

Working Towards a Fairer Consumer Credit Market:

A study of the issues in New Zealand's consumer credit market and proposals for reform

Title of this Research Paper: Debt Collection

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We acknowledge the support of the Michael and Suzanne Borrin Foundation which made this work possible.

1. INTRODUCTION AND OVERVIEW

This report sets out the results of research by Victoria University of Wellington on certain key issues around debt collection in the context of lending under consumer credit contracts in New Zealand, as at date of writing (August 2019). The proposed changes to the law (in the October 2018 package of reforms and now in the Credit Contracts Legislation Amendment Bill (CCLAB), introduced 11 April 2019) do not address the most concerning aspects of debt collection, which are issues with harassment and the high costs of debt collection (which costs are often passed on to the debtor).

New Zealand does not have a targeted regime that regulates debt collection. Contact with debtors is not regulated in New Zealand beyond general laws relating to behaviour towards others. There is little preventing debt collectors from engaging in predatory practices to intimidate debtors into making repayments, for example visiting a debtor's home at any time to demand repayment. The frequency and nature of contact is not specifically regulated beyond suggestions for lenders in the Responsible Lending Code. New Zealand lags behind comparable jurisdictions such as Australia, the United Kingdom and the United States, all of which have extensive guidelines about what is acceptable behaviour for debt collectors.

In this report, "debt collection" means the business of recovering unpaid debts, which usually occurs after a debtor has defaulted on one or more of the scheduled repayments. There are different ways in which lenders facilitate debt collection: the lender may conduct the collection itself (via its in-house debt collection process), the lender may engage a third party debt collector to act as an agent on its behalf to take steps to recover the debt, or the lender may sell the debt to a third party who acquires the rights of the lender to recover the debt.¹ Where the third party acquires the lender's rights to debt collection, the third party purchases the debt from the lender, typically at a discounted price, then attempts to recover the debt from the debtor. Different legal issues can arise around debt collection depending on the specific way debt collection occurs.

Little research has been done on how lenders go about debt collection in New Zealand. The Ministry for Business, Innovation and Employment (MBIE)'s Additional Information Document, which accompanied MBIE's June 2018 Discussion Paper "Review of Consumer Credit Regulation" (the June 2018 Discussion Paper),² stated that: "Stakeholders have

¹ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 22. Accessible at: <https://www.mbie.govt.nz/assets/3f19e04173/background-and-technical-detail-for-discussion-paper.pdf>; and Commerce Commission *Repossession Guidelines* (June 2018) at 9.

² Ministry of Business, Innovation and Employment *Discussion Paper: Review of consumer credit regulation* (June 2018). Accessible at: <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/>

suggested that the use of external debt collectors is increasingly popular. We have heard claims of some high-cost lenders sending up to a third of defaulted loans to debt collectors”.³ In the 2017-2018 period, the most complaints received by the Commerce Commission related to debt collection, exceeding complaints made about irresponsible lending, disclosure and fees in consumer credit issues.⁴ The complaints commonly related to debt collectors potentially misrepresenting their right to collect, the debt amount and the individual elements contributing to the total debt claimed.⁵

It is standard practice to include a clause in loan contracts with consumers stating that debtors will bear the recovery fees of their debt, but there is no targeted regulation of those fees. Debts can be negotiated down between the debtor and the debt collector but there does not appear to be any law or even standard industry practice around how this is done. Evidence from financial mentors suggests that even within a debt collection company, debt collectors vary in reasonableness. Comparable jurisdictions are more advanced in their regulations of recovery fees than New Zealand.

2. SUMMARY OF KEY RESEARCH FINDINGS

- There is no comprehensive regime regarding debt collection in New Zealand. As a result, debt collection practices vary significantly. The few laws which regulate the practices of debt collectors are split across several pieces of consumer legislation. This makes it difficult for debtors to know or enforce their limited rights.
- Debt collection laws in Australia, United Kingdom and United States include clear limitations on contact with debtors. In these jurisdictions, restrictions on debt collectors regarding contact with debtors are clear and enforceable.
- Financial mentors across New Zealand have reported that the effects of unregulated debt collection on consumers’ lives are significant. Debt collectors’ actions contribute to stress, mental health issues, and can cause debtors to face greater financial

³ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 22. Accessible at: <https://www.mbie.govt.nz/assets/3f19e04173/background-and-technical-detail-for-discussion-paper.pdf>

Note that this paper did not specify whether these external debt collectors are purchasers of the debt or agents for the lender.

⁴ The Commerce Commission received 125 complaints about debt collection, 84 complaints about responsible lending, 65 complaints relation to disclosure practices and 54 complaints about fees. Commerce Commission *Consumer Issues 2017/18* (27 November 2018) at 3. https://comcom.govt.nz/_data/assets/pdf_file/0017/108161/Consumer-Issues-Report-2017-18.pdf

⁵ Commerce Commission *Consumer Issues 2017/18* (27 November 2018) at 20. https://comcom.govt.nz/_data/assets/pdf_file/0017/108161/Consumer-Issues-Report-2017-18.pdf

difficulties. The practices that are used by debt collectors can be oppressive and potentially amount to harassment and misrepresentation.

- There is evidence that the pressure and negotiating tactics used by some debt collectors mean that on occasion debtors would rather avoid the debt collection process by taking out another loan or borrow more under their existing loan to pay off their original loan.
- Many debtors are experiencing one or more of the following factors: poverty, mental health issues, cognitive impairments, and low levels of financial literacy. Negotiating repayments can be very difficult for people facing such obstacles. This also means that there is often a serious power imbalance between debtors and debt collectors.
- MBIE's June 2018 Discussion Paper gave five regulatory options to manage the harm currently being caused by debt collection practices.⁶ Only one suggestion out of five made it into the Credit Contracts Legislation Amendment Bill. This suggestion was a relatively minor disclosure requirement which requires every debt collector to disclose key information to the debtor before debt collection starts under the contract.⁷

3. RECOMMENDATIONS

- Financial mentors have reported that debt collectors' current practices have caused significant harm to consumers. These practices include potential harassment, oppressive conduct, and misrepresentations in particular about the effect of non-payment. Harm could be reduced by introducing regulation that clearly states the restrictions on debt collectors regarding contact with debtors. Guidelines should be created, modelled on the existing guidelines in Australia and United Kingdom, which set out the rules governing contact with a debtor.
- Affordable repayment schedules should be a legislative requirement in order to ensure that debtors are able to meet their living costs while repaying the debt. At present, repayment schedules do not always accommodate the financial position of the debtor and sometimes debtors must forego essential expenses in order to meet the terms of the repayment agreement. Debt collectors should be required to conduct

⁶ Ministry of Business, Innovation and Employment *Discussion Paper: Review of consumer credit regulation* (June 2018) at 36-38. Accessible at: <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/>

⁷ Credit Contracts Legislation Amendment Bill 2019 (131-1), cl 42.

a new affordability assessment at the start of the debt collection process and negotiate an affordable repayment schedule with the debtor which takes into account the debtor's financial position.

- All debt collectors, including those which act as agents for the original lender, should be included in the definition of 'creditor' in the CCCFA. This would mean that all those persons would be subject to the prohibition on charging unreasonable fees and also subject to the lender responsibility principles.

4. THE CURRENT LAW IN NEW ZEALAND THAT APPLIES TO DEBT COLLECTION

a. Credit Contracts and Consumer Finance Act 2003

At date of writing (August 2019), in relation to debt that arises from a consumer credit contract, the Credit Contracts and Consumer Finance Act 2003 (CCCFA) applies to lenders when they carry out debt collection in-house and to debt collectors who purchase debt and are assigned rights to the debt (as they are deemed creditors).⁸ However, debt collectors acting as agents for the lender are not directly subject to the CCCFA (but the lender does remain responsible for the agent's compliance with the CCCFA).

The relevant law for debt collectors that are regulated by the CCCFA includes the requirement to not charge unreasonable fees.⁹ Specifically, default fees must not be unreasonable, but it is currently unclear how this applies to fees charged by a debt collection agent.¹⁰

The lender responsibility principles (the Principles) set out in the CCCFA which apply to all creditors under consumer credit contracts include a duty to exercise care, diligence and skill. Under the Principles, lenders are required to exercise the care, diligence and skill of a responsible lender at all times, including in dealings after the agreement has been made.¹¹ The Principles also include a requirement to act reasonably and ethically.¹² The Principles apply to creditors engaging in debt collection, which includes in-house debt collectors and

⁸ Credit Contracts and Consumer Finance Act 2003, s 5.

⁹ Credit Contracts and Consumer Finance Act 2003, s 41.

¹⁰ Credit Contracts and Consumer Finance Act 2003, s 44A, Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 74. Accessible at: <https://www.mbie.govt.nz/assets/3f19e04173/background-and-technical-detail-for-discussion-paper.pdf>

¹¹ Credit Contracts Consumer Finance Act 2003, s 9C(2)(a)(iii).

¹² Credit Contracts and Consumer Finance Act 2003, s 9C.

debt purchasers. If debt collection occurs through an agent, the original lender is responsible for the actions of the debt collector.¹³

A lender, in relation to an agreement, is also required to make reasonable enquiries so as to be satisfied that the borrower will make the payments under the agreement without suffering substantial hardship¹⁴ Further, a lender must ensure that in any subsequent dealings, information is not provided in a manner that is likely to be misleading, deceptive or confusing¹⁵ Borrowers should be treated reasonably and ethically, including when the contract has been breached, when a borrower faces unforeseen hardship, and during a repossession process.¹⁶

b. Responsible Lending Code

The Responsible Lending Code (the Code), which elaborates on the obligations under the CCCFA, contains guidance on how to comply with the Principles. The Code is not binding but evidence of compliance with the Code is treated as evidence of compliance with the Principles.¹⁷ There are no direct enforcement consequences of non-compliance with the Code.

The Responsible Lending Code includes guidance that is relevant to debt collection. In particular, in order to comply with the Principles, a lender should:¹⁸

- require that any debt collection agent it uses agrees to comply with relevant legal obligations, including those under the CCCFA;
- require any debt collection agent it uses to ensure that its staff understand and agree to comply with the relevant legal obligations; and
- confirm with the debt collection agency that it has processes to ensure that staff understand and agree to comply with their legal obligations and act in accordance with the terms of the agreement between the lender and the borrower.

The Code states that lenders are responsible for the conduct of their agents acting within the scope of their authority, which can include debt collectors.¹⁹

Although many guidelines in the Code do not refer specifically to debt collectors, the Principles extend to lenders (and debt purchasers) when acting as debt collectors which

¹³ Credit Contracts and Consumer Finance Act 2003, s 9B.

¹⁴ Credit Contracts Consumer Finance Act 2003, s 9C(3)(a)(ii).

¹⁵ Credit Contracts Consumer Finance Act 2003, s 9C(3)(c)(ii).

¹⁶ Credit Contracts Consumer Finance Act 2003, s 9C(3)(d)(i-iii).

¹⁷ New Zealand Government *Responsible Lending Code* (Revised June 2017) at 4.

¹⁸ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.18 (a-c).

¹⁹ New Zealand Government *Responsible Lending Code* (Revised June 2017) at 9.

means that if debt collectors comply with the Code guidelines, it is likely they will be considered as complying with the Principles.

Clauses 2.5-2.7 establishes guidelines for contacting a borrower (or guarantor) by phone or in person. A lender should:²⁰

- Take steps to verify they are dealing with the borrower (or guarantor), a person who is authorised to act on the borrower's (or guarantor's) behalf, or a contact provided by the borrower (or guarantor);
- Having established they are dealing with a person in the above category, identify themselves, the name of the lender, and the purpose of the contact;
- Comply with their obligations to not disclose information about the borrower (or guarantor) to third parties under the Privacy Act 1993, and in addition, avoid indirectly revealing the borrower (or guarantor's) personal information to others to the extent practicable; and
- If authorised by the borrower (or guarantor), co-operate with the borrower's (or guarantor's) advisors, including, where possible, by giving those advisors the information the advisor needs to advise borrower (or guarantor).

In addition to the above, lender must make reasonable efforts to contact the borrower using their preferred channel of communication unless it is impractical to do so. A lender should also contact the borrower (or guarantor) at reasonable hours, such as between 8am and 9pm, taking into account all the circumstances and the borrower's reasonable wishes.²¹

Clause 3.3 of the Code requires lenders to comply with advertisement practices for fees. This includes avoiding giving an unrealistic impression of the overall levels of fees and costs. This also includes stating whether fees apply and if ascertainable, any mandatory fees the borrower must pay when entering the agreement.²² This can be interpreted as meaning that the lender should state whether any fees apply for debt collection in the event a borrower defaults, in order to comply with the Principles.

The guidelines around fees also apply to disclosure practices. Lenders must ensure that information presented to the borrower is not, or likely to be, misleading, deceptive or confusing including making sure information is legible or audible, that the information is disclosed in a level of detail proportionate to its importance, avoid giving an unrealistic impression of the overall levels of fees and costs and advise if fees will apply and if ascertainable, any mandatory fees the borrower must pay when entering the agreement.²³

²⁰ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 2.5.

²¹ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 2.6 and 2.7.

²² New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 3.3.

²³ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 7.22.

A lender should have policies or procedures in place to ensure that advertising complies with legal obligations and is not misleading, deceptive or confusing.²⁴ A lender's policies or procedures should ensure that their agents are required to comply with the CCCFA, Fair Trading Act 1986 and the Code and the lender is satisfied that they understand how to do so.²⁵

In relation to disclosure requirements, a lender should provide or direct the borrower to alternative methods of receiving information if they suspect that the borrower does not have a good understanding of the English language.²⁶ Where the lender advertises their credit products in a language other than English and the lender suspects that the borrower does not have a good understanding of the English language, the lender should communicate the information about the key features in that language, or refer the borrower to an interpreter, at the lender's cost.²⁷ Where the lender has explained the key features of the agreement but is aware that the borrower has not understood these, the lender should take further steps to assist the borrower's understanding. This can include recommending that the borrower takes a copy of the information and seeks legal advice or advice from organisations that provide information about consumer rights, or for online transactions, recommending that the borrower contact the lender in another way before they decide to enter into a credit contract.²⁸

Lenders must also ensure that the terms of the agreement are expressed in plain language in a clear, concise and intelligible manner. In order to do this, the lender should set out agreements using a layout and font size that can easily be read; set out the terms in a logical order; highlight important information and explain complex information in plain language.²⁹ In light of the new disclosure requirements introduced in the CCLAB, where every debt collector must ensure disclosure of as much of the key information in the regulations as applicable to the credit contract before debt collection starts,³⁰ these guidelines in the Code may be helpful to interpret what is required for disclosure by debt collectors. It is important to note that the regulations that accompany the CCLAB have not yet been released at the time of the writing of this report.³¹

In subsequent dealings with the borrower, a lender should make certain information generally accessible throughout the life of the agreement, which can include making the

²⁴ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 3.7.

²⁵ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 3.8.

²⁶ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 7.14.

²⁷ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 7.15.

²⁸ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 7.16.

²⁹ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 7.18.

³⁰ Credit Contracts Legislation Amendment Bill 2019 (131-1), cl 42.

³¹ As of August 2019.

information available on their website, at their premises, or by providing it promptly on request. This should include what to do if the borrower changes address; details of the lender's internal complaints processes; details of the lender's dispute resolution scheme; information about the availability of relief for unforeseen hardship and application processes for seeking changes to the credit agreement on the grounds of unforeseen hardship; and the potential consequences of default, including, if relevant repossession.³² A lender should be generally available for contact by borrowers, which includes ensuring that borrowers have access to up-to-date information about the lender's contact details and the hours in which they are available, and acknowledging and responding to queries from borrowers within a reasonable time.³³ A lender should also contact the borrower to provide information about the borrower's rights and potential consequences when they are in default or where the borrower has informed the lender that it is likely that the borrower will soon be in default.³⁴

As stated above, the Principles require the lender, in relation to an agreement with a borrower, to treat the borrower and their property (or property in their possession) reasonably and in an ethical manner. This includes where breaches of the agreement have occurred or may occur or when other problems arise; and when a debtor under a consumer credit contract suffers unforeseen hardship.³⁵ In relation to these Principles, the Code provides that a lender should implement procedures which set out when and how they will contact borrowers if the borrower misses repayments and manages the loans of borrowers who notify the lender that they are having, or likely to have, difficulties repaying the loan.³⁶ If a borrower is experiencing financial difficulties, the lender should encourage early, open and honest communication and only contact the borrower to the extent necessary and not for the purpose of harassing or embarrassing the borrower.³⁷

The information that lenders provide to borrowers who have missed repayments will differ depending on the amount, nature and time of default. This information may include notifying the borrower of missed payments, informing the borrower of the risk of escalating debt and any interest or charges, finding out the reason for the missed repayments, reminding the borrower of their right to seek changes to the credit agreement due to unforeseen hardship, and reminding the borrower to obtain legal advice or advice from budgeting services or consumer rights services.³⁸ For high-cost credit agreements, the lender should contact the

³² New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 11.2.

³³ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 11.3.

³⁴ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 11.4.

³⁵ Credit Contracts and Consumer Finance Act 2003, s 9C(3)(d).

³⁶ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.2.

³⁷ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.7.

³⁸ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.3.

borrower after one missed payment to notify them of the missed payment and the risk of escalating debt.³⁹

In relation to an unforeseen hardship application that the lender is aware that a borrower is or will be preparing, the lender should inform the borrower of the information required from the borrower, the likely timeframe for assessing the application, that there are free and independent budgeting services that can help with a repayment plan, and the lender should consider suspending the active pursuit of recovery of a debt for a reasonable period where the lender is satisfied that there is a repayment plan that will be presented to the lender within a reasonable period of time.⁴⁰ When considering a proposed repayment plan, the lender should have regard to the likely duration of the unforeseen hardship and what steps the borrower is taking to address it; the borrower's credit history and other factors relevant to determining whether the borrower can make repayments without substantial hardship; whether the repayment plan will allow the borrower to meet its obligation during the period of the proposed repayment plan and over the remaining life of the credit agreement; and whether the repayment plan would not allow the borrower to meet their obligations during the period of unforeseen hardship, would be likely to result in the borrower experiencing financial difficulties over the remaining life of the credit agreement.⁴¹

Where the borrower does not meet the definition of unforeseen hardship under the CCCFA,⁴² the lender should also make genuine attempts to work with the borrower to limit the rate at which the effects of the default escalate⁴³ and the lender should take into account the borrower's preferred means of repaying the debt.⁴⁴

When the lender has attempted to work with the borrower to meet their obligations, but is at the point of exercising its enforcement rights, the lender's decisions about which enforcement response to take should be based on what the lender considers to be the most effective way of obtaining repayment of the loan and not simply for the purpose of punishing the borrower or guarantor for default. They may also consider whether a particular enforcement response is necessary to prevent the borrower obtaining more credit.⁴⁵

³⁹ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.4.

⁴⁰ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.9.

⁴¹ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.10.

⁴² Credit Contracts and Consumer Finance Act 2003, s 55. This states that "A debtor who is unable reasonably, because of illness, injury, loss of employment, the end of a relationship, or other reasonable cause, to meet the debtor's obligations under a consumer credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms were changed in a manner set out in section 56 may apply to the creditor to agree to that change".

⁴³ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.12.

⁴⁴ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.13.

⁴⁵ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.16.

When the lender is exercising their enforcement rights, the lender should require that their debt collection agent complies with obligations under the CCCFA, require that the debt collection agent ensures its staff understand and agrees to comply with the obligations under the CCCFA, and confirm with the debt collection agency that it has processes to ensure that its staff understand and agree to comply with their legal obligations and act in accordance with the terms of the agreement between the lender and borrower.⁴⁶ This means that lenders are responsible for the actions of the debt collection agents if they fail to comply with the Principles or any other provision under the CCCFA, when acting as agent for the lender.

Under the Code, if the borrower has indicated concerns about how the lender is dealing with the borrower, a lender should remind the borrower of their right to use the lender's internal dispute resolution scheme and access the lender's free external dispute resolution scheme.⁴⁷ The lender's internal complaints process should be documented and easy for borrowers and guarantors to use and information should be provided about the process which details how complaints can be made, how they will be dealt with, by whom and the timeframes for dealing with complaints.⁴⁸ If there is no full resolution by the end of the lender's internal complaints process, the lender should inform the borrower of their right to refer the complaint to the external scheme and provide the borrower with contact details.⁴⁹

c. Fair Trading Act 1986

The Fair Trading Act 1986 (FTA) prohibits any person in trade from making false or misleading representations,⁵⁰ unsubstantiated representations⁵¹ or engaging in misleading or deceptive conduct.⁵² It also prohibits any person from engaging in physical force, harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.⁵³ Consumers, the Commerce Commission, and rival traders are able to take legal action for breaches of the FTA.⁵⁴ The Commerce Commission has the jurisdiction to issue infringement notices to traders where they believe on reasonable grounds that the person is committing, or has committed, an infringement offence; and no information for that offence has been laid against, and no infringement notice has been issued to, the person in

⁴⁶ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.18.

⁴⁷ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.20.

⁴⁸ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.21.

⁴⁹ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 12.24.

⁵⁰ Fair Trading Act 1986, s 13.

⁵¹ Fair Trading Act 1986, s 12A.

⁵² Fair Trading Act 1986, s 9.

⁵³ Fair Trading Act 1986, s 23.

⁵⁴ Ministry of Business, Innovation and Employment "Fair Trading Act" (2019) Consumer Protection <www.consumerprotection.govt.nz>. <https://www.consumerprotection.govt.nz/general-help/consumer-laws/fair-trading-act/#your-rights>

relation to the conduct alleged to be an infringement offence.⁵⁵ The court may, on application of the Commission or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute:⁵⁶

- A contravention of the FTA;
- Any attempt to contravene such a provision;
- Aiding, abetting, counselling, or procuring any other person to contravene such a provision;
- Inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision;
- Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
- Conspiring with any other person to contravene such a provision.

The Commerce Commission issued a reminder to debt collectors about their legal obligation to avoid misrepresenting consumers' rights in 2018, following the actions of debt collector Intercoll Limited for a likely breach of the FTA. The conduct of Intercoll involved telling a debtor that if she wanted to question her debt, she should contact the company to which she originally owed money. Intercoll told the debtor that she needed to pay the disputed amount, and if the dispute with the original lender was successful, then Intercoll would pay the money back. This was incorrect statement because Intercoll had purchased the debt and the debtor has the right to dispute the debt directly with Intercoll.⁵⁷

In the same reminder released by the Commerce Commission, Commissioner Anna Rawlings stated that complaints to the Commerce Commission about debt collection had increased in 2018 and that debt collectors needed to ensure that they had systems in place for ongoing compliance with their legal obligations to debtors. Rawlings stated that while debtors need to pay any overdue debt, it is important that they are not misled when it comes to debt recovery.⁵⁸

Another FTA investigation by the Commerce Commission in early 2018 involved determining whether the debt collection group Receivables Management had breached the FTA by incorrectly claiming it had the right to charge interest, costs and fees to loan balances after the repossession and sale of consumer goods. This conduct is prohibited by the CCCFA. When

⁵⁵ Fair Trading Act 1986, s 40D(1).

⁵⁶ Fair Trading Act 1986, s 41.

⁵⁷ Commerce Commission "Debt collection industry on notice about misleading tactics" (press release, 18 October 2018) <https://comcom.govt.nz/news-and-media/media-releases/2018/debt-collection-industry-on-notice-about-misleading-tactics>

⁵⁸ Commerce Commission "Debt collection industry on notice about misleading tactics" (press release, 18 October 2018) <https://comcom.govt.nz/news-and-media/media-releases/2018/debt-collection-industry-on-notice-about-misleading-tactics>

borrowers are in default, lenders have a choice between either issuing proceedings and continuing to charge interest and fees, or repossessing secured goods which freezes the amount owed under the loan. This investigation resulted in Receivables Management agreeing to refund all affected borrowers by the end of March 2018. If affected customers are owed a cash refund, they are also entitled to an additional 5% of the interest and fees charged for not having had use of the money.⁵⁹

The Commerce Commission has also issued a guidance note for debt collectors setting out legal obligations and giving examples of what might amount to harassment or coercion.⁶⁰

d. The Privacy Act 1993

All debt collectors are subject to the Privacy Act 1993 as they are included within the s 2 definition of “agency” which includes any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector; and for the avoidance of doubt, includes a department. The Privacy Act 1993 sets out the information privacy principles in s 6, of which principle 8 states that an agency that holds personal information shall not use that information without taking reasonable steps to ensure the information is accurate, up to date, complete, relevant, and not misleading.⁶¹

In 2016, the Privacy Commissioner investigated and reported on a breach of principle 8 by a debt collection agency, Law Debt. The facts involved a disputed debt with a childcare centre. When contacted by Law Debt, the complainant informed Law Debt that the debt was disputed. Law Debt nonetheless continued to pursue him and eventually referred the debt to a credit reporting agency.⁶²

The Privacy Commissioner found that Law Debt had breached principle 8 of s 6 because Law Debt did not take reasonable steps to check that the information regarding the debt was accurate, up to date, and not misleading before using it. The Commissioner said it would have been reasonable for Law Debt to continue to correspond with the complainant by email to establish whether or not he had a genuine reason to dispute the debt. Instead, Law

⁵⁹ Commerce Commission “Debt collection group to credit customers overcharged after goods repossessed” (press release, 16 January 2018) <https://comcom.govt.nz/news-and-media/media-releases/2018/debt-collection-group-to-credit-customers-overcharged-after-goods-repossessed>

⁶⁰ See Commerce Commission Guidance for Debt Collectors, at https://comcom.govt.nz/__data/assets/pdf_file/0026/157661/Guidance-for-debt-collectors-June-2019.pdf

⁶¹ Privacy Act 1993, s 6 principle 8.

⁶² Privacy Commission “Case note 279069 [2016] NZ PrivCmr 12: Debt collector Law Debt* fails to check accuracy of information before use” (5 December 2016) <www.privacy.org.nz>. <https://privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-279069-2016-nz-privcmr-12-debt-collector-law-debt-fails-to-check-accuracy-of-information-before-use/>

Debt posted letters to the complainant, knowing he would not receive them or be able to respond in a timely manner as he was overseas. Without taking reasonable steps to check the accuracy of the information, Law Debt referred the matter to a credit reporting agency. Law Debt advised the credit reporter that the debt was not disputed and this was misleading.⁶³

The Commissioner formed a final view that Law Debt breached principle 8 because it did not take reasonable steps to ensure the information about the complainant's case was accurate, up-to-date, complete and relevant. The Commissioner advised Law Debt it would be appropriate for it to make an offer of resolution to the complainant, but Law Debt did not respond to the Commissioner.⁶⁴

During the time the default had been listed against the complainant's credit record, he had been unable to renegotiate his mortgage rates with his bank. He also explained that at the time, his family circumstances were stressful and Law Debt's actions had caused him additional stress and anxiety. The complainant said it affected his sleep and he had to take several days off work.⁶⁵

⁶³ Privacy Commission "Case note 279069 [2016] NZ PrivCmr 12: Debt collector Law Debt* fails to check accuracy of information before use" (5 December 2016) <www.privacy.org.nz>. <https://privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-279069-2016-nz-privcmr-12-debt-collector-law-debt-fails-to-check-accuracy-of-information-before-use/>

⁶⁴ Privacy Commission "Case note 279069 [2016] NZ PrivCmr 12: Debt collector Law Debt* fails to check accuracy of information before use" (5 December 2016) <www.privacy.org.nz>. <https://privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-279069-2016-nz-privcmr-12-debt-collector-law-debt-fails-to-check-accuracy-of-information-before-use/>

⁶⁵ Privacy Commission "Case note 279069 [2016] NZ PrivCmr 12: Debt collector Law Debt* fails to check accuracy of information before use" (5 December 2016) <www.privacy.org.nz>. <https://privacy.org.nz/news-and-publications/case-notes-and-court-decisions/case-note-279069-2016-nz-privcmr-12-debt-collector-law-debt-fails-to-check-accuracy-of-information-before-use/>

e. MBIE's summary of debt collectors' obligations

The Ministry of Business, Innovation and Employment's (MBIE) Consumer Protection website summarises the obligations of debt collectors as follows (and our understanding of the source of each obligation is noted in the accompanying footnotes):⁶⁶

- to not use physical force, or unreasonably harass the debtor or the debtor's family;⁶⁷
- to not mislead or deceive the debtor about the debt or threaten legal action without any grounds to do so;⁶⁸
- to not take advantage of any vulnerability, disability or other circumstance;⁶⁹
- to not tell the debtor's family, friends, employer or others about the debt without the debtor's consent;⁷⁰
- to not provide false information to a credit reporting agency;⁷¹
- to only charge reasonable debt collection fees,⁷² 'reasonable' meaning fees which relate to actual work done by the lender;⁷³
- to keep the debtor's personal information and the personal information of third parties confidential;⁷⁴ and

⁶⁶ Ministry of Business, Innovation and Employment "Debt Collection" (2019) Consumer Protection <www.consumerprotection.govt.nz>. <https://www.consumerprotection.govt.nz/help-product-service/credit-banking-finance/debt-and-debt-collection/debt-collection/>

⁶⁷ The source of this obligation is the Fair Trading Act 1986, s 23 and the Harassment Act 1997 which defines "harassment" in s 3, as "a pattern of behaviour that is directed against that other person... that includes doing any specified act to the person on at least 2 specified occasions within a period of 12 months." Specified acts are listed in s 4.

⁶⁸ Fair Trading Act 1986, s 13.

⁶⁹ This is an obligation founded in equity. *Bowkett v Action Finance Limited* [1992] 1 NZLR 449 at [89]. The High Court found that an unconscionable victimisation (in breach of the equitable doctrine of unconscionable bargain) will occur where there are: "... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice."

⁷⁰ Privacy Act 1993, s 6 principles 10 and 11.

⁷¹ Fair Trading Act 1986, s 9; and Privacy Act 1993, s 6 principle 8.

⁷² Credit Contracts and Consumer Finance Act 2003, s 41. This only applies to debt arising from a consumer credit contract.

⁷³ Credit Contracts and Consumer Finance Act, 2003, s 44A. This section states: (1) *In determining whether a default fee is unreasonable, the court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for the following:(a) any cost incurred by the creditor;(b) a reasonable estimate of any loss incurred by the creditor as a result of the debtor's acts or omissions.*(2) *In determining whether the fee reasonably compensates the creditor for any cost and loss referred to in subsection (1), the court must have regard to reasonable standards of commercial practice.*

⁷⁴ Privacy Act 1993, s 6 principles 10 and 11.

- to only charge late payment fees if the original lender informed the debtor at the time the debtor bought the products or services that late payments would result in extra charges.

MBIE’s Consumer Protection website states:⁷⁵

“Debt collection is one of the options amongst others that a lender may have under the contract, such as taking legal action to recover the debt, repossession, or adverse credit reporting. In other words, the source of the debt collector’s powers, including to charge fees for late payments or recover the expenses of the collection process, is the contract between the lender and the borrower.”

f. Repossession

Repossession is a separate process to debt collection but is another way of ensuring debts are repaid. It involves the lender taking the debtor’s property that the lender has a security interest over to be sold to cover the amount of the debt. Regulation around repossession in relation to consumer credit contracts was tightened in 2015 through the introduction of Part 3A of the CCCFA. There are now specific rules in Part 3A for repossession of consumer goods under credit contracts and the creditor must also comply, in relation to the repossession, with the Principles.⁷⁶ The Code provides guidance on how the Principles apply to repossession.⁷⁷ The Commerce Commission has also released a “Repossession Guidelines” document to explain the repossession rules and explain how the Principles apply to repossession.⁷⁸

The obligation of every lender to treat the borrower and their property reasonably and in an ethical manner extends to a repossession process.⁷⁹ In general, property is only able to be repossessed if the contract explicitly allows it.⁸⁰ In other words, the right of the creditor to repossess goods over which security has been taken is a right that stems from the contract with the lender. Goods typically cannot be repossessed unless they were specifically identified in the credit contract,⁸¹ which requires an “adequate description” so the goods can be identified.⁸² This means that clauses which purport to allow the lender to repossess “all present and after-acquired property” are invalid because they do not specifically identify the

⁷⁵ Ministry of Business, Innovation and Employment “Debt Collection” (2019) Consumer Protection <www.consumerprotection.govt.nz>. <https://www.consumerprotection.govt.nz/help-product-service/credit-banking-finance/debt-and-debt-collection/debt-collection/>

⁷⁶ Credit Contracts and Consumer Finance Act 2003, s 83E(1)(c).

⁷⁷ New Zealand Government *Responsible Lending Code* (Revised June 2017), cl 13.

⁷⁸ Commerce Commission *Repossession Guidelines* (June 2018) at 3.

⁷⁹ Credit Contracts and Consumer Finance Act 2003, s 9C(3)(d)(iii).

⁸⁰ Credit Contracts and Consumer Finance Act 2003, s 83C(1).

⁸¹ Credit Contracts and Consumer Finance Act 2003, s 83F(1)(a).

⁸² Credit Contracts and Consumer Finance Act 2003, s 83F(2)(a).

goods that are able to be repossessed.⁸³ Certain household necessities and important documents are also unable to be repossessed, unless there is a purchase money security interest over the goods, which means that the loan is taken out specifically to purchase those goods.⁸⁴ Household necessities that cannot be repossessed include beds and bedding, cooking equipment including stoves, medical equipment, portable heaters, washing machines and refrigerators. Documents that cannot be repossessed include travel documents, identification documents and bank cards.⁸⁵ Goods can only be repossessed if the debtor is in default or the goods are at risk of being damaged, sold or disposed of contrary to the credit contract, and the creditor has fully complied with the requirements of Part 3A.⁸⁶ Part 3A includes a requirement that a warning notice must be served in writing, at least 15 days before repossession, and containing relevant details as set out in Schedule 3A.⁸⁷ Debtors are able to voluntarily deliver goods back to the creditor.⁸⁸

In addition, if a security interest in consumer goods is or may be taken in connection with a credit contract then the contract or arrangement that creates or provides for the security interest is treated as part of the consumer credit contract,⁸⁹ the creditor is treated as a secured party under the Personal Property Securities Act 1999,⁹⁰ and the debtor is treated as a debtor under the Personal Property Securities Act 1999.⁹¹

Following a breach of the repossession rules, a lender or their agent can be convicted and fined under the CCCFA, companies up to \$600,000 per breach and individuals up to \$200,000, and ordered to pay damages or refund money to borrower. For minor breaches of the rules, the Commerce Commission can issue infringement notices with fines of up to \$1,000.⁹²

Broadly speaking and based on the comments made by financial mentors, issues with poor creditor debt collection behaviour around repossession are considered to have decreased since the introduction of the detailed regulation in Part 3A in 2015.

⁸³ Commerce Commission *Repossession Guidelines* (June 2018) at 7.

⁸⁴ Credit Contracts and Consumer Finance Act 2003, s 83ZN(2).

⁸⁵ Credit Contracts and Consumer Finance Act 2003, s 83ZN; and Commerce Commission *Repossession Guidelines* (June 2018) at 8.

⁸⁶ Credit Contracts and Consumer Finance Act 2003, s 83E(1).

⁸⁷ Credit Contracts and Consumer Finance Act 2003, s 83G(3).

⁸⁸ Credit Contracts and Consumer Finance Act 2003, s 83H.

⁸⁹ Credit Contracts and Consumer Finance Act 2003, s 83B(2)(a).

⁹⁰ Credit Contracts and Consumer Finance Act 2003, s 83B(2)(b).

⁹¹ Credit Contracts and Consumer Finance Act 2003, s 83B(2)(c).

⁹² Commerce Commission *Repossession Guidelines* (June 2018) at 4.

5. EVIDENCE OF PROBLEMS OCCURRING AROUND DEBT COLLECTION AS COLLECTED BY MBIE IN THE 2017–2018 REVIEW OF CONSUMER CREDIT

This section sets out what MBIE found in its 2017–2018 review of consumer credit regulation, as recorded in the June 2018 Discussion Paper and Additional Information Document.

In its 2017-2018 review, MBIE found there were various problems arising in practice with debt collection in relation to consumer credit contracts.⁹³ The June 2018 Discussion Paper noted that the following problems were occurring:⁹⁴

a. False and misleading claims: The majority of Fair Trading Act-related debt collection complaints received by the Commerce Commission pertain to misrepresentation of rights. The most common types of misleading and false claims being made by debt collectors relate to the right to collect debt (including non-existent debts, debts owed to a different person, or statute-barred debt) and the amount of the debt.

b. Unaffordable repayment schedules: We have heard that it is common for debt collectors to make unaffordable repayment demands. In one example, a borrower offered the maximum of what they could afford to pay (approximately \$120 per month in repayments); the debt collector refused and demanded that double that be paid. Unaffordable repayment schedules create unnecessary additional stress and can cause or deepen hardship. We have also heard that, even where borrowers have defaulted due to difficulties in making regular payments, many debt collectors send initial letters to borrowers that demand immediate full and final payment of the debt.

c. Excessive charges (fees and interest) for debt collection: We've been told that many debt collectors charge borrowers excessively high fees to collect loans. In some cases, total collection costs are bigger than the initial loan. Examples of individual fees include a \$30 letter fee incurred when the debt is initially passed on to the debt collector and \$15 being charged per phone call.

d. Harassment: Stakeholders have raised concerns about harassment (sometimes unlawful) being used by some debt collectors as part of normal business practice. These include frequent phone calls to the borrower or their employer, and aggressive or coercive behaviour. We have heard that even after a repayment schedule is agreed, some debt collection agencies call borrowers frequently – whether or not the arrangement is being complied with – requesting them to either raise the repayment amount or repay the full outstanding amount immediately.

⁹³ The MBIE review looked across the board at all consumer credit contracts, not just problems with high cost loans.

⁹⁴ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 35 and 36.

More aggressive debt collection (and debt with higher rates of interest) is rewarded by being prioritised for repayment over other debt, which creates disincentives to collect debt responsibly (and an uneven playing field among debt collectors). Vulnerable consumers are highly unlikely to raise complaints with Police and use existing protections in criminal law.

The Additional Information Document released by MBIE with the June 2018 Discussion Paper gave more detail on problems relating to debt collection. That paper reported that:⁹⁵

Complaints to the Commerce Commission about debt collection have been steadily rising.

It is unclear whether the rise in complaints to the Commerce Commission is due to: (a) an increase in the number or use of debt collectors; (b) an increase in undesirable debt collector behaviour, or; (c) because consumers are more willing to complain when they experience an issue.

It is likely that debt collection issues are under-reported. 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.

There may be particular problems around the use by debt collectors of wage deduction authorities (this is also a practice used by some creditors prior to entry into the debt collection process). The Additional Information paper stated:⁹⁶

In some cases, wage deductions are used to obtain repayments, and we have been told that this practice may be increasing. This is problematic for people in hardship because it means that borrowers' incomes go towards debt repayments before essential items like food and bills. When they have limited income, this can also increase the probability of defaulting on a bill, thereby perpetuating debt spirals.

Regarding the issue of excessive charges for debt collection, the paper stated:⁹⁷

We've been told that many debt collectors charge borrowers excessively high fees to collect loans. Examples we've heard of include a \$30 letter fee incurred when the debt is initially

⁹⁵ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 22 and 23.

⁹⁶ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 23.

⁹⁷ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 23.

passed on to the debt collector, \$15 being charged per phone call, a monthly "arrangement fee" of \$5 for the term of the repayments, and a \$1 transaction fee per payment.

In some cases, total collection costs are bigger than the initial loan. In one example, the charges on an account were 113% more than the original amount referred to the debt collection agency.

Incurring additional costs is a reasonable consequence of not repaying a loan in the time agreed, and is a good way of motivating prompt payment. However, costs this high may be seen as disproportionate and punitive. Such costs can create debt spirals, trapping individuals into many years of repayments, and perpetuating hardship.

On the subject of harassment, the paper reported:⁹⁸

The Commerce Commission's 2016 consumer issues report noted that there are growing numbers of complaints in this area.

Examples of harassment include:

- a. 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.*
- b. Aggressive or coercive behaviour.*

⁹⁸ At 24.

6. MBIE'S PROPOSALS FOR REFORM AND WHAT HAS BEEN APPROVED BY CABINET

MBIE proposed a series of possible reforms in relation to debt collection under consumer credit contracts in the June 2018 Discussion Paper. The options were as follows:

Option A:

MBIE's first proposed reform was to require debt collectors to disclose key information at the commencement of debt collection, including the name of the original creditor, a breakdown of the amount owing, information about the debtor's rights, and contact information for financial mentors.⁹⁹

Option B:

Secondly, MBIE proposed that debt collectors should have to offer the debtor a new affordability assessment for the purpose of determining a new affordable repayment schedule.¹⁰⁰

Option C:

Thirdly, MBIE proposed that appropriate limits could be specified on communication between the debtor and the debt collector.¹⁰¹

Option D:

Fourthly, MBIE proposed that debt collectors which operate as agents for the original lender become subject to the CCCFA.¹⁰²

Option E:

Finally, to prevent unreasonable debt collection fees from being charged to the debtor, MBIE proposed that external debt collection fees become cost-based.¹⁰³

⁹⁹ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 36 and 37.

¹⁰⁰ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 37.

¹⁰¹ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 37.

¹⁰² Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 38.

¹⁰³ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 38.

Of these proposals, the only reform in this area that was recommended by MBIE was Option A: increasing the disclosure requirements at the beginning of the debt collection process.¹⁰⁴ The September 2018 Regulatory Impact Statement stated that Option A was recommended because:¹⁰⁵

[Option A] has significant benefits, especially around improved transparency and enhanced self-enforcement opportunities. Accurate information would benefit debtors, who could more readily understand the debt, work with debt collectors to establish a repayment plan, and challenge the debt if necessary. It would also benefit debt collectors, who could resolve the debt more readily if all parties understood key facts of the loan.

It has comparatively few costs, given that debt collectors indicated in their submissions that they already undertake a level of disclosure. Compliance costs will be higher for all debt collectors, and there is a small risk that some debt collectors will use fraudulent documents. On balance, we consider that the benefits to consumers outweigh the costs to lenders.

...

There was broad support for this option, including from some dispute resolution schemes, a lender, a debt collector, and a consumer advocate. The Financial Services Federation (and several other submissions from debt collectors) noted that ‘responsible’ debt collectors already provide most of the information specified in this option “as standard practice at the commencement of debt collection action”.

Option A was approved by Cabinet and is now (August 2019) included in the Credit Contracts Legislation Amendment Bill.¹⁰⁶

Debt Collection Option B (require debt collectors to offer an affordable repayment plan) was not recommended because MBIE received “insufficient information to accurately assess the extent and probability of the costs and benefits”.¹⁰⁷ The perceived risks included a concern that it would become more difficult for debt collectors to recover their costs and recovery rates may reduce. It may also create incentives for creditors to take alternative enforcement action, such as repossession or court proceedings in preference to debt collection, which may result in greater consumer harm than the status quo.

¹⁰⁴ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 56.

¹⁰⁵ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 56.

¹⁰⁶ Credit Contracts Legislation Amendment Bill 2019 (131-1), cl 42.

¹⁰⁷ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 56, F5.1.

Option C (limit contact between the debt collector, borrower and other persons) was also considered too risky because of the likely reduction in 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, which may have negative effects for debtors. Again, MBIE recorded that it had received insufficient information to accurately assess the extent and probability of the costs and benefits.¹⁰⁸

Option D (make third-party debt collection agencies directly subject to the CCCFA) was rejected because it would not effectively address consumer harm in relation to debt collection and would not address concerns about debt collection that was not in relation to consumer credit.¹⁰⁹

Option E (make external debt collection fees cost-based) was rejected because it “may not result in lower costs of debt collection for consumers.”¹¹⁰

¹⁰⁸ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 56, F5.1.

¹⁰⁹ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 56, F5.1.

¹¹⁰ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 56, F5.1.

7. WHAT SUBMITTERS TO THE JUNE 2018 DISCUSSION PAPER SAID

Significant evidence of poor debt collection practices emerged from the submissions made to the June 2018 Discussion Paper.¹¹¹ Many submitters (notably financial mentors and consumer advocates) provided evidence of the problems faced by debtors, in particular harassment by debt collectors and demands for unreasonable repayments.

Lenders and lender industry bodies wrote at length on debt collection and were generally against the reforms (excluding Option A, which was supported by five lenders,¹¹² as well as the Financial Services Federation and the New Zealand Bankers Association). There was significant push back on Option E in particular, which proposed putting limits on the costs that could be charged to debtors. However, several lenders and industry bodies were in favour of New Zealand adopting guidelines around debt collection practices modelled on those that operate in Australia, including: Sunshine Loans, Rapid Loans, the Financial Services Federation, Baycorp, Intercoll and Illion.

There were mixed views on what level of contact with a debtor was appropriate. Some lenders mentioned three times per week as a reasonable level of contact (for example, Sunshine Loans suggested three times per week until a repayment plan is put in place, then no contact unless that is breached).¹¹³

A key theme of the lenders' submissions was that the same regulation which applies to lenders that conduct debt collection in-house should apply to third-party collectors (whether they are agents or debt purchasers), otherwise some types of debt collectors will be advantaged and that will create incentives to use less regulated collection avenues. Additionally, lenders advocated for proper research to uncover what poor practices are actually happening (on the basis that consumer advocates may be exaggerating the problems).

In its September 2018 Regulatory Impact Statement, MBIE stated that the content of the submissions suggested that there are significant problems around debt collection. MBIE referred to the Commerce Commission's submission, which noted that most Fair Trading Act-related debt collection complaints that it received related to misrepresentations made by

¹¹¹ Submissions are accessible at <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=>

¹¹² ANZ (partial disclosure only), BNZ (for debt collectors), DCO Finance, Rapid Loans, and Sunshine Loans.

¹¹³ Rapid loans and Sunshine loans. Further, Illion supported a code of practice; and Full Balance and BayCorp supported prescriptive contact measures like Australia.

debt collectors in breach of the Fair Trading Act 1986.¹¹⁴ The Commission noted that false and misleading claims impact the debtor's ability to dispute the debt. MBIE also referred to the Citizens Advice Bureau's submission, which noted that most debt collection enquiries that it received were related to costs charged by debt collectors.¹¹⁵

MBIE also recorded that debtors being pressured to agree to unaffordable repayment schedules was an issue and that wage deductions were also problematic. Additionally, MBIE reported the concern from submitters that harassment was becoming increasingly common, and cited an example where "a client [was] visited by a debt collection agency (in his home and the home of his wife's parents) every other day" and subjected to misleading threats, including "threats to repossess all their household goods [and] to get the client fired from his job".¹¹⁶ MBIE concluded that the submissions demonstrated that "genuine issues do exist, and are not localised to one particular area or collection agency".¹¹⁷

However, MBIE felt that it was operating under constraints, for example, it had received conflicting evidence on whether the problems are being caused by a small number of non-compliant debt collectors or whether the poor conduct was more widespread, and conflicting evidence regarding the prevalence or harassment; while consumer advocates provided many examples of harassment, some lenders and debt collectors claimed to have clear policies that limited the contact with debtors. MBIE also acknowledged the likely under-reporting of problems by consumers because vulnerable consumers are generally less likely to speak up and more likely to be the subject of debt collection action. Finally, MBIE noted that there is very little quantitative information on the extent of problem.

¹¹⁴ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 49, F2.1.

¹¹⁵ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 49, F2.1.

¹¹⁶ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 49, F2.1.

¹¹⁷ Ministry of Business, Innovation and Employment *Coversheet: Consumer Credit Regulation Overview* (24 September 2018) at 49, F2.1.

8. EVIDENCE OF DEBT COLLECTION PRACTICES FROM RESEARCH DONE SINCE THE MBIE REVIEW WAS COMPLETED

Further evidence of poor debt collection practices emerged from research undertaken in December 2018 by the Justice Innovation Centre Community Law Canterbury. The final report resulting from that research, entitled *Survey of financial mentoring and budgeting services in Aotearoa on high cost loans, debt collection and other consumer credit issues*¹¹⁸ reported that:¹¹⁹

On average, across [budgeting] agencies, it appears that around half of clients have been referred to debt collectors. ...

Debt collection doesn't come free. Agencies are almost unanimous (96%) that it is very common (somewhat common = 4%) for debt collectors to add additional fees and costs to the debt, in the process of seeking to have it repaid.

As well, it is common for interest on debts to continue to be charged when they have been passed to a debt collector.¹²⁰ With only two or three dissenting voices, budgeting agencies decried this practice:

NO NO NO! We need to stop the clock and allow people to take responsibility for what they are trying to deal with without ongoing penalties.

No The debt has been sold on with the Debt Collection fee added that should be the final amount owing.

Definitely not. Understand a fee, but this too should be reasonable and standardised, there is huge variation between collection agencies.

¹¹⁸ Liz Gordon *Survey of financial mentoring and budgeting services in Aotearoa on high cost loans, debt collection and other consumer credit issues* (Justice Innovation Centre: Community Law Canterbury and FinCap, February 2019). Available from [<https://www.fincap.org.nz/big-changes-needed-to-protect-consumers-from-high-cost-loans-and-debt-collection-practises/>].

¹¹⁹ Justice Innovation Centre Community Law Canterbury *Survey of financial mentoring and budgeting services in Aotearoa on high cost loans, debt collection and other consumer credit issues* (2019) at 24.

¹²⁰ This conflicts with the evidence received by MBIE which noted that one submitter said: "it is the general practice that any interest component ceases being charged since the customer attracts this collection cost." *Ministry of Business, Innovation and Employment "Consumer Credit Regulation Overview" Regulatory Impact Statement* (24 September 2018) at F2.1.

Feel all interest should be frozen until repayment plan is established. Companies who sell debt to collection companies - collection companies should pay for privilege of collecting the debt.

No. If it has gone to a debt collector because they could not pay anyway why carry this on?

No. The company that has passed the debt on has cut their losses and were not getting paid at all so recovering the debt that is outstanding at the point of being passed on to debt collectors should suffice. If the debt collectors are charging interest it just makes it even harder for the client to repay the debt and means that they are in the same position as when the debt was with the originating company.

No, have found also that the creditor and debt collection agency set fees as a percentage and they would not be regarded as fair and reasonable. example - mortgagee sale - \$32,000 added and client had 2 letters only, insolvency will be only option for client.

... Aside from the question of collection costs and interest, the survey explored what other practices by debt collectors were experienced by agency clients, whether helpful or punitive.

The most common practices ... are also the most punitive, except that an old practice of knocking on neighbour's doors appears to have been significantly reduced due, perhaps, to privacy concerns. A couple of agencies commented that debt collectors can show a human face:

We do have the odd collector who is quite engaging and wants to help their customer when applying for hardship.

Some companies can be helpful when they know the client is working with a budget adviser to try to resolve the debt.

But most of the "other" practices cited by agencies are punitive. Several noted debt collectors approaching employers about the person's debt. Some note demands for direct payments from benefits, leaving "no essentials money available (food and rent)".

...

Other practices include the use of private investigators, attachment orders, Facebook 'stalking', text messaging, emails or threats to repossess goods.

A couple of agency responses noted that clients make it harder for themselves:

Mixed results due to persons ability to articulate their personal situation

Unfortunately, many of these clients ignore the first approaches and only seek help when there is nowhere else to avoid paying and need to seek other sources to loan money

Finally, several agencies outlined some disturbing financial practices:

Write off one part but replace it with a MUCH larger amount. BULLY tactics.

Threats to repossess, offers to defer interest if the client takes out more debt with same company

Threatening to take further action BUT if they pay in full including a little bit of interest then no further action will be taken.

The issue of debt collection evoked quite passionate responses from local financial capability and budgeting agencies, and is worthy of further study. One person noted that these questions should really be directed at the clients themselves, so a future study may involve interviews with clients.

9. ISSUES NOT ADDRESSED BY THE PROPOSED REFORMS

a. Unaffordable repayment schedules

A repayment schedule is the agreement between the debtor and creditor regarding paying down the debt.¹²¹ According to financial mentors, these agreements currently are generally dictated by debt collectors, and debt collectors do not always accommodate the financial position of the debtor. There is evidence from financial mentors that some debt collectors are difficult to negotiate with, "having a predetermined amount that they won't go below even if the consumer can't afford it",¹²² and some are "extremely aggressive".¹²³

The lack of regulation over the way that repayment schedules are agreed means that debt collection practices can have oppressive or otherwise detrimental effects on the debtor.

Some debtors (based on the evidence of financial mentors) have mental health issues, physical and intellectual disabilities, or are financially illiterate. These factors, coupled with financial stress, mean that the debtor is at a comparative disadvantage when it comes to bargaining. This disadvantage can be exacerbated by the debt collector turning up at a debtor's house unannounced.

Some debtors agree to a repayment plan that they cannot afford "because they just want [debt collectors] off their backs".¹²⁴ There is also evidence that contact does not cease once a plan is agreed and collectors may continue to request larger repayments.¹²⁵ This is illustrated by the following example reported by the Marton and Districts Budgeting Service:¹²⁶

"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

¹²¹ Note that the following section includes quotes from a questionnaire that FinCap sent out to budgeting services on 3rd July 2018 asking for feedback on the June 2018 Discussion Paper. These responses were used in FinCap's (then called the National Building Financial Capability Charitable Trust) submission to the June 2018 Discussion Paper and a list of budgeting services who responded to this questionnaire can be found at the end of the submission. This submission can be found at <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=>

¹²² Compassion Trust Budget Service, Christchurch.

¹²³ Whangarei Budgeting Service.

¹²⁴ Nelson Budget Service, Te Ratonga Whakarite Putea o Whakatu.

¹²⁵ Wellington City Mission.

¹²⁶ Marton and Districts Budgeting Service.

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."

b. Harassment

The issue of harassment by debt collectors was highlighted by the Minister in the June 2018 Discussion Paper.¹²⁷ The frequency, type and content of the contact made with the debtor is a source of great stress for debtors. There is also evidence that some debt collectors display aggressive behaviour to debtors, such as threatening court action if the debtor is unable to pay.¹²⁸ These factors can lead to debtors paying more than they can afford to minimise contact with debt collectors.

Stories of how debt collection affects clients' mental health were provided by budgeting services in the questionnaire FinCap sent out for feedback on the June 2018 Discussion Paper.¹²⁹ For debtors who have anxiety or other mental health problems, the confrontational communication and the pressure placed on debtors can exacerbate their existing conditions.

Financial mentors, when acting on behalf of debtors, often have trouble making contact with debt collectors. Services see many instances where debt collection agencies avoid working with the financial mentor, for example by refusing to answer phone calls or provide requested information. Services perceive that it is in the interests of debt collection agencies to be uncooperative because that means more interest and fees accrue on the loan.¹³⁰ Once financial mentors sign on as the point of contact for the debt collector, financial mentors themselves are sometimes harassed for greater sums.¹³¹

¹²⁷ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 36.

¹²⁸ Cabinet Economic Development Committee *Review of Consumer Credit Regulation* (10 October 2018) at 24; Susan Edmunds "I owe money, but do debt collectors have to chase so hard?" (18 January 2019) Stuff <www.stuff.co.nz>. <https://www.stuff.co.nz/business/109991629/i-owe-money-but-do-debt-collectors-have-to-chase-so-hard>

¹²⁹ Northern Community Budget Service, Kerikeri reports that "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".

¹³⁰ Tim Barnett *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 5 September 2018) at 34. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=&start=70>

¹³¹ Wellington City Mission.

Financial mentors found that contact between the debt collector and the debtor is often at a frequency that causes stress to the debtor. As an illustration, one debt collector states in their paperwork “unless the debtor pays their minimum, calls, emails and letters will still be actioned by the collector”.¹³² FinCap stated in its submission to MBIE’s June 2018 Discussion Paper “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.”¹³³

The Wellington City Mission reported that some collectors hold themselves out as lawyers and threaten legal action if the debt is not paid.¹³⁴ The current law requires that debt collectors do not mislead debtors by stating that debtors will be responsible for legal costs if the matter is taken to court.¹³⁵

c. Excessive fees charged for debt collection

Fees and charges are commonly added to a debt when it goes to debt collection to cover the costs of collection. Generally, these fees are provided for in the original lending contract in broad terms, for example in language such as “all costs associated with debt collection will be borne by the debtor.”

Default fees can be added onto the debt after the debt collection process starts, which includes third party and enforcement costs. The CCCFA distinguishes between default fees and default interest rates. A default interest rate is a higher interest rate charged if a borrower breaches a credit contract, such as by missing payments or going over a credit limit.¹³⁶ This default interest rate can only be applied to the amount of the default, not the whole unpaid balance of the loan, and while the default continues.¹³⁷

Default fees are fees payable on a breach of a credit contract by a borrower or on the enforcement of a credit contract by a lender. This means that debt collection fees that are charged by the lender (or an assignee of the lender) are costs that come within the definition

¹³² Tim Barnett *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 5 September 2018) at 30. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=&start=70>

¹³³ National Building Financial Capability Charitable Trust submission to the Discussion Paper “Review of Consumer Credit Regulation” June 2018.

¹³⁴ Wellington City Mission.

¹³⁵ “Debt recovery by a debt collection agency” in *Community Law Manual* (2018). <http://communitylaw.org.nz/community-law-manual/chapter-24-credit-and-debt/debt-recovery-and-enforcement/debt-recovery-by-a-debt-collection-agency/>

¹³⁶ Credit Contracts and Consumer Finance Act 2003, s 5.

¹³⁷ Credit Contracts and Consumer Finance Act 2003, s 40.

of a default fee as these costs relate to steps taken to enforce repayment of a debt.¹³⁸ These fees must not be unreasonable under s 44A of the CCCFA, which provides that in determining whether a default fee is unreasonable, the court considers the matter giving rise to the fee and whether the fee reasonably compensates the creditor for any cost they incur, and is the fee a reasonable estimate of any loss incurred by the creditor as a result of the debtor's acts or omissions. In determining whether the fee reasonably compensates the creditor for any cost and loss, the court must have regard to reasonable standards of commercial practice.¹³⁹ The "matter giving rise to the fee" means the transaction-specific activity to which the credit fee relates.¹⁴⁰ "Reasonably compensates" means that the fee should recover only the reasonable cost of the loan-related activity and cannot include any profit or the recovery of any cost that does relate closely to the activity for which the fee is charged. The "reasonable standards of commercial practice" consideration is subordinate to the principle that fees should only reasonably compensate the lender and is not a separate test. Reference to commercial practice only informs the main test, which concerns compensating for any cost or loss incurred by the creditor, but this is not determinative on its own.¹⁴¹ This is because a common commercial practice may not necessarily be a reasonable standard of commercial practice, which was confirmed by the Supreme Court in *Sportzone Motorcycles Ltd (in liq) v Commerce Commission*.¹⁴²

Default fees must not exceed the total of any cost incurred by the lender and a reasonable estimate of the lender's loss, and the loss recovered must be a result of the borrower's acts or omissions which means that the lender cannot recover loss caused by some other borrower or class of borrowers. Default fees differ from credit fees because default fees allow the lender to recover their reasonable losses, which needs to be of a kind that is within the contemplation of the parties to the loan. A default fee must be a genuine estimate of future loss and not a penalty to deter the borrower from defaulting.¹⁴³

Section 11 of the CCCFA defines a consumer credit contract as a credit contract where interest or credit fees are payable under the contract.¹⁴⁴ The definition of 'creditor' includes the original lender and any person who has taken an assignment of the creditor's rights (but not

¹³⁸ Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 27.

https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

¹³⁹ Credit Contracts and Consumer Finance Act 2003, s 44A.

¹⁴⁰ Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 21.

https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

¹⁴¹ New Zealand Government *Responsible Lending Code* (Revised June 2017) at cl 10.7.

¹⁴² *Sportzone Motorcycles Ltd (in liq) v Commerce Commission* [2016] NZSC 53, [2016] 1 NZLR 1024 at [93] and [94]; and Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 22.

https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

¹⁴³ Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 28.

https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

¹⁴⁴ Credit Contracts and Consumer Finance Act 2003, s 11.

the agent). Accordingly, debt collectors (in house or assignees of the debt) that charge fees are covered by the CCCFA (and the Responsible Lending Code), which states that fees should be reasonable. Debt collection agents are not directly subject to that requirement. Nor are agents subject to the limits on default fees in s 44A. The lender is subject to s 44A, but if the agent charges an excessive fee for its services, that becomes a “cost incurred by the creditor”.

Default fees include collection and enforcement costs passed on to the borrower from a lender’s agent where the lender outsources the collection of debt or the enforcement of a loan. The Commerce Commission view is that if a lender can establish a sufficiently close connection between debt recovery costs and the particular default, an appropriate apportionment of the costs can be charged.¹⁴⁵ MBIE suggested in the June 2018 Discussion Paper that it was unclear how the requirement that default fees must not be unreasonable applies to fees charged by an external debt collector (in other words, a debt collection agent).¹⁴⁶ In MBIE’s view the current law “leaves wide latitude for third-party debt collectors to charge high fees to the borrower, and creditors currently have weak incentives to limit these.”¹⁴⁷

Sections 83ZB and 83ZE of the CCCFA relate to costs payable by a borrower who seeks to reinstate or settle a contract after repossession of secured items, which are not deemed default fees. These costs of repossessing, storing or repairing goods or preparing the goods for sale must be reasonable and only relate to the lenders’ actual reasonable costs. Where these repossession fees relate to costs that the lender incurs from a third party who is not associated¹⁴⁸ with the lender, then the fee is not subject to a reasonableness assessment as described above. Instead, the lender must pass on the fee at cost and cannot add a margin to it. Fees charged by an associated third party are deemed credit fees and are subject to a reasonableness assessment.¹⁴⁹

The Commerce Commission took action against Receivables Management, who acquire debt, loans and receivables and handle debt collection, which resulted in a settlement agreement dated 15 December 2017. Receivables Management acts as creditors under consumer credit contracts and collect debts and monies on behalf of third party clients. Receivables Management represented that they or their clients had the right to add interest and fees to some debtor accounts after repossession and sale action. Although the actions concerned

¹⁴⁵ Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 31.

https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

¹⁴⁶ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 38.

¹⁴⁷ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 74.

¹⁴⁸ Credit Contracts and Consumer Finance Act 2003, s 8A.

¹⁴⁹ Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 29.

https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

occurred when the Credit Repossession Act was still in force, the obligation under s 35 of this Act prohibited a creditor from recovering more than the balance outstanding after deducting the net proceeds from the sale of those assets from the amount owing by the debtor. The debtor's obligation is frozen at this shortfall on sale, so that the creditor is not entitled to add ongoing interest and fees. This prohibition is reaffirmed by s 83ZM of the CCCFA. This representation is also prohibited by s 13(i) of the Fair Trading Act 1986 which prohibits false and misleading conduct in trade.¹⁵⁰ Receivables Management undertook a review of their loan book as part of this investigation, which identified that \$1,408,358.56 in interest and fees were added to 1,698 loans after repossession and sale action had been taken. Receivables Management agreed to refund all affected debtors who have been overcharged interest and to cease charging interest and fees in respect of loans where repossession and sale action has been taken.¹⁵¹

Fees that do not fall under ss 83ZB and 83ZE are default fees and are therefore subject to the reasonableness assessment whether or not the third party is associated with the lender. The association with the lender will be relevant to determine whether the fee is consistent with reasonable standards of commercial practice. In assessing whether a default fee that seeks to recover third party collection or enforcement costs will be reasonable, the Commerce Commission will consider:¹⁵²

- “Whether the fee recovers no more than the actual, or reasonably estimated, cost incurred by the lender (i.e. the amount charged, or expected to be charged, to the lender by the third party). The third party fee may incorporate a profit component, provided that the fee paid by the borrower is not unreasonable;
- Whether the type of fee, and the amount of the fee, is consistent with reasonable standards of commercial practice (for example whether the amount of the fee is significantly higher than would have been charged by a reasonable collection agent);
- The relationship between the lender and the collection agent. For example, if the collection agent is associated with, or otherwise closely connected to the lender, the Commerce Commission will consider whether the lender is using the collection agent

¹⁵⁰ Commerce Commission *Commerce Commission and (1) Receivables Management (NZ) Limited (2) Southern Receivables Limited (3) Allied Recoveries Limited (4) RJK Receivables Limited: Settlement Agreement with Enforceable Undertakings* (15 December 2017) at 3.

https://comcom.govt.nz/data/assets/pdf_file/0041/69998/Receivables-Management-settlement-agreement-15-December-2017.PDF

¹⁵¹ Commerce Commission *Commerce Commission and (1) Receivables Management (NZ) Limited (2) Southern Receivables Limited (3) Allied Recoveries Limited (4) RJK Receivables Limited: Settlement Agreement with Enforceable Undertakings* (15 December 2017) at 4.

https://comcom.govt.nz/data/assets/pdf_file/0041/69998/Receivables-Management-settlement-agreement-15-December-2017.PDF

¹⁵² Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 29.

https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

to avoid the prohibition against recovering profits or non-transaction specific costs; and

- Whether, in the circumstances, it is otherwise reasonable for the lender to recover a fee of that amount from the borrower. For example, if the amount of the default fee significantly exceeds the amount in default or the lender is unreasonably receiving payment or commission from the third party.”

If a lender provides for a fee in a credit contract, which includes default fees or fees under ss 83ZB or 83ZE, that seeks to recover third party collection costs, they are still subject to the oppression provisions in the CCCFA, in that these fees must not be oppressive.¹⁵³

In a research report by Dr Liz Gordon from the Justice Innovation Centre, Community Law Canterbury, budget agencies were almost unanimous (96% of budgeting agencies surveyed) that it is very common for debt collectors to add additional fees and costs to the debt, in the process of seeking to have it repaid.¹⁵⁴ Examples of individual fees that debt collectors charge included a letter fee and phone call fee. FinCap and MBIE have evidence of debt collectors charging a \$30 letter fee when the debt is initially passed onto the debt collector and a fee of \$15 per phone call made to the debtor. MBIE has evidence of a monthly “arrangement fee” of \$5 for the term of the repayments and a \$1 transaction fee per payment being charged.¹⁵⁵ The Commerce Commission included in its submission to the June 2018 Discussion Paper evidence of high debt collection fees. An example involved a third party debt collector who added collection costs of 30% of the debt to a debtor’s account. The collection costs were \$8,762.64 added by a third party debt collector to an original debt of \$29,335.79, making the total debt \$38,088.43. Another example of high debt collection fees include collection fees of \$11,796.87 added by a third party debt collector to an original debt of \$46,161.79, making the total debt \$57,958.56.¹⁵⁶

¹⁵³ Credit Contracts and Consumer Finance Act 2003, pt 5; and Commerce Commission *Consumer Credit Fees Guidelines* (June 2017) at 29. https://comcom.govt.nz/data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-June-2017.pdf

¹⁵⁴ Liz Gordon *Survey of financial mentoring and budgeting services in Aotearoa on high cost loans, debt collection and other consumer credit issues* (Justice Innovation Centre: Community Law Canterbury and FinCap, February 2019) at 24. Available from <https://www.fincap.org.nz/big-changes-needed-to-protect-consumers-from-high-cost-loans-and-debt-collection-practises/>.

¹⁵⁵ Tim Barnett *Submission to the Finance and Expenditure Select Committee on the Credit Contracts Legislation Amendment Bill* (Ministry of Business, Innovation and Employment, 14 June 2019) at 59; and Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 23.

¹⁵⁶ Commerce Commission *Commerce Commission submission on Discussion Document: Consumer Credit Regulation* (1 August 2018) at 67. Available from [<https://www.mbie.govt.nz/dmsdocument/4056-commerce-commission-consumer-credit-regulation-review-submission-pdf>].

Examples of fees charged by third party debt collectors that the Commerce Commission has reviewed included:¹⁵⁷

- a) A contingent debt fee of 25% charged for each repayment instalment paid by a debtor.
- b) Several collectors charging a commission of 20%.
- c) 25% to 45% commission charged on recovered monies depending on the size of the debt. The same collector also added a 15% margin to third party disbursements and fees.
- d) Information gathered from several debt collectors' websites detailed that a commission charged for collection can range from 15% to 45% depending on the size, age and history of the debt.

According to a letter of demand sent to a debtor by a debt collection agency that was included in FinCap's submission to the June 2018 Discussion Paper, there is evidence of a debt collection agency threatening to commence legal proceedings to satisfy a debt, unless the debtor settled the day within seven days of receiving the letter of demand. If judgment was obtained, the debt collection agency said it could take the following steps:¹⁵⁸

- a) "Apply for a Distress Warrant whereby a Court Bailiff seizes goods and sells them to satisfy the debt.
- b) Apply for a Garnishee Order which would attach to any monies owed to you by a third party, to enable our client to have that money paid to [redacted].
- c) Subject to certain other steps not having realised monies for our client, then apply to the Court to sell any land owned by you.
- d) Apply for an Order of Examination. If you do not comply with this Order, you may then receive a Contempt of Court Order and be liable to be arrested and brought before the Court for oral examination. If after examination by the Court, you refuse to pay the amount owing, you may be liable to undergo Community Service for up to six months. An order of Community Service will not extinguish or affect the liability of you to pay the amount outstanding.
- e) Make application for an Attachment Order whereby your employer is required to make compulsory salary or wage deductions to help to pay the debt.
- f) After examination by the Court, make application for an Attachment Order to WINZ to make deductions from any benefit to which you may be entitled.
- g) Take proceedings to have you declared bankrupt."

¹⁵⁷ Commerce Commission *Commerce Commission submission on Discussion Document: Consumer Credit Regulation* (1 August 2018) at 67. Available from [<https://www.mbie.govt.nz/dmsdocument/4056-commerce-commission-consumer-credit-regulation-review-submission-pdf>].

¹⁵⁸ Tim Barnett *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 5 September 2018) at 57. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=&start=70>

At the end of this letter, the debt collection agency stated that judgment would adversely affect the debtor's credit rating. The letter also stated that the debt collection agency could increase the total amount outstanding "substantially" by including further costs and interest.

FinCap stated in its submission to the June 2018 Discussion Paper that it had evidence of debt collection fees of up to 30% of the principal loan.¹⁵⁹ In the submission, FinCap referred to a media article where a bank on-sold a debt of \$13,000. A debt collection fee of \$3,100 was added, being 25% of the outstanding principal amount of the loan to be paid.¹⁶⁰ MBIE stated it had evidence of one case where debt collection charges were 113% more than the original amount that was referred to the debt collection agency.¹⁶¹ Newtown Budgeting and Advocacy Service, in their answer to the survey that FinCap sent budgeting services regarding the June 2018 Discussion Paper, reported that debt collection fees add 20% to the total cost of the loan, but once a loan is passed onto a debt collector, the accrual of interest and fees on the original loan (as distinct from debt collection costs) typically stops.¹⁶²

Debt collector Intercoll, in its submission to the June 2018 Discussion Paper, stated that it did not charge debt collection fees once a debt has gone to debt collection (via debt purchasing). Intercoll stated that it was "unique" in this respect:

*"No charges are to be added on purchased or assigned debt. This includes interest (pre or post Judgment), loading costs, quarterly payment fees or traces fees even if the initial contract makes provision for the addendum of these costs. Our belief is that a debtor who has not paid a debt for a time period sufficient to cause the debt to be assigned needs to be fiscally rehabilitated and not kept in a state of constant payment. We believe to keep adding charges to an account is at the detriment to our industry. It is our belief that we are unique in respect to the zero fees addendum and that we have been for many years."*¹⁶³

¹⁵⁹ Tim Barnett *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 5 September 2018) at 33. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=&start=70>

¹⁶⁰ Nine To Noon "Living and retiring in debt" (25 July 2018) Radio New Zealand <www.rnz.co.nz>. <https://www.rnz.co.nz/national/programmes/ninetoonoon/audio/2018655098/living-and-retiring-in-debt>

¹⁶¹ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 24.

¹⁶² Newtown Budgeting and Advocacy Service.

¹⁶³ Intercoll Ltd *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 30 July 2018) at 4. Presumably the expected costs of recovering the purchased debt are factored into the price paid for the debt. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+intercoll&df=01%2F05%2F2018&dt=31%2F12%2F2018&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=>

d. Other issues

When a debt is on-sold to a debt purchaser, the original lender remains responsible in law to prove that the Principles were adhered to (up to the point of sale), in particular that the affordability assessment was undertaken (and to provide evidence of the affordability assessment done, to the debtor or their advocate). The experience of services is that the original lender is often uncooperative once a loan is on-sold, typically saying that they are no longer responsible for any legal obligations in relation to it.¹⁶⁴

10. OPTIONS FOR ADDRESSING ISSUES WHICH REMAIN AFTER THE CCLAB

a. Unaffordable repayment schedules

Option B in the June 2018 Discussion Paper was to require all debt collectors to offer repayment plans that were affordable.¹⁶⁵ This would require debt collectors to do a new affordability assessment at the start of the debt collection process. Coupled with a regulated contact regime, the pressure to repay debt at a higher rate than the debtor can afford would likely be reduced.

It is often the case that individuals going through debt collection are under financial pressure, which is why they have not paid their debts. Affordability assessments at all levels (lending and debt collection) that are properly carried out are beneficial to both parties. Affordable repayment agreements will mean that debt collectors can be more confident that the payments will be made and that debtors are not going without the necessities to meet their obligations.

There was not strong opposition from the debt collection community regarding this Option. The New Zealand Bankers' Association was not opposed to it but noted that:¹⁶⁶

¹⁶⁴ Budget Service Marlborough.

¹⁶⁵ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 37. Debt collection is used in the June 2018 Discussion Paper to refer to all recovery action taken after a consumer defaults on a loan, including in-house debt collection, a debt collection business acting as an agent of a creditor, or a debt collection business buying debt from lenders before pursuing it, see page 35.

¹⁶⁶ New Zealand Bankers Association *Submission to the Ministry of Business, Innovation and Employment on the Discussion paper: Review of consumer credit regulation* (Ministry of Business, Innovation and Employment, 1 August 2018) at [86]. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+new+zealand+bankers+association&df=01%2F05%2F2018&dt=31%2F12%2F2018&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=>

“If this option were to be adopted, the requirement should allow for variation to the repayment plan by mutual agreement to reflect a change in circumstances. For example, a consumer may be unable to repay a debt due to losing his or her job. A repayment schedule would be agreed on that basis. However, if the consumer then obtains a new job, and his or her affordability materially improves, it is in both the borrower’s and the lender’s interests to update that repayment schedule.”

Small loan provider DCO Finance submitted in support, and noted that contact between the debt collector and debtor after the repayment plan is made should be minimal:¹⁶⁷

“I would imagine that regarding payment arrangements, contact after an arrangement has been finalised should not be more than once every three months to see if the situation has changed (if there is a reasonable expectation that it could have changed). For example, if the affordable repayment plan were for say \$5 weekly, it would be perfectly reasonable for the lender to send a free letter to the borrower (or budgeter) every three months to see if there were a change in circumstances that enabled a higher payment plan to be established. If there has been no change, the existing plans continues. If there has been a change, a new plan is negotiated accordingly with the same holistic approach.”

The best option for addressing unaffordable repayment schedules may be to create a requirement for debt collectors to negotiate affordable repayment schedules with debtors and to regulate the way in which those repayments are agreed. Other options include:

- educating debt collectors about dealing with debtors facing mental health and intellectual disability issues, similar to the United Kingdom’s Mental Health Advisory Group advice;¹⁶⁸
- creating regulations around the information that must be obtained by the debt collector when negotiating a repayment schedule in order to ensure that the debtor can afford to meet the repayments; and
- expressly providing, in regulation, for the right of debtors to have representation when negotiating repayments.

¹⁶⁷ DCO Finance Ltd *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 4 September 2018) at 19. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=&start=10>

¹⁶⁸ Money Advice Liaison Group *Good Practice Awareness Guidelines for helping consumers with mental health conditions and debt* (United Kingdom, 2015).

b. Harassment

In Australia there is clear regulation about what contact is appropriate depending on the stage of negotiation in its guidelines on debt collection practices, and there is emphasis on limiting contact as much as possible.

Debt collection agency Baycorp noted that, although it was not required to, it was already adhering to the Australian standard in its New Zealand operations:¹⁶⁹

“Baycorp also operates in Australia and has other obligations that are not necessarily observed in New Zealand, such as requirements under the Australian Securities and Investments Commission & Australian Competition and Consumer Commission Debt Collection Guideline, and the Australian Collectors and Debt Buyers Association Code of Practice (collectively Australian Collection Guidelines). 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.”

Further, Baycorp stated:

“The Australian Collection Guidelines thoroughly address debt collection practices and outline what is considered reasonable. They also address the issue of contact with customers before and after a payment arrangement is entered into.

In compliance with the Australian Collection Guidelines, Baycorp does not contact customers after a payment arrangement has been agreed, unless:

- *the customer does not meet the terms of that arrangement, or*
- *the purpose is to review that arrangement after a period of 90 days (as advised when the arrangement is set), or*
- *Baycorp wants to provide the customer with an alternate solution to their debt, which is beneficial to them.*

The likely impacts of the above are:

¹⁶⁹ Baycorp Submission on discussion document: Consumer Credit Regulation Review (Ministry of Business, Innovation and Employment, 5 September 2018) at 1-2. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=&start=20>

• *Borrowers will benefit from an industry wide standard of acceptable debt collection practices. They will also benefit from less contact from debt collection agencies if they are making agreed payments.*¹⁷⁰

Some submitters were not in favour of regulating contact between the debtor and debt collector, at least where debt to the government is concerned.¹⁷¹

The best option for addressing issues around harassment may be to set clear regulations similar to those in the Australian Debt Collection Guidelines.¹⁷² A definition of harassment as regards debt collection gives debt collectors clarity about appropriate processes and is a way of debtors understanding their rights. Specific regulations such as “contact more than 3 times per week or 10 times per month may amount to harassment” leave little room for misinterpretation or abuse. Harassment regulation should cover all types of contact (be it via email, social media, or in person), appropriate times for contact, and when the debtor has the ability to request that a debt collector cease contact. See the next section of this paper for more detail on the Australian Guidelines.

c. Excessive fees charged for debt collection

The current (August 2019) reasonableness standard for default fees in relation to consumer credit contracts is whether the fee reasonably compensates the creditor for any cost incurred by the creditor; and whether this is in line with reasonable standards of commercial practice.¹⁷³ Debt Collection Option E in the June 2018 Discussion Paper was to make external debt collection fees cost-based, which would be an improvement on the current unreasonableness standard for default fees because this means that only the actual costs incurred by debt collectors acting as agents of creditors can be passed on to borrowers. This

¹⁷⁰ BayCorp *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 5 September 2018) at 4. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+&df=01%2F05%2F2018&dt=31%2F12%2F2018&submit=Search&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=&start=20>

¹⁷¹ Intercoll Ltd *Submission on discussion document: Consumer Credit Regulation Review* (Ministry of Business, Innovation and Employment, 30 July 2018) at 6. Intercoll supports a definition of “contact” compared to “attempted contact”. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+intercoll&df=01%2F05%2F2018&dt=31%2F12%2F2018&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=>

See also New Zealand Bankers Association *Submission to the Ministry of Business, Innovation and Employment on the Discussion paper: Review of consumer credit regulation* (Ministry of Business, Innovation and Employment, 1 August 2018) at 12. <https://www.mbie.govt.nz/document-library/search?keywords=consumer+credit+regulation+review+nz+bankers+association&df=01%2F05%2F2018&dt=31%2F12%2F2018&type%5B66%5D=66&topic%5B3%5D=3&subtopic%5B19%5D=19&sort=>

¹⁷² Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017).

¹⁷³ Credit Contracts and Consumer Finance Act 2003, s 44A.

would prevent the creditor from including a general clause in the credit contract which makes the borrower agree to pay any costs incurred by the creditor in attempting to recover amounts owing.¹⁷⁴ Any additional fees and commissions charged by the debt collector would be paid by the creditor.

It is noted in the Additional Information Document to the June 2018 Discussion Paper that current threshold for requiring the court to have regard to reasonable standards of commercial practice is a high threshold and it may be difficult to declare a fee unreasonable. This leaves a wide scope for third-party debt collectors to charge high fees to the borrower and there are currently weak incentives for creditors to limit these fees.¹⁷⁵ Making debt collection fees cost-based is an improvement on the current unreasonable fees standard because it is easier for a budgeting service or Commerce Commission to prove that fees have exceeded a cost-based threshold, rather than whether the fee charged reasonably compensates the creditor for any cost they incur which allows scope for the debt collector to charge fees above the cost they incur as long as they are closely relevant to the transactional activity.

Debt Collection Option E would “impose compliance costs on debt collectors acting as agents for creditors, who would need to separate their actual collection costs from other charges”. Also, creditors “would be left with greater costs from debt collection, which may be passed on to defaulting borrowers in the form of higher default interest rates”.¹⁷⁶ The interest rate cap on loans of 0.8% interest and fees per day introduced into the CCLAB in September 2019 may impact on the ability of lenders will be unable to pass on these costs, depending on whether default fees are included in fees that are capped.¹⁷⁷

Another improvement to the current unreasonable fees standard would be to require all debt collectors including agents to observe the substantiation obligation in Fees Option A, which was proposed in the June 2018 Discussion Paper as only applying to lenders. Debt collectors should also be required to observe this substantiation obligation, which is to calculate their fees by reference to the costs of the activities that are being recovered and to keep records

¹⁷⁴ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 38.

¹⁷⁵ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 74. Accessible at: <https://www.mbie.govt.nz/assets/3f19e04173/background-and-technical-detail-for-discussion-paper.pdf>

¹⁷⁶ Ministry of Business, Innovation and Employment *Review of consumer credit regulation: Additional information to support the discussion paper* (June 2018) at 75. Accessible at: <https://www.mbie.govt.nz/assets/3f19e04173/background-and-technical-detail-for-discussion-paper.pdf>

¹⁷⁷ Stephen Forbes “Government includes daily interest rate cap on loans as part of a bid to crack down on loan sharks and predatory lending” (3 September 2019) Interest <www.interest.co.nz>. <https://www.interest.co.nz/personal-finance/101502/government-includes-daily-interest-rate-cap-loans-part-bid-crack-down-loan>

that show how their fees have been calculated to prove that their fees are not unreasonable.¹⁷⁸ This would be an improvement to the current unreasonable fees standard because the onus should be on the debt collector to prove the costs of their activities, as the person in the best position to be able to justify the fees they charge. This provision also makes clear that lenders and debt collectors must keep records of the cost of their activities, which is unclear under the current unreasonable fees standard. Using this substantiation obligation in conjunction with the cost-based fees standard would be a more precise and easier to apply standard than the unreasonable fees standard as MBIE has received evidence that the current standard is unclear.¹⁷⁹

d. Other issues

Penalties should be imposed on lenders who claim that they have no responsibility for compliance with the CCCFA or Code (for conduct pre-sale) in relation to a debt that has been on-sold. The CCCFA could also impose legal obligations on lenders, their agents and debt purchasers to cooperate with consumer advocates.

¹⁷⁸ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 31.

¹⁷⁹ Ministry of Business, Innovation and Employment *Discussion paper: Review of consumer credit regulation* (June 2018) at 31.

11. COMPARATIVE RESEARCH: HOW DEBT COLLECTION IS REGULATED IN OTHER JURISDICTIONS

AUSTRALIA

a. Introduction

The following section sets out the law in Australia that regulates debt collection practices in relation to consumer credit contracts, on the key issues of information provision, affordable repayment schedules and contact with debtors. The key document is the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) Debt collection guideline for collectors and creditors. This guideline document explains ACCC's and ASIC's views on the consumer laws that they administer. The relevant laws are:

- The Australian Consumer Law (ACL) (which is a schedule to the Competition and Consumer Act 2010 (Cth) (CCA). The ACL is jointly enforced by the ACCC and state and territory consumer protection agencies,
- Part 2, Division 2 of the Australian Securities and Investments Commission Act 2001 (Cth), which is enforced by ASIC, and
- National Consumer Credit Protection Act 2009 (Cth) (NCCP), which includes the National Credit Code as Schedule 1 to the NCCP, which is enforced by ASIC.

The ACCC states on its website that *“This 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 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.”*

b. Providing information to debtors

Debt collectors must meet any request for information as soon as possible.¹⁸⁰ Failure to provide information about the debt may “constitute misleading or deceptive conduct or unconscionable conduct”.¹⁸¹ If a debtor requests information about an amount claimed as owing, or how that amount has been calculated, the debt collector should provide the debtor with an itemised statement of the account specifying of how the debt is calculated.¹⁸² When a debt is sold, the debtor must be informed of the sale.¹⁸³ It is important to clearly explain the consequences of the debt being sold.¹⁸⁴ The information must be provided in plain English.¹⁸⁵ Contact details, information about scheduling payments and other useful information should be available to the debtor.¹⁸⁶ The purchaser should ensure that it has all the relevant information from the original lender when it purchases the debt, in anticipation of providing it to the debtor.¹⁸⁷ The debtor should not be disadvantaged by the purchase.¹⁸⁸

When a lender uses a debt collector as their agent, the original lender remains liable for the agent’s actions.¹⁸⁹

The debtor has the right to access any personal information the debt collector holds about the debtor.¹⁹⁰ Personal information about the debtor should not be collected for purposes that are not related to the debt.¹⁹¹

¹⁸⁰ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(a).

¹⁸¹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(b).

¹⁸² Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(e).

¹⁸³ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(m).

¹⁸⁴ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(n).

¹⁸⁵ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(n).

¹⁸⁶ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(n).

¹⁸⁷ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(j).

¹⁸⁸ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(j).

¹⁸⁹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 11(h).

¹⁹⁰ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 8(g).

¹⁹¹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 8(e).

c. Affordable repayment schedules

If the debtor advises the debt collector that they cannot afford to repay the debt, the debt collector can make reasonable enquiries into their financial position to determine that the debtor is able to make reasonable and sustainable repayments.¹⁹² If this is unable to be determined, the debt collector should advise the debtor to see a financial counsellor. If the debtor demonstrates willingness and intention to seek advice, then the debt collector should not contact them until after a reasonable time has passed so that the debtor can better understand their options.¹⁹³ If the debt collector is aware that the debtor is unable to make meaningful and sustainable repayments towards a debt, then it is unreasonable and inappropriate to continue to contact the borrower to demand payment.¹⁹⁴ Although repayment negotiations with a debtor are not mandatory, the ACCC encourages these negotiations. If the debt collector is unwilling to enter into repayment negotiations, this can constitute misleading conduct which is prohibited under the National Consumer Credit Protection Act 2009.¹⁹⁵ Conduct that can be misleading includes:¹⁹⁶

- Advising a debtor that the debt collector does not, or is unable to, enter into repayment negotiations when this is not the case;
- Misleading a debtor about their rights, for example, a right to seek a repayment variation;
- Misleading a debtor about the consequences of non-payment; and
- Misleading a debtor about the legal status of the debt.

Under the prohibition on misleading conduct, pressuring a debtor in the following ways is also unacceptable:¹⁹⁷

- Requiring a debtor to pay in full or in unreasonably large instalments, or to increase payments when the debt collector is aware that the debtor is unable to do so;
- Stating that only after requiring a debtor to pay a large upfront amount that the debt collector will consider payment arrangements;
- Encouraging the debtor to get further into debt to pay out an existing debt;

¹⁹² Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 1(k).

¹⁹³ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 1(k).

¹⁹⁴ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 2(c).

¹⁹⁵ National Consumer Credit Protection Act 2009 (Australia Cth), s 160D.

¹⁹⁶ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 14(f).

¹⁹⁷ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 14(g).

- Requiring a debtor to show proof of unsuccessful alternative credit applications before a repayment plan will be negotiated; and
- Encouraging the debtor to borrow from family or friends to pay out a debt; and
- Encouraging the debtor to access their superannuation early.

When making repayment arrangements with debtors, debt collectors should adopt a realistic and flexible approach. When arranging a repayment plan with the debtor, debt collectors should allow for living expenses, consider if the debtor is on a low income, recognise if there are multiple debts, and ensure repayments are meaningful and sustainable.¹⁹⁸ Repayment arrangements should be documented fully and accurately.¹⁹⁹

Financial hardship applications are dealt with through the National Credit Code (NCC),²⁰⁰ which is created through Schedule 1 of the National Consumer Credit Protection Act 2009. This allows a debtor to give the creditor notice that they are unable to meet their obligations and the creditor must then notify the debtor whether the credit contract will be changed to reflect the debtor's hardship. During this process, the debtor should not be contacted for the purposes of debt collection.²⁰¹ ASIC has the ability to request that the creditor change the contract. If the debt is owed to an energy or financial product or service provider, other options for addressing hardship also exist.²⁰²

d. Contact with debtor

The subject of contact with debtors is dealt with in some detail in the Debt Collection Guideline. This section is split into four sub sections: General; Purpose and definition of contact; Timing and frequency; and Location of contact.

¹⁹⁸ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 14(a).

¹⁹⁹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 14(i).

²⁰⁰ National Consumer Credit Protection Act 2009 (Australia Cth), sch 1 pt 4 cl 72.

²⁰¹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline for collectors and creditors* (Australian Government, Canberra, July 2017) at 14(c).

²⁰² The National Energy Retail Law (NERL) requires energy retailers to develop, maintain and implement a customer hardship policy for residential customers and the Australian Energy Regulator (AER) oversees this process. Energy retailers have an obligation to develop processes to identify consumers experiencing hardship and provide flexible payment options. The AER collects data to monitor retailers' compliance and performance in these areas. See <<http://www.aer.gov.au/consumers/aer-resources>> and <<http://www.aer.gov.au/consumers/my-energy-bill/problems-paying>>.

General

The general laws around contacting consumers apply to debt collection, including Australian privacy laws.²⁰³ Identifying the debtor correctly before divulging information about a debt is important.²⁰⁴ Debt collectors must treat debtors' personal information with respect.²⁰⁵ Information should not be gathered if it is not reasonably necessary to carry out the work.²⁰⁶

When a debtor has an authorised representative (such as a financial counsellor), specific rules apply.²⁰⁷ Once a debt collector knows that a debtor is represented, they typically must not continue to contact the debtor directly.²⁰⁸

Debt collectors must not misrepresent their identity. It is unlawful for a collector to hold him or herself out as a solicitor or government official.²⁰⁹

The Debt Collection Guideline also states that debt collectors must "avoid communications with the debtor that may distort the true purpose of the communication or communicate an unwarranted sense of urgency or cause unwarranted stress or anxiety".²¹⁰

Purpose and definition of contact

Contact is defined so as to include written communication (including letter, email, text, and phone application), phone communication and in-person communication.²¹¹

²⁰³ Privacy Act 1988 (Australia Cth).

²⁰⁴ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 1(a).

²⁰⁵ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 8(a).

²⁰⁶ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 8(e).

²⁰⁷ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 9(b).

²⁰⁸ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 9(b).

²⁰⁹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 1(i).

²¹⁰ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 12(d).

²¹¹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 3(a).

Contact with the debtor must be for a reasonable purpose.²¹² Providing information, demanding payment and arranging payment are all purposes which may be reasonable.²¹³ There may be circumstances where contact which was initially made for a reasonable purpose becomes unreasonable,²¹⁴ and what constitutes a reasonable purpose may change according to the personal characteristics of the debtor,²¹⁵ so being sensitive to the situation is vital.

Attempted contact (for example, where a debt collector phones a debtor but the call is unanswered, and the debt collector does not leave a voice message) is distinguished from contact. Despite this, “continually attempting to contact a debtor ... may amount to undue harassment”.²¹⁶

Where a debt is disputed, all collection activity should be suspended.²¹⁷ A debt may be disputed on the basis that the amount is incorrect²¹⁸ or on the basis that the person is being wrongly pursued because they are not the alleged debtor.²¹⁹

Contact must also typically not occur once a repayment plan has been set up and is being followed.²²⁰ If a debt collector is aware that a debtor is unable to make meaningful and sustainable repayments towards a debt, continuing to contact the debtor to demand payment will not be reasonable or appropriate.²²¹

²¹² Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 2(a).

²¹³ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 2(b).

²¹⁴ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 2(d).

²¹⁵ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 2(c).

²¹⁶ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 3(g).

²¹⁷ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 13(a).

²¹⁸ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 13(h).

²¹⁹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 13(d).

²²⁰ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 15(a).

²²¹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 8.

A person should not be pursued for a debt before the debt collector has ascertained that they are contacting the right person.²²²

Timing and frequency of contact

The Debt Collection Guideline sets out the appropriate hours of contact (although other times can be arranged). For example, debt collectors should not contact debtors by telephone before 7:30am or after 9:00pm on weekdays.²²³ Any workplace contact should only occur during the debtor's normal working hours.²²⁴ However, if the debtor has a reasonable request for the debt collector to contact them at another time then that should be respected.²²⁵

Unnecessary, unduly frequent, or unreasonably frequent contact may amount to harassment.²²⁶ Unduly frequent contact designed to "wear down" a debtor, or which is likely to have this effect, constitutes undue harassment.²²⁷

Debtors are entitled to be free from excessive communications from debt collectors.²²⁸ Accordingly, the Guideline recommends that contact is not made more than 3 times per week or 10 times per month at most.²²⁹ However, unsuccessful contact (such as a phone call to a disconnected number or a bounced email) does not amount to contact.²³⁰

²²² Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 13(d).

²²³ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 4(a).

²²⁴ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 4(a).

²²⁵ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 4(c)-(d).

²²⁶ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 5(c)-(d).

²²⁷ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 5(j).

²²⁸ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 5(a).

²²⁹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 5(c).

²³⁰ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 3(f).

Location of contact

Face-to-face contact should be avoided unless absolutely necessary.²³¹ The Federal Court of Australia in *ACCC v Esanda Finance* held that five face-to-face visits for the period of collection was the maximum amount that would be acceptable.²³²

When face-to-face contact is made, it should be done during the appropriate contact hours.²³³ If asked to leave, a debt collector must do so immediately.²³⁴ Debt collectors should not behave in a way that might indicate the debtor is under surveillance (for example, by staying in the vicinity of the debtor's home for an extended period of time before or after visiting the debtor).²³⁵

i. Home Visits

The most appropriate location to visit a debtor, if this is required, is at the debtor's home.²³⁶ If the debtor instead provides an alternative and reasonable location for contact and is able to be contacted at that location, the debtor should not be contacted at their home.²³⁷

Debt collectors should not visit uninvited. If the debtor refuses a visit, the debt collector must not go.²³⁸ The purpose of the visit should be clear to the debtor beforehand.²³⁹ A debtor should be allowed time prior to any visit to seek support or representation.²⁴⁰ A debt collector should not visit the debtor's home if the debt collector is aware of any personal circumstances

²³¹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(a).

²³² *ACCC v Esanda Finance Corporation Ltd* [2003] FCA 1225 in the Schedule (which set out the detailed orders of the Court), "Agents must not contact Customers by attending at their home or place of employment on more than 5 occasions in total" followed by certain exceptions to this rule; and Australian Competition & Consumer Commission *Debt collection guideline: for collectors and creditors* (July 2017) at 14.

²³³ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(b).

²³⁴ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(h).

²³⁵ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(i).

²³⁶ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(b).

²³⁷ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 6(b).

²³⁸ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(g).

²³⁹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(g).

²⁴⁰ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(g).

affecting the debtor (for example, serious illness) which would make a face-to-face visit inappropriate.²⁴¹

ii. Work Visits

Visiting the debtor's place of work should only be done as a last resort.²⁴² Clauses 7 (j)–(p) of the Debt Collection Guideline sets out very clear expectations about the conduct of debt collectors before and during workplace visits and for what purpose those visits are permissible. The purpose of the visit should not be disclosed to any third party in any circumstances.²⁴³ Debt collectors must leave if asked to do so,²⁴⁴ and should not linger around the area.²⁴⁵

²⁴¹ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(g).

²⁴² Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(j).

²⁴³ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(n).

²⁴⁴ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(n).

²⁴⁵ Australian Competition and Consumer Commission and Australian Securities and Investments Commission *Debt collection guideline: for collectors and creditors* (Australian Government, Canberra, July 2017) at 7(p).

UNITED KINGDOM

a. Introduction

In the United Kingdom, debt collectors are regulated under the Financial Services and Markets Act 2000 (FSMA)²⁴⁶ and the Consumer Credit Act 1974.²⁴⁷ Debt collection regulations and guidance have been developed and are administered by the Financial Conduct Authority (FCA). The FCA derives its ability to give guidance on the law from s 139A of the FSMA.²⁴⁸ The FCA publishes this guidance in the FCA Handbook, which sets out all the law that it regulates, from the high-level principles to the exact fees and business standards.

The FCA Handbook contains the Consumer Credit Sourcebook (CONC).²⁴⁹ It applies to all credit-related regulated activities and all firms involved in consumer credit.²⁵⁰ Firms must take reasonable steps to ensure that their employees and agents are acting in accordance with CONC.²⁵¹ CONC contains both Rules (which lenders and debt collection firms must follow) and Guidance (which is not mandatory). Breaches of the Rules are subject to enforcement and action for damages.²⁵² Guidance in the Handbook explains implications of the Rules, and indicates possible ways of compliance or recommends a particular course of action or arrangement.²⁵³ While Guidance is not binding, following Guidance will go towards compliance with relevant Rules. Directions are legally binding under the FSMA.²⁵⁴

Breaches of the FSMA and the associated rules can be published,²⁵⁵ penalised,²⁵⁶ and lead to authorised persons (being persons authorised to carry on a regulated activity) being suspended.²⁵⁷

b. How the UK Principles Address Particular Issues that Arise in Relation to Debt Collection.

²⁴⁶ Financial Services and Markets Act 2000 (UK).

²⁴⁷ Consumer Credit Act 1974 (UK).

²⁴⁸ Financial Services and Markets Act 2000 (UK), s 139A(1).

²⁴⁹ Financial Conduct Authority (FCA) Handbook. <https://www.handbook.fca.org.uk/handbook/CONC.pdf>

²⁵⁰ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC.1.1.2.

²⁵¹ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.1.1 (1)-(4).

²⁵² Financial Conduct Authority *Reader's Guide: An introduction to the Handbook* (January 2019) at 11.

²⁵³ Financial Conduct Authority *Reader's Guide: An introduction to the Handbook* (January 2019) at 11.

²⁵⁴ Financial Conduct Authority *Reader's Guide: An introduction to the Handbook* (January 2019) at 11.

²⁵⁵ Financial Services and Markets Act 2000 (UK), s 205.

²⁵⁶ Financial Services and Markets Act 2000 (UK), s 206.

²⁵⁷ Financial Services and Markets Act 2000 (UK), s 206A.

i. Disclosure

The following obligations in the FCA Handbook apply to in-house debt collectors, agents of lenders who have been given the job of debt collection, and to third parties that have purchased debt. This is because the definition of “debt-collecting” means:²⁵⁸

- “Taking steps to procure the payment of a debt due under a credit agreement or a relevant article 36H agreement is a specific kind of activity”;²⁵⁹ and
- “Taking steps to procure the payment of a debt due under a consumer hire agreement is a specified kind of activity”.

This does not include an art 36H activity, which relates to operating an electronic system in relation to lending.

The expression “firm” in the following paragraphs describes an authorised person who has permission from the FCA or Prudential Regulation Authority in the UK under the Financial Services and Markets Act 2000 to carry on regulated activities, which includes debt adjusting, debt counselling, debt collecting and debt administration. “Firm” does not include a professional firm, which is an “individual who is entitled to practise a profession regulated by a designated professional body and in practising it, is subject to its rules, whether or not he is a member of that body” or “a person (not being an individual) which is controlled or managed by one or more such individuals” unless it is an authorised professional firm, who is a professional firm authorised to carry out regulated activities.²⁶⁰ However, the definition of “firm” depends on the particular section being referred to in the FCA Handbook, therefore references to a “firm” in the below sections are clarified if they specifically refer to debt collectors.

Firms must establish and implement clear, effective and appropriate policies and procedures for dealing with customers whose accounts fall into arrears and for the fair and appropriate treatment of customers, who the firm understands or reasonably suspects to be particularly vulnerable.²⁶¹ Customers with mental health difficulties or mental capacity limitations may fall into the category of particularly vulnerable customers.²⁶² For customers that have mental

²⁵⁸ The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, art 5 cl 39F. <https://www.legislation.gov.uk/uksi/2013/1881/article/5/made>
<https://www.handbook.fca.org.uk/handbook/glossary/G3204.html>
<https://www.handbook.fca.org.uk/handbook/glossary/G973.html>

²⁵⁹ “A “relevant article 36H agreement” means an article 36H agreement ... which has been entered into with the facilitation of an authorised person with permission to carry on a regulated activity of the kind specified by that article.

²⁶⁰ Financial Conduct Authority *Financial Conduct Authority Handbook Glossary* (September 2019). <https://www.handbook.fca.org.uk/handbook/glossary/?page=3&filter-title=firm> “Regulated activities” is defined in Financial Services and Markets Act 2000 (UK), s 22.

²⁶¹ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.2.1.

²⁶² Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.2.2.

health limitations, firms may also have regard to the “Good Practice Awareness Guidelines for Helping Consumers with Mental Health Conditions and Debt” published by the Money Advice Liaison Group (MALG).²⁶³

Where lenders are dealing with customers in default or in arrears, they should pay due regard to the obligation under Principle 6 to treat customers fairly.²⁶⁴

If a customer is in default or in arrears difficulties, the firm, which includes both the lender and debt collector,²⁶⁵ should inform the customer of free and impartial debt advice options from not-for-profit advice bodies and make referrals.²⁶⁶ A lender and debt collector must provide the customer or any representative with information on the amount of any arrears and the balance owing.²⁶⁷

CONC 6.5.2 sets out the rule that firms are required to contact a debtor when a debt is assigned to a third party.²⁶⁸

Section 158 of the Consumer Credit Act 1974 requires a credit reference agency to give to the consumer a copy of their file kept by the agency upon a request in writing from that consumer including such particulars that enable them to identify the file and after receiving a fee of £2. If a credit reference agency fails to comply with s 158, they have committed an offence.²⁶⁹

The Principles in the FCA Handbook provide further interpretation for how a firm, which includes lenders and debt collectors, should interact with debtors.²⁷⁰ Principle 6 requires a firm to pay due regard to the interest of their customers and treat them fairly. Principle 7 requires a firm to pay due regard to the information needs of their clients and communicate information in a clear and fair manner which is not misleading. Principle 9 requires reasonable care to ensure the suitability of advice in the context of discretionary decisions where the customer is entitled to rely upon the firm’s judgment.

²⁶³ Money Advice Liaison Group *Good Practice Awareness Guidelines for helping consumers with mental health conditions and debt* (United Kingdom, 2015).

²⁶⁴ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.2

²⁶⁵ CONC 7.3 of the Financial Conduct Authority Handbook is titled “Treatment of customers in default or arrears (including repossessions): lenders, owners and debt collectors” therefore the obligations in CONC 7.3 apply to both lenders and debt collectors.

²⁶⁶ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.7A.

²⁶⁷ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.4.1.

²⁶⁸ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 6.5.2.

²⁶⁹ Consumer Credit Act 1974 (UK), s 158.

²⁷⁰ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at PRIN 2.1.

ii. Repayment schedules

Where a customer fails to make a repayment, debt collectors should set up a repayment arrangement within the original term of the agreement, unless:²⁷¹

- (a) they reasonably believe that it is appropriate to allow for a longer period for repayment and has no reason to believe the total amount to pay will become unsustainable or cause the customer financial difficulties; or
- (b) they reasonably believe that terminating the agreement will mitigate such adverse consequences for the customer and before terminating the agreement they explain this to the customer.

A lender and debt collector must treat customers in default or in arrears difficulties with forbearance and due consideration.²⁷² Examples of treating a debt with forbearance can include considering suspending, reducing waiving or cancelling any further interest or charges, such as default fees or repayments as they fall due, when the debtor is in financial difficulties, or allowing deferment of repayment where repayments would be excessive.²⁷³

Where a lender or debt collector does not allow for alternative affordable repayments, they are likely to breach Principle 6 (due regard to the interests of their customers) and CONC 7.3.4 (forbearance and due consideration to customers in default or arrears difficulties).²⁷⁴ A lender or debt collector must not refuse to negotiate during the development of a repayment plan.²⁷⁵ Further, a lender or debt collector must not put pressure on a customer to:²⁷⁶

- (a) pay a debt in a single lump sum or in a small number of repayments or in unreasonably large amounts, when it would have an adverse impact on the customer's financial circumstances; or
- (b) pay a debt within an unreasonably short period of time; or
- (c) raise funds to repay the debt, such as by selling their property, borrowing money, or increasing their existing borrowing.

An example of behaviour likely to contravene CONC 7.3.10 (outlined above) and Principle 6 (due regard to the interests of their customers) is a lender or debt collector pressuring a

²⁷¹ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.3. The definition of "firm" in CONC 7.3 includes lenders, owners and debt collectors. For clarity, the above section refers to debt collectors instead of a "firm".

²⁷² Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.4.

²⁷³ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.5 (1).

²⁷⁴ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.8.

²⁷⁵ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.9.

²⁷⁶ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.10.

debtor to raise funds by requiring them to obtain a lump sum from their pension scheme in order to make debt repayments.²⁷⁷

Lenders and debt collectors must suspend the active pursuit of recovery of a debt from a customer for a reasonable period where the customer informs them that a debt counsellor or another person acting on the customer's behalf or the consumer is developing a repayment plan.²⁷⁸ A reasonable period for the lender or debt collector to suspend actively pursuing a debt is generally thirty days where there is evidence of a genuine intention to develop a repayment plan. The firm should consider extending this period for a further thirty days where there is reasonable evidence demonstrating progress to agreeing to a plan.²⁷⁹

A lender or debt collector should not act disproportionately against a debtor in default or in arrears. The lender or debt collector should not apply to the court for an order for sale or submit a bankruptcy petition without having fully explored any more proportionate options.²⁸⁰

iii. Contact

Upon contact, the lender or debt collector²⁸¹ must explain to the customer who the person contacting the customer is, their role in the firm and the purpose of the contact.²⁸² Lenders and debt collectors must not embarrass the customer and must take reasonable steps to ensure that third parties do not become aware that the customer is being pursued in respect of a debt.²⁸³ Reasonable steps may, for example, require a firm to ensure that all post addressed to the customer is marked "private and confidential."²⁸⁴

If a lender or debt collector carries out an in person visit, they must give the customer adequate notice of the date and likely time of the visit, which must be at a reasonable time

²⁷⁷ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.10A.

²⁷⁸ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.11.

²⁷⁹ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.12.

²⁸⁰ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.3.14.

²⁸¹ Although CONC 7.9 does not expressly state that it applies to both lenders and debt collectors, it also does not state that it specifically only applies to one of these credit-related regulated activities. CONC 1.2.1 states that the "CONC applies to a firm with respect to carrying on credit-related regulated activities and connected activities, unless otherwise stated in, or in relation to, a rule". Under CONC 1.2.4, credit-related regulated activities include consumer credit lending and debt collecting, among other activities.

²⁸² Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.9.1.

²⁸³ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.9.7.

²⁸⁴ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.9.8.

of day. When the lender or debt collector visits the debtor, they must clearly explain the purpose of the visit and the intended outcome.²⁸⁵ Visitors must not:²⁸⁶

- act in a threatening manner;
- visit a customer at a time when they know or suspect that the customer will be particularly vulnerable;
- visit at an inappropriate location, unless the customer has expressly given consent;
- enter the customer's property without their consent or an appropriate court order;
- refuse to leave when the customer becomes unduly distressed or when it becomes clear that the customer lacks mental capacity to make an informed repayment decision or to engage in the debt recovery process; and
- visit or threaten to visit without prior agreement when a debt is deadlocked or reasonably queried or disputed.

iv. Privacy

The obtaining, recording, holding and passing on of information about individuals for the purposes of tracing a customer and/or recovering a debt due will involve the processing of personal data. Firms possessing such data are deemed by CONC 7.13.1 to be "data controllers" or "data possessors" and are obliged to comply with data protection legislation and, in particular, to adhere to the data protection principles.²⁸⁷ A firm must take reasonable steps to ensure that it maintains accurate data to avoid the risk that:²⁸⁸

- an individual who is not the borrower is pursued for repayment of a debt; and
- the borrower or hirer is pursued for an incorrect amount.

A firm must not disclose or threaten to disclose information relating to the customer's debt to any third party.²⁸⁹ A firm should ensure that adequate and accurate information it holds about a customer in relation to a debt is made available to persons involved on its behalf in the debt recovery process (such as agents). This includes, for example, information such as the customer being in financial difficulty, being particularly vulnerable, being in the process of disputing the debt, having established a repayment plan or forbearance, or having a representative acting on the customer's behalf.²⁹⁰

v. Debt collection fees

²⁸⁵ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.9.12.

²⁸⁶ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.9.14.

²⁸⁷ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.13.1.

²⁸⁸ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.13.2.

²⁸⁹ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.9.6.

²⁹⁰ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.13.5.

A lender or debt collector must not claim the costs of recovering a debt from a customer if it has no contractual right to claim such costs. This means that debt collection costs can only be charged when specifically provided for in the loan contract.²⁹¹ When a customer is in default or arrears difficulties, the charges imposed must be no higher than necessary to cover the reasonable costs of the firm.²⁹² Principle 6 of the FCA Handbook (paying due regard to the interests of customers and treating them fairly) must also be observed when levying charges for debt recovery on customers.²⁹³

²⁹¹ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.7.3.

²⁹² Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.7.5.

²⁹³ Financial Conduct Authority *Financial Conduct Authority Handbook* (September 2019) at CONC 7.7.1.

UNITED STATES

a. Introduction

In the United States, the Fair Debt Collection Practices Act²⁹⁴ (FDCPA) governs the law around debt collectors and provides protections to consumers from abusive debt collection practices. The FDCPA limits the behaviour and actions of third-party debt collectors who are attempting to collect debts on behalf of another person or entity, therefore in-house debt collectors are not covered.²⁹⁵ However, some states, such as California, have state consumer protection laws in addition to the FDCPA and extend application to in-house debt collectors.²⁹⁶ Federal case law has also interpreted the FDCPA to include debt collectors who purchases defaulted debt from a creditor for the purpose of debt collection. This is because the Court interpreted Congress' intention as intending to protect borrowers from third persons who regularly collect debts for others, which includes debt collectors who purchase debt from creditors.²⁹⁷ The FDCPA is under Title VIII of the Consumer Credit Protection Act.²⁹⁸

The FDCPA was enacted to address four issues:²⁹⁹

1. *Abusive practices*
 - “There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”
2. *Inadequacy of laws*
 - “Existing laws and procedures for redressing these injuries are inadequate to protect consumers.”
3. *Available non-abusive collection methods*
 - “Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.”
4. *Interstate commerce*

²⁹⁴ Fair Debt Collection Practices Act 15 USC 1692 § 801 (United States).

²⁹⁵ Will Kenton “Fair Debt Collection Practices Act (FDCPA)” (8 April 2019) Investopedia <[www.investopedia.com](https://www.investopedia.com/terms/f/fair-debt-collection-practices-act-fdcpa.asp)>. <https://www.investopedia.com/terms/f/fair-debt-collection-practices-act-fdcpa.asp>

²⁹⁶ Michael Rice “California Fair Debt Collection Laws” (2019) Nolo <[www.nolo.com](https://www.nolo.com/legal-encyclopedia/california-fair-debt-collection-laws.html)>. <https://www.nolo.com/legal-encyclopedia/california-fair-debt-collection-laws.html>

²⁹⁷ *Holmes v Telecredit Service Corporation* 736 F Supp 1289 (D Del 1990) at 1293; and *Kimber v Federal Financial Corporation* 668 F Supp 1480 (MD Ala 1987) at 1485.

²⁹⁸ Consumer Credit Protection Act 15 USC (United States).

²⁹⁹ Fair Debt Collection Practices Act 15 USC 1692h § 802 (United States).

- “Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely interstate in character, they nevertheless directly affect interstate commerce.”

The stated purpose of the FDCPA is “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses”.³⁰⁰

b. Current Law

i. Disclosure

From the date that the debt collector first contacts the debtor, they have five days to send a written notice containing the following details:

- the amount of the debt;³⁰¹
- the name of the current creditor;³⁰²
- a statement that the debtor has 30 days to dispute the debt otherwise the debt will be assumed to be valid;³⁰³
- a statement that if the debtor notifies the debt collector in writing that the debt is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and that a copy of the relevant document will be mailed to the consumer by the debt collection;³⁰⁴
- a statement that, upon written request from the consumer within the thirty-day period, the debt collector will provide contact information for the original creditor.³⁰⁵

³⁰⁰ Fair Debt Collection Practices Act 15 USC 1692h § 802 (e) (United States).

³⁰¹ Fair Debt Collection Practices Act 15 USC 1692h § 809 (a)(1) (United States).

³⁰² Fair Debt Collection Practices Act 15 USC 1692h § 809 (a)(2) (United States).

³⁰³ Fair Debt Collection Practices Act 15 USC 1692h § 809 (a)(3) (United States).

³⁰⁴ Fair Debt Collection Practices Act 15 USC 1692h § 809 (a)(4) (United States).

³⁰⁵ Fair Debt Collection Practices Act 15 USC 1692h § 809 (a)(5) (United States).

ii. Repayment schedules

A debt collector must not collect any debt using unfair or unconscionable means.³⁰⁶ Section 808 lists conduct which is violates this prohibiting, and including accepting or soliciting any post-dated cheques,³⁰⁷ and communicating with debtor by postcard.³⁰⁸

iii. Contact

There are restrictions on when it is lawful to contact a debtor. These restrictions can be lifted if the debtor consents.³⁰⁹ Debt collectors are prohibited from contacting debtors at inconvenient times and places,³¹⁰ specifically, after 9pm and before 8am.³¹¹ Collectors cannot call debtors at their workplace if the workplace prohibits personal calls.³¹² A debt collector is permitted to discuss the debt with are the debtor and the debtor's representative.³¹³

Debtors are entitled to write a letter to the debt collector requesting the collector to cease contact.³¹⁴ Once such a letter is received, a debt collector may only contact a debtor to inform them that further efforts to collect will be terminated,³¹⁵ and that the debt collector may invoke other remedies, which the collector should specify if they are known.³¹⁶

The debt collector is prohibited from engaging in certain behaviours that may induce a debtor to repay a debt, including threats of violence and harm³¹⁷ and other criminal means to harm a person, their reputation or their property.³¹⁸ The use of profane language to abuse the debtor is also unlawful.³¹⁹ Lists of debtors must not be published³²⁰ but may, however, be shared with consumer credit reporting agencies.³²¹ It is also unlawful to make repeated

³⁰⁶ Fair Debt Collection Practices Act 15 USC 1692g § 808 (United States).

³⁰⁷ Fair Debt Collection Practices Act 15 USC 1692g § 808 (1)-(2) (United States).

³⁰⁸ Fair Debt Collection Practices Act 15 USC 1692g § 808 (7) (United States).

³⁰⁹ Fair Debt Collection Practices Act 15 USC 1692d § 805 (a) (United States).

³¹⁰ Fair Debt Collection Practices Act 15 USC 1692e § 805 (a) (1) (United States).

³¹¹ Fair Debt Collection Practices Act 15 USC 1692e § 805 (a) (1) (United States).

³¹² Fair Debt Collection Practices Act 15 USC 1692e § 805 (a) (3) (United States).

³¹³ Fair Debt Collection Practices Act 15 USC 1692e § 805 (b) (United States).

³¹⁴ Fair Debt Collection Practices Act 15 USC 1692e, § 805 (c) (United States).

³¹⁵ Fair Debt Collection Practices Act 15 USC 1692e, § 805 (c)(2) (United States).

³¹⁶ Fair Debt Collection Practices Act 15 USC 1692e, § 805 (c)(2)-(3) (United States).

³¹⁷ Fair Debt Collection Practices Act 15 USC 1692e, § 806 (1) (United States).

³¹⁸ Fair Debt Collection Practices Act 15 USC 1692e, § 806 (1) (United States).

³¹⁹ Fair Debt Collection Practices Act 15 USC 1692e, § 806 (2) (United States).

³²⁰ Fair Debt Collection Practices Act 15 USC 1692e, § 806 (3) (United States).

³²¹ Fair Debt Collection Practices Act 15 USC 1692e, § 806 (3) (United States).

phone calls and texts, or to harass any person at the called number.³²² The debt collector must disclose who is making the phone call.³²³ Robocalls are not permitted.³²⁴

If a consumer notifies the debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication, contact must cease while a debt collector verifies that the debt is owing and that the collector is pursuing the right person.³²⁵ The term “consumer” in these circumstances, includes the consumer’s spouse and representatives.³²⁶

Debt collectors must not make any false or misleading representations about the debt.³²⁷ Falsely representing that there is involvement of lawyers or the government or the likelihood of arrest or legal action is unlawful.³²⁸ Representations that imply that non-payment of debt will lead to imprisonment or that other court orders have been made (when they have not) are unlawful.³²⁹ Debt collectors must not wrongly imply that the debtor has committed a crime.³³⁰ Misrepresentations must not be made about how much is owed, the type of debt or its legal status. The debt collector must be clear about what fees it can charge and must not make any false representations about compensation it may receive.³³¹ Other representations that must not be made include (for example):

- Communicating or threatening to communicate to any person credit information which is known to be false, including the failure to communicate that a disputed debt is disputed;³³²
- Using or distributing any written communication that falsely represents that the document is issued or authorised by the United States government;³³³
- Making a false representation or using deceptive means to collect or attempt to collect any debt or to obtain information about a consumer;³³⁴
- Falsely representing that the debt has been sold;³³⁵
- Falsely representing or implying that documents are part of the legal process;³³⁶

³²² Fair Debt Collection Practices Act 15 USC 1692e, § 806 (5) (United States).

³²³ Fair Debt Collection Practices Act 15 USC 1692e § 806 (6) (United States).

³²⁴ Fair Debt Collection Practices Act 15 USC 1692e § 806 (6) (United States).

³²⁵ Fair Debt Collection Practices Act 15 USC 1692e § 805 (c) (United States).

³²⁶ Fair Debt Collection Practices Act 15 USC 1692e § 805 (d) (United States).

³²⁷ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (United States).

³²⁸ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (1), (3) (United States).

³²⁹ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (4) (United States).

³³⁰ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (2)(A) (United States).

³³¹ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (2)(B), (3) (United States).

³³² Fair Debt Collection Practices Act 15 USC 1692f, § 807 (8) (United States).

³³³ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (9) (United States).

³³⁴ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (10) (United States).

³³⁵ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (12) (United States).

³³⁶ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (13) (United States).

- Using any business, company, or organisation name other than the name of the collector’s business;³³⁷
- Falsely representing or implying that forms do not need further action by the consumer;³³⁸
- Falsely representing or implying that a debt collector operates or is employed by a consumer reporting agency, defined under § 1681(f).³³⁹

When communicating with people that are not the debtor with the intention of finding out information about the debtor, the existence of the debt should not be disclosed.³⁴⁰ The debt collector must identify themselves and state that they are wanting to confirm information about the location of the debtor, but should not state their employer unless expressly requested to.³⁴¹

Once the debt collector is aware that the debtor is represented, the attorney should be the point of contact unless the attorney fails to respond within a reasonable period.³⁴²

iv. Fees and charges of debt collection

Collecting of any extra amount (including interest, fee, charge, or expense incidental to the principal obligation) is illegal, unless it is agreed in the contract or permitted by law.³⁴³ In order for debt collection charges to be added to the debt, the contract must set out that there will be costs of debt collection and that these will be added onto the debt. Breaches of the law will result in the award of damages under s 813 of the FDCPA.³⁴⁴ As the FDCPA is strict liability law, a court is able to award statutory damages of up to \$1,000 for any successful action.³⁴⁵ In addition to statutory damages, the costs of the action together with a reasonable attorney’s fee as determined by the court are able to be awarded for successful action.³⁴⁶

³³⁷ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (14) (United States).

³³⁸ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (15) (United States).

³³⁹ Fair Debt Collection Practices Act 15 USC 1692f, § 807 (16) (United States). A “consumer reporting agency” defined in § 1681(f) means any person who, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

³⁴⁰ Fair Debt Collection Practices Act 15 USC 1692c, § 804 (2) (United States).

³⁴¹ Fair Debt Collection Practices Act 15 USC 1692c, § 804 (1) (United States).

³⁴² Fair Debt Collection Practices Act 15 USC 1692c, § 804 (6) (United States).

³⁴³ Fair Debt Collection Practices Act 15 USC 1692g, § 808 (1) (United States).

³⁴⁴ Fair Debt Collection Practices Act 15 USC 1692i, § 813 (United States).

³⁴⁵ Fair Debt Collection Practices Act 15 USC 1692k (a)(2)(A), § 813 (United States).

³⁴⁶ Fair Debt Collection Practices Act 15 USC 1692k (a)(3), § 813 (United States).

v. Continuing issues with debt collection

In 2013, the National Association of Attorneys General (NAAG) urged federal and state legislators to:

- End robo-signing and attempts to collect without proper documentation;
- Establish a sell-by date for all debt, making it illegal to sell or attempt to collect debt that is more than seven years old;
- Require debt collectors to identify the name of the original creditor and provide an itemised record of the total principal, interest, fees, and other charges that have been added to the debt;
- Require debt collectors to submit more detailed information when filing suit, including the name of the original creditor and an itemised record of the total principal, interest, fees, and other charges that have been added to the debt, so that the consumer can see if it is his or her debt, and in the right amount; and
- Increase oversight to ensure consumers are properly notified of lawsuits.³⁴⁷

In 2018, the Consumer Financial Protection Bureau (CFPB) reported that there is an ongoing issue with compliance in the area of debt verification, stating: “Examinations found that one or more debt collectors routinely failed to mail debt verifications before engaging in further collections activities. Instead, one or more debt collectors forwarded consumer debt validation requests to originating creditors; the creditors then reviewed the debts and mailed responses directly to consumers. One or more debt collectors accepted creditor determinations that the debt was owed by the relevant consumer for the amount claimed without receiving information verifying the debt and without mailing the required verification to consumers. One or more debt collectors then continued collection activities on accounts in violation of section 809(b) of the FDCPA”.³⁴⁸

It would seem therefore that despite the existing law, there continues to be issues associated with debt collection for consumers in the United States. The CFPB released a report in January 2017 based on a consumer survey conducted between December 2014 and March 2015.³⁴⁹ Gaps in protection were identified by the survey, including issues with disputed debts, pressure to repay and issues of privacy.

³⁴⁷ National Association of Attorneys General Gazette “Debt Collection Continues to Plague Consumers” (20 December 2012) <www.naag.org>. <https://www.naag.org/publications/naagazette/volume-6-number-12/debt-collection-continues-to-plague-consumers.php>

³⁴⁸ Bureau of Consumer Financial Protection *Supervisory Highlights* (Issue 17, September 2018) at 6. https://files.consumerfinance.gov/f/documents/bcfp_supervisory-highlights_issue-17_2018-09.pdf

³⁴⁹ Consumer Financial Protection Bureau *Consumer Experiences With Debt Collection: Findings From the CFPB’s Survey on Consumer Views on Debt* (January 2017) at 7. https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

The CFPB's³⁵⁰ 2019 annual report on the FDCPA stated that from 1st January 2018 to 31st December 2018, the CFPB received approximately 81,500 debt collection complaints. The largest percentage of these complaints (40%) were in regards to attempts to collect debt not owed, then complaints about written notification about debt, communication tactics, took or threatened to take negative or legal action, false statements or representations, and threatened to contact someone or share information improperly.³⁵¹

In 2018, the CFPB engaged in six public enforcement actions arising from alleged FDCPA violations. The most successful action in 2018 resulted in \$800,000 being paid into the civil penalty fund, which is used to provide relief to eligible consumers who would not otherwise get full compensation.³⁵²

c. Proposed Amendments to the Fair Debt Collection Protection Act 1977

The CFPB is seeking to update the FDCPA, given that the law was passed in 1977 and did not anticipate modern technology. The four aims of the proposed amendments are to:³⁵³

- Establish a clear, bright-line rule limiting call attempts and telephone conversations;
 - The proposed amendment limits debt collectors to a maximum of seven attempts in contacting the debtor by telephone per week and per debt.
- Clarify consumer protection requirements for certain consumer-facing debt collection disclosures;
 - The proposed amendment would require debt collectors to send consumers a disclosure with certain information about the debt and related consumer protections. This can include an itemization of the debt and plain-language information about how a consumer may respond to a collection attempt, including by disputing the debt. This would require a “tear off” on documents

³⁵⁰ Note that the Annual Report 2019 is published under the name “Bureau of Consumer Financial Protection” but since the publishing of this report, the Bureau has reverted their name back to Consumer Financial Protection Bureau. <https://www.washingtonpost.com/business/2018/12/19/cfpb-tried-change-its-name-heres-why-its-giving-up/>

³⁵¹ Bureau of Consumer Financial Protection *Fair Debt Collection Practices Act: BCFP Annual Report 2019* (March 2019) at 16. https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf

³⁵² Bureau of Consumer Financial Protection *Fair Debt Collection Practices Act: BCFP Annual Report 2019* (March 2019) at 23. https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf

³⁵³ Consumer Financial Protection Bureau “Consumer Financial Protection Bureau Proposes Regulations to Implement the Fair Debt Collection Practices Act” (7 May 2019) <www.consumerfinance.gov>. <https://www.consumerfinance.gov/about-us/newsroom/bureau-proposes-regulations-implement-fair-debt-collection-practices-act/>

sent to the debtor for the consumer to use this in responding to the debt collection attempt.

- Clarify how debt collectors can communicate with consumers;
 - Debt collectors are able to use newer communication technologies, such as voicemails, emails and text messages, to communicate with consumers. Consumers are able to unsubscribe to future communications through these methods. The proposed rule would also clarify how debt collectors may provide required disclosures electronically. Consumers are also able to limit ways debt collectors can contact them, such as while they are at work or during specific hours.
- Prohibit suits and threats of suit on time-barred debts and require communication before credit reporting.
 - A debt collector would not be able to sue or threaten to sue a consumer to collect a debt if they are aware, or should be aware, that the statute of limitations has expired. A debt collector would also be prohibited from furnishing information about a debt to a consumer reporting agency unless they have already communicated about the debt to the consumer.

The proposed amendments have been criticised by consumer and privacy advocates on the basis they would allow debt collectors to send texts, emails and private messages on social media services to consumers on an unlimited basis. Although the proposed law limits debt collectors to seven calls per week per debt, the potential for debtors to be inundated with different methods of communications remains.³⁵⁴ Furthermore, if a person has four or five debts in collection, they could receive up to two or three dozen telephone calls each week.³⁵⁵ The CFPB in their Notice of Proposed Rulemaking has recognised the ability for these communications to harass, oppress, or abuse any person in connection with the collection of a debt. In addressing this concern, the CFPB is proposing bright-line rules limiting the frequency for phone calls, but expressly say that these limits are not in place for emails and text messages. A way to address this concern is a proposed provision requiring debt collectors to notify consumers how to opt out of receiving electronic debt collection communications or communication attempts directed at a specific email address, telephone number for text messages, or other electronic-medium address. A debt collector would also be unable to charge any opt out fees or require the consumer to provide any other information other than

³⁵⁴ Aimee Picchi “Debt collector rules could allow unlimited texts and emails to consumers: “We are horrified”” (8 May 2019) CBS News <www.cbsnews.com>. <https://www.cbsnews.com/news/debt-collector-rules-proposed-by-consumer-bureau-may-soon-allow-unlimited-texting-and-emails-to-be-sent-to-consumers/>

³⁵⁵ Bureau of Consumer Financial Protection *Debt Collection Practices (Regulation F)* 12 CFR Part 1006, RIN 3170-AA41 at 142. https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf

the email address, telephone number for text messages, or other electronic-medium address subject to the opt-out in order to opt out of these communications.³⁵⁶

³⁵⁶ Bureau of Consumer Financial Protection *Debt Collection Practices (Regulation F)* 12 CFR Part 1006, RIN 3170-AA41 at 113-115. https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf