

Debt collection in New Zealand: Considering the case for adoption of guidelines, modelled on Australian debt collection guidelines, to address poor conduct by debt collectors

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The recovery of unpaid debts can be pursued with firmness, determination and civility. It can do all those things without resorting to bullying, bluff, misrepresentation or stand-over tactics. If it does the first and avoids the second it is unlikely to contravene the law. ACCC v McCaskey [2000] FCA 1037, at [51] (French J).

Evidence revealed by the Government's recent consumer credit review suggests there are issues regarding poor debt collector conduct in New Zealand by some collectors. This paper looks at the law in New Zealand that is relevant to debt collection and, drawing on the experience in Australia, considers how that law, and in the particular the prohibition in s 23 of the Fair Trading Act 1986 against harassment and coercion, might be utilised more effectively to improve standards across the industry. In particular, it considers whether the adoption of regulator guidelines, based on the Australian debt collection guidelines, that explain how s 23 is interpreted by the regulator, might be a useful measure to address poor debt collection practices.

Introduction

Debt collection is an important aspect of any business operation. While no in-depth industry research has been done in New Zealand, it must be a given that the debt collection industry contributes to the economy of New Zealand by employing many workers and assisting businesses to maintain cash flow. However, the recent consumer credit review undertaken by the Ministry of Business, Innovation and Employment (MBIE) (the 2018 Consumer Credit Review) has revealed that New Zealand may have a serious problem concerning the behaviour exhibited by some debt collectors towards debtors. Reports from budget services, who commonly see vulnerable members of society in financial distress, suggest harassment and other pressuring tactics are employed by some collectors.

As a result of the consumer credit review, MBIE recommended one change to consumer credit law, around the disclosures that must be made to the debtor at the start of the debt collection process. This has resulted in an amendment to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) that is expected to come into force in 2021.¹ No other law change was supported by MBIE, who cited concerns around the possibility of reduced recovery rates and flow-on detrimental effects for debtors among the reasons for not recommending any law change to address other problems that they acknowledged existed, including poor debt collection practices.

New Zealand has a range of laws already in place that can be used to regulate debt collector conduct. These include the prohibitions in the Fair Trading Act 1986 (FTA) on misleading conduct, on harassment and coercion in connection with recovery of a debt and (under an imminent law change) on unconscionable conduct in trade. There are also certain obligations imposed on creditors and debt purchasers under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) which apply to the debt collection process.

One regulatory mechanism that has been employed in Australia with significant success in improving debt collection practices for all types of debt (not just debt arising from consumer credit contracts) is

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¹ See Credit Contracts Legislation Amendment Act 2019, s 51 which inserts new s 132A into the CCCFA.

the adoption by the regulator of detailed guidelines setting out the regulator's view of what is permitted (and not permitted) by relevant law. These guidelines, called the Debt Collection Guideline for Collectors and Creditors,² were developed by the two relevant regulators in Australia: the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC), after consultation with the industry and other stakeholders. Initially developed in 2005, the guidelines were reissued in July 2014 (updated to reflect case law and changes to the relevant statutes). These guidelines, which are referred to as 'the Australian Guidelines' in this paper, have come to be regarded as best practice in the industry.³

Many industry submitters indicated in their submission to MBIE's 2018 Consumer Credit Review that they would support the introduction in New Zealand of guidelines modelled on the Australian Guidelines. However, some submitters expressed concerns with the adoption of any form of (even non-binding) prescription around the conduct of debt collectors, saying more definition around what was acceptable conduct could be detrimental to debtors.

This paper looks at the evidence of poor debt collection practices in New Zealand and the law that regulates debt collection in New Zealand. It focuses on the prohibition in s 23 of the FTA and notes the arguments for and against the development and adoption by the regulator of detailed guidelines, which would clarify the regulator's view of what types of conduct will breach the prohibition by reason of constituting harassment or coercion. There is very little New Zealand case law to assist in the interpretation of s 23, but there is a large body of case law from Australia on the corresponding Australian prohibition. Australia's experience suggests that introducing detailed guidelines in New Zealand would likely assist in both enforcement and improvements to debt collection industry practice.

There is, however, an issue with some significant differences in the New Zealand prohibition on harassment and coercion as compared with the comparable Australian prohibition. The Australian prohibition is against 'undue harassment and coercion', and breach is an offence. The corresponding New Zealand prohibition is against 'harassment and coercion' and leads only to civil remedies (including an injunction or an award of compensation for loss or damage). The prohibition on 'undue harassment and coercion' has been an important tool in regulation of poor debt collection practice in Australia. By contrast, the New Zealand prohibition has never come before the courts in any action taken by the regulator.

This paper suggests that while guidelines that elaborated on how the regulator interprets the current law in New Zealand would likely be very useful, there is an urgent need to review the New Zealand prohibition in view of the benefits that could be gained by aligning both the wording and consequences of breach of the New Zealand prohibition, with the corresponding Australian provision.

The debt collection industry in New Zealand and the law that currently regulates it

² The Debt Collection Guideline for Collectors and Creditors (Australian Guidelines) are available from <https://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors>. This paper refers to the Australian Guidelines in force as at July 2020 (being the July 2014 version of the guidelines).

³ One of the key findings of the report of the Research into the Australian Debt Collection Industry undertaken for the ACCC in 2015 (2015 Industry Research) (at p 6) was that the Debt Collection Guideline: for Collectors and Creditors (Australian Guidelines) represent best practice for the debt collection industry in Australia. This research is available from the ACCC website: <https://www.accc.gov.au/>

There is no licensing of debt collectors in New Zealand and there appears to be no industry body for debt collectors, although a small number are members of the Financial Services Federation.⁴ Debt collectors that act as agent for the person owed the money do not have to register on the Financial Service Providers Register,⁵ as the business of debt collection is not a ‘financial service’ under s 5 of the Financial Service Providers (Registration and Dispute Resolution) Act. A Google search of debt collectors in New Zealand undertaken by the author revealed around 80 companies, although there may well be more. These range from large, well-known collection companies like Baycorp and Illion (formerly Dun & Bradstreet (NZ) Ltd), to many small companies that appear to service a defined locality. About a quarter of the companies revealed in the search do not have a website and can only be initially contacted by phone or mail to a physical address.

A study of the debt collection industry in Australia done in 2015 revealed a similar profile of the industry:⁶ “The debt collection industry in Australia is relatively competitive, with over 500 businesses offering some form of debt collection service. While the industry is dominated by a few larger players, the sector is mainly comprised of small businesses, with 63% generating less than \$200,000 in revenue and 95% employing less than twenty people.”

Debt collectors either act as agent for the person owed the money, or they purchase debt and then seek to recover it on their own behalf. Some businesses do both – act as agents and purchase debt. Based on the information available from searches of New Zealand debt collection businesses, most appear to act only as agents.⁷ A common business model appears to be for the debt collector who acts as agent to take a percentage of the money recovered as commission.⁸ One submitter to the 2018 Consumer Credit Review stated that the standard fee was 20% of the amount of the debt.⁹ Assuming that the original contract allows collection fees to be added onto the debt, this percentage is added onto and becomes part of the amount owing by the debtor.

Common types of debt that consumers incur that may result in debt collection include fines, utility bills and loans. Debt that arises from default under a consumer credit contract attracts a greater degree of regulation around debt collection than other types of debt.

⁴ See the Financial Services Federation membership list attached as Appendix A to the Financial Services Federation submission to Discussion Paper, Review of Consumer Credit Regulation, June 2018, Ministry of Business, Innovation and Employment, (MBIE Discussion Document) (available from this MBIE webpage: <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law>) (the 2018 Discussion Document). Two debt collection agencies are listed as members (Baycorp and Illion). The submissions to the 2018 Discussion Document are available from <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/changes-to-consumer-credit-law-2020/>

⁵ This register is established under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

⁶ 2015 Industry Research, n 3, at 3.

⁷ A recent Stuff article reported that three big Australian debt purchasers had recently invested in New Zealand operations, and described New Zealand’s debt purchasing market as “fledgling”. See <https://www.stuff.co.nz/business/money/104472214/the-lowprofile-business-of-reselling-debts>

⁸ For example, Baycorp in its submission to the 2018 Discussion Document said this is how Baycorp operates (at p 2). Comments made by the Commerce Commission in its submission also suggest that fees are generally collected on a contingency basis, ie only payable on money recovered (at [205]).

⁹ Credit Recoveries Ltd in its submission to the 2018 Discussion Document Paper stated (at p 2) that 20% is the general benchmark in the debt collection industry in New Zealand. The Commerce Commission submission stated (at [222]): “information gathered from several debt collectors’ websites detail that a commission charged for collection can range from 15% to 45% depending on the size, age and history of the debt.”

In relation to all types of debt, debt collectors are subject to certain rules under the FTA. Both agents and debt purchasers are subject to the relevant prohibitions in the FTA, which are enforced by the Commerce Commission. Where the conduct also breaches the Financial Markets Conduct Act 2013 (FMCA) then that conduct will also come within the jurisdiction of the Financial Markets Authority (FMA).

Under the FTA, there is a general prohibition on misleading conduct in trade,¹⁰ plus prohibitions on certain types of misleading conduct and false or misleading representations.¹¹ There is also a prohibition on making unsubstantiated representations (an example might be saying that legal action is about to be commenced in relation to the debt when there are no reasonable grounds for saying that).¹² These prohibitions are enforceable against a debt purchaser or a debt collector acting as agent, if the conduct occurs when acting in the course of business. Breach of the general prohibition on misleading conduct gives rise only to civil proceedings, but breach of the more specific prohibitions, for example the prohibition on false or misleading representations under s 13, gives rise to an offence.¹³

There is also a prohibition on using physical force, harassment or coercion in connection with the payment for goods or services (s 23), which is enforceable against debt collectors who act as agents and debt collectors who purchase debt. Breach of s 23 is not a criminal offence. If the court finds that a person has suffered loss or damage by reason of the conduct, it can make a variety of orders, including compensation for the loss or damage.¹⁴

The Fair Trading Amendment Bill, currently (July 2020) before Select Committee, introduces a prohibition on unconscionable conduct in trade, which will also be enforceable against both agents and debt purchasers. Breach will give rise to an offence.

The unfair contract term rules in the FTA are also potentially relevant to debt collection. For example, a clause in a standard form telecommunications contract that stated that all fees incurred in relation to debt collection would become payable by the consumer might potentially be found by the court to be an unfair term and therefore unenforceable.

The Financial Markets Conduct Act 2013 (FMCA) mirrors certain of the prohibitions on conduct that are contained in the FTA, for financial service providers. Section 19 prohibits misleading or deceptive conduct in trade generally (in relation to dealings in financial products or supplies of financial services) and ss 20 to 22 contain more specific prohibitions relating to misleading conduct or representations. Sections 23 to 27 relate to unsubstantiated representations. The term 'financial service provider' includes creditors and debt purchasers but does not include debt collection agents, who are currently only under the jurisdiction of the Commerce Commission for misleading conduct regulation. There is no equivalent to s 23 of the FTA (prohibition on harassment or coercion) in the FMCA. Nor is there any prohibition on unconscionable conduct in the FMCA. The Financial Markets (Conduct of Financial Institutions) Amendment Bill currently (July 2020) before Parliament is potentially relevant in that once banks and insurers become subject to the fair conduct principle, that could impact on obligations in relation to debt collection.

¹⁰ Fair Trading Act 1986 (FTA), s 9.

¹¹ FTA, ss 10-12, 13-15. Breach leads to an offence.

¹² FTA, ss 12-12D. Only the Commerce Commission can commence proceedings for breach of these provisions.

¹³ FTA, s 40. Breach of s 14(2) (No person shall use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land) only leads to civil remedies.

¹⁴ FTA, s 43.

All debt collectors (agents and purchasers) are subject to the privacy principles under the Privacy Act 1993. The principles impose (for example) limits on disclosing personal information about a debtor's affairs to third parties.

Debt collection agents are subject to a limited range of obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and are supervised by the Department of Internal Affairs in relation to these obligations. The obligations on debt collectors are to report suspicious activity (and associated rules).¹⁵ The person originally owed the debt is subject to the full range of obligations under the AML/CFT Act as a business involved in lending including consumer credit lending is considered a financial institution. Debt purchasers would appear to be subject to the AML/CFT legislation in the same way as the person originally owed the debt.¹⁶

If the debt arises from a consumer credit contract, then there are additional obligations that apply to the debt collector if the debt collector has purchased the debt. If the debt collector has purchased the debt, then the debt collector become the 'creditor' for the purposes of the application of the obligations under the CCCFA.¹⁷ In relation to a debt collector that is acting as agent, the obligations under the CCCFA are not directly enforceable against the agent. The obligations are enforceable only against the original lender. In other words, if the debt collector as agent breaches any of these obligations, the original lender is responsible for that. Whether the agent is required to compensate the lender for any loss the lender suffers as a result of the agent's actions depends on what the contractual arrangement is between the lender and the agent.

Under the CCCFA, the creditor (in other words, the original lender or a person that has purchased the debt) has obligations (relevantly) to: (1) exercise the care, diligence and skill of a responsible lender in all dealings with the borrower; and (2) treat the borrower and their property (and property in their possession) reasonably and in an ethical manner including where the agreement has been breached.¹⁸ If a court was to find that the creditor had exercised a right or power conferred by the agreement in an oppressive manner, the contract could be reopened by the court.¹⁹ On reopening a contract, the court may make any order it considers necessary to remedy the matter that caused the court to reopen the contract.²⁰ The Responsible Lending Code sets out guidance on how creditors should comply with the obligations under the CCCFA. That Code is at time of writing (July 2020) undergoing review as a result of the recent amendments to the CCCFA, in particular around the responsible lending rules. The guidance in the Responsible Lending Code (for example, that a lender should contact a borrower at reasonable hours taking into account all the circumstances and the borrower's reasonable wishes)²¹ is only applicable to debt arising from a consumer credit contract.

Recent changes to the CCCFA which are expected to come into force in 2021 will require all debt collectors (agents and debt purchasers) to disclose certain key information at the start of the debt collection process in relation to a credit contract, if: the debtor is a natural person; the credit was to be used for personal, domestic or household purposes; and the debt collection is carried out in the course of a business.²²

¹⁵ Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011, reg 22.

¹⁶ Persons carrying on a business of factoring are included in the definition of financial institution.

¹⁷ Credit Contracts and Consumer Finance Act 2003 (CCCFA), s 5 (definition of 'creditor').

¹⁸ CCCFA, s 9C.

¹⁹ CCCFA, s 120. See also s 124 (guidelines for reopening contracts).

²⁰ CCCFA, s 127.

²¹ Responsible Lending Code, cl 2.7.

²² Credit Contracts Legislation Amendment Act 2019, s 51 which inserts new s 132A into the CCCFA.

There are specific rules in the CCCFA around repossession activity. These rules apply before a creditor under a consumer credit contract, any assignee of the debt or any debt collection agent may repossess consumer goods, at the time of repossession and following repossession. Importantly, the goods must be identified in the contract and a repossession warning notice must be served. Certain types of goods are exempt from repossession such as beds, washing machines and refrigerators. This paper does not focus on the repossession rules but rather on the rules that apply in relation to collecting unsecured debt.

Both the FTA and the CCCFA are enforced by the Commerce Commission. The Commerce Commission has issued a 3-page guidance note entitled “Guidance for debt collectors” which explains that the FTA makes it unlawful to make false or misleading representations when collecting debt and gives some examples of misleading representations. The note states that it is unlawful to harass or coerce someone into repaying debt and gives one example (from the Australian case of *ACCC v Accounts Control Management Services Pty Ltd*²³) of what might be harassment or coercion. The guidance note also briefly explains the additional rules that apply to collection of consumer credit debt and the privacy obligations that apply in relation to debtor information.

The FMCA is enforced by the FMA. The Commerce Commission and the FMA have signed a memorandum of understanding which provides that while the FMA generally has primary responsibility for enforcement of misleading conduct by financial service providers, the Commission has primary regulatory responsibility for misleading conduct in relation to consumer credit contracts.²⁴

Some industries such as the electricity industry have developed guidelines for dealing with vulnerable consumers who may have difficulty paying their bills.²⁵

The evidence of poor conduct by debt collectors in New Zealand

A wealth of information on debt collection practices in New Zealand has become available as a result of the 2018 Consumer Credit Review. This information is primarily contained in the MBIE discussion document issued in June 2018²⁶ (the MBIE Discussion Document) and the accompanying additional information document (Additional Information Document),²⁷ which summarise the information that came to light as a result of the MBIE consultations before June 2018, and in submissions made after June 2018 to the MBIE Discussion Document. Further evidence is available from a survey of budget

²³ *ACCC v Accounts Control Management Services Pty Ltd* [2018] FCA 1115.

²⁴ See Memorandum of Understanding between Financial Markets Authority and Commerce Commission dated 31 March 2014.

²⁵ See the Guideline on Arrangements to Assist Vulnerable Consumers Version 2.1, Electricity Authority Guidelines available from the Electricity Authority website: ea.govt.nz.

²⁶ Discussion Paper, Review of Consumer Credit Regulation, June 2018, Ministry of Business, Innovation and Employment, (MBIE Discussion Document) available from this MBIE webpage:

<https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law>

²⁷ Review of Consumer Credit Regulation, Additional Information to Support the Discussion Paper, June 2018, Ministry of Business, Innovation and Employment (Additional Information Document), available from this MBIE webpage: <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law>

services undertaken in December 2018²⁸ and from responses to a questionnaire sent out to budget services by the umbrella body, FinCap, in 2018.²⁹

The MBIE Discussion Document and Additional Information Document report that MBIE heard concerns that debt collection practices frequently included false and misleading claims, harassment, excessive charges and unrealistic payment demands.³⁰ MBIE considered that debt collection issues are likely under-reported stating: “We have heard that consumers are reluctant to complain about debt collector behaviour or irresponsible lending for a range of reasons, including shame, fear, or a lack of knowledge of rights and processes surrounding complaints.”³¹ The most common types of misleading and false claims being made by debt collectors were misrepresentations about their right to collect debt (including non-existent debts, debts owed to a different person, or statute-barred debt) and misrepresentations regarding the amount of the debt.³² Examples of harassment of debtors given to MBIE included frequent phone calls to the borrower or their employer. “We understand that this is very common. We were told of a debt collector who called a borrower’s workplace receptionist up to five times a day demanding payment.”³³ MBIE also was given evidence of aggressive or coercive behaviour by debt collectors.³⁴

Submissions to the MBIE Discussion Document came from lenders, the regulator, debt collectors, budget services and others, and almost every submission commented on the problems around debt collection. A key theme that emerged from those submissions was that many consumers, as debtors, have experienced conduct from debt collectors that might amount to harassment or coercion. This evidence builds on the information previously collected by MBIE that is summarised in the MBIE Discussion Document and Additional Information Document.

Many submitters mentioned that poor debt collection practices particularly adversely affect vulnerable consumers, including as those with mental health issues, poor physical health or low literacy skills, and particularly if there is a poor grasp of English.³⁵ The New Zealand Federation of Business and Professional Women, in its submission to the MBIE Discussion Document, said that

²⁸ Report of survey of financial mentoring and budgeting services in Aotearoa on high cost loans, debt collection and other consumer credit issues, February 2019, available from this FinCap webpage: <https://www.fincap.org.nz/resources/>

²⁹ FinCap is a trust supported by the Ministry of Social Development as part of the Ministry’s Building Financial Capability initiative and acts as the umbrella body for the 199 budgeting organisations around New Zealand. The author had access to the responses to the questionnaire sent out by FinCap to services in 2018 through an interview with FinCap on 23 June 2020.

³⁰ Additional Information Document n 27, at 21.

³¹ Additional Information Document n 27, at 22-23.

³² Additional Information Document n 27, at 23.

³³ Additional Information Document n 27, at 24.

³⁴ Additional Information Document n 27, at 24.

³⁵ The Commerce Commission gave the following explanation of who is a vulnerable consumer in its 2015 Consumer Issues Report: A vulnerable consumer is often considered to be a person whose ability to transact, and/or acquire goods and services, effectively is impeded by factors like low income, limited English comprehension, some form of disability, serious or chronic illness, poor reading or numeracy skills, homelessness, or being very young, or very old. See Consumer Issues 2015, Commerce Commission of New Zealand, at [96], available from the Commerce Commission webpage: <https://comcom.govt.nz/business/consumer-reports/consumer-issues-report>. A vulnerable consumer has been defined by UK’s Financial Conduct Authority (FCA) as “someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care.” See Consumer Vulnerability, Financial Conduct Authority, February 2005, Occasional Paper No 8, available from the FCA website: www.fca.org.uk

“harassment by text or phone of vulnerable borrowers with emotional issues or mental health issues often results in paralysis, panic attacks and an inability to seek work.”³⁶ Christian Budgeting New Zealand said “harassment has a huge impact on vulnerable borrowers, adding to their stress levels, with other negative health and social consequences for borrowers and their families.”³⁷ One of the lenders that submitted to the MBIE Discussion Document stated that “the most vulnerable consumers the CCCFA aims to protect are likely to be dealing with these [debt collection] agencies on many occasions though credit contract default, not choice.”³⁸

The concern that poor debt collection practices impact most heavily on vulnerable consumers has also been expressed by the Australian regulator. Among the reasons for the introduction of guidance by the ACCC in 1999 (discussed below) was that many of the consumers likely to be the subject of debt collection are on low incomes and/or are otherwise vulnerable or disadvantaged, and many of those likely to be the subject of debt collection are unlikely to be aware of their rights in this area.³⁹ The ACCC said in 2005 when launching the first version of the Australian Guidelines that “Debt collection activity continues to be a source of complaints to the ACCC. In fact, debt collection was the first trend to emerge in the ACCC’s campaign to protect disadvantaged and vulnerable consumers.”⁴⁰ The industry research undertaken for the ACCC in 2015 found as one of its key findings that non-compliant debt collection practices result in significant detriment to vulnerable and disadvantaged consumers.⁴¹

However, in line with the recommendations of MBIE, made after the submissions to the MBIE Discussion Document were considered, the Government decided in 2019 to shelve proposals to address issues around harassment and coercion in the consumer credit debt collection market, choosing only to introduce law around disclosures by debt collectors. The reasons given by MBIE for its recommendation included that additional measures could reduce recovery rates and that creditors might resort to other types of actions such as court action which could be more harmful to debtors.⁴²

Extracts from the submissions to the MBIE Discussion Document and the earlier questionnaire, which give evidence of conduct that might amount to harassment or coercion, are contained in **Appendix 1**.

Approach to debt collection regulation in Australia

This paper focuses on the measures introduced in Australia that are targeted at poor debt collection practices, with a view to assessing whether guidelines modelled on the Australian Guidelines could be

³⁶ Submission to the MBIE Discussion Document from The New Zealand Federation of Business and Professional Women Inc, at 5.

³⁷ Submission to the MBIE Discussion Document from Christian Budgeting New Zealand, at 6.

³⁸ Submission to the MBIE Discussion Document from DCO Finance, at 19.

³⁹ Launch of Report & Guidelines on undue harassment and coercion in debt collection, Speech of Allan Asher, Deputy Chairman Australian Competition and Consumer Commission, 10 June 1999, (Launch of 1999 Guidelines) available from the ACCC webpage: <https://www.accc.gov.au/speech/launch-of-report-guidelines-on-undue-harassment-and-coercion-in-debt-collection>

⁴⁰ ACCC- ASIC debt collection publications launch, Speech by Louise Sylvan, ACCC Deputy Chair, Australian Institute of Credit Management National Conference, 14 October 2005 (ACCC/ASIC Debt Collection Publications Launch 2005), at 2. Available from this ACCC webpage: <https://www.accc.gov.au/speech/accc-asic-debt-collection-publications-launch>

⁴¹ 2015 Industry Research, n 3, at 7.

⁴² See Impact statement: consumer credit regulation review, MBIE, 24 September 2018, (2018 Impact Statement) at 56 – 57, accessible on this MBIE webpage: <https://www.mbie.govt.nz/assets/c09d5636b6/coversheet-consumer-credit-regulation-review.pdf>. Another difficulty MBIE faced when dealing with debt collection issues is that the consumer credit review only focused on one part of the debt market, while debt collection issues arise in relation to all types of debt. It was not part of MBIE’s mandate to address debt collection issues across all debt but that is what is now required.

considered a useful regulatory tool for New Zealand, in particular to address problems with harassment and coercion of debtors. The reasons for focusing on the regulation in Australia include that Australia's debt collection regulation is similar to New Zealand's, in that it is based on generally applicable laws (such as those in the FTA) which are then focused on debt collection activity through regulator guidance. In addition, the legal obligations that underpin the Australian Guidelines are similar to the comparable legal obligations in New Zealand's FTA, CCCFA and FMCA. It is also relevant that many debt collectors operating in New Zealand also operate in Australia. Several of these businesses and some lenders indicated to MBIE in their submissions that they would support the adoption by the New Zealand regulator of guidelines modelled on the Australian Guidelines.⁴³

a. Australian Debt Collection Guidelines and other regulator activity

The key document relating to debt collection practices in Australia is the Australian Guidelines which have been developed jointly by the ACCC and ASIC. ASIC is responsible for dealing with misconduct associated with collection of debts that arise from financial services, while the ACCC is responsible for dealing with misconduct associated with debts that arise from the provision of non-financial goods and services. The principle underlying laws are: the Australian Consumer Law (ACL); Part 2, Division 2 of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act); and the National Consumer Credit Protection Act 2009 (Cth) (NCCPA) (which includes the National Credit Code as Schedule 1).⁴⁴

The ACL is broadly comparable to New Zealand's FTA. It provides a framework of protection for consumer transactions within Australia. In particular, it contains prohibitions on misleading conduct in trade, on certain types of misrepresentations, and on harassment and coercion. The ACL is jointly enforced by the ACCC and state and territory consumer protection agencies. The provisions in Part 2, Division 2 of the ASIC Act are broadly comparable to Part 2 of New Zealand's FMCA. This part of the ASIC Act provides for certain consumer protection measures in relation to financial services and includes, for example, prohibitions on misleading conduct and misrepresentations in relation to financial products and services. The ASIC Act is enforced by ASIC. The NCCPA is broadly comparable to New Zealand's CCCFA. It contains rules on responsible lending and specific rules around the provision of consumer credit. The NCCPA is also enforced by ASIC.

The Australian Guidelines are not enforceable law. The Australian Guidelines state⁴⁵ "[t]his guideline does not have legal force. The ACCC and ASIC cannot make law in this field because that is the role of parliament. The ACCC and ASIC also cannot provide a definitive interpretation of the law because that is the role of the courts. ASIC and the ACCC will approach each potential compliance and enforcement matter on a case-by-case basis, taking into account all relevant circumstances, and by applying their respective enforcement and compliance policies. Compliance with this guide cannot provide a guarantee against enforcement action by ASIC or the ACCC. Businesses may also be subject to action by private parties. Businesses should consider seeking independent legal advice on these matters. The

⁴³ Businesses or organisations that indicated they would support the adoption in New Zealand of guidelines modelled on the Australian Guidelines include Baycorp, Credit Recoveries, the FSF, ANZ, Illion, and Rapid Loans.

⁴⁴ There is also a range of other statutory and common law obligations and remedies that potentially affect collectors' and creditors' operations. These include, for example, state and territory fair trading laws and licensing obligations, and privacy laws.

⁴⁵ Australian Guidelines, n2, at 3.

ACCC and ASIC encourage businesses engaging in debt collection activity to follow this guideline and incorporate it into their staff training, both in terms of the text and the spirit of the document.”

The ACCC first introduced guidance addressing what was harassment in debt collection in 1999.⁴⁶ In 1998, the ACCC had received more than 230 complaints and inquiries about what constituted debt harassment. Although the complaints were not tested in the courts by the ACCC, the ACCC considered that this level of inquiry indicated concern in the community.⁴⁷ The ACCC said in 1999:⁴⁸

“With other agencies at the 'coalface' of the problem of harassment, the ACCC has identified areas of concern including: unreasonably frequent telephone calls and/or calls late or early; contacts at the debtor's workplace in a way where the debtor's job maybe endangered; deceptive tactics about the consequences of non-payment or about the recovery process; disclosure of loan information to third parties; threats to disclose debts to employers, child welfare agencies and similar; and abusive language.”

The 1999 guidance was introduced to clarify the meaning of s 60 of the Trade Practices Act 1974, which was described as “a little used section of the Act but it does afford some protection to consumers, particularly 'battlers', who find themselves in debt because of unforeseen circumstances such as redundancy or illness.”⁴⁹ Section 60 is the section that s 23 of the FTA was modelled on. Section 60 (now replaced by s 50 of the ACL and s 12DJ of the ASIC Act) stated: “A corporation shall not cause or permit a servant or agent of the corporation to use, at a place of residence, physical force, undue harassment or coercion in connexion with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.”

Shortly after the introduction of the 1999 guidance, the ACCC brought its first case against a debt collection company alleging harassment. The resulting decision, *ACCC v McCaskey*,⁵⁰ provided the first Australian case law on what is ‘undue harassment’ for the purposes of s 60. Justice French, in the Federal Court, stated:⁵¹ “If legitimate demands are reasonably made, on more than one occasion, for the purpose of reminding the debtor of his or her obligation and drawing the debtor’s attention to the likelihood of legal proceedings if payment is not made, then that conduct, if it be harassment, is not undue harassment. If the frequency, nature, or content of the approaches and communications associated with them is such that they are calculated to intimate or demoralise, tire out or exhaust a debtor rather than convey the demand and associated legitimate threat of proceedings, the harassment will be undue”.

In 2002, the ACCC and ASIC became jointly responsible for administering consumer protection legislation in relation to the debt collection industry. ASIC deals with debt collection complaints relating to a financial service. This includes debts on credit card accounts, personal or home loans,

⁴⁶ See Launch of 1999 Guidelines, n 40.

⁴⁷ See Launch of 1999 Guidelines, n 40.

⁴⁸ See ACCC media release 1999, Clear Guidelines aid debt collectors, consumers, available from the ACCC webpage: <https://www.accc.gov.au/media-release/clear-guidelines-aid-debt-collectors-consumers>

⁴⁹ See ACCC media release 1999, Clear Guidelines aid debt collectors, consumers, available from the ACCC webpage: <https://www.accc.gov.au/media-release/clear-guidelines-aid-debt-collectors-consumers>

⁵⁰ *ACCC v McCaskey* [2000] FCA 1037.

⁵¹ *ACCC v McCaskey* [2000] FCA 1037, at [48].

finance provided by a finance company (for example, for items such as a car or household goods), as well as fees for the provision of financial advice. The ACCC deals with debt collection complaints relating to purchases of goods and non-financial services. This includes debts for telephone services or other utilities, and for the services of tradespeople and professionals, where immediate payment is not required.

In 2005, the ACCC and ASIC issued a joint debt collection guideline which replaced the earlier ACCC guidance.⁵² “The bad news is that complaints about debt collection show little sign of abating” said ACCC Deputy Chair, Louise Sylvan, on the launch of the 2005 guidelines.⁵³ The 2005 guidelines, which were the first version of the Australian Guidelines, reflected recent relevant court decisions and changes in the debt collection industry’s structure and practices, including “the increasing prevalence of outsourced or assigned debt collection.”⁵⁴ The 2005 guidelines provided guidance to the debt collection industry on how to avoid breaches of these laws, as well as to consumers who were subject to debt collection activity and to creditors who use external agencies to collect debts. These guidelines were developed in consultation with the industry and other stakeholders and finalised after a consultation round in which more than 50 submissions were received.⁵⁵

In 2014, an updated version of the 2005 guideline was produced by the ACCC and ASIC. This was prepared following extensive consultation with industry and consumer representatives. Announcing the release of the 2014 version, the regulators said:⁵⁶ “This publication has been updated to reflect significant changes to the law, such as the introduction of the Australian Consumer Law in 2011, the National Consumer Credit Protection Act 2009, and new privacy laws and principles. It also incorporates recent court outcomes and practical examples to assist creditors, collectors and debtors in areas that have caused concern.”

In 2015, the ACCC commissioned research into the scale, scope and structure of the debt collection industry, stating at the time:⁵⁷ “As part of our work, we are looking to gauge the industry’s understanding of and compliance with their obligations under the ACL. Identifying problematic behaviours, specific issues and industry best practice will enable us to better address debt collection issues.”

⁵² A booklet aimed at debtors was released by the regulators at the same time, entitled: Debt Collection, Your Rights and Responsibilities.

⁵³ ACCC/ASIC Debt Collection Publications Launch 2005, n 40.

⁵⁴ ACCC/ASIC Debt Collection Publications Launch 2005, n 40.

⁵⁵ See ASIC press release, IR 05-38: ACCC and ASIC issue further consultation draft of the joint debt collection guideline, 1 July 2005, available from this ASIC webpage: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2005-releases/ir-05-38-acc-and-asic-issue-further-consultation-draft-of-the-joint-debt-collection-guideline/>

⁵⁶ See ACCC press release, ACCC and ASIC revise guidelines for businesses and consumers about debt collection activities, 8 July 2014, available from this ACCC webpage: <https://www.accc.gov.au/media-release/acc-and-asic-revise-guidelines-for-businesses-and-consumers-about-debt-collection-activities>

⁵⁷ Speech, Working together to cement and improve the Australian Consumer Law, Rod Sims, National Consumer Congress, 20 March 2015, available from this ACCC webpage: <https://www.accc.gov.au/speech/working-together-to-cement-and-improve-the-australian-consumer-law>

The resulting report (2015 Industry Research) noted that the Australian Guidelines have resulted in improved behaviour within the debt collection industry and represent best practice.⁵⁸ They were described as a “highly successful regulator initiative”.⁵⁹ The Institute of Mercantile Agents, whose members are generally smaller operators in the debt collection industry, noted that the mass adoption of the Australian Guidelines was one factor that has contributed to a more compliant industry.⁶⁰

The research showed there was still “room for further improvement.”⁶¹ Issues of particular concern identified in the report of the 2015 Industry Research included that:⁶² “Some in the sector were not abiding by the guidelines and the law and this was causing considerable detriment to vulnerable and disadvantaged consumers,” and “Consumer advocates are particularly concerned about debt collection practices within the energy sector. Billing issues, management of hardship, disconnections and the referral of debt to multiple debt collectors were cited as concerns.”

There were also widespread concerns about the practices of credit repair businesses. While not considered part of the debt collection industry, these businesses often charge consumers large fees (consumer advocates state that these are sometimes larger than the debts involved) for support that is freely available to them from other agencies, such as industry ombudsman schemes and financial counsellors.

Conduct affecting vulnerable consumers continues to be a priority supervision area for both the ACCC and ASIC.⁶³ In 2016, the ACCC commenced proceedings against debt purchaser ACM Group in relation to conduct that occurred in 2011- 2015 towards two consumers in relation to outstanding phone bills. One consumer was a resident in a care facility, and the other a single parent with a limited income. The conduct was found to breach the prohibitions on misleading conduct, on undue harassment and coercion and also the prohibition on unconscionable conduct. Pecuniary penalties of \$750,000 were imposed by the court.⁶⁴ In 2019, the ACCC commenced proceedings against another debt collection business, Panthera Finance (which both purchases debt and acts as collection agent), alleging that certain conduct amounted to undue harassment and coercion and that false representations were made. The Federal Court confirmed (following admissions from Panthera) that repeatedly requiring

⁵⁸ 2015 Industry Research, n 3, at 6.

⁵⁹ 2015 Industry Research, n 3, at 44. “[I]t is clear that all levels of industry are heavily reliant on the guideline to interpret the ACL in a practical way.” (At 44)

⁶⁰ 2015 Industry Research, n 3, at 44 and 80.

⁶¹ ACCC Deputy Chair Delia Rickard, on the launch the report at the Institute of Mercantile Agents Annual Conference. See ACCC press release: ACCC report on debt collection industry reveals improvements but warns against non-compliance, 22 May 2015, available from this ACCC webpage: <https://www.accc.gov.au/media-release/accc-report-on-debt-collection-industry-reveals-improvements-but-warns-against-non-compliance>

⁶² See ACCC press release: ACCC report on debt collection industry reveals improvements but warns against non-compliance, 22 May 2015, available from this ACCC webpage: <https://www.accc.gov.au/media-release/accc-report-on-debt-collection-industry-reveals-improvements-but-warns-against-non-compliance>

⁶³ See 2019 Compliance and Enforcement Policy and Priorities, February 2019 available from: https://www.accc.gov.au/system/files/2019%20Compliance%20and%20Enforcement%20Policy_0.pdf and Compliance & enforcement policy & priorities 2020, available from <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities#2020-priorities>

⁶⁴ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115 and *ACCC v ACM Group Limited (No 3)* [2018] FCA 2059.

the debtors to provide proof that they were not liable for the debt in question amounted to undue harassment, and pecuniary penalties of \$500,000 were imposed.⁶⁵

What the Australian Guidelines (July 2014 version) cover

The Australian Guidelines set out the regulators' view, expressed as "practical guidance", on what is and is not acceptable conduct by debt collectors (agents and purchasers) in relation to all types of debt. It provides guidance on how the Australian laws apply to all debt collectors. The term 'debt collector' includes a debt collection agency, a debt purchaser, and an in-house debt collection division of a business. The Australian Guidelines also provide guidance to the person originally owed the debt, who will remain responsible for the conduct of their agent if they use a debt collection agent to collect the debt. Where debt is sold, the original owner of the debt remains responsible for misconduct that occurred before the debt was sold. The Australian Guidelines are also intended to provide a reference point for budget advisers when negotiating with debt collectors (and the debt owner) about the debt and / or debt collection practices.⁶⁶

The Australian Guidelines set out detailed practical guidance relating to the following matters in particular (all of which are relevant to the Australian prohibition on undue harassment and coercion):

- how the collector may contact the debtor,
- that contact should cease for a reasonable time if the debtor intends to contact a financial counsellor,
- that contact should cease if the collector is aware that the debtor is unable to make meaningful payment towards the debt,
- that contact may become unreasonable in certain circumstances, for example if the debtor suffers from an intellectual disability,
- what constitutes contact,
- details of when are reasonable times to contact a debtor,
- a recommendation that contact be made no more than 3 times per week,
- use of automatic dialler systems,
- use of different types of contact, including that face to face contact should be the last option, and on contact with third parties,
- visits to the home and to the workplace,
- setting out the limited circumstances in which contact with the debtor is appropriate once the debtor is represented, for example by a financial counsellor,
- record keeping and what information provision obligations are,
- what to do if liability for the debt is disputed,
- encouraging collectors to negotiate realistic repayment arrangements,
- limiting contact once a repayment arrangement is in place,
- specifics of the types of conduct towards debtors that are likely to breach the law, such as abusive remarks, disrespectful or demeaning remarks, being aggressive, threatening or intimidating, and embarrassing or shaming the debtor, with examples to illustrate the types of behaviour that would be unacceptable,
- what is appropriate conduct towards family members and other third parties, emphasising particular care in relation to communication with the debtor's children,

⁶⁵ *ACCC v Panthera Finance* [2020] FCA 340.

⁶⁶ Australian Guidelines, n 2, at 1.

- appropriate representations about the consequences of non-payment and on the status of the debt,
- how to deal with debtor complaints, and
- obligations in relation to external dispute resolution schemes.

The Australian Guidelines also set out the additional obligations that apply in relation to collection of consumer credit debt. Australian law, like New Zealand, law imposes a higher degree of regulation for consumer credit debt.

Comparison between Australian and NZ law that relates to debt collection conduct

The key legislative provisions that underpin the Australian Guidelines, as they relate to conduct of debt collectors towards debtors, are in most respects very similar to the comparable New Zealand provisions. The key provisions are set out below.⁶⁷

a. Prohibition on harassment:

Section 50 of the ACL states:

A person must not use physical force, undue harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.

Section 12DJ of the ASIC Act states:

A person contravenes this subsection if the person: (a) uses physical force or undue harassment or coercion, and (b) uses such force, harassment or coercion in connection with the supply or possible supply of financial services to a consumer or the payment for financial services by a consumer.

Section 23 of the FTA states:

No person shall use physical force or harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.

Breach of the Australian prohibitions constitutes an offence or gives rise to a pecuniary penalty,⁶⁸ while breach of the New Zealand provision gives rise an injunction or a range of orders set out in s 43 of the FTA. The most relevant of these is an order for compensation.⁶⁹

b. Prohibition on misleading conduct:

Section 18 of the ACL states:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 12DA(1) of the ASIC Act states:

⁶⁷ The law is stated as at July 2020 (date of writing).

⁶⁸ The ACL provides for both offences and pecuniary penalties for breach of the s 50 prohibition – see ACL ss 168 and 224. Similarly the ASIC Act provides for offences and pecuniary penalties for breach of s 12DJ. Pecuniary penalties are non-criminal monetary penalties imposed by a court in civil proceedings that apply the civil standard of proof.

⁶⁹ The court could declare that the contract between the person owed the money and the debtor was void but would be unlikely to do so if the debtor had already received goods or services.

A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive in trade or commerce.

Section 9 of the FTA states:

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 19 of the FMCA states:

A person must not, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to—

(a)

any dealing in financial products; or

(b)

the supply or possible supply of a financial service or the promotion by any means of the supply or use of financial services.

The various sections of the ACL and ASIC Act that target certain types of misrepresentations (ss 29, 33 and 34 of the ACL and ss 12DB, 12DC and 12DF of the ASIC Act) are comparable to ss 10, 11 and 13 of the FTA and ss 20, 21 and 22 of the FMCA. Section 9 of the FTA, like s 23, only gives rise to civil proceedings.

c. Prohibition on unconscionable conduct:

The ACL contains three provisions that relate to unconscionable conduct. Section 20 prohibits unconscionable conduct within the meaning of the unwritten law, s 21 prohibits unconscionable conduct in connection with goods or services, and s 22 sets out the factors the court will consider when deciding whether conduct is unconscionable.

The ASIC Act has mirror provisions relating to unconscionable conduct in relation to financial services, in ss 12CA, 12CB and 12CC.

Under new section 7 of the FTA (currently (July 2020) in the Fair Trading Amendment Bill, s 6):

(1) A person must not, in trade, engage in conduct that is unconscionable.

(2) This section applies whether or not—

(a) there is a system or pattern of unconscionable conduct; or

(b) a particular individual is identified as disadvantaged, or likely to be disadvantaged, by the conduct;
or

(c) a contract is entered into.

(3) This section is not limited by any rule of law or equity relating to unconscionable conduct.

New section 8 sets out the matters the court may have regard to when assessing if conduct is unconscionable.

Support for adoption of New Zealand guidelines on debt collection in line with the Australian Guidelines from submitters to MBIE's consumer credit review

The Australian Guidelines were referred to by many submitters to the MBIE Discussion Document. Many lenders and debt collectors suggested that New Zealand should adopt guidelines that mirrored the Australian Guidelines, as illustrated by the following extracts from the submissions.

“If New Zealand were to implement guidelines setting out appropriate contact with debtors we suggest that these should also be developed consistently with the Australian Securities and Investments Commission (ASIC) Guidelines.”⁷⁰

“These Australian Collection Guidelines not only require Baycorp to consider affordable payment arrangements for customers and outline certain obligations when customers are meeting such arrangements, but they also outline what is and is not acceptable when it comes to debtor harassment, and false and misleading claims. While Baycorp is not required to apply the same standard under its legal obligations in New Zealand, it takes pride in the fact that it does employ the same standard across the business in both countries in an effort to be a customer centric organisation. [...] Borrowers will benefit from an industry wide standard of acceptable debt collection practices. [...] Although many of the major agencies that operate in both the Australian and New Zealand markets already uphold the same standards across both, it will give Regulators in New Zealand a standard by which to benchmark and enforce against the agencies that are not currently at the same standard. Those agencies that are engaging in unsatisfactory practices may have a financial impact with compliance requirements, and enforcement costs if Regulators act on breaches of such Guidelines. This could either force those players to comply or move away from the industry; thus giving a benefit to customers. Lenders will have comfort in the fact that their agents would be held to the same debt collection standards as them. It could also mean a reduction in complaints against them and reduction in their own costs.”⁷¹

“Furthermore, elements of the Australian Competition & Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) debt collection guidelines are adhered to when contacting customers that have entered a repayment arrangement. Some of these guidelines include but are not limited to: Only contacting a customer once every three (3) months; or Contacting the customer to provide a genuine offer such as a discount off the total amount due. These guidelines have been in effect for a number of years in Australia and are used as a base to provide self-regulation in the New Zealand debt collection market.”⁷²

“The FSF notes that in 2017 ASIC introduced a Debt Collection Guideline: for creditors and collectors in Australia which is considered to be helpful to those collectors who operate on a trans-Tasman basis. The FSF would support the development of such guidance for collectors based on the New Zealand context and is committed to developing something along these lines with FSF’s debt collection agency members using the ASIC guideline as a basis to ensure a consistent approach to matters like affordability and acceptable conduct. ... FSF debt collection agency members would find adoption of guidance to the sector along the lines of ASIC’s Debt Collection Guideline: for creditors and collectors would be helpful here.”⁷³

⁷⁰ Submission to the MBIE Discussion Document from ANZ, at 11.

⁷¹ Submission to the MBIE Discussion Document from Baycorp, at 2 and 4-5.

⁷² Submission to the MBIE Discussion Document from Credit Recoveries Ltd, at 2.

⁷³ Submission to the MBIE Discussion Document from Financial Services Federation, at 22-23.

“We would encourage any contact frequency rules that are to be established to be consistent with those stipulated in the ASIC/ACCC Debt Collection Guidelines in Australia, where Milton Graham also operates. These are broadly perceived to operate fairly and effectively.”⁷⁴

“We consider that the debt collection regulation model developed by the Australian Consumer Competition Commission (ACCC) and Australian Securities and Investment Commission (ASIC), is worthy of consideration by the Minister.”⁷⁵

“Sunshine Loans considers that the debt collection regulation model developed by the Australian Consumer Competition Commission (ACCC) and Australian Securities and Investment Commission (ASIC), could be considered during the review.”⁷⁶

Arguments for and against developing guidelines modelled on the Australian Guidelines

It is not difficult to come up with reasons why the New Zealand regulators (the Commerce Commission and FMA)⁷⁷ should now develop and issue detailed guidelines for debt collection conduct in New Zealand that specify in particular what is and is not permitted by the prohibition on harassment and coercion under section 23. These include that:

- The evidence from many budget services of poor conduct by some debt collectors suggests that there is a problem that needs to be addressed. Many budget services referred to the negative impact on borrowers caused by the stress of harassment in particular for vulnerable consumers.
- Guidelines would provide debt collectors with certainty around what conduct was and was not acceptable in the eyes of the regulators.
- Guidelines would assist those collectors in particular who do not have the scale or expertise to interpret the legislative requirements.
- The Commerce Commission would be assisted in enforcement of the FTA and CCCFA if its expectations were clearly set out in guidelines.
- The guidelines could become the industry standard and would inform dispute resolution schemes when determining if conduct was acceptable or not and also assist budget advisers when dealing with clients and negotiating with debt collectors.
- There would be an easily accessible repository of information on what was and what was not acceptable behaviour including a clear explanation of relevant Australian and New Zealand case law that would assist and educate debt collectors, consumers and others.
- Setting out the limits for reasonable contact with debtors would help to protect the most vulnerable consumers, who are particularly at risk of poor debt collection practices.
- Issues of unaffordable repayment schedules and harassment could be tackled in the context of non-prescriptive expectations that set the industry standard rather than having to introduce more ‘hard’ law.
- Compliance with the guidelines could supported and reinforced by industry codes, as has happened in Australia.⁷⁸

⁷⁴ Submission to the MBIE Discussion Document from Illion, at 5.

⁷⁵ Submission to the MBIE Discussion Document from Rapid Loans NZ Ltd, at 22.

⁷⁶ Submission to the MBIE Discussion Document from Sunshine Loan Centres Pty Ltd, at 17. This submitter was an Australian lender considering setting up business operations in NZ.

⁷⁷ The FMA would need to be involved if the guidelines were to include guidance on the prohibitions on misleading conduct in trade, which appear in both the FTA and the FMCA.

⁷⁸ The 2015 Industry Research (n 3) stated (at p 29): The effectiveness of the debt collection guideline is increased by the inclusion of a requirement of compliance in a number of industry codes. For example, the

- Some lenders may have to be more careful with lending as they would may not be able to rely on third party debt collectors to achieve the same results that some currently do (using irresponsible debt collection practices such as harassment and coercion).

There would be advantages in modelling New Zealand guidelines on the Australian Guidelines, including for these reasons:

- There are similarities between the underlying laws of Australia and New Zealand and many debt collection businesses operate in both jurisdictions.
- Many lenders and debt collectors that submitted to the MBIE Discussion Document supported the adoption of guidelines in NZ modelled on the Australian Guidelines.
- Some debt collectors and lenders already operate in accordance with the Australian Guidelines, in effect adopting it as self-regulation. If there was a set of rules that applied to all debt collectors then those that already comply with the Australian Guidelines are not under a competitive disadvantage.
- The Australian Guidelines have resulted in improved behaviour in the debt collection industry in Australia.⁷⁹

However, some stakeholders raised concerns about the adoption of any more definitive law around debt collection practices, even soft law in the form of detailed guidance by the regulator.

One concern raised by some lenders is that (at least some) debtors are dishonest and should not be given any latitude to avoid repaying the debt. Acorn Finance said: “There are borrowers who have no intention of paying back their loan and there needs to be sufficient means of coercion to encourage payments. Mostly this is the threat of higher costs, threat of a bad credit rating and eventually the use of a debt collector or court action.”⁸⁰ In a similar vein, EB Loans said: “The problem is nothing is taken into account of the harm caused to lenders when loans are not paid on time or when a lender agrees to a lesser realistic amount and you are seen as a soft touch and or the borrower breaks the reasonable lower arrangement even against the budget advisors recommendation.”⁸¹ Rapid Loans also expressed concern about giving debtors leeway stating: “debtors will frequently exaggerate their claims if they perceive that, by doing so, they can avoid paying their debts.... Associated with this hurdle is the fact that many third parties - particularly financial counsellors and consumer advocates - are very naive in regard to the absconding borrower’s ability to lie and their willingness to defraud. The propensity of absconding borrowers looking for a way out of paying their debts, to exaggerate, must not be overlooked.”⁸²

A concern which was raised by the Financial Services Federation was that only responsible debt collectors will comply with the guidelines and irresponsible ones will not comply. “[T]hose lenders who are not concerned about meeting their responsible lending obligations to consumers are unlikely to be concerned about whether their debt collection practices meet legal requirements either.”⁸³ This

following codes require signatories, and their debt collectors, to comply with the ACCC/ASIC Debt Collection Guideline: Australian Bankers’ Association Code of Banking Practice, Customer Owned Banking Association Customer Owned Banking Code of Practice, Telecommunications Consumer Protection Code, Energy Retail Code (Victoria).

⁷⁹ 2015 Industry Research, n 3, at 6, 44 and 80.

⁸⁰ Submission to the MBIE Discussion Document from Acorn Finance, at 10.

⁸¹ Submission to the MBIE Discussion Document from EB Loans, at 11.

⁸² Submission to the MBIE Discussion Document from Rapid Loans NZ Ltd, at 21 and 24.

⁸³ Submission to the MBIE Discussion Document from Financial Services Federation, at 20.

concern is compounded by the fact that ‘guidelines’ are not enforceable and non-compliance attracts no penalty. It is also relevant that the issues with irresponsible conduct may be limited to a small segment of the debt collection industry (as asserted by FSF) so increased compliance will add a burden to those already compliant businesses.

A concern raised by several submitters was that any more definition around what is acceptable contact and/or requiring reasonable repayment arrangements (and the Australian Guidelines do suggest this) will drive down collection rates, leading to higher costs and more use of the court system, both of which will ultimately be detrimental to consumers (either through having to pay more for services or loans or because of increased stress through use of other forms of debt collection such as court action.)

Intercoll stated that “any restrictions on debt collection practices that are the catalyst for lowered collection rates will lead to the increased costs of goods and services due to higher write-off amounts for finance companies and utility companies. Once again this means that those customers that pay on time will be penalised. Lowered collection rates on assigned consumer debt will mean the purchase price for distressed ledgers will drop and again this will lead to higher costs for, ultimately, paying consumers.”⁸⁴ Rapid Loans was of a similar view, saying that “any regulatory regime component that reduces recovery rates and increases the time and effort involved in recovery - therefore reducing lenders’ income - will encourage the imposition of cross-subsidisation by the borrowers who observe their contract conditions.”⁸⁵

This concern was recognised by MBIE in the 2018 Discussion Document, as a potential “cost” of requiring debt collectors to offer an affordable repayment plan or specifying limits around contact between collectors and borrowers. The Discussion Document stated: “The new processes are likely to reduce recovery rates and this may cause cross-subsidisation of defaulting borrowers by non-defaulting borrowers and higher interest rates.”⁸⁶ The Impact Statement released by MBIE in September 2019, which set out the preferred options and why other options were not being recommended, stated that introducing law that put limits on the contact between debt collectors and debtors would “help to protect the most vulnerable consumers, who are most likely to face debt collection action. ...A major cost is that the new processes are likely to reduce recovery rates. This may result in higher risk being associated with some types of credit, and the cost of credit being raised. Alternatively, debt collectors may mitigate this by taking debts to court earlier. This may also have negative effects for debtors.”⁸⁷

Intercoll also suggested that a system that allows the cessation of debt collection activity for any reason would force debt collection companies to resort to collection through the District Court.⁸⁸ Intercoll considered that this would add substantial costs in the form of service fees and legal costs and also clog a civil debt recovery process that “is already struggling.”⁸⁹ Intercoll stated that the Australian model that is considered as a guideline in New Zealand “is seen by many in Australia as an overly constrictive document that resulted in a total and complete inundation of civil action that could have possibly been amicably collected.”⁹⁰

⁸⁴ Submission to the MBIE Discussion Document from Intercoll Ltd, at [23]

⁸⁵ Submission to the MBIE Discussion Document from Rapid Loans NZ Ltd, at 24.

⁸⁶ MBIE Discussion Document, n 26, at 39. See also the Additional Information Document, n26, at 73.

⁸⁷ 2018 Impact Statement, n 42, at 56.

⁸⁸ Submission to the MBIE Discussion Document from Intercoll Ltd, at [23].

⁸⁹ Submission to the MBIE Discussion Document from Intercoll Ltd, at [23].

⁹⁰ Submission to the MBIE Discussion Document from Intercoll Ltd, at [23].

MBIE echoed this concern in the Impact Statement stating:⁹¹ “[t]he intention of this option (requiring affordable repayment plans) was to provide stronger protection for debtors, ...However, there are a number of costs and risks associated with this option. ...It may also create incentives for creditors to take alternative enforcement action, such as repossession or court proceedings in preference to debt collection. This may result in greater consumer harm than the status quo.”

These concerns focus attention on the prohibition on harassment and coercion in s 23 of the FTA. It cannot be suggested that they provide any reason to engage in misleading or deceptive conduct (or in unconscionable conduct, assuming the enacting of the prohibition on such conduct contained in the Fair Trading Amendment Act is enacted). Any guidelines issued by the regulator cannot change the law or create new law, but what they can do is provide clarity on how the regulator interprets the existing law. As stated by French J in *ACCC v McCaskey* in 2000:⁹² “In today’s credit-based economy the collection of payments for goods and services is an indispensable element of trade and commerce but the use of physical force, undue harassment or coercion in connection with the collection of debts is regarded as unacceptable.” New Zealand law already contains a prohibition on harassment and coercion that applies to the activity of debt collection. The next issue to consider is what those terms mean.

Neither of the terms ‘harassment’ or ‘coercion’ is defined in the FTA. The Commission has not taken any action under s 23 that has generated any case law that assists in clarifying the meaning of the words ‘harassment’ or ‘coercion’. There have been some cases taken between private parties that have focused on the meaning of those words, and there has also been Australian case law that has assisted in clarifying the meaning of “undue harassment” and “coercion” (as well as unconscionable conduct).

New Zealand case law on harassment and coercion

There is a limited amount of New Zealand case law on s 23 of the FTA. In summary, those cases have established that in New Zealand, the question of whether conduct amounts to harassment or coercion requires an evaluation exercise by the court that will be very focused on the facts of the conduct the subject of the dispute. As explained below, New Zealand case law establishes that ‘coercion’ may be defined arising at “the moment that the person who influences the other does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have obtained” and that it involves something in the nature of the negation of choice. Coercion ranges “from the subtle to the overtly threatening” and encompasses implied threats.

The first New Zealand case to consider s 23 of the FTA was the unreported 1988 High Court decision of *CED Distributors Ltd v Schnellenberg*.⁹³ This case concerned guarantees given by directors in consideration for CED Distributors agreeing to hold off pursuing legal proceedings against certain companies for non-payment of amounts outstanding in relation to the supply of computer equipment. The dispute centred on the liability under the guarantees. One argument the guarantors raised was that the conduct of CED amounted to harassment or coercion and was in breach of s 23 of the FTA. Master John Hansen said “I can see nothing whatever in a careful review of the correspondence and the contents of the affidavits to suggest that the actions of the plaintiff were anything other than the proper actions of a supplier to obtain payment for goods. An overall view of the affidavits and the

⁹¹ 2018 Impact Statement n 42, at 56.

⁹² *ACCC v McCaskey* [2000] FCA 1037, at [1].

⁹³ *CED Distributors Ltd v Schnellenberg* CP154/88, CP155/88 High Court, Wellington, 28/6/1988.

annexed correspondence, shows that the plaintiff has legitimately tried to pursue recovery of the debt owed to it. I do not accept that the Fair Trading Act is designed to remove such legitimate rights.”⁹⁴

The first reported case to consider the meaning of s 23, *Watson v Waitemata Electric Power Board*,⁹⁵ was a dispute between the receivers of a group of companies and certain electricity suppliers who were owed arrears of electricity charges. The electricity suppliers said they would cut off supply of electricity to certain buildings unless the arrears were paid. The companies submitted that the threat to turn off the electricity amounted to physical force or harassment or coercion under s 23 of the FTA. The High Court rejected that claim, saying:⁹⁶ “However, it seems to me clear that what is being contemplated in this section is physical coercion of an improper type; certainly something done pursuant to a statutory power, a bona fide exercise of a right conferred by statutory regulation, could not be considered coercion.”

*Allen's Enterprises Ltd v Bank of New Zealand*⁹⁷ was a dispute between a business and a bank. The bank exercised a contractual right to amend the terms on which it processed credit card payments made to the business. The business rejected the changes, resulting in the bank terminating the agreement. The business claimed breach of s 23 of the FTA on the grounds of coercion and the bank sought summary judgment on the grounds that the cause of action could not succeed. The High Court found there had been no coercion, as the bank had a contractual right to take the action it did and in particular had given reasonable notice of the exercise of its legal right.

The definition of coercion that the High Court adopted was from *Ellis v Barker*,⁹⁸ where Lord Romilly had said (at 607): “Coercion takes an infinite number of forms, but it may properly be thus defined:- the moment that the person who influences the other does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have obtained, then it becomes coercion and it ceases to be persuasion or consideration.”

A relatively recent decision, *Crossfit Inc v Exercise Industry Association Limited*,⁹⁹ was an action for defamation in relation to certain comments made by Mr Beddie (CEO and sole director of the Exercise Industry Association) which appeared in television programmes and newspaper articles and referred to the plaintiff (CrossFit). The plaintiff also pleaded breach of s 23 of the FTA. The defendants sought strike out of the FTA action. In short, the allegation was that the defendants’ motivation in making criticism of CrossFit was to coerce CrossFit trainers into registering as members of The New Zealand Register of Exercise Professionals and paying the membership fee to avoid further criticism by the defendants and also to coerce the plaintiff into requiring CrossFit trainers to so register.

The High Court said of s 23:¹⁰⁰

“Harassment and coercion are not concepts which can be pigeon-holed. Such is reflected in the judgment of Lord Romilly, MR, in *Ellis v Barker* where his Lordship said: [see quote above]...To similar effect the observation of Peterson J in *Hodges v Webb*,¹⁰¹ observing: “Coercion” is a word of ambiguous import. In one sense, anyone is coerced who under pressure does what he would prefer

⁹⁴ *CED Distributors Ltd v Schnellenberg* CP154/88, CP155/88 High Court, Wellington, 28/6/1988, at 9.

⁹⁵ *Watson v Waitemata Electric Power Board* (1989) 4 NZCLC 65,344.

⁹⁶ *Watson v Waitemata Electric Power Board* (1989) 4 NZCLC 65,344, at 65,349.

⁹⁷ *Allen's Enterprises Ltd v Bank of New Zealand* (2002) 7 NZBLC 103,755.

⁹⁸ *Ellis v Barker* (1871) 40 LF Ch 603.

⁹⁹ *Crossfit Inc v Exercise Industry Association Limited* [2016] NZHC 1028.

¹⁰⁰ *Crossfit Inc v Exercise Industry Association Limited* [2016] NZHC 1028, at [57] to [58].

¹⁰¹ *Hodges v Webb* [1920] 2 Ch 70 at 85-87.

not to do; but a reluctant debtor who pays under stress of proceedings is not coerced within the legal meaning of the word.... Coercion involves something in the nature of the negation of choice...”

Referring to the equivalent section in the Australian TPA (s 60), the High Court noted that Australian cases have “grappled with a degree of ambiguity that arises in the Australian legislation from the addition of the word ‘undue’.”¹⁰² The Court said:¹⁰³ “The Australian authorities serve to emphasise the evaluative nature of the exercise in which the Court is engaged when determining whether there has been coercion (or harassment). ...Also relevant is the observation by the authors of Treitel, [...]The passage in Treitel again recognises the fact-specific nature of the enquiry when any allegation of coercion is made: ‘Whether the threat actually gives rise to duress must then be considered by reference to its coercive effect in each case: no particular type of threat is regarded either as ipso facto having such an effect, or as being incapable, as a matter of law, of producing it.’”

Refusing to strike out the claim, the Court said:¹⁰⁴ “There are features of this case in terms of the pleadings from which a Court might conclude, when the evidence is adduced, that the conduct as pleaded amounted to coercion under s 23 Fair Trading Act. The background (common interest of the defendants in relation to membership of NZREPs) is relevant. In terms of the authorities to which I have referred, coercion carries with it the concept of the negation of choice. Such may occur through either express or implied threat. [...] it will be a matter for the trial Court to determine whether the conduct was by its nature coercive – it is unnecessary that the Court finds that the conduct succeeded in changing CrossFit’s practices.”

In relation to the alternative claim of harassment, the Court said:¹⁰⁵ “it may be open to CrossFit to characterise the pleaded conduct as either coercion or harassment (or both), given that Mr Ringwood relies particularly on the repeated nature of Mr Beddie’s statements.”

The question of whether the s 23 claim was tenable was back before the High Court in 2017, where the defendant sought review of the earlier decision that Crossfit had an arguable case for breach of s 23. The Court again found for the plaintiff, saying:¹⁰⁶ “I agree with the Judge that “coercion” for the purposes of s 23 must encompass implied as well as direct threats. Threats are often most effective when they do not need to be spelt out, because there is a common understanding about the demand or outcome sought, and the consequences of non-compliance. The threat may be expressed in a subtle way but it is real nevertheless, and understood as such. CrossFit have pleaded an implied threat in the form: join NZREPs or else we will continue to publish damaging statements. If proved, it is certainly arguable that this constitutes coercion under the FTA.”

The defendants applied for leave to appeal to the Court of Appeal, on the grounds that the correct interpretation of s 23, and the legal test of coercion, remain capable of bona fide and serious argument, that the Act provides no definition of coercion and there is no appellate authority. Nicholas Davidson J said:¹⁰⁷ “Coercion for the purpose of s 23 should be read in the context and purpose of the FTA as a whole. It is expressed in the context of physical force, harassment or coercion in connection with the supply, or possible supply of goods or services or the payment for them. It is directed at wrongful pressure being applied to influence a decision about some aspect of trade. It thus has a distinctly factual element to it, but there is nothing in the section to complicate its interpretation, as I

¹⁰² *Crossfit Inc v Exercise Industry Association Ltd* [2016] NZHC 1028, at [61].

¹⁰³ *Crossfit Inc v Exercise Industry Association Ltd* [2016] NZHC 1028, at [62] to [63].

¹⁰⁴ *Crossfit Inc v Exercise Industry Association Ltd* [2016] NZHC 1028, at [68].

¹⁰⁵ *Crossfit Inc v Exercise Industry Association Ltd* [2016] NZHC 1028, at [72].

¹⁰⁶ *Crossfit, Inc v Exercise Industry Association Ltd* [2017] NZHC 899, at [53].

¹⁰⁷ *Crossfit, Inc v Exercise Industry Association Ltd* [2018] NZHC 1093, at [60] to [63].

decided in reaching judgment of 5 May 2017 and again here.... I do not think there can be any doubt that coercion may be express or implied. The behavioural elements of s 23 could, in my view, be satisfied by an intimidating presence or, on the other hand, “or else” conduct which left no doubt as to the physical force or the threat of it. It is intended to protect the freedom of choice of consumers unsullied by commercially unfair and despicable conduct. The coercion ranges from the subtle to the overtly threatening.”

Leave to appeal was denied.

Australian case law on harassment and coercion

The issue of what is undue harassment and/or coercion for the purposes of the Australian prohibitions has come before the Australian courts on several occasions. The most relevant are noted in the following paragraphs.¹⁰⁸ In summary, the question of whether conduct amounts to harassment or coercion involves an evaluative judgment. While repeated unwelcome approaches requesting payment of a debt might amount to harassment, and “a person will be harassed by another when the former is troubled repeatedly by the latter”,¹⁰⁹ it will not be undue harassment unless “the frequency, nature or content of the approaches and communications associated with them is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings”.¹¹⁰ There is some judicial divergence on whether the word ‘undue’ also qualifies ‘coercion’ but the better view seems to be that it does not. Coercion “carries with it the connotation of force or compulsion or threats of force or compulsion negating choice or freedom to act.”¹¹¹

In *ACCC v McCaskey*,¹¹² a debt collection agent engaged in bullying, aggressive and threatening behaviour towards debtors and frequent telephone contact. The agent also made misleading representations concerning the existence of rights in relation to collection of the debt. Discussing the meaning of the words ‘undue harassment’ and ‘coercion’ in s 60 of the TPA, French J said¹¹³ “The words of the section are to be given their ordinary meanings relevant to the context in which they appear.” He referred to the Shorter Oxford English Dictionary definition of ‘harass’, and said the question whether or not there is harassment involves an evaluative judgment.¹¹⁴ Noting that the Australian section included the word ‘undue’ before harassment, his Honour stated:¹¹⁵

“The word “undue” adds an extra layer of evaluation which is more relevant to the case of debt recovery than to the sale of goods or services. Repeated unwelcome approaches to a potential acquirer of goods or services could qualify as harassment and, so qualified, require very little additional evidence, if any, to attract the characterisation of “undue harassment”. On the other hand a consumer who owes money to a supplier can expect repeated unwelcome approaches requesting payment of the debt if he or she does not pay. No doubt such approaches might also qualify as harassment. If legitimate demands are reasonably made, on more than one occasion, for the purpose

¹⁰⁸ Other cases include: *Community Title Scheme No X v SV and HF* [2018] ACAT 72, *ACCC v Safety Compliance Pty Ltd (in liq)* [2015] FCA 211, *ACCC v Lux Pty Ltd* [2004] FCA 926, *Quach v Butt* [2017] ACTCA 4, *Ahmed v Harbour Radio Pty Ltd* [2009] FCA 1113, and *Director of Consumer Affairs Victoria v Parking Patrols Vic Pty Ltd*, [2012] VSC 137.

¹⁰⁹ *ACCC v Maritime Union of Australia* [2001] FCA 1549, at [60].

¹¹⁰ *ACCC v McCaskey* [2000] FCA 1037, at [48].

¹¹¹ *ACCC v Maritime Union of Australia* [2001] FCA 1549, at [61].

¹¹² *ACCC v McCaskey* [2000] FCA 1037.

¹¹³ *ACCC v McCaskey* [2000] FCA 1037, at [47].

¹¹⁴ *ACCC v McCaskey* [2000] FCA 1037, at [48].

¹¹⁵ *ACCC v McCaskey* [2000] FCA 1037, at [48].

of reminding the debtor of his or her obligation and drawing the debtor's attention to the likelihood of legal proceedings if payment is not made, then that conduct, if it be harassment, is not undue harassment. If, however, the frequency, nature or content of the approaches and communications associated with them is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings, the harassment will be undue."

The word "undue" does not appear in s 23 of the FTA.

In relation to the meaning of 'coercion', his Honour again referred to the dictionary definition. He considered that the word 'undue' also related to coercion, but a different view on that has been taken by later Australian cases.¹¹⁶ He stated:¹¹⁷ "The collection of debts may involve coercion in the sense that the debtor is subjected to the pressure of the demand and the legitimate threat of civil process for recovery with the additional cost and damage to credit which that can involve. Such pressure may be thought of as coercion but is entirely legitimate and not "undue". Where the demand includes content which does not serve legitimate purposes of reminding the debtor of the obligation and threatening legal proceedings for recovery but is calculated otherwise to intimidate or threaten the debtor, then the coercion may be undue. So if a threat is made of criminal proceedings, or of the immediate seizure and sale of house and property, a remedy not available in the absence of retention of title or some form of security, the coercion is likely to be seen as undue."

In *ACCC v Maritime Union of Australia*,¹¹⁸ Hill J stated: "'harassment' in my view connotes conduct which can be less serious than conduct which amounts to coercion. The word 'harassment' means in the present context persistent disturbance or torment. ... Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter. The reasonableness of the conduct will be relevant to whether what is harassment constitutes undue harassment."

Of coercion his Honour said:¹¹⁹ "'Coercion' on the other hand carries with it the connotation of force or compulsion or threats of force or compulsion negating choice or freedom to act: see *Hodges v Webb* [1920] 2 Ch 70 at 85-7 per Peterson J. A person may be coerced by another to do something or refrain from doing something, that is to say the former is constrained or restrained from doing something or made to do something by force or threat of force or other compulsion. Whether or not repetition is involved in the concept of harassment, and it usually will be, it is not in the concept of coercion."

In *ASIC v Accounts Control Management Services Pty Ltd*,¹²⁰ ASIC brought proceedings against a debt purchaser, ACM Group. ASIC claimed that during telephone calls to debtors, ACM employees said things that were not true (for example, that lawyers had been retained to sue the debtor when this was not so) or that the conversations were unduly harassing or coercive. There was no debate over the principles to be applied to establish if the things that were said which were in recorded transcripts, were misleading or deceptive. There was, however, debate over the interpretation of the prohibition on undue harassment and coercion.

¹¹⁶ Later cases which have come to the view that 'undue' does not qualify coercion are *ACCC v Maritime Union of Australia* [2001] FCA 1549 at [59], *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164 at [15], and *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [184].

¹¹⁷ *ACCC v McCaskey* [2000] FCA 1037, at [51].

¹¹⁸ *ACCC v Maritime Union of Australia* [2001] FCA 1549, at [60].

¹¹⁹ *ACCC v Maritime Union of Australia* [2001] FCA 1549, at [61].

¹²⁰ *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164.

Perram J stated¹²¹ “The first matter which is clear is that the rule is against undue harassment rather than mere harassment. The content of the word ‘undue’ will vary with the circumstances. In the context which is the confronting business of debt collection, it is likely to have a significant impact. By definition, the class of person who find that they have fallen into the hands of a debt collection agency are likely to be those who, for whatever reason, have not met their legal obligations. The necessary context is one, therefore, in which the law of contract and the ordinary usages of lending have failed to secure compliance by the debtor with his or her obligation to repay. It is not to be expected in such cases that the debt collector must proceed as if at a prayer meeting. There are, of course, limits to everything. In [ACCC v McCaskey] at [48] French J thought that, in the context of debt collection, if the frequency, nature or content of approaches and communications from the debt collector were such that they were ‘calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings, the harassment will be undue’ It is with this test that I will assess the unduly harassing or coercive nature of the calls before me.”

While his Honour considered that ‘undue’ did not apply to coercion, coercion was a “stronger word than harassment. It connotes .. some negation of choice or freedom to act.”¹²² “[W]hether any particular discussion or conversation is revealed to be unduly harassing or coercive will depend not upon a line-by-line analysis but, rather, on the overall impression.”¹²³

In *ACCC v Excite Mobile*,¹²⁴ the ACCC claimed (among other allegations) that a telecommunications company made misrepresentations about its debt collection processes in a way that amounted to both undue coercion and unconscionable conduct. Letters sent to debtors represented that they were from an independent debt collector to whom the debt been referred by Excite for collection. In fact all debt collection communications were made by Excite or on its behalf. The language used in the letters was strong and threatening and referred to a fictitious lawyer that would pursue the debt in legal proceedings.

The Court drew on the previous decisions of *ACCC v McCaskey* and *ACCC v Maritime Union* to interpret the s 60 prohibition, in particular saying of the word ‘harassment’:¹²⁵ “in the case of a person employed to recover money owing to others,..., it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made. On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely to convey the demand for recovery, the conduct will constitute undue harassment... The word ‘undue’, when used in relation to harassment, ensures that conduct which amounts to harassment will only amount to a contravention of the section where what is done goes beyond the normal limits which, in the circumstances, society would regard as acceptable or reasonable and not excessive or disproportionate ...”

The Court said it was not necessary to decide if ‘undue’ also related to coercion and, saying it was adopting the meaning of ‘coercion’ given in both the *ACCC v McCaskey* and *ACCC v Maritime Union*

¹²¹ *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164, at [14].

¹²² *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164, at [16].

¹²³ *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164, at [17].

¹²⁴ *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350.

¹²⁵ *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350, at [160].

cases, stated that coercion requires “something significantly beyond legitimate and reasonable demands.”¹²⁶

*ACCC v Harrison*¹²⁷ also involved a telecommunications provider. Following customer complaints, a number of the Harrison Companies faced regulatory action by or incurred significant debts to regulatory authorities. It was alleged that Mr Harrison’s modus operandi had been to cease trading through those companies subject to regulatory action and to create new companies under his control which then carried on the business of the previous companies, often with the same business name. Mr Harrison then transferred or purported to transfer the customers’ contracts (both rights and obligations) from one Harrison Company to another, without the customer’s knowledge or consent. When customers whose contracts had purportedly been transferred refused demands for payment, they were subjected to persistent threats of legal action or threats of referral to debt collection agencies or law firms for debt recovery. This was found to be in breach of the prohibitions on unconscionable conduct and undue harassment.

In relation to the claim of undue harassment, Moshinsky J said:¹²⁸ “The word ‘harassment’ means in the present context persistent disturbance or torment ...The section does not relate to harassment unless it is ‘undue’. ...the word ‘undue’ will vary with the circumstances. Here, certain conduct amounted to persistent disturbance or torment; and it was ‘undue’ because the amounts were not owing.”

*ACCC v ACM Group Ltd*¹²⁹ was a claim by ACCC against debt purchaser ACM Group that arose out of the same general facts as has been litigated in the 2012 decision, but in relation to two debtors.

One debtor was a person who had suffered three strokes, was living in a care facility, had difficulty talking and was on a government disability support pension. ACM representatives telephoned the care facility in which the debtor lived on numerous occasions, on each occasion asking to speak to the debtor. On each of those six occasions that an ACM representative spoke to the debtor, he was asked to verify his identity but, because of his disability, he was not able to verify his identity nor to speak in full sentences. Instead, he said a few words on each occasion, such as “stroke”, “no”, “nursing home” and “speech” in order to convey that he could not speak because he had had a stroke and lived in a nursing home. In addition, ACM sent at least 20 letters to the debtor demanding repayment, some of which letters were alleged to contain misleading representations. Allegations were made that the conduct was unconscionable, misleading or deceptive and constituted undue harassment.

The second debtor was a single mother of three children and part time employee receiving Centrelink benefits. Various representations were made to this debtor during a telephone call that were threatening and/or not true. The debtor felt railroaded into agreeing to make payments she could not afford.

The parties were in agreement as to the relevant legal principles to be applied in relation to the claims of undue harassment and coercion. ACM put emphasis on the need to take into account the realities of debt collecting, recognised by French J in *ACCC v McCaskey*.¹³⁰ Griffiths J drew on the principles established in *ACCC v McCaskey*, *ACCC v Maritime Union* and *ASIC v ACM*, namely that harassment has

¹²⁶ *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350, at [209].

¹²⁷ *ACCC v Harrison* [2016] FCA 1543.

¹²⁸ *ACCC v Harrison* [2016] FCA 1543, at [115].

¹²⁹ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115.

¹³⁰ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [179].

its ordinary meaning “which includes conduct which tends to intimidate, embarrass, ridicule, shame or otherwise distress the person to whom the conduct is targeted,”¹³¹ but what must be established to show a breach of the ACL is undue harassment, namely “conduct occurs [which] extend beyond that which is acceptable or reasonable” and “goes beyond the normal limits which, in the circumstances, society would regard as acceptable or reasonable and not excessive or disproportionate”¹³² and is “calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings.”¹³³

The words of French J in *ACCC v McCaskey* were followed in relation to the issue of what amounted to coercion, namely, “where the demand includes content which does not serve legitimate purposes of reminding the debtor of the obligation and threatening legal proceedings for recovery but is calculated otherwise to intimidate or threaten the debtor, then the coercion may be undue.”¹³⁴ The concept of negation of choice or freedom to act was also endorsed.¹³⁵

In the recent case of *ACCC v Panthera Finance*,¹³⁶ a debt purchaser, Panthera, admitted that its conduct amounted to undue harassment by repeatedly contacting the debtors and requiring them to prove that they were not liable for the debts being pursued and continuing to pursue the debtors when they all disputed liability and were not in fact liable for the relevant debts. Jagot J confirmed that the behaviour amounted to undue harassment because it was “such as to intimidate or demoralise, tire out or exhaust a debtor, rather than merely to convey the demand for recovery”¹³⁷ Pecuniary penalties of \$500,000 were awarded against Panthera Finance.

New Zealand already has guidance in the form of guidance notes issued by the Commerce Commission and under the Responsible Lending Code

As was pointed out by several submitters to the MBIE consumer credit review, New Zealand already has some guidance on what will constitute behaviour in breach of the prohibition in s 23, and also what is required by the relevant obligations under the CCCFA. Does this suggest that no further guidance is needed?

The Commerce Commission has issued a three-page guidance note which includes the following section on the s 23 prohibition:

It is also unlawful to harass or coerce someone into repaying a debt. It may be harassment and/or coercion to:

→ misrepresent your intentions about how you will deal with the debt or what you are permitted to do about the debt as a means of pressuring the debtor to pay. If you have to follow a particular process before making a final decision about what action to take, you need to make this clear to debtors. When telling debtors what you intend to do next, you should only make clear and accurate statements,

→ threaten or intimidate debtors into paying the debt,

¹³¹ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [180].

¹³² *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [180].

¹³³ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [184].

¹³⁴ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [185], noting that his Honour did not consider that coercion had to be “undue” to breach the provision.

¹³⁵ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [183].

¹³⁶ *ACCC v Panthera Finance Pty Ltd* [2020] FCA 340.

¹³⁷ *ACCC v Panthera Finance Pty Ltd* [2020] FCA 340, at [24].

→ *make unreasonably frequent attempts to contact the debtor, their family and friends, or make contact in a way that might cause embarrassment to the debtor,*

→ *contact the debtor at unsociable times of the day or at a time they have specifically asked you not to, and/or*

→ *continue to demand payment from a borrower in circumstances where you know they have no ability to pay.*

By contrast, the Australian Guidelines set out detailed, practical guidance on what will be considered breach of the prohibition on undue harassment or coercion, as set out above. The level of detail in the Australian Guidelines means there is very little room for differing interpretations of what is and is not acceptable behaviour. By contrast, under the Commerce Commission guidance note, there is room for differing interpretations of what constitutes threatening or intimidating a debtor, what would amount to making unreasonably frequent attempts to contact the debtor, and what is an unsociable time of day.

It is noted there is also guidance in New Zealand under the Responsible Lending Code, that relates to contact with a debtor generally and specifically after default in payment.¹³⁸ The Code only relates to debt that has arisen under a consumer credit contract, which is a subset of the types of debt incurred by consumers in New Zealand.¹³⁹

The guidance given in the Code relating to contact requires (relevantly) verification of the borrower's identity, an obligation to co operate with the borrower's advisers if authorised by the borrower, an obligation to make reasonable efforts to use the borrowers' preferred channel of communication and only contacting the borrower between the hours of 8am and 9pm where possible. This guidance does not go into detail of what is or is not acceptable contact with a borrower.

Neither of the Commerce Commission guidance note nor the Responsible Lending Code can be regarded as comparable to the Australian Guidelines, given the coverage and level of detail contained in the Australian Guidelines. In addition, the Commission's guidance note fails to recognise the difference in wording of the New Zealand prohibition in section 23 as compared with the Australian prohibition.

Significance of the fact that New Zealand's prohibition does not include the word 'undue'

Given the omission of the word 'undue' in the New Zealand section, and the comments made in the Australian cases about what is 'harassment' as compared with 'undue harassment', there is a good case for arguing that under current law, less serious types of behaviour will breach the New Zealand prohibition by comparison to the Australian provision.

¹³⁸ Responsible Lending Code, cls 2.5 to 2.7 and 12.5. Several lenders and other stakeholders that submitted to the MBIE Discussion Document (ANZ, BNZ, NZBA, Credit Recoveries) pointed out that the Responsible Lending Code already contains limits on contact with debtors in relation to consumer credit debt collection and suggested that no further elaboration of what is acceptable is required.

¹³⁹ The Commerce Commission said in its submission to the MBIE Discussion Document (at [204]) in the context of commenting on the proposals for law reform of debt collection activities in relation to consumer credit contracts: "in our experience, many debt collection issues arise in relation to other types of contracts (for example utilities or other contracts for services)."

In French J's opinion, repeated unwelcome approaches to a debtor would constitute harassment but not undue harassment.¹⁴⁰ Hill J considered that 'harassment' meant persistent disturbance or torment and said:¹⁴¹ "Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter." Any guidance issued by the regulator in New Zealand should recognise that the type of conduct that will breach the s 23 prohibition on harassment is conduct that meets the standard of 'harassment' and is not required to meet the standard of 'undue harassment'. In this regard, the existing guidance note that has been put out by the Commerce Commission, which refers to the facts of *ACCC v ACM* as an example of conduct amounting to harassment, fails to recognise the differences in the wording of s 23 as compared with the Australian prohibition.

The fact that a different standard applies in New Zealand in relation to conduct that might amount to harassment could be an inconvenience for debt collectors operating in both New Zealand and Australia who wish to utilise the same policies and training manuals in both their Australian and New Zealand businesses. This issue was alluded to by Baycorp in its submission to the 2018 Discussion Document, where it said: "most reputable debt collection agencies operating in New Zealand also operate in Australia and therefore employ the same standards. ...any additional requirements beyond what it already does across both Australia and New Zealand would increase costs, which would inherently be factored into the costs of providing credit to all consumers."¹⁴²

However, that is a consequence of the law that currently exists in the FTA. It is a relevant consideration in this context that breach of the Australian prohibition constitutes an offence while breach of the New Zealand provision gives rise only to civil remedies. It is suggested that the Government should give consideration to amending the FTA to include the word 'undue' before harassment and make breach of s 23 an offence. This would line New Zealand law up with Australian law, generally contributing to trans-Tasman business law harmonisation, and allowing the adoption of guidelines that mirror the Australian Guidelines. It would also recognise the seriousness of this type of conduct and potentially make enforcement easier, as the Commerce Commission and New Zealand courts would have a body of Australian law to guide them. Importantly it would remove the need for the Commission or any other person seeking a remedy under s 43 of the FTA to prove that a person has suffered loss or damage by reason of the harassment or coercion, as is currently required under s 43 of the FTA.¹⁴³

Will the new prohibition against unconscionable conduct address the problem of poor conduct?

The Fair Trading Amendment Bill introduces a prohibition on unconscionable conduct in trade, into the FTA. Breach of this prohibition gives rise to an offence. The explanatory note to the bill states that "[u]nconscionable conduct is serious misconduct that goes far beyond being commercially necessary or appropriate."¹⁴⁴ Australian case law on the equivalent prohibition in the ACL is likely to be utilised by the New Zealand courts when considering the meaning of unconscionability.¹⁴⁵

¹⁴⁰ *ACCC v McCaskey* [2000] FCA 1037, at [48].

¹⁴¹ *ACCC v Maritime Union of Australia* [2001] FCA 1549, at [60].

¹⁴² Submission to the MBIE Discussion Document from Baycorp, at 4.

¹⁴³ Noting that the phrase "loss or damage" includes emotional damage: *AMP Finance NZ Ltd v Heaven* 8 TCLR 144 (CA), at 158 to 159.

¹⁴⁴ The Bill and explanatory note can be accessed from the New Zealand Legislation website:

<http://www.legislation.govt.nz/>

¹⁴⁵ The background MBIE paper stated: "Ministers have indicated their intention to proceed with Option 1A [prohibition on unconscionable conduct], on the basis that this will support alignment with Australia and allow New Zealand to draw on Australian case law." See <https://www.mbie.govt.nz/dmsdocument/6623-protecting-business-and-consumers-from-unfair-commercial-practices>

The Federal Court in *ACCC v Excite Mobile* adopted the following definition of unconscionable conduct:¹⁴⁶ “For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated ...the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable ...The level of moral obloquy required is high.” The conduct in that case was found to be unconscionable because:¹⁴⁷ “It was unfair to such a degree as to attract a strong adverse moral judgment... In reality, upon analysis, and except in the case of some limited users of mobile phone services, the Excite Mobile plan was destined to expose its consumers to quite substantial monthly charges but was presented in such a way that it effectively concealed that reality...and it did so when Excite Mobile knew that its plan was not suited to the requirements of the everyday user.”

In *ACCC v Harrison*, the following statements from the previous decision of *ACCC v Lux Distributors*¹⁴⁸ guided the Court in determining what was unconscionable conduct:¹⁴⁹ “The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values.... These laws of the States and the operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct... The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.”

The conduct in question in *ACCC v Harrison* was found to be unconscionable. These factors were relevant to that finding:¹⁵⁰ (1) there was an imbalance in the strength of the bargaining positions of the Harrison Companies and the customer; (2) the transfers were invalid and ineffective and there was no legitimate basis for the ‘transferee’ company to demand an early termination fee (or threaten to impose such a fee); (3) the process by which the Harrison Companies transferred the customer contracts from one company to another lacked transparency and, at worst, involved trickery and deception; and (4) the Harrison Companies placed undue pressure on the customer to pay the early termination fee or ‘remain’ with the ‘transferee’ company. The pressure was ‘undue’ because there was no legitimate basis to require the customer to pay the fee.

In *ACCC v ACM*, when considering the principles to be applied in relation to the claim of unconscionable conduct, the Court was guided by principles expressed in previous cases, including that the word ‘unconscionability’ means something not done in good conscience, and the statutory norm is one which must be understood and applied in the context in which the circumstances arise.¹⁵¹ “The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.”¹⁵² The conduct was found to be unconscionable as regard debtor 1 for these reasons: there

¹⁴⁶ *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350, at [146], citing from *Hurley v McDonald's Australia Ltd* [1999] FCA 1728.

¹⁴⁷ *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350, at [178].

¹⁴⁸ *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, at [23] and [41].

¹⁴⁹ *ACCC v Harrison* [2016] FCA 1543, at [111].

¹⁵⁰ *ACCC v Harrison* [2016] FCA 1543, at [125].

¹⁵¹ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [189].

¹⁵² *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [189], citing from *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

was a strong disparity in the relevant strengths of the bargaining positions of ACM and the debtor; the letters ACM sent were misleading or deceptive; ACM's conduct was inconsistent with relevant parts of the 2005 Debt Collection Guidelines; ACM's conduct was reprehensible and unreasonable having regard to the debtor's severe disability and position of disadvantage, matters which were well known to ACM; and ACM's conduct contravened its own policies and procedures. ACM's conduct was also unconscionable as regards debtor 2, due to a clear disparity in strength of bargaining positions, ACM was aware debtor 2 had offered to pay \$20 a week but embarked upon a course which was designed to pressure the debtor into making a substantial up-front payment, misleading and deceptive representations were made as a tactic to extract a large up-front payment, and the conduct was inconsistent with ACM's own policies and procedures.¹⁵³

The new prohibition on unconscionable conduct will be a useful addition to the New Zealand regulator's tool kit as regards dealing with poor debt collection conduct. However, there remains a need for a separate prohibition on harassment (or undue harassment) and coercion. The threshold for meeting the criteria of unconscionability is higher than either of 'undue harassment' or 'coercion'. A finding of unconscionable conduct will not be made lightly.¹⁵⁴ "[F]eatures such as 'dishonesty, trickery, predatory or overbearing behaviour, choice or the absence of choice, disadvantage, vulnerability and exploitation all remain relevant matters.'¹⁵⁵ Conduct that breaches the prohibition on harassment (or even undue harassment) or the prohibition on coercion will not necessarily breach the prohibition on unconscionable conduct. The prohibition on harassment (or undue harassment) is also particularly relevant in the context of debt collection activity, as it sets a boundary on what level of contact with a debtor is appropriate.

Role of the regulator

No amount of guidance will prove effective in modifying debt collection practices if the industry perceives that there is no enforcement of the underlying laws by the regulator. The 2016 and 2017 Consumer Issues reports of the Commerce Commission noted an increase in complaints around debt collection activity,¹⁵⁶ and a warning letter issued in 2016 noted that consumer debt collection was a focus area for 2016-2017.¹⁵⁷ However it does not appear to be a focus area for the 2019/2020 year.¹⁵⁸

¹⁵³ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [275] to [283].

¹⁵⁴ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [188].

¹⁵⁵ *ACCC v ACM Group Limited (No 2)* [2018] FCA 1115, at [193].

¹⁵⁶ The Commission's Consumer Issues Report 2016 noted there had been a growing number of complaints about debt collection methods (at 31, 32, 34), that this was the most complained about area to Citizens Advice Bureau (at 34), and that this is a growing area of concern internationally (at 34-35). The Consumer Issues report for 2017/2018 stated (at 20): "We have observed an increase in complaints related to the collection of debt during 2017/18."

¹⁵⁷ A warning letter to Latitude Financial Services Ltd, 22 December 2016, stated (at [18]): "The Commission has identified a number of special focus areas for the 2016-2017 year. One of those areas is the practices associated with consumer debt collection..." Available from the Commerce Commission webpage: <https://comcom.govt.nz/search?query=warning+letter+latitude>

¹⁵⁸ See Priorities 2019/2020 At A Glance, available from this webpage: https://comcom.govt.nz/data/assets/pdf_file/0018/162801/Our-Priorities-2019-2020.pdf. Note however that in the 2018 Lender Seminars the Commission said: "Credit work programme 2018/19: We will be keeping a close eye on: • Debt collection." (Available from this webpage: https://comcom.govt.nz/data/assets/pdf_file/0029/92756/Commerce-Commission-lender-seminars-2018-Presentations.pdf)

There has been a significant amount of enforcement activity by the Commission in the last ten years in relation to debt collection activity generally. Some of this related to incorrect application of the repossession rules, in particular around the fees that can be charged.¹⁵⁹ Several sets of proceedings have been issued by the Commission in relation to debt collection, most of which relate to allegations of misleading or deceptive conduct.¹⁶⁰ The only enforcement action that relates directly to the prohibition on harassment or coercion appears to be a warning issued to Twenty Five Station Ltd and its director in relation to conduct that the Commission considered might have amounted to harassment or coercion. In the Commission's view, Mr Campbell and Twenty Five Station Ltd (which traded as Law Debt Collection) engaged in conduct with one person that was also likely to amount to harassment and/or coercion because of the "volume, tone and content of the correspondence." "In our view the volume, tone, and content of correspondence with this person was used to intimidate and/or wear him down, so that he paid a debt he disputed."¹⁶¹

By contrast, there has been a significantly greater level of regulatory enforcement activity in Australia invoking the prohibitions on undue harassment and coercion. In addition to the cases mentioned above (*ACCC v McCaskey*, *ACCC v Maritime Union of Australia*, *ASIC v Accounts Control Management Services Pty Ltd*, *ACCC v Excite Mobile Pty Ltd*, *ACCC v Harrison*, *ACCC v ACM Group Limited (No 2)*, *ACCC v Panthera Finance*), enforcement activity by the regulators in relation to conduct that was alleged to constitute undue harassment or coercion includes:

- An enforceable undertaking from a debt purchaser (Alliance Factoring) in 2005;
- Proceedings against a finance company (Esanda Finance Corporation Ltd) and its debt collectors in 2003 resulting in declarations of undue harassment and unconscionable conduct and a compensation payment; and
- an ASIC surveillance in 2018 which found that Cash Converters was failing to meet the guidelines on debt collection practices, including by too frequently contacting consumers, which resulted in licensing conditions being imposed on the company and an agreement to outsource all debt collection work to a third-party debt collector.

The importance of the regulator taking an active role in monitoring compliance with the guidelines and taking enforcement activity when breaches are detected was noted as key to the success of the Australian Guidelines, in the 2015 Industry Research.¹⁶²

Possible reasons for the lack of enforcement activity centred on s 23 FTA include that breach only gives rise to civil remedies by way of injunction or an award of compensation, and that the Commission has to prove that a person has suffered loss or damage in order to get access any of the remedies available under s 43 of the FTA. It is suggested that at a minimum the Government should engage in a conversation with the Commission to ascertain the Commission's views on the best ways to effectively enforce the prohibition in s 23. This may require that the provision be amended to make

¹⁵⁹ For example, the Commission entered into a settlement with Baycorp in 2013 in relation to Baycorp claiming to have a right to add collection costs onto a debtor balance after items were repossessed. Broadlands was required to refund customers after a settlement with the Commission in 2014 involving similar activity, and an enforceable undertaking was entered into by Receivables Management in 2017 in relation to similar activity.

¹⁶⁰ Reported cases include: *Commerce Commission v Budget Loans Limited* [2016] NZDC 8714, *Budget Loans Ltd v Commerce Commission* [2017] NZHC 695, *Commerce Commission v Budget Loans Limited* [2018] NZDC 11202, *Commerce Commission v Allan Robert Hawkins* [2019] NZDC 23790.

¹⁶¹ See Commerce Commission media release 13 December 2019 "Debt collector warned for likely harassment, coercion, misleading claims" available from this webpage: <https://comcom.govt.nz/news-and-media/media-releases/2019/debt-collector-warned-for-likely-harassment,-coercion,-misleading-claims>

¹⁶² 2015 Industry Research, n 3, at 83.

breach an offence. For consistency with Australian law and to recognise the more serious penalty, it would seem appropriate to insert the word 'undue' before 'harassment'.

Conclusion

This paper has considered whether the development and adoption by the New Zealand regulators of detailed guidelines setting out the regulators' view of conduct likely to breach the existing prohibitions in the FTA and other Acts relevant to debt collection activity would be a useful measure to address issues with poor debt collection conduct, as revealed in a recent Government review of consumer credit regulation. Several lenders indicated support for such guidelines in the recent review and for those guidelines to be modelled on the Australian Guidelines. Given the broadly similar nature of the underlying laws, at first glance it would seem that modelling New Zealand guidelines on the Australian equivalent makes sense.

However, there is a significant difference between the New Zealand and the Australian prohibitions on harassment and coercion. The prohibition in New Zealand is on conduct that amounts to harassment or coercion and breach only leads to civil remedies. The corresponding prohibition in Australia is on conduct that amounts to undue harassment or coercion, and breach is an offence. Guidelines in New Zealand based on the current law would have to reflect the lower threshold of 'harassment' in the FTA prohibition and therefore would likely set out a different set of expectations for debt collectors in New Zealand by contrast to those operating in Australia.

There has been very little regulatory action in New Zealand that has alleged breach of the New Zealand prohibition on harassment or coercion. By contrast, the Australian prohibition has been used in several cases brought by the regulators, leading to case law defining the meaning of the terms used in the prohibition and resulting in hefty penalties being awarded against offending debt collection businesses. The fact that the prohibition only leads to civil remedies and requires proof of loss or damage may be a deterrence for the New Zealand regulator in view of the limited resources to expend on enforcement activity.

It is suggested that the New Zealand Government should consider aligning New Zealand and Australian law by making the prohibition in s 23 of the FTA an offence and raising the threshold for breach to 'undue harassment or coercion'. This would provide consistency for those businesses that operate trans-Tasman, further harmonisation of business laws between the two countries, and allow the use of the same training materials and policies by businesses that operate in both countries. It would allow the adoption of guidelines in New Zealand that set out the regulators' understanding of what is acceptable conduct for debt collection businesses, which were modelled closely on the Australian Guidelines. It would also recognise the serious nature of poor debt collection practices, which impact in particular on vulnerable consumers.

Appendix 1 – Evidence of poor conduct by debt collectors

Evidence from the submissions

a. Budget services

The following are examples of the types of conduct reported to budget services, and noted in submissions to the MBIE consumer credit review, that might amount to harassment or coercion by debt collectors, both of which are prohibited conduct under the FTA. The full submissions are available from <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/changes-to-consumer-credit-law-2020/>

They have harassed the client and convinced them that they should not work with CAP to a point where our relationship with the client was placed in jeopardy. (Christians Against Poverty)

The company showed up repeatedly at her door with intimidating looking men, looking for payment. They ignored her 'do not knock' sticker. ...The client has also reported multiple visits from two intimidating looking men at the following times: in a black RAV4 type car, had visited at least 4 times..... The neighbours also reported seeing them come one other time when none was at home. They've left multiple letters. (Christians Against Poverty)

'Bombing' of text messages, with many receiving 5/6 phone calls a day from early morning until 10 pm at night– sometimes 24/7 contact. They have also reported debt collectors arriving on their doorsteps with direct debit payment forms, with no statement or paperwork regarding the alleged debt. Such harassment has a huge impact on vulnerable borrowers, adding to their stress levels, with other negative health and social consequences for borrowers and their families. (Christian Budgeting)

Clients are often even more fearful when debt collectors dress like police officers. (Christian Budgeting)

In most cases we see from the aggressive and bullying tactics of this (one particular) company, the borrower goes insolvent just to get this one creditor gone. (Dunedin Budget Advisory Services)

Ongoing issues with debt collectors especially harassment. Clients have experienced all the situations outlined in the Discussion Document. (Family Finances Services)

Have clients driven to consider and or attempt suicide form ongoing harassment by debt collectors. One instance: client was texted 3 times and rung once while in a meeting with budget adviser. Also impersonating an office of the court or police officer. (Family Finances Services)

In terms of how widespread the problems are, services commonly report experiences of debt collectors harassing borrowers. A common example is hounding debtors with phone calls and texts at all times of night and day. Even when payment arrangements are in place or payments are being made to creditors, debtors are being bombarded with calls, emails and/or text messages. (FinCap)

It is not uncommon for a debt collector to harass the debtor (usually until the debtor applies for bankruptcy), calling many times per day, or using automated dialer technology (Robo calls) that can call the debtor multiple times per day. In one case we know of, 33 calls were made in one day. Evening visits are also sometimes made (between 6pm and 10pm). (FinCap)

We see many cases where debt collectors threaten clients with the removal of all their household goods. Our clients do not understand this is illegal and will often borrow money from loan sharks in order to meet the demands of debt collectors causing them further hardship and harm. (Waahi Whaanui Trust)

In another instance: our service contacted [name of debt collector] to let them know the client was working with a financial mentor and an affordable payment plan would be entered into once a thorough assessment of the client's financial position was carried out.[Name of debt collector] loaded the Financial Mentor's mobile phone number into their system resulting in that person receiving six text messages and two phone calls per day, every day, including weekends. When [name of debt

collector] were contacted to get the communication to stop they refused unless an alternative phone number was supplied. It was only the threat of court action by our organisation which stopped this harassment. (Waahi Whaanui Trust)

We have some creditors who use gang members to enforce debt collection which is extremely intimidating for clients. (Waahi Whaanui Trust)

One client I was working with was being visited by [name of debt collector] every second day. Visits were occurring at the home of the client and at his wife's parents. There were constant threats that they would visit the client's employer to tell them the client was a dead beat and disclose details of the client's financial position. In addition to these visits there were phone calls at least once a day to the client and to his wife. The threats being made were intimidating and misleading – threats to repossess all their household goods, to get the client fired from his job, to take possession of his parent's property. (Waahi Whaanui Trust)

b. Dispute resolution schemes

Consumers commonly allege poor debt collection practices have occurred, including not receiving required notice, excessive phone calls, and threatening behaviour. (Insurance and Financial Services Ombudsman)

c. Lenders

Unfortunately, on a regular basis, there are some lenders and/or debt collectors who are not so willing to be reasonable ... External debt collectors can be quite aggressive with collection techniques as they are not bound by CCCFA requirements nor are interested in long-term relationship maintenance (DCO Finance)

The FSF is in no doubt that a small number of consumers have experienced one or more of these problems during the course of a debt collection relative to the very large number of debt collections that are taking place each day. (FSF) a small minority of lenders or debt collectors who have behaved irresponsibly and in many cases illegally. (Financial Services Federation)

Rapid Loans and their contracted debt collectors have never used such practices. However, we are aware of others that do. (Rapid Loans)

d. Others

There are clear rules about debt collection and these are frequently ignored as few people know about them or are intimidated by collection agents. (Debt Blocker)

Often phone calls and texts come to a borrower's place of work and are so intense and disruptive that the borrower's job is put at risk. Harassment by text or phone of vulnerable borrowers with emotional issues or mental health issues often results in paralysis, panic attacks and an inability to seek work. {New Zealand Federation of Business and Professional Women)

Evidence from responses to FinCap's questionnaire in 2018:

We have clients being harassed 24/7 with bullying, threats and even violence. At times when access is gained to a property the debt collector will take other goods purchased under another finance company which escalates the stress. (Northern Community Budget Service, Kerikeri)

*Some collectors hold themselves out as lawyers and threaten legal action if the debt is not paid.
(Wellington City Mission)*

“We have recently had a case in point, where a client had already told the trading company that she could not afford the agreed repayments and was going to be seeing a budget advisor. The Financial Mentor also contacted the company and asked them for a week to come back with a proposal. They agreed, but a debt collector from the company still turned up at the client’s home after 7pm, unannounced and harassed the client, refusing to leave until she had signed an agreement to pay (more than she could afford). The Financial Mentor phoned the company the next day to cancel this agreement and get some clarification and was stonewalled. The person she spoke to didn’t know which Financial Services Disputes Organisation they were registered with (actually didn’t know what the Financial Mentor was talking about), and finally suggested that the Financial Mentor was at fault and their collectors would never act in that way.” (Marton and Districts Budgeting Service)