the then Banking and Financial Services Ombudsman, and arrange and pay for an industry workshop to promote best practice in the debt collection industry.<sup>6</sup>

In addition to Regulatory Guide 96 we have issued two reports dealing with issues relating to debt collection:

- *Report 155: Debt collection practices in Australia, May 2009* – this joint report (ASIC & ACCC) was published in 2009 and summarised the major issues

<sup>5</sup> <http://www.asic.gov.au/asic/asic.nsf/byheadline/12-261MR+Federal+Court+finds+debt+collection+group+mised+and+harassed+debtors?openDocument>

<sup>6</sup> <http://www.asic.gov.au/asic/asic.nsf/byheadline/08-106+ASIC+acts+on+GE+Money%27s+insurance+and+debt+collection+practices?openDocument>

identified in the debt collection industry at the time and promoted further discussion among consumers, industry and regulators<sup>7</sup>

- *Report 55: Collecting statute-barred debts, September 2005* – this report examined debt collection industry practices in relation to old debts where the legal limitation period had expired<sup>8</sup>

We engage closely with industry to ensure we are aware of current issues and trends and are able to respond appropriately when we receive reports of misconduct.

If you wish to discuss the content of ASIC's submission please contact Glen Cochrane on [REDACTED]

Yours faithfully [REDACTED]

Tim Gough

Acting Senior Executive Leader, Deposit takers, Credit & Insurers  
Australian Securities and Investments Commission

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<sup>7</sup> [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP155-debt-collection-report.pdf/\\$file/REP155-debt-collection-report.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP155-debt-collection-report.pdf/$file/REP155-debt-collection-report.pdf)

<sup>8</sup> [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/statute\\_barred\\_debts\\_report.pdf/\\$file/statute\\_barred\\_debts\\_report.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/statute_barred_debts_report.pdf/$file/statute_barred_debts_report.pdf)